



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 50 OF 2002

NATIONWIDE ELECTRICAL INDUSTRIES LTD..... APPELLANT

AND

PRIME CAPITAL & CREDIT LTD. RESPONDENT

**(Appeal from the Ruling of the High Court of Kenya at Nairobi Milimani Commercial Courts
(Onyango Otieno, J.) dated 27th April, 2001**

in

H.C.C.C. NO. 534 OF 1998)

JUDGMENT OF O’KUBASU, J.A.

The appellant herein, ***NATIONWIDE ELECTRICAL INDUSTRIES LTD.***, is aggrieved by the judgment of the superior court (*Onyango Otieno, J. – as he then was*) by which the superior court found the appellant liable and entered judgment for the respondent as prayed in the plaint and dismissed the appellant’s counter-claim.

The dispute between the parties can be traced to a plaint filed in the superior court on 25th September, 1998 by the ***PRIME CAPITAL & CREDIT LTD.*** (*as the plaintiff*) citing the appellant herein as the respondent. The pertinent paragraphs of the said plaint were as follows:-

***“3. The plaintiff’s claim is against the defendant as maker of the four (4) promissory notes described hereunder payable to Shah Motors Limited or order on the dates and for the sums set out hereunder which said promissory notes were endorsed by Shah Motors Limited in favour of the plaintiff who in the ordinary course of business, discounted the same in the account of Shah Motors Limited with the plaintiff and who is the holder in due course of the promissory notes for value.*”**

PARTICULARS OF PROMISSORY NOTES

DATE DUE DATE AMOUNT (KSHS)

(a) 11th March 1997 11th April 1997 5,000,000.00

Interest thereon at 42% p.a.

From 11th April 1997 to

24th August 1998

(b) 11th March 1997 12th May 1997 5,000,000.00

Interest thereon at 42% p.a.

from 12th May 1997 to

24th August 1998 3,509,916.00

(c) 11th March 1997 12th June 1997 5,000,000.00 Interest thereon at 42% p.a.

from 12th June 1997 to

24th August 1998 3,216,699.00

(d) 11th March 1997 11th July 1997 5,000,000.00

Interest thereon at 42% p.a.

From 11th July 1997 to

24th August 1998 2,951,562.00

TOTAL 30,939,781.00

Payments of KShs.250,000/= each made on 2nd July 1997, 4th August, 1997, 2nd September 1997, 2nd December 1997 and 22nd December 1997 have been adjusted by the plaintiff against outstandings.

4. The promissory notes were duly presented for payment on their respective due dates and were dishonoured by non-payment. In the alternative and without prejudice to the foregoing, the defendant being the maker of the said promissory notes, presentment of the same of the respective due dates to render the defendant liable thereon was not necessary and has been dispensed with.

5. In payment of the above said four (4) promissory notes on their respective dates, the defendant issued to the plaintiff four (4) post-dated cheques described hereunder which said cheques when presented for payment were dishonoured and returned unpaid.

PARTICULARS OF DISHONOURED CHEQUES

<u>Cheque No.</u>	<u>Drawn on</u>	<u>Dated</u>	<u>Amount</u>
172860	Commercial Bank of Africa	11 th April 1997	5,000,000.00
172861	Commercial Bank of Africa	12 th May 1997	5,000,000.00
172862	Commercial Bank of Africa	12 th June 1997	5,000,000.00

172863 Commercial Bank of Africa 11th July 1997 5,000,000.00

The plaintiff will crave leave of court to rely on the said dishonoured cheques for their full meaning tenor and effect.

6. Notice of dishonour of each of the said promissory notes has been given to the defendant. In the alternative and without prejudice to the foregoing notice of dishonour was not required to be given to the defendant as it is the maker of the said promissory notes.

7. The plaintiff therefore claims from the defendant the sum of KShs.30,939,781/= plus further interests with effect from 25th August 1998 as broken down hereinbefore:

(i) KShs.20,000,000/= with interest at 42% p.a. compounded monthly.

(ii) KShs.10,939,781/= with interest at 30% p.a. compounded monthly.

Payments of KShs.250,000/= each made on 2nd July 1997, 4th August 1997, 2nd September 1997, 2nd October 1997, 3rd November, 1997, 2nd December 1997 and 22nd December 1997 have been adjusted by the plaintiff against the outstandings.

8. Despite demand having been made and notice of intention to sue having been given, the defendant has refused, failed and/or neglected to pay the said sum or any part thereof.

9. This cause of action arose at Nairobi within the jurisdiction of this Honourable Court.

REASONS WHEREFORE the plaintiff prays for judgment against the defendant for:-

(a) The sum of KShs.30,939,781/=.

(b) (i) Interest on KShs.20,000,000.00 at the rate of 42% p.a. from 25th August 1998 until payment in full;

(ii) Interest on KShs.10,939,781/= at commercial rate of 30% per annum from 25th August 1998 until payment in full;

(c) Interest thereon at court rates from the date of judgment until payment in full;

(d) Costs of this suit; and

(e) Such further or other relief that this Honourable Court may deem fit to grant.”

In response to the foregoing, the appellant (as the defendant) through its advocates filed a statement of defence in which it averred inter alia:-

“3) The defendant denies all the allegations set out in paragraph 3 of the plaint and further states that there is/was no consideration for the alleged promissory notes allegedly drawn in favour of Shah Motors Limited.

4) The defendant further states that it is a stranger to the alleged endorsement of the promissory notes by Shah Motors Limited in favour of the plaintiff as there is/was no privity of contract between the plaintiff and the defendant.

5) The promissory notes sued on were drawn by the defendant and collected by Shah Motors Limited, without consideration, but the said Shah Motors Limited illegally and unjustifiably endorsed the said promissory notes to the plaintiff without prior knowledge and or consent of the defendant or at all.

- 6) *And in any event the said promissory notes did not provide for a duration period in terms of number of days when the same shall be payable if at all by the defendant or at all.*
- 7) *The defendant further denies that the plaintiff became a holder of the alleged promissory notes in due course for value.*
- 8) *The defendant further states that the plaintiff came into possession of the said promissory notes after the drawee (Shah Motors Limited) ceased to be in business and in any event the plaintiff did not or has not protested the said promissory notes to date as required by practice.*
- 9) *The defendant further states that the said promissory notes whose particulars are set out in paragraph 3 of the statement of claim are null and void for infringement of the Stamp Duty Cap 480 of the Laws of Kenya.*
- 10) *The defendant further states that the alleged adjustments made by the plaintiff were/are illegal and unjustified and the defendant shall counterclaim for the unjustified payments made and received by the plaintiff.*
- 11) *The defendant denies the allegations contained in paragraph 4 of the statement of claim and further states that there was no legal obligation to meet the value of the alleged promissory notes for lack of consideration in law and the plaintiff is put to strict proof on the allegations to the contrary.*
- 12) *The defendant denies in toto all the allegations contained in paragraph 5, 6, and 7 of the statement of claim and further states that there was no consideration to support the alleged cheques which were issued and delivered to the plaintiff by one S.K. Shah who then was the defendant's director without knowledge and or consent of the Board of Directors of the defendant and the defendant was/is not enjoined in law to meet or make payments to the plaintiff as alleged or at all. The plaintiff is put to strict proof on the allegations to the contrary.*
- 13) *The defendant further states that the said cheques had been signed for other purposes of the defendant's company business as and when the Managing Director of the defendant is out of the country and infact the said Managing Director was out of the country at the material time and at the time the said cheques were in the custody of S.K. Shah who illegally inserted the plaintiff's name in the cheques and passed them over to the plaintiff without the consent and or knowledge of the defendant company's Board of Directors and in any event there was no consideration flowing from the plaintiff to the defendant and or vice versa or as between the defendant and Shah Motors Limited or at all.*
- 14) *The defendant admits having received the demand and notice of intention to sue but states that it is not obliged in law to meet such misguided demands.*
- 15) *The jurisdiction of this Honourable Court is admitted.*

COUNTERCLAIM

- 16) *The defendant repeats paragraphs 1 to 15 both inclusive, of the Statement of Defence hereinabove and says that by reason of the premises the said promissory notes are wholly worthless and that the payment so far made to the plaintiff should be refunded.*
- 17) *The defendant counterclaim against the plaintiff a sum of KShs.1,750,000.00 made of cheques Number: 172860, 172861, 172862, 172863, dated 11th April, 12th May, 12th June and 11th July 1997 respectively for KShs.250,000,00. each which were received by the plaintiff erroneously and by mistake.*
- 18) *The plaintiff has acknowledged receipt of the said sum by correspondence and pleadings contained in paragraphs 3 and 7 of the plaint in the suit herein.*
- 19) *The plaintiff wrongly received the said monies and are subject to a refund to the defendant.*

20) *The defendant counterclaims for the said sum of KShs.1,750,000.00 with interest at commercial rates of 32% per annum from the date of receipt until payment in full.*

REASONS WHEREFORE the defendant prays that the plaintiff's suit in its entirety be dismissed with costs on a higher scale and for judgment to be entered against the plaintiff thus:-

- i) *As set out in paragraphs 17 and 20 of the counterclaim herein.*
- ii) *Interest on (i) above at commercial rates of 32% per annum from the date of receipt of the said monies until payment in full.*
- iii) *Cost of suit in respect of the counterclaim.*
- iv) *Any other or further relief as to this Honourable Court may seem fit and just to grant."*

The hearing of the suit commenced in the superior court on 18th February, 2000 when one, **Ananthwarayan Ranganathan**, a senior credit manager with the respondent company gave evidence on behalf of his employer (*the respondent herein and the plaintiff in the superior court*). It should be pointed out that this was the only witness who testified on behalf of the respondent. The evidence of this witness was that sometimes in September 1996, a company called **Shah Motors Ltd.** applied for facilities for working capital and as a result the respondent granted it facilities to the tune of Shs.20,000,000/= which was enhanced to Shs.30,000,000/= and further enhanced to Shs.50,000,000/=. Rate of interest was agreed at 36% *p.a.* with penal interest rate of 6% *p.a.* There was an extension of time for repayment to 30th September, 1997.

In the course of these transactions the respondent received four promissory notes of Shs.5,000,000/= each and a similar number of cheques of Shs.5,000,000/= each. The respondent calculated the interest and the net amount made to Shah Motors through a cheque for Shs.18,460,000/=. This amount was paid to Shah Motors by the respondent in respect of the promissory notes. The cheques which had been issued by the appellant were not paid when presented for payment.

The appellant called two witnesses – **Justus Nungi Kamau (DW1)** who was in charge of current accounts at Bank of Baroda. The gist of his evidence was that out of the four cheques two were paid and produced those paid as **Exhibit D1(a)** and **D1(b)**. These two cheques were for Kshs.5,000,000 each.

The second witness for the appellant was **Surendra Lalji Ladhi Shah (DW2)** who was the Managing Director of the appellant Company. He testified that the appellant made the promissory notes to Shah Motors for the purchase of vehicles to enable the appellant supply electrical equipment to Serena Group of Lodges in Tanzania, and that the said vehicles were not delivered. This witness went on to testify how the appellant did not benefit in any way from these financial arrangements. In conclusion, **Shah (DW2)** stated that the respondent had acted dishonestly and for that reason he asked the superior court to dismiss the respondent's suit.

The learned Judge considered the foregoing and the submissions by counsel appearing for the parties. In the end the learned Judge was satisfied that the respondent had proved its case and hence entered judgment in favour of the respondent. That is what provoked this appeal.

This being a first appeal we are obliged to reconsider the evidence, re-evaluate it and make our own conclusions, but as we do so, we must bear in mind that we have neither seen nor heard the witnesses. As was stated by Sir Clement de Lestang VP in **SELLE & ANOTHER V. ASSOCIATED MOTOR BOAT COMPANY LTD. & OTHERS [1968] E.A. 123 at p. 126:-**

“An appeal to this court from a trial by the High court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

The above has been continually cited with approval by this Court in its subsequent decisions e.g. ***JIVANJI V. SANYO ELECTRICAL COMPANY LTD. (2003) KLR 425 at p. 431*** and ***CHOGERA V. KIMANI & OTHERS [2005] 2 KLR 214 at p. 219.***

We must therefore bear the foregoing in mind as we deal with the submissions before us in this appeal. Although the pleadings and the grounds of appeal were rather lengthy and numerous, the dispute was essentially in respect of the four promissory notes.

When the appeal commenced before us on 28th May, 2007, Mr. Rustam Hira appeared for the appellant, while Mr. James Ochieng Oduol appeared for the respondent. The memorandum of appeal contained **17 grounds** of appeal but Mr. Hira decided to abandon *grounds 9, 16 & 11* and consolidated *grounds 1, 2, 3, 4, 5 and 16*. Mr. Hira addressed us at length in a bid to show that the respondent had not proved its case against the appellant. He took issue with the fact that there was no consideration. Mr. Ochieng Oduol on his part submitted that the respondent was a holder of the promissory notes and that the issuer of a promissory note is not allowed to dispute or even challenge the consideration. On my part all I can say is that Mr. Hira's submission as regards lack of consideration in respect of the four promissory notes cannot be sustained in view of clear provision of **section 29** of the ***Bills of Exchange Act***. The respondent was a holder in due course.

The second important issue in this appeal related to the four promissory notes and whether or not two of the four cheques were paid out. Mr. Hira referred to the evidence of the two witnesses for the appellant and it was Mr. Hira's contention that ***S.L.L. Shah (DW2)*** was a truthful witness. On this issue, Mr. Ochieng Oduol contended that the grounds of appeal argued by Mr. Hira on this issue were a complete departure from what had been pleaded in the statement of defence. Mr. Hira took us through the evidence and in the end posed a question, ***"where did 10 million go?"***

I have gone over the evidence adduced in the superior court and I am of the view that the matter before the learned Judge was indeed complicated. Mr. Hira raised the question of accounts for Shah Motors. It is significant that ***A. Ranjnathan (PW1)*** the only witness for the respondent refused to produce the accounts of Shah Motors and that it was only after he was recalled to testify that he alluded to the payment of the two cheques. In the course of his judgment the learned Judge said:-

"Further all that DW1 told this court was that he did not know why the cheques D1(a) and D1(b) were issued. The defendant set out to show that the cheques were issued as payments for the promissory notes, it did not call any witnesses to say so and preferred to be content with speculation. If the two cheques were in respect of payment of the Promissory notes by Shah Motors then one may ask why Suresh Shah who was then a Director of both Defendant and Shah Motors could not have told the defendant company of the same payment."

The learned Judge went on to consider the fact that one, Suresh Shah who was a director of both the appellant and Shah Motors had gone underground and then went on to state:-

"It is clear to me that the defendant, in finding these two cheques, believed they were for payment of promissory notes, but on proper consideration, there is no proper evidence upon which a court of law can make a finding that these two cheques were used for the payment of the promissory notes the subject of this matter."

I have given this matter a careful consideration and in view of the evidence on record it would appear that the two cheques of ***Shs.5,000,000/=*** each were, indeed, paid out in respect of the two promissory notes. The appellant attempted to show that it had paid the full amount of ***Shs.20,000,000/=*** but my re-evaluation of the evidence shows that it paid only ***Shs.10,000,000/=***.

We were urged by Mr. Hira to reduce the rate of interest charged but this having been the agreed rates, a court of law would have no reason to re-write a contract entered into by the parties.

In **NATIONAL BANK OF KENYA LTD. V. PIPEPLASTIC SAMKOLIT (K) LTD. AND PROF. SAMSON K. ONGERI [2001] KLR 112 at p.118** this Court said:-

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud, or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.”

The foregoing answers Mr. Hira’s submission on the issue of what he considered unjust rates of interest.

I think I have said enough. In my view, this appeal therefore succeeds only partially, in that the judgment of the superior court is varied so that judgment is entered for **Shs.10,000,000/=** instead of **Shs.20,000,000/=** in **prayer b (i)** of the plaint. To that extent the appeal succeeds. As regards costs of this appeal, I would order that the appellant gets half the costs.

Dated and delivered at Nairobi this 9th day of October, 2008.

E.O. O’KUBASU

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JUDGE OF APPEAL