



REPUBLIC OF KENYA



**Munyoki v Ndunge (Civil Appeal E004 of 2023)
[2024] KEHC 11736 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E004 OF 2023**

RK LIMO, J

OCTOBER 1, 2024

BETWEEN

MAGRET KASYOKA MUNYOKI APPELLANT

AND

HILDA NDUNGE RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgement of Hon. M. Kimani delivered on 15th December 2022 in Kitui CMCC No. 213 of 2019.
2. In that case the Appellant sued the Respondent for breach of contract and the claim by the Appellant was that she advanced Respondent a friendly loan of Kshs. 497,000/= on 5th June 2017 which was to be refunded on 30th June 2017.
3. In her pleadings in the lower court, the Appellant claimed that the Respondent failed to refund the amount as agreed forcing her to go seek legal assistance from her lawyer. She pleaded that upon a demand letter being made through her lawyer, the Respondent only refunded Kshs. 200,000/= leaving a balance of Kshs. 347,000/= which she sued for. At the trial she relied on a hand written acknowledgement by the Respondent.
4. The Respondent on the other hand disputed the Appellant's claim. At the trial she testified that she had paid back and settled the debt. She however, gave inconsistency and contradicting testimony where on hand she stated she repaid Kshs. 200,000/= which she owed and on the other hand denied owing Kshs. 200,000/= or repaying the same. She also admitted doing transactions with the Appellant while in her defence she denied the same. She told the trial court that her evidence was conflicting because she was emotionally unstable due to grief of losing a relative.



5. The trial evaluated the evidence tendered and found that the Appellant had not proved her claim because the signature on the agreement or acknowledgement was disputed. The suit was dismissed with costs to the respondent.
6. The Appellant felt dissatisfied with the Judgement and filed this appeal raising the following grounds namely;
 - i. That the trial magistrate erred in law and fact in failing to establish that the appellant had made or established a prima facie case and misapprehended that the Respondent did not borrow money from the Appellant.
 - ii. That the learned magistrate erred in law and fact by failing to frame issues of law and fact as stated in the pleadings considering the law relevant to the issues arising in the matter.
 - iii. That the learned magistrate misdirected herself in both law and fact by failing to consider that the Respondent admitted that they had done various engagements before and present claim was one of the issues between them (sic).
 - iv. That the trial court erred in law by failing to deliver judgement which did not comply with order 21 Rule 4 of the Civil Procedure Rules (sic) and erred by dismissing the suit.
 - v. That the Judgement of the Resident Magistrate is wrong in principle and founded on consideration of extraneous and irrelevant matters not before court.
 - vi. That the learned trial magistrate showed open bias by conducting the case in favour of the Respondent and flaunting Civil Procedure Rules (sic).
 - vii. That the trial court flaunted the principle of judicial precedent or stare decisis and acted on wrong principle in arriving at an unjust decision (sic).
 - viii. That the trial court erred in law and fact in favoring the agreement, signed in the document produced with any evidence of rebuttal adduced by the Respondent (sic).
 - ix. That the learned magistrate erred in law and fact by failing to admit agreement to hand money which was not denied by the Respondent and/or agreement which was not disapproved in the circumstances of the case (sic)
 - x. That the learned trial magistrate erred in law and fact by failing to appreciate the evidence adduced in court orally and documents relied upon to prove that the appellant had advanced the Respondent money and she had paid some money and she had paid some money to settle the debt.
 - xi. That the learned magistrate erred in law in failing to uphold rules of procedure over substantive rights of the parties (sic) thus arriving at wrong decision.
 - xii. That the trial magistrate erred in law to make findings on all issues (sic) raised by Plaintiff/Appellant in her submissions and evidence tendered pleadings (sic).
 - xiii. That the trial magistrate erred in law and fact by considering the respondent's submission as conclusive in making his decision basing his reasons when doing the Judgement (sic).
7. In her written submissions done through her learned counsel Mulinga, Mbaluka & Co Advocates, the Appellant contends that she gave evidence at the trial and produced documents showing she advanced to the Respondent Kshs. 547,000/= and indicated that she was paid Kshs. 200,000/= leaving a balance of Kshs. 347,000/=. She submits that she even called a witness to attest the same.



8. She contends that the Respondent never rebutted her evidence and the fact that she endorsed her ID number in the acknowledgement which in her view indicate that acknowledgment was valid because she submits that the validity of the document was uncontroverted.
9. She submits that the Respondent failed to prove that the signature on the acknowledgment did not belong to her or the disprove the ID number appearing on the agreement.
10. She contends that the Respondent acknowledged in her defence that she had fully settled her debt which according to her is an acknowledgment that she borrowed the money.
11. She submits that parties are bond by the pleadings and that any evidence tendered which is at variance with the pleadings filed should be disregarded.
12. She submits that the appellant contradicted herself in her statement by contesting the loan advanced to her but admitting it during trial. She points out that the responded denounced her defence. She contends that the admission by the Respondent that she transacted with the Appellant was sufficient to show that there was a legal transaction.
13. The Appellant further submits that the Respondent never denounce the agreement as fraudulent and did not demonstrate that she had repaid the debt in full.
14. She faults the trail court for failing to analyse well the evidence tendered and failing to note that the Respondent's defence and testimony were conflicting. She relies on the decision of Mohamed Guyo Boru v Richard Mwilaria Aritho in buttressing the contention that a party is bound by his pleadings. She has also cited the following decisions;
 - a. Tufaa Capital Limited v Jactone Owinyo Otieno (Nrb Small Claims Court No. 182 of 2021)
 - b. Siriba Ontita v Albert Mongare Okenwa (Eldoret HCC CA No. 41 of 2019)
 - c. [Alfred Anekeya Mang'ula T/A Alfabetty Enterprises -vs- Paul Indimuli & Primus Holdings Limited \(Kakamega HCC CA No. 41 of 2020\)](#)
15. The Respondent has opposed this appeal through undated written submissions by her Advocates Mati, Mati & Mati Advocates. She submits the appellant's claim was denied and that the agreement tendered was contested.
16. She contends that the appellant's own testimony contradicted her pleadings because she stated in her pleadings that the Respondent had paid Kshs. 200,000/= while in her oral testimony she claimed that only Kshs. 160,000/= had been deposited in her bank by the Respondent. She submits that no document was tendered to prove her allegations that money had been deposited in her bank account by the Respondent.
17. She contends that she disputed her signature on the hand acknowledgment tendered by the Appellant adding that the original copy was never tendered in court.
18. She submits that the burden of proof was on the Appellant and not on her to disprove that the signature on the agreement was valid. She cites the provisions of Section 107 & Section 109 eKLR in respect to who bears the legal burden of proof. She further relies on the decision in Alice Wanjiru Ruhui v Mosaic Assembly of Yahweh [2021] eKLR in that contention.
19. The Respondent faults the reliance of the contested agreement by the Appellant stating that the signature on the agreement was not linked to her contending that there was no proof that it was hers.



She cites the provisions of Section 94 & 97 of the Evidence Act to back her position that the signature was not authenticated and proven to belong to her.

20. She submits that the disputed agreement failed to meet the threshold of an enforceable contract because there was no evidence of offer and acceptance. She submits that the Appellant's claim was countered by the Respondent during trial and faults her for giving contradictory evidence.
21. This court has considered both this appeal and the submissions made. Have also considered the response made by the Respondent through written submissions.
22. This court for starters finds that the some of grounds of appeal as drafted left them perplexing to say the least. This court found paragraphs 1,2,3,4,6,7,8,9,11,12 and 13 a bit confusing but nevertheless this court tried as much as it could to try and make sense out of the cited grounds.
23. Let me begin with ground 4 of the appeal. This is how it is framed;

“The learned trial magistrate erred in law and fact in failing to deliver Judgement which did not comply with Order 21 Rule 4 of the Civil Procedure Rules (sic) and erred in dismissing the suit.”

Now let me assume that the Appellant meant that the judgement delivered in the lower court failed to comply with the provisions of Order 21 Rule 4 of the Civil Procedure Rules. The cited provisions provide;

“Judgement in defended suits shall contain concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.”

24. I have looked at the Judgement of the trial magistrate and I note that the trial magistrate in her Judgement laid out the Appellant's claim concisely and proceeded to frame the following issues for determination namely;
 - i. “Whether the Plaintiff loaned the Defendant Kshs. 497,000/=
 - ii. Whether Kshs. 347,000/= said to be outstanding is recoverable”

The trial court then went on to analyze the evidence and determined the issues. This court therefore finds that the Judgement from the trial court complied with the provisions of Order 21 Rule 4 of the Civil Procedure Rules.

25. The other main issue in this appeal is whether the trial court misapprehended the principles of law in finding that the Appellant never discharged the burden of proving her case to the required standard.
26. It is quite clear from the submissions of both parties that the Appellant's claim is based on breach of contract and her case was anchored on an agreement or rather a hand written acknowledgment. The said acknowledgment was disputed by the Respondent.
27. I have perused through the copy of the hand written acknowledgment. It is true that a copy was tendered in evidence but the Respondent never raised objections to the production of the same. It is therefore belated for her to now fault the Appellant for not producing the original. However, a perusal of the document indicates that the Respondent was acknowledging receipt of Kshs. 497,000/= on 5th June 2017 and was to refund on 30th June 2017. The acknowledgment was attested by 2 witnesses namely Margaret Kasyoka and Esther Munyoki. None of the 2 attesting witnesses were called because the only witness called by the Appellant was one Esther Musyoki (PW2). It is not clear if Esther



Munyoki captured in the contested acknowledgement is the same Esther Musyoki (PW2) who testified during trial and stated the Respondent was given Kshs. 477,000/= by the Appellant.

28. Going by the oral testimony given by the Appellant, it is not clear what the amount advanced was exactly, how much was refunded and what was outstanding. The evidence tendered and the pleadings of the Appellant are not in tandem and though she says a party is bound by his/her pleadings it appears she is on the receiving end as far as that statement or principle of law is concerned. Now looking at the amended plaint dated 10th June 2019, the Appellant pleaded in paragraph 4 that the amount advanced was Kshs. 497,000/=. In paragraph 7 she proceeds that the Respondent made a deposit of Kshs. 200,000/= but in paragraph 9 she pleads that the initial demand was Kshs. 547,000/= and because Kshs. 200,000/= was paid, the amount owing was Kshs. 347,000/=. The Appellant did not give a breakdown of how the figure of Kshs. 347,000/= was arrived at. If Kshs. 497,000 was advanced, then the balance should have been Kshs. 247,000 up to factoring in the Kshs. 200,000 said to have been paid.
29. Secondly, during her testimony in court, the Appellant made a departure from her pleadings by stating that she was aware that the Respondent only paid a deposit of Kshs. 160,000/= through instalments of Kshs. 100,000, Kshs. 30,000/= and Kshs. 30,000/=. She failed to demonstrate how the calculations arrived at the figure of Kshs. 347,000/= which she was claiming. The question lingering is did the Respondent refund Kshs. 160,000/= as claimed in court during trial or Kshs. 200,000/= as pleaded? Again if the amount advanced was Kshs. 497,000/= and amount refunded was Kshs. 200,000/= as pleaded was the amount sued for not Kshs. 297,000/= plus costs? It is not clear from the Appellant's written statement dated 10th June 2019 how much the legal fee was for demand made through her lawyer.
30. Thirdly and more importantly, there was no clear demonstration of how the money was advanced. Was it through cash or a cheque or via bank transfer. It was also not shown whether the Appellant was doing legitimate business of lending money to individuals and what interests were charged. This is significant in light of the current financial situation in this country where a number of "loan sharks" or "shylocks" have been preying on unsuspecting public with what appears to be easy on the eye of acquiring "soft loans" but with usually exorbitantly high interest rates that in the end becomes exploitative and unconscionable. The usual characteristics of such agreements or acknowledgments are that interests are never revealed and neither the actual amount.
31. This court finds that under Article 46 1(b) of constitution consumers of services have a right to full information necessary for them to gain full benefit of the goods & services. Any contract or agreement/acknowledgment that is either shrouded in secrecy, or is exploitative and unconscionable in nature is illegitimate and is unenforceable. A valid agreement is lawful and clear in its terms. It should spell out the obligations of both parties and must be legitimate.
32. The trial court found the agreement/acknowledgment tendered wanting because the signature by the Appellant was disputed and that the Appellant never discharged the burden of proof. She is the one who bore the burden of proof and not the Respondent. She failed to discharge the burden of proof and she cannot fault the Respondent for giving conflicting evidence.

This court upon evaluation of the evidence tendered finds that the agreement tendered is unenforceable because the terms thereon are not clear as to whether it was the principal amount or inclusive of costs. Secondly, was the amount the principal sum or it was inclusive of interests? Was the money a friendly loan and was it in cash or kind?. The questions posed above were not clearly set out.
33. This court finds that the Appellant failed to prove her case to the required standard in view of the many unanswered questions in her case. Her oral evidence in court jointly with her pleadings made it unclear how much money was being claimed and proof of the same.



In the premises this court finds no merit in this appeal. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 1ST DAY OF OCTOBER, 2024

HON. JUSTICE R. K. LIMO

JUDGE

