REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 120 OF 2012

MAUREEN WACHERA MACHARIA………APPELLANT

VERSUS

1. MARY ANNE WAHU KAMAU

2. KAMAU NDUNGU T/A NYERI AGGROVET SERVICES....RESPONDENTS

(Being appeal from the judgment and decree in Nyeri Chief Magistrates' Court Civil Case No. 466 of 2010 delivered on 10th October, 2012)

BETWEEN

MAUREEN WACHERA MACHARIA………………....………PLAINTIFF

VERSUS

1. MARY ANNE WAHU KAMAU

2. KAMAU NDUNGU T/A NYERI AGROVET SERVICES…DEFENDANTS

JUDGMENT

The appellant filed a suit against the respondents in the magistrates' court seeking payment of Kshs 765,000/= plus costs and interest at court rates. According to her plaint dated 25th October 2010 and filed in court on 27th October, 2010, the appellant and the respondents entered into some agreement in the year 2005 according to which the appellant lent the respondents "a friendly loan" of the sum of Kshs 765,000/=. The respondents, according to the appellant, refused, neglected and ignored to refund the money hence the suit against them.

The respondents denied the claim; they drew and filed their statement of defence in that regard. In particular, they denied having received any loan from the plaintiff; in fact, they contended that they were strangers to the appellant's allegations. They, however, stated later in their defence they refunded all the money which, apparently, they had received from the appellant.

In her judgement, the learned magistrate found for the respondents and dismissed the appellant's suit with costs. According to the learned magistrate, the appellant did not prove her claim against the respondent on a balance of probabilities. Being dissatisfied with the decision of the magistrates' court, the appellant opted to appeal and filed a memorandum of appeal dated 6th November, 2012 in which he raised nine grounds of appeal; some of those grounds are repetitive but if I may paraphrase them they appear to me to

as follows: -

1. The learned magistrate misdirected herself in law in failing to comply with **order 21 rule 4** of the **Civil Procedure Rules;**

2. The learned magistrate misdirected herself in law by requiring an independent witness and determining the matter on technicality contrary to the express provisions of the law;

3. The learned magistrate erred in law by failing to consider **article 159** of the Constitution of Kenya;

4. The learned magistrate erred in law in failing to find that the respondent's defence was defective;

5. The learned magistrate erred in law in making the decision she made without proper consideration of the case before her;

6. The learned magistrate misdirected herself on the law and facts and arrived at a wrong conclusion;

From the evidence on record, the basis of plaintiff's claim was simply this: she and the respondents were acquaintances and as at 2nd May, 2015 when she testified, they had known each other for 6 years. The respondents were husband and wife and they were both business people who traded in Nyeri town as Nyeri Agrovet Services.

As their friend, the appellant loaned the respondents some money when they were in need; in particular, she gave the 1st respondent the sum of Kshs. 420,000/= which the 1st respondent herself acknowledged having received on 15th March, 2006. Apart from the acknowledgement, the 1st respondent also issued the appellant with a cheque for the sum of Kshs 420,000/= as security for the repayment.

Similarly, the appellant lent the respondents the sum of Kshs 345,000/= for which again she was issued with a cheque of a similar amount by the 1st respondent as security for repayment of this particular sum.

The appellant produced the two cheques and the acknowledgement signed by the 1st respondent in evidence to support her case.

When she presented the cheques for payment, apparently when the debt became due, the respondents asked their bank to stop the payments and so the two cheques were not honoured. She provided proof that the cheques had been banked but their payment had been the stopped.

When she demanded for payment of the total sum of Kshs 765,000/= the respondents, through their counsel responded by a letter dated 1st September, 2006 denying the claim; they, however, admitted owing the appellant the sum of Kshs 110,000/= only.

When it was their turn to testify, the 2nd respondent testified first and admitted that the 1st respondent was his wife. He also admitted that sometimes in 2006 the appellant lent them a Kshs 300,000/=; this sum was the principal but it attracted an interest of 40% which was equivalent to Kshs 120,000 and therefore the total sum due and owing was Kshs. 420,000/=. Accordingly, the respondent also admitted having drawn a post-dated cheque of Kshs 420,000/= in the appellant's favour. He also admitted his wife's acknowledgement of receipt of this sum.

The 2nd respondent testified that they settled part of the loan by four instalments three of which were of the sum of Kshs 75,000/= each while the fourth one was of the sum of Kshs 85,000/=. The balance, according his evidence was the sum of Kshs 110,000/= which was later settled in September 2006. With these payments, there was nothing outstanding and it is for this reason the respondent directed his bank to stop payment of the cheques with which they had issued to the appellant.

Upon cross examination, the respondent testified the appellant used to collect money from their shop in Nyeri though she neither acknowledged receipt nor issued any receipts for the sums she received from the respondents.

Just like her husband, the 1st respondent admitted having borrowed the sum of Kshs 300,000/= from the appellant but because of the accruing interest, the total sum due and payable was Kshs 420,000. Out of this sum, they repaid the sum of Kshs 75,000/= by cash and the balance of Kshs 345,000/= by cheque. Despite these payments, she testified that the 2nd respondent paid two further instalments, apparently by cash, of the sums of Kshs 75,000/= and Kshs 85,000/= respectively.

This comprised the evidence at the trial and it has been necessary to reproduce it here because being the 1st appellate Court, this Court has the obligation to evaluate the evidence afresh and come to its own conclusions regardless of the fact that it is only the subordinate court that heard and saw the witnesses. In making its own factual conclusions, this court will be cautious of this disadvantage. **(See Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126).**

My assessment of the appellant's claim is that it was supported by documentary proofs; these are the 1st respondent's note acknowledging receipt of money, the two cheques dawn on the respondents' account in favour of the appellant and, the advice notes from the appellant's bank notifying the appellant that the payment of cheques had been stopped.

The acknowledgement by the respondents of receipt of the sum of Kshs 420,000/= from the appellant was dated 15th March, 2006 and it read as follows:

> *"Cash acknowledgement*
>
> *I Maryanne Wahu Kamau on behalf of Nyeri agrovet services has received the sum of 420,000/= (Four Hundred and Twenty Thousand only from Maureen Wachira Macharia of P.O. Box 106 Nyeri. The cash is payable on or before 15/4/06 I have issued a postdated cheque No 00078 as security of the said amount.*
>
> *Signed."*

This piece of evidence was admitted without any objection from either of the respondents; as a matter of fact, they both admitted it was the 1st respondent's document and it was duly signed by her. If that is the case, there was no basis for the respondent's contention that the amount she received was less than the sum stated in their own acknowledgement and that the difference was made up of interest. The attempt by the respondents to vary or alter what in effect was their written undertaking by oral evidence was objectionable.

The trial court on its part, could not admit such evidence and was bound by the contents of the written document. If the rate of interest was such a fundamental term of the contract (and indeed it appears to have been crucial because the respondents would later allege that they disputed the rate of interest charged) then it ought to have been included in the written agreement.

Accordingly, the evidence by which the trial court was bound was that the respondents had received from the appellant the sum of Kshs 420,000/= which was "secured" by a cheque drawn on the respondents' account in favour of the appellant.

The second cheque of **Kshs 345,000**/= is alleged to have been given on similar terms although this time round it was not supported by any note acknowledging receipt of this sum of money.

According to the respondents, they issued the cheque for this latter sum in part settlement of the sum of Kshs 420,000/=. The appellant is alleged to have received the difference of Kshs 75,000/= in cash.

The problem I have with the respondent's contention is that there was no proof of any sort that either the appellant received the sum of Kshs 75,000/= or that he was given the second cheque in replacement of the first cheque.

As far as the appellant is concerned, it was sufficient for her to demonstrate that the respondents owed her a particular sum which they attempted to repay by way of a cheque but which could not be honoured because the respondents stopped it. Once she presented that evidence the burden shifted to the respondents to demonstrate the contrary and show, at least on a balance of probabilities, that this particular cheque was not for any other purpose other than for part settlement of the initial loan of Kshs 420,000/=. This, in my humble view, they did not do.

If the respondents were inclined to issue the second cheque in replacement of the first cheque, then I cannot understand why they should not have insisted on the appellant surrendering this latter cheque before she could be issued with a fresh one. To say that the appellant had misplaced the first cheque was not sufficient. It may be true indeed the initial cheque may have been misplaced but in such circumstances, they were bound to take basic precautions to protect themselves from any unwarranted claim; for example, I cannot see why they could not compel the appellant to commit herself in writing that she was receiving the second cheque in replacement of the first cheque.

My humble view is, in the absence of any evidence to the contrary, the appellant proved, on a balance of probabilities, that she was issued with two cheques for the total sum of Kshs 765,000/= in repayment for a loan she had lent to the respondents. The logical conclusion from the evaluation of the evidence is that the respondent could not have been drawing these cheques in her favour if they did not owe her the money.

The appellant also established, and the respondents themselves agreed, that the respondents stopped the payment of these cheques. With this admission, the burden was upon the respondents to prove that they had had repaid the appellant the value of the cheques. Looking at the evidence on record, there is no indication whatsoever that they discharged this burden. All they said was that the appellant used to collect money from their shop without any form of acknowledgement of receipt.

I find that testimony difficult to believe because, they could not have paid the appellant the sum of Kshs 420,000/= without insisting on any form of acknowledgement considering that the appellant was holding cheques which they had drawn in her favour. It is doubtful that the respondents could have been so careless as to pay such a tidy sum without any document to cover them; however, if they chose to go that direction, then it is inevitable now that they have to pay for their recklessness.

In the ultimate, my own assessment of the evidence leads me to the conclusion that the appellant proved her case on a balance of probabilities and her claim against the respondents ought to have succeeded. Accordingly, I allow her appeal and set aside the judgment of the lower court; in its place, I enter judgement for the appellant against the respondents jointly and severally for the sum of Kshs 765,000/= plus costs and interest at court rates which shall be calculated from the date of judgment in the lower court. The appellant is also awarded costs of the appeal. It is so ordered.

Dated, signed and delivered in open court this 13th day of January, 2017

Ngaah Jairus

JUDGE