



REPUBLIC OF KENYA



**Nguna v Khan (Civil Appeal 273 of 2013)
[2024] KEHC 2382 (KLR) (Civ) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 273 OF 2013

JN MULWA, J

MARCH 8, 2024

BETWEEN

CHARLES NGUSYA NGUNA APPELLANT

AND

NATHEEM SHAKUR KHAN RESPONDENT

*(Being an Appeal from the Judgment of Hon. S. Atambo Principal
Magistrate in Civil Suit No.1879 Of 2010 Delivered on 26/4/2013)*

JUDGMENT

1. The Appellant's case against the Respondent in the trial court was for a sum of Kshs. 1,200,000/= with interest alleged to have been advanced to the Respondent in the year 2006 but which the Respondent failed and refused to refund. The Respondent in his defense denied the claim by stating that the said sum was working capital in a joint business venture of importing vehicles with the Appellant from Japan for sale. Upon trial the lower court held that the Appellant had failed to prove his case on a balance of probabilities as required under the law and dismissed it with costs.
2. Dissatisfied with the trial court's Judgment the Appellant filed this Appeal by a Memorandum of Appeal dated 23/05/2023 raising the following grounds:
 - i. The Magistrate misdirected herself that upon finding that the Respondent received the money claimed by the Appellant, the Appellant was obliged to prove the purpose for which he advanced the money to the Respondent.
 - ii. The Magistrate erred in failing to appreciate that the question for determination was whether the Respondent received the money claimed by the Appellant.



- iii. In the absence of proof of the reason why the Respondent received the money claimed, the proper finding ought to have been that the Respondent refunds the money.
- iv. The magistrate made a finding that he doubted the credibility of the Plaintiff without giving any reason for making that finding. She did not attribute the finding to either the demeanor of the Plaintiff as testified or any inconsistency in his testimony.

The Appellant prays that the trial court's Decree and Judgment be set aside with an order for Judgment to be entered as prayed in the Plaint in Civil Suit No.1870 of 2010.

3. The Appellant's case was argued through his evidence as PW1 wherein he adopted his witness statement dated 22/05/2012 and list of documents. He testified that it was not true that he had a joint business venture with the Respondent. Upon cross examination PW1 testified that he advanced Kshs. 800,000/= to the Respondent which he was to pay within two weeks and a further 300,000/- both of which were to be paid back together with Kshs. 50,000/- each as interest as agreed by both parties.
4. The Respondent's case was adduced by DW1 Natheem Shakur Khan. In his testimony he testified that together with the Respondent they agreed to import 10 motor vehicles and each one was to contribute Kshs. 4,000,000/- as working capital. He further testified that the Defendant contributed the full amount while the Plaintiff contributed 1,200,000/- promising to top up but which he never did; adding that he then sent Kshs. 5,200,000/- to the supplier. He stated that although the supplier gave them time to pay the balance he was unable to raise the balance. It was his testimony that the same Kshs. 1,200,000/= was forfeited when they failed to pay the balance to the supplier as was the consequence for noncompliance.
5. The Appeal was canvassed by way of written submissions. The Appellant's submissions are dated 19/01/2024. The Respondent did not file submissions.

Analysis and Determination

6. The Court has analyzed the pleadings, evidence and the Appellant's submissions. It is evident that money was advanced by the Appellant to the Respondent for an undisclosed purpose as there is no proof adduced by any of the two parties of a joint venture business. What comes out clearly is that the Appellant advanced to the Respondent Kshs. 1,200,000/= at the material time. This Court is persuaded that the trial magistrate erred and misdirected herself in finding that the burden to prove the reason for the money being advanced was upon the Appellant. There was no requirement for the Appellant to prove the reason why he advanced the money to the Respondent, the same having been admitted by the Respondent himself.
7. Section 3(2) and 3(3) of the [Evidence Act](#) provides guidance on proof of matters of facts in contest. The Sections provide as follows:
 3. Interpretation
 - (2) A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.
 - (3) A fact is disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.



8. It is clear and uncontroverted that the Appellant advanced to the Respondent the sum of Kshs. 1,200,000/= which is clearly admitted by the Respondent through a letter from his advocates Ochieng' Ogutu & Company Advocates dated 5/7/2007 wherein the Respondent proposed to import a motor vehicle worth Kshs.1.2 million which was equal to the money the Appellant had advanced to him, but which proposal was rejected. I find no reason why the Respondent would have made the proposal to import a vehicle for the Appellant equivalent to the money advanced to him other than a clear admission of the advance, and trying to find ways of paying back the said money, one being importing a vehicle for him of amount equivalent to the advance.
9. In light of the above this court finds that the Appeal is merited and it makes the following orders:
 1. The Appeal is merited and allowed.
 2. The Judgment of the trial court dated 26/04/2013 is set aside, and judgment entered as prayed in the trial court with interest at court rates accruing from the date of filing of the plaint in the trial court.
 3. The Appellant shall have the costs of the Appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH ,2024.

J. N. MULWA

JUDGE

