Oyath v Chogo & another (Civil Appeal 113 of 2018) [2025] KEHC 2610 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2610 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 113 OF 2018

HI ONG'UDI, J

MARCH 13, 2025

BETWEEN

JEFF OYATH .... APPELLANT

AND

ARTHUR OKE CHOGO .... 1ST RESPONDENT

ZAKAYO OKWARO MONDE .... 2ND RESPONDENT

(Being an appeal from the Judgment and decree of Hon. M.I.G Moranga (PM) in Nakuru CMCC No. 1560 of 2003, delivered on 24th February 2016)

JUDGMENT

1. This appeal arises from the Judgment and decree dated 24th February, 2016 delivered in Nakuru Chief Magistrate's court MCCC No. 1560 of 2022. In the said suit, the 1st respondent (who was the plaintiff) vide the plaint dated 3rd July March, 2003 prayed for several orders against the appellant and the 2nd respondent (who were the defendants). The trial court on 24th February 2016 entered judgment in favour of the 1st respondent against the appellant and the 2nd respondent jointly and severally in the sum of kshs. 100,000/= with an interest at 15% per month from 8th July 2001 until payment in full. The 1st respondent was also awarded costs of the suit and kshs. 10,000/= already paid to the 1st respondent was to be deducted from the amount found to be due to him.

2. Being aggrieved by the Judgment the appellant filed the memorandum appeal dated 14th August, 2018 on the following grounds:

   i. That the honourable learned magistrate erred in fact and in law in failing to note and consider that the 1st respondent breached the agreement between the parties in making payment.

ii. That the honourable learned magistrate erred in law and in fact in failing to note that the appellant paid the money to the 2nd respondent only and specifically in his individual savings account.

iii. That the honourable learned magistrate erred in law and in fact in failing to note and consider that the 1st respondent's breach effectively removed the appellant from the contract.

iv. That the honourable learned magistrate erred in law and in fact in failing to note and consider that the appellant did not receive or use any money from the 1st respondent and was thus not liable to him or at all.

v. That the honourable learned magistrate failed to note and consider that the appellant did not sign any relevant cheques in the transaction including the returned cheques.

vi. That the honourable learned magistrate erred in law and in fact and failed to note and consider that the appellant did not sign the repayment schedule between the respondents.

vii. That the honourable learned magistrate erred in law and in fact and failed to note and consider that when the respondents gave evidence in court they referred to each other as "he" and "him" and not "they".

viii. That the honourable learned magistrate erred in law and in fact and failed to note and consider the evidence issued by the appellant.

ix. That the honourable learned magistrate erred in law and in fact and failed to note and consider that the 2nd respondent also effectively exonerated the appellant.

x. That honourable learned magistrate erred in law and in fact and failed to note and consider that when problems arose in the transaction it is the 2nd respondent who was summoned to the police station and not the appellant.

xi. That honourable learned magistrate erred in law and in fact and failed to note and consider that the 1st respondent was not a licensed financial institution to enable him charge interest on any lendings.

xii. That Honourable learned Magistrate erred in law and in fact and failed to note and consider to take extra care in writing judgment as behooves a court writing judgment without the benefit of hearing 'parties.

3. The appeal was canvassed through written submissions.

Appellant's submissions

4. These were filed by Ochieng' Gai & Company advocates and are dated 22nd April 2024. Counsel submitted on all the grounds of appeal.

5. Regarding grounds 1,2 and 3 counsel submitted that the trial magistrate failed to take note that the 1st respondent paid money to the 2nd respondent's individual savings account only. Further, that by doing so the 1st respondent breached on the mode of payment thereby removing the appellant from the contract. He added that exhibit 3 which was a cheque for kshs. 150,000/= was signed by the 2nd respondent only.

6. On grounds 4 and 5 counsel submitted that the trial magistrate failed to note that the appellant did not receive or use any money from the 1st respondent and also failed to note that he did not sign any relevant

cheque in the transaction. Further, that the 1st respondent did not pay any money to the appellant and the amount of Ksh 100,000/= that he claims was paid to the savings account of the 2nd respondent.

7. On grounds 6 and 7 counsel submitted that on page 5 of the record of appeal paragraph *4* the 1st respondent stated that they had made a schedule on how the whole amount was to be paid. The said schedule is dated 11th July, 2001 and is part of the list of exhibits but was not given an exhibit number. He added that the trial magistrate did not consider that throughout the proceedings the respondents constantly referred to each other as “he” and “him” and not “they” particularly after the 1st cheque of security.

8. Regarding grounds 8 and 9 counsel submitted that the appellant gave evidence on the matter to the effect the 1st respondent had given them a loan in the sum of Ksh 100,000/= but that he parted ways with the 2nd respondent. Further, that the appellant wrote to the 1st respondent informing him that he had nothing to do with the money nor benefited from it and that he only signed the cheque which was issued as a security. He added that the 1st respondent stated that he had transferred money to the 2nd respondent’s account and he had even written a letter to him stating what he owed him. The said letter which he produced as exhibit 4 was however missing from the court records.

9. Regarding ground 10, counsel submitted that at pages 4 and 5 of the proceedings the 1st respondent stated that the 2nd respondent had given him cheques which bounced. Further, that the appellant did not issue any cheque nor was he called to the CID at any time in respect of the transactions. That it was the 2nd respondent who had been summoned to the police station. In respect of ground 11, he submitted that the trial court erred in allowing interest of 15% claimed by the 1st respondent. Further, that the said interest led to the 1st respondent’s wrongful claim of kshs. 3,073,561.04/= from the appellant plus costs and interests. According to him only financial institutions such as banks could charge interests on loans.

10. Finally, on ground 12 he submitted that parties gave evidence before Hon. Muketi (CM) therefore Hon. M.I.G Moranga did not have the benefit of personally noting down the evidence of the parties and witness demeanor. Thus, judgment ought to have been written after keen perusal of the proceedings and special care taken to make up for the missed points that could have been gleaned in hearing evidence of parties. He added that 1st respondent did not prove that he gave the appellant money or that the appellant received any money from him. He urged the court to allow the appeal, set aside the judgment delivered on the 24th February, 2016 and the suit be dismissed with costs.

11. The appellant filed supplementary submissions dated 22nd November 2024 where he reiterated the contents of his earlier submissions.

1st respondent’s submissions

12. These were filed by Konosi & Company Advocates and are dated 12th February 2024. Counsel gave a brief background of the case and submitted on the grounds of appeal.

13. Regarding grounds 1 and 3 counsel submitted that the 1st respondent did not breach any of the terms in the agreement. That DW1 (the 2nd respondent) admitted that the 1st respondent advanced to them a sum of Kshs. 100,000/= in december 2000 and that he was with the appellant when he received the money. Further, that it was the appellant and the 2nd respondent who breached the contract by failing to repay the sum advanced to them by the 1st respondent. He added that the agreement made on 9th december 2000 and produced as PExh 1 did not provide any term for the removal of the appellant from the contract in the event there was a breach.

14. On the 2nd ground, counsel submitted that it was not indicated in the proceedings or the defence that the appellant paid the money to the 2nd respondent only and specifically in his individual savings accounts (sic). Further, that the appellant never gave any evidence in form of the particulars of the 2nd respondent's individual savings account.

15. On grounds 4, 5, 6, 7 and 10, he submitted that the appellant having signed the agreement was ultimately bound by the terms of the said agreement. Further, that every partner in a firm is liable jointly with the other partner for all debts and obligations of the firm incurred. He placed reliance on Halsbury's Laws of England 4th Edition Volume 35 at par. 56 where it was stated as follows:

> "General liability in tort. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable to the same extent as the partner so acting or omitting to act and where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies, or where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm Is liable to make good the loss."

16. Counsel further submitted that the 2nd respondent and the appellant were partners and the cheques that were produced as P Exhibit 2, P Exhibit 3, P Exhibit 5 and P Exhibit 6 originated from Venpalm Landscape Designers. In addition, P Exhibit 1 being cheque no 900086 had been signed by both the appellant and the 2nd respondent.

17. In respect of grounds 8 and 9 counsel submitted that during the hearing the 1st respondent adduced evidence and produced documents that proved his case against the appellant and the 2nd respondent. Further, that the 1st respondent was also able to prove that the appellant and the 2nd respondent owed him money advanced under the agreement entered into on 9th December 2000. He placed reliance on section 107(1) and 109 of the *Evidence Act*.

18. Counsel further submitted on ground 11 arguing that during the hearing the appellant never led any evidence or defence that the 1st respondent was not a licensed financial institution to enable him charge any interest on lendings. Further, that the said issue was never raised before the trial magistrate thus the court could not pronounce itself on the same as parties are bound by their pleadings. He placed reliance on the decisions in Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR and Raila Amolo Odinga & Another v IEBC & 2 Others [2017] eKLR.

19. On ground 12 counsel submitted that all parties were given a chance to present their case before the trial court. Further, that the learned trial magistrate considered the evidence submitted by the parties during hearing and found that the 1st respondent had on a balance of probabilities proved that he was entitled to the prayers sought in the plaint.

20. Lastly, on costs counsel placed reliance on the decision in Jabir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others [2014] eKLR and urged the court to award costs of the suit and appeal to the 1st respondent. He also urged the court to uphold the trial magistrate's decision and dismiss the appeal.

2nd respondent's submissions

21. These were filed by Daina Ateka & Company Advocates and are dated 16th September 2024. Counsel gave a background of the case and identified four issues for determination.

22. On the first issue on whether the 1st respondent breached the agreement and whether the breach removed the appellant from the contract, counsel submitted that though not expressly indicated from the agreement it was the obligation of the 1st respondent to advance Kshs. 100,000/= to the appellant and the 2nd respondent. That on the other hand, it was the obligation of the appellant and the 2nd respondent to service the advanced amount at an interest rate of 15% until full repayment in full.

23. Further, that the money was to be used in their joint business not for personal gain and the 1st respondent performed his obligation under the agreement by issuing the advanced amount. Therefore, he was not in breach and the appellant having executed the agreement deliberately and willingly, and was a party to the agreement and was therefore bound by the terms of the agreement.

24. The second issue was whether the interest awarded/charged was unconscionable and unfair and whether the 1st respondent engaged in unfair lending practices. Counsel submitted that at the trial court, it was established that the 15% interest was not agreed to be accruing either monthly or annually and no date of repayment was given. Further, that the 1st respondent was not a recognized financial institution and was therefore operating an unregulated, illegal and exploitative business which can be termed as "shylock'. He urged the court to review the amount of interest awarded to the 1st respondent by the lower court and align it with the in duplum rule.

25. The court's attention was drawn to article 46 (1) (c) of *the Constitution* of Kenya, 2010, the paper by Georgiadis Makadia Khaseke titled "Introduction of the Duplum Rule in Kenya (2008)" and the decisions in Mugure & 2 others v Higher Education Loans Board (Petition E002 of 2021) [2022] KEHC 11951 (KLR), Musyoka v Wambua (Civil Appeal 9 of 2019) [2022] KEHC (KLR) and Joel Njema Waruiru & Another v Robert Kibunja [2013] eKLR.

26. On the third issue as to whether the amount due and owing to the 1st respondent should be jointly serviced by the appellant and the 2nd respondent, counsel submitted that the appellant signed the agreement deliberately and willingly and the money was advanced by the 1st respondent as per the agreement. Thus, it was the obligation of both the appellant and the 2nd respondent to service the advanced amount "jointly". Additionally, that the money advanced was to enable them construct a flower nursery for their business and not for personal gain. Furthermore, the business being jointly owned imposed joint responsibilities and liability upon the appellant and the 2nd respondent.

27. Lastly, on costs counsel left it to the discretion of the court.

Analysis and determination

28. This being a first appeal, this court is called upon to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. See

    i. Selle & another V Associated Motors Boat & Others 1968 E.A 123.

    ii. Peters V Sunday Post Limited [1958] E.A 424.

29. Having carefully perused the proceedings, the judgment and the record of appeal as a whole including the parties' submissions, I find that the issue arising for determination is whether the appeal herein has merit.

30. The appellant contends in his memorandum of appeal that the learned trial magistrate erred in law and in fact by failing to consider that the 1st respondent breached the agreement between the parties in making payments to the 2nd respondent only and specifically in his individual savings account. Further, that the honourable learned magistrate erred in law and in fact in failing to consider that the said breach effectively removed the appellant from the contract.

31. On their part, the respondents argued that the 1st respondent was not in breach of the contract and the appellant having executed the agreement deliberately and willingly, was a party to it and was bound by the terms of the agreement.

32. The trial Magistrate in his judgment noted that vide the agreement of 9th December 2000, the appellant and the 2nd respondent had borrowed money from the plaintiff. He also noted that on a balance of probabilities the 1st respondent had proved that indeed they owed him the monies claimed. He added that no evidence was adduced to contradict the plaintiff's evidence that indeed the cheques produced as Exhibit P2, P3, P5 and P6 were issued by the defendants but were never cleared nor replaced. He therefore entered judgment in favour of the 1st respondent for the amount claimed in the plaint plus interest.

33. Upon perusal of the court records I confirm that indeed vide the judgment dated 24th February 2016 the trial court entered judgment in favour of the 1st respondent against the appellant and the 2nd respondent. The reasons given by the trial Magistrate are as stated under paragraph *32* above.

34. The dispute between the parties herein arose from an contract/agreement and this court should be reluctant to interfere with the terms agreed on by the parties unless the same is shown to be illegal, unconscionable or fraudulent as doing so would amount to re-writing the contract for them. I am guided by the decision in Desai & Others vs Fina Bank Ltd [2004] 2 EA 46 at 51, where it was held as follows: -

> " .....the function of the court is to enforce what is agreed between the parties and not what the court thinks ought to have been fairly agreed between the parties...."

35. This court having considered the evidence adduced by the 1st respondent (who was the plaintiff) concurs with the trial Magistrate's findings on the same and notes that no evidence was adduced by the appellant to counter the same. Further, the appellant's contention that the trial Magistrate did not hear the witnesses testifying hence failed to take extra care while writing the judgment is neither here nor there.

36. It is evident from the lower court record that the appellant and the 2nd respondent were given adequate time to defend themselves when the 1st respondent's case was closed on 20th January 2004 but they failed to do so. They ended up calling one witness (2nd respondent) and thereafter the court granted them several adjournments to avail more witnesses but they did not. Finally, on 29th May 2014 the court had no option but to close the defence case having noted their absence in court despite having been served severally. In addition, they did not file any submissions even after their case was closed.

37. The parties were bound by the terms and conditions of their agreement. There is no dispute that the appellant and the 2nd respondent had defaulted in repayment of the loan. I do not find any good ground to make this court fault the trial court over the judgment delivered on 24th February 2016.

38. The upshot is that the appeal herein lacks merit and is hereby dismissed with costs. The judgment by the trial court is upheld.

39. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 13TH DAY OF MARCH, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE