



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HIGH COURT CIVIL APPEAL NO. 14 OF 2017**

**AGGREY MAULIA MALUNGU ..... APPELLANT**

**-VERSUS-**

**JOSEPH SANYA MWAKAVI ..... RESPONDENT**

**JUDGEMENT**

1. The Appellant was sued in Makindu CC NO. 48/2011 for **Ksh.86, 947/=** interest and costs.
2. It was the plaintiff's claim that on or about 2009 the defendant/appellant requested and was advanced **Ksh.86, 947/-**.
3. The amount was to be paid within one month. The defendant/appellant defaulted repayment thus provoking the suit.
4. The defendant filed defence and counter claim where he pleaded that he was advanced **Ksh.21,000/-** and had repaid same by paying **Kshs.52,000/-** thus over paying by **Kshs.27,000/-** which he counter-claimed as refund.
5. He denied that he was advanced **Kshs.86,947/=**. The case was heard and the trial court entered judgement for the plaintiff's claim as prayed in the plaint.
6. Being aggrieved by the above decision, the appellant/defendant lodged instant appeal and later amended grounds which were as follows:-

1) **That** the Learned Resident Magistrate erred in law and in fact by failing to consider and make a decision on the Appellant's counter claim as set out in his defence and counter claim dated 16<sup>th</sup> June, 2011 and filed in court on the 22<sup>nd</sup> June, 2011.

2) **That** the learned Resident Magistrate erred in law and fact by failing to consider and make findings on the evidence led by the Appellant both orally and his written statement.

3) **That** the Learned resident Magistrate erred in law and in fact by finding that the purported agreement (**Exhibit 1**) was signed voluntarily by the appellant.

4) **That** the Learned Magistrate erred in law and in fact by holding that the Appellant owed the Respondent a sum of **Kshs.86,947/-**.

5) **That** the learned Resident Magistrate erred by failing to find that the Respondent was not

allowed by the law permitted to charge interests.

6) **That** the learned magistrate erred in law and fact when she relied on an Agreement which was null and void for lack of consent of the divisional land control board.

7) Alternatively to paragraph 5, the Learned Magistrate erred in law in relying on an agreement which was not properly proved in accordance with the rules of evidence.

8) **That** the learned Magistrate erred in law in finding as a fact that the document dated 3<sup>rd</sup> May, 2010 was a loan agreement by the respondent to the appellant whilst it was a mere interests (proceeds) product of interests balance of figure **Kshs.58, 000/-** which was left when the appellant overpaid loan by **Kshs.52,000/-** and the respondent calculated the balance to reach **Kshs.90,947/-** as purported. **Kshs. 4,000/-** was the last payment of the first loan of **Kshs.25,000/-** and the appellant never paid anything as purported on that loan as there was no money involved at that stage. The Magistrate therefore erred in law when he held that the respondent loaned the appellant **Kshs.90,947/-** and thereafter he paid **Kshs.4,000/-** as acknowledgement of the loan.

9) **That** the Learned Magistrate erred in law when he failed to consider the statement of the appellant filed together with the defence which had been admitted as evidence together with the list of document and particularly the letter written by the appellant advocates to the respondent had the magistrate considered the evidence contained in the statement and the list of documents.

10) **That** she would have found that the alleged agreement did not exist and if it existed it was a forgery and or obtained under duress as alleged in evidence by the appellant and the evidence contained in the said statement which was conclusive as it was not challenged.

11) **That** the Learned Magistrate erred in law in holding the payment of **Kshs.4,000/-** was part payment of the loan of **Kshs.90,947/-** by the appellant in the agreement and therefore the appellant did not receive **Kshs.90,947/-** from the respondent.

12) **That** the Learned Magistrate erred in law in failing to direct his mind to the absence of a clause of receipt of **Kshs.90,947/-** by the appellant in the agreement and therefore the appellant did not receive **Kshs.90,947/-** from the respondent.

13) **That** the appellant shall seek leave to adduce further evidence to prove that **Kshs.52,000/-** was interests calculated by the respondent a sing it on the loan of **Kshs.25,000/-** given to the appellant earlier and which was paid and the **Kshs.4,000/-** was its final payment and that claim of **Kshs.86,947/-** by the respondent was fraudulent.

14) **That** there are documents containing evidence that the sum of **Kshs.52,000/-** was interests calculated and added to the principal loan of **Kshs.25,000/-** which the respondent gave to the appellant but the same could not be produced in evidence as it is part of the evidence contained in the recorded statement which the Magistrate failed to consider as it had been filed with the defence.

15) **That** the Magistrate failed to evaluate evidence properly or at all and her decision is against the weight of evidence.

7. The parties argued the appeal orally. This being a first appellate court it is enjoined to evaluate, scrutinize and relook the evidence afresh.

8. The evidence on record is summarized as follows:-

- **The plaintiff testified that he loaned the defendant money amounting to Kshs.90,947/- and they entered in to a written agreement whereby it was agreed that if the defendant defaulted to repay he would be charged interest of 20%. The plaintiff indicated that the defendant was to pay the loan on the 3<sup>rd</sup> day of every month. On 03/06/2010, the defendant paid him Kshs.**

4,000/- and stated that he did not have the rest. It was his testimony that the defendant therefore owed him Kshs.86,947/- and an interest of Kshs.16,189.40/-. He produced the agreement dated 03/05/2010 as exhibit No. 1. He thus prayed for repayment of the Kshs.86,947/- owing plus interest and costs of the suit.

- Upon cross examination, the plaintiff stated that what the defendant owes him is as per the agreement. He denied threatening the defendant to sign the agreement. He averred that he had also given the defendant Kshs.25,000/- which he duly paid. The plaintiff indicated that the case before the court related to 2010 and not 2009.
- The defendant on his part averred that in 2009, the plaintiff loaned him Kshs.25,000/- which he duly paid however, he denied that the plaintiff had loaned him Kshs.90,000/- as per exhibit no. 1. He indicated that he believes that that is interest on the Kshs.25,000/-. He informed the court that he signed the said agreement under duress as the plaintiff had a knife on his table. He denied that his wife was present when he signed the agreement but indicated that his cousin/s son was. It was his testimony that the plaintiff signed the agreement on behalf of his wife. He denied borrowing the plaintiff money in 2010 and urged the court to dismiss his case.
- Upon cross examination, the defendant averred that he knows the agreement produced and admitted the signature was his. He indicated that the plaintiff however threatened him with a panga to sign. He explained that a panga and a knife are one and the same thing but then stated that the plaintiff had a knife. He indicated that he however did not report to the police station because the plaintiff is a pastor.

9. The appellant in his submissions told the court that:-

- This is a case in which the plaintiff claimed a sum of Kshs.86, 947/- that he lent to the defendant as per the plaint dated 3<sup>rd</sup> May 2011. In his evidence the plaintiff claimed that he lent the defendant amount of money being Kshs.90,047.90/-
- The document produced as exhibit 1 brought more confusion into the plaintiff's claim as the same talks about a totally different amount.
- The defendant's defence is that it is true that he at some point borrowed some money from the plaintiff. The defendant testified that he borrowed the amount of Kshs.25, 000/- which he fully repaid to the plaintiff. The Appellant submit that the plaintiff's evidence and pleadings totally failed to add up. Even if the plaintiff had lent the money claimed in the plaint to the defendant as per the agreement dated 03/05/2010, then what became of the interest stated to be charged in the agreement this suit having been brought one year later.
- The agreement is also not capable of being enforced in court. The same is illegal as the plaintiff is not a licensed money lender and this honourable court cannot be called upon to enforce an illegality.
- Appellant further submit that the case should have in the above circumstances failed and urged court to dismiss the same with costs to the appellant.

10. The respondent replied as follows:-

- *"...the plaintiff filed his case on 3<sup>rd</sup> May 2011 claiming payment of Kshs.86,947/- from the defendant being an amount that he had advanced to the defendant.*
- *The defendant filed two statements of defence. The first one is dated 16/06/2011 and was filed on 22/06/2011 together with a counterclaim and a defendant's statement for the same date. The second defence is dated 12/08/2013 and was filed on 26/08/2013 together with defendant's statement for the same date.*
- *During the hearing on 27/08/2014, the plaintiff produced exhibit 1 dated 03/05/2010 in which the defendant agreed that he was lent Kshs. 90,647.90/- to be paid back within 30 days. As per plaintiff's exhibit 1, the guarantor to the defendant was one FRANSISCA MWELU MAULA and the security was LR NO.1 NZAUI/MASUMBA/341.*
- *During cross examination, the plaintiff indicated to the court that the defendant signed the agreement dated 03/05/2010 willingly.*
- *The plaintiff also stated that the defendant tried to alter the date of the agreement. So he insisted that the defendant should countersign alongside the date, which he did at the top.*

- *The defendant in his written statements dated 16/06/2011 and 12/08/2013 never denied that he was lent money by the plaintiff.*
- *During the defence hearing on 27/08/2014, the defendant admitted that he signed the agreement dated 03/05/2010.*
- *In addition, the defendant alleged that he signed the agreement dated 03/05/2010 under duress because the plaintiff held a knife on his table and threatened to beat him up, if he didn't sign the agreement. The provisions of the Evidence Act (Cap 81) are very clear that whoever alleges a fact must prove it.*
- *The facts on duress or coercion alleged by the defendant in signing the agreement dated 03/05/2010 are not proved. The defendant stated that his own son was present when the defendant was put under duress to sign the agreement, yet the defendant never called this said son as his defence witness.*
- *In addition, the defendant never produced an occurrence book record from any police station as proof of the threats to be beaten by the plaintiff or any duress using a knife or panga to sign the agreement dated 03/05/2010.*
- *Even though the defendant alleged to have paid all the monies due to file plaintiff, he never produced any evidence on the same.*
- *During cross examination, the defendant agreed that he knew the agreement dated 03/05/2010 and acknowledge that the signature in it belongs to him.*

11. After going through the evidence on record, the pleadings and the parties submissions, I find the issue emerging as follows:-

- **Whether the case was proved on balance of probabilities?**

12. The court observes that by a letter dated **02/11/2010**, the appellant advocate **MULUA MAITHUVA** wrote a letter to the respondent advocate indicating that the appellant borrowed **Kshs.25,000/-** previous year 2009 and had paid **Kshs.52,000/-** to date of the letter.

13. The respondent advocate **K. ONSEMBE** by a letter dated 23/12/2010 replied to the same but avoided to state the advanced amount but instead stated that by an agreement of 03/05/2010 the parties entered to an agreement for respondent to advance money to the appellant. The amount outstanding as at **03/10/2010** was **Kshs.265, 445/10/-**.

14. In his statement filed in the court signed on **03/05/2011**, the respondent stated that the loan was advanced in 2009 being **Kshs.90, 647/-** and that the appellant paid **Kshs.3, 700/-** leaving a balance of **Kshs.86, 947/-** unpaid.

15. In court, the respondent testified that the amount borrowed was **Kshs.90, 947/-** and that same was to attract a penalty of **Kshs.20%**. On 03/06/2010, **Kshs.4, 000/-** was paid by the appellant leaving a balance of **Kshs.86, 947/-** thus the claim. The agreement was dated 03/05/2010.

16. In cross examination, the respondent stated that the amount was given in cash on **03/05/2010**. He denied loaning appellant any money in 2009.

17. On another breath, he agreed that he had advanced appellant **Kshs.25, 000/-** which the respondent said was repaid.

18. The appellant testified that in 2009, the Respondent advanced him **Kshs.25,000/-** and same was repaid. He denied ever being loaned **Kshs. 90,000/-** or thereabout by the respondent and that the claim in court was of interest of **Kshs.25,000/-** advanced to him. The appellant agreed he signed an agreement of **03/05/2010** but under duress as respondent had a knife on his table.

19. The court having gone through the evidence, pleadings and documents, it observes that the respondent claim for **Kshs.86, 947/-** was unfounded. He admitted that he had advanced **Kshs.25,000/-** which was repaid fully. This is inconsistent with letter of 02/11/2010 by appellant advocate.

20. In reply to the letter aforesaid, the respondent advocate by letter dated **23/12/2010**, he did not deny the principle **Kshs.25,000/-** but only stated that via agreement of **03/05/2010** the outstanding amount including interest was **Kshs.265,445/10**.

21. The respondent agrees in his statement of **03/05/2011** that the amount was advanced in 2009 but while testifying on oath he stated that the amount was given cash on **03/05/2010**.

22. The court finds that the amount advanced was **Ksh.25,000/-** in 2009 and that the agreement of 03/05/2010 was for interest/penalties of **Kshs.20% per month** which the appellant could have been forced to sign.

23. The appellant by a letter dated **02/11/2010**, admitted that **Kshs.52,000/-** having been paid no other amount was due to the respondent.

24. The interest or penalty of 20% either per month or per annum charge on friendly loan is unlawful. Even on commercial loan advanced by the bank has to be pegged on interest pegged on central bank guidelines and the provisions of the banking act.

25. The respondent could not thus claim **Kshs.25,000/-** plus **interest /penalty at 20%**. He could only apply the court rates which is 12% under Section 27 of the Civil Procedure Act.

26. The appellant had already paid **Kshs. 52,000/-** but he has not counter claimed for the excess in payment. **The court therefore will allow the appeal with no orders as to costs in the circumstances of the case.**

**SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 27<sup>TH</sup> DAY OF JULY, 2017.**

**C. KARIUKI**

**JUDGE**

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