



REPUBLIC OF KENYA
IN THE HIGH OF KENYA
AT NAIROBI
CIVIL APPEAL NO 125 OF 2001

JANE N. MUKAMBA APPELLANT

VERSUS

BETTY A. WAKALA RESPONDENT

(An Appeal from the Judgment of Hon. G. N. Ngari, SRM
in Milimani Commercial Courts Civil Suit No. 983 of 2001
delivered on 7th December, 2000).

JUDGMENT

By a Plaint dated 17th January, 2000, and filed in the lower court on 9th February, 2000, the Respondent (Plaintiff in the lower court) claimed a sum of Kshs.200,000/= from the Appellant/Defendant being the amount advanced to the Appellant as a friendly loan “on 10th December, 1998”. The Appellant denied this, and after a full hearing, the lower court found for the Respondent. Aggrieved by that decision, the Appellant has appealed to this Court on the following six ground of appeal:

- 1. The learned trial Magistrate erred both in fact and in law by relying on the uncorroborated evidence of the plaintiff.***
- 2. The learned trial Magistrate erred in not considering that the appellant herein had in an earlier case i.e. HCCC No 72 of 2000 admitted owing the respondent Kshs.800,000/=.***
- 3. The learned trial Magistrate also failed to take into account that while the respondent sued for Kshs.800,000/= she could have included the Kshs.200,000/= to make her alleged claim Kshs.1,000,000.00.***
- 4. The learned trial Magistrate disregarded why the agreement for lending was not in writing or even witnessed by any person or whether it was illegal.***
- 5. The trial Magistrate did not give any reason as to why she described the defendant as incompetent.***
- 6. The learned Magistrate also purported to award Special Damages without quantifying the same or indicating how they were arrived at and they had not even been pleaded for.***

Ms Gesora, Counsel for the Appellant, submitted that there was no sufficient evidence adduced in the lower court to lead to the conclusion that Respondent advanced to the Appellant the sum of Kshs.200,000/=. The only evidence, relied upon by the Respondent, was a withdrawal slip from the Standard Bank (PW Exhibit 1) showing that the aforesaid sum had been withdrawn on 25th March, 1999. She argued further that the alleged agreement was “oral” although in the past the same parties had entered into a written agreement for a loan of Kshs.800,000/= by the Respondent to the Appellant. Why then would this transaction be oral? She asked.

Mr Ochieng, Counsel for the Respondent, submitted that there was evidence of withdrawal; that there was a history of borrowing; that the Respondent had provided an explanation in her testimony as to why the agreement was not reduced into writing; all of this leading to proof of payment on a balance of probability.

As this is a first appeal, it is my duty to assess and re-evaluate the evidence before the lower court, bearing in mind that this court has neither seen or heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before him and that he has not acted on wrong principles in reaching his conclusion.

Now, let us begin with the pleadings – the Plaintiff and the Defence. Paragraph 4 of the Plaintiff specifically pleads that the loan of Kshs.200,000/= was advanced by the Plaintiff (Respondent) to the Defendant (Appellant) on 10th December, 1998. (underlining mine). The Defence denies this.

In her evidence before the lower court, the Plaintiff/Respondent said as follows:

“I know defendant. She had been my good friend for several years. I reside at Madaraka Estate Nairobi. Defendant has been running a supermarket at Madaraka and we became friends. Defendant’s business went down and she borrowed me (sic) Kshs.200,000/= to run a Wine & Spirit shop. This was in March 1999. I had lent her money before on various occasions. Upon agreeing, I and defendant went to the Standard Bank Haile Sellassie Avenue on 25th March, 1995 (1999?) and I withdrew Kshs.200,000/= and I gave it to her. I exhibit withdrawal receipt.”

The Respondent’s only evidence before the lower court was the withdrawal slip (Exhibit 1) from the Standard Bank. That document clearly shows that the withdrawal took place on 25th March, 1999. That is the date on which she says she handed over the money to the Appellant. Yet, her own pleading states specifically that the funds were advanced on 10th December, 1998. The parties are bound by their pleadings. There is no indication that the Plaintiff was amended. In the circumstances, as the only evidence in the Court stated that the funds were “withdrawn” on 25th March, 1999, they could not have been received by the Appellant on 10th December, 1998. Accordingly, I am satisfied that the Respondent did not prove her case in the lower court on a balance of probability.

This appeal, therefore, succeeds. The Judgment and the decree of the lower court is set aside and the Respondent’s case in the lower court is dismissed with costs. The Appellant will also have the costs of this appeal.

Dated and delivered at Nairobi this 16th day of May, 2005.

ALNASHIR VISRAM

JUDGE