



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga)

CIVIL APPEAL NO. 86 OF 2019

ESTHER KIOKO.....APPELLANT

-VERSUS-

MRS. ELIZABETH KITUKU.....RESPONDENT

[An Appeal against the Judgment and Decree of the Senior Principal Magistrate's Court at KANGUNDO (Hon. Eddah Agade, Ms. SRM) dated 30th May, 2019]

BETWEEN

ESTHER KIOKO.....PLAINTIFF

VERSUS

MRS. ELIZABETH KITUKU.....DEFENDANT

JUDGEMENT

1. The Appellant herein by a plaint dated 16th August, 2018 filed a suit against the Respondent in which she claimed Kshs 120,000/-, interest at the rate of 20% per month with effect from 1st December, 2017, costs and interests at court rates from the same date.
2. According to the Appellant, on 5th February, 2016, the Respondent, a family friend approached the Appellant and requested the Appellant for a friendly financial loan of Kshs 120,000/- to enable the Respondent meet certain school fees requirements, a request which the Appellant acceded to and advanced the said amount in cash. It was pleaded that the parties agreed on a flexible long-term repayment period of between September to November, 2017 with default interest at the rate of 20% per month on reducing balance. As a result, a home-made agreement was signed by the two parties in the presence of the Respondent's husband, **Mr Maurice Kituku**, who agreed and was generally understood to be the guarantor to the loan.
3. It was pleaded that the said agreement was entered into in good faith and that there was no demand or requirement for security for the same, the Respondent being a fellow teacher and having been a religious mentor and provider of spiritual nourishment to the Appellant.
4. It was averred that despite demand made and notices to sue given the Respondent failed to repay the same amount which according to the Appellant, she would have put to beneficial/productive use in September, 2017.
5. There are two statements of defence on record. The first one was filed on 3rd October, 2018 and in it, the Respondent made general denial of the facts pleaded in the plaint save for the descriptive parts thereof and the fact of the demand having been made and the non-existence of similar proceedings.
6. Another statement of defence was however, filed on 9th October, 2018 in which the Respondent admitted that on 5th February, 2016, she borrowed from the Appellant Kshs 20,000/- on agreed terms. However, due to pressure she had of paying school fees for her children, she delayed in repaying the same. She however pleaded that she signed the said agreement under pressure when the Appellant visited her with

her husband at the Respondent's place of work on a later date and in the absence of the Respondent's husband.

7. The Respondent pleaded that the Appellant had escalated the amount from Kshs 20,000/- to Kshs 120,000/- at an alarming rate of interest despite the fact that she was willing to repay the amount advanced.

8. In her witness statement, the Appellant reiterated the contents of the plaint and added that the Respondent, on the date when she visited the Appellant on 5th December, 2016, was accompanied by her said husband and that an agreement was signed in the presence of the Respondent's said husband.

9. In her evidence, the Appellant relied on the said statement and added that the Respondent needed the said money so that she could pay for her daughter's parallel degree fees. She therefore sought for the said sum of Kshs 120,000.00 plus interest since the same remained unpaid for three years plus the costs of the suit. According to her, though she was not a shylock, the Respondent knew that she had the money which she had borrowed. The Appellant denied that she sent Mr Malemba who was the Appellant's head teacher to send the money to the Respondent. It was her evidence that she gave the Respondent a whole year from November, 2016 to November, 2017 to repay the said amount but the Respondent failed to repay the same. It was her testimony that she had taken the loan from Kwetu Sacco where she was a member and that she intended to buy land which had already been sold hence the money was available when her friend requested to borrow the same.

10. On her part, the Respondent testified that the Appellant gave her only Kshs 20,000/- which she was ready to repay having taken a loan which was due for February. It was her evidence that she had informed the Appellant as much. She therefore requested the court to reduce the interest. It was her testimony that the Appellant sent Mr Malemba to take to her the said sum of Kshs 20,000/-. According to her the transaction was done on phone.

11. In support of her case, the Respondent called, as DW2, **Malemba Albanus**, a teacher at Kawauni Primary School. According to him the Appellant and the Respondent were his fellow teachers and friends as well. He however denied that the Appellant gave him money to take to the Respondent. He denied any knowledge of the said transaction.

12. In her judgement, the learned trial magistrate found that there was no dispute that the Respondent was given money by the Appellant which the Respondent was yet to pay back and that what was disputed was the amount that was borrowed. According to the Court the agreement sought to be relied on was titled "Money Transaction" dated 5th February, 2016 and the parties were mentioned as well as the amount of Kshs 120,000/-. The same was executed by the Respondent and the guarantor was mentioned as the Respondent's husband but he had not signed the same. It was noted that the Appellant seemed to have signed but the name lender was written in hand as opposed to the other designations which were in print and the pen used by the lender was different.

13. The Court tissue with the fact that the agreement was not witnessed and that the guarantor did not sign the same. She found that the fact that the name of the lender was added in hand and in different ink meant that it was actually added at a later date and that the Respondent was never given a copy of the same. It was further noted that the repayment date in the agreement was said to be September 2017 where 2017 was added at the top after the initial entry was crossed over.

14. It was the Court's finding the relying on such an agreement to prove the debt would be unwise given the weaknesses pointed out and in the absence of any corroborative evidence, the Court awarded only the undisputed sum of Kshs 20,000.00 with interest at court rate and costs of the suit.

15. In this appeal, the only party that filed submissions as directed was the Appellant. In her submissions, she stated that the Appeal was against only that part of the Judgment that disallowed her claim for any principal amount which was above the Kshs. 20,000/= that was awarded and acknowledged that the Respondent had since paid the amounts stated in the Decree. It was submitted that the Respondent in her statement admitted having signed the agreement and in fact in her evidence did not deny that the Money Transaction contract produced and relied on in evidence was the only one that she signed and in fact requested the Court to have it produced in evidence. It was further noted that the Respondent did not claim/allege (and it was not her case) that the amounts that she signed for or the ones shown in the Agreement had been amended or that she signed a blank agreement. According to the Appellant, the Respondent did not say that she signed my part "later" as found by the trial Court and did not allege that she did not have, nor was not given, a copy of the Contract for Kshs. 120,000/=, contrary to what the trial Magistrate insinuated and found. It was further submitted that the Respondent had no issue with the lack of formal 'witnessing' of the Agreement but only maintained that her husband was *not present* at the time of signing and that this explained the lack of his signature on the document.

16. It was contended that the learned trial magistrate irregularly introduced for the first time in the entire case and at the stage of final Judgment matters of fact that were never canvassed by or put to the parties before her. The learned trial magistrate was accused of having descended into the arena of the conflict and took sides, ultimately employing a wrong standard of proof i.e. "*beyond reasonable doubt*" in arriving at a patently wrong decision that was against the weight of mutual evidence such as the signed loan Contract and the amount of Kshs. 120,000/= stated therein. It was submitted that whereas the parole evidence rule estopped the Respondent and the Court from circumventing the Money Transaction Agreement dated 05/02/2016, and despite having found as a fact that the Agreement was signed by both parties, the trial Court proceeded on a contradictory tangent by demonizing a document that is self-explanatory in all relevant aspects. To the Appellant, there was no factual or legal basis for the Court to demand further "corroboration" of a complete and perfect contract; to conclude without evidence that the Appellant did not sign the contract on the stated date (and without giving the alternative date); to import extraneous matters into the document and to employ these to literally dismiss and illegally re-write the Contract in favour of the Respondent and thereby stamp its bias against the Appellant.

17. It was further submitted that the Respondent had a duty to prove the allegations that were peculiarly within her knowledge and which were in her powers to, once the burden had shifted to her, as it had done, viz; -

(i) Proof that she signed the suit Agreement under some alleged 'pressure'.

(ii) Call her husband (a material witness) to 'corroborate' her denial that he witnessed the signing of the suit transaction at the Appellant's home.

(iii) Prove her allegation that the suit claim was laden with excessive interest, whose rate(s) and duration she failed to prove.

(iv) That she signed the Agreement on an unspecified date that was 'later' than the documented 05/02/2016.

18. It was noted that the Respondent having called a witness "DW-2" to support her case but who ended up disowning the case, the trial Court failed to assign due import and weight to this witness's evidence and the lack of "corroboration" of the Defence case. The Respondent's evidence and denials ought, therefore, to have been treated with a pinch of salt in the totality of the circumstances wherein she confirms having signed an Agreement but whose contents she later turns around and purports to disown.

19. According to the Appellant, under 26(1) of the **Civil Procedure Act** Cap 21 Laws of Kenya, the principle behind the award of interest for any period prior to the filing of suit is to compensate the aggrieved party for the deprivation of the productive use of his property/funds from the date of accrual of the wrong complained of. In this regard, the Appellant relied on **Magic Chemicals Inc. vs. Prapid Enterprises (E.A.) Ltd [2016] eKLR**.

20. It was submitted that the Respondent admitted the date of debt as 05/02/2016. Apart from alleging a cancellation of "duration" of repayment, she did not dispute the due date of expected repayment as September 2017. She failed to avail her copy of the Agreement or to give an "alternative" date of repayment. No justification was given by the Respondent for the delay in repayment despite receipt of Demand Letters. The parties are admittedly friends and this suit was filed as a last resort. The Plaintiff properly sought interest from 01/12/2017. Parties had agreed that default interest will accrue monthly at 20%, and the Respondent's only plea was that the contract be literally re-written to reduce the interest.

21. It was submitted that the Lower Court erred in failing to guide/allow the Appellant to present final Written Submissions on the issue and generally, and in refusing to award interest @ 20% p/m from 01/12/2017 without assigning any reasons [see Prayer No. ii of the Plaintiff]. It only awarded interest at Court rates (prayer iv), and even so, from the date of Judgment 30/05/2019 as opposed to date of filing suit. It was submitted that the Court failed to consider a critical matter that it ought to have pronounced itself on, and this was a wrongful exercise of discretion that ought to be disturbed in this Appeal.

22. In conclusion, it was submitted that this Appeal has merit in fact and in law and the Court was urged to allow it in terms as prayed in the Memorandum of Appeal dated 25/06/2019, and Judgment be entered as sought in the Plaintiff dated 16/08/2018.

Determination

23. I have considered the submissions of the parties in this appeal.

24. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** 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 demeanour of a witness is inconsistent with the evidence in the case generally."

25. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

26. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not

taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

27. However, in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 the Court of Appeal held that:

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

28. Before dealing with the merits of the appeal, as noted at the beginning of this judgement, the Respondent filed two statements of defence. While the first one was general denial, the second one admitted certain allegations in the plaint. What then is the legal consequence of the said pleadings? Order 13 Rule 1 of the *Civil Procedure Rules* provide that:

Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.

29. The effect of that rule is that the Respondent admitted part of the Appellant’s claim vide her subsequent statement of defence. In that pleading she admitted that on 5th February, 2016, she borrowed from the Appellant Kshs 20,000/- on agreed terms and that due to pressure she had of paying school fees for her children, she delayed in repaying the same. She also admitted that she signed the said agreement but alleged that it was under pressure when the Appellant visited her with her husband at the Respondent’s place of work on a later date and in the absence of the Respondent’s husband.

30. The law relating to pleadings is that a party is bound by his pleading despite evidence. The Court of Appeal decision in Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR quoted with approval an excerpt from an article by Sir Jack Jacob entitled “*The Present Importance of Pleadings*” where it was stated:-

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

31. In M N M v D N M K & 13 Others [2017] eKLR it was held that:

“Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182, the Court held that:

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”

Later in Kenya Commercial Bank Ltd v. Sheikh Osman Mohammed, CA No. 179 of 2010 the Court expressed itself thus:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See Odd Jobs v. Mubea [1970] EA 476). However that was clearly not the case in this appeal.”

32. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 Others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where **Adereji, JSC** expressed himself thus on the importance and place of pleadings: -

“....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

33. From the foregoing, the legal position before the learned trial magistrate was that the Appellant and the Respondent entered into an agreement in which the Appellant agreed to lend the Respondent some money on agreed terms. It was also not disputed that the parties signed an agreement though the Respondent contended that it was signed under duress. The law as regards parole evidence was succinctly stated in **Vallabhdas Pragji vs. Nasani Lubega [1964] EA 659** where it was held that:

“Proof of a larger consideration than the one stated in a written instrument is not a contradiction of the terms of that instrument. Rules of law may exclude parole evidence, where a written instrument stands in competition with it, but it has long been settled that it is not within any rule of this nature to adduce evidence of a consideration additional to what is stated in a written instrument. The rule is, that where there is one consideration stated in the deed, you may prove any other consideration which existed, not in contradiction to the instrument to prove a larger consideration than what is stated.”

34. What I understand by that decision is that whereas nothing barred the Appellant from adducing evidence that apart from the consideration mentioned in the agreement there was another consideration, the Respondent was barred from adducing evidence that the consideration was in fact lower than what was stated. It follows that the burden was upon the Respondent to prove that what was stated in the agreement which she admittedly signed was not the correct position. In attempting to prove this, the Respondent called DW2 who unfortunately disowned the Respondent and testified that he was unaware of the transaction. Whereas the Respondent could have called her husband to testify that he was not present at the time the agreement was being signed, the Respondent did not call him at all.

35. It is therefore my finding that the trial court’s findings were contrary to the pleadings in so far as those findings tended to cast doubts on the signing of the said agreement. I agree that the learned trial magistrate’s findings were based on the failure to adhere to the rules of pleadings and as a result, it arrived at an erroneous decision.

36. In the result, I allow the appeal, set aside the judgement in the court below and substitute therefor a judgement in the sum of Kshs 120,000.00 with interest at court rates from the date of filing of the suit till payment in full with the costs before the trial court. I however decline to award any rate of interest other than at Court rates since the Appellant admitted that she was not a shylock.

37. Of course in computing the amount due account must be taken of the amount already paid. Since this appeal was never opposed each party will bear own costs of this appeal but the Appellant will be entitled to the disbursement spent in this appeal.

38. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos 29th day of November, 2021

G V ODUNGA

JUDGE

Delivered the presence of:

Ms Esther Kioko, the Appellant in person

CA Susan