



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL APPEAL NO. 41 OF 2020**

**ALFRED ANEKEYA MANGU'LA**

**t/a ALFABETTY ENTERPRISES.....APPELLANT**

**VERSUS**

**PAUL INDIMULI.....1<sup>ST</sup> RESPONDENT**

**PRIMUS HOLDINGS LIMITED.....2<sup>ND</sup> RESPONDENT**

**(An appeal from the judgment of Hon. W Lopokoiyit, Resident Magistrate, in Kakamega CMCCC No. 84 of 2018, delivered on 30<sup>th</sup> July 2020)**

**JUDGMENT**

1. The suit at the primary court was initiated by the appellant against the respondents, with respect to moneys allegedly borrowed by the respondents from the appellant, which the respondents had failed to repay. The claim is for recovery of the moneys loaned, plus interest thereon, and penalties for dishonoured cheques and expenses on debt recovery. The respondents denied liability, asserting that if any such moneys were lent to them, they had been repaid in full. The trial court took evidence, and found in favour of the respondents, on the basis that there was no documentary proof of an agreement between the appellant and the 1<sup>st</sup> respondents for money lending, and no proof that the 2<sup>nd</sup> respondent was a surety for the alleged money lending arrangement.
2. The appellant was aggrieved, hence the instant appeal. The appeal raises several grounds – that trial court misapprehended the evidence, the trial court failed to properly frame the issues of law and fact as stated in the pleadings, the trial court flouted the principle of judicial precedent or *stare decisis* and acted on wrong principles, the trial court did not address the applicable statutes, the trial court delivered a judgment which did not comply with Order 21 Rule 4 of the Civil Procedure Rules, and the trial court erred in dismissing the suit with costs.
3. Directions were taken on 22<sup>nd</sup> June 2021, for disposal of the appeal by way of written submissions. Both sides have complied, by filing written submissions. Those by the appellant are dated 29<sup>th</sup> July 2021, while those by the 1<sup>st</sup> respondent are dated 21<sup>st</sup> October 2021.
4. In his written submissions, the appellant argues that an oral money lending agreement was enforceable, and sufficed for a claim for refund of the money borrowed or lent. He submits that the trial court erred in suggesting that such an agreement had to be backed by documentary proof, yet the appellant had provided proof by way of cheques drawn in his favour by the borrower. He submits that the respondents did not testify, and, therefore, his evidence should not have been rejected. On proof of the claim, he asserts that the cheques were drawn for value, and were admission of the claim. He relies on *Equatorial Commercial Bank vs. Wilfred Nyasim Oroko* [2015] eKLR (Gikonyo J). He submits that, as the respondents did not adduce evidence, his claim remained uncontroverted, and he had proved his case on a balance of probability. He relies on *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited* [2001] eKLR (Mbaluto J).
5. On his part, the 1<sup>st</sup> respondent submits that the trial court fully addressed all the issues in dispute, and did not misapprehend the facts, or failed to frame issues, or flouted the *stare decisis* principle, or failed to apply applicable statutes, among others. It is asserted that in the absence of a written agreement between the two parties, it was impossible to ascertain the terms of the lending agreement, and especially with respect to the involvement of the 2<sup>nd</sup> respondent. It is submitted that the plaint did not indicate that the appellant had any dealings with the 2<sup>nd</sup> respondent. It is further submitted that, if the cheques in question were used as security as alleged, then a board resolution ought to have been tabled. It is asserted that the 2<sup>nd</sup> respondent did not issue the cheques in value. He cites section 3(1) of the Law of Contract Act, Cap 23, Laws of Kenya, for the proposition that the alleged money lending agreement was not enforceable to the extent that it was not in writing. It is submitted that the suit was bad for it contravened section 3(1) of the Law of Contract Act.

6. There are only two issues for me to determine. One, whether a money lending contract or agreement must be in writing for it to be enforceable. Two, whether the appellant had established his case, at the trial, on a balance of probability against the respondents.

7. On the first issue, it was stated, in *Abdulkadir Shariff Abdirahim & another vs. Awo Shariff Mohamed t/a AS Mohamed Investments* [2014] eKLR (Waki, GBM Kariuki & M'Inoti JJA), that there was no general rule that all agreements must be in writing, but the law, in the Law of Contracts Act, does require that certain agreements be in writing. It was pointed out that the Law of Contracts Act does not require that money lending agreements be in writing. With respect to section 3(1) of the Law of Contract Act, it was stated that the same was limited to guarantees, and requires that the guarantee agreement be in writing. See also *Agriculture Finance Corporation & another vs. Kenya Alliance Insurance Co. Ltd & another* [2002] 1 KLR 231 (Ringera J).

8. The conclusion to draw, from the above, is that a money lending agreement need not be in writing, for it to be enforceable. The fact, therefore, that the agreement between the appellant and the 1<sup>st</sup> respondent was not in writing did not make it unenforceable.

9. Secondly, section 3(1) of the Law of Contract Act, which the respondents submit is the basis of the decision by the trial court, is limited to guarantee agreements. The question then would be whether the alleged agreement between the appellant and the respondents was a guarantee agreement, for section 3(1) of the Law of Contract Act to be applied to it. According to the plaint, as amended, the witness statement of the appellant and the recorded oral evidence, the engagement to lend money was between the appellant and the 1<sup>st</sup> respondent, and, going by *Abdulkadir Shariff Abdirahim & another vs. Awo Shariff Mohamed t/a AS Mohamed Investments* [2014] eKLR (Waki, GBM Kariuki & M'Inoti JJA), it did not require to be in writing. It would appear that the 2<sup>nd</sup> respondent was not directly involved in that engagement, and, in any event, being a limited liability company, it could not enter into such engagement, unless through its officers and directors, and it would appear that the 1<sup>st</sup> respondent, who is said to be one of its directors, is not said to have represented the 2<sup>nd</sup> respondent in the arrangement. According to the amended plaint, the 2<sup>nd</sup> respondent was brought into the matrix by the 1<sup>st</sup> respondent, to meet the condition by the appellant that required security for the borrowings, whereupon the 1<sup>st</sup> respondent furnished the cheques drawn by the 2<sup>nd</sup> respondent. There is, therefore, no nexus between the appellant and the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent was, therefore, a sort of surety or guarantor for the borrowings. It would appear that that guarantee, if ever there was one, was not supported by an agreement or memorandum or note in writing, between the appellant and the 2<sup>nd</sup> respondent. For the guarantee arrangement, if there was one, between the appellant and the 2<sup>nd</sup> respondent, to be enforceable, it had to comply with section 3(1) of the Law of Contract Act. To the extent that that was not complied with, meant that the oral agreement, between the appellant and the 1<sup>st</sup> respondent, could not be enforced against the 2<sup>nd</sup> respondent, but the same was enforceable as between the appellant and the 1<sup>st</sup> respondent.

10. On the second issue, as to whether the appellant established his case against the two respondents, there are several secondary issues. Firstly, the respondents did not tender any evidence. They did not file any witness statements. The effect of that was that the case presented by the appellant was uncontroverted. That, of course, does not mean that the court was bound to grant the prayers as prayed, for it was still obliged to consider the evidence as against the law and any pleadings filed by the other side. As against the 2<sup>nd</sup> respondent, I reiterate what I have said in paragraph 9, here above, the role to be played by the 2<sup>nd</sup> respondent was to be akin to that of a guarantor, and section 3(1) of the Law of Contract Act applied. To the extent that there was no undertaking, in writing, by the 2<sup>nd</sup> respondent, to repay the money, in the event of default by the 1<sup>st</sup> respondent, meant that the appellant could not maintain a claim against the 2<sup>nd</sup> respondent, despite the 2<sup>nd</sup> respondent not defending the suit.

11. With regard to the 1<sup>st</sup> respondent, there are two things. One, although the 1<sup>st</sup> defendant did file defence, he did not comply with Order 11 of the Civil Procedure Rules, by filing a witness statement, and he was locked out on that ground, among others. The fact that he did not adduce any evidence meant that the case presented by the appellant, that he had entered into an oral agreement to lend him money, and that he did lent to him the sums claimed, was uncontroverted. The oral agreement was not barred by law. The uncontroverted testimony by the appellant was that they did enter into such an oral agreement, and money changed hands, and the same had remained unpaid. The 1<sup>st</sup> respondent did not breathe life to his pleadings, and, therefore, the testimony by the appellant stood unchallenged. The appellant, had, therefore, established a case, on a balance of probability, to warrant judgment being given in his favour as against the 1<sup>st</sup> respondent. See *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited* [2001] eKLR (Mbaluto J).

12. The second thing, in his defence statement, at paragraph 10, the 1<sup>st</sup> defendant pleaded, in alternative to the mere denials that preceded, that, if the appellant had lent any money to the respondents, then the amounts were lesser than those claimed, and were lent not to him, but to the 2<sup>nd</sup> respondent, and had been repaid in full. That amounted to admitting the claim, that in fact there was a money lending arrangement between the appellant and the respondents, and that the moneys lent had been paid in full. It was said, in *Mariano Dinacci vs. Angelo Lattineli* [2015] eKLR (Okwengu, Makhandia & Sichale JJA), that, in the face of such an admission, by way of alternative pleading or averment, the burden of proof shifts from the plaintiff to the defendant. In the instant case, the counter allegation was that the moneys lent were lesser than the amounts claimed, had not been lent to the 1<sup>st</sup> respondent but the 2<sup>nd</sup> respondent, and had been paid in full. Upon the burden shifting to the 1<sup>st</sup> respondent, he was bound to lead evidence to demonstrate that the amounts borrowed were smaller than what was being claimed, that the amounts had been lent to the 2<sup>nd</sup> respondent, and had since be repaid in full. The 1<sup>st</sup> respondent did not discharge that burden.

13. In view of all what I have said above, it is my conclusion that the appeal herein has merit, and it is hereby allowed. The judgment of the trial court, dated and delivered on 30<sup>th</sup> July 2020, is hereby set aside, and substituted with a judgment for the appellant, as against the 1<sup>st</sup> respondent, for the sums claimed in the amended plaint. The claim against the 2<sup>nd</sup> respondent is hereby dismissed. Interest on the amounts, the subject of the judgment, shall accrue from the date of the filing of the suit. The appellant shall have the costs of this appeal, as well of the suit in the court below. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 4<sup>TH</sup> DAY OF FEBRUARY., 2022**

**W. MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Mr. Balusi, instructed by Balusi & Advocates for the appellant.**

**Mr. Munyendo, instructed by Akwala & Company, Advocates, for the respondents.**