



**Kirui v Korir (Civil Appeal E027 of 2023) [2024] KEHC 5608 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5608 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E027 OF 2023**

**RL KORIR, J  
APRIL 11, 2024**

**BETWEEN**

**STANLEY KIBET KIRUI ..... APPELLANT**

**AND**

**JOHN KIPRONO KORIR ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Principal Magistrate, Kibelion  
K. at the Magistrate's Court at Bomet, Civil Suit Number 82 of 2020)*

**JUDGMENT**

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for the recovery of Kshs 715,000/= that he had advanced to the Appellant as a loan.
2. The trial court conducted a hearing where both parties presented their cases and testified.
3. In its Judgment delivered on 19th April 2023, the trial court found that the Respondent (then Plaintiff) had proved his case and entered Judgment in his favour in the amount of Kshs 720,000/=. The court also awarded the Plaintiff the costs of the suit and interest from the date of the Judgement.
4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 17th May 2023 and relied on the following grounds:-
  - I. That the learned Magistrate erred in law and in fact in arriving at a wrong conclusion yet no evidence was tabled by the Respondent to demonstrate That the Respondent had advanced money to the Appellant.
  - II. That the learned Magistrate erred in law and fact by disregarding the Appellant's evidence adduced in court yet there was no oral or written agreement subsisting which the Respondent's claim was grounded and no witness came to court to attest That they were present during the making of the said oral agreement.



- III. That the learned Magistrate erred in law and in fact by deliberately linking the business entity to the Appellant yet in his defence, the Appellant had denounced his relationship with the said entity.
  - IV. That the learned Magistrate erred in law and in fact by failing to consider that the post-dated cheques relied upon by the Respondent were issued by a business entity and not the Appellant thus there was no nexus between the Appellant and the business entity.
5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify. See *Selle and another vs Associated Motor Boat Co. Ltd* (1968) E.A. 123.

**The Plaintiff's/Respondent's case.**

6. Through his Complaint dated 16th October 2020, the Respondent stated that on diverse dates between 18th June 2018 and 4th July 2018, he advanced the Appellant a loan of Kshs 715,000/=. That the Appellant then drew three post-dated cheques for Kshs 130,000/=:, Kshs 260,000/=: and Kshs 325,000/=:.
7. It was the Respondent's case that on diverse dates between 24th September 2018 and 7th November 2018, he went to deposit the post-dated cheques but they were rejected for insufficiency of funds.
8. The Respondent's claim against the Appellant was for the payment of the money he advanced to him.

**The Appellant's/Defendant's Case.**

9. Through his Statement of Defence dated 4th November 2021, the Appellant denied receiving a loan of Kshs 715,000/=: from the Respondent. The Appellant further denied drawing any post-dated cheques.
10. On 25th July 2023, I directed that this Appeal be canvassed by way of written submissions.

**The Appellant's Submissions.**

11. The Appellant submitted that the Respondent neither produced a written agreement nor brought any witness to support his claim. That the Respondent wrongly insinuated that there was an oral agreement in place. The Appellant further submitted that the Respondent's evidence of the pictures and the post-dated cheques were not enough to prove his case.
12. It was the Appellant's submission that the post-dated cheques emanated from Stamar Stationers and General Supplies which he had no knowledge of. It was the Appellant's further submission that he did not sign the post-dated cheques.
13. The Appellant submitted that the dates (in the Complaint) in which the Respondent supposedly gave the Appellant money contradicted the dates he gave during his testimony. That on the Complaint, the Respondent stated that he advanced the Appellant money on diverse dates between 18th June 2018 and 4th July 2018 but in his testimony, he (the Respondent) stated that he advanced the Appellant money on 10th July 2018, 28th July 2018 and 8th August 2018. The Appellant further submitted that the Respondent's testimony was inconsistent.
14. It was the Appellant's submission that the Respondent reported the matter to Bomet Police Station on 9th May 2019, a year after the post-dated cheques were rejected. That the police did not charge him because of insufficient evidence.



15. The Appellant submitted that the Respondent's case did not show any cause of action and that he did not prove his case on a balance of probabilities. He relied on *Evans Nyakwana vs Cleophas Bwana Ongaro* (2015) eKLR, *Daniel Torotich Arap Moi vs Mwangi Stephen Muriithi & another* (2014) eKLR and *William Kabogo Gitau vs George Thuo & 2 others* (2010) 1 KLE 526.
16. It was the Appellant's submission that the Respondent did not advance him any loan and that the post-dated cheques were issued by Stamar Stationers & General Supplies. That the said entity was not enjoined as an interested party. It was the Appellant's submission that there had been no evidence to indicate whether the Appellant had been sued as a director or shareholder of Stamar Stationers and General Supplies.
17. The Respondent prayed that the Judgment of the trial court be set aside and he be awarded the costs of this Appeal.

### **The Respondent's Submissions.**

18. The Respondent submitted that he proved that the Appellant received the money because he produced photographs of the Appellant receiving and counting the money and that beside the money, there was a cheque on the table.
19. It was the Respondent's submission that he produced the post-dated cheques which clearly showed the Respondent's signature. That the signature on the post-dated cheques were similar to the one contained in his statement and this proved that it was the Appellant who issued and signed the cheques.
20. The Respondent submitted that even though the Appellant denied knowledge of Stamar Supplies, this court should look at the name "Stamar" which was a combination of the names Stanley and Margaret who was the Appellant's wife. That this was not a coincidence.
21. It was the Respondent's submission that there was a valid agreement as per the law. He relied on *Alfred Anekeya Mangu'la T/A Alfabetty Enterprises vs Paul Indimuli & another* (2022) eKLR which stated that a money lending agreement need not be in writing and the fact that the agreement was not in writing did not make it unenforceable.
22. The Respondent submitted that the corporate veil needed to be lifted because the Appellant received the money in person but issued the cheques in the name of Stamar Stationeries and General Supplies as security further arguing that companies did not sign cheques.
23. It was the Respondent's submission that he discharged his evidentiary burden of proof and that the onus to disprove the evidence shifted to the Appellant. That the Appellant's defence and testimony were mere denials.
24. The Respondent submitted that there was a valid agreement and the Appellant breached the agreement. That the Appellant ought to have provided a valid cheque and by failing to do so, he breached the terms of their agreement.
25. The Respondent submitted that the Appeal lacked merit and prayed that it be dismissed.
26. I have gone through and carefully considered the Record of Appeal dated 17th May 2023, the Appellant's Written Submissions dated 9th August 2023 and the Respondents' Written Submissions dated 20th September 2023. The only issue for my determination was whether the Respondent proved his case to the required legal standard.
27. Section 107 of the [\*Evidence Act\*](#) describes the burden of proof as follows:-



- (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.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
28. The Halsbury's Laws of England, 4th Edition, Volume 17, describes such burden of proof as:-
- The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues
- The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?
29. The standard of proof in civil cases is on the balance of probabilities. In *James Muniu Mucheru vs National Bank of Kenya Ltd* (2019) eKLR, the Court of Appeal stated as follows: -
- “Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable.”
30. In differentiating between the legal burden and evidential burden of proof, *Mrima J. in Ahmed Mohammed Noor vs Abdi Aziz Osman* (2019) eKLR stated:-
- “.....For clarity, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant.”
31. The interplay and distinction between the legal burden of proof and evidential burden was given clarity by the Supreme Court of Kenya in *Raila Amolo Odinga & Another vs. IEBC & 2 Others* (2017) eKLR, as follows:-
- “Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
- It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground



is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.....”

32. It was the Respondent’s case that the Appellant had requested for a loan of Kshs 715,000/=. The Respondent testified that he agreed to the request and he advanced Kshs 130,000/= on 10th July 2018, Kshs 260,000/= on 28th July 2018 and Kshs 325,000/= on 5th August 2018. The Respondent submitted that they had a valid agreement with the Appellant and the Appellant breached that agreement when he offered invalid cheques.
33. The Appellant on the other hand denied the existence of any written or oral agreement between him and the Respondent. He further submitted that the Respondent did not call any witness in the trial court to support his claim.
34. I have considered the trial court record and I have noted that the Respondent (then Plaintiff) did not attach a written agreement detailing the nature of their transaction. That leaves this court to consider the possibility of an oral agreement between the parties.
35. Contracts, whether written or oral, must fulfil similar conditions for them to be valid and enforceable. The conditions include:-
  - i. Offer
  - ii. Acceptance
  - iii. Consideration
  - iv. Legality.
36. The Court of Appeal in *William Muthee Muthami versus Bank of Baroda (2014)* eKLR held:-

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”
37. Further, the Supreme Court of Kenya in *Moi University vs Oindi Zaipelline and another in Petition Number 43 of 2018* stated:-

“It is trite that for any contract to be valid at law, it must meet certain elements commencing with offer and acceptance. The essential components of a contract as Petition No.43 of 2018 Page 14 was observed by Harris JA in *Garvey v Richards [2011] JMCA Civ 16* ought to ordinarily reflect the following principles:

“[10] It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”



38. Regarding oral agreements as in the present case, the contract need not be in writing but can be inferred from the conduct of the parties. The Court of Appeal in *Ali Abid Mohammed vs Kenya Shell & Company Limited* (2017) eKLR, stated that:-

“It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded.....”

39. I am persuaded by *Mulwa J. in Patrick Njuguna Kimondo vs Geoffrey Vamba Mbuti* (2019) eKLR, where she held:-

“.....I am of the opinion that oral agreements supported by credible evidence can be and are enforceable.....”

40. In this case, the burden of proof lay with the Respondent to show that there was a valid agreement between him and the Appellant. For the oral agreement to be valid, he had to show that there had been some consideration, that there had been an offer and that he offer had been accepted. Additionally, the conduct of both parties in relation to the offer and repaying of the loan could confer validity upon the oral agreement.

41. The Respondent submitted that he had proved that the Appellant received money by virtue of the photographs he produced and marked as P.Exh 1a-c. Production of photographic evidence is governed by Section 106B of the *Evidence Act* which states:-

1. Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
2. The conditions mentioned in subsection (1), in respect of a computer output, are the following—
  - a. the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
  - b. during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
  - c. ..
  - d. the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
3. ...
4. In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—



- a. identifying the electronic record containing the statement and describing the manner in which it was produced;
- b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- c. dealing with any matters to which conditions mentioned in subsection (2) relate; and
- d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”

42. While discussing the application of the above section, the Court of Appeal in *County Assembly of Kisumu & 2 Others vs. Kisumu County Assembly Service Board and 6 Others* (2015) eKLR observed that:-

“Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document ‘if the conditions mentioned in this section are satisfied in relation to the information and computer.’

In our view, this is a mandatory requirement which was enacted for good reason. The Court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in subsection 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced.”

43. With regard to the requisite contents of a certificate, the court in the above case went on state as follows:-

“The *Evidence Act* does not provide the format the certificate required under subsection 106B (2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.”

44. The Respondent failed to attach the requisite Certificate and this in my view was fatal. The authenticity of the photographs cannot be vouched for and is called into question by this court. It is therefore my finding that the said photographs were inadmissible. I agree with the trial court that the photographs were of no probative value.

45. The Respondent stated that the Appellant issued the post-dated cheques dated 10th July 2018, 28th July 2018 and 5th August 2018. He produced the cheques and they were marked as P.Exh 2a, 2b and 2c. The Appellant on the other hand stated that he did not issue any post-dated cheques and the cheques that the Respondent had presented as evidence were drawn by Stamar Stationers and General Supplies.

46. The Respondent submitted that the signature on the post-dated cheques and the signature on the witness statement filed by the Appellant on 4th July 2022 were similar and therefore it confirmed that the Appellant had signed the cheques. The Respondent invited this court to look into the name ‘Stamar’ and he suggested that the name was an acronym for the names Stanley (Appellant) and Margaret (the Appellant’s wife) and that it the entity Stamar Stationers and General Supplies belonged to the Appellant.



47. In my analysis of the evidence in the trial court, the Respondent stated that he lent the Appellant Kshs 715,000/= in cash as a soft loan and as security for the loan, the Appellant drew and handed over to him three post-dated cheques that covered the total amount of the loan. The Respondent produced the three post-dated cheques as P.Exh 2a, P.Exh 2b and P.Exh 2c. I have gone through the exhibits and it is shown that the post-dated cheques were not honoured due to insufficiency of funds.
48. When the Respondent was cross examined, he stated that the Appellant wanted the loan so that he could purchase books. Further that when the Appellant failed to refund him his money, he reported the matter to the Police after which the Appellant promised to pay him.
49. I have gone through the Appellant's defence and statement filed on 4th July 2022. The Appellant adopted his statement to be his testimony and after going through the statement and his defence, it is my finding that the Appellant offered mere denials to the Respondent's claim. He denied receiving money from the Respondent and further denied any connection with the entity Stamar Stationers & General Supplies in whose name the post-dated cheques were drawn.
50. As stated earlier in this Judgement, the legal and evidentiary burden of proving a case lay with the claimant and in this case, the Respondent. The evidentiary burden may however shift to the opposing party depending on the nature of evidence that will be adduced. In the present case, the Respondent was able to demonstrate that he gave the Appellant Kshs 715,000/= as a loan and he received three post-dated cheques as security from the Appellant, albeit in the name of Stamar Stationers & General Supplies.
51. In my view, once the Respondent established that he received the cheques from the Appellant, the evidentiary burden of disowning or disproving the existence or validity of the post-dated cheques shifted to the Appellant. He had to produce evidence to rebut the Respondent's claim. As I have stated earlier, the Appellant gave mere denials and did not adduce evidence to rebut the Respondent's claim. It is my finding that the Appellant failed to discharge his evidentiary burden of proof.
52. I have considered the conduct of the parties. The Appellant offered the post-dated cheques in the name of Stamar Stationers & General Supplies to the Respondent as security. The Appellant cannot run away from this fact as he was in possession of the cheques before he handed them to the Respondent. I have also considered the fact that the Respondent reported the matter to the Police Station after the Appellant had failed to pay him. The question that I ask myself is would the Respondent would report the Appellant to the police for no reason? I think not.
53. It is clear to me from the evidence that there existed a contractual relationship between the parties. Money was offered by the Respondent and accepted and the Appellant who offered security in the form of three post-dated cheques. As stated earlier, the parties conduct afterwards also led credence to the existence of a contract. It is my finding that the contract was valid and enforceable.
54. Having found that there existed a contract between the parties, it is my finding that the Respondent proved his claim on a balance of probabilities. The breach of the contract was remedied by the trial court when it awarded the Respondent the sum of Kshs 720,000/=.
55. In the end, there is no merit in the Appeal dated 17th May 2023 and the same is dismissed.
56. The Respondent shall have the costs of the Appeal. The costs of the suit and interest thereon shall remain as awarded by the trial court.
57. Orders accordingly.



**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 11TH DAY OF APRIL,  
2024**

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**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of Mr Kadet for the Respondent and in the absence of the Appellant.  
Siele (Court Assistant)

