



**Gachie v Maitha (Civil Appeal 126 of 2020)  
[2023] KEHC 23849 (KLR) (Civ) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23849 (KLR)

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

**CIVIL**

**CIVIL APPEAL 126 OF 2020**

**JN NJAGI, J**

**OCTOBER 19, 2023**

**BETWEEN**

**STEPHEN KAMUIRU GACHIE ..... APPELLANT**

**AND**

**MICHAEL WAIGWA MAITHA ..... RESPONDENT**

*(Being an Appeal from the judgment and decree of the Hon. B.J Ofisi (Mrs.),  
Resident Magistrate, in Nairobi CMCC NO. 7635 of 2018 delivered on 28/2/ 2020)*

**JUDGMENT**

1. The Appellant herein who was the Plaintiff at the lower court had sued the Respondent seeking to recover a sum of Ksh.800,000/= that he contended he had advanced the Respondent as a friendly loan. The trial magistrate dismissed the case on the ground that there was no evidence that the money was dispersed to the Respondent. The Appellant was aggrieved by the decision and filed the instant appeal.
2. The Appellant's Memorandum of Appeal sets out the following grounds of appeal:-
  - (1) The learned magistrate erred in law and in fact in making a finding that the appellant did not prove its case and thereby dismissing the appellant's case with costs against the weight of the evidence.
  - (2) The learned magistrate erred in law and in fact by failing to consider the appellant's evidence and documents before reaching the judgment.
  - (3) The learned magistrate erred in law and in fact by failing to consider the submissions made by the appellant and by applying the wrong principles of the law.



- (4) The learned magistrate erred in law and in fact by making a finding that there was no contract between the Appellant and the respondent whereas as per the appellant's documents including Respondent's statement to the police and the statement of defence by the respondent there was no dispute that the respondent received money from the appellant.
  - (5) The learned magistrate erred in law and in fact in dismissing the suit against the weight of the evidence.
3. The Appellant prays that his appeal be allowed with costs and that a judgment be entered in favour of the Appellant against the Respondent for a sum of Ksh.800,000/=.

### **Appellant's Case**

4. The Appellant testified as PW1 in the case and sought to rely on his witness statement dated 17/08/2018 as his evidence-in-chief. He stated that he had known the Respondent for some time as they were personal friends. It was his evidence that in the year 2012 the Respondent approached him and requested for a loan in the sum of Ksh. 700,000/= which he advanced him by depositing the sum in the Respondent's bank account. The Appellant testified that the Respondent further requested for a further loan in the sum of Ksh.100,000/= which he advanced him in cash. He averred that after advancing the money to the Respondent, the respondent started evading him and making false promises. He sued for the refund.
5. The Appellant adduced a statement from Equity Bank indicating that he withdrew Kshs.700, 000/= from his bank account. He also produced a bank statement alleged to be that of the Respondent showing that Kshs.700, 000/= was deposited in the account.

### **Respondent's Case**

6. The Respondent filed a defence on 1<sup>st</sup> February 2019. He denied ever borrowing the stated sum of money from the appellant. He contended that the amounts complained of were not friendly loans as alleged but for designs which the Appellant took for his own manipulation and use only to later come back and allege that one of the designs had been rejected and he needed his money back from the Respondent. The Respondent further contended that the Appellant had been using the police to harass him by making false claims of obtaining the money by false pretence.
7. The Respondent did not testify during the trial. He however stated in his witness statement submitted alongside the statement of defence that he became acquainted with the Appellant during his tenure as an engineer in Kwale County. That the Appellant engaged him on several occasions to create structural designs for him. That payment for his services was conducted through bank transfers or the use of M-Pesa.
8. The Respondent stated that after he had done so many works for the Appellant, he got transferred from Kwale to Nyeri and the Appellant called him indicating that one of the designs had been rejected and therefore the Appellant wanted his money back. The Respondent further stated that the Appellant wanted him to pay his money back by arranging for him to get contacts with the County Government of Nyeri but when he declined, the Appellant resorted to using police to harass him. He stated that he does not owe the Appellant any money in the form of a friendly loan.

### **Judgment of the Trial Court**

9. Upon hearing the parties, the trial court found that there was no evidence that the Appellant and the Respondent entered into a contract. The court also noted that there was no evidence adduced to prove



that money was disbursed to the Respondent. The court held that the Appellant had failed to prove his case against the Respondent on a balance of probabilities. The Appellant's suit was dismissed with costs.

### **Submissions**

10. This court gave directions for the appeal to proceed by way of written submissions. The Appellant submitted that the Respondent had in paragraph 4 of the statement of defence admitted to having received the said sum of Ksh.800,000/= but alleged that the same was for preparation of designs. The Appellant further submitted that the trial court disregarded the said evidence in finding that no evidence was adduced to prove that money was disbursed to the Respondent.
11. The Appellant submitted that a copy of the Respondent's bank statement in page 11 of the Record of Appeal clearly shows that a sum of Ksh.700,000/= was deposited in his bank account.
12. The Appellant submitted that the trial court was wrong in relying on section 3(3) of the Laws of Contract Act as the matter before the court dealt with a friendly loan and not a contract for the sale of land.
13. The Respondent on the other hand submitted that there is nothing wrong with the judgment of the trial court. That the statement showing withdrawals of money from one's account and a certificate of registration of a business name does not prove disbursement of money to the Respondent. The Respondent urged this court to dismiss the appeal with costs.

### **Analysis and Determination**

14. As a first Appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This position was reaffirmed by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR.
15. I have considered the record of the trial court, the pleadings and the rival submissions by the advocates for the parties. The issue that falls for determination is whether the trial court erred in finding that the Appellant had not proved his case against the Respondent on a balance of probabilities.
16. Verbal/oral contracts are valid just like written contracts. This is as long as such contracts are for a lawful purpose, there is mutual agreement, consideration and genuine assent for the contract to be enforceable. The court of Appeal in *Ali Abid Mohammed versus Kenya Shell & Company Limited* (2017) eKLR, stated that a contract between parties 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. The court said;  
  
"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. See *Timoney and King v King* 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time."
17. It is trite law that whoever lays a claim before the court against another has the burden of proving it. Sections 107 and 108 of the [Evidence Act](#) provide 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 the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
18. The Court of Appeal in the case of *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR considered the provisions of the above section and stated as follows:
- “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? In this case, the incidence of both the legal and evidential burden was with the appellant.”
19. In the instant case, the burden of proving that there was a verbal agreement for a friendly loan between the Appellant and the Respondent rested with the Appellant. The Appellant produced in evidence both his bank statement and the Respondent’s bank statement to prove that a sum of Ksh.700,000/= was transferred from his account to that of the Respondent.
20. The Respondent in his statement of defence and witness statement did not deny receiving the amounts alleged to have been transferred to him by the Appellant. He instead offered an explanation that the said sums of money were for structural designs that he had sold to the Appellant. No evidence was adduced by the Respondent to support his version of the story.
21. From the evidence on record, it is evident that there was some form of financial transaction of an oral contract between the Appellant and the Respondent. The bank statement of the Appellant proves that the Appellant deposited money in the sum of Ksh.700,000/= to the Respondent’s account. The Respondent did not adduce evidence in the case. It is trite that where a party does not adduce evidence in a case, its statement of defence is of no probative value and the evidence of the opposite side remain uncontroverted. In the case of *Interchemie E. A. Limited Vs Nakuru “Veterinary Centre Limited* [2001] eKLR the court held that:
- “Where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. If one is still in doubt as to the legal position reference could be made to the case of *Drappery Empire vs. The Attorney General* where Rawal, J (as she then was) held that where evidence is not challenged and stands uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.”
22. The Appellant herein gave evidence that the money was for a friendly loan which evidence was not controverted by the Respondent. The Appellant had therefore proved, on a balance of probabilities, his case against the Respondent. In my view, the trial court erred in dismissing the suit for the reason that there was no evidence that the money was dispersed to the Respondent when the Respondent did not deny receiving the money.



23. The upshot is that the appeal is merited. The judgment of the trial court dismissing the case is set aside and substituted with an order for judgment for the Appellant in the sum of Ksh.800,000/= with interest at court rates.

24. The Appellant to have the costs of the appeal and of the suit at the lower court.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Gachuhi for Appellant

Miss Miriti for respondent

30 days Right of Appeal.

