



**Momentum Credit Limited v Ouma (Commercial Appeal 017 of 2023)
[2024] KEHC 13741 (KLR) (Commercial and Tax) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL 017 OF 2023**

**A MABEYA, J
NOVEMBER 7, 2024**

BETWEEN

MOMENTUM CREDIT LIMITED APPELLANT

AND

KENEDY MESHACK OUMA RESPONDENT

(Being an appeal from the whole judgment and orders of Hon Adjudicator V.M. MOCHACHE issued at the Milimani Small Claims Court SCCCOM NO E7107 OF 2022)

JUDGMENT

1. This is an appeal against the decision of the Hon V. M. MOCHACHE, Adjudicator delivered on 21/2/2023 at the Small Claims Court. Being aggrieved by that decision, the appellant filed the present appeal vide a Memorandum of appeal dated 7/3/2023.
2. The appellant raised 10 grounds of appeal which can be summarized as follows: -
 - a. The trial court erred in fact and law in finding that the burden of proof was upon the appellant to prove the handwriting of the loan application.
 - b. The trial court erred in fact and law in holding that the claimant did not prove that Kshs. 440,000/- was disbursed.
 - c. The trial court erred in law and fact in failing to take into account, that the respondent did not make any installment.
3. The appellant therefore prayed that the appeal be allowed and judgment be set aside.
4. The appeal was canvassed by way of written submissions which I have considered. The appellant submitted that the evidence on record demonstrated that the parties had entered into a contract vide



a contract document dated 8/3/2021 where the respondent executed the same himself. That the trial court disregarded the provisions of section 107(1) of the *Evidence Act* which lays the burden of proof on the person making assertions.

5. It was further submitted that the contract document produced in court served as an essential piece of evidence in meeting the burden of proof. That having proven that the contract existed, the respondent was bound by the terms of the contract and failure to perform the same amounted to a breach.
6. On his part, the respondent submitted that the appellant did not establish the existence of a valid contract between the parties. That while the loan application form was signed by both parties, indicating an offer and acceptance, the respondent denied having received the funds or executed the relevant documents.
7. That the loan restructure form was signed on 3/12/2020, but the loan was purportedly disbursed on 8/3/2020, with the first installment due on 6/1/2021. The respondent also highlighted that the appellant failed to provide proof of consideration, specifically that Kshs. 440,000/- was debited from its accounts and credited to the respondent's account.
8. I have carefully considered the record of appeal and the submissions by counsel. The main issue for determination is whether the appeal has merit. In *Selle v Associates Motor Boat & Co.* [1968] EA 123, the court emphasized its responsibility in a first appeal, to thoroughly review both the legal and factual aspects of the case. It stated that the evidence should be subjected to a fresh and exhaustive examination, allowing the court to draw its own independent conclusions and findings. The court also noted the importance of considering that it did not have the chance to see the witnesses directly.
9. The facts leading up to this appeal are that, the appellant filed a claim at the Small Claims Court on 31/9/2022. It alleged that it had advanced the respondent a loan facility of Kshs. 458,920/-. That the respondent completed a loan application form and offered motor vehicle registration number KCE 805N as security, which was registered at the collateral registry.
10. That however, the respondent failed to make the required repayments. Whereby the appellant repossessed the vehicle, which needed repairs, and sold it for Kshs. 400,000/-. That the amount was insufficient to cover the outstanding debt, which totaled Kshs. 930,619/-.
11. The respondent opposed the claim stating that, he was a stranger to the terms of the agreement and therefore did not execute the loan agreement. That the appellant had the details of the motor vehicle registration document pursuant to other loans that had been previously used for loan applications. That the appellant had forged his signature.
12. The trial court dismissed the suit and held that, the appellant had the onus of proving that the handwriting in the loan agreement belonged to the respondent and having failed to do so, the claim could not succeed.
13. 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.”

14. In *Muriungi Kanoru Jeremiah vs Stephen Ungu M’warabua* [2015] eKLR, the court held as follows with regard to the burden of proof: -

“... As I have already stated, in law, the burden of proving the claim was the appellant’s including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided ... The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant ... The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove ... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.”

15. The *Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: posits thus: -

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

16. In civil proceedings, the burden of proof rests on the party making the claim. It is well captured in the old adage that ‘he who alleges must prove’. This burden is assessed on a balance of probabilities. This means that the party claiming a right must demonstrate, through evidence, that his version of events is more likely to be true.

17. 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 rests upon the person making the claim, 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.

18. In the present case, the appellant’s claim against the respondent was with respect to a loan facility allegedly advanced to the respondent. In support of its claim, the appellant produced a loan agreement whose authenticity was challenged. The signature in the said document was denied by the respondent who further stated that the loan had not been disbursed and the documents used by the appellant were in respect of another loan facility previously disbursed to the respondent.

19. Firstly, the moment the respondent challenged the authenticity of the documents relied upon by the appellant including the signature in the loan agreement, the evidentiary burden of proof shifted back to the appellant to prove those documents. It could only prove the signature by adducing expert evidence which it failed to. The trial court cannot be faulted in its holding that the signature was not proved.



20. From the evidence on record, it is clear that the parties had a prior relationship prior to the disbursement of the loan. The car tracking system installed with respect to the motor vehicle and the valuation report all predate the date of attestation of the facility letter. Further, the record only shows the loan statement from the appellant and it is not demonstrative on how the money, if any, was disbursed to the respondent.
21. The minute the respondent raised the issue of not receiving the money, the burden shifted back to the appellant to show that the money actually left its account and hit that of the respondent. Further, the court is in agreement with the trial court that, at face value the signatures provided in the ID number as well as the witness statement are similar but do not resemble that in the loan agreement.
22. That being the case, the court finds that the appellant failed to demonstrate that the respondent was advanced the alleged loan. No evidence was availed to attest to the existence of a valid loan agreement and the actual advance. Accordingly, there was no justification in disposing the motor vehicle. If anything, the amount claimed by the appellant goes against the in duplum rule which is applicable to any money lending entity.
23. Consequently, the appellant has not met the necessary threshold on the balance of probabilities, thus making the claim made unsubstantiated. Accordingly, the Court finds no merit in the appeal and the same is dismissed with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE

