Awimbo v Muiruri (Civil Appeal E032 of 2022)
[2024] KEHC 2017 (KLR) (Civ) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2017 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL

CIVIL APPEAL E032 OF 2022

FG MUGAMBI, J

MARCH 1, 2024

BETWEEN

SUJI WALTER AWIMBO ..... APPELLANT

AND

IRENE WANJIRU MUIRURI ..... RESPONDENT

(Being an appeal from the ruling of Hon H. M. Nyaberi delivered on 17th January 2022 in MCCOMM no. E1008 of 2021)

JUDGMENT

Background

1. By a plaint dated 21st July, 2021 the respondent sued the appellant for the sum of Kshs 7,959,885/= and GBP 6,141 with interest from 21st September 2021 until payment in full and costs of the suit. Filed together with the plaint was a Notice of Motion application dated 21st July, 2021 seeking judgment on admission against the respondent based on the default on the repayment agreement entered between the appellant and the respondent.

2. In rebuttal to the application the appellant filed a replying affidavit sworn on 6th December 2021 by Suji Walter Awimbo wherein the appellant refuted the debt, contending that the repayment agreement was executed under coercion and duress. After considering the evidence presented, the trial court ruled in favor of the respondent consequently granting judgment on admission as prayed.

3. Aggrieved by the ruling, the appellant filed the instant appeal praying that this Court allows the appeal, sets aside the ruling of 17th January, 2022 and for costs of the appeal. The Memorandum of Appeal dated 17th March, 2022 cites the following 18 grounds of appeal:

i. The learned magistrate erred and misdirected himself in fact and in law in exercising his discretion in allowing the Notice of Motions application dated 21st February 2021 (hereinafter the application) and in doing so arrived at a wrong conclusion.

ii. The learned magistrate erred in fact and in law in the exercise of his discretion in failing to appreciate, consider and apply the principles governing an application for judgment on admission.

iii. The learned magistrate erred in fact and in law and misdirected himself in his interpretation and application of the principles governing the application that was before him and in so doing arrived at a wrong conclusion.

iv. The learned magistrate erred in fact and in law in the exercise of his discretion in failing to appreciate and consider that there ought to be a plain, obvious and unequivocal admission before entering judgment on admission.

v. The learned magistrate erred in fact and in law in failing to consider and appreciate that there was no clear, obvious and unequivocal admission of debt in the payment plan agreement (the agreement), the correspondence and the deed of undertaking and in so doing arrived oat a wrong conclusion.

vi. The learned magistrate erred in fact and in law in the exercise of his discretion in failing to consider and appreciate that the agreement and the deed of undertaking were contested and did not meet the threshold for grant of the orders sought.

vii. The learned magistrate erred in fact and in law in failing to appreciate and consider that the payment plan agreement and the deed of undertaking were contested by the appellant in both his replying affidavit to the application and his statement of defence and in so doing arrived at a wrong conclusion.

viii. The learned magistrate erred in fact and in law in finding that the appellant had acknowledged the debt in the deed of the undertaking and undertaken to repay it when there was no such acknowledgement and undertaking.

ix. The learned magistrate erred in law and in fact in finding that in the circumstances there was a clear and obvious case admission of the respondent's debt when there was no such admission.

x. The learned magistrate erred in law and in fact in finding that the defendant had not commented about the annexures to the application when in fact the appellant disputed the alleged debt both in his replying affidavit and statement of defence.

xi. The learned magistrate erred in law in failing to consider whether the appellant's statement of defence raised triable issues.

xii. the learned magistrate erred in fact and in law in failing to appreciate and consider that the Appellant's statement of defence raised inter alia the following triable issues:

    a. whether the appellant willingly entered into any agreement and/or payment agreement with the Respondent after extensive consultations;

    b. whether the payment plan agreement referred to and relied upon by the Respondent was a result of duress and coercive pressure on the part of the Respondent against the Appellant during and after their romantic relationship;

c. whether the appellant executed any payment plan agreement with his valid signature;

d. whether any execution of the payment plan agreement was a result of duress due to extreme coercive pressure by the Respondent;

e. whether the appellant owed the amount allegedly due to the Respondent;

f. whether on account of the acrimonious end to the relationship between the appellant and the Respondent, the Respondent sought to unjustly enrich herself through undue coercive pressure against the appellant in relation to the agreement.

xiii. The learned magistrate erred in fact and in law in failing to consider and appreciate that the triable issues raised in the Appellant's statement of defence could not be properly determined in the absence of a full hearing to ventilate the same.

xiv. The learned magistrate erred in law and in fact in failing to consider and appreciate that judgment on admission could in any event not be entered where the appellant's statement of defence raises triable issues.

xv. The learned magistrate erred in fact and in law in issuing an award of interest to the Respondent from the date of filing suit till payment in full when there was no basis for such an award.

xvi. The learned magistrate erred in law and in failing to give effect to the overriding objectives in sections 1A and 1B of the *Civil Procedure Act* in denying the appellant an opportunity to ventilate its case.

xvii. The learned magistrate erred in fact and in law in failing to consider the appellant's submissions and list of authorities and in so doing arrived at a wrong decision.

xviii. The learned magistrate erred in fact and in law in considering matters which he ought not to have considered and failing to consider relevant matters in arriving at his decision.

4. The appeal was canvassed by way of written submissions. In summary, Counsel for the appellant submitted that judgment on admission is discretionary, emphasizing that for such a judgment to be rendered, the admission must be unequivocal and beyond doubt.

5. The appellant argues the trial court failed to appreciate there was no obvious admission of the exact debt by the appellant, pointing out that the documents referenced on pages 38-39 of the Record of Appeal were fraught with ambiguity. Counsel maintained that the appellant had contested the debt, presenting defenses that merited examination at a full trial.

6. Moreover, the Appellant highlighted a discrepancy in the amounts, noting that the deed of undertaking pertained to Kshs. 1,487,950.80, whereas the legal action demanded Kshs. 7,959,885 and GBP 6,141. Based on this disparity, the Appellant posited that the court should not have granted judgment for the larger sums claimed.

7. The appellant argues he was not accorded a chance to be heard. He pleads with the court to allow the appeal and remit the file back to the subordinate court for hearing, asserting the fundamental principle of justice that every party should be given the chance to present their case.

8. The respondent on the other hand submits that the decision of the trial court was justified based on Order 13 Rule 2 of the *Civil Procedure Rules*, maintaining that the judgment was anchored in well-founded principles. The respondent highlights that a demand letter was sent to the appellant, which elicited a response via email wherein the appellant apologized and subsequently made a partial

payment. The respondent asserts that once a debt is unequivocally admitted, the court's role is effectively concluded, with no remaining issues warranting trial.

9. Furthermore, the respondent argues that the appellant's admission of the debt and a pledge to pay coupled with the failure to pay renders the appeal baseless. The respondent finds the argument of duress by the appellant to be unsustainable as the appellant had an opportunity to seek advice from Counsel.

Analysis

10. I have carefully considered the pleadings, written and oral submissions as well as the authorities cited by adverse parties. The grounds of appeal all point to one key issue for determination and that is whether the judgment on admission was proper, and whether the same should be set aside.

11. I am mindful that the duty of this court as the first appellate court is to re-evaluate and re-analyze the evidence presented before the trial court, thereby drawing its own conclusions. This is in alignment with the precedent set in *Selle & Anor v Associated Motor Boat Co Ltd & Another*, [1968] EA 123.

12. The instant appeal arises from the discretion of the trial court. In this regard, guidance is found in the holding of the Supreme Court in *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others*, (2019) eKLR where it was articulated that, in appeals emanating from decisions predicated on the discretionary powers of a court, the burden lies on the appellant to demonstrate that such a decision was made on a whim, or was otherwise prejudicial or capricious. The Court held that:

> "We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious."

13. It is also a well-established principle that an appellate court's discretion must be exercised judiciously, with intervention in the trial court's ruling warranted only upon a clear demonstration that the decision was predicated upon the application of incorrect or irrelevant principles. This standard ensures that appellate review respects the trial court's authority and intervenes solely on substantial grounds of legal misapplication or misinterpretation, maintaining the integrity of judicial discretion and decision-making processes.

14. Order 13 rule 2 of the *Civil Procedure Rules*, 2010 provides as follows:

> "Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

15. The provision is grounded on the need to expedite the resolution of cases where facts are undisputed or where a party admits to the claims against them. Jurisprudence on this subject is largely settled and the courts have established the salient principles that a court should consider in dealing with such an application.

16. Courts will not allow an application for judgment on admission if the alleged admission by the defendant is not clear, unequivocal, and unambiguous. This has been held in decisions such as *Cassam v Sachania*, [1982] KLR 191 and in *Choitram v Nazari*, (1984) KLR 327. It therefore follows that

an admission must be explicit and leave no room for interpretation or doubt regarding the fact that it relates to.

17. If an admission can be interpreted in more than one way, judicial pronouncements show that the court is likely to rule that the matter should proceed to trial for a full determination of the facts. I concur entirely with the sentiments of this court (Havelock J) in *747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others*, HCCC No. 445 of 2012 that there is no point in letting a matter go for a trial if there is nothing to be gained in the trial.

18. Likewise, the courts have held for instance in *Express Automobile Kenya Limited v Kenya Farmers Association Limited & Another*, that the power to enter judgement on admission is not mandatory but discretionary. It should be exercised upon an examination of the facts and prevailing circumstances. Where there is a genuine dispute over any material fact or if the defense raises a plausible argument that could potentially lead to a different outcome, the application for judgment on admission ought to be denied so as to allow the matter to proceed to full trial. Against this background I shall now evaluate the evidence presented before me.

19. The correspondence between the parties proceeding the agreement to pay are contained in the Supplementary Record of Appeal, which has been filed by the respondent. The trail of emails particularly on August 26th 2020 and 7th September 2020 confirms that the parties spent some time before the agreement was signed off and that the appellant knew exactly what he was signing against.

20. This is more so because there is indication that the appellant even had an opportunity to engage Counsel before signing off the Payment Plan Agreement dated 21st September 2020. Like the trial magistrate observed, this would negate the claim that the agreement was entered into under duress, which seems to be an afterthought on the part of the appellant.

21. Clause 1.1 of the said agreement states the obligation due as Kshs. 7,959,885/= and GBP 6141 which is the same amount claimed in the plaint. Clause 2.1 further provides in part that the payer shall pay the payee the amount of Kshs. 100,000/= per month in clearance of the obligation provided that the payer shall endeavor to clear the obligations as soon as possible.

22. The parties executed the said agreement by way of digital signature, as provided for in clause 9.2 of the agreement. Besides the Payment Plan Agreement there is also a Deed of Undertaking executed by the parties although it appears that the suit is premised on the Payment Plan Agreement.

23. The authenticity of a letter written by the appellant to the respondent at page 22 of the Supplementary Record of Appeal has not been denied. In the said undated letter, the appellant apologizes for missing one payment, which he explains as owing to financial hurdles. He later commits to regularize payments and confirms that it is my intention to honour the terms of the Payment Plan as we discussed.

24. It is a settled fact as held in *Choitram v Nazari*, [1984] KLR 327 that admissions need not be on the pleadings. They can be by way of correspondence, documents which are admitted or they may even be oral. It is obvious to me that the trial court considered the email correspondence as well as the executed agreement between the parties and found that this amounted to a clear admission, before proceeding to dismiss the allegations of coercion and duress in signing the agreement. I couldn't agree more with the learned magistrate. I am not persuaded that the trial magistrate erred in exercising her discretion.

25. It is equally my finding that the admission by the appellant was clear, unequivocal, unambiguous and as such, going to trial would be a waste of judicial resources and time.

Determination

26. The upshot is that this appeal lacks merit and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 1ST DAY OF MARCH 2024.

F. MUGAMBI

JUDGE