



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 639 OF 2012**

**CHETAN SHAH.....APPELLANT**

**VERSUS**

**ROBERT OMBUI MASESE**

**T/A MWABITUTU ENTERPRISES.....RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. This is an appeal against the ruling of the Chief Magistrate Milimani CMCC No. 4490 of 2008 delivered on the 3<sup>rd</sup> October 2012.
2. The respondent filed suit for recovery of Kshs. 3 million advanced to the appellant as a soft loan as well as interest and costs of the suit. The trial court awarded the respondent Kshs. 2,154,000 as well as costs and interest until payment in full.
3. The appellant being dissatisfied with the judgement appealed on 11 grounds as indicated in the Memorandum of appeal that can be summarised as follows;

*a) That the respondent lacked locus standi to institute suit on behalf of Mwabitu Enterprises*

*b) That the learned magistrate erred in law and fact in holding that the appellant was the appropriate party to be sued.*

*c) That the learned magistrate erred in law and fact in holding that the loan alleged to have been advanced to the appellant had been repaid in full*

4. The parties consented to dispose of the matter by way of written submissions.

**B. Appellant's Submissions**

5. The appellant submitted that the suit as initially instituted had no initiator as the respondent instituted the suit in his personal capacity when it was clear that the partnership was the proper plaintiff in the suit. The appellant relied on the cases of **Baskins v United Mine Workers (1920) 150 ark 398, 40L, Free Pentecoastal Fellowship in Kenya v KCB** as well as that of **Football Kenya Federation v Kenya Premier League & 4 Others (2015) eKLR**.

6. The appellant further submitted that the appellant was not the proper person to be sued as he was a director at Guaca Stationers Limited who borrowed the suit money and thus he couldn't be held liable for its debts. The appellant relied on the cases of **Salomon v Salomon & Company Ltd (1897) AC 22 HC, Moir v Wallersteiner [1975] 1 ALL ER 849, Victor Mabachi & Anor v Nurturn Bates Limited (2013), Jan Bolden Neilsen v Herman Philious Steyn & 2 Others (2012) eKLR, Amon v Raphael Tuck & Sons Ltd (1965) 1 All ER 273** and that of **Anthony Frncis Wareheim & 2Others v Kenya Post Office Savings Bank (2002) eKLR**.

7. The appellant further submitted that the respondent was not a party to the contract and as such could not claim the money for his personal benefit and conversely the appellant could not be found liable to a contract which he was not a party to. The appellant relied on the case of **City Council of Nairobi v Winfred Kamau Gathua T/A Githua Associates& Anor (2016) eKLR**.

8. The appellant further submitted that one Joel Oiga was an agent of Mwabitutu Enterprises and was seized of both actual and ostensible authority to deal on behalf of the partnership. The appellant relied on the cases of **Branwhite v Worcester Works Finance Ltd (1969) 1 A.C. 552 and that of Garnac Grain Co. Inc v H.M. Faure & Fair Daugh Limited**.

9. It was submitted that the respondent failed to prove on a balance of probability that either the appellant or Guaca Stationers owed him any money and the same had been repaid in full.

### **C. Respondent's Submissions**

10. The respondent submitted that the appellant failed to file a defence in response to his claim leading to a default judgement in favour of the respondent after which the appellant and respondent entered into a consent on mode of payment to which the appellant issued cheques which were subsequently dishonoured.

11. The respondent further submitted that Order 30 rule 1 of the Civil Procedure rules allows suit to be brought in the name of the firm and this is further provided in section 7 of the Partnership Act. The respondent relied on the case of **Ledama Ole Kina v Ndungu Njoroge & Kwach Advocates (2009) eKLR**. The respondent further submitted that a suit cannot be defeated for misjoinder and quoted the case of **Bhundia Builders & Erectors v Ima Agencies Limited [2014] eKLR**.

12. It was further submitted that the loan agreement was between the appellant and the respondent and consequently it could only be enforced against the parties to a contract. The respondent relied on the case of **Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] Eklr**

13. The respondent further submitted that the allegation by the appellant that Joel Omwenga was an agent of the respondent was unsubstantiated. The appellant further submitted that the loan was advanced to the appellant in his personal capacity and had never been repaid as alleged.

### **D. Analysis of Law**

14. The duty of the first trial court The duty of a first appellate Court as was held in the cases of **Mwana Sokoni v Kenya Bus Service Ltd (1985) KLR 931** and **Selle v Associated Motor Boat company ltd (1968) EA 123** as to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

15. The issues for determination in this appeal are as follows:-

- a) Whether the respondent was possessed of the locus to sue
- b) Whether the appellant was rightly sued.
- c) Whether the respondent was an agent whose actions were binding on the partnership.
- d) Whether the loan was repaid in full.

16. On the issue of locus standi raised by the appellant, Order XXIX Rule 1 of the revoked Civil Procedure Rules which is similar to Order 30 Rule 1 of the Civil Procedure Rules 2010 which provides;

***“Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) in which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct.”***

17. The current suit leading to this appeal was instituted by the respondent trading as Mwabitutu enterprises. This in my view was in line with the provisions of the then Order XXIX Rule 1 of the revoked Civil Procedure Rules which mirrors Order 30 Rule 1 of the Civil Procedure Rules 2010.

18. In the case of **Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank [1992] eKLR**, relied on by the appellant, the Court held that;

***“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit must be instituted by or against one or more such persons in the representative capacity pursuant to the provision of o1 rule 8 Civil Procedure Rules.”***

19. The case of **Football Kenya Federation v Kenya Premier League & 4 Others (2015) eKLR** as quoted by the appellant is in my view inapplicable to the current case as what was up for consideration was the suitability of an unincorporated society which the court correctly held to be incapable of being sued. This case has different facts and I find it not relevant

20. I find that the respondent was possessed of the standing to institute the suit.

21. It is not in doubt that the appellant obtained a soft loan of Kshs. 3 million from the respondent, the same is admitted by the applicant in his own testimony before the trial court. The money was then transferred from the respondent to Guaca Stationers Ltd, a company in which the appellant was a director. From the court record, the same is admitted by the appellant and evidenced by an attachment to the respondent's replying affidavit sworn on 24.10.2008 which states as follows:

***“I Chetan Shah confirm having received a soft loan of Kshs. Two Million Two Hundred Thousand***

***Received on 22/6/07 Kshs. 1.7M***

***31/7/07 Kshs. 0.5M***

***Loan received from Mwabitutu Enterprises”***

22. In addition to the above, the respondent testified in court that he made a transfer of Kshs. 800,000 to the appellant and backed it up by producing a statement of account as an exhibit. The appellant therefore received Kshs. 3,000,000 from the respondent.

23. From the foregoing evidence, it is clear that the appellant was the appropriate party to sue in case of breach of the aforementioned agreement. The appellant clearly took out the soft loan in his own capacity and payment was made to a company in which he was a director. Other than citing case law to the contrary opinion, the appellant failed to tender any evidence before the trial court to refute the contents of the aforementioned agreement between the parties.

24. I also find that indeed the parties before this court were the proper parties privy to the aforementioned loan agreement and that the appellant was rightly sued.

25. It is noteworthy that from DW1’s testimony in cross examination confirmed that he was not a director of the company and further that he had no evidence to prove that he had repaid the funds received from the appellant to the respondent.

26. It was submitted by the appellant that one Joel Omwenga was an agent of the respondent and further that he received payment of the monies due to the respondent.

27. The appellants further submitted that the loan had been repaid in full and relied on ledgers produced by DW1. It is imperative to note that there was no evidence tendered by the appellant to the effect that DW1 was authorised to receive payment on behalf of the respondent. Further allegations that DW1 was acting as an agent of the respondent were vehemently denied by the respondent who stated that DW1 was a marketer and not authorised to deal with financial matters and further that the respondent wrote a letter to the appellant dated 3<sup>rd</sup> March 2008 to that effect.

28. The respondent did not deny receiving a total of Kshs. 46,000/= paid in parts by the appellant in repayment of the debt as alleged by the appellant in his testimony. Consequently, it is my opinion that the trial court was correct in holding that the appellant owed the respondent Kshs. 2,200,000/=.

29. It is my considered opinion that the appellant has failed to satisfy the court on any of the grounds of appeal.

30. I find that this appeal lacks merit and is dismissed with costs to the respondent.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2019.**

**F. MUCHEMI**

**JUDGE**