



REPUBLIC OF KENYA



**Rono v Lomsons Enterprises (Civil Case 5 of 2019)
[2024] KEHC 6249 (KLR) (31 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6249 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CIVIL CASE 5 OF 2019
JRA WANANDA, J
MAY 31, 2024**

BETWEEN

ALEX KIPCHIRCHIR RONO PLAINTIFF

AND

LOMSONS ENTERPRISES DEFENDANT

JUDGMENT

1. This is another old matter that has unfortunately taken too long to be concluded. I took over the matter in April 2023 after the trial had already commenced before Hon. Justice E. Ogola and by which time the Plaintiff had already closed his case. The case was therefore part-heard.
2. The matter was commenced vide the Complaint filed on 29/1/2019 through Messrs Limo R.K & Co. Advocates in which the Plaintiff sought Judgment against the Defendant as follows:
 - i. Principal amount of Kshs 21,000,000/-.
 - ii. Interest.
 - iii. Costs of this suit.
 - iv. Any other relief that this Court might deem fit and just to grant.
3. In the Complaint, it was pleaded that the Defendant was advanced a loan facility of Kshs 22,000,000/- by Consolidated Bank of Kenya vide charge dated 8/08/2012 and the Plaintiff stood as guarantor for the Defendant, that the Defendant deposited his title deed for the parcel of land known as Eldoret Municipality Block 7/190 as security for the loan and the same was charged in favour of the Bank, that vide the Statutory Notice dated 31/01/2014, the Bank, as chargee, initiated enforcement of its rights under the charge and guarantee instruments due to defaults in servicing the loan by the Defendant as the Principal Debtor, that vide the Court Order dated 13/05/2016 given in Eldoret Environment & Land Case No. 6 of 2015, the Plaintiff paid the amount he guaranteed at Kshs 21,000,000/- and his



- title was then discharged. The Plaintiff therefore averred that he suffered loss and damage which he claims from the Defendant.
4. The Defendant filed its Statement of Defence on 26/02/2019 through Messrs Magare Musundi & Co. Advocates. It was pleaded in the Defence, that the Defendant was never advanced a loan of Kshs 22,000,000/- but that the Consolidated Bank advanced different amounts, namely, Kshs 76,023,660/- and a personal guarantee of Kshs 31,000,000/-. It was however admitted that the Plaintiff stood surety for a loan of Kshs 22,000,000/- and a personal guarantee of Kshs 31,000,000/- but it was denied that the amount was for the benefit of the Defendant. It was averred that the same was for the exclusive use of the Plaintiff.
 5. It was further stated that the Plaintiff required a loan of Kshs 10,000,000/- and approached the Defendant to stand surety for him but the Defendant was reluctant to stand such surety since the Plaintiff's financial strength was unknown, that the Defendant advised the Plaintiff to take part of the Plaintiff's consolidated loan of Kshs 76,023,660/= and once the loan was advanced, the Plaintiff be surety for the Defendant, that in reality therefore, the Plaintiff was getting a loan for his own benefit, that the Defendant got a loan of Kshs 10,000,000/- and gave the Plaintiff a sum of Kshs 10,000,000/- and which the Plaintiff was to repay pro rata, that the Plaintiff paid the Defendant a commission of Kshs 400,000/-, that instead of the Plaintiff paying for his part of the loan, he refused to service the loan claiming that the Defendant should pay, that the Defendant paid its part of the loan but was unable to complete, that statutory notices were then issued when the sum due reached Kshs 66,673,420/- and that the interest rate increased drastically and the loan restructured for the other sureties but the Plaintiff was to shoulder his own loan hence his loan was not structured.
 6. It was pleaded further that upon the Plaintiff being informed of the default, he filed a suit which he then compromised without regard to the true interest due, that the Plaintiff allowed interest to accumulate and did not pay his part of the bargain, that the guarantee was not ex gratis but for the benefit of the Plaintiff, that the matter having arisen in a civil suit without enjoining the Defendant, the issues are Res Judicata, that the matter having arisen on 13/2/2016 and this suit being an alleged indemnity suit, is time-barred by dint of the Limitation of Actions Act, that the Plaintiff did not suffer any loss and if he did, then it was self-inflicted. It was then stated that the suit is tainted with fraud and particulars of fraud were given as accepting to pay amounts over and above the pro rata sums admitted by the Bank, consenting the double payment of auctioneer's charges when they had already depleted from the Defendant's account the whole sum due from the auctioneers, purporting to consent to payment knowing that he may ultimately seek indemnity, accepting payment from the Defendant and not giving due credit, failing to disclose amounts received from the Defendant, passing over his own indebtedness, selling off land used as against third parties to defeat the raising of funds by the guarantors and the Defendant, being opaque in his accepting loading fictitious amounts to the account and obtaining benefit without intending to pay.
 7. After some delays caused by various factors including pendency of interlocutory applications, the matter eventually proceeded to trial which commenced when the Plaintiff, as PW1, testified before Ogola J on 2/11/2021. Led in his evidence-in-chief by his Counsel, Mr. Kibii, the Plaintiff adopted his Witness Statement and bundle of documents. In cross-examination by the Defendant's Counsel, Mr. Magare, the Plaintiff basically reiterated the matters stated in his Plaintiff and denied the allegations contained in the Statement of Defence. The Plaintiff then closed his case.
 8. The suit then came up for defence hearing on various dates but could not proceed basically because the law firm on record for the Defendant, Messrs Magare Musundi & Co. informed the Court that it was not receiving instructions from its client. The firm therefore filed an Application seeking leave to cease acting. Having by then take over hearing of the suit, I heard the Application and granted it on



25/7/2023. I then fixed the suit for defence hearing for 7/11/2023 on which date however, and despite there being evidence of service upon the Defendant via Whatsap, there was no attendance for or on behalf of the Defendant. In the circumstances, I marked the case as closed and gave the Plaintiff leave to file written Submissions.

9. The Plaintiff's Counsel then filed his Submissions on 20/02/2023. In the Submissions, he observed that the Defendant only filed a defence and witness statement but failed to call witnesses in support of its case. He then recited the testimony of the Plaintiff and the exhibits produced and submitted that from the evidence, it is clear that the Defendant is truly indebted to the Plaintiff to the tune of Kshs 21,000,000/-. He submitted that the Plaintiff had discharged his burden of proof as stipulated under Section 107 of the *Evidence Act*. He cited the cases of Kakamega High Court Civil Case No. 26 of 2015, Rapid P. Kenya Limited v Mituxize Saving & Credit Co-operative [2017] eKLR, the case of Francis Otile v Uganda Motors Kampala HCCS No. 210 of 1989 and various others. According to Counsel therefore, the Plaintiff's case was uncontroverted as the Defendant failed to call evidence.

Determination

10. The issue that arises for determination in this suit is "whether the Defendant is indebted to the Plaintiff for the sum of Kshs 21,000,000/- being the loan balance alleged to have accrued in respect to a loan advanced by a bank to the Defendant and guaranteed by the Plaintiff and which balance was paid by the Plaintiff on behalf of the Defendant".
 1. Upon reviewing the pleadings, the testimony of the Plaintiff and the documents produced in evidence by the Plaintiff, I am satisfied that the Plaintiff has demonstrated that the Defendant was advanced a loan facility of Kshs 76,023,660/- by Consolidated Bank of Kenya vide the letter of offer dated 7/11/2012. I also observe from the Charge document dated 8/08/2012 and Guarantee & Indemnity document (although undated) that out of the said sum, the Plaintiff stood as a guarantor for a portion of Kshs 22,000,000/-. It is also evident from the said Charge document, the Certificate of Lease and the Official Search dated 12/01/2015 that the Plaintiff also gave out his property, namely, Eldoret Municipality Block 7/190 as security for the loan and in respect to which a charge was lodged in favour of the said Bank. It has not been denied that the loan amount was disbursed to the Defendant. From the Statutory Notice dated 31/01/2014, demand letter dated 20/02/2014 from the Bank, Redemption Notice dated 10/06/2014, Notification of Sale dated 9/01/2015 and the newspaper advertisement published on 12/01/2015, there is evidence that there was default in repayment of the loan.
12. There is also evidence that the Plaintiff challenged the Bank's move to sell the said property in exercise of its statutory power of sale in Eldoret Environment & Land Court Case No. 6 of 2015 but which case was eventually compromised when the Plaintiff paid the said sum of Kshs 21,000,000/- to the Bank in settlement of the loan balance and his title accordingly discharged and released to him. These matters are evident from the Consent Court Order dated 13/05/2016, Payment Remittance Slip (Swift) dated 20/05/2016, Bank Receipt dated 12/01/2017 and the Plaintiff's letter dated 12/01/2017.
13. The Defendant having failed to call any witness, the contents of the Statement of Defence and the Defendant's Witness Statement remain mere allegations which have not been proved. The Plaintiff's testimony and the documents produced by the Plaintiff also remain uncontroverted. This principle has been reiterated in many cases. One such case is North End Trading Company Limited (Carrying



on the Business Under the Registered Name of) Kenya Refuse Handlers Limited Vs. City Council of Nairobi [2019] eKLR in which J.A. Makau J held as follows:

- “ 18. In Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No.23 of 1997, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.
19. In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of Autar Singh Bahra And Another vs. Raju Govindji, HCCC No. 548 of 1998 appreciated that:-
- ‘Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.’”
20. In the case of Karuru Munyororo vs Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, Makhandia, J held that:
- “The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”
21. It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant's evidence. In the instant case the plaintiff gave evidence which was not challenged, proved documents in support of her claim. I find the plaintiff's evidence to be credible and I am satisfied the plaintiff pleaded and proved her claim for special damages.



14. There is also the Court of Appeal in the case Edward Mariga through Stanley Mobisa Mariga Vs. Nathaniel David Shulter & Another [1979] eKLR where it was stated as follows:

“The respondents filed a defence in which they denied the appellant’s claim and averred that the accident was caused by the appellant’s own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother.”

15. Similar holding was reiterated by C.B. Madan JA in the Court of Appeal case of CMC Aviation Ltd Vs. Crusair Ltd (No.1) (1987) KLR 103 where he made the following remarks:

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

16. In the circumstances, the Defendant being the Principal debtor and/or loanee and which is the entity that received the loan amount, I accept that the payment of Kshs 21,000,000/- made by the Defendant to the Bank to settle the loan was paid on behalf of the Defendant. The Plaintiff had no choice but to pay the balance so as to save his property lodged as security from being auctioned. It is therefore evident that the Defendant is obligated to refund or reimburse the Plaintiff the amount paid on the Defendant’s behalf.

Final Orders

17. The upshot of my findings above is that this suit is allowed and Judgment is entered in favour of the Plaintiff against the Defendant in the following terms:

- i. Kshs 21,000,000/-.
- ii. Interest from the date of filing suit.
- iii. Costs of this suit.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF MAY 2024

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WANANDA J. R. ANURO

JUDGE

