



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO. 43 OF 2018

JOSEPH SANYA MWAKAVI.....APPELLANT

-VERSUS-

SIMON KISILU.....1ST RESPONDENT

RAEL MUKII KIMEU.....2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. J.D Karani (RM) in Makindu Principal Magistrate's Court

Civil Case No. 255 of 2017, delivered on 6th June 2018)

JUDGMENT

1. The appeal herein arises from the judgment by Hon. Karani J.D Resident Magistrate dismissing the Appellant's suit on 6th June, 2018.
2. The Appellant had in the plaint before the trial court claimed for Kshs.253,457/= from the Respondents on the basis of a friendly loan. The Respondents denied the claim.
3. After a full hearing, the trial court found the Appellant's claim not proved and dismissed it.
4. The Appellant being dissatisfied with the said judgment filed this appeal raising the following grounds: -
 - 1) **That**, the learned magistrate erred in law and in facts in arriving at a decision which was against the weight of evidence and specifically disregarding all evidence on an agreement for advancing a friendly loan of Kshs.253,457/= to the Respondents despite them accepting having written and signed the loan agreement without any undue influence.
 - 2) **That**, the learned magistrate erred in law and in fact in failing to properly analyze and address himself on the evidence before him and misdirected himself on arriving at erroneous conclusion not supported by evidence.
 - 3) **That**, the learned trial magistrate erred in law and in fact and misdirected himself in applying wrong principles in arriving on erroneous decision.
 - 4) **That**, the learned trial magistrate erred in law and in facts in failing to analyze and address himself on the pertinent legal and factual issues contained in the Appellant's submissions evidence and facts thereby arriving at erroneous and misguided determination.
5. The Appellant had vide a plaint dated 7th July, 2017 claimed for Kshs.253,457/= plus interest and costs from the Respondents. The claim was based on a personal loan given to the 1st Respondent on 11th December, 2010. The same was to be repaid on 1st January, 2011 with interest and a penalty of 20% in the event of a default. The 2nd Respondent was the guarantor of the sum borrowed.
6. The Appellant pleaded that the Respondents defaulted in payment and as at the time of filing the suit the amount outstanding was Kshs.253,457/= which he was demanding from them.
7. In their joint statement of defence, the Respondents vehemently denied the claim. They questioned the document relied on by the Appellant as the agreement for lending. They however agreed having dealt with the Appellant in 2010 where their particulars may have been

used and inserted in the pre-prepared agreement form by use of modern technology.

8. The Appellant testified as Pw1 explaining how the 1st Respondent borrowed Kshs.253,457/= from him, in the presence of the 2nd Respondent and her husband. That the 2nd Respondent was his guarantor. He stated that the 1st Respondent has deposited with him his payslip as security while the 2nd Respondent offered plot no. 398 Masimba as security. The Respondent received the money but did not pay as agreed on 1st January, 2011. He sent them a demand letter but received no response and that's when he filed the suit. He produced their agreement dated 1st December, 2010 (PEXB1). He added that the agreement was drafted by the 1st Respondent.

9. Upon cross examination, he denied drawing the agreement nor lending money (Kshs.15,000/=) to the 2nd Respondent's husband. He also denied that the 2nd Respondent's husband repaid the money he had borrowed. He further stated that the 2nd Respondent had used plot documents as security and she had not come back for the said documents.

10. The 1st Respondent testified that he knew the Appellant as his neighbor and former pastor. He denied borrowing any money from him saying it was the 2nd Respondent's husband that borrowed Kshs.15,000/= from the Appellant out of which he took Kshs.1,000/= as 20% interest so he received Kshs.14,000/=. This was on 11th December, 2010. He also stated that the 2nd Respondent's husband **Kimeu Kinyili** gave the Appellant an original title deed.

11. After a month, he accompanied the 2nd Respondent to the Appellant's home to refund the Kshs.15,000/= borrowed by her husband. The Appellant asked them to sign a document before the release of the title deed. The document showed him as a borrower of Kshs.253,457/=. He produced a bundle of documents (*D EXB1*).

12. Upon cross examination, he denied borrowing any money from the Appellant.

13. The 2nd Respondent gave similar evidence to that of the 1st Respondent. She stated that the Appellant had made her sign a document for release of her title deed for plot no. 398. She denied owing the Appellant any money.

14. In cross examination, she denied taking any money from the Appellant nor being the 1st Respondent's guarantor.

15. The appeal was disposed of by way of written submissions. In his brief submissions the Appellant contends that parties are bound by the terms of their contract. In this case, he says the Respondents are bound by the agreement. That there was nothing to show that they were coerced into signing it.

16. Mr. Kasyoka for the Respondents submitted that the appeal lacked merit as the suit had been dismissed for failure by the Appellant to prove his case. That he failed to produce essential original documents. He argued that the Appellant had failed to demonstrate which wrong principles the trial court had applied in his judgment.

Analysis and Determination

17. This being a first appeal, this court has a duty to re-analyze the evidence and come to its own conclusion. In the case of **Selle & Anor – vs- Associated Motor Boat Co. Ltd. & Others (1968) E.A 123** the court stated this duty in the following terms:

“I accept counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

18. Having considered the evidence on record, grounds of appeal and the submissions by both parties, I find the only issue falling for determination to be whether the Appellant proved his case on a balance of probabilities. Both Respondents denied borrowing any money from the Appellant. In fact, their evidence is that it's the 2nd Respondent's husband who borrowed Kshs.15,000/= from the Appellant and the said debt was paid. The Appellant has disputed that and insisted that it is the 1st Respondent who borrowed his money which was guaranteed by the 2nd Respondent.

19. He who alleges a fact has the duty to prove. Section 107 (1) and (2) of the Evidence Act provides: -

(1) “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

20. The Appellant relied on an agreement (*P EXB1*) to show that a contract was entered into by him and the Respondents on 1st December, 2010. On the basis of this agreement, he gave the 1st Respondent Kshs.253,457/00/= cash after certain securities had been given. His evidence is that the money was not paid hence this suit. An analysis of the evidence clearly brings out the following: -

- The agreement produced in court as PEXB1 which is meant to be the original document does not mention any interest rates or penalty. However, a similar document filed together with the plaint and received by the court on 07/07/2017 shows a penalty of 20% and interest rate of 20%. So which of the two documents was genuinely signed by the Respondents?
- Besides the alleged lending agreement there is no document or part of the PEXB1 showing where the 1st Respondent acknowledged receipt of the money with 2nd signing as the guarantor. The way the document is worded this was cash money which the 1st Respondent is supposed to have physically received.
- The Appellant did not show or explain to the court the source of his money that he was giving to borrowers.
- According to the plaint, the claim is for Kshs.253,457/= borrowed on 11th December 2010. The suit was filed on 7th July 2017. This clearly means that for six (6) years, seven (7) months he elected not to charge any penalty or interest despite the fact that there was no repayment by the 1st Respondent. This cannot be tenable.
- According to the Appellant he gave out secured money which has not been refunded to date. It is therefore expected that the securities are still intact as they could not be released without the repayment of the said securities i.e. Pw1's payslip and the title deed for no. 398 Masumba which are crucial documents in the Appellant's possession and which he should have produced as exhibits. Failure to produce them shows the documents were never given to him and if they were in any event given they were released to the depositors of the same. They could only have been released upon payment of any sums of money owing. If they got lost, he could have reported and stated so.
- The 1st Respondent produced two demand letters from Kalwa & Co advocates SK6(i) and SK6R both 13/01/2011. In SK6(i) is a demand for **Kshs.331,529/=** plus interest allegedly borrowed by the 1st Respondent. The SK6R demands for **Kshs.180,690/=** plus interest. The question this court asks is where the Kshs.253,457/= falls between the two figures. It is not mentioned anywhere. What is it that was borrowed by the 1st Respondent?
- The money was allegedly borrowed on 01/12/2010 and was to be repaid on 01/01/2011 when time started running. The suit was filed on 07/07/2017 which was six and half (6 ½) years after the due date. Under contract the suit was time barred.

21. The above is the evidence that was placed before the trial court. The said evidence has so many gaping holes and is so convoluted. Besides being time barred, the Appellant failed to prove his case.

22. The upshot is that the Appellant failed to establish his claim against the Respondents. I am therefore in agreement with the findings by the learned trial magistrate. The end result is that the appeal lacks merit and is dismissed with costs. The judgment by the trial court is upheld.

DELIVERED, SIGNED AND DATED THIS 9TH DAY OF OCTOBER, 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE