



**Oduor t/a Alvo Closet v Simiyu (Commercial Case E085 of 2023)  
[2024] KEHC 14438 (KLR) (Commercial and Tax) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14438 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E085 OF 2023  
BK NJOROGE, J  
NOVEMBER 21, 2024**

**BETWEEN**

**ALVIN ODERO ODUOR T/A ALVO CLOSET ..... APPELLANT**

**AND**

**BEVERLY MUVOKA SIMIYU ..... RESPONDENT**

*(Appeal from the Judgment and decree of the Chief Magistrate's Court at Nairobi  
Honourable B. Cheloti (PM) dated 14.04.2023 in MCCOMMSU/E422 Of 2021)*

**JUDGMENT**

1. This is an Appeal against the Judgment delivered by Hon. B. Cheloti (PM) on 14.04.2023 in Milimani MCCOMMSCU No. E 422 OF 2021.
2. The Trial Court passed a Decree in favour of the Respondent who was the original Plaintiff against the Appellant who was the original Defendant as follows;
  - a. That the Defendant do pay Kshs.590,000/- being the balance of the principal amount loaned to him.
  - b. That interest on (a) above at Court's rate from 1<sup>st</sup> January, 2019 until payment in full.
  - c. The cost of this suit be borne by the Defendant at Court rates from the date of delivery of this Judgment until payment in full.

**Background facts**

3. The Respondent sued the Appellant on account of a sum of Kshs.590,000/-. This was said to be the balance of a sum of Kshs.640,000/- advanced to the Appellant. The amount was said to be a soft



loan advanced to the Appellant sometimes in 2018. The amount was due for repayment on or before December, 2018.

4. When the Appellant defaulted in payment, the Respondent made repeated demands. The Appellant issued her with 2 cheques for payment each of Kshs.320,000/- hence totaling Kshs.640,000/-. The Appellant then informed the Respondent not to bank the cheques as there were insufficient funds in his account.
5. The Respondent engaged the services of M/S Kiriiyu Merchant Auctioneers to collect this debt. A demand letter was sent to the Appellant dated 17/7/2020. It is at this juncture that the Appellant remitted 4 Mpesa payments to the Respondent between 26/7/2020 and 9/1/2020. The total Mpesa payments made were Kshs.50,000/-. This brought down the balance outstanding to Kshs.590,000/-.
6. The Respondent thereafter claimed the amount due with interest at the commercial rate of 15% p.a from 1/1/2019 until payment in full. She then proceeded to file a suit.
7. The Appellant denied the claim filed a statement of Defence. He denied the claim in total. He stated that the Respondent was his ex-girlfriend.
8. He further stated that the Respondent had approached him for help to start up a business. This was as a consequence of the Respondent having lost her job. As the Respondent had earlier assisted the Appellant, when the Appellant's mother was recovering from cancer care, he felt obliged to step in and help a friend in need.
9. He therefore issued the Respondent with two cheques of Kshs.320,000/- totaling Kshs.640,000/-. The cheques were postdated. As he did not have sufficient funds in the bank account, he informed the Respondent not to bank the cheques. He maintained that the cheques were issued for no consideration at all. Therefore, no claim could arise based on the two cheques.
10. The Respondent maintained that the whatapp messages did not prove anything. They did not prove the claim as framed by the Appellant.
11. Lastly, the claim for interest at commercial rates was denied.
12. The Respondent presented her case before the Trial Court as the sole witness. The Appellant was also heard in his defence as the sole witness.
13. The Trial Court returned a verdict allowing the Respondent's claim. The defence raised by the Appellant was rejected. This is what has triggered this Appeal.
14. The matter was flagged down for the Rapid Result Initiative (RRI) during the month of October, 2024. The Appeal was admitted on 15/11/2023. Further directions issued that the Appeal be disposed of by way of written submissions.
15. The Court has seen and perused the Appellant's written submissions dated 19/12/2023 as well as the Appellant's list of authorities. The Court has equally seen and read the Respondent's written submissions dated 19/5/20204 and the Respondent's list of authorities dated 19/4/2024. The Court is grateful for the submissions made by Counsel in this matter.

#### **Issues for determination**

16. The Court proceeds to frame 2 issues for determination. This is after having had the benefit of reading the 9 grounds of Appeal raised by the Appellant, as well as the Submissions filed by the parties.
17. The issue raised are as follows;



- a. Whether the Appeal is meritorious?
- b. What reliefs flow from this Appeal?

### **Analysis**

18. This is a first Appeal. The Court is therefore duty bound to re-look, re-consider and re-evaluate the evidence presented before the Trial court afresh. Then this Court has to reach its own conclusions. However, this Court has to bear in mind that it neither saw nor heard the witnesses, and should make allowances for such. See *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] E.A 123.
  - c. Whether
  - d. What reliefs
19. The Court proceeds to analyse the two issues in seriatim as follows;
  - a. Whether the appeal is meritorious?
20. The duty of the Court in reviewing the evidence is to find out whether the Respondent/Plaintiff proved her case on a balance of probabilities. Equally whether the defence raised was sufficient to counter the Plaintiff's case.
21. At the Trial, the Respondent adopted her written statement as her evidence in Chief. Thus maintaining that she had lent to the Appellant a sum of Kshs.640,000/- in 2018.
22. No documentary evidence was placed before the Trial Court to show how the amount of Kshs.640,0900/- was paid to the Appellant. The loan agreement was oral.
23. The loan is denied by the Appellant. His version of the story is that he was advancing monies to his ex-girlfriend. This was to help her out. The Mpesa statements and the Equity deposit slip show a sum of Kshs.373,187/- sent by the Appellant to the Respondent. This was on divergent dates and the amounts sent also differed.
24. The Respondent relied on the two cheques totaling Kshs.640,000/- as proof that indeed there was a debt which the Appellant sought to repay.
25. That further the Appellant was sent a letter of demand by M/s Kiriiyu, Merchants Auctioneers dated 16/07/2020. The Appellant made Mpesa payments in instalments amounting to Kshs.50,000/-.
26. The Court has perused the Respondent's Supplementary List of Documents. It introduced further whatsapp messages. The message exchanged between 20<sup>th</sup> May, 2019 and 21<sup>st</sup> May, 2019 gave a background of the loan. It started as Kshs.960,000/-. A sum of kshs.50,000/-was paid leaving a balance of kshs.910,000/-. A further payment of Kshs.180,000/- (through equity bank) left a sum of Kshs.780,000/-. A further payment of Kshs.40,000/- left a balance of Kshs.690,000/-.
27. It is not clear from any other payments how this amount ended up being Kshs.640,000/-. The Court looking at the Respondent's pleadings and submissions indicated the claim to be Kshs.640,000/- less Mpesa payments of Kshs.50,000/-, which leaves a balance of Kshs.590,000/-.
28. The Respondent in her testimony claimed to have lent the Appellant a sum of Kshs.960,000/-. The balance remaining after payment was KSHS.640,000/-. This is not supported by her plaint where the amount claimed is Kshs.590,000/-. Nevertheless the Court notes what is being claimed is Kshs.590,000/-.



29. During cross examination the Respondent admitted that there was no written agreement as to the lending. That she had received repayments of kshs.370,000/-. That she was not a leading institution, hence she was not allowed to charge interest.
30. The Appellant in turn adopted his statement as his evidence in chief. In his statement, he did not admit the debt. He however confirmed having issued the two cheques for a total sum of Kshs.640,000/- to the Respondent.
31. During cross examination he confirmed having deposited a sum of Kshs.180,000/- on 29/4/2019 to the Respondent. Thereafter he also issued the two cheques. Lastly, he confirmed the following;
- “ The whatsapp message the Plaintiff has provided are mine.”
32. The Court is confronted with two different versions of stories on the reasons why there was exchange of monies between the two parties.
33. Having reviewed the two versions before the Court, this Court is persuaded to follow the Respondent’s version. The Appellant did not explain with any clarity why he would deposit a sum of Kshs.180,000/- in the Respondent’s account at Equity Bank.
34. The Appellant’s explanation for issuing the two cheques amounting to Kshs.640,000/-, which is not a tiny amount, also lack conviction. The Trial Court was not convinced. This Court too is not convinced.
35. Lastly, the admission by the Appellant as to the authenticity of the whatsapp messages sufficiently persuades this Court in favour of the Respondent.
36. Some of the messages are reproduced below;
- “ Please let’s not retrogress we were making progress well. I do not want us to go back to where we were. You promised to get money by Monday its Wednesday.”
- “I am banking the cheques kesho”
- “Kindly don’t. there is insufficient funds in that account. Let’s meet all of us and come up with one final solution that will be fair for both of us. thank you.”
- “What time?”
- Today is the last day of your games.
- Because of lying to me. I have banked the cheques. We will pick it up after they bounce.”
37. The tone and tenor of the two messages do not support the Appellant’s story that he was helping out an ex-girlfriend who was in trouble. If that was the case, why would she threaten to bank the cheques so that they bounce? Why would the Appellant call for a meeting to come up with a solution that is fair for both parties?
38. The Court notes that the burden to prove the case always rested on the Respondent who was alleging the debt. Having presented the evidence, it was incumbent upon the Appellant to shift this burden. He did not do so.
39. Cases are proved on facts and evidence. The standard of proof is one of on a balance of probabilities.
40. The Court relies upon *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September



2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ). The Supreme Court of Kenya held as follows as regards the burden of proof.

Though the legal and evidential burden of establishing the facts and contentions which would support a party's case was static and remained constant throughout a trial with the plaintiff, however, depending on the effectiveness with which he or she discharged that, the evidential burden kept shifting and its position at any time was determined by answering the question as to who would lose if no further evidence was introduced.

41. The Court also relies upon the decision of the Court of Appeal in Mumbi [\*M'Nabea v David M. Wachira \(Civil Appeal 299 of 2012\)\*](#) [2016] KECA 773 (KLR) (Civ) (22 February 2016) (Judgment). The Court of Appeal pronounced itself as follows;

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the [\*Evidence Act\*](#), Cap 80 Laws of Kenya provides as follows: -

“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.”

The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows: -

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that: -

“Whereas under section 107 of the [\*Evidence Act\*](#), (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

“In this case, the burden on the appellant before the trial court was to prove on the balance of probabilities that the respondent was negligent in his driving and therefore liable for causing the accident. In the appeal before us, the appellant allege that the respondent was negligent in his actions, the burden of proof would be on the appellant to prove that it was more probable than not that the respondent acted negligently and if this was done, the burden would have been discharged. If however, the appellant failed to do this, he would consequently not have succeeded in his claim. We think the latter scenario applies in this case.”

42. The Court is of the considered view that the Respondent proved the case before the Trial Court. The Trial Court reached a fair verdict on the issue of the debt.



43. The Court has noted that the two parties were engaging on friendly basis. The Respondent acknowledged during cross examination that she was not a lending institution. She was not lending with a view to make a profit by way of interest, such as a commercial bank would do.
44. The Court commiserates with her that her money has been kept away from her for a long period of time. This however would not justify why interest should accrue at the rate of 18% from 1/1/2019. Certainly, there was no contract for payment of interest.
45. In Makube Vs. Nyamiro [1983] KLR 403, the Court stated that;
- “... a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”
46. The Court is of the opinion that the discretion of the Trial Court was exercised properly in awarding interest at Court rates. But however, it fell into error by awarding interest from 1/1/2019, as if it was a contractual obligation.
47. This is a proper case for the court to interfere with the exercise the Trial Court discretion on award if interest. The interest should have been from the date of filing suit and as stated by the Trial Court, at Court rates.
- b. What reliefs flow from the Appeal?
48. The Appeal therefore partially succeeds to the extent that the date from which interest is to accrue is revised to be from 1/1/2019 to be from the date of filing suit. Otherwise, the appeal fails on the rest of the grounds.
49. Costs are awarded at the discretion of this Court. As the Appellant still owes the Respondent, there shall be no orders as to costs.

### **Determination**

50. Therefore, the appeal partially succeeds and the Decree of the Lower Court is amended as follows: -
- a. The Trial Court’s finding entering judgment in favour of Respondent for a sum of Kshs.590,000.00 is hereby upheld.
- b. The portion of the Decree awarding interest on the principal amount above at Court rates from 1/1/2019 is set aside and substituted with an award of interest at Court rates from the date of filing suit until payment in full.
- c. The award on costs to be borne by the Defendant at Court rates from the date of judgement of the Trial Court until payment in full is also upheld.
51. There be no orders as to costs of this Appeal.
52. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024.**

**NJOROGE BENJAMIN. K**

**JUDGE**

In the presence of: -



..... for the Appellant

.....for the Respondent

Court Assistant: .....

