



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, OTIENO-ODEK & KANTAI JJ.A.)

CIVIL APPEAL NO. 236 of 2008

BETWEEN

BARCLAYS BANK OF KENYA LIMITEDAPPELLANT

AND

EVANS ONDUSA ONZERE RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Sitati J.) dated 26th September 2008

in

HCCC No. 1250 of 2003)

JUDGMENT OF THE COURT

1. At all material times in the suit before the High Court, the respondent was an employee of the appellant bank and was designated Team Leader, Head Office Support (HOS) Grade B4 having been employed in 1978. In July 2002, the appellant bank replaced the previous layer of management headed by the respondent and introduced a new position which the respondent applied for but was not successful; the position was filled by another person who was recruited.
2. Subsequent to the new position being filled by another person, it is alleged by the appellant that the respondent took an early retirement. Conversely, it is contended by the respondent that the appellant terminated his services on redundancy on the ground that his office had been abolished.
3. The respondent filed a plaint and an amended plaint. The appellant filed a defence to the plaint but did not file any defence to the amended plaint. By a Plaint dated 17th November 2003, the respondent filed suit against the appellant claiming redundancy due to loss of office. The respondent also claimed terminal dues and in the alternative averred that the appellant's bank action to terminate his services was actuated by malice. In the Plaint dated 17th November 2003, the respondent claimed the following:
 - a. Compensation for loss of office and or
 - b. Redundancy pay;
 - c. Damages for unfair dismissal;

- d. Terminal dues and
- e. Costs of the suit.

4. The appellant bank filed a statement of defence dated 20th January 2004. In the defence, the appellant denies that the respondent declined to accept early retirement; the particulars of malice are denied; it is denied that the respondent lost his job due to redundancy or loss of office; it is stated that the respondent did not qualify for the new position and the respondent opted to take advantage of the appellant's Early Leavers' Scheme and that the respondent's demand for compensation was misplaced.

5. By an amended plaint dated 18th May 2005, the respondent amended his claim against the appellant and itemized the same to be a claim for redundancy made up as follows:

- (a) Three months salary in lieu of noticeKshs.456,852/=
- (b) Payment for the 2 days worked in September, 2002Kshs. 12,690/=
- (c) Service pay @ 1 ½ months pay for each complete year
of service i.e. (1.5 x152, 284 x 2)Kshs. 5,482,224/=
- (d) Outstanding Leave for the year 2002Kshs. 152,284/=

TOTALKshs.6,104,050/=

6. The specific claim by the respondent in his amended plaint is prayer for redundancy pay for Kshs.6,104,050/=; damages for unfair dismissal and costs of the suit and interest thereon.

7. When the amended plaint was filed, the appellant did not file an amended statement of defence.

8. The respondent/plaintiff filed and served upon the appellant a Notice to Admit dated 8th March 2008. Item No. 8 on the list is a document titled "Early Leavers Scheme." This document is in the respondent's bundle of documents filed before the trial court.

9. The trial court conducted a full hearing where the respondent/plaintiff testified and the appellant bank did not call any witness. Upon hearing the suit, the learned judge entered judgment for the respondent in the sum of Kshs.6,104,050/=. In entering judgment, the trial court expressed itself as follows:

"Since the defendant did not adduce any oral evidence in answer to the plaintiff's testimony, I do find that the plaintiff's testimony as to the facts leading to his departure from the defendant's employment on 2nd September 2002 remain uncontroverted. I also find that apart from the remaining issue of leave pay for the accrued leave for the year 2002 and pay for the 2 days worked in September 2002, the defendant is not opposed to the plaintiff's other claims, whether we christen some of them under redundancy or service pay for the number of years worked..."

As per the amended plaint filed in court on 22nd June 2005, the plaintiff seeks payment as follows:

- a) Three months salary in lieu of noticeKshs.456,852/=**
- b) Payment for the 2 days worked in September, 2002 Kshs.12,690/=**
- c) Service pay @ 1 ½ months pay for each complete year of service i.e. (1.5 x 152, 284 x**

2) Kshs.5,482,224/=

d) Outstanding Leave for the year 2002..... Kshs.152,284/=

TOTAL..... Kshs.6,104,050/=

As stated earlier, the defendant has not disputed these figures either in the pleadings or by way of oral evidence. In the light of the findings above, I hereby enter judgment for the plaintiff against the defendant in the sum of Ksh. 6,104,050/=. As the defendant had offered (and has not withdrawn the offer) to reduce the plaintiff's liability by 25%, I order that the plaintiff is still entitled to the same. The defendant shall also pay the costs to the plaintiff and the same shall bear interest at court rates with effect from the date of filing suit."

10. Aggrieved by the judgment of the trial court, the appellant has lodged this appeal citing the following grounds:

"(a) The learned judge erred in law and in fact in failing to appreciate sufficiently or at all that the pleadings, documents filed in court, evidence and submissions made before her disclosed that the plaintiff's claim as pleaded had been paid to the extent of Ksh. 6,000,120/=.

(b) The learned judge made a fundamental error of law and fact in finding that the respondent was entitled to payment of Ksh. 6,104,050 / = when the same had substantively been settled prior to the filing of the suit.

(c) The learned judge erred in law in finding that the appellant's failure to call evidence was an admission of liability.

(d) The learned judge erred and misdirected herself in finding on the basis of documents before her and evidence adduced that there was owing to the respondent a sum of Ksh. 6,104,050/=.

(e) The learned judge did not consider the submission filed on behalf of the appellant."

11. At the hearing of this appeal, learned counsel Mr. Geoffrey Muchiri and Mr. Edwin Odundo appeared for the appellant while learned counsel Mr. Rajab Sumba appeared for the respondent.

12. Counsel for the appellant reiterated the grounds of appeal emphasizing that the learned judge did not consider all the pleadings and evidence before the court. That the amended plaint contains the itemized claims based on redundancy claim; that the total amount claimed by the respondent was Kshs.6,104,050 / = and the respondent during cross-examination admitted that this sum had been paid in full by the appellant bank. Counsel for the appellant referred this Court to the excerpts of the respondent's cross-examination which we reproduce hereunder:

"Yes, my pay slips shows I paid the bank some outstanding loans. After I left the loan account was credited with the money. I am the one who paid into the account for closing it up. What I remember is that the bank paid money into that bank account but I cannot remember how much or what it was for. At page 8 of my Bundle of Documents – Exit terms I am seeing the terms therein totaling Ksh. 6,120,000/=. This is the amount offered to me on 2nd September 2002. My amended plaint is for 3 months salary in lieu of notice. I confirm this amount had been offered to me by the bank. The bank also offered me 1 ½ months service for every completed year of service and I have claimed it. Yes, the leave for 2002 was not offered and the 2 days worked in September 2002. It is true I did not sign this document. I am not demanding same amounts. I am also claiming for redundancy pay which is 1 1/2 months salary for any completed year of service which amounts to Ks. 5,482,224/=. In the offer of 3rd September 2002, the offer was 5, 542,968/=. I agree the difference between the two figures is about Ksh. 60,000/= more than what I have claimed. Yes I was in debt to the bank Ksh. 1,777,963/15; there was also a house extension loan Ksh. 235,770/65. Yes there was a personal loan but I cannot remember the exact amount. I do not dispute the amounts. Yes, the bank

was ready to give me 25% discount on the Ksh. 1,777,963/15 which is Ksh. 444,491/=. Yes, I can see the net amount offered by the bank Ksh. 2,808,999/15. Yes this amount was deposited in my account. I agree that the only issues outstanding are the leave for 2002 and the 2 days worked in September 2002.”

13. Counsel for the appellant urged this Court to find that from the evidence disclosed during cross-examination, the appellant had paid to the respondent the sum of Kshs.6,104,050/= which sum is the subject of claim in the amended plaint. It was submitted that the cross-examination evidence reveals that the sum claimed was paid as follows:
 - a. Kshs.2,808,999/15 credited directly by the appellant to the respondent’s account;
 - b. Kshs.1,777,963/15 deducted as an outstanding debt due from the respondent to the appellant;
 - c. Kshs.235,770/65 house extension loan deducted as due from the respondent to the appellant and
 - d. Personal loan due from the respondent to the appellant bank.
14. Counsel for the appellant cited the case of **Peters -v- Sunday Post Limited (1958) EA 424**, where it was held that “as there was documentary and other evidence which either tended strongly to confirm the appellant’s evidence or alternatively, to show that the respondent’s principal witness was unworthy of credit, the full significance of which the trial judge had apparently not appreciated, this was a case where the appellate court ought not to allow the conclusion reached by the trial judge to stand.” The appellant further cited the case of **Karugi & Another -v- Kabiya & 3 others (1987) KLR 347** where it was held that the burden on a plaintiff to prove his case remains the same throughout the case and this burden is in no way lessened because the case is heard by way of formal proof.
15. The respondent in opposing the appeal submitted that the trial judge did not err in her findings and conclusions firstly because the appellant neither filed an amended defence to specifically deny the respondents claim for Kshs.6,104,050 /= and secondly, the appellant called no witnesses to give oral or documentary evidence to challenge or contradict the respondents oral testimony. It was submitted that the issue whether the amount of Kshs.6,104,050 /= had been paid to the respondent was never pleaded in the defence; that whereas the appellant bank had the liberty to file an amended defence, the appellant choose not to deny the new issues in the amended plaint and specifically did not deny the claim for Kshs.6,104,050/=. Counsel submitted that the trial judge did not err in law in confining herself to the issues raised in the pleadings.
16. We have considered the grounds of appeal and submission by the parties. The central issue in this appeal is whether the learned judge erred in law in evaluating the evidence on record and failed to ascertain that the respondent had been paid all sums claimed in the amended plaint prior to institution of the suit. The parties had set out the agreed issues for determination by the trial court. One of the agreed issues was whether the respondent at his own volition sought and or accepted and took advantage of the Early Leavers Scheme offered by the appellant bank; the other issue was whether the respondent was entitled to all or any of the prayers set out in the plaint. It is instructive to note that the Statement of Agreed Issues was filed before the plaint was amended. The respondent filed a Notice to Admit Documents under ***Order 12 Rule 3*** of the ***Civil Procedure Rules***.
17. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123**); see also **(Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270)**. We remind ourselves the dicta in **Mwangi - v- Wambugu (1984) KLR 453**, where it was stated that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding.

18. During cross-examination, the respondent testified that at the time of his departure from employment by the appellant bank he owed the bank various sums of money. That he owed Kshs.1,777,963/15; he also owed Kshs. 235,770/65 for a house extension loan and he further owed a personal loan of which he could not recall the amount. In cross-examination, he admitted that the appellant bank had credited his account with the sum of Kshs.2,808,999/15 and which he did not know what it was for.
19. How did the trial court evaluate the admissions by the respondent in cross-examination? We have read and analyzed the judgment of the trial court; the court did not address its mind to the evidence revealed through cross-examination, and the court did not evaluate this evidence. It is the duty of the trial court to consider and evaluate the entire evidence on record placed before it. (**See Wagude -v- R (1983) KLR 569**). The admission by the respondent that he owed the appellant bank various sums of money, and that his account had been credited with the sum of Kshs.2,808,999/15 are facts that go a long way in determining whether the respondent was entitled to any damages and or any of the specific sums claimed in the plaint. The trial court by failing to consider and evaluate the evidence disclosed during cross-examination erred in fact and law thereby arriving at a wrong conclusion.
20. The cross-examination evidence reveals a clear admission by the respondent of receipt of Kshs.2,808,999/15 which was credited into his account; there is admission of set off of all the outstanding loans due from the respondent to the appellant. In our view, the dicta in **Mwangi -v- Wambugu (1984) KLR 453** is applicable. The trial court by ignoring the cross-examination evidence misapprehended the evidence on record and demonstrably arrived at a wrong conclusion of fact.
21. A relevant dictum is the case of **Choitram -v- Nazari, (1984) KLR 327**, where it was stated that admissions need not be in the pleadings; that admissions may be in correspondence or documents which are admitted or they may even be oral. We are cognizant that it is settled law that a judgment on admission is at the discretion of the trial court and that discretion must be exercised judiciously. In the instant case, the trial court erred in failing to take into account the admissions by the respondent elicited during cross-examination. Had the trial court taken into consideration the evidence disclosed in cross-examination, we have no doubt that the court would have dismissed the respondent's claim. It is our finding that the respondent did not prove the claim of Kshs.6,104,050/= on a balance of probabilities.
22. We remind ourselves that a court of law in awarding relief must ensure that a claimant is compensated for losses suffered and there is no unlawful enrichment or double payment. In the instant case, on a balance of probabilities, the respondent having been paid the sum claimed in the amended plaint, the judgment and decree of the trial court amounts to double payment and is an unjustified enrichment. We find this appeal has merit. We hereby set aside in entirety the judgment of the trial court dated 26th September 2008. The appeal is hereby allowed with costs to the appellant at the trial court and before this Court.

Dated and delivered at Nairobi this 4th day of December, 2015

F. SICHALE

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR