



Obonyo t/a Buyuka Obonyo Advocates v Omita & another (Civil Appeal E458 of 2022) [2024] KEHC 12008 (KLR) (Civ) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12008 (KLR)

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

CIVIL

CIVIL APPEAL E458 OF 2022

JM OMIDO, J

OCTOBER 4, 2024

BETWEEN

**MOSES BUYUKA OBONYO T/A BUYUKA OBONYO
ADVOCATES APPELLANT**

AND

ALOIS OMITA 1ST RESPONDENT

ANTHONY APOLLO HAWII OMITA 2ND RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. E.M. Kagoni, Principal Magistrate delivered on 17th June, 2022 in Nairobi Milimani CMCC No. 868 of 2019)

JUDGMENT

1. The Appellant, Moses Buyuka Obonyo T/A Buyuka Obonyo Advocates has brought this appeal, being aggrieved by the judgement and decree of the Chief Magistrate's Court (Hon. E.M. Kagoni, Principal Magistrate) delivered on 17th June, 2022 in Nairobi Milimani CMCC No. 868 of 2019, against the Respondents, Alois Omita and Anthony Apollo Hawii Omita.
2. The Appellant has presented the following grounds of appeal vide the Memorandum of Appeal dated 22nd June, 2022:
 1. That the learned Magistrate erred in law and in fact in failing to appreciate the evidence before him.
 2. That the learned Magistrate erred in law and in fact by disregarding the Appellant's testimony and documentary evidence of proof of remittance of GBP 16,740 to the Respondents.



3. That the learned Magistrate erred in law and in fact in totally disregarding the exhibits produced by the Appellant and in particular one dated 22nd July, 2016.
 4. That the learned Magistrate erred in law and in fact in totally disregarding the uncontroverted evidence by the Appellant in support of his claim.
 5. That the learned Magistrate erred in law and in fact in failing to award the Appellant costs of the suit.
3. 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.
 4. 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.”
 5. The matter before the lower court was a liquidated claim arising out of alleged breach of contract in which the Appellant (the Plaintiff in the lower court), vide an amended plaint dated 9th January, 2020 and filed in court even date sought for judgement against the Respondents (the Defendants) jointly and severally in the sum of Ksh.2,3317,987.80/- together with costs of the suit and interest at the rate of 14% per annum from 1st August, 2016 until payment in full.
 6. The matter proceeded before the lower court.
 7. The lower court record bears it that the Appellant testified as PW1 and adopted the contents of his statement dated 7th November, 2019.
 8. In his statement, the Appellant stated that in the month of July, 2016, the 1st Respondent approached him and requested for a friendly loan on account of fees and accommodation for the 2nd Respondent who was his son and who was facing threats of eviction from a university in the United Kingdom where he was studying.
 9. That on 22nd July, 2016, the Appellant remitted the sum of Ksh.2,317,987.80, equivalent to GBP 16,740/- to account No. 87xxxx47 in the name of Hamptons Estate Limited, London/United Kingdom on account of the arrears pursuant to the 1st Respondent's request, who undertook to refund the money within 30 days but failed to do so despite demands, necessitating the suit before the lower court.
 10. The Appellant produced the following documents in support of his case: Demand letter dated 8th October, 2019. Copy of a remittance slip.
 11. Although the plaint in the lower court file was amended with the result that the 2nd Appellant was joined as a Defendant, it is not clear whether service of summons to enter appearance was effected upon the 2nd Respondent. The statement of defence in the lower court record dated 16th December, 2019



was filed by the 1st Respondent. There is nothing in the record that shows that the 2nd Respondent participated in the trial before the lower court.

12. Be that as it may, as the Respondents did not call any witnesses, the defence case was closed on 12th April, 2022.
13. Upon considering the record before him and the evidence presented by the Appellant, the learned trial Magistrate rendered himself in part as follows:

“Upon perusing the contents of the demand letter dated 8th October, 2019, I find the amount allegedly owed to be Ksh.2,700,000/- whereas the amount sought in the plaint herein is Ksh.2,317,987.80/-. Again, the Plaintiff’s evidence in court was that he loaned Ksh.2,317,987.80. However, the demand letter used as evidence alleges he loaned Ksh.2,700,000/-.

I have also considered a copy of the remittance slip and find indeed that an amount of Ksh.2,317,987.80/- was paid out to Hampton Estates Ltd. Is this enough to grant the orders sought? Certainly not. This document is simply evidence that a sum of money was paid out to Hampton Estate Ltd. It is not evidence that the said sum was borrowed from the Plaintiff, by the Defendant for payment of the said amount. Taking note that evidence is inconclusive as to what amount was furnished to the Defendant, and which evidence the Plaintiff voluntarily volunteered, taking note of the absence of any evidence on record showing or proving that the Defendant asked for these sums of money from the Defendant (sic) and taking further note that there is no evidence that Anthony Apollo Hawii is the son of the Defendant, I find there is no evidence to award the orders sought.

Reasons wherefore judgement is hereby entered as follows:

- a. The Plaintiff’s suit is hereby dismissed.
 - b. There are no orders as to costs.”
14. Back to the appeal, this court directed that the same proceeds by way of written submissions. Whereas the Appellant filed his submissions, the Respondents, though aware of the directions of the court, failed to file their submissions.
 15. I have considered the above grounds of appeal, the submissions by the Appellant and both the present record and that of the lower court. The single issue for determination in the present appeal is whether the trial court erred in law and in fact in reaching the decision that the Appellant did not prove his case on a balance of probabilities pursuant to which the suit in the lower court was dismissed with no order as to costs.
 16. From the oral evidence that was presented to the trial court by the Appellant, it is to be noted that the Appellant stated that the 1st Respondent requested him for a friendly loan to pay his son’s fees and accommodation, which money was to be repaid within 30 days. That pursuant thereto, he loaned the 1st Respondent Ksh.2,317,987.80 which was remitted to Hamptons Limited at the request of the 1st Respondent.
 17. It is instructive from the trial court file that neither the Respondents nor their Advocates appeared in court when the matter proceeded. The Appellant was as a result not cross examined and the matter was closed without any evidence on the part of the Respondents being taken.



18. The foregoing being the position, the evidence of the Appellant was not challenged and remained uncontroverted, particularly the following issues:
- i. That the Appellant loaned the 1st Respondent Ksh.2,317,987.80/- at the request of the latter, which was to be paid back within 30 days..
 - ii. That the purpose of the loan was to pay fees and accommodation for the 2nd Respondent, who was the 1st Respondent's son.
 - iii. That the said amount of Ksh.2,317,987.80/- was remitted by the Appellant, at the request of the 1st Respondent to account No. 87xxxx47 in the name of Hamptons Estates Limited, London/United Kingdom.
 - iv. That the 1st Respondent did not repay the said amount within the 30 days that the parties agreed.
 - v. That demands were sent to the 1st Respondent by the Appellant but the former did not make good the latter's claim, as a result of which the suit before the lower court was filed.
19. From the above excerpt of the trial court's judgement, the learned trial Magistrate dismissed the Appellant's suit on the following grounds:
- i. That the amount claimed of Ksh.2,317,987.80/- as appearing in copy of the remittance slip was different from that stated in the demand letter, which was Ksh.2,700,000/-.
 - ii. That as per the copy of the remittance slip the amount of Ksh.2,317,987.80/- was paid out to Hampton Estates Limited and not the 1st Respondent and that there is no evidence that was presented that the 1st Respondent received the money and further that there was no evidence that the said sum was borrowed from the Appellant by the 1st Respondent.
 - iii. That the Appellant did not prove that the 2nd Respondent was a son to the 1st Respondent.
20. I have under paragraph 18 of this judgement outlined aspects of the evidence of the Appellant that were not challenged by the Respondents and therefore remained uncontroverted. I say so because the Respondents (particularly the 1st Respondent) and/or their Advocates did not attend court on the date that the matter proceeded and the evidence of the Appellant was therefore not challenged.
21. With respect to the first reason for the dismissal of the suit (the ground that the amount claimed of Ksh.2,317,987.80/- as appearing in copy of the remittance slip was different from that stated in the demand letter, which was Ksh.2,700,000/-), I opine that the learned trial Magistrate erred by not objectively considering the whole evidence that the Appellant presented. In particular, the trial court did not take into account that the document that was produced as proof that the actual transaction took place was the copy of the remittance slip which indicated the amount remitted as Ksh.2,317,987.80/-.
22. The unchallenged oral evidence of the Appellant was consistent with the contents of the remittance slip on the amount and it would have been prudent that the lower court, instead of rejecting the claim on the basis that the amount in the demand letter was different, considers that the amount that was proved was Ksh.2,317,987.80/- and not Ksh.2,700,000/- as stated in the demand letter.
23. The second reason as to why the trial court rejected the Appellant's claim was that the money was remitted to Hampton Estates Limited and not the 1st Respondent and that there was no evidence that



was presented that the 1st Respondent received the money, and further that there was no evidence that the said sum was borrowed from the Appellant by the 1st Respondent.

24. On this ground, I will reiterate my earlier findings on the matters that were not contested at the trial. It would appear to me that while considering the evidentiary material before the court, the trial court left out the unchallenged oral evidence of the Appellant, thereby considering only the documentary evidence. Oral evidence is evidence and the same ought to have been considered.
25. First, it was the oral evidence of the Appellant that the 1st Respondent borrowed the money from him and that the former remitted the same to Hamptons Limited at the request of the 1st Respondent. My finding is therefore that the trial court fell into error when it reached the findings that there was no evidence that the 1st Respondent borrowed and received money from the Appellant, when there was clear unchallenged oral evidence that the 1st Respondent borrowed the cash from the Appellant and requested that it be remitted to the account of Hamptons Limited.
26. Second, perhaps a deeper scrutiny of the remittance slip by the trial court would have been apt in the circumstances as the same indicates, consistent with the Appellant's oral evidence that the details of the payment related to student accommodation for Anthony Omita, the 2nd Respondent. Such consistency flows further as the document itself indicates that the payment was to cover the 2nd Respondent's accommodation fees.
27. The third reason that the trial court gave as why the Appellant's claim failed was that the Appellant did not prove that the 2nd Respondent was a son to the 1st Respondent. I need not restate that the oral evidence presented by the Appellant to the effect that the 2nd Respondent was a son to the 1st Respondent was not challenged. On that, the learned trial Magistrate erred.
28. It is to be remembered that the standard of proof in civil cases is on a balance of probabilities. In *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of the *Evidence Act*.....”

29. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

30. In the result, I find that the Appellant, on the basis of the unchallenged and/or uncontroverted oral and documentary evidence that was placed before the trial court, proved his case against the 1st Respondent on a balance of probabilities for the liquidated claim of Ksh.2,371,987.80/-
31. On the basis of my findings above, I find merit in the appeal and proceed to allow it by setting aside the order of the trial court dismissing the suit before it and substituting the same with an order entering



judgement in favour of the Appellant (the Plaintiff before the lower court) against the 1st Respondent (the 1st Defendant before the lower court) for the amount of Ksh.2,317,987.80/- together with interest at court rates from the date of filing the suit in the lower court as this was a liquidated claim.

32. Costs of the suit in the lower court shall be borne by the 1st Respondent.
33. I make no orders in respect to the suit against the 2nd Respondent, as there is uncertainty as to whether service of summons to enter appearance and pleadings was effected upon him.
34. Costs of this appeal shall be borne by the 1st Respondent.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 4TH DAY OF OCTOBER, 2024.

JOE M. OMIDO

JUDGE

For the Appellant: Mr. Onduso.

For the Respondents: No appearance.

Court Assistant: Ms. Njoroge.

