



REPUBLIC OF KENYA



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**Nzioka v Mutisya (Civil Appeal E191 of 2021)
[2023] KEHC 23151 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E191 OF 2021
MW MUIGAI, J
SEPTEMBER 26, 2023**

BETWEEN

MICHAEL NDAMBUKI NZIOKA APPELLANT

AND

ONESMUS MWEU MUTISYA RESPONDENT

*(Being an Appeal from the Judgment of Hon. Martha Opanga (SRM) in
Kangundo in CMCC Case No. 101 of 2017 delivered on 9th November, 2021)*

JUDGMENT

Trial Court Record

1. This suit was commenced vide a Plaint dated 7th July, 2017 in which the Plaintiff contended that on or about 17th day of December, 2011 the Plaintiff at the Defendants instance and request advanced the Defendant a friendly loan of Kshs.154,000/- which was payable in two equal instalments of kshs.77,000/- on 1st March, 2012 and on 30th April, 2012 full particulars which were well within the defendants knowledge.
2. The Defendant failed to pay the said sum as per the agreement and the parties entered into another agreement on 16th December, 2013 in which the defendant agreed to pay the Plaintiff Kshs.154,000/- plus another Kshs.10,000/- being disbursements incurred by the Plaintiff totalling to kshs.164,000/- which was payable by instalments of Kshs.100,000/- on 31st January, 2014 and Kshs.64,000/- on 28th February, 2014 respectively but the Defendant did not pay the said sum.
3. The Plaintiff's claim against the defendant is for Kshs.164,000/- particularised here above.
4. The Plaintiff prays for judgment against the defendant for:-
 - a. Kshs.164,000.00



- b. Costs
- c. Interest on (a) and (b) above at Court rates with effect from 1st March, 2012 until full payment.

Request For Judgment

5. The Defendant failed to enter appearance nor file Defense hence the Plaintiff herein filed Request for judgment dated 30th September, 2017. Judgment was entered in favour of the Plaintiff as prayed on 3rd October, 2017 and a decree issued accordingly.

Certificate Of Urgency

6. The Defendant filed an application under certificate of urgency dated 19th February, 2018 seeking stay of execution of the judgment entered on 3/10/2017 and any decree or other orders made subsequent thereto pending the interpartes hearing of the said application. The prayers were granted by the Trial Court and the matter fixed for hearing on 6/03/2018.

Replying Affidavit

7. The Plaintiff filed a Replying Affidavit sworn on 6th March, 2018 deposing that the exparte judgment was regularly obtained and that the purported draft defence did not raise any triable issues.

Ruling

8. The Trial Court delivered its Ruling on 17th July 2018 on the Defendant's Application dated 19th February, 2018 setting aside the judgment of the Court dated 3/10/2017 and all other consequential orders.

Statement Of Defence Filed On 22/08/2018

9. The Defendant filed his defence dated 19th July, 2018 denying all the allegations as stated by the Plaintiff but admitted that he borrowed money from the Plaintiff and which he was to pay in instalment. The Defendant stated that he paid the entire amount of Kshs.164,000/- on 29/04/2017 in full and the Plaintiff had no claim thereof.
10. The amount claimed by the Plaintiff herein has since then been repaid in full and the Defendant was discharged of his obligation under the agreement which the Defendant shall provide herein.
11. The Defendant prayed that the Plaintiff's suit be dismissed with costs.

Hearing:

12. The hearing commenced on 20/08/2019. Both the Plaintiff and the Defendant called two (2) witnesses each in support of their case.

Plaintiff's Evidence

13. Pw1 Michael Ndambuki Nzioka the Plaintiff told the Court that on 17th December, 2011 he advanced to the Defendant a friendly loan of Kshs.154,000/- repayable in two equal instalments of Kshs. 77,000/- on March and April, 2012 respectively. The Defendant failed to pay as per the agreement and they entered into another agreement in which the Defendant was to pay the initial 154,000/- plus another Kshs.10,000/- being disbursements incurred all totalling to Kshs.164,000/- repayable by instalments of Kshs.100,000/- and Kshs.64,000/- on January and February, 2014 respectively. The Defendant's wife (who was the assistant chief) wrote the first agreement. Both the Plaintiff and



Defendant signed the agreement. The 2nd agreement was written by the Plaintiff in the presence of the Defendant's In-charge one Sgt. Wambua. Both the Plaintiff and Defendant signed. The Defendant never paid the money he owed the Plaintiff. He denied appending his signature on defendant's document dated 29th April, 2017.

14. During cross –examination by Ms Kioko for the Defendant the Plaintiff stated that he is not sure whether the Defendant retained a copy of the agreement. The 2nd agreement of 16/12/2013 was written by the Plaintiff in the presence of Sgt. Wambua both bears stamp of Assistant Chief. The last agreement done by the Defendant, the signature thereof is not of the Plaintiff.
15. Pw.2 Rafael a prison officer stated that he knew both Plaintiff and the Defendant. He accompanied the Plaintiff to write an agreement concerning the loan money. The wife of the Defendant who is the area assistant chief was also present. The Plaintiff told him that the Defendant did not refund him his money.
16. During cross-examination he stated that he was not present when his brother gave the defendant the loan. He was only present on 17th December, 2011 and not on 16th December, 2013.

Defendant's Witness

17. Dw1 Onesmus Mweu Mutisya the Defendant stated that the Plaintiff loaned him Kshs.154,000/-. They did not write down any agreement that time but did it later on 17/12/2011 whereby the Defendant's wife, Plaintiff's wife and Plaintiff's brother Pw2 were present and they all appended their signatures. The Defendant was not able to refund the money as previously agreed as he went to Somalia for two years. When he returned he paid the Plaintiff kshs.164,000/- on 29/04/2017. The amount included interest of kshs.10,000/-. The Plaintiff came alone to the defendant's house. The Assistant Chief wrote down the payment agreement dated 29/04/2017. The Defendant paid the Plaintiff the whole amount owed in cash.
18. In cross – examination by Ms Wayua for the Plaintiff he told the Court he did not pay the loan on time as agreed as he travelled to Somalia. When he returned back he had money which he was intending to buy land with but when the Plaintiff came to his place he paid him the whole amount in cash.
19. Dw2 Virginia Nduku Mweu wife to the Defendant and a Senior Assistant Chief testified that she became aware that the Plaintiff had advanced a loan to the Plaintiff in 2011 when the Plaintiff came with his brother to their home and complained that the Defendant borrowed him money and had refused to repay it back. She mediated between them and an agreement was written down, signatures appended and she stamped it.
20. On 29/04/2017 the Plaintiff came to their home and told her that the Defendant had not paid him the money. She intervened and the Defendant who happened to have the money then paid the Plaintiff the whole amount plus Kshs.10,000/- being the interest accrued. They did an agreement. Pw2 wanted to stamp the agreement but the Plaintiff said there was no need because they were friends. The Plaintiff signed and left peacefully.
21. During cross-examination by Ms Wayua she stated that she presided over the matter and the Plaintiff and the Defendant reached an agreement on modality of payment. She wrote the agreement dated 29/04/2017 after Defendant paid the Plaintiff Kshs.164,000/-

Trial Court Judgment

22. In its judgment delivered on 8th November, 2021 the Trial Court found that there was no proof that the signature on the agreement dated 29/04/2017 was a forgery therefore the Plaintiff did not prove



his case against the defence on a balance of convenience. The said agreement showed that the Plaintiff was paid his money in full hence he had no claim against the Defendant whatsoever. The Plaintiff's case was consequently dismissed with costs to the Defendant.

Appeal

23. Being aggrieved by the Judgment of the Trial Court the Appellant filed his Record of Appeal appealing against the whole judgment based on the following grounds;
- a. That the learned Trial Magistrate erred in law and in fact in holding and finding that the Appellant did not prove his case against the defendant on a balance of probability.
 - b. That the learned Trial Magistrate erred in law and in fact in finding that the signature on the agreement dated 29/04/2017 was not a forgery and that the agreement showed that the Appellant was paid in full which was in contrary.
 - c. That the learned Trial Magistrate erred in law and in fact in finding that the Appellant was paid his money in full and that the Appellant had no claim against the Respondent.
 - d. That the learned Trial Magistrate erred in law and in fact by ignoring the appellant's case against the respondent.
 - e. That the learned Trial Magistrate erred in law and in fact by ignoring the Appellant's submissions in her judgment without proper reasons to do so.
 - f. That the learned Trial Magistrate erred in law and in fact in coming to the conclusion that she did contrary to the evidence on record.
 - g. That the learned Trial Magistrate erred in law and in fact by arriving at the conclusion she did while relying on extraneous material and/or facts which did not form part of the proceedings.
 - h. That the learned Trial Magistrate erred in law and in fact in coming to the conclusion that she without any or any reason or sufficient cause.
24. The Appellant prayed for orders that;
1. The appeal be allowed.
 2. The judgment of the Trial Court be set aside and judgment be entered for the Appellant against the Respondent as pleaded in the plaint.
 3. Costs of the Appeal.
25. On 8/02/2023 this Court directed the parties to file their written submissions. Both parties complied.

Written Submissions

Appellant Submissions dated 14th March, 2023

26. The Appellant raised two issues for determination:-
- a. Whether the Trial Magistrate erred in finding that the respondent paid the Appellant his money in full.
 - b. Whether the Trial Magistrate erred in finding that the Appellant did not prove his case against the Respondent on a balance of convenience.



27. On whether the Trial Magistrate erred in finding that the respondent paid the Appellant his money in full it is submitted that the Agreement dated 29/04/2017 which was produced by the Respondent was written by the Respondent's wife – Virginia Nduku Mweu and who happened to be the Assistant Chief. The Appellant and Respondent purportedly signed the said agreement in her presence. There was no other independent witness.
28. Section 119 of the *Evidence Act* outlines that:
- “The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”
29. On Whether the Trial Magistrate erred in finding that the Appellant did not prove his case against the Respondent on a balance of convenience it is submitted that it is evidential burden of proof lies on the Respondent as he did not prove that he paid the money on a balance of probabilities. Section 109 And 112 of *Evidence Act* state as follows:
- Section 109
- ‘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.’
- Section 112
- ‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.’
30. Reliance is made in the following cases – in the case of Sambayon Ole Semaera –vs- Kalka Flowers limited & Anor [2021] eKLR and in the case of Raila Amolo Odinga & Anor v Independent Electoral & Boundaries Commission and 2 Others and in the case of D.T. Dobie Company (K) limited –vs- Wanyonyi Wafula Chembukati [2014] eKLR.

Respondent's Submissions

31. On behalf of the Respondent it is submitted that the only issue for determination is whether the Respondent paid back the amount which he had borrowed from the Appellant. The Respondent produced proof of his defence vide an agreement dated 29th April, 2017 which showed that although he had borrowed the money subject matter herein, he fully paid back the same thus discharging his obligation towards the Appellant. The Trial Court was justified in dismissing the Appellant's claim in the lower Court.
32. Reliance is made in the case of Elizabeth Kamene Ndolo –v- George Matata Ndolo [1996] eKLR Court Appeal and also in the case of Re-Estate of Kimani Kahehu (deceased) 2018 eKLR.
33. It is finally submitted that the Appellants appeal lacks merit and the appeal should be dismissed.

Determination

34. The Court considered the Court proceedings judgment Ruling and written submissions by parties through Counsel and the issue for determination is whether the judgment of 9/11/2021 should be upheld that the Respondent refunded Ksh 164,000/- to Appellant or dismissed that the Respondent still owes Ksh 154, 000/- to be paid.



35. The *Evidence Act* defines evidence as:
- ... “evidence” denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity;
- “fact” includes—
- (a) anything, state of things, or relation of things, capable of being perceived by the senses; and
 - (b) any mental condition of which any person is conscious
36. Where the facts in question are not admitted, judicially noticed or presumed in favour of the party who would otherwise have to prove them, the ways/means of proof include:
- a. by the testimony of a witnesses, and
 - b. by exhibiting the material evidence, documentary or otherwise,
 - c. By affidavit, if the manner of proceedings allow proof by this means.
37. Section 107-112 *Evidence Act* provide for burden and standard of proof in both criminal and civil cases. Section 112 of *Evidence Act* provides for proof of special knowledge in civil proceedings as follows;
- In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
38. In *Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:
- “As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue
- There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
39. In *The Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:
- “The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”
- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the



course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

40. The *Evidence Act* provides in a nutshell that ‘He who alleges must/shall prove’
41. This being a first appellate court, as was held in *Selle vs. Associated Motor Boat Co.* [1968] EA 123 the Court should comply with the following that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
42. The Plaintiff/Appellant proved by oral evidence and documentary evidence that on 17th December, 2011 he advanced to the Defendant a friendly loan of Kshs.154,000/- repayable in two equal instalments of Kshs. 77,000/- on March and April, 2012 respectively. The Appellant proved that the Defendant failed to pay as per the 1st agreement of 17/12/2011 copy attached /annexed, the said Agreement was duly signed dated and witnessed.
43. The Appellant/Plaintiff proved by oral evidence and documentary evidence that the loaned amount of Ksh 154,000/- was not paid as agreed and they entered into another agreement in which the Defendant was to pay the initial 154,000/- plus another Kshs.10,000/- being disbursements incurred all totalling to Kshs.164,000/- repayable by instalments of Kshs.100,000/- and Kshs.64,000/- on January and February, 2014 respectively. The 2nd Agreement of 17/12/2013 was/is annexed/attached to pleadings and was duly signed dated and witnessed.
44. The Defendant’s wife (who was the assistant chief) wrote the first agreement. Both the Plaintiff and Defendant signed the agreement. The 2nd agreement was written by the Plaintiff in the presence of the Defendant’s In-charge one Sgt. Wambua. Both the Plaintiff and Defendant signed.
45. The Defendant/Respondent denied all the allegations as stated by the Plaintiff but admitted that he borrowed money from the Plaintiff and which he was to pay in instalments. He defaulted and later signed another Agreement in 2013.
46. The Defendant stated that he paid the entire amount of Kshs.164,000/- on 29/04/2017 in full and the Plaintiff had no claim thereof. The Respondent relied on copy of Agreement of 29/4/2017 dated signed but not witnessed. The Appellant denied that the debt was settled/paid as written in the Agreement. The amount claimed by the Plaintiff herein has since then been repaid in full and the Defendant was discharged of his obligation under the agreement which the Defendant shall provide herein.
47. This court finds that cumulatively the evidence on record before the Trial Court adduced by the Appellant lent and the Respondent received a loan of Ksh 154,000/-which was reduced in writing by an Agreement entered into by Onesmus Mweu Mutisya ID xxxx and Michael Ndambuki Nzoka ID xxxx that was witnessed by Raphael Musyoki Nzoka ID xxxx & Jacinta Nthenya Ndambuki ID No xxxx.The Agreement made and signed in the presence of Virginia Kivati Nguluni Sub Location.



48. On 16/12/2013, a Further Agreement between Onesmus Mweu Mutisya ID xxxx Service Number 67335 swear to pay Michael Ndambuki Nzoka IDID xxxx Ksh 154,000/- and Ksh 10,000/- in 2 instalments; Ksh 100,000/- 31/1/2014 & Ksh 64,000/- by 28/2/2014.
49. The 2nd Agreement was signed and dated by Appellant/Creditor, Debtor/Respondent & witnessed by Sgt Wambua ID No xxxx & Simon Wambua Mutisya ID xxxx.
50. The 3rd Agreement signifying repayment as alleged by the Respondent, that the Appellant visited his home on 29/4/2017 and the Respondent paid the Appellant his money in full in the presence of his wife. The Plaintiff/Appellant came alone upon payment his wife wrote the acknowledgement of payment. The Plaintiff counted the money they shook hands and he left.
51. The Appellant contested the 3rd Agreement and stated he did not sign the Agreement and he was not paid his money back to date. The Appellant contested the signature that it is not his signature.
52. This Court finds the Trial Court record confirms the following;
 - a. The Appellant loaned the Respondent Ksh 154,000/- in 2011
 - b. The Respondent failed to pay and they agreed on payment in 2014.
 - c. The Appellant through his advocate sent demand letter 3rd May 2012 (Copy in the file)
 - d. The Appellant filed suit in July, 2017 as per Complaint attached
 - e. The Respondent was served as per the Affidavit of service filed on 2/10/2017.
 - f. Request for default judgment was sought and granted on 2/10/2017 and decree on 24/11/2017
 - g. The application to set aside default judgment was filed heard and determined by Ruling of 17/7/2018.
 - h. The matter was heard inter partes and judgment was delivered on 9/11/2021.
53. On the evidence on record this Court finds the following;
 - a. Both Agreements of 17/12/2011 & 17/12/2013 are signed dated and witnessed and original Agreements produced in the Trial Court. These Agreements are not contested by parties that a debt of Ksh 154,000/- is owed and due for payment.
 - b. The 3rd Agreement confirming and discharging debt due to alleged payment is signed and dated but not witnessed it is by the Appellant, the Respondent and his wife. The Respondent stated the Appellant came to his house and by sheer coincidence he had cash in the house of the loaned debt and there and then paid the Appellant. He had the money as he had come back from Somalia.
 - c. This Court finds that on a balance of probability these facts are not proved, where was the source of the cash no records were provided bank slips etc that he had such funds in the 1st place and secondly, that payment was made it is one word against the other, the Respondent and his wife allege they paid and Appellant and his witness that there is a debt due and owing.
 - d. It is strange/disturbing that after payment the Appellant filed suit a month later in July 2017 after allegedly being paid in April 2017, the loaned amount in full, yet he waited patiently for payment of the loan since 2011 upto 2017 and upon payment filed suit.



- e. The Agreement discharging the debt unlike other 2 Agreements is not witnessed and the signature is contested.
- f. The Trial Court took the view that since the Appellant failed to prove forgery then he did not discharge the burden of proof and hence his claim was not justified or proved.
- g. The contested signature allegedly made by the Appellant ought to be subjected to Handwriting Expert and confirmed if signed by the Appellant or not, but on a balance of probability in the absence of evidence of the Respondent having been in Somalia and thus was paid allowances that amounted to the exact amount the Appellant claimed and he was paid in cash when he allegedly suddenly came to their house in full at once is farfetched and circumstances are too good to be true.
- h. In the circumstances, the Respondent has not discharged the burden of proof on a balance of probability that the loaned amount was paid in full. The burden of validity of the Agreement cannot legally be on the Appellant, he is not the author. The 3rd Agreement is contested and shall be subjected to Document Examiners Expertise on handwriting and signatures on the Agreement at both parties expense before the matter is fully determined.

Disposition

1. The Appeal is upheld, the judgment delivered on 9/11/2021 is set aside.
2. Rehearing of the matter shall be in any other Court.
3. The 3rd Agreement in original form to be subjected to Document Examiner's expertise on the signatures and handwriting and expenses met by both parties.

JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 26TH SEPTEMBER, 2023 (PHYSICAL/VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE - FOR THE APPELLANT

NO APPEARANCE - FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT (S)

