



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL 63 OF 2018

JOAB NJERU NGAI.....APPELLANT

VERSUS

EPHANTUS NJAGI MBOGO.....RESPONDENT

(Being an appeal from the Judgment of Hon. J.Omwange RM

delivered on the 4/10/2018 in Siakago CMCC No.2 of 2018)

JUDGMENT

FACTS

1. A brief outline of the case was that the respondent brought a suit against the appellant claiming the sum of Kshs.500,000/- that was advanced to the appellant pursuant to a request made by the appellant to him (the Respondent); this agreement was reduced into writing and was duly witnessed by **PW2** who was an advocate of the High Court, the appellant failed and or refused to repay the monies advanced to him;
2. Judgment was entered in favour of the Respondent for the sum of Kshs.500,000/- together with costs and interest from 1/09/2017;
3. The Appellant being dissatisfied with the decision that was delivered on the 4/10/2018 appealed against it in its entirety and listed four (4) grounds of appeal as are summarized *inter alia*:
 - (i) The trial court erred in finding that the Respondent had proved his case; and erred in finding that there was conclusive evidence of disbursement of funds;
 - (ii) The trial court erred in failing to find that the agreement was repudiated by the respondents' failure to disburse the agreement funds;
4. The parties were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of the rival submissions;

APPELLANTS CASE

5. The appellant submission was that he had entered into a Loan Agreement but although the Agreement had been reduced into writing no monies were ever disbursed to him so he did not owe the Respondent anything;
6. No evidence was adduced by the Respondent to demonstrate that he had disbursed the loan amount to the Appellant; It was alleged that the cash disbursed to the Appellant had been withdrawn from the Co-operative Bank but there was no evidence produced by the Respondent on the withdrawal from the Bank;
7. **PW2** under cross-examination stated that the money was brought to his office and counted by his secretary and disbursed by his secretary to the Appellant; However, this secretary was never called as a witness to corroborate the evidence on the disbursement to the Appellant; for that reason the Respondent had failed in discharging the burden of proof; Case law relied on **Riley Falcon Security Limited vs Maseno University and Another [2017] eKLR**;

8. The Appellant further submitted that **PW2** acted contrary to Rule 9 of the Advocates (Practice) Rules in that he acted for both the Appellant and the Respondent; **PW2** also witnessed the Loan Agreement; when the matter became contentious **PW2** then turned up as a witness for the Respondent; the Appellant argued that the trial court ought to have disregarded **PW2**'s evidence as he had breached his duty of confidentiality to the appellant;

9. The trial court having disregarded the evidence before acted on wrong principles and therefore made an error in its judgment; The appellant therefore prayed that the judgment delivered on 4/10/2018 be set aside and prayed for an order dismissing the suit with costs.

RESPONDENTS SUBMISSIONS

10. In response the Respondent opposed the appeal and submitted that at the behest of the Appellant he had given the appellant a friendly loan in the sum of Kshs.500,000/- without interest; the Loan Agreement had been reduced into writing by **PW2** who was an advocate of the High Court and who had also witnessed the Loan Agreement;

11. To support his claim the Respondent produced three (x3) documents in evidence; the documents were as follows;

(i) The Loan Agreement dated 3/08/2017 (**PExh.1**);

(ii) Demand Letter dated 16/11/2017;and

(iii) Defendants Reply dated 6/12/2017;

12. The trial court had framed the issues for determination very clearly and after full consideration of all the evidence found that the Respondent had proved his case in compliance with Section 107,108,109 and 110 of the Evidence Act;

13. The Respondent submitted that the appeal was lacking in merit and prayed that it be dismissed with costs.

ISSUES FOR DETERMINATION

14. The honourable court read the rival written submissions of the parties herein, the following are the issues found by this court for determination;

(i) Whether the subject monies were disbursed to the Appellant,

(ii) whether the Appellant was indebted to the Respondent;

(iii) whether the respondent proved his case to the desired threshold;

ANALYSIS

15. Being the first Appellate court it is incumbent upon this court to re-evaluate the evidence on record and arrive at an independent conclusion. Refer to the case of **Arrow Cars Limited V. Bimomo & 2 Others, C.A. No. 344 OF 2004.**

Whether the subject monies were disbursed to the appellant; whether the appellant was indebted to the respondent; whether the respondent proved his case to the desired threshold;

16. The cause of action brought by the Respondent is based on breach of contract due to non-payment of the friendly loan advanced to the Appellant by the Respondent; the only contentious issue raised by the Appellant is that the loan money was never disbursed to him;

17. **PW1**'s evidence was that he withdrew the money from the Co-operative Bank at Siakago Branch and proceeded to Muraguri & Co. Advocates based at Siakago where both the Appellant and himself had gone to draw an agreement; The court record reflects under cross-examination the Respondent stated as follows;

'...Mr. Muraguri counted the money and confirmed it.....He took the money and then signed the Agreement.'

18. The evidence of **PW2** who was the advocate who witnessed the execution of the Loan Agreement corroborated the evidence of **PW1** and the contents of the above documentary evidence produced as '**PExh.1**'; **PW2** went further to state that the money was counted in his presence and thereafter handed over to the Appellant after he had signed the agreement; the court record reads as follows

'My fees were paid by the borrower – Jacob Njeru Ngari. The money was disbursed to the borrower in my presence and before signing the Agreement the borrower received the money and that was part of the agreement. The money was transacted. The secretary also counted the money.'

19. The Loan Agreement is dated 3/08/2017 at paragraph 3 it reads as follows;

'That upon execution of this Agreement the Borrower acknowledges Kenya Shillings Five Hundred Thousand (Kshs.500,000/-)

cash.

20. However, despite all the above, the Appellant alleges that no monies were ever disbursed to him by the respondent. It is trite law that the burden of proof in a suit or a proceeding lies with the person who would fail if no evidence at all was given on either side. In this instance the Appellant is the party who stands to fail once the Respondent had given evidence and had closed his case the burden then shifted to the Appellant to prove the allegations set out in his defence.

21. This Court has analyzed the evidence on record and finds that there is no evidence adduced by the Appellant to demonstrate the funds were never disbursed whereas it is noted that the Respondent presented the evidence of **PW2** who was an advocate and an officer of the court and he would not have given untrue facts or evidence before the Honorable Court. Pw2 evidence was that the money was counted in his presence and thereafter handed over to the Appellant. The witness stated that the Appellant even paid him for services rendered; it beats logic for a client to pay for services that were incomplete or had not been rendered. Further there was no evidence of any complaint either oral or written ever having been received by **PW2** from the Appellant that the loan amount had not been disbursed.

22. The Appellant had the opportunity of calling the secretary as his witness to prove his statement on whether or not the monies were disbursed. The appellant could have also obtained summons from the trial court to have the secretary as a witness. Upon perusal of the court record this court finds that it is devoid of any corroborative evidence on the allegations made by the Appellant. The court record is devoid of any summons issued or requesting for the attendance of the secretary to give evidence;

23. This court is satisfied that there was overwhelming evidence before the trial court to demonstrate and prove that the monies were disbursed;

24. This court reiterates that once the Respondent had given evidence and closed his case the burden then shifted to the Appellant to prove the allegations set out in his defence. The honourable court finds that there was no wrong principle applied by the trial court and it correctly arrived at the decision that the Respondent had proved his case to the desired threshold.

25. This ground of Appeal is found devoid of merit and it is hereby disallowed.

FINDINGS & DETERMINATIONS

26. For the reasons set out above this court makes the following findings and determinations;

- (i) This court finds that the subject monies were disbursed to the Appellant, the Appellants is found to have been indebted to the Respondent; and further finds that the Respondent proved his case to the desired threshold;
- (ii) The Appeal is found lacking in merit in its entirety and it is hereby dismissed;
- (iii) The trial courts judgment is hereby upheld;
- (iv) The Appellant shall bear the costs of the appeal;

Orders Accordingly.

DATED, SIGNED AND DELIVERED AT NYERI THIS 13TH DAY OF SEPTEMBER, 2021.

HON.A. MSHILA

JUDGE