



REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 103 of 2009

PAULINE NYAWIRA NGONGU.....APPELLANT

VERSUS

JANE WANJIRU MWANGI RESPONDENT

(An Appeal from the Judgment of A.K. ITHUKU - RM sitting at KERUGOYA in Civil Suit No. 46 of 2006 delivered on 23/6/2009).

J U D G M E N T

PAULINE NYAWIRA NGONGU “the Appellant” was the Defendant while Jane Wanjiru Mwangi “the Respondent” was the Plaintiff in Kerugoya Senior Principal Magistrate's Civil Case No.46/06. The matter proceeded to full hearing and Judgment was entered in favour of the Respondent. The Appellant was aggrieved and has appealed against the Judgment citing the following grounds;

- 1. The learned Magistrate erred in law and in fact in accepting and relying on agreement dated 28/8/2005 which the Appellant had not signed and as such it was not binding on her.***
- 2. The learned Magistrate erred in law and in fact in failure to consider that the claim was contradictory as Respondent in the plaint was claiming ksh.160,500/= while the said letter contract is demanding ksh.121,140/= and was also demanding interest at the rate of 240% per year then reducing it to 12% per month.***
- 3. The learned Magistrate erred in law and in fact in failure to consider that since this was failed land sale transaction after 6 months the Respondent could only get refund of consideration if any without interest, and the Plaintiff is still illegally retaining the Respondent Land title.***
- 4.The learned Magistrate erred in law and in fact in failure to consider that Appellant had proved that she had not received the money demanded.***
- 5.The learned Magistrate erred in law and in fact in failure to consider that the Respondent was operating illegal money rendering scheme charging immoral interest of 240% per annum and as such he cannot be assisted by Court.***
- 6.The learned Magistrate erred in law and in fact in failure to consider that if 1st Appellant had***

borrowed any money she had borrowed ksh.38,000/= and had refunded all of it.

7.The learned Magistrate erred in law and in fact in failure to consider the fact that Respondent had admitted that Appellant had refunded all her money.

8.The learned Magistrate erred in law and in fact in failure to consider the fact that Respondent coerced Appellant to sign invalid agreement.

9.The learned Magistrate erred in law and in fact in failure to consider the weight of evidence which was in Appellant's favour.

Both Counsels agreed to dispose of the appeal by way of written submissions. In his submissions Mr. P.N. Mugo appears to submit that the agreement which the Respondent relied on was an illegality and should not be accepted by the Court. He cites an agreement dated 21/4/2005 and talks of HCCA NO.52/06 and HCCA NO.102/09. This is causing a bit of confusion. I will concentrate on this appeal before me. Mr. Munene for the Respondent in his submissions has generally submitted that the Appellant has not proved her grounds of appeal which she totally departed from.

This being a first appeal this Court is enjoined to re-consider and re-evaluate the evidence that was adduced in the Court below and arrive at its own decision. I am also alive to the fact that I did not hear nor see the witnesses. I am guided by the case of ***MANASES KURIA & OTHERS -V- NJOROGE CIVIL APPEAL NO.153/94 – COURT OF APPEAL.***

I therefore move ahead to review the evidence. By a plaint dated 23/2/2006 the Respondent claimed shs.121,140/= with interest at 12% per annum. The claim was based on money borrowed by the Defendant on 28/8/2005 and was to be refunded on or before 10/9/2005.

The Appellant in her defence denied the claim. She further pleaded that the Respondent was operating an unlawful lending business. And that the Respondent had unlawfully taken her title deed. She prayed for the Court to dismiss the Respondent's suit.

The Respondent gave evidence and produced an agreement dated 28/8/2005 showing that the Appellant had borrowed shs.121,140/= from her and would refund it. The money was given in the presence of Damaris Kagio Mwangi. The Applicant gave her a plot plus the title deed (EXB 4). She had earlier on on 21/4/2005 given the Defendant shs.81,000/= which was repaid. Upon cross-examination she admitted that there was a land transfer document dated 28/8/05 (DMF1 1) and the amount in it was shs.150,000/=. The demand of shs.196,000/= was to cover land transfer expenses. She did not call any witness.

The Applicant testified that the Respondent had lent her money twice i.e. October 2004 (shs.35,000/=). She was with Leah Wangithi Ndegwa when she borrowed the money. And she had repaid shs.25,000/=. She denied owing the money claimed, but wrote a document on 28/8/2005 after being forced to write it.

She called one witness (Leah W. Ndegwa) who stated that she was with the Appellant on 10/11/2004 when they borrowed shs.35,000/= at an interest rate of 20%. And on 9/1/2005 she witnessed the Appellant give Damaris Kagio and the Respondent shs.50,000/=. Later the Appellant handed her title deed to Damaris and the Respondent in her presence.

I have carefully considered the grounds and the submissions. From the record and the evidence of the Defendant who is now the Appellant the only documents produced by her were **TWO**. And that is DEXB 1 – agreement dated 21/4/2005 and DEXB 4 – which is a letter from Munene to Magee advocate in response to a demand notice dated 15/11/2005. The other documents DMFI 2 & 3 were never produced as exhibits and I will therefore not refer to them.

From the evidence adduced by the Respondent she stated that the money the Appellant had borrowed on 21/4/2005 had been fully repaid and she had no claim on it. Therefore DEXB 1 was not in issue.

The pleadings are about the agreement of 28/8/2005 where shs.121,140/= was borrowed. This agreement was produced as PEXB 1. It was however not included in the record of appeal. The original record has it and I have looked at it. At page 9 line 18-19 of the record of appeal the Applicant indicated that she is the one who wrote that document and even signed it, and even put her identity card number therein. It is on the basis of this agreement that the Respondent is claiming for this money.

A close scrutiny of this agreement shows that it involves two people i.e. the lender and the borrower. The lender is the Respondent while the borrower is the Appellant. However this agreement which is written by the Appellant has no name of the Respondent on it and is also not signed by the Respondent.

Why did the Respondent not sign it if indeed she was giving the Appellant money?

In other words I do not see the connection of the money claimed and the Respondent. The Appellant may have written the document but not executed it. One can only talk of execution when both parties have signed with a witness or witnesses. The Respondent did not sign to confirm release of the money to the Appellant.

The Appellant has maintained that she did not borrow that money. The failure by the Respondent to sign the document renders it impossible to be enforced. This agreement was the basis of this claim. And having found it unenforceable the Respondent has been left with no other evidence to hang on.

Had the learned trial Magistrate noted this anomaly he would not have given Judgment in favour of the Respondent. I will therefore not even consider the several other grounds of appeal filed.

I do find there to have been no evidence on which to base the Respondent's case.

I allow the appeal and set aside the Judgment by the Resident Magistrate. I substitute it with an order dismissing the Respondent's suit in the lower Court with costs. The Appellant will get the costs in the lower Court.

**DATED AND DELIVERED AT EMBU THIS 19TH
DAY OF MARCH 2013.**

**H.I. ONG'UDI
J U D G E**

**In the presence of:-
Mr. P.N. Mugo for Appellant
Njue – C/c**