



REPUBLIC OF KENYA



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**Inuka Africa v Iguanya (Civil Appeal E001 of 2023)
[2024] KEHC 10427 (KLR) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E001 OF 2023
FN MUCHEMI, J
AUGUST 23, 2024**

BETWEEN

INUKA AFRICA APPELLANT

AND

JOYCE WAITHERA IGUANYA RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. O. J. Muthoni (RM/Adjudicator)
delivered on 31st August 2023 in Thika Small Claims Court SCCCOM No. E636 of 2023)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCCOM No. E636 of 2023 in a claim arising from a breach of a loan agreement in which the court found that the appellant breached the agreement and awarded the respondent a sum of Kshs. 836,720/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 6 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in awarding the respondent judgment in the sum of Kshs. 836,720/- without any factual basis.
 - b. The learned trial magistrate erred in law and in fact in holding the appellant liable for the fraudulent activities by one of its former employees.
 - c. The learned trial magistrate erred in law and in fact in failing to appreciate that the respondent did not sufficiently service her loan.
 - d. The learned trial magistrate erred in fact and in law by failing to appreciate the overwhelming contents of the loan agreement entered between the appellant and the respondent.



3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that the respondent filed a suit on 24/8/2022 against the appellant at the Small Claims Court in Thika SCCCOMM E636 of 2022 seeking judgment for compensation for loss or damage to property which occurred on 8th March 2022 valued at Kshs. 770,000/-. The respondent claims that she was funded by the appellant with a sum of Kshs. 100,000/- via a loan agreement dated 18th June 2024 payable within two years and added two diary cows (Fresian cows, both valued at Kshs. 120,000/-) as collateral to the loan.
5. The respondent further provided for three guarantors who agreed that if the respondent failed to make the payments as specified in the schedule, the appellant was entitled to recover any outstanding payments, interests, penalties, and incidental costs associated with the loan from the guarantors.
6. The appellant submits that the respondent made consistent loan repayments using its pay bill number and near the end of the repayment period, she began making payments directly to the officer Jerusha Nyambura. Furthermore, the respondent claims that her guarantor paid Kshs. 56,500/- and an additional Kshs. 30,000/- in loan arrears. The respondent further claims that the appellant raided her home while she was away and took away her livestock worth Kshs. 770,000/-.
7. The appellant submits that it filed its response to the claim on 22nd November 2022 claiming that the respondent voluntarily applied for a loan in the sum of Kshs. 110,800/- and the respondent failed to settle her loan balance and accrued penalties.
8. The appellant turned over the defaulted account to Silverline Auctioneers to recover the amount owed. The respondent failed to honour the proclamation notice and was impounded on 8th March 2022 by the auctioneers.
9. The appellant argues that the respondent was in default of her obligations to service the loan. The loan agreement specifically provided that no payment was to be made by the borrower to any officer outside of the office and the secured creditor accepts no responsibility for such payments. The appellant argues that the respondent was made aware of the said provision as she initially paid the loan through the pay bill number provided. However she claims that she later started paying personally to one of the appellant's former employees after the said employee told her to pay directly to her.
10. In any event, the appellant submits that the respondent did not provide any evidence of having made payment to the appellant's former employee. The respondent did not provide any trail of financial records such as mpesa statements. Thus the appellant argues that it was exercising its legal rights as stipulated in the agreement to recover the outstanding loan balance and penalties accrued by handing over the defaulted account to Silverline Auctioneers.
11. The appellant submits that the learned trial magistrate failed to highlight the issues it raised in regard to the respondent failing to adhere to the express provisions of the loan agreement in terms of making payments for the loan. Further the learned trial magistrate failed to consider the provisions of the loan agreement and the responsibilities of each party in the agreement and the consequences of non-adherence to the provisions.
12. The appellant argues that the respondent being aware of the clause prohibiting a party from paying an officer outside the office directly, it was reasonably expected that she would make payments to the appellant's branch offices. It is therefore unfair, unjust and unlawful to place blame on the appellant for the respondent's failure to adhere to clear, simple contractual terms.



13. Furthermore, the appellant submits that the respondent failed to undertake any due diligence with it to enquire as to why such substantial changes to a contract were being communicated via word of mouth. Upon being served with the proclamation notice, the respondent visited the appellant's offices to enquire on the status of her loan and that is what she ought to have done in the first place.
14. The appellant further submits that it did not make any representations or actions that could have led the respondent to reasonably believe that the employee had the authority to collect the loan repayments on its behalf.
15. The appellant relies on Section 107 and 109 of the *Evidence Act* and the cases of *Kipkebe Limited v Peterson Ondieki Tai* [2016] eKLR and *Wangongu v Kithinji & 2 Others* (Civil Appeal 293 of 2023) [2024] KEHC 6272 (KLR) (30 May 2024) (Judgment) and submits that he who alleges must prove. The appellant argues that the learned trial magistrate awarded Kshs. 836,720/- to the respondent which was not proven in court as there was no evidence adduced to support the said sums. The respondent confirmed that she had no evidence to prove that the cows were valued at Kshs. 460,000/-, chicken at Kshs. 150,000/- and geese at Kshs. 160,000/-. The respondent did not produce valuation reports on the properties and therefore the learned trial magistrate had no basis to award such amounts.

The Respondent's Submissions

16. The respondent submits that the appellant who operates a credit offering institution sent her field officer Jerusha Nyambura to their village. Jerusha went from home to home marketing a loan facility that would help them expand their farming business in which they were to use their livestock as collateral. The respondent took a loan of Kshs. 100,000/- and used her livestock as collateral.
17. The respondent submits that the loan was disbursed by the loan officer Jerusha Nyambura who gave her a pay bill number to use to repay the loan. The respondent states that halfway in making the repayments, the loan officer went and told her that her employer had withdrawn the pay bill number she had given them and she directed that she would be coming every month to collect monthly repayments and issue receipts until another pay bill was issued and she did so until the respondent fully paid the loan disbursed.
18. The respondent states that five months after completion of the loan payment, another field officer Mr Alex Kimiti called her spouse and informed him that she had an outstanding loan of Kshs. 56,000/- and as her guarantor he was required to pay the said sum to avoid auctioning of their livestock they had kept as collateral.
19. The respondent submits that she protested on the same and informed the officer that she had reserviced the full loan amount through Jerusha Nyambura and was issued with receipts. The said officer stated that the appellant did not recognize any cash collected by Jerusha as she had been sacked for collecting and stealing the appellant's money from clients' loan repayments.
20. The respondent states that the said officer told her that she would have to make the repayments again to avoid the auctioneers and her husband made the payments. In May 2021, the same officer visited her home and demanded Kshs. 30,000/- stating that the balance still reflected in her loan and threatened to unleash their auctioneers. The respondent submits that although it was unfair they came to an agreement that she would pay Kshs. 1,200/- per month to clear the balance. The respondent states that she paid the amount as agreed but despite her compliance, the said officer went to her home on 8th March 2022 accompanied by goons and confiscated all their livestock worth over Kshs. 800,000/- and took them away.



21. The respondent submits that she presented all her mpesa statements to support her claim that she had been forced to overpay the loan disbursed and she brought her guarantor who testified and presented his mpesa statements to prove that he was unfairly forced to repay the loan balance.
22. The respondent submits that the appellant has withheld information that their filed officer was their only contact point with herself from marketing of their loan product to disbursements of the same. Further, the appellant's offices are located in Githunguri town while their loaning officer was dealing with her at her home in a village in Ndeiya Limuru. The appellant never alerted the respondent that they fired Jerusha Nyambura.
23. The respondent submits that the appellant is liable to every cation of their employees in line with the principle of vicarious liability. Thus the actions of the appellant's employees Jerusha Nyambura and Alex Kimiti who without any justification confiscated the respondent's livestock and sold the same amounted to a miscarriage of justice.
24. The respondent argues that the appellant is silent on the issue of confiscating all the livestock belonging to her and does not explain what happened to the livestock proceeds sold and how much they received after auctioning the subject livestock. Relying on the case of *Caliph Properties Limited v Barbel Sharma & Another* [2015] eKLR, the respondent argues that he who comes to equity must come with clean hands and must do equity. Thus the appellant cannot be allowed to hide behind and stick to a clause in the loan agreement and fail to account for their subsequent actions of the livestock confiscated and sold.

Issue for determination

25. The main issue for determination is whether the appeal has merit.

The Law

26. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

27. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

28. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
 - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;



- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit.

29. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

(108) the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

30. The burden of proof was discussed in the case of Muriungi Kanoru Jeremiah v Stephen Ungu M'mwarabua [2015] eKLR where the court held as follows:-

31. As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account as provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant...The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.

32. It is not disputed that the appellant and the respondent entered into a loan agreement in 2018. What is in dispute is the fact that the appellant claims that the respondent did not repay back her loan and accrued interest whereas the respondent argues that she paid back her loan amount through the appellant's officer Jerusha Nyambura.

33. From the record, the respondent testified in the trial court that she and the appellant entered into a loan agreement whereby the appellant was to disburse to her a sum of Kshs. 100,000/- repayable in two years. The said loan was advertised to the respondent by Jerusha Nyambura who went to her home. According to the respondent, the loan was to be repaid through a pay bill number that the said officer Jerusha Nyambura provided.

34. The respondent testified that she repaid the loan and towards the end, the said officer Jerusha, informed her that the pay bill number was withdrawn and that she would be visiting the farmers every month to collect the loan repayments, which she did until the respondent completed the loan repayments.

35. The respondent stated that five months after the loan was fully repaid, the appellant through its officer Mr. Samuel Karigo called her husband, a guarantor of the loan, informing him that the loan advanced to the respondent had fallen into arrears and forced him to pay Kshs. 56,500/- to clear the loan balance. In June 2021, a field officer from the appellant company by the name Mr. Alex Kimiti visited the respondent and claimed that she had an outstanding balance of Kshs. 30,000/- and in the event she did not pay the loan balance, they would send auctioneers to auction her property. The respondent stated that she told the said officer that she had paid her loan from July 2016 to July 2018 through their officer Jerusha Nyambura.



36. The said officer told the respondent that Jerusha had been sacked for illegally collecting and stealing money collected from clients and that the respondent would have to pay the said sums again to the appellant company. They agreed that she would be paying Kshs. 1,200/- per month which she had been paying without fail. On 8th March 2022, Mr. Alex Kimiti in the company of goons raided her home and took away her expectant fresian cow valued at Kshs. 460,000/-, 100 chicken valued at Kshs. 150,000/- and 40 geese valued at Kshs. 160,000/-.
37. The appellant argues that the loan amount advanced to the respondent was Kshs. 110,800/- which was disbursed to her on 22nd May 2018 and she was to pay back Kshs, 155,120/-. The appellant testified that the respondent paid back a sum of Kshs. 105,531/- and was left with an outstanding sum of Kshs. 49,589/-. At the time of the impound, the appellant claims that the respondent had an outstanding loan balance of Kshs. 49,589/- plus Kshs. 154,500/- being the penalties accrued. The appellant stated that upon the respondent failing to settle her loan balance, the appellant handed over her defaulted account to Silverline Auctioneers to recover the amount due.
38. The appellant states that according to the loan agreement there was a clause prohibiting repayments by the borrower to an officer of the appellant outside the office. The said provision reads:
- All repayments must be made without any deductions whatsoever, through Inuka Africa Pay bill Account provided unless very exceptional circumstances compel...In the event it is not possible to pay via the aforesaid pay bill the cash payments must be made at Inuka Africa Limited Branch/office and the Borrower or any person paying on his or her behalf must demand a receipt for monies paid. No payments are to be made by the borrower or his/her assigns to any officer outside the office and the secured creditor accepts no responsibility or liability for such payments.
39. From the record, it is clear that the parties entered into a loan agreement for a sum of Kshs. 100,000/- as annexed by the Loan Application Form. The point of contact between the respondent and the appellant was through Jerusha Nyambura who went to the respondent's house to sell her the loan and give her the pay bill number. The respondent and the appellant were clear that the respondent did not visit their offices. Furthermore, the loan documents including the security agreements have been signed by Jerusha Nyambura on behalf of the appellant company. Interestingly, the pay bill number has not been provided in any of the loan documents or the service agreement the appellant has referred to. Thus, it is safe to presume that the said pay bill number was provided by Jerusha as the respondent testified. Therefore, it is safe to say that when the said officer went and informed the respondent that the pay bill was not working and directed that payments would be paid to the said officer, the respondent would not question the same as she dealt with the said officer from the onset of the loan process.
40. That notwithstanding, the respondent presented mpesa statements showing that she paid over the loan balance account and her husband equally made payments that were over the loan amount. Despite that, the appellant went to the respondent's home and took away her livestock. There is no justification to warrant the appellant taking livestock which exceeded the debt allegedly owed by the respondent. Furthermore, the appellant did not give an account of how much proceeds they made from the sale of the livestock or how much remained.
41. Although the appellant claims that the fraudulent activities by its employee Jerusha should not be visited upon them, it is evident that the respondent should not be penalized for shortcomings of the said officer. Once the appellant knew that the said officer was stealing monies from clients, nothing stopped them from pursuing a criminal claim against her. It is unjust for the appellant to force the respondent repay the loan twice for misgivings of his own officer which ought to have been settled



between the said officer and the appellant company. Furthermore, the appellant is prevented from claiming that the respondent did not pay Jerusha the said monies yet the appellant admitted in its evidence that they fired the said officer as she was stealing monies from clients that was meant to reservice their loans. Thus, the appellant was aware that the said officer had carried out fraudulent activities of stealing and they ought to have pursued her when they knew of the same instead of making its customers overpay the loan amounts which amounts to unjustly enriching themselves. That notwithstanding, nothing stopped the appellant from making calls to its customers when they learnt of the fraudulent activities of their employer and informing them that they had fired the said officer Jerusha Nyambura as she was stealing from them.

42. The issue is who should bear the loss of funds stolen by the employee of the appellant? Definitely, it is the employer who is the appellant but not the borrowers of the loans.
43. It is my considered view that the respondent proved her claim against the appellant in the court below and that the magistrate reach a finding based on the law and evidence.

Conclusion

44. I therefore find no merit in this appeal and it is hereby dismissed with costs.
45. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 23RD DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE

