Luhar v Jethwa (Civil Appeal E537 of 2023)
[2024] KEHC 11310 (KLR) (Civ) (24 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11310 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E537 OF 2023

JM OMIDO, J

SEPTEMBER 24, 2024

BETWEEN

DIPESH LUHAR ..... APPELLANT

AND

AMIT JAYANT JETHWA ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. M.W. Murage Principal Magistrate delivered on 26th May, 2023 in Milimani Commercial Courts CMCC No. E12579 of 2021)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. M.W. Murage delivered on 26th May, 2023 in Milimani Commercial Courts CMCC No. E12579 of 2021.

2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 23rd June, 2023, 2023 upon which it seeks to upset the judgement and decree of the lower court are as follows:

    i. The Honourable Court erred in law and fact that the Appellant did not lend money to the Respondent despite the Respondent acknowledging the same.

    ii. The Honourable Court erred in law and fact in ignoring the evidence adduced by the Appellant on the existence of a debt from the Respondent.

    iii. The Honourable Court erred in law and fact by finding in favour of the Respondent despite failing to rebut the evidence adduced by the Appellant on the existence of a debt.

    iv. The Honourable Court erred in fact by ignoring the previous long-term relationship that existed between the parties leading to disbursement of the loans.

v. The Honourable Court erred in law by stating that a written agreement is required in money lending transactions despite finding to the contrary in the Respondent's favour.

vi. The Honourable Court erred in law and fact by relying on the Respondent's averment that was not supported by evidence.

vii. The Honourable Court's decision was contradictory and biased in favour of the Respondent on the requirement of loan agreement.

viii. The Honourable Court erred in law and fact by solely relying on the forensic examination report adduced by the Respondent while ignoring the Appellant's forensic examination report in response.

ix. The Honourable Court erred in law and fact by ignoring the Appellant's forensic examination report which was in response to the Respondent's report.

x. The Honourable Court misapplied the law and fact thereby arriving at an erroneous finding.

3. The Court directed that the appeal proceeds by way of written submissions and gave the parties herein timelines for filing their submissions. Both parties filed their respective submissions.

4. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Sielle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

5. In Sielle, Sir Clement De Lestang observed that:

> " This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

6. The claim before the lower court, as per the plaint dated 12th November, 2021, was one based on contract whereby the Respondent herein (the Plaintiff before the trial court) claimed and pleaded that he loaned the Appellant money, which the latter agreed to repay back with interest, but failed to do so.

7. The Respondent stated that the transactions were as follows:

a. That on 10th June, 2016, the Appellant advanced to the Respondent a sum of Ksh.750,000/- at an agreed monthly interest of 27.13%, which was payable over a period of 3 years. That as at 31st December, 2020, the total amount the Respondent owed the Appellant with regard to the transaction was Ksh.1,055,212.50/- being the principal amount plus the interest accrued.

b. That on 11th August, 2016, the Appellant advanced to the Respondent a sum of Ksh.1,000,000/- at an agreed monthly interest of 27.13%, which was payable over a period of 3 years. That as at 31st December, 2020, the total amount the Respondent owed the Appellant with regard to the transaction was Ksh.1,406,950/- being the principal amount plus the interest accrued.

c. That on 26th November, 2016, the Appellant advanced to the Respondent a sum of Ksh.320,000/- at an agreed monthly interest of 27.88%, which was payable over a period of 3 years. That as at 31st December, 2020, the total amount the Respondent owed the Appellant with regard to the transaction was Ksh.453,837.44/- being the principal amount plus the interest accrued.

d. That on diverse dates between 4th January, 2017 and 3rd April, 2018, the Appellant advanced short-term loans at agreed daily rates to the Respondent totaling Ksh.1,668,000/-. That as at 31st December, 2020, the total amount the Respondent owed the Appellant with regard to the transactions was Ksh.3,400,200/- being the principal amount plus the interests accrued.

8. The Appellant pleaded that as at 31st December, 2020, the total amount, inclusive of interests, that the Respondent owed him under the agreement(s) was Ksh.6,316,199.94/- and that he filed the suit following breach of and/or failure by the Respondent to honour the agreement(s).

9. The reliefs that the Appellant sought were as follows:

a. The outstanding amount being Ksh.6,316,199.94/- as at 31st December, 2020.

b. Costs of the suit.

c. Interest on (a) and (b) above at court rates from 18th January, 2018 until full payment.

d. Any such other or further relief as the Honourable Court may deem appropriate.

10. The Respondent resisted the Plaintiffs claim by filing before the lower court an undated statement of defence. He denied entering into any loan agreement(s) with the Appellant and further denied being indebted to the Appellant as claimed or at all. He sought that the suit be dismissed with costs.

11. The Appellant testified before the trial court as PW1 and adopted the contents of his statement dated 12th November, 2021 in which he restated that he loaned the Respondent, whom he described as a friend, money as pleaded in the Plaint (as reproduced under paragraphs 7(a) to (d) above).

12. He stated further that he deposited some of the loaned amount directly into the Respondent's bank account while some other amounts were collected by the Respondent from the Appellant's office on various dates.

13. The Appellant stated that the Respondent was paying interest amount of Ksh.47,000/- up to 20th May, 2019 when he stopped making payments.

14. That as at 31st December, 2020, Respondent owed him under the agreement(s) Ksh.6,316,199.94/-, which included unpaid interests.

15. That the Respondent breached the agreement(s) by declining, neglecting and/or failing to pay the loaned amount and/or defaulting to pay the same, despite demands made by the Appellant.

16. The Appellant produced the following documents before the trial court in support of his case:Demand letters.The Appellant's loan schedule.A bundle of bank slips.A bundle of vouchers.Communication records purported to be between the Appellant and the Respondent.

17. Upon cross-examination, the Appellant told the trial court that the parties did not execute any written agreement(s).

18. The Respondent testified before the trial court and denied entering into any loan agreement(s) with the Appellant and further denied being indebted to the Appellant. The Respondent stated that he

had paid back to the Appellant the monies that were loaned to him. He denied the signatures on the documents produced by the Appellant, stating that he did not author them. His evidence as recorded by the trial court was brief and was as follows:

> "I am Amit Jayant Jethwa. I am a consultant. I live in Nairobi. I have interacted with the Plaintiff herein. We did not have an agreement. Whatever was loaned, I returned to him. I did not sign any petty cash vouchers. The signatures do not belong to me. I rely on the forensic report as my evidence."

19. The Respondent did not produce the report that he was referring to as an exhibit.

20. Upon cross examination, the Respondent admitted that the Appellant loaned him "about Ksh.8,000,000/-" in various amounts as specified by the Appellant but added that he repaid back all the money together with the "various interests". In that respect, his evidence reads as follows:

> "I met Dipesh through business and we became friends. I have never sent text messages and WhatsApp messages.
>
> He loaned me about Ksh.8m and I paid him back. He would give me cash. There were various amounts and various interests as he has specified."
>
> I left DTB Bank. I was not fired due to fraud."

21. I have considered the grounds of appeal as set out in the Memorandum of Appeal, the submissions by the parties herein and the record of the lower court. The issues for determination, as discernible from the record are as follows:

    a. Whether the Appellant proved on a balance of probabilities that he entered into agreement(s) with the Respondent, to loan the Respondent money to be paid back with interest and whether the Appellant advanced to the Respondent the said loans, and how much the amount loaned was, if any.

    b. If the answer in (a) above is in the affirmative, whether the Respondent breached the loan agreement(s) and whether the Respondent repaid to the Appellant the loaned amounts together with the applicable interests and/or whether the Respondent is indebted to the Appellant, and to what tune.

    c. What is the appropriate order as to costs?

22. With regard to issue (a), the Respondent initially denied entering into any money lending agreement with the Appellant. He denied being indebted to the Appellant. However, in his further testimony, he admitted that the Appellant loaned him "about Ksh.8,000,000/-" in various amounts but added that he repaid back all the money together with the "various interests" that were applicable. On the basis of the admission by the Respondent, the learned trial Magistrate correctly, in my view, reached the finding that the Respondent confirmed being loaned by the Appellant Ksh.8,000,000/- without a written agreement.

23. It is to be noted that the Appellant produced printed SMS messages and WhatsApp conversations which he said were exchanged between the parties. My understanding of the case is that the intended purpose of the printouts was to serve as evidence that the Appellant remitted to the Respondents the amounts and that the Respondent was indebted to the Appellant.

24. As stated above, among the exhibits that the Appellant produced in support of his case were bank slips, 29 petty cash vouchers and communication records between the Appellant and the Respondent

and a Forensic Document Examiner's report prepared by Mr. Martin E. Papa of Ms. Spectral Forensic Services, which the trial court christened the SFS report. The Appellant claimed that the vouchers were signed by the Respondent and that the communication records comprised of messages through SMS and WhatsApp that were exchanged between the two.

25. In the Forensic Document Examiner's report, Mr. Papa stated that he received from the Appellant and analyzed 29 petty cash vouchers to ascertain whether the signatures on the same were those of the Respondent. Upon analyzing the same using the methodology stated in his report, he formed the opinion that 27 of the 29 vouchers had the Respondent's signature, when compared with his known signatures. The signatures in two of the vouchers were however not those of the Respondent.

26. In the same report, Mr. Papa indicated that he extracted SMS and WhatsApp messages exchanged between cellphone numbers 0722-74 and 0724-4**5 belonging to the Appellant and the Respondent respectively and compiled the two sets of messages in his report. The report has a certificate stated to be issued under Section 65(8) as read with Section 106(B) of the *Evidence Act*. A perusal of the messages compiled in the report provides information that there were exchanges between the two numbers via SMS and WhatsApp and that the Respondent borrowed money from the Appellant and acknowledged indebtedness.

27. On the veracity of the said documents, the learned trial Magistrate rendered herself as follows:

> " The Plaintiff in prove (sic) of the fact that he lent money to the Defendant herein relied on SMS messages and Whats-up (sic) conversations between him and the Plaintiff as well as the bank slips and vouchers. First, on the issue of the messages and Whats-up (sic) conversations alleged to be between the Plaintiff and the Defendant herein produced as SFS Report has not been accompanied by a certificate of electronic evidence as mandated by Section 106B of the *Evidence Act*. I have also considered the said conversation and the same does not indicate the sender or the receiver of the said messages and I have lost site whether the same originated between the parties herein or someone else sent them. They have not demonstrated whether the money was ever loaned and how much.
>
> On the issue of the vouchers DW1 told the court that he received money loaned earlier in cash and paid the same in cash. He confirmed never having signed any voucher. Furthermore, the signature appended to the said vouchers were not his and this was fortified by the forensic report which proved that the signature was authored by someone else but not the Defendant. I have gained undoubtable impression that the money was loaned in cash and the court has also lost sight of the import of the vouchers accompanying the bank slips which was not sufficient proof as it did not indicate the purpose for which the money was being deposited and the court is not allowed to be seen aiding any party to a suit by filling in the gap.
>
> On the issue of vouchers, DW1 told the court that he received money loaned earlier in cash and paid the same in cash. He confirmed never having signed any voucher. Furthermore, the signature appended to the said vouchers were not his and this was fortified by the forensic report which proved that the signature was authored by someone else."

28. With that, the trial court went on to reach the finding that the Appellant did not prove his case on a balance of probabilities, resulting which the suit was dismissed with costs.

29. The learned trial Magistrate's findings, upon consideration by this court, were plainly wrong for the following three reasons.

30. First, the report clearly indicated the cellphone numbers between which the SMS and WhatsApp messages were exchanged, as being 0722-74 and 0724-45 belonging to the Appellant and the Respondent respectively. It is to be noted that the Respondent did not deny or in any other way contest ownership of cellphone number 0724-4**5. The trial court's finding that the same did not indicate the sender or the receiver of the said messages was therefore in error.

31. Second, it is clear from the report prepared by Mr. Papa, contrary to the findings of the trial court, that the author complied with Section 106(B) of the *Evidence Act*, by preparing and attaching a certificate under the said provision of statute to the documents that he extracted.

32. The third reason is that the trial court did not explain how it arrived at the decision that the signatures on the 27 vouchers did not belong to the Respondent, yet the document examiner, who is the expert in that respect stated that the Respondent authored the same. It is to be remembered that although the Respondent filed a Forensic Document Examination Report said to have been prepared by one Mr. Daniel M. Gutu, he did not produce the same as an exhibit and the same was therefore not available to the trial court for consideration.

33. Relying on a forensic report that did not form part of the court record, the same not having not been produced as an exhibit went against the rules of evidence.When a document is filed as part of the list of documents, the document though in the court file, does not become part of the judicial record until it is tendered or produced in evidence as such (see Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR and Jackson Ndwiga v Elizabeth Thara Ngahu [2021] eKLR.

34. As regards the admission that the Respondent borrowed and received from the Appellant "about Ksh.8,000,000/-", the finding of the learned trial Magistrate was that the said amount was money loaned by the Appellant earlier in cash and that was repaid in cash. I understand the learned Magistrate to say that the said amount concerned a different transaction from the amounts that were claimed through the suit before her.

35. With profound respect, that finding by the trial court was not based on the evidence that was recorded. There is nowhere in the testimony of the Respondent, either in his examination-in-chief or upon being cross-examined, which I have reproduced above, where he stated that the Ksh.8,000,000/- that he admittedly borrowed from the Appellant comprised a different or separate transaction other than the ones addressed in the Appellant's pleadings.

36. The Respondent, as I have stated above, admitted to borrowing money from the Appellant, which he was to pay with interest. In his own words, he stated that;

> " He loaned me about Ksh.8m and I paid him back. He would give me cash. There were various amounts and various interests as he has specified. "

37. The Respondent's reference to various amounts and various interests as specified by the Appellant are without doubt those the Appellant specified, described and itemized in his evidence, as per paragraphs *7* and *11* above.

38. It is to be noted that Ksh.8,000,000/- is a large amount and if indeed the Respondent paid back the amount to the Appellant, there is no reason that he presented as to why he did not produce any evidence of having refunded the money.

39. It is to be remembered that the standard of proof in civil cases is on a balance of probabilities. The burden of proof is on the party alleging the existence of a fact which he wants the court to believe.

40. Section 107 (1) and (2) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows: -

> " 107
>
> (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 he burden of proof lies on that person."

41. In Miller v Minister of Pensions [1947] All E.R 372, Lord Denning addressed this standard in the following terms: -

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

42. With the Respondent's admission and the other evidence that I have addressed above, my persuasion is that the above standard has been discharged on the case that the Appellant presented before the trial court on the basis of the admission, notwithstanding that the Respondent denied indebtedness to the Appellant in his defence. In the case of CMC Aviation Ltd v Crusair Ltd (No.1) [1987] KLR 103 the court observed that:

> " The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."

43. From the foregoing, as there is an admission by the Respondent that the Appellant loaned him "about Ksh.8,000,000/-", and as there is no evidence presented by the Respondent that he paid back the money, I am in the premises persuaded that the Appellant proved on a balance of probabilities that he entered into agreement(s) with the Respondent, to loan the Respondent the money that the Appellant specified in his evidence and that the same was to be paid back with interest.

44. In Edward Muriga through *Stanley Muriga v Nathaniel D. Schulter Civil Appeal No.23 of 1997*, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.

45. The amounts that the Respondent admitted to have received from the Appellant "as specified" were specifically set out in the plaint as follows"

a. That on 10th June, 2016, the Appellant advanced to the Respondent a sum of Ksh.750,000/- at an agreed monthly interest of 27.13%, which was payable over a period of 3 years. That as

at 31st December, 2020, the total amount the Respondent owed the Appellant with regard to the transaction was Ksh.1,055,212.50/- being the principal amount plus the interest accrued.

b. That on 11th August, 2016, the Appellant advanced to the Respondent a sum of Ksh.1,000,000/- at an agreed monthly interest of 27.13%, which was payable over a period of 3 years. That as at 31st December, 2020, the total amount the Respondent owed the Appellant with regard to the transaction was Ksh.1,406,950/- being the principal amount plus the interest accrued.

c. That on 26th November, 2016, the Appellant advanced to the Respondent a sum of Ksh.320,000/- at an agreed monthly interest of 27.88%, which was payable over a period of 3 years. That as at 31st December, 2020, the total amount the Respondent owed the Appellant with regard to the transaction was Ksh.453,837.44/- being the principal amount plus the interest accrued.

d. That on diverse dates between 4th January, 2017 and 3rd April, 2018, the Appellant advanced short-term loans at agreed daily rates to the Respondent totaling Ksh.1,668,000/-. That as at 31st December, 2020, the total amount the Respondent owed the Appellant with regard to the transactions was Ksh.3,400,200/- being the principal amount plus the interests accrued.

46. Having made the above findings, I reach the persuasion that the Appellant proved his case before the trial court on a balance of probabilities.

47. In light of that, I proceed to allow the appeal, set aside the orders of the trial court dismissing the suit with costs and substitute in its place an order entering judgement for the Appellant (the Plaintiff) against the Respondent (the Defendant) on the claimed amount of Ksh.6,316,199.94/- on the basis of the admission by the Respondent that the Appellant loaned him "about Ksh.8,000,000/- as was specified by the Appellant."

48. Interest is also awarded to the Appellant at court rates from the date of filing of the suit in the lower court.

49. Costs of the suit before the lower court and of this appeal shall be borne by the Respondent.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 24TH DAY OF SEPTEMBER, 2024.

JOE M. OMIDO

JUDGE

For Appellant: Mr. Kimuyu.

For Respondent: Ms. Andeyi.

Court Assistant: Ms Njoroge.