REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Appeal 79 of 1995

CONSOLIDATED BANK OF KENYA LTD……APPELLANT

AND

1. MOMBASA DEVELOPMENT LIMITED

2. JIMBA CREDIT CORPORATION……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Justice Wambilyangah) dated 31st January, 1995

IN

H.C.C.C. NO. 658 OF 1993

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JUDGMENT OF THE COURT

We need not go to the facts of this appeal as these were set out at length by this Court in this appeal (in an application in the appeal) on 31st January, 1997 in which application two of us Tunoi & Shah JJ.A. were members of the Court.

We would however reiterate what this Court said in an application for stay of execution of orders made by the superior court (Wambilyangah, J.). That was an application under rule 5(2) (b) of the Ruled of this Court. This court said:

"In this application for a stay of execution the applicant has satisfied us that the intended appeal is arguable; in particular it was doubtful if there was an admission within the meaning of order X11 rule 6."

Order X11 rule 6 provides as follows:

"6. Any party may at any stage of 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."

It is trite law that the court can only enter judgment on an admission when the admission is clear, unambiguos, unequicoval and sufficient. In other words it must be plain and obvious. With the greatest of respect to the learned Judge we do not find any admission either in the pleadings or in the documents which were before the learned Judge.

The first declaration sought by the respondent (the 1st respondent) in this appeal (hereinafter referred to as the plaintiff) in its application (chamber summons) dated 11th February, 1994 was as follows:

:A declaration that the Seizure and Repossession of motor vehicle KYJ 484 and KYE 363 in May 1989 was out of contract dated 11th October, 1988."

The said contract dated 11th October, 1988 (it really is a letter of offer which the plaintiff calls contract as it accepted the offer) itself provided that the plaintiff would give the title of the two vehicles and signed bank transfer forms in respect of the said vehicles tot he 2nd respondent herein (hereinafter refered to as the first defendant). Seizure and repossession of the two vehicles is very much in issue even according t o the plaintiff who had itself drafted issues for trial court as follows:

"5 On the date and day of repossession was the First Defendant (Consolidated Bank of Kenya Limited) in law or otherwise under the terms of the loan agreement or offer entitled to seize and repossess the 2 motor vehicles""

"6. Did the letter of offer or agreement provide in terms or otherwise for the First Defendant to repossess the vehicles in case of late payments or did it provide the right to charge penalty of 1% only""

These are elaborate issues and there was no admission of any sort to enable the learned Judge to grant the aforesaid first prayer.

The second order granted by the learned Judge to the plaintiff was a declaration to the effect that the loan was limited to a maximum of Shs.60,000/=. This again was very much in issue. There was no admission. The plaintiff had offered (and paid) a sum of Shs.60,000/= and had specifically stated that the sum will carry interest at the rate of 18% per annum from the date of loan. It is indeed amazing that the learned Judge granted such a declaration.

Thirdly the learned Judge proceeded to make an order to the effect that the said two vehicles be returned tot he plaintiff in good order. There was again no admission of any sort in this respect. The appellant was clearly saying that the vehicles were given as security for loan. At no time did any of the defendants make any admission of any sort in respect of the said two vehicles to suggest that it was bound to return the same to the plaintiff, except on full payment of the loan.

The learned Judge appears to have equated the alleged slovenliness and procrastination on part of Jimba Credit Corporation (the second respondent) in disposing of the securities, to Jimba Credit Corporation having no defence to the claim. That can never form part of an order XII rule 6 application. In any case the second respondent, Jimba Credit Corporation, had warned the plaintiff that its vehicles will be sold unless the loan was repaid. We see distinct bias in the ruling appealed against. The bias is in favour of the plaintiff and pointedly against the appellant and Jimba Credit Corporation.

In brief there was no admission express or implied to enable the learned Judge to make the far reaching orders that he did make.

The upshost of all this is that this appeal is allowed. The ruling of the superior court dated 31st January, 1995 and order following therefrom are set aside and it is ordered that the suit be heard by way of a proper trial on merits. The appellant will have costs of this appeal as against the first respondent (the plaintiff). We make no order as to costs against the second respondent.

Dated and delivered at Mombasa this 25th day of July, 1997.

A. M. COCKAR

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CHIEF JUSTICE

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL