



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 67 OF 2018

PURITY NJERI GITONGA MWANIKI.....APPELLANT

VERSUS

LUCY MUKWANYAGA MBAABU.....RESPONDENT

JUDGMENT

1. This is an appeal arising from the judgment of Hon.M.N.Gicheru (CM) delivered on 19/11/2018 in Embu CMCC No.234 of 2017.
2. The cause of action arose out of a suit filed by the respondent against the appellant for a liquidated sum arising from a soft loan advanced to the appellant towards a joint venture; the respondent sought the following reliefs;
 - (i) Principal sum of Kshs.490,000/-
 - (ii) Interest on (i) above at commercial rates
 - (iii) Costs and interest of the suit
 - (iv) Any other relief.
3. Judgment was entered in favour of the respondent on the 19/11/2018 in the sum of Kshs.390,000/- together with costs and interest at court rates from the 19/02/2017 till payment in full;
4. The appellant being aggrieved by the decision instituted this Appeal and listed six (6) grounds of appeal which are summarized hereunder;
 - (i) The trial court erred in finding that the appellant received Kshs.450,000/- from the respondent which finding was not backed by any evidence; and in finding that the note produced by the respondent constituted a binding agreement; the respondent failed to prove she had granted any loan to the appellant;
 - (ii) The trial court erred in ordering the appellant to pay Kshs.390,000/- with costs and interest from 19/02/2017 yet the respondent did not disclose to the trial court the nature and physical location of the joint business venture;that the respondent failed to prove her case on a balance of probabilities;
 - (iii) The trial court disregarded the appellants defence and submissions and erred in entering judgment in the respondents favour.
5. The parties were directed to dispose of the appeal by filing and exchanging written submissions; a summary of the parties respective submissions is as follows;

APPELLANTs SUBMISSIONS

6. The appellant's contention was that the note produced by the respondent was not a binding contractual agreement nor was it clear as to who drafted the agreement as it had two different hand writings; the signature appended on the agreement was not hers; it was upon the respondent to prove that it was indeed a binding agreement between the two parties;
7. The appellant denied ever doing business with the respondent or receiving any loan from her; the respondent did not prove the existence of any contract nor was any letter produced as evidence to prove that the respondent terminated the contract;
8. The respondent failed to prove she gave out the loan and that in actual fact it was the respondent who owed the appellant money;failed to

also prove what business the loan was for, the business to be done together, the nature of the business and the physical location of the joint venture; in conclusion the respondent had failed to prove her case on a balance of probabilities;

9. The appellant submitted the appeal was merited and prayed that it be allowed and the judgment of the lower court be set aside; and the costs of the lower court and the appeal be awarded to the appellant.

RESPONDENT'S SUBMISSIONS

10. In response the respondent submitted that the court be obliged to abide by the provisions of Section 78 of the Civil Procedure Act and to evaluate and examine the evidence in the lower court record and arrive at its own conclusion; case law referred to **Selle vs Associated Motor Boat Co. Ltd (1968) EA 123**.

11. The respondent submitted that the parties entered into a friendly agreement and the agreement was produced in court as an exhibit; whereas the appellant adduced no evidence in rebuttal; nor did the appellant dispute the amount owed; nor deny executing the said agreement nor did she call a document examiner to testify on the disputed signature appearing on the agreement.

12. The claim that the respondent owed the appellant the sum of Kshs.60,000/- was not supported by any evidence nor did the appellant raise a counter-claim against the respondent;

13. On the 27th August, 2018 counsel for the appellant made an admission that the appellant acknowledged that she owed the respondent the sum of Kshs.190,000/- and prayed that judgment be entered on the admitted sum;

14. The respondent submitted that she had proved her case on a balance of probabilities that the appellant received a sum of Kshs.490,000/- and failed to honour the agreement; that the appeal was not merited and prayed for its dismissal with costs; and the judgment of the lower court be upheld.

ISSUES FOR DETERMINATION

15. After reading the respective written submissions this court has framed the following issues for determination;

(i) Whether there was a contractual agreement between the appellant and the respondent; whether the respondent proved her case to the desired threshold.

(ii) Whether the respondent is entitled to interest from the commencement date.

ANALYSIS

16. In considering the appeal, this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**; where it was held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, the Court will normally as an appellate court, not interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law.

17. The Court of Appeal also held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).

Whether there was a contractual agreement between the appellant and the respondent;

18. The live issue is whether the parties had an agreement between them; the burden of proof of this particular fact then lay with the respondent who in this instance adduced evidence and provided the trial court with a document dated 19/02/2017 in support of her claim; upon perusal of the document this court notes that it indicates that the appellant received the sum of Kshs.250,000/- and had agreed to repay the amount by monthly sum of Kshs.20,000/-; the document further indicates that the appellant obtained Kshs.200,000/- towards a joint venture which sum was also repayable at Kshs.20,000/- per month;

19. This document bears the names and National Identification Numbers of both the parties and also bears their signatures; despite this the appellant's contention is that the note did not amount to a contract as the details of the joint venture were not clearly specified therein; this court makes reference to the case of **Mamta Peesh Mahanjan** wherein Onguto J observed that;

“What is essential is the legal minimum to create a contract. These are the intention to create legal obligations and consideration. Other terms are secondary as far as formation of a contract is concerned. The reason is that the law does not require commercially sound terms or sensible terms. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain.”

20. The evidence presented by the respondent supports the fact that there was an offer made by her to loan the money which offer was followed by the acceptance by the appellant in execution of the note dated 19/02/2017; as for the issue of there being valid consideration this was spelt out in the note that it was towards a joint venture;

21. The exhibit produced satisfies this court of the existence of the essential basic legal minimums of intention to create legal relations between the parties and that there was also valid consideration that passed from one party to the other for the joint venture;

22. Even though the details of the joint venture were not clearly set down in the note, this court is guided by the application of the objective test; this test is well defined in the case of **RTS Flexible Systems Ltd vs Molkerei Alois Muller GMBH & Co KG (UK Production) [2010] UKSC14 [45]** where the **Supreme Court** stated that;

‘The general principles are not in doubt. Whether there was a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.’

23. Another guide that demonstrates, verifies and strengthens the fact that the parties had entered into a legal relationship is the admission by the appellant in court on 27/08/2018 that she owed the respondent the sum of Kshs.190,000/-; and the respondent also acknowledged that the appellant had paid to her a sum of Kshs.60,000/- in repayment of a portion of the loan;

24. It is trite law that he who alleges a fact must prove it; and this applicable law is found at Section 107 of the Evidence Act; bearing this in mind this court is satisfied that the respondent by producing into court the duly signed document dated 19/02/2017 as an exhibit proved her case on a balance of probabilities; whereas the appellant merely denied the claim and failed to counterclaim or avail expert witnesses to support her allegations;

25. This court finds no reason to interfere with the trial courts finding that the respondent proved her case to the desired threshold; and is satisfied that the computation in the trial courts judgment of the amounts outstanding as being Kshs.390,000/- is found to be the correct amount due and payable by the appellant;

26. This ground of appeal is found lacking in merit and is disallowed.

Whether the respondent is entitled to interest from 19/02/2017

27. Upon perusal of thePlaint filed by the respondent this court notes that one of her prayers in the pleading reads as follows;

‘(b). interest on (a) above at commercial rates prevailing from time to time from the respective due dates until payment in full.’

28. The document dated 19/02/2017 which forms the basis of the respondents claim, makes no provision for interest whether at commercial bank rates or otherwise; in the case of National Bank of Kenya Ltd vs Pipeplastic Samokolit (K) Ltd Civil Appeal No.95 of 1999 the Court of Appeal held that;

29. In its judgment the trial court granted the respondent ***‘interest at court rates from the 19/02/2017 until payment in full’***; this court reiterates the position adopted in cited authority of **National Bank (supra) ‘that a court of law cannot re-write a contract for the parties with regard to interest and the parties are bound by the terms of their contract’**; the correct position would have been to award interest at court rates from the date of filing suit as opposed to the date of the agreement as it was never included as a term therein.

30. For those reasons the only portion of the judgment of the trial court that this court will interfere with relates to the interest which ought to have run from the date of filing suit and not from the 19/02/2017;

31. Otherwise this court is satisfied that there was a valid contract between the parties and that the respondent proved her case to the desired threshold;

FINDINGS & DETERMINATION

32. From the foregoing reasons this court makes the following findings and determinations;

(i) The respondent is found to have proved her case to the desired threshold;

(ii) The appeal is found lacking in merit and it is hereby dismissed; the judgment in favour of the respondent in the sum of Kshs.390,000/- is hereby affirmed with costs and interest;

(iii) The date 19/02/2017 from when interest starts to run is hereby set aside and substituted with interest at court rates applicable thereon from the date of filing of the suit.

(iv) The appellant shall bear the costs of the appeal.

Orders Accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 25th day of February, 2021.

HON.A.MSHILA

JUDGE