



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO.71 OF 2018

URBANUS KYALO WAMBUA.....APPELLANT

-VERSUS-

BRIGGITA NDILA MUSAU.....RESPONDENT

(Being an Appeal from the Judgment of Hon. G.M Mutiso (SRM)

in Makindu Principal Magistrate's Court Civil Case No.85 of 2011,

delivered on 30th June 2015)

JUDGMENT

1. The Respondent filed a suit in the lower court seeking payment of Kshs.300,000/= plus interest and costs. Her case was that she loaned the amount to the Appellant but he failed, neglected and/or refused to pay.
2. The Appellant filed a statement of defence, denied being indebted to the Respondent and called for strict proof of the claim. After the preliminaries, the matter was slated for hearing.
3. The Respondent called a total of three (3) witnesses while the Appellant only called one witness. Judgment was eventually entered in favour of the Respondent.
4. Aggrieved by the decision, the Appellant filed this appeal and listed 4 grounds stating that the learned trial magistrate erred in law and fact by;
 - a) *Finding that the Respondent gave a loan of Kshs.300,000/= to the Appellant by depositing it in the Appellant's bank account.*
 - b) *Finding that the bank account in which the Kshs.300,000/= was deposited belonged to the Appellant yet there was a variance on the account numbers contained in the agreement between the Appellant and the Respondent and that contained in the bank slip.*
 - c) *Failing to recognize that there was no agreement in support of the banking slip thus the purpose for the money could not be established without adducing evidence which the Respondent failed to do.*
 - d) *Dismissing the Appellant's defence despite being credible and corroborated by documentary evidence.*
5. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.
6. The evidence adduced before the trial court was that Pw1 **Briggitta Ndika Musau** was the principal of Mwaani girls secondary school (*the school*) and that the Appellant became known to her while teaching at St. Joseph secondary school. He approached her for financial assistance of Kshs.500,000/= to start a supermarket in early 2010, but she could only raise Ksh.300,000/= which he undertook to refund after 2 months. He sent the account number to her phone and she deposited the amount into the KCB account, Emali branch. She produced the deposit slip as exhibit 1.
7. Being a gentleman's agreement, it was not reduced into writing but the Appellant promised to refund it once business picked up. He however became evasive and even stopped picking her calls. It was after being traced through a third party that they entered into an

agreement (EXB2) with Pw2 and Pw3 as witnesses.

8. The Appellant did not repay the loan even after a demand letter was issued to him and the Respondent filed a civil suit. It was her evidence that the agreement (EXB2) was never meant for securing a loan as alleged by the Appellant. She denied that the Appellant supplied her school with any materials. For any supplies to schools there are processes and procedures e.g. local purchase orders (LPOs), delivery notes, and particular mode of payments which could have been available if that was the case.

9. On cross examination, she said she had a good relationship with the Appellant and dealt with him in her former station where he used to supply mock materials and exam papers. She agreed that she could deposit or effect payment but not in form of cash.

10. She explained that she had Kshs.200,000/= from her Sacco and withdrew Ksh.100,000/= from her KCB account. She got suspicious when he stopped picking her calls and used a 3rd party number to trace him. She said that school transactions are never complete without delivery notes. She further explained that the agreement was an acknowledgement of being indebted to her and denied coercing him to do the agreement.

11. **Pw2 Albanus King'oo**, and **Pw3 Joseph Keli Mutinda** were both employees of the Appellant then. The agreement (EXB2) was prepared by Pw2 and witnessed by both of them. Both confirmed that the agreement (EXB2) was made on 18/4/2011 by Pw2 on the Appellant's instructions. Pw2 confirmed being made aware of the issue on the date of the agreement. Pw3 is the Respondent's son and he stated that the Respondent had told him about the money in issue.

12. The Appellant testified as DW1 and said he was a businessman at Makindu but denied ever receiving the money from the Respondent. That he used to supply revision booklets and exams to the school where the Respondent was a principal. He also said that the Respondent's son, PW3, was his employee, and him and the Appellant had a loan business relationship.

13. He testified that the Respondent approached and told him that she was expecting some money from somewhere and needed an agreement showing that she owed him money to enable her borrow. He then instructed PW2 to draft an agreement showing that the Respondent gave him Kshs.300,000/= and that was how exhibit 2 came about. It was signed by Pw2 and Pw3 who were his employees.

14. Further, he testified that the agreement does not reflect the true position and is not related to the banking slip (*exhibit 1*). He denied that the account number in the agreement belonged to him and said a fictitious number was put there because it was not serious. He stressed that the correct account number is the one in the banking slip and the money banked was for goods supplied. He claimed that there were some commissions which he was supposed to pay to the Respondent and their relationship became sour when he failed to pay hence the suit.

15. In cross examination he admitted having first met the Respondent when she was the Principal of St. Joseph girls secondary school hence the CEO. He agreed he had no LPOs or deliveries and that he never paid any stamp duty. It was his case that though he started his supermarket in 2010, he did not obtain any loan from the Respondent for that purpose.

16. He added that by the time of preparing the agreement, there was a strained relationship between them. That he wanted to assist her but later realized it was a mistake. He denied receiving the demand letter but agreed that he gave the account in the agreement.

17. In his submissions filed by Makau and Mulei advocates he submits on ground **(a)** that according to the Respondent, the Ksh.300,000/= (*the money*) was to assist him in putting up a supermarket. That she did not produce any agreement to prove the allegation.

18. On ground **(b)**, he submits that the account numbers in the repayment agreement and bank slip are at variance hence casting doubt on whether the money was in respect of a loan agreement from which a repayment agreement was later entered into.

19. On ground **(c)**, he submits that no agreement in support of the loan advancement was produced in evidence. That from the bank slip, the trial court could not confirm if indeed the money deposited was in regard to the alleged loan hence the court erred by finding that the deposit arose from a loan.

20. On ground **(d)**, he submits that the money deposited into his account was in respect of supplies made to the education institution headed by the Respondent and that he produced various invoices addressed to Mwaani girls school. That an inference can therefore be drawn that indeed the deposit was in respect of supplies.

21. On the other hand, the Respondent submits that the plaint was amended orally to reflect the correct account number and that the error had been occasioned by the Appellant.

22. She was categorical that all school transactions are documented and denied ever receiving a motor vehicle from the Appellant.

23. She submits that it was clear from her testimony that she gave the money as a loan without any written agreement and that the agreement was prepared when she realized that the Appellant had become elusive.

24. She contends that the defence was neither credible nor practical as the trial court found that there was no procurement, delivery or LPOs. That the *malafides* conduct of the Appellant is manifest in the number of adjournments which he sought in order to delay the conclusion of the case.

25. She finally submits that the Appellant sought to deny the validity of the agreement while admitting that he signed it and further stating that he put a fictitious bank account number because the agreement was not serious.

Analysis and Determination

26. As a first appellate court, this court has the duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses. This principle was stated in the case of **Selle & Another –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123** in the following words:

“(i) an appeal from the High Court is by way of re-trial and the court of appeal is not bound to follow the trial judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.”

27. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the only issue for determination is whether the Appellant owes the Respondent Kshs.300,000/= as claimed.

Whether the Appellant is indebted to the Respondent in the sum of Ksh.300,000/=

28. The Appellant does not deny that the money claimed was deposited into his account as per the banking slip (*exhibit 1*). He nonetheless contends that the money was for payment of supplies which he had delivered to Mwaani girls secondary school. He produced some invoices, a cash sale receipt and an extract from his diary.

29. Conspicuously absent from his evidence were documents to show that he had been contracted to supply materials to the school and I do agree with the observation of the learned trial magistrate in that regard. Further, the facts that the money was deposited by the Respondent personally and the Appellant did not make a counterclaim against the school are pointers to the improbability of the Appellant’s version.

30. With regard to the complaint about the account numbers, the banking slip clearly shows that the money was deposited by the Respondent to the Appellant’s account. The plaint was amended to reflect the proper account number on 15/05/2012 and there was no objection. It is also noteworthy that the Appellant does not dispute the deposit of the money into his account. Further, the Appellant admitted that he gave the fictitious number in the agreement. Accordingly, the finding by the learned trial magistrate, that the money was deposited in the Appellant’s account, was factual.

31. With regard to the agreement, the same clearly states that the Appellant is indebted to the Respondent in the sum of Ksh.300,000/= which was given to him through a KCB bank account. The appellant was to pay the money on or before 15/06/2011 and the Respondent had the leeway to seek legal redress in case of breach.

32. The Appellant’s version that the purpose of the agreement was to assist the Respondent borrow some money was actually incredible. In any event, if that was the case, the agreement should have shown that it was the Respondent who was indebted to the Appellant and not vice versa. This also brings out the irony in the Appellant’s version in that, according to his evidence, it was him who instructed PW2 on how to prepare the agreement.

33. It also beats logic as to why he would be so willing to assist her yet the evidence shows that their relationship was sour at the time of writing the agreement. The Appellant admitted that indeed he started his supermarket in 2010 which is the same year the money was deposited in his account. His version is therefore an afterthought.

34. From the totality of the evidence on record, it is clear that the agreement was made by the parties freely and without any coercion. The agreement was also in tandem with the Respondent’s evidence that she had casually given the money to the Appellant who later became elusive and they decided to reduce their gentleman’s agreement into writing. The Appellant’s attempt to contradict the purpose of the agreement amounts to extrinsic evidence which offends the *parol* evidence rule.

35. The following passage from **Halsbury’s Laws of England 4th edition Vol. 12** is relevant;

“Where the intention of the parties has been reduced to writing it is, in general not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary, or add to the terms of the document.”

36. The following excerpt from **Chitty on Contract 29th Edition Vol. 12** is also relevant.

“It is often said to be a rule of law that if there is a contract which has been reduced to writing, verbal evidence is not to be given..... so as to add or subtract from, or in any manner to vary or qualify the written agreement..... The rule is usually known as “parol evidence” rule. Its operation is not confined to oral evidence. It has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation.

37. From the foregoing, I do find that the agreement sufficiently supported the banking slip and that the money given to the Appellant was a loan which he failed to pay, and should pay. I find no reason to make me fault the trial magistrate’s finding.

38. The upshot is that the appeal lacks merit and is dismissed with costs. The money deposited as per the court orders of 15th December, 2016 shall be released to the Respondent.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 19TH DAY OF SEPTEMBER, 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG’UDI

JUDGE