



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CIVIL APPEAL NO. 20 OF 2020

LILIAN NJERI MUGUCHA.....APPELLANT

VERSUS

PETRONILA MUYATHI MWINZI.....RESPONDENT

(Being an appeal from the judgement of the Honorable Onkoba P.M vide Mwingi PM's Court Civil Suit No. 5 of 2017.

JUDGEMENT

1. This is an appeal that arose from the judgement delivered by *Hon. Onkoba Principal Magistrate's through Mwingi Principal Magistrate's Court Civil Suit No. 5 of 2017.*

In that case, the appellant had filed a claim against the respondent based on breach of contract where the appellant she claimed that the respondent had failed to repay her Kshs. 317,200 an amount she had lent the respondent as friendly loan.

2. In her defence, the respondent denied the appellant's claim stating that she was a business partner and that the amounts claimed was incorrect because the amount contributed was for joint business it was Kshs. 300,000. According to her the amount she contributed was Kshs. 399,268 and that they were to share profit or losses together. She held her position that by the time the partnership collapsed, the appellant had been paid back but kept demanding for interests.

3. The trial court evaluated the evidence tendered and found that the appellant had deviated from her pleadings when she testified and gave her evidence. The trial court noted that from her evidence, she contributed Kshs. 300,000 for joint business venture with the respondent which was different from a loan as pleaded. The court further noted that the appellant was demanding a refund of Kshs. 85,090 which was a deviation from the pleadings and found that she had failed to discharge her burden to prove her case to the required standard. That was the basis upon which the trial court dismissed her suit.

4. The appellant felt aggrieved and filed this appeal raising the following grounds namely;

i. That the learned trial magistrate erred in law and fact by failing to properly scrutinize and evaluate the pleadings and submissions tendered and thereby failing to arrive at a fair and reasonable decision.

ii. That the learned trial magistrate erred by finding that the appellant had deviated from the pleadings.

iii. That the learned trial magistrate erred by finding that the appellant had not proved her case.

iv. That the learned trial magistrate erred by failing to appreciate the documentary evidence tendered in court that proved that the respondent borrowed the money.

v. That the learned trial magistrate erred by failing to find that the respondents case had failed to challenge her case.

vi. That the trial magistrate considered extraneous matters.

vii. That the trial magistrate failed to consider that the respondent borrowed the money and acknowledged the fact.

viii. That the trial magistrate erred by not properly taking into account the evidence tendered in support of the appellant's claim.

ix. That the learned trial magistrate erred in his conclusion that the appellant had not proved her claim.

x. That the learned trial magistrate failed to take into account the appellant's submissions, arguments and evidence.

xi. That the trial magistrate erred by failing to give reasons for his judgement.

5. In her written submissions done through learned counsel *M/s Mulinga Mbaluka & Co. Advocates*, the appellant contends that the record of proceedings shows that she lent money to the respondent which she failed to repay. She asserts that her claim at the trial court was a liquidated demand of Kshs. 317,000.

6. The appellant contends that the respondent admitted receiving money and that she further admitted that she deposited some money in repayment to the appellant's account. She submits that the amount deposited was not the total amount loaned to the respondent. She contends that she produced bank statements during trial confirming that money was withdrawn from her account and deposited on the respondent's account.

7. She contends that her evidence tendered was strong and cogent and that it proved her claim against the respondent. She denied deviating from her claim.

8. She claims that the trial court did not scrutinize the agreement for lending which she claims was not challenged. She terms the evidence by the respondent as flimsy and she faults the trial court for giving more weight to her evidence under cross-examination.

9. She insists that her claim was proved to the required standard and that the trial court did not give reasons for its judgement. She has cited the following authorities which she contends supports her position.

i. FKT versus GI [2020] eKLR

ii. Solomon Muringa Kitheka versus Benard Oyugi [2015] eKLR.

iii. Sriram Bharatam & Anor versus Laura Akunga & Anor. [2019] eKLR.

10. The respondent on the other hand has opposed to this appeal vide written submissions vide learned counsel *M/s Kinyua Mwaniki & Wainaina Advocates*.

11. The respondent submits that the appellant during cross examination admitted that the amount in dispute was not a loan but a business venture which collapsed. She claims that the amounts claimed is what she withdrew from business and that she was demanding interests which she dares.

12. She submits that the amount pleaded in the plaint was Kshs. 317,200 but in her evidence in court she stated that she was asking for Kshs. 300,000. She submits that a party is bound by pleadings and cites the decision in ***Independent Electoral and Boundary Commission versus Stephen Mutinda Mule & 3 Others [2014] eKLR*** to buttress her position.

13. She further contends that the appellant is claiming interests on undisclosed amount yet the appellant in her view should know better arguing that an interest of 15% per month which translates to 180% per year is unreasonable and illegal. She cites ***Section 3(2) of Contract Act*** to support her contention.

14. This court has considered this appeal and the response made. The only issue arising from this appeal is whether the appellant's action or claim at the trial court was proved to the required standard in civil cases.

15. As I have observed above, the appellant's suit was based on breach of contract or agreement. The appellant filed her suit vide a plaint dated 16th January, 2017 where she pleaded that on diverse dates and months in the year 2013, the respondent approached her with request to be lent some money as friendly loan to be paid back at agreed interest of 15% per month.

16. The appellant in her paragraph 4 of the plaint in the lower court states as follows about her claims;

“The amount accrued interest amounting to Kshs. 317, 200 wherefore the defendant had agreed to borrow and the plaintiff had agreed to lend.”

Let me pause there for the time being. The appellant claim was founded on that paragraph and it is true that under the provisions of ***Order 2 Rule 6 (i)*** a party is bound by his or her pleadings.

17. It is also trite that this being a first appellate court, the duty of the court is to re-evaluate or re-assess the evidence tendered and make own conclusions in determining whether the plaintiff's suit was proved to the required standard.

18. Looking at paragraph 3,4 and 5 of the plaint, on their own it is different to tell if the amount of Kshs. 317,200 is the principal amount plus interest or it is just accrued interest as described under paragraph 4 thereof. It is also difficult to know from the plaint how much the principal amount was and when it was advanced.

19. Now let me turn to the evidence tendered by the appellant.

The appellant filed her suit together with her plaint documents which she indicated were to be relied upon by her in her case. The same were a demand letter and an agreement dated 9/1/2015. The agreement states that the principal amount loaned was Kshs. 422,000 and the interests were 15% which translated to Kshs. 63,300 totaling up to Kshs. 485,300.

20. In her evidence in chief going by the record of proceedings the appellant testified that she gave the respondent, she described her as her business partner.

According to her it was agreed that the respondent was the one running the business and that at one time (she did not say when) the respondent deposited in her account Kshs. 167,800. She further testified that the respondent had agreed to pay her Kshs. 485,300. If you subtract the amount she claims that she was paid that is Kshs. 167,800 from the amount of Kshs. 485,300, you will get Kshs. 317,500 which shows a minor discrepancy with the amount claimed in the plaint which is Kshs. 317,300.

21. However, what the appellant stated in cross examination in my view brought about confusion and ambiguity about her claim. She stated that they agreed with the respondent on a joint business where she was to have 55% profit ratio while the respondent was to remain with 45% ratio. This is what she stated during cross-examination and when you consider that in the context of her pleadings then you get the basis upon which the trial court found that there was some deviation. She claimed under cross-examination that she contributed Kshs. 399,268 to the business and that the respondent contributed Kshs. 167,800. So if the amount she claims was paid into her account was Kshs. 167,800 why would the amount be deposited in her account yet she had stated in Chief that she contributed Kshs. 300,000? Again if her contribution was Kshs. 399,268 as she claimed, why would the agreement reflect Kshs. 422,000 and agreed interests of Kshs. 63,300? The figures or amounts stated in her evidence simply did not add up.

22. Those not the only inconsistencies in the appellant claim because she also stated under cross-examination that the respondent paid Kshs. 600,000 on account of some construction projects and that the balance upon factoring that was Kshs. 85,090. The appellant states that the trial court put weight on what she stated under cross-examination but that was her evidence. I also find it a bit ironical for the appellant to state that her claim was not challenged and at the same time say that the trial court put more weight to what she said under cross-examination. The trial court was required to evaluate the evidence tendered as a whole in order to determine if the appellant's claim had been proved because she carried the burden of proof as correctly stated by the trial court in its judgement.

23. The respondent in her testimony stated that she was a business partner with the appellant and that theirs was a joint venture where each contributed Kshs. 211,000. According to her the capital investment in aggregate was Kshs. 422,000 and that the business was for buying and selling cereals with her doing the actual business because the appellant was a banker and could not be able to run up and down doing the business. She denied the amount of Kshs. 317,000 saying that the same were interest which she claimed were not payable.

24. I have re-evaluated the evidence tendered viza viz the pleadings and it is quite evident that the pleadings (plaint filed was not supported by the evidence tendered. That is the first discrepancy. The amount reflected in the agreement is Kshs. 485,300. The plaint reflects that the amount claimed is Kshs. 317,200 and there are no explanations offered either in the pleadings or in the evidence tendered in court to explain the discrepancies and put the claim in clear perspective.

25. Secondly, the plaint does not state the actual or principal amount and when it was advanced to the respondent. If the amount of Kshs. 317,200 is accrued interests, the appellant did not show how the figure was arrived at and yet she had a burden of proof. It is also true that if the interests charged was 15% per month as indicated in the plaint, this court would have found the rate of interest charged to be both unconscionable and illegal. It is however not clear from the pleadings if the amount of Kshs. 317,200 was principal amount plus interests or only interests. When one looks at the agreement dated 9.01.2013 where the amount shown is Kshs. 422,000 and interests of Kshs. 63,300, the claim becomes even more ambiguous.

As I have observed above the appellant did not connect the dots or shade light on how the amount of Kshs. 317,200 pleaded was arrived at. The trial court was correct to find that there were some deviations from what was pleaded with the evidence tendered. I find that the glaring inconsistencies on the figures claimed on the plaint and the evidence tendered really failed to establish the appellant's claim.

26. The appellant could only depart from her pleadings with leave of the trial court through an application to amend but no such amendments were carried out. In the end, the appellant failed to prove her case on her balance of probabilities and considering the glaring discrepancies, I have pointed out above that the trial court cannot be faulted for finding that the appellant had failed to prove her case.

27. In the end this court finds no merit in this appeal. The same is **dismissed** with costs to the defendant.

DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF FEBRUARY, 2022.

HON. JUSTICE R. LIMO

JUDGE