REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 153 OF 2018

MSA..APPEALLANT

VERSUS

PARVEEN YUNUS..................RESPONDENT

J U D G M E N T

1. Before the trial court was a suit for the recovery of the sum of Kshs.1,140,000/= said to have been a loan advanced to the Appellant by the Respondent and documented in an agreement dated 18/12/2012. In support of the said claim the Respondent filed a list of documents containing the agreement and a witness statement by herself and a witness called Hadija Ali Ahmed.

2. The witness statement revealed that the two were not strangers to each other but were acquaintances since the year 2011 having met at the Land Registry and the Appellant assisted the Respondent with the acquisition of a title document. When served the Appellant filed a statement of defence and witness statement of own.

3. In the defence, the Appellant pleaded that she never signed any agreement with the Respondent to acknowledge receipt of Kshs.600,000/= and jewellery worth 540,000/= and denied ever receiving the said property. She contended that the suit was part of an elaborate fraudulent and extortionist scheme hatched and executed by the Respondent against the appellant which had seen the appellant lose some 1,500,000/= to the respondent. She added that the respondent had in fact kidnapped her and held her in solitary confinement during which confinement money was extorted from her besides emotional physical and sexual abuse till she was rescued by her family.

4. The agreement dated 18/12/2012 was once again denounced and termed a forgery calculated to fraudulently obtain money from her. Even receipt of the demand for payment was denied and the Respondent generally put to very strict proof thereof.

5. In witnesses statement the Appellant asserted that she was the person who lent to the Respondent the sum of Kshs.950,000/= which was used to purchase a motor-vehicle Registration No. KBP ***X which was later transferred to the Appellant after which the Respondent resorted to blackmail and intimidation with the use of the police to the extent that she never saw the motor vehicle nor knew where it was hidden by the Respondent. It was contended that the suit was intended to defeat her claim over for the motor vehicle from the respondent. She denied borrowing my money or receiving the jewelry from the Respondent.

6. After the defence there was filed a reply to defence and a supplementary list of documents. The reply to defence did no more than join issues with what had been pleaded in the defence while the supplementary list of documents introduced several letters by the Appellant to the police as well as a statement made and the pleadings in Mombasa CMCC No. 67 of 2014 for defamation and an agreement alleging a settlement of the said suit.

7. With such pleadings the suit was set down for hearing during which the Respondent led evidence by two witnesses while the Appellant gave evidence by herself without calling the other witness who had been named in the list of witnesses but had not filed any witness statements.

The evidence

8. The evidence led by the Respondent at trial was in essence of reiterating what was asserted in the witness statement to the effect of the loan, the agreement and default to pay which led her to make a report to the police at Diani. On cross examination she said that after reporting to the police she was advised that the dispute was civil to be determined by the civil courts. She however said that the signature on the loan agreement and a document shown to her by counsel differed. On re-examination, the witness said that she trusted the Appellant as a friend and that she did not have receipts for jewelry some having been given to her by the mother her being the only girl in the family.

9. The evidence by PW 2 was to the effect that she was called to witness the agreement between the two parties, that she saw the gold and

that the loan was a friendly one as the respondent was not a money lender. She then added that she once accompanied the Appellant to the bank to seek a loan to pay the Respondent. She confirmed that she and the two disputants were friends. Not much was elicited in the cross examination of the two witnesses.

10. For the Appellant the evidence led was to the effect that she was never lent any money by the Respondent. She denied the agreement acknowledging the loan and insisted that the only agreement she knew was the one by which she advanced to the Respondent Kshs.950,000/= which was used to buy a motor vehicle which had been transferred into her name by the Respondent. She also referred to yet another agreement by which she lent to the Respondent Kshs.100,000/= which had not been paid .

11. On cross-examination, the witness said that a search of motor vehicle KBP ***X showed the registered owner was one Achoki Achika Nichodemus. On the agreement for Kshs.100,000/= dated 24/1/2014 she said she did not bring a witness to court. When cross-examined on the gold she said she owned gold given to her as a wedding gift and that she had instructed an advocate to demand some gold from one Swala Swaleh who is her sister. On re-examination she acknowledge CMCC No. 67 of 2014 have been based on defamation and that she had reported the Respondent to the police because the said respondent had threatened her.

12. Upon close of the tender of evidence, parties filed submissions for the court to consider in coming up with a determination. In a reserved judgment, the court made a determination that the Appellant had failed in hers burden to prove that the signature in the agreement sued upon was not her and therefore entered judgment for the respondent as prayed. The court said:-

> **"In my view, the question whether the agreement dated 18/12/2012 should be entered by the court will ultimately turn on whether the defendant has been able to prove that her signature on the agreement has been forged of cause forgery, being a serious allegation requires cogent evidence to be adduced to required standard which is higher that the balance of probabilities required in civil cases though lower than the standard of prove in criminal cases which is beyond reasonable doubt. This was the holding in the case of Ndolo versus Ndolo (2008) 1 KLR (G & F) 742 where it was held;-**
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> **We start by saying that it was the respondent who was alleging that the will has a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a series charge of forgery on fraud the standard of proof required of him was obviously higher than that required in ordinary civil cases namely proof upon a balance of probability but the standard of proof was certainly not one beyond reasonable doubt as in criminal cases.**
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> **Although I agree that it was necessary to call the document examiner as has been suggested by counsel for the defendant in order to prove that the agreement was a forgery, that burden was on the defendant who has failed to discharge it. Consequently, it is my finding that the agreement dated 18/12/2012 is valid and enforceable".**

13. That decision and judgment has provoked the current appeal in which some seven grounds have been raised. Even if so framed the grounds can be seen to fault the judgment for failure to find that the burden of proof had not been discharged regarding the sum claimed and the further in finding that the agreement relied upon was a valid agreement. There was also the omnibus ground that the whole evidence was never considered. In my own appreciation, I will consider the appeal under the following grounds:-

a. Whose burden was it to prove the validity of the loan agreement?

b. Did the Respondent prove the case to the requisite standards?

c. Did the trial court consider the totality of the evidence in arriving at the decision appealed against?

d. Who should pay the costs of the appeal?

14. Even though I have so set out the issues for determination, I proceed from the stand point that my mandate as a first appellate court is to review and reappraise the entire evidence afresh and come to own conclusions.

15. Having so reminded myself, I also proceed from the dictate of the law that as an appellant court I should not freely and slightly interfere with the findings of the trier of facts unless it be demonstrated that the court proceeded on a wrong footing by considering an irrelevant matter of failing to consider a relevant factor or just that the finding is based on no evidence on record and thus perverse.

16. From the facts pleaded and evidence led, the entire case and the decision rotated upon the validity of the agreement dated 18/12/2012. That agreement being the foundation of the dispute fits being reproduced here in full. In it the parties expressed themselves as follows:-

> **"<u>Agreement</u>**
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> **I am an adult female of sound mind holder of ID No. *******. I took two sets, rings, earings and necklace worth 540,000/= and cash Ksh.600,000/= as a loan cause I wanted a 1 million shillings from parveen and she did not have that amount she decided to give me some golds so I can take to someone as surety to get some money which I did. I am suppose to pay in duration of 6 months from this date of 18/12/12.**
>
> **MSA Parveen Yunus Yusuf**
>
> **Signature Signature**

ID No. *******   **ID No. *******”**

17. On its terms, it requires no depth to interpret and understand what the parties said. Even though signed by both and witnessed by PW 1, the document is clearly an acknowledgement by the appellant of a debt and undertaking to pay the same within 6 months. The plaintiff’s claim having been grounded-on the agreement all she needed to prove was its validity and existence of the debt. That the validity having been brought into issue by the Appellant, it was her duty to prove that the agreement was forged and or that the signature thereon was not hers.

18. In order to prove the existence of a debt and even the invalidity of the agreement, the standard of proof reminded that within a balance of probability even though the burden on the Appellant was higher having been on allegation of fraud and forgery themselves connoting criminality.

19. It is clear from the judgment that the trial court did not isolate the issues as mandated by Order 21 Rule 4 but it is also apparent that the trial court considered the all-important matter - the validity of the agreement and whose burden it was to prove such invalidity. For that reason, I do not find any error on the part of the trial court.

20. I may only add that whether or not her signature was forged was a matter especially within the Appellant’s knowledge and it was thus her duly under Section 112 of the Evidence Act to prove the invalidity by way of establishing that it was forged. It was not for the Respondent to prove that the signature on the agreement belonged to the Appellant but it was the Appellant to prove that the signature was a forgery as asserted in the defence. Having reviewed the pleadings and the evidence led including the Appellants our testimony and the fact that there was a suit for defamation which was settled, I do find that the trial court cannot be faulted on the validity and legal burden to proof and can only be upheld.

21. Having so said, I also find that the evidence led by PW 1 & PW 2 were cogent and not shaken even in cross examination and that it did suffice for a proof on a balance of probabilities.

22. There was ground (3) in the Memorandum of Appeal framed to challenge the judgment on the basis that it concerned special damages which were not properly pleaded and proved as by law dictated. In my view that was a wild card and a finishing net cast too wide hoping to catch everything and anything that comes by it, just in case there was anything. I so say because in my view the claim was never a special damage claim but a liquidated claim. In a liquidated claim, all a litigant needs to plead is that circumstances leading to the accrual of liability and the evidence of such facts showing the sum owed. In the circumstances of this case it was adequately pleaded that the liability was incurred by a written agreement undertaking to pay a specific sum within a definite period. Once that was proved in evidence, it was not necessary at all for the Respondent to prove by way of receipts how to come by the Kshs.600,000/= or the jewelry worth Kshs.540,000/=. That need was exhausted and made wholly unnecessary by the parties signing to own the agreement dated 18/12/2012.

23. In any event we have moved on as a legal system from the old position, if it ever existed, that the only way to prove a value is by documents. In ***Jacob Ayiga vs Thomas Ndays [2005] eKLR,*** the Court of Appeal said:-

> **“That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only do documentary evidence can prove these things”**
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> **(emphasis provided)**

24. In the end, I do find that there is no merit in the entire appeal for which reason I order that it be dismissed with costs to the Respondent.

Dated and delivered at **Mombasa** this **21st** day of **January 2020**.

P.J.O. OTIENO

JUDGE