



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL APPEAL NO. 79 OF 2019**

**ELIUD MUGO KAGAI.....APPELLANT**

**VERSUS**

**WILSON M NJENGA.....RESPONDENT**

*{Being an appeal against the Ruling of Hon. P. Gichohi (Mrs.) - CM Kiambu dated and delivered on the 23<sup>rd</sup> day of April 2019 in the original Kiambu Chief Magistrate's Court Civil Case No. 493 of 2017}*

**JUDGEMENT**

This appeal arises from a suit filed by the respondent against the appellant for a sum of Kshs. 5,250,000/= which he allegedly borrowed but refused to repay. The respondent's case was that on diverse dates between the months of January 2015 and May 2015 he advanced to the appellant, who was his colleague at work, sums of money amounting to Kshs. 5,250,000/= on the understanding that the appellant was to repay the money immediately but in any event before the end of the year 2015. The appellant had allegedly asked for the money ostensibly to fulfil a big job which he had secured as a contractor. He promised to repay the money as soon as he was paid. According to the respondent, on 14<sup>th</sup> May 2015 the appellant wrote him a cheque for the full amount but advised him not to bank it as he was going to deposit the cash directly into his (respondents') account. The appellant did not deposit the cash and the cheque expired. After the appellant failed to deposit the cash as promised the respondent demanded payment and on 4<sup>th</sup> December 2015 the appellant issued him another cheque for the full amount. However, the appellant once again requested him not to deposit the cheque this time on the ground that he had not been paid for the job. The appellant allegedly continued making promises to pay but he never did and so the respondent instructed his advocate to make a demand but the appellant persisted in his refusal to pay and the respondent filed suit.

The appellant disputed that the amount was a loan and contended that the sum of Kshs. 5,250,000/= in the two cheques he issued to the respondent was security for anticipated profits of a joint agribusiness venture or partnership which he and the respondent were engaged in. He contended that the parties injected a capital of Kshs. 1 million each into the joint venture and their anticipated profit was Kshs. 5,250,000/=. He contended that they did not reap anything from their investment and that the respondent was taking advantage of the two cheques in order to enrich himself unfairly and unjustly.

After hearing and considering evidence by both parties the learned trial magistrate made a finding that the respondent had proved his case on a balance of probabilities and entered judgement in his favour for the sum of Kshs. 5,250,000/= with interest from the date of filing suit and also awarded him the costs of the suit. The appellant was aggrieved by that judgement and so he preferred this appeal. The appeal is premised on grounds that: -

**“1. THAT the learned magistrate erred in law and fact in finding that the plaintiff had proved his case on a balance of probabilities and failing to appreciate that the defendant had disproved the plaintiff's case.**

**2. THAT the learned magistrate erred in law and fact in misconstruing the evidence adduced and thereby arriving at a wrong conclusion of law and fact.**

**3. THAT the learned magistrate erred in law and fact in holding that the defendant was indebted to the plaintiff despite the inconsistent evidence of the plaintiff which was effectively rebutted by the defendant.**

**4. THAT the learned magistrate erred in law and fact in ignoring the defendant's defence and in otherwise placing a higher burden upon the defendant to disprove the plaintiff's case.”**

Counsel for the parties consented to canvass the appeal by way of written submissions and I have considered those submissions and also reconsidered and analysed the evidence in the court below so as to arrive at my own independent conclusion. I do the latter while keeping in mind that I did not see or hear the witnesses – *See Selle & another v Associated Motor Boat Co. Ltd & another [1968] EA 123*. The issues that arise for determination in this appeal are: -

**1. Whether there in fact existed a partnership or joint agri-business venture between the parties or whether the relationship between them was merely that of a lender and borrower.**

**2. Whether the two cheques of Kshs. 5,250,000/= which were admittedly issued to the respondent by the appellant were for repayment of a loan or whether they were payment of the respondent's share of the anticipated profit from the joint venture.**

In regard to issue number 1 the appellant's contention was that he and the respondent entered into a joint venture in which each contributed Kshs. 1,000,000/= and planted and supplied agricultural produce; that they anticipated a profit of Kshs. 5,250,000/= which they would share equally and that because the respondent was not at ease he gave him the two cheques to hold as security for the anticipated profits. He contended that implementation of the venture however delayed and they were yet to be paid and earn a profit. At the hearing he testified that the two of them engaged a farm manager called John Mwai and they did a research which proved that if they planted garlic on a 10-acre piece of land they would get a yield of 30 tonnes which if they sold at Kshs. 175/= per kilogramme they could get a minimum profit of Kshs. 5.25 million. He stated that they had at the site a ledger in which their contributions were entered and that the respondent was reluctant to pay his contribution of Kshs. 1 million until he was given a cheque for Kshs. 5,250,000/=. The appellant stated that it was at that time that he gave the respondent the first cheque and that he wrote him the second cheque on 4<sup>th</sup> December 2015 when he (the respondent) said the first one had expired. The appellant further stated that they harvested the first crop in January 2016 but when they left it to their manager to do the rest he went under and they could not even reach him on phone as it was switched off. He contended that the respondent demanded his share of the profits even though their manager had vanished and he decided therefore to take advantage of the two cheques. The appellant vehemently disputed that the amount of the cheque was a loan and contended that the agreement they had was to plant garlic and earn from it. He stated that he was however unable to prove the partnership because the manager vanished with the records. He also stated that he did not have bank statement or anything else to prove that he contributed Kshs. 1 million to the joint venture.

On his part, the respondent maintained that the money was a loan which the appellant refused to repay.

Although the appellant alleged a partnership between him and the respondent and told the court that they carried out a survey to establish the income and profit they would generate he did not produce any document that would prove that. But even more telling is that even were we to believe that the records vanished with John Mwai, the Manager, it would have been very easy for him to prove the existence of the partnership by adducing evidence of his own contribution to the same as this was well within his means to do. He did not however produce any bank statements or any other documents to prove that he contributed Kshs. 1 million to a joint venture making it doubtful that there was such a contribution. He could also have produced evidence that he reported the fraud perpetrated upon them by James Mwai to the police if indeed such was the case given that the proceeds embezzled by the said Mwai was substantial and one would have expected that a report was made. Moreover, if they indeed had a manager one would expect that they kept records of his engagement normal to any employee, to wit, the records of the contract of employment; payment of his salary and his personal data. The fact that the appellant did not produce any of those leaves one in doubt as to whether James Mwai really existed. He who asserts bears the burden of proof (*see Section 108 of the Evidence Act*) and in this case the burden of proof lay upon the appellant to prove the existence of the joint venture or partnership. The evidential burden of proof of course lay upon the respondent who was the plaintiff in the suit but having asserted the existence of the partnership the burden of proof shifted to the appellant to prove it. He did not do so. This is in contrast to the respondent who adduced cogent and credible evidence and even produced two cheques and explained how and why they were issued to him by the appellant. The respondent's averments in his pleadings and his testimony in court were very consistent unlike those of the appellant which kept changing. It is my finding therefore that the respondent's account was more convincing than that of the appellant. Lord Denning in **Miller v Minister of Pensions [1947] 2 ALL ER 372** stated in regard to the standard of proof: -

*“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.*

*Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”*

Having weighed the evidence of both parties I find that of the respondent more probable and hence find in his favour on the first issue.

My determination on issue No. 2 flows from my findings on issue No. 1 and it is that the appellant issued the two cheques to the respondent as a means of repaying the loan. The respondent gave a convincing explanation as to why he did not bank the first cheque which is that he was requested by the appellant not to bank it because he would pay cash into his account. He also explained that the appellant wrote the second cheque because the first one expired. It is indeed the case that a cheque which has overstayed expires. The second cheque was issued almost seven months after the first one and I am satisfied therefore that the explanation is credible. That the respondent did not invoke the provisions of the **Bill of Exchange Act (Cap 27)** does not water down his very cogent evidence. As for the appellant his evidence was shaky and unconvincing. It is very doubtful that he would have written a cheque of Kshs. 5,250,000/= for anticipated profits when there is no evidence to support the allegation that that was in fact the profit they anticipated. Secondly, whereas in his written statement of defence he alludes to the Kshs. 5,250,000/= being the profit due to the respondent, in his witness statement he alleged they were to share the profit equally. In his testimony he claimed to have given the cheque to the respondent because the respondent declined to contribute to the venture until he got the cheque. This is not convincing at all and it is my finding that the inconsistency of his account renders it untrustworthy, unconvincing and unreliable. If they were equal partners why is it only the respondent that received the cheques and if they were to split the profit why did he not get the respondent to issue a separate cheque to him or why didn't he issue the cheque in their joint names? The foregoing questions go to show that his evidence did not do anything to rebut that of the respondent and that the judgement of the trial Magistrate was based on the evidence and was sound. His appeal has no merit and it is dismissed with costs to the respondent. It is so ordered.

**Signed and dated at Nyamira this 25<sup>th</sup> day of February 2021.**

**E. N. MAINA**

**JUDGE**

**Judgement signed, dated and delivered Electronically at Kiambu via Microsoft Teams this 9<sup>th</sup> day of March 2021.**

**MARY KASANGO**

**JUDGE**