



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 42 OF 2021**

**(Formerly KAKAMEGA HCCA NO. 107 OF 2019)**

**HARON NGAIYWA MALWEYI.....APPELLANT**

**VERSUS**

**ISAAC MWANJE KHAYUGILA.....RESPONDENT**

**(Being an appeal from the original judgment and decree of Hon. M Nabibya, Senior Resident Magistrate, of 1<sup>st</sup> October 2019, in Hamisi PMCCC No. 79 of 2019)**

**JUDGMENT**

1. The suit at the primary court, in Hamisi PMCCC No. 79 of 2018, was initiated by the respondent herein against the appellant, for refund of a sum of Kshs. 74, 162.00, being moneys that the respondent had to pay to the Chebokaptich Farmers Empowerment Projects, to be referred to as the organisation, to settle a loan that the appellant had taken from the organisation, and in respect of which the respondent acted as his guarantor. The respondent averred that the appellant defaulted in his obligations to the organisation, by failing to repay the moneys advanced to him by it, whereupon the organisation recovered the sum claimed from the respondent. The appellant filed a defence, in which he acknowledged being indebted to the respondent in the figure of Kshs. 74, 162.00, but averring that he had paid him a sum of Kshs. 40, 000.00 but that he had refused to receive the final balance of Kshs. 34, 162.00, on grounds that the amount had attracted interest.

2. At the oral hearing, only the two parties testified. The respondent stated that he had guaranteed the appellant for a loan, and a sum of Kshs. 74, 162.00 deducted from his accounts with the organisation. He stated that the appellant committed himself to the organisation to pay, but he did not. He admitted that the appellant paid him a sum of Kshs. 20, 000.00 through MPesa, and after deducting the costs of the transactions the amount came down to Kshs. 19, 800.00. He asserted that the amount paid through MPesa did not total Kshs. 25, 000.00. He denied receiving any money through the police. The appellant told that court that he had paid Kshs. 40, 000.00 by MPesa and through the police.

3. After reviewing the evidence adduced at the trial, and other material on record, the trial court found that there was evidence that the respondent had received Kshs. 25, 000.00 through MPesa, and there was no other evidence of payment. Judgment was entered for Kshs. 74, 162.00, less the amount received of Kshs. 25, 000.00, totalling Kshs. 49, 162.00, plus an additional Kshs. 5,000.00, as per agreement between the parties, making a grand total of Kshs. 54, 162.00.

4. The appellant was aggrieved by the decision, and lodged this appeal. His case, as articulated in his memorandum of appeal, dated 29<sup>th</sup> October 2019, is that the trial court erred in finding that the respondent was entitled to Kshs. 54, 162.00, in finding that the respondent had received a sum of Kshs. 20, 000.00 only, and erred in disregarding his evidence on payments.

5. The appeal was argued orally on 19<sup>th</sup> May 2021. Both parties addressed me on their respective cases.

6. The only issue is whether the appellant had established that he had made payment of Kshs. 40, 000.00 to the respondent. He produced an MPesa statement, which showed that he had paid to the respondent a sum of Kshs. 25, 000.00, which evidence was accepted by the court. On the amounts allegedly paid at the police station, he produced no evidence. He did not call the police officer who was facilitating the payments, nor produce any records from that police station to support the claim that such payments were made through the station. I agree with the trial court, that the only evidence on record was that the appellant paid a sum of Kshs. 25, 000.00 to the respondent vis MPesa. The trial court cannot, therefore, be faulted for the conclusion it came to. The appellant has not raised the issue of the additional Kshs. 5, 000.00. The appeal has no merit and it is hereby dismissed with costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF SEPTEMBER, 2021**

**W. MUSYOKA**

**JUDGE**