Consolidated Bank of Kenya Limited v Njagi t/a Kenmax General Suppliers (Commercial Appeal E136 of 2022) [2025] KEHC 1128 (KLR) (Commercial and Tax) (28 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1128 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E136 OF 2022

BM MUSYOKI, J

FEBRUARY 28, 2025

BETWEEN

CONSOLIDATED BANK OF KENYA LIMITED ..... APPELLANT

AND

PIUS MUKUNDI NJAGI T/A KENMAX GENERAL SUPPLIERS ..... RESPONDENT

(Being an appeal against judgment of the Chief Magistrate's Court at Nairobi Milimani (Honourable Mr. Kagoni E.M. Principal Magistrate) dated 31st October 2022 in Milimani MCCOMMU No E346 of 2020)

JUDGMENT

1. The appellant filed suit in the trial court in which it prayed for the following;
    1. Judgment against the defendant for Kshs 9,114,560.69 as at 27th February 2020 with interest at the bank's commercial rate with effect from 28th February 2020 until payment in full provided that credit be given for any amount recovered from the decree ensuing in Nairobi HCC HC COM 507/17 Consolidated Bank v Pius Mukundi Njagi.
    2. Costs of the suit on an Advocate-Client basis and interest thereon until payment in full.
2. The respondent did not enter appearance or file defence following which the appellant requested for judgment and on 8-12-2021. The honoruable magistrate allowed the request and fixed the matter for formal proof. The matter was heard with the appellant calling one witness and, in its judgment delivered on 31-10-2022, the trial court dismissed the suit for the main reason that the same had been filed out of statutory time although it made other observations on the manner in which the prayers had

been pleaded. It is against the judgement that the appellant has brought this appeal raising grounds which can be summarized as follows;

i. The honourable magistrate erred in law by failing to appreciate that the matter ought not to have gone for formal proof hearing.

ii. The honourable magistrate erred by holding that the suit was statue barred.

iii. The honourable magistrate erred in her evaluation of evidence hence reaching an erroneous decision.

3. I have read the pleadings and the judgment of the trial court, the memorandum of appeal and the appellant's submissions dated 11th November 2024. This is a first appeal and as an established principle, this court should re-evaluate, re-analyse and re-consider the evidence produced before the trial court and come to its own conclusion. The appeal herein is not so much about the evidence produced before the lower court but mainly concerns issues of law. The first two grounds of appeal are sufficient to dispose this appeal in one way or the other. I will therefore not delve into the third ground.

4. The appellant has submitted that the magistrate should not have ordered the matter to go for formal proof as the claim was liquidated. The appellant argues that the formal proof ordered by the magistrate was a nullity and relies on the holding of Honourable Justice G.V. Odunga in Nancy Musili v Joyce Mbete Katisi (2019) eKLR in which Judge held as follows;

> 'In this case what was claimed was a mere debt arising from money alleged to have been advanced. It was a specific sum of money which did not require any further step to be taken in order to ascertain the sum due. In my view what was before the trial court was a liquidated demand and final judgment could be entered in default of appearance. In fact, in that even the entry of interlocutory judgment would have been erroneous. That was the position in Coach Safaris Ltd vs Gusii Deluxe Ltd. civil appeal number 117 of1996 where the Court of Appeal held that formal proof is unnecessary in liquidated claims where ex-parte judgment has been entered and the formal proof, if carried out, is a nullity.'

5. It is true that the claim in the matter was for a specified amount but as observed by the trial magistrate which observation this court agrees with, prayers in the plaint were a bit strange and not reconcilable with a purely liquidated claim. The resultant decree from the prayers in the plaint would no doubt be dependent on satisfaction of another decree in High Court Commercial case number 507 of 2017. The decretal amount in the said earlier suit was not disclosed. In addition, paragraph 8 of the plaint indicated that the appellant had disposed one of the charged properties yet the appellant did not give accounts for the sale. At least, the accounts were not ascertainable from the pleadings and in the circumstances more investigations in form of hearing were necessary.

6. It is not difficult to fit the holding of Justice Odunga in the above cited authority in this case. The Honourable Judge in other words described a liquidated claim as that which did not need any further step to ascertain the amount claimed. The case before the trial court undoubtedly needed more enquiries. A claim does not become liquidated simply because the prayers say so. It must be looked into as a whole both in the body of the pleadings and the prayers. If the pleaded facts call for investigation or interrogation, the court would be justified to order the matter to go for formal proof.

7. The decree which would have resulted from entry of final judgment without a formal proof would not have been capable of execution without further reconciliations or explanations and independent of the outcome of the earlier suit. To me, liquidated claim would mean that the amount prayed for is so clear that it does not need a combination of other factors of consideration for the extraction of the decree

other than calculation of figures within the same matter. Where the person drawing the decree would need to make references to facts which are external and not within the confines of the pleadings, the claim ceases to be a liquidated one.

8. In this case the appellant prayed that the Kshs 9,114,560.69 it was asking for be subjected to outcome of payment in commercial case number 507 of 2017. The only document in that other suit produced in the trial court was a ruling of Honourable Justice M.W. Muigai dated 22-11-2019. It is not clear whether the decretal sum in that other matter was paid or not. If the appellant had discounted a definite figure from the Kshs 9,114,560.69, it would be justified to complain of having been taken through a formal proof.

9. Prayer 'b' of the plaint asked for costs on and advocate - client basis and interest on the costs until payment in full. The interest on costs was not part of the agreement between the parties and as such could not be said to be a direct product of the breach of the contract. In that case, the court would not have been right to enter final judgment without a formal proof. Where a party prays for interest or rate of interest which was not part of their contract or cannot be ascertained from their documents and pleadings filed, the claim cannot be termed as liquidated. In Charles Wasike v Catholic Archdiocese of Kisumu (Tumsifu Agency – Sifa Gardens) (2021) KEHC 8114 (KLR) the court held that

> 'I believe that the interest which the Plaintiff is claiming, and which he has added to the money he had paid out originally, is in the nature of compensation. Although the Plaintiff quantified the interest payable between November 2006 and December 2013 that did not make the claim for interest into a liquidated demand.'

10. In view of the above analysis, it is my holding that the trial magistrate did not err in ordering the matter to go formal proof.

11. The other ground of appeal is that the magistrate erred in holding that the matter was statutory time barred. The amount claimed in the plaint was said to have arisen from loan facilities advanced to the respondent by the appellant in October 2012. The loans were secured by charges over Embu/Municipality/611 and Mbeti/Kiamuriga/2289 both registered to the respondent. The respondent failed to pay the loans and on 4-10-2013, the appellant wrote a demand letter which was not honoured. According to the appellant, it on 14-04-2015 moved to sell one of the properties which raised a sum of Kshs 7,200,000.00. The appellant further pleaded that title number Mbeti/Kiamuriga/2289 was released to the respondent against his advocate's professional undertaking to pay Kshs 1,550,000.00 dated 21-11-2013 which the advocate failed to honour prompting institution of recovery proceedings through commercial suit number 507 of 2017. With this state of affairs, the question the magistrate was to answered here was when did the cause of action arise. According to the magistrate, the cause of action arose when the demand letter dated 4-10-2013 was issued. The magistrate held that;

> 'It is PW1's testimony that the parties contracted in 2012 vide letter of offer dated 25-10-2012. I have perused the first demand ever sent to the defendant herein, as per the evidence before the court, and which was vide a letter date 4-10-2013. I have also considered Section 4(I)(a) of the *Limitation of Actions Act*. In view of this, the court finds the claim before the court statute barred and it became so sometime on 5-10-2019.'

12. From the above, it is clear that the honourable magistrate considered the debt as having arisen from a contract. It is true that the charges over the properties were contract but it is the position of the law that such contracts are not the ordinary contracts that are covered under Section 4(1)(a) of the *Limitation*

of Actions Act. If they were, the legislature would not have enacted Section 19(1) of the same Act which states that;

> 'An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.'

13. The appellant has relied on the authority of Habib Bank A.G. Zurich v Rajnikant Khetshi Shah (2018) eKLR and emphasized the holding therein that a cause of action under a continuing security never dies or lapses until the debt is fully paid or the property is discharged. I agree with the submissions by the appellant that debt was based on a charge but in my opinion, the charge over Embu/Municipality/611 lapsed when it was sold on 14-04-2015 and in my view that is when the cause of action arose. This position looked together with Section 19(1) of the *Limitation of Actions Act* would mean that the time for filing suit would lapse on 13-04-2027. Even if I were wrong and the magistrate was right on the date of the cause of action, the said Section would still place the lapse of the cause of action on 3-10-2025. This suit was filed in 2020 and therefore within statutory period and in that case, the magistrate erred in dismissing the suit for having been filed out of time. On this point, I take persuasion in the authority of National Bank of Kenya Limited v Felis Ole Nkaru (2008) KEHC 707 (KLR) where Honourable Justice L. Kimaru held as follows;

> 'I think the defendant is incorrect in stating that the plaintiff's suit was time barred. My interpretation of Section 19(1) of the *Limitation of Actions Act* is that the limitation period, in a suit to recover the principal sum of money secured by a mortgage of land, starts running from the date when there is default on the repayment of the money and the bank has made a demand for the repayment of the same. From the exhibits produced by the plaintiff as plaintiff's exhibit No. 1, the plaintiff gave notice of default to the defendant on 23rd October 1997. The redemption notice was issued on behalf of the plaintiff by El Dima Limited, a firm of auctioneers, notifying the defendant of its intention to sale of the charged property. The limitation period of twelve years therefore started running from 1997 when the right to recover the money accrued. That period expires in 2009. The plaintiff filed its suit in 2005. The defendant cannot therefore claim that the plaintiff's suit was time barred.'

14. The appellant has asked this court to allow the appeal and enter judgment as prayed in the plaint. I have observed earlier that the way the prayers were couched necessitated the matter to go for formal proof. The way in which the magistrate approached the matter did not give a room for evaluation of evidence produced before him. This is an appellate court and although it has jurisdiction to reconsider the matter as if it was conducting re-trial, my position over the way the prayers were pleaded limits me from making a substantive decision on the suit. In these circumstances, I believe that the appropriate order is for retrial.

15. This appeal is therefore allowed in the following terms;

    1. The judgement dated 31st October 2022 in the Milimani commercial Courts Chief Magistrate Courts commercial suit number E346 of 2020 is hereby set aside.

    2. The matter is remitted to the trial court for fresh hearing and disposal before a magistrate other than Honourable Kagoni E.M (PM).

    3. There shall be no orders as to costs of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Lawrence Ongeri for the appellant and absence of the respondent