



**Monari v Onyari (Civil Appeal E60 of 2022) [2024] KEHC 9972 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 9972 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL APPEAL E60 OF 2022  
SN MUTUKU, J  
MAY 9, 2024**

**BETWEEN**

**BENARD MONARI ..... APPELLANT**

**AND**

**POLYCARP KENGARA ONYARI ..... RESPONDENT**

*(Being an appeal from the Judgement of Hon. Kinyatta, Adjudicator in  
Kajiado Small Claims Court Case No. E042 of 2022 delivered on 7th July 2022)*

**JUDGMENT**

1. The Appellant being aggrieved and dissatisfied with the Judgement of Hon Kinyatta adjudicator in Kajiado Small Claims Court Case No. E042 of 2022 delivered on 7.7.2022 hereby appeals to this Honourable court and sets forth the following grounds of appeal:
  - a. That the Honourable Adjudicator erred by holding that the Respondent had proved his case on a balance of probabilities or to the required standards.
  - b. That the Honourable Adjudicator did not consider evidence of the Appellant.
  - c. That the Honourable Adjudicator did not give reasons to support the judgement.
  - d. That the Honourable Adjudicator did not analyze the evidence of the Appellant.
2. They urged that the appeal be allowed and that the judgement of the lower court be set aside.
3. The appeal was canvassed by way of written submissions.

**Appellant's submissions**

4. The Appellant filed his submissions dated 14<sup>th</sup> December, 2023. He has submitted that the Respondent was the one refunding money owed to him and not the other way round; that the



Appellant loaned the Respondent Kshs.300,000/ and that the only money in contention is Kshs. 50,000/-. He claims that it was an error for the court to allow the entire claim.

### **Respondent's submissions**

5. The Respondent filed his submissions dated 29<sup>th</sup> January, 2024. It was submitted that this court has a duty to examine the evidence afresh on matters of law and fact, subject the whole evidence to scrutiny and arrive at an independent decision (see *Selle -vs- Associates Motor Boat & Co* [1968] EA 123).
6. He submitted that the grounds of appeal were not justified by the Appellant. He argued that the lower court was right in giving judgment in his favour; that they demonstrated through documentary evidence that Kshs. 350,000 was transferred from his account through RTGS on 24<sup>th</sup> February, 2022 to the Appellant; that on the same date, the Respondent withdrew Kshs 100,000 on the same day as shown in the statement and that Kshs 50,000 was given to the Appellant.
7. He submitted that the Honourable court was right in rejecting the Appellant's claim that he gave the Respondent Kshs. 300,000/-because it was not backed by evidence. The Respondent urged that this appeal be dismissed with costs to him.

### **Analysis and Determination**

8. I have read the entire record of the lower court and I have understood the evidence adduced by both parties with a view to arriving at my own independent decisions guided by the evidence and the law (*Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212). Further, I have read and understood the grounds of appeal and the arguments of parties through their respective submissions.
9. It is my understanding from the Statement of Claim, that there was a mutual agreement between the parties for a friendly loan of Kshs 400,000. The Respondent claimed to have loaned the Appellant that money which was to be repaid in 2 weeks' time. The Respondent stated that he transmitted Kshs. 350,000 on 23<sup>rd</sup> February, 2022 through an RTGS transfer from his Kenya Commercial Bank account No. 119889xxxx to the Appellant's account No. 071019236xxxx held at Equity Bank. He stated further that he withdrew Kshs. 100,000 out of which he sent Kshs. 50,000 to the Appellant. He stated that the Appellant did not repay the money.
10. The Appellant denied that the Respondent loaned him Kshs 400,000. Instead, he claimed that he is the one who loaned money to the Respondent in cash. He stated that on 22<sup>nd</sup> December 2021 at his house, he gave the Respondent Kshs. 100,000/-. That on 5<sup>th</sup> January 2022 he gave the Respondent a further Kshs. 200,000/-.
11. During re-examination the Appellant stated that Kshs. 300,000 given to him by the Respondent was in repayment of the debt he had and that he requested for an extra 50,000/- which totaled to Kshs. 350,000/-.
12. The general principle is that an appellate court will only interfere with a discretionary power of a trial court if it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice as stated in *Mbogo & Another vs Shah*, [1968] EA 93 where the court stated that:

“An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as



a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

13. The trial court in this matter looked at the evidence adduced before it. I agree with the trial court on the evidential burden which states that he who alleges must prove. Section 109 of the [Evidence Act](#) provides as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

14. The issue is whether the Appellant proved his claim on a balance of probabilities. In [Evans Nyakwana vs. Cleophas Bwana Ongaro](#) (2015) eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the [Evidence Act](#), Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person..... Section 108 of the [Evidence Act](#) provides the burden lies in that person who would fail if no evidence at all were given as either side.”

15. The question as to what amounts to proof on a balance of probabilities was discussed in [William Kabogo Gitau vs. George Thuo & 2 Others](#) [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

16. I have read the evidence of both the Appellant and the Respondent. The Appellant is shown in evidence to have told the court that he did not have any evidence documentary or otherwise that he had given the Respondent any money. He told the court that he gave the Respondent Kshs 100,000 in cash on 22<sup>nd</sup> December 2021 while both were in his (Appellant’s) house and Kshs 200,000 on 5<sup>th</sup> January 2022, again he did not show any evidence documentary or otherwise except by the word of his mouth.

17. I have considered this matter. I note that the Appellant has not argued the grounds of appeal he has advanced. I have read the judgment of the lower court. I find that the Adjudicator applied correct principles to back up her findings. She found that the Appellant did not adduce evidence to discharge the evidentiary burden that the money he received from the Respondent was repayment of the money he had loaned the Respondent.

18. The judgment as captured in the determination shows that the trial court considered and analyzed all the evidence and arrived at a conclusion that the Respondent had proved his case on a balance of



probabilities. In applying *Mbogo & Another case*, I find that I have no reason to fault the Adjudicator in her decision. On my own analysis, I arrive at the same conclusion that the Appellant did not adduce evidence to support his claim that he was being repaid by the Respondent. Therefore, I have no reason to interfere with her decision.

19. Consequently, the Appeal is dismissed with costs to the Respondent.
20. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED ON 9<sup>TH</sup> MAY 2024.**

**S. N. MUTUKU**

**JUDGE**

In the presence of:

Mr. Itaya for the Appellant

No Appearance for the Respondent

