Case Number:	Civil Appeal 22 of 2005
Date Delivered:	22 Mar 2012
Case Class:	Civil
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Riaga Samuel Cornelius Omolo, Philip Nyamu Waki, Erastus Mwaniki Githinji
Citation:	CO-OPERATIVE BANK OF KENYA LTD v WASHINGTON OTIENO OGINDO [2012] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

CIVIL APPEAL NO. 22 OF 2005

BETWEEN

THE CO-OPERATIVE BANK OF KENYA LTD. ……. APPELLANT

AND

WASHINGTON OTIENO OGINDO ……..……. RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (Tanui, J) delivered on 22nd June, 2004

In

H.C. C. Appeal No. 20 of 2004)

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JUDGMENT OF THE COURT

This is a second appeal to this Court. The appellant is the **Co-operative Bank of Kenya Ltd.,** while the respondent is **Washington Otieno Ogindo**. The respondent had sued the appellant in the court of the Chief Magistrate at Kisumu, seeking:

"(a) A DECLARATION that the plaintiff has settled his indebtedness with the defendant.

(b) costs of this suit.

(c) Any other remedy deemed just so to be granted."

There was no dispute on the evidence led before the Magistrate that the appellant had lent to one Silvanus Shikuku Abuto who traded in the firm name of Solbo Electrical Works or Contractors the sum of **Shs.150,000/-**. The security offered for the loan was the appellant's personal guarantee and in addition to that the respondent charged to the bank his property known as Muhoroni/Settlement Scheme /Plot No. 064/933/4. The loan or the over-draft facility was to be for one year running from 20th February, 1996 to 20th February, 1997. That was also the duration of the guarantee offered by the respondent. The appellant was unable to produce before the Magistrate the actual charge document signed between itself and the respondent; instead the appellant produced a sample charge document saying the one signed between it and the respondent had been destroyed during the 1998 bomb-blast at the appellant's offices in Nairobi. But it was agreed between the parties that the period of guarantee ran from 20th February, 1996 to 20th February, 1997. The respondent had alleged before the Magistrate that Shikuku had informed him that by 20th February, 1997, the loan had been fully repaid but that contention was not really justified by the evidence on record. What appears to have happened was that the principal borrower, Shikuku, agreed with the appellant that the period of repayment would be extended by a further twelve months to 20th February, 1998. It was agreed that the appellant and the principal borrower did not involve the respondent in their agreement to extend the time. In her judgment, the Senior Principal Magistrate had dealt with the matter in this way:-

"Looking at the documents exhibited especially P Exh 1, a certified copy of the charge the operative date 21.03.1996. Thus the account ought to have reverted to credit by 21.03.1997 but looking at the Bank Statements P Exh2 by 21.03.1997 the account had a debit balance of Shs.273,695/25 and in the explanation of DW1 the borrower was liable to incur heavy penalties for that breach and thus when he approached them for extension of the payment period, the Bank allowed the request. Even the payment of Shs.243,620/85 on 17/05/1997 did not clear the overdraft which was then standing at Shs.361,911.70. A balance of Shs.115,290.85 still remained. Consequently, the plaintiff's obligation to the bank extended beyond the one year earlier stipulated and the extension of the repayment period did not alter the parties' rights/obligations or affect them adversely. If anything, it was favourable to the parties especially the plaintiff and the account holder. It was not in the sense that further advances were made to the account holder."

It was on that basis that the Magistrate dismissed the appellant's claim, provoking the appeal to the High Court. That court (Tanui, J) found and held that in extending the period of repayment, from one year to two years, the appellant and the principal debtor were in effect entering into a new contract and since the respondent was not even made aware of the new situation, the respondent was discharged from the guarantee. The learned Judge held:-

"It appears to me that when the respondent [i.e. the bank] acceded to the debtor's request to extend time for repayment of the loan that amounted to an agreement which was binding and capable of being enforced. The fact that it was given without seeking the consent of the appellant [i.e. the present respondent] amounted to a material variation of the contract. In those circumstances I find that the appellant was discharged from his liability to the respondent, as he was not consulted."

It is from this decision that the appellant appeals to this Court on four principal grounds, namely:-

"1. The Learned Judge misdirected himself and erred in law in permitting the Respondent to raise on appeal an issue that had not been pleaded in the court of first instance and when the plaint had not been amended to plead it and then proceeding to decide the appeal on the said issue, namely, that the Respondent had been discharged from his guarantee to the Appellant by reason of variation of the guarantee by the Appellant extending to the Principal Debtor the period within which to pay the guaranteed debt without consulting the Respondent.

2. The Learned Judge erred and misdirected himself in law by allowing the Respondent to depart from his pleadings and the grounds of appeal and then proceeding to decide the appeal in favour of the Respondent on the basis of an issue raised by the Respondent as a result of such departure from the pleadings.

3. The Learned Judge erred in deciding the appeal on an issue that had not been pleaded by the Respondent in his plaint.

4. The Learned Judge erred in not appreciating that the dispute between the Appellant and the Respondent was the charge over the suit property and the charge instrument provided at clause 1 (iv) (sic) that the appellant was at liberty to grant time or extend any indulgence for the Principal Debtor to pay the loan wherefore the indulgence given the Principal Debtor was within the terms of the charge and/or guarantee of the Respondent and the Respondent was not and could not therefore be discharged from his guarantee by the sheer reason that the Appellant had extended time or given indulgence to the Principal Debtor to pay the facility beyond the agreed time without notice to or consent of the Respondent."

These were the principal grounds which Mr. Onyango, learned counsel, argued before us on behalf of the appellant. On the first ground, it was argued that the respondent had not pleaded in his plaint that the appellant and the principal debtor had, without notice to, or consent of the respondent, extended the loan repayment period and that the learned Judge was wrong in allowing that issue to be raised and argued before him. For that proposition, the case of **CHALICHA F.CS LTD VS. ODHIAMBO & 9 OTHERS, [1987] KLR 182** was cited. In that case, this Court held:

"Cases must be decided on the issues on the record. The court has no power to make an order, unless it is by consent, which is outside the pleadings. In this instance the issues raised by the Judge and the order thereon was a nullity."

In the cited case, the point which was not pleaded and which the judge was found to have imported into the case was one of some alleged public policy based on equitable principle. While in the appeal we are considering it was not directly pleaded that the extension of the repayment period was done without the agreement of the respondent, yet in paragraphs 3, 4 and 5 of the plaint, it was pleaded as follows:-

"3. Sometime between December, 1998 and January, 1996 the plaintiff guaranteed the borrowing of one Mr. S. Abuto, the sole proprietor of M/s SOLBO ELETRICAL CONTRACTORS (now deceased) some loan facility from the defendant amounting to Shs.150,000/- and the plaintiff's land title No. KISUMU/MUHORONI 64/933 was charged as seventy (sic).

4. The said Mr. S. Abuto then performed his part of the contract between him and the defendant by settling the loan amount early in 1997, thereby discharging the first charge over the plaintiff's land title afore said.

5. The defendant now claims that there still exists an outstanding sum of Shs.440, 303.80 in the plaintiff's loan account and is threatening to realize its security by exercising its statutory power of sale."

It is clear from these citations that in paragraph 3, the period of guarantee was specifically set out as being between January, 1996 and December, 1998. In the evidence, it was agreed the period of guarantee was in fact between February, 1996 and February, 1997. Such evidence was given by both the respondent and the appellant's own witness James Nyaga Njoka (DW1). When cross examined by Mr. Odhiambo, who appeared for the appellant before the Magistrate, the respondent stated:-

"----------. By the charge, I agreed to pay away monies owing as principal sum lent or as interest but only for the period of one year, that I signed for. The Bank did not have absolute authority to extend the loan period at its discretion. They had to follow the principles of natural justice and notify me of any extensions. Clause 7 (4) of the charge gave the bank the powers to extend loans but only during the validity of the charge, i.e. one year."

On re-examination the respondent re-asserted that the guarantee was only for one year and that he was not a party to the extension of time. So in the plaint the period of guarantee was set out and during the trial before the Magistrate, there was absolutely no protest by any one that the respondent was giving evidence outside his pleadings. In his "*Memorandum of Appeal*" in the High Court, ground (b) specifically stated:-

"The learned trial Magistrate erred in law in misinterpreting the cited authorities before her."

Among the authorities which had been cited before the Magistrate were **ATOOL P. SHAH VS. BANK OF BARODA**, HCCC No. 305 of 1999 (Kisumu) and **HARILAL & CO. & ANOTHER VS. THE STANDARD BANK LTD.**, Civil Appeal No. 41 of 1996 and **NATIONAL and GRINDLAY BANK V. PATEL & OTHERS [1969] EA 40**3. All these authorities dealt with the issue of when a guarantor such as the respondent would be discharged from his liability and having additionally cited HALSBURY'S Laws of England, Volume 20 thus:-

"A binding agreement between the creditor and the principal debtor to give time to the principal debtor, as distinguished from mere passive inactivity on the creditor's part not resulting from any contract with principal debtor, will discharge the surety from liability if it is made without his consent whether or not he is prejudiced by it. ----------."

The making of new and valid contract to which the surety does not assent between the creditor and the principal debtor which extends the period which by the original contract between them the principal debtor was obliged to pay the creditor, amounts to a giving of time", Judge then

the learned Judge then came to his conclusion which we have already set out herein, namely, that the respondent had been discharged from liability. These issues were not plucked out of thin air by the Judge. They had been agitated before the Magistrate and as we have seen one of the grounds of appeal before the learned Judge was that the Magistrate had misinterpreted the authorities which had been cited before her. Again, looking at the record before the High Court, no objection was ever raised that either the grounds of appeal themselves, or the submissions in support of them were outside the scope of the issues which had been pleaded or that they were not raised during the trial. Add to these factors the current provisions of ***Article 159 (d)*** of the Constitution and ***section 3A & 3B*** of the Appellate Jurisdiction Act **Chapter 9** Laws of Kenya, and it must be clear that grounds 1, 2 and 3 in the appellant's memorandum of appeal must fail. We reject those grounds.

Did clause ***7 (iv)*** of the charge entitle the appellant to enlarge time for the principal debtor without any reference to the respondent"

In our view, there was no doubt that the appellant and the principal debtor were, by their agreement of 1997 extending time, radically varying the agreement which directly affected the rights of the respondent. The loan which the appellant had guaranteed was Shs.150,000/- with interest thereon. By the time the respondent was being given notice of the principal debtor's defaults, the principal debtor was already dead and the loan had risen to over Shs.440,303.80. The trial Magistrate had thought the extension of the repayment period was for the benefit of both the principal debtor and the respondent. We think that even if that was so, the respondent ought to have been made aware of the extension; as we have seen from the quotation from HALSBURY'S LAWS of England, when such a radical variation of the terms of the contract are being contemplated the guarantor ought to consent to them whether he is or is not prejudiced by them. As we have seen from the evidence of the respondent, he thought extensions or indulgences could only be extended to the principal debtor during the validity of the twelve month period. We can find nothing unreasonable in the respondent's understanding of clause **7 (iv)**. In all the circumstances of the appeal, we do not think there is anything which would warrant our interfering with the judgment of the High Court. Accordingly, the appeal fails and we order that it be and is hereby dismissed with costs thereof to the respondent.

Dated and delivered at Kisumu this 22nd day of March, 2012

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.