



**Mosi v Onyango (Civil Appeal E006 of 2023)
[2023] KEHC 23685 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E006 OF 2023
MS SHARIFF, J
SEPTEMBER 29, 2023**

BETWEEN

HARRY BOB MOSI APPELLANT

AND

SAMUEL ONYANGO RESPONDENT

JUDGMENT

A. Case background:

1. The Respondent sued the Appellant at the lower court seeking Kshs 2,000,000/= plus costs and interest on account of an unpaid loan.
2. The particulars of the case before the magistrate court were that on or about the 6th of December 2010 the Appellant borrowed a sum of Kshs 2,000,000/= from the Respondent, ostensibly to boost his business operations with the promise to repay the loan on or before the November 10, 2011.
3. The Appellant however failed to keep his word forcing the Respondent to file suit. Vide a judgment delivered on December 7, 2022 the Learned Magistrate found in favour of the Respondent and awarded him Kshs 2,000,000/= plus costs and interest of the suit.

B. Appeal

4. Aggrieved by the judgment the Appellant has now proffered this appeal on the following grounds:
 1. That the learned Magistrate erred in law and fact by holding that the Respondent had proven that there was an oral agreement between the parties.
 2. That the learned Magistrate erred in law and fact by failing to appreciate that there was no evidence whatsoever to show that the amount of Kshs 2,000,000/= deposited by the Respondent into the Appellant's client account amounted to an agreement to advance a loan.



3. That the learned magistrate erred in law and fact by failing to hold that the refusal by the Respondent to furnish his bank accounts as to the origin of the subject matter of Kshs 2 million went to show that the said bank accounts would have tended to support the version by the Appellant about the amount of Kshs 2 million having emanated from Mumias Sugar Company Limited and not the Respondent as alleged.
4. That the Learned magistrate erred in law and fact by failing to find that moneys deposited in an Advocate's client account do not personally belong to the Advocate but rather to his clients.
5. Vide directions taken on 9/5/2023 both parties agreed to dispose of the matter by way of written submissions.

C. Submissions:

C.1. Appellant's Submission:

6. In his submissions dated 29/5/2023 the Appellant contended that the money was advanced for purposes of undertaking a legal assignment for Mumias Sugar Company Limited hence the reason why it was deposited in the Client account.
7. It was his further contention that the Respondent fell afoul of section 107 and 108 of the *Evidence Act* by failing to prove that an agreement actually existed. He averred that the Respondent's failure to avail his bank statement proving the source of the funds buttressed the fact that the funds originated from Mumias Sugar Company.
8. Additionally, it was his submission that the fund transfer slip did not stipulate the reason for the transaction hence the Magistrate was wrong in finding in favour of the Respondent. He placed reliance on the cases of *Siriba Ontita vs Albert Mongare Okemwa* [2021] eKLR and *Patrick Peter Kitbini v Kamau Kimanzi* [2020] eKLR.
9. He urged the court to dismiss the appeal on account of the Appellant's failure to capture the transaction in writing, failure to issue a demand letter and for depositing the money in a client's account contrary to Rule 7 of the Advocates (Accounts) Rule as read with Rule 2 thereof.

C.ii. Respondent's Submissions:

10. In his submissions dated 28/6/2023 the Respondent urged this court to dismiss the appeal based on the twin facts that;
 - i. The Appellant had acknowledged receipt of the money
 - ii. The Appellant had not provided any evidence that the money was from Mumias Sugar Company.

D. Analysis and Determination:

11. This being a first appeal, this court is enjoined to reconsider the evidence, evaluate it and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses and make due allowance for this. (see the Court of Appeal case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR).
12. After a careful re-evaluation of the evidence as contained in the record of appeal and upon consideration of the rival submissions filed herein, this court is of the opinion that the only issue that arises for determination is whether the learned Magistrate was right in awarding the Respondent Kshs 2,000,000/=.



13. In as much as the Appellant acknowledges having received Kshs 2,000,000/= from the Respondent it is his contention that the essentials of an oral agreement had not been met and that the money was from Mumias Sugar Company for other purposes.
14. In the Court of Appeal case of *Ali Abid Mohammed v Kenya Shell & Company Limited* [2017] eKLR, it was stated that an oral contract can be inferred from the conduct of the parties. The court held as follows:

“It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and King v King* 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per litter and for a certain period of time.”
15. The Respondent’s conduct of receiving money from the Appellant points to some form of arrangement. The Appellant states that the money was advanced by Mumias Sugar Company for consultancy services. Section 107 of the *Evidence Act* behoves a party who wishes for the court to give judgment as to any legal right or liability dependent on the existence of facts must prove those facts exist. In this case therefore the onus was on the Appellant to prove that indeed the Respondent was a conduit for money from Mumias Sugar. Section 109 of the *Evidence Act* stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
16. In the present case the Appellant did not discharge this burden to the required standard. He should have for instance sought to enjoin Mumias Sugar to these proceedings so that they may elucidate more on the source and the purpose of the funds. Additionally, the Appellant did not provide any evidence of the consultancy services allegedly offered in regard to Nairobi Industrial claim no. 146 of 2015.
17. In the absence of this evidence it is hard to fault the trial magistrate for finding in favour of the Respondent. The upshot of the foregoing is that this appeal lacks merit and is dismissed with costs to the Respondent assessed at Kshs 15,000.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 29TH DAY OF SEPTEMBER, 2023

MWANAISHA S. SHARIF

JUDGE

