



**Manyara v Odhiambo (Civil Appeal E975 of 2023)
[2024] KEHC 11880 (KLR) (Civ) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11880 (KLR)

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

CIVIL

CIVIL APPEAL E975 OF 2023

RC RUTTO, J

OCTOBER 4, 2024

BETWEEN

JUSTUS MWENDA MANYARA APPELLANT

AND

SAMUEL ODHIAMBO RESPONDENT

(Being an Appeal from the Judgment of the Small Claims Court of Kenya at Nairobi delivered by the Hon. Resident Magistrate Gillian Simatwo, on the 25th August, 2023 in Nairobi SCC COMM NO E1374 OF 2023)

JUDGMENT

1. This appeal arises from a Judgment and decree entered in Nairobi SCC COMM No E1374 of 2023. In the said suit, the Appellant (Claimant) sued the Respondent for breach of contract relating to money received as a soft loan from the claimant.
2. The genesis of this dispute as stated in the statement of claim was that on 1st August, 2022, the Respondent requested a soft loan of Kshs 102,000/= from the Appellant. That it was a term of the said contract that the same was repayable on or before 31st August, 2022.
3. It was the Appellant's case that he disbursed the said amount to the Respondent via MPESA in two tranches the first one being Kshs 12,000 on 1st August, 2022 and the second Kshs 90,000/= on 2nd August, 2022. That the Appellant on several occasions sought audience with the Respondent for reimbursement of the amount loaned but he was unwilling to refund the same.
4. In response by a Statement of Claim dated 4th April 2023, the Respondent stated that the amount claimed was not advanced as soft loan but sent as a corporate social responsibility (CSR) fund to enable



- the Appellant's company obtain contract for provision of security services to the residents of Al Nasra gardens.
5. The trial Magistrate delivered her judgment on 25th August, 2023 and dismissed the claim for lack of merit. Each party was directed to pay its own costs.
 6. The Appellant aggrieved with the entire judgment, lodged this appeal on 22nd September, 2023 setting out the following grounds of appeal:
 - i. That the Honourable adjudicator herein erred in law and fact in holding that the Respondent did not owe the Appellant KES 102,000/= as pleaded in the claim.
 - ii. That the Honourable Adjudicator erred in law and fact by dismissing the appellant's claim against the weight of evidence.
 - iii. That the Honourable adjudicator erred in law fact by ruling that the claimant did not tender any evidence to support the claim that the said KES 102,000/= given to the Respondent was as a loan.
 - iv. That the Honourable adjudicator erred in law and fact by holding that the fact that the appellant was a director of Salsan Security, was enough reason to create doubt about the loan.
 - v. That the Honourable adjudicator erred in law and fact by introducing issues that had not been brought by the parties in their pleadings.
 - vi. That the Honourable adjudicator erred in law and fact by ignoring the demand letter given to the Respondent to repay the money.
 - vii. That the Honourable adjudicator erred in law and fact by ruling that a soft loan ought to have a repayment date without considering that the terms of the loan were agreed verbally.
 - viii. That the Honourable adjudicator erred in law and fact by holding that the Mpesa statement produced in court was not sufficient to show indebtedness by the respondent.
 - ix. That the Honourable adjudicator erred in law and fact by failing to appreciate that there was no consideration for the payment of KES 102,000/= given to the Respondent by the appellant.
 7. The Appellant prayed that the appeal be allowed with costs and, that the judgment delivered on 25th August, 2023 and subsequent decree be set aside and substituted with a judgment for the sum of Kshs 102,000/= in favour of the Appellant.
 8. The appeal was canvassed by way of written submissions.

Appellant's submissions

9. The Appellant's submissions were dated 10th June, 2024. It identified three issues for determination. First whether the money transferred from the Claimant to the Respondent constitutes a loan agreement. Second is whether the Respondent provided sufficient evidence to support their claim that the money was sent as CSR funds and thirdly, whether the Appellant proved his case on a balance of probabilities.
10. On the first issue it was submitted that the sum of Kshs 102,000/= sent to the Respondent was a friendly loan and need not to be in writing. Reference was made to the case of Kanji Jadvla Valji v Trinity Prime Investment Ltd & 2 others [2014] eKLR and submitted that the Appellant had discharged the burden that he was the one who deposited the said amount as evidenced by the Mpesa transaction.



11. It was the Appellant submission that the Respondent was unable to discharge the burden of proving that the money was his. That the Respondent failed to prove that the money was for Corporate Social Responsibility (CSR) for Al Nasra Gardens Residents Association.
12. The Appellant went on to submit that at no point did he enter into a contract with Al Nasra Resident Association or vice versa. He relied on the case of *Salomon v Salomon & Co. Ltd* [1897] AC 22 and submitted that the Appellant was distinct from Salsaan Security Services Ltd. It was their further argument that there was no evidence of receipts or invoices to support the assertion that the said amount was for CSR.
13. The second issue was whether the Respondent provided sufficient evidence to support their claim that the money was sent as CSR funds. He submitted that the Respondent failed to attach any supporting evidence to support his claim that the money advanced was intended for CSR. He relied on the case of *Peter Ngugi Kigira v Fredrick Nganga Kiriga* [2021] eKLR.
14. The Appellant submitted that the Respondent acknowledged receipt of the money sent but failed to explain the reason for the same or tender evidence of how the sum was utilized for the alleged CSR. He cited the case of *Karuru Munyoro v Joseph Ndumia Murage & another* Nyeri HCCC No 95 of 1988 and submitted that the Respondent failed to adduced any evidence that controverted the Appellant's case.
15. The final issue was whether the Appellant proved his case on a balance of probabilities. It was submitted that the Appellant produced evidence to confirm that the Respondent was given the money as a soft loan. He submitted that the Appellant confirmed how he disbursed the said money thus proving his case on a balance of probability.
16. He further submitted that the Respondent failed to tender sufficient evidence in support of his Response to the Statement of Claim to warrant dismissal. He cited the case of Bungoma Election Petition No 4 of 2017 *Levi Simiyu Makali v Koyi John Waluke & 2 others* (2018) eKLR.
17. In conclusion, counsel urged the court to allow the appeal and set aside the decision of the learned adjudicator and award the Appellant the amount as pleaded in the Statement of Claim.

Respondent's submissions

18. The Respondent's submissions were dated 12th August, 2024. The Respondent submitted that the Appellant failed to provide any documentary evidence or witness to substantiate his claim. He submitted that the Respondent on the other hand provided credible evidence corroborated with two witnesses that the funds were contributed as a CSR initiative for the benefit of the estate.
19. It was the Respondent's submission that in agreement with the trial court's finding it was not a mere coincidence that the sum in dispute was transferred to the Respondent in his official capacity on the same date that there was a contract entered into between Salsan Security Services Limited and Al Nasra Gardens Residents.
20. It was further submitted that the Claimant and the Respondent had never interacted before and that their first interaction was during execution of the agreement. That the Appellant failed to prove that the sum of Kshs 102,000/= given to the Respondent was a loan since there was no agreement to that effect. He relied on the case of *Patrick Peter Kitbini v Justus Mwangela* (2020) eKLR and submitted that in the absence of such evidence, the Appellant's claim was unfounded.
21. The Respondent submitted that the Appellant's case was unsubstantiated since he did not provide any documentary evidence or call any witness to support his claim. He relied on the case of *Ephantus*



Mwangi v Duncan Mwangi Wambugu [1984] eKLR and urged the court to dismiss the appeal with costs.

Analysis and Determination

22. This court has considered the grounds of appeal, the proceedings of the lower court, and the submissions filed by the Appellant. To begin with, the duty of this court as the appellate court exercising jurisdiction under the Small Claims Court squarely falls under Section 38 of the Small Claims Court Act. This section limits the jurisdiction of the High Court on appeals from the Small Claims Court to matters of law only.

23. What constitutes, points of law, has been settled in the case of Peter Gichuki King'ara v Iebc & 2 others, Nyeri Civil Appeal No 31 of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) of 13.02.2014, where the court of appeal stated as follows: -

“[I]t is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law.”

24. Having gone through the Memorandum of Appeal and the grounds set out there under, I note that the Appellant raises issues of both law and fact. All the ground of appeal are premised on the grounds that the learned adjudicator erred in both the law and fact. The submissions also have been crafted to support both the issues of fact and law. Thus, based on the above authority, and on the definition, of what constitutes issues of law, this court will limit itself from delving into the issues of facts and address the only issue of law arising which is; Whether the Appellant proved its case on a balance of probabilities as required by law?

25. It is not in contention that the Appellant sent the Respondent Kshs 102,000/= as evidenced from the Mpesa transaction statement. It is also not in dispute that the Respondent received the said amount. The issue in contention is whether the Appellant proved that the said amount was a friendly soft loan or a contribution for CSR for the residents of Al Nasra Estate Association as alleged by the Respondent.

26. The court of Appeal in Mbutia Macharia v Annah Mutua & another {2017} eKLR discussed the issue of burden of proof and stated that;

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 burden initially rests 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? In this case the incident of both the legal and evidential burden was with the Appellant.”

27. Further, Sections 107 and 109 of the Evidence Act places the burden upon the Claimant to prove his claim. In the instant case, the Appellant claimed that the amount advanced was a soft loan to the Respondent and which the Respondent agreed to refund verbally. The Appellant, claims that the entire transaction was conducted verbally. In his witness statement, he asserts that he made numerous



attempts to contact the Respondent for a refund through phone calls, WhatsApp messages, and SMS but his efforts have been futile, as the Respondent repeatedly made false promises. To support his claim, the Appellant relied on his bundle of documents, which only listed a demand letter dated 24th January 2022. Notably, no call logs, WhatsApp print outs and SMS chats were produced as evidence before this Court to substantiate the alleged repeated efforts to reach out to the Respondent.

28. In response, the Respondent averred that the money advanced was sent as CSR to enable the Appellant's company obtain a contract for the provision of security services for the residence of Al Nasra Gardens. Further that he is a representative of the Al Nasra Gardens Association while the Appellant was the director of the Salsan Security Limited which was contracted by Al Nasra gardens residence to provide security services. It was submitted that the Appellant contributed Kshs 12,000/- towards refreshments and Kshs 90,000/- towards construction of the shade for the guards. To support these assertions, the Respondent called two representatives of Al Nasra residents namely; Halima Ali and Catherine Wamuyu all of whom corroborated what the respondent had stated. They also alleged that the Appellant had instituted another suit SCCOMM/E1373 of 2023 where the Respondent had been sued in his capacity as the representative of Al Nasra Gardens for services rendered by the Appellant. They attached the contract form, mpesa statement, demand letter and invoices to prove the same.
29. Having analysed the evidence before this court, it is not in dispute that Kshs 102,000/- was sent to by the Appellant and received by the Respondent. The gist and turning point of this dispute is whether the said amount was a soft loan advanced to the Respondent or whether it was meant for CSR for the benefit of the residents of Al Nasra.
30. This court notes that the Appellant has only provided the Mpesa statement which details the transfer to the Respondent, to support its case. As rightfully stated in the case of *Patrick Peter Kitbini v Justus Mwangela* (2020) eKLR an Mpesa transaction without any further evidence clarifying the basis of the transaction is insufficient to prove a fact on a balance of probability.
31. In this instance this court notes that the Appellant has not demonstrated any relationship and or basis to lead the court to believe that the Kshs 102,000/- sent to the Respondent was advanced to him as a soft loan. From the evidence presented in court, the relationship between the parties appears to be that of a service provider and a client. There is no indication of any other relationship, such as friendship or acquaintance, that might suggest they were likely to lend each other money. The records show that the Respondent received money from the Appellant around the same time the Appellant was awarded a contract by the Respondent for the supply of security services. This raises the question: Is it common for individuals with no prior personal relationship or history of friendship to easily extend a soft loan to one another? Or is it more likely that the money transferred was linked to the business contract the Appellant was pursuing?
32. I also note that the Appellant did not provide any rebuttal to the assertions by the Respondent which were further corroborated by two additional witnesses. While I will refrain from delving into whether the money constituted an inducement, as that borders on criminality since that issue is not before me, it is evident, as the trial court observed, that the amount in question was not a soft loan. As reasoned above, the nature of the relationship between the parties does not suggest the possibility of extending loans to one another. Therefore, I concur with the findings of the trial court, that the evidence presented by the appellant does not indicate that the amount was a loan to be repaid at a later date. The Mpesa statement by itself is not sufficient prove that the money transferred was a loan. The Appellant should have demonstrated, that beyond the Mpesa transaction, other elements of a loan agreement have been met.



33. In view of the foregoing, this court is convinced that the learned trial magistrate was right in finding that the Appellant failed to discharge the burden proving that the amount advanced was a loan to the Respondent. In view of the foregoing, the appeal fails in its entirety and each party bears its costs of the appeal.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 4TH DAY of OCTOBER 2024

For Appellant:

For Respondent:

Court Assistant: Peter Wabwire

