



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KITUI

#### CIVIL APPEAL NO. 51 OF 2016

**K N.....APPELLANT**

**VERSUS**

**J M T.....RESPONDENT**

#### J U D G M E N T

1. The Respondent, **J M T**, by way of Plaintiff claimed **Kshs. 260,000/=** from the Appellant, **K N**. It was pleaded that he advanced a friendly loan to the Appellant in the sum of **Kshs. 290,000/=** between **2010** and **2015**, money that used to be sent via M-pesa service. That the Appellant who was supposed to refund the money by **1<sup>st</sup> March, 2015** only paid **Kshs. 30,000/=** leaving an outstanding balance of **Kshs. 260,000/=**.
2. In defending the claim the Appellant denied the allegations set out, in particular having borrowed money from the Respondent. She averred that she had a love affair with the Appellant and anything he gave to her was in reciprocation of her love intensity. She prayed for the dismissal of the suit.
3. The learned trial Magistrate considered evidence adduced and reached a finding that indeed the sum of **Kshs. 260,000/=** was owing. He entered Judgment in favour of the Respondent in the sum of **Kshs. 260,000/=** with costs of the suit.
4. Aggrieved by the decision of the Lower Court the Appellant appealed on grounds that the decision of the Court was based on extraneous matters; Awarding the liquidated damages of **Kshs. 260,000/=** despite the fact that it was the Respondent who breached the agreement was erroneous and that the case was not proved on a balance of probabilities.
5. Rival submissions were filed by Counsels for both parties to dispose of the Appeal.
6. This being the first Appellate Court it is duty bound to re-evaluate the evidence, assess it and come to a own conclusion bearing in mind the fact that It did not have the opportunity of seeing or hearing witnesses who testified at trial (**See Selle vs. Associated Motor Boat Company Ltd (1968) EA 123** and **Williamson Diamonds Ltd vs. Brown (1970) EA 1**).
7. The learned trial Magistrate has been faulted for not conducting a pre-trial conference. After pleadings closed the Court set a date for the pre-trial conference. On the date for mention, the **29<sup>th</sup> October, 2015** both Counsels for the Appellant and Respondent were present. Counsel for the Respondent had complied with the requirements of **Order 3 Rule 2** and **Order 11 Rule 2** of the **Civil Procedure Rules**. It is Counsel for the Appellant who sought time to comply. He was granted time until **19<sup>th</sup> November, 2015** when he made no appearance in Court. When the matter came up on the **14<sup>th</sup> July, 2016** he indicated that he was ready to proceed therefore the matter proceeded. In the premises that ground of Appeal fails.
8. Issues for determination were filed by the Respondent but the learned Magistrate failed to comply with **Order 21 Rule 4** of the **Civil Procedure Rules** which requires a Judgment in suits that are defended to contain a statement of the case, points for determination and reasons for the decision. This however does not go to the substance of the matter therefore an Appeal would not be allowed on the stated ground *per se*.
9. The claim herein was a liquidated one. It is pleaded that the Appellant approached the Respondent to advance her a friendly loan of **Kshs. 290,000/=** on or about **2010, 2015** to be refunded on the **1<sup>st</sup> March, 2015**.
10. The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in **Section 107(1)(2)** of the **Evidence Act** that provides thus:

**“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he**

*asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”*

Section 112 of the Evidence Act provides thus:

***“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.”***

11. To discharge the burden of proving the fact that he gave the Appellant money the Respondent adduced in evidence his M-pesa statement. According to the statements money was sent by the Respondent to the Appellant thus, on:

*2014 – 10 – 16 – Kshs. 1027*

*2014 – 10 – 13 – Kshs. 227*

*2014 – 10 – 12 – Kshs. 227*

*2014 – 10 – 11 – Kshs. 227*

*2014 – 10 – 11 – Kshs. 2027*

*2014 – 10 – 10 – Kshs. 227*

*2014 – 10 – 09 – Kshs. 1027*

*2014 – 10 – 05 – Kshs. 527*

*2014 – 10 – 02 – Kshs. 627*

*2014 – 10 – 02 – Kshs. 1027*

*2014 – 09 – 28 – Kshs. 527*

*2014 – 09 – 25 – Kshs. 1627*

*2014 – 09 – 23 – Kshs. 1027*

*2014 – 09 – 22 – Kshs. 527*

*2014 – 09 – 19 – Kshs. 1627*

*2014 – 09 – 17 – Kshs. 3049*

*2014 – 09 – 11 – Kshs. 627*

*2014 – 09 – 07 – Kshs. 527*

*2014 – 08 – 21 – Kshs. 1027*

*2014 – 08 – 14 – Kshs. 1027*

*2014 – 08 – 07 – Kshs. 1027*

*2014 – 07 – 31 – Kshs. 3549*

*2014 – 07 – 29 – Kshs. 427*

*2014 – 07 – 27 – Kshs. 627*

*2014 – 07 – 24 – Kshs. 1027*

*2014 – 07 – 17 – Kshs. 1027*

2014 – 07 – 10 – Kshs. 1027

2014 – 07 – 04 – Kshs. 627

2014 – 07 – 03 – Kshs. 1027

2014 – 06 – 26 – Kshs. 1027

2014 – 06 – 23 – Kshs. 427

2014 – 06 – 22 – Kshs. 1027

2014 – 06 – 22 – Kshs. 1027

2014 – 06 – 20 – Kshs. 1027

2014 – 06 – 19 – Kshs. 3000

2014 – 06 – 16 – Kshs. 2027

2014 – 06 – 11 – Kshs. 427

2014 – 06 – 09 – Kshs. 400

2014 – 06 – 08 – Kshs. 400

2014 – 06 – 04 – Kshs. 227

2014 – 06 – 03 – Kshs. 227

2014 – 06 – 29 – Kshs. 7000

2014 – 05 – 12 – Kshs. 5066

2014 – 05 – 12 – Kshs. 5066

2014 – 04 – 28 – Kshs. 427

2014 – 04 – 24 – Kshs. 1027

2014 – 04 – 20 – Kshs. 527

2014 – 04 – 20 – Kshs. 427

2014 – 04 – 19 – Kshs. 227

2014 – 04 – 18 – Kshs. 5027

2014 – 04 – 17 – Kshs. 1027

2014 – 04 – 12 – Kshs. 447

2014 – 04 – 10 – Kshs. 1027

2014 – 04 – 08 – Kshs. 227

2014 – 04 – 07 – Kshs. 1027

2014 – 04 – 03 – Kshs. 1027

2014 – 04 – 02 – Kshs. 5066

2014 – 03 – 27 – Kshs. 200

*2014 – 03 – 27 – Kshs. 2700*

*2014 – 03 – 24 – Kshs. 427*

*2014 – 03 – 24 – Kshs. 500*

*2014 – 03 – 21 – Kshs. 1027*

*2014 – 03 – 13 – Kshs. 1027*

*2014 – 03 – 11 – Kshs. 427*

*2014 – 03 – 10 – Kshs. 427*

*2014 – 03 – 06 – Kshs. 2000*

*2014 – 03 – 05 – Kshs. 10000*

*2014 – 03 – 03 – Kshs. 10000*

*2014 – 03 – 01 – Kshs. 327*

*2014 – 03 – 01 – Kshs. 3000*

*2014 – 02 – 27 – Kshs. 1027*

*2014 – 02 – 20 – Kshs. 1027*

*2014 – 02 – 08 – Kshs. 10110*

*2014 – 01 – 28 – Kshs. 227*

*2014 – 01 – 23 – Kshs. 1027*

*2014 – 01 – 18 – Kshs. 327*

*2014 – 01 – 16 – Kshs. 327*

*2014 – 01 – 03 – Kshs. 327*

*2013 – 12 – 27 – Kshs. 500*

*2013 – 11 – 29 – Kshs. 1027*

*2013 – 11 – 22 – Kshs. 1027*

*2013 – 11 – 17 – Kshs. 527*

*2013 – 11 – 14 – Kshs. 1027*

*2013 – 11 – 13 – Kshs. 227*

*2013 – 11 – 09 – Kshs. 427*

*2013 – 11 – 09 – Kshs. 427*

*2013 – 11 – 07 – Kshs. 1027*

*2013 – 11 – 02 – Kshs. 327*

*2013 – 10 – 31 – Kshs. 1027*

*2013 – 10 – 29 – Kshs. 327*

2013 – 10 – 29 – Kshs. 527

2013 – 08 – 19 – Kshs. 1027

2013 – 08 – 15 – Kshs. 527

2013 – 08 – 08 – Kshs. 527

2013 – 08 – 01 – Kshs. 527

2013 – 08 – 01 – Kshs. 1027

2013 – 07 – 25 – Kshs. 527

2013 – 07 – 19 – Kshs. 227

2013 – 07 – 18 – Kshs. 527

2013 – 07 – 11 – Kshs. 1027

2013 – 07 – 04 – Kshs. 5582

2013 – 06 – 27 – Kshs. 527

2013 – 06 – 20 – Kshs. 527

2013 – 06 – 16 – Kshs. 527

2013 – 06 – 13 – Kshs. 1027

2013 – 06 – 06 – Kshs. 527

2013 – 06 – 03 – Kshs. 527

2013 – 05 – 30 – Kshs. 1027

2013 – 05 – 17 – Kshs. 227

2013 – 05 – 16 – Kshs. 527

2013 – 05 – 13 – Kshs. 527

2013 – 05 – 08 – Kshs. 2000

2013 – 05 – 02 – Kshs. 527

2013 – 04 – 25 – Kshs. 527

2013 – 04 – 18 – Kshs. 527

2013 – 04 – 13 – Kshs. 527

2013 – 04 – 13 – Kshs. 527

2013 – 04 – 04 – Kshs. 527

2013 – 03 – 28 – Kshs. 527

2013 – 03 – 22 – Kshs. 527

2013 – 03 – 17 – Kshs. 227

2013 – 03 – 17 – Kshs. 527

*2013 – 03 – 16 – Kshs. 1027*

*2013 – 03 – 16 – Kshs. 1527*

*2013 – 03 – 10 – Kshs. 775*

*2013 – 02 – 28 – Kshs. 527*

*2013 – 02 – 23 – Kshs. 227*

*2013 – 02 – 23 – Kshs. 3550*

*2013 – 02 – 21 – Kshs. 1027*

*2013 – 02 – 07 – Kshs. 30000*

*2013 – 02 – 02 – Kshs. 1525*

*2013 – 01 – 31 – Kshs. 825*

*2013 – 01 – 30 – Kshs. 425*

*2013 – 01 – 29 – Kshs. 325*

*2013 – 01 – 24 – Kshs. 525*

*2013 – 01 – 23 – Kshs. 225*

*2013 – 01 – 18 – Kshs. 1000*

*2013 – 01 – 17 – Kshs. 1025*

*2013 – 01 – 15 – Kshs. 225*

*2013 – 01 – 14 – Kshs. 625*

*2013 – 01 – 10 – Kshs. 1725*

*2013 – 01 – 04 – Kshs. 425*

*2013 – 01 – 03 – Kshs. 1225*

*2012 – 12 – 27 – Kshs. 1725*

*2012 – 12 – 20 – Kshs. 1325*

*2012 – 12 – 17 – Kshs. 625*

*2012 – 12 – 13 – Kshs. 1525*

*2012 – 12 – 08 – Kshs. 225*

*2012 – 12 – 06 – Kshs. 1025*

*2012 – 12 – 03 – Kshs. 325*

*2012 – 12 – 03 – Kshs. 525*

*2012 – 11 – 29 – Kshs. 1000*

*2012 – 11 – 29 – Kshs. 525*

*2012 – 11 – 28 – Kshs. 425*

2012 – 11 –24 – Kshs. 425

2012 – 11 –22 – Kshs. 525

2012 – 11 –20 – Kshs. 425

2012 – 11 –17 – Kshs. 225

2012 – 11 –16 – Kshs. 525

2012 – 11 –15 – Kshs. 6075

2012 – 11 –11 – Kshs. 425

2012 – 11 –08 – Kshs. 525

2012 – 11 –06 – Kshs. 325

2012 – 11 –01 – Kshs. 1525

2012 – 10 –27 – Kshs. 225

2012 – 10 –26 – Kshs. 525

2012 – 10 –25 – Kshs. 425

2012 – 10 –25 – Kshs. 525

2012 – 10 –18 – Kshs. 1025

2012 – 10 –14 – Kshs. 425

2012 – 10 –11 – Kshs. 525

2012 – 10 –10 – Kshs. 525

2012 – 10 –10 – Kshs. 225

2012 – 10 –08 – Kshs. 225

2012 – 10 –01 – Kshs. 425

2012 – 09 –29 – Kshs. 525

2012 – 09 –26 – Kshs. 225

2012 – 09 –24 – Kshs. 425

2012 – 09 –20 – Kshs. 1025

2012 – 09 –18 – Kshs. 600

2012 – 09 –18 – Kshs. 625

2012 – 09 –17 – Kshs. 325

2012 – 09 –13 – Kshs. 2025

2012 – 09 –13 – Kshs. 525

2012 – 09 –09 – Kshs. 225

2012 – 09 –08 – Kshs. 225

2012 – 09 –06 – Kshs. 1025

2012 – 08 –23 – Kshs. 1025

2012 – 08 –22 – Kshs. 225

2012 – 08 –18 – Kshs. 525

2012 – 08 –16 – Kshs. 425

2012 – 08 –16 – Kshs. 525

2012 – 08 –09 – Kshs. 525

2012 – 08 –03 – Kshs. 525

2012 – 08 –01 – Kshs. 525

2012 – 07 –30 – Kshs. 1525

2012 – 07 –29 – Kshs. 525

2012 – 07 –28 – Kshs. 1025

2012 – 07 –26 – Kshs. 525

2012 – 07 –25 – Kshs. 1525

2012 – 07 –21 – Kshs. 525

2012 – 07 –19 – Kshs. 525

2012 – 07 –16 – Kshs. 1525

2012 – 07 –15 – Kshs. 425

2012 – 07 –12 – Kshs. 1025

2012 – 07 –09 – Kshs. 525

2012 – 07 –05 – Kshs. 525

2012 – 07 –05 – Kshs. 525

2012 – 06 –30 – Kshs. 5100

2012 – 06 –28 – Kshs. 2025

2012 – 06 –26 – Kshs. 1025

2012 – 06 –23 – Kshs. 625

2012 – 06 –21 – Kshs. 525

2012 – 06 –09 – Kshs. 525

2012 – 06 –07 – Kshs. 2025

2012 – 06 –05 – Kshs. 525

2012 – 05 –31 – Kshs. 525

2012 – 05 –31 – Kshs. 1555

2012 – 05 –28 – Kshs. 225

2012 – 05 –26 – Kshs. 225

2012 – 05 –24 – Kshs. 525

2012 – 05 –23 – Kshs. 525

2012 – 05 –07 – Kshs. 225

2012 – 05 –01 – Kshs. 425

2012 – 04 –28 – Kshs. 325

2012 – 04 –19 – Kshs. 2025

2012 – 04 –18 – Kshs. 225

2012 – 04 –16 – Kshs. 225

2012 – 04 –09 – Kshs. 300

2012 – 04 –01 – Kshs. 400

2012 – 03 –21 – Kshs. 225

2011 – 12 –22 – Kshs. 1025

2011 – 12 –15 – Kshs. 1025

2011 – 10 –15 – Kshs. 1225

2011 – 09 –15 – Kshs. 825

2011 – 09 –08 – Kshs. 500

**TOTAL**                      **Kshs. 276,177**

12. In his testimony the Respondent stated that the sum of money was a loan. In her defence the Appellant confessed having received the money but sought to avoid liability by arguing that the money was given to her in consideration of love and affection. The question to be answered is whether that love affected the claim. Was this a debt founded on an immoral consideration? Was it actually a debt that was capable of being enforced?

13. A loan would ordinarily be money lent by an individual to another where there is a promise to repay on a specific date. There ought to be a specified period of time when the money should be repaid.

14. A casual perusal of the M-pesa statement does not suggest that the sum that was being sent to the Appellant was a loan. It does not specify if the sum of money was to be repaid. There is no indication of any obligation on the part of the recipient to repay the sum of money that was being received.

15. It is therefore difficult for the Respondent to enforce the obligation that should have arisen as a contract. The arrangement that existed between the Respondent and Appellant does not amount to that of a lender and borrower. It is probable that the sum of money was founded on an immoral consideration as stated by the Appellant which cannot be enforceable in law.

16. In the premises the Appeal is allowed. The Judgment of the Lower Court is hereby set aside. Due to the nature of the matter, each party shall bear their own costs.

17. It is so ordered.

**Dated, Signed and Delivered at Kitui this 19<sup>th</sup> day of April, 2018.**

**L. N. MUTENDE**

**JUDGE**