



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL NO. 51 OF 2013

BETWEEN

ROBERT OUMA NJOGA APPELLANT

AND

BENJAMIN OSANO ONDORO RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. Sala, RM at Chief Magistrates Court in Kisumu in Civil Case No. 512 of 2012 dated 13th June 2013)

JUDGMENT

1. The appellant, who was the plaintiff in the subordinate court, appeals against a judgment dismissing his claim. For purposes of this judgment, the parties shall be referred to in their respective capacities in the subordinate court.

2. In the plaint dated 10th November 2012, the plaintiff averred that;

[2] On or about 26.10.11, the Plaintiff advanced to the Defendant at the latter's request and instance a sum of Kshs. 15,000/- as a friendly loan repayable within a reasonable time and upon demand.

[3] That despite repeated verbal and written demands the Defendant has refused, failed and/or ignored to comply as demanded.

3. The defendant through his defence dated 9th December 2012, denied the plaintiff's claim. He stated that in the alternative, the claim did not disclose any cause of action, was frivolous, vexatious and an abuse of the court process. The learned magistrate dismissed the case precipitating this appeal.

4. As this is a first appeal from the magistrate's court and in considering this matter I am guided by principle that the duty of the first appellate court is to reconsider the evidence, evaluate it and reach its own conclusion bearing in mind that it neither heard or saw the witnesses (see *Selle and Another v Associated Motor Boat Company Ltd & Others [1968] EA 123*).

5. The evidence before the lower court was as follows. The plaintiff (PW 1), an advocate, testified that on 26th October 2011, the defendant, whom he knew very well, came to see him in his office and requested for a personal loan to sort out a personal problem. PW 1 obliged and instructed his clerk, Shem Akila Wasanda (PW 2) to prepare a petty cash voucher (Exhibit No. 1) for the defendant to acknowledge that he received the Kshs. 15,000/- cash which PW 1 had handed over to PW 2. PW 1 testified that despite

promising to pay the amount, the defendant did not repay the loan forcing him to instruct his advocate to formally make a demand.

6. PW 2 told the court that he was a clerk in PW 1's office and on the material day, PW 1 instructed him to prepare a petty cash voucher and give the respondent, whom he knew, Kshs. 15,000/- cash. He witnessed the respondent signing the voucher and writing his identity card number and mobile phone number. Brazhner Ochieng Angwech (PW 3), a process server, testified that he knew the respondent and had served the demand letter on 31st August 2012.

7. The defendant (DW 1) testified that he was a retired police officer and was a businessman and that he knew the appellant as they are from the same area. He denied that he was in the plaintiff's office on the material day or that the appellant advanced him money as claimed. He admitted that the telephone and the identity card numbers on the voucher were his but denied that the signature. He told the court that while he was at Awasi, a young man who stated that he came from the appellant's office, approached him and requested him to assist him with some accident cases. The man took a copy of his identity card and telephone number and promised to pay him a Kshs. 15,000/- commission. When cross-examined about the signature, he stated that the signature on the voucher was not his but resembled his known signature.

8. After outlining the evidence and submissions, the learned magistrate dismissed the claim on three grounds. First, that the plaintiff did not file a reply to defence as required by law hence, "[T]he implication is that he concurs with the defence and that the ground alone is enough to dismiss the suit." Second, that the plaintiff did not show that the notice of demand was served. The learned magistrate concluded that, "effectively means that the suit is premature and ought to be struck out." Third, the learned magistrate stated that, "the plaintiff did not call any expert witness to confirm whether the signature on exhibit 1 belongs to the defendant or not." The court took that view that in the absence of an expert, it could not determine whether the signature on the document evidencing the debt belonged to the defendant and as such the plaintiff had not proved its case.

9. The appellant represented by Mr Okoyo complains that on each of the grounds the learned magistrate misdirected himself. As regards the failure to file the reply to defence, he submitted that under the **Civil Procedure Rules**, the failure to file a defence amounts to a joinder of issue. Counsel further contended that failure to write or make a demand only disentitled the plaintiff to costs in the event the claim was successful. Counsel submitted that the plaintiff satisfied the burden of proving the debt and it was incumbent on the respondent to call the expert to prove forgery.

10. Mr Oyuko, counsel for the respondent, supported the judgment on the ground that the plaintiff's witness, PW 3, admitted that the letter of demand was not served. Further that the debt as evidenced by the voucher was contested and it was incumbent on the plaintiff to prove that the signature thereon belonged to the defendant. Counsel contended that the issue concerning the reply to defence was not raised in the appeal should not be considered.

11. The main issue in this appeal is whether the respondent had discharged its burden of proving that the plaintiff advanced the defendant the sum of Kshs. 15,000/- and it was the burden of the plaintiff to satisfy the court on that issue. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of **section 107(1)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, which provides:

107. (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.

12. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence (See **Isca Adhiambo Okayo v Kenya Women's Finance Trust KSM CA Civil Appeal No. 19 of 2015 [2016]eKLR**). That is captured in **sections 109 and 112** of the **Act** as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to

believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. 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.

13. The well-known aphorism, “he who asserts must prove” was augmented by the Court of Appeal in ***Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010[2013]eKLR*** as follows

We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.

14. The testimony of PW 1 and PW 2 establishes that that PW 1 lent DW 1 Kshs. 15,000/- cash which was evidenced by a signed voucher which was prepared in the ordinary course of business. It is important to point out at this stage that the transaction was a friendly loan that did not meet all the characteristics of a debt agreement. What emerged from the evidence is that the parties knew each other. That he signed the voucher and placed very personal information including his identity card number and mobile number fortifies the plaintiff’s case. The defendant tried to explain this away by alluding to a young man from the plaintiff’s office taking a copy of his identity card and phone number and promising to pay a commission. This issue was not put to PW 1 or PW 2 in cross-examination hence I conclude that the issue was an afterthought.

15. Since the defendant raised the issue of forgery it was incumbent upon him to prove it as required by **section 107** of the ***Evidence Act***. It was his burden to call the expert witness to prove the fact that the signature on the voucher was not his. On that issue the case of ***Jennifer Nyambura Kamau v Humphrey Mbaka Nandi (Supra)*** is on fours with this case. In essence the defendant’s defence was a mere denial which could not surmount the evidence presented by the plaintiff.

16. The issue whether the appellant failed served the appellant with a demand letter or not does not affect liability to pay the debt as it was not a condition precedent for filing the suit. When summons were served on the defendant, he did not admit the debt and tender payment. He chose to fight the suit vigorously. He cannot claim have been prejudiced by failure to serve the notice. The learned magistrate therefore erred in this in this respect.

17. Contrary to Mr Ayuko’s submission, the issue of the effect of failing to file a reply to defence was set out in the memorandum of appeal as the first ground. In dealing with this issue I would do no better than quote the Court of Appeal in ***Joash M. Nyabicha v Kenya Tea Development Authority KSM CA No. 302 of 2010 [2013]eKLR*** where it held as follows;

A plain reading of Order VI rule 9 (1) shows that an allegation in a pleading may be traversed expressly by the opposing party or there may be a joinder of issue under rule 10 of the same Order which joinder operates as a denial of the issue or issues. Rule 10 (1) and (2) reads as follows:-

10(1) If there is no reply to a defence there is a joinder of issue on that defence (2) Subject to sub-rule (3) -

(a) there is at the close of pleadings a joinder of issue on the pleading last filed, and

(b) a party may in his pleading expressly join issue on the immediately preceding pleading.

Having failed to file a reply to defence there was a joinder of issue and not an admission which served to deny those allegations. In any case, the defendant's defence was a bare denial and did not raise anything new.

18. On the whole therefore the plaintiff proved his case on a balance of probabilities and was entitled to judgment for the debt. The defendant failed to prove that the signature on the voucher was a forgery.

19. I therefore make the following orders:-

- a. The appeal is allowed.
- b. The judgment and decree in the subordinate court is substituted with an order for judgment in favour of the appellant for the sum of Kshs. 15,000/- together with interest thereon at court rates from 26th November 2011 until payment in full.
- c. The appellant shall have the costs of this appeal assessed at Kshs. 15,000/-.

DATED and DELIVERED at KISUMU this 30th day of June 2016.

D.S. MAJANJA

JUDGE

Mr Okoyo instructed by Nyanga and Company Advocates for the appellant.

Mr Oyuko instructed by Amos O. Oyuko and Company Advocates for the respondent.