



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 19 OF 2015

(CORAM: J.A. MAKAU – J.)

DAVID OMONDI OKOTH.....APPELLANT

VS

MICHAEL ODONGO ORUAKO.....RESPONDENT

(Being an Appeal against the Judgment dated 25.03.2015 in PMCC No. 2 of 2013 in Ukwala Law

Court before Hon. R.M. Onanda – S.R.M)

J U D G M E N T

1. The Appellant **DAVID OMONDI OKOTH** was the Defendant at the Lower Court and the Respondent was the Plaintiff. The respondent through a plaint dated 2nd January 2013 sued the Appellant seeking the following orders: -

(a) Payment of Kshs. 50,680/=.

(b) Cost of the suit.

(c) Interest on (a) and (b) above.

(d) Any other relief this Honourable Court may deem fit and just to grant.

2. The Appellant filed Memorandum of appearance dated 23rd February 2013 and a defence dated 26th February 2013 denying liability save for the sum admitted in his defence.

3. That after full trial, the Learned Trial Magistrate entered judgment in favour of the Respondent for Kshs.37,430/= with costs as interest.

4. The Appellant was aggrieved by the trial court's judgment dated 25th March 2015, which provoked this appeal filed on 24th April 2015 setting out the following two grounds of appeal: -

(i) The Learned Magistrate erred in law and fact by awarding the Respondent the sum of Kshs.50,600/= without proof and in disregard of the agreement that had been entered into by the parties.

(ii) The Learned Magistrate misdirected himself by relying on adverse evidence irregularly

introduced in submissions without any backing in pleadings and the required standard of proof in respect thereof.

5. At the hearing of the Appeal, Mr. Wanyama, Learned Advocate, appeared for the Appellant, whereas the Appellant appeared in person. Mr. Wanyama, Advocate combined all the two grounds of appeal and urged them as one ground of appeal and further urged, in case the appeal succeeds the appellant wouldn't pray for costs. He urged that the trial court in its judgment, it misdirected itself in awarding the sum of Kshs. 50,680/=, pleaded in the plaint as the Respondent did not prove that the sum had been received by the Appellant nor acknowledged in form of signing of a voucher. That no document was produced to confirm the Appellant acknowledging receipt of the said amount. The Respondent failed to prove he advanced the said money to the Appellant as the Advocate who was the intended witness for the Respondent was not called as a witness. He urged proper judgment should have been entered in favour of the Respondent for Kshs.22,300/= as exhibited by the exhibits produced before court; thus exhibit-1, which amount he urged should have been reduced by Kshs.13,250/= which the respondent acknowledged receipt through M-PESA. Mr. Wanyama, Advocate therefore urged the trial court should have entered judgment in favour of the Respondent for the balance.

6. The Respondent on his part urged he pleaded and strictly proved his claim and urged the court to discuss the appeal.

7. The issue for consideration as raised by the Appellant in his combined grounds of appeal and urged as one is whether the Respondent pleaded and strictly proved his claim of Kshs.50,680/= as against the Appellant? The respondent in his plaint dated 2nd January 2013 pleaded that his son D O (minor) and himself were involved in an accident provoking them to filing 2 suits at Maseno Law Courts through the firm of M/S Nyachiro, Nyagaka & Co. Advocates. The Respondent was successful in the Maseno Case No. PMCC 293 of 2005. The Respondent averred the defendant deceived him that his son's case had been dismissed with costs, thus prompting Respondent to travel to Nakuru to see his lawyer, who informed him he had been awarded Kshs.93,100/= out of which sum he had handed Kshs.50,680 to the Defendant for onward transmission to the Respondent.

8. The Respondent in his evidence stated that he enquired about his son's claim from his Advocate in the presence of the Defendant, who told the Respondent he had used the Kshs.50,680/= on a funeral. The Advocate told the Respondent his money was to be paid by the Defendant. That on 27th October 2011, the two agreed the Defendant was to pay the money by installments, prompting the Appellant to give the Respondent four cheques each of Kshs.5,575/= totaling to Kshs.22,300/= and he promised to draw cheque for the balance, the cheques given were dishonored. The Respondent produced the agreements as exhibits P1 and P2 and proceedings at Maseno Court as exhibit P3. The Respondent told the court he claimed Kshs.50,680/=. The Respondent claimed Kshs.50,680/= as that was the money the Advocate gave the Appellant, his Clerk, for onward transmission to the Respondent.

9. The Appellant in his defence admitted, that between the year 2002 upto 2012 he used to be a clerk in the firm of M/S Nyagaka & Co. Advocates at Nakuru and that he had known the Respondent since 2005. He denied that he got any money in favour of the Plaintiff from the Respondent's Advocate, but stated that he received Kshs.25,000/= from the Plaintiff claiming, he asked the Respondent to give him a loan after; he had been paid by his Advocate, offering to refund the amount within two (2) months and urged that he refunded to the Respondent Kshs.2,700/=, leaving a balance of Kshs.22,300/= which he offered to pay by postdated cheques. That he paid Ksh.12,500/= through M-PESA, leaving a balance of Kshs.10,800. He denied receiving any money from the Advocate on behalf of the Respondent. He offered to pay Kshs.10,800/= being the unpaid balance.

10. In this case, the Respondent demonstrated that he had filed a civil suit on his behalf and his son, that is in **Maseno PMCC No. 293 of 2005, Dan Ouma V Kenya Bus Services Ltd** as exhibit P3, in judgment which was entered in favour of his son for Kshs.93,100/=, which amount was payable to his Advocate M/S Nyagaka & Co. Advocates, who were duty bound to pay the sum due to the Respondent and not the Appellant. There is no evidence, how much money the Advocate paid and to whom it was paid, however, if the amount was paid to the Appellant by the Advocate on behalf of the Respondent, that

was not proper as there is no evidence, that the Respondent had donated any power of Attorney to the Appellant to be paid the said amount on behalf of the Respondent. The Respondent did not demonstrate to the satisfaction of this court that Kshs.50,680/= was paid, if at all, to the Appellant on his behalf. The Advocate who the Respondent claims called the Appellant and before whom, the Appellant admitted receipt of Kshs.50,680/= on behalf of the Respondent, was not called as a witness nor did he give the Respondent any document duly executed by the Appellant, duly witnessed by any witness acknowledging receipt of Kshs.50,680/= on behalf of the Respondent.

11. In view of the above, I find that though the Respondent specifically pleaded the sum he claimed of Kshs.50,680/=, he failed to strictly prove that Kshs.50,680/= was received by the Appellant from his Advocate on his behalf. I however, find the Respondent proved through exhibit P1 that the Appellant acknowledged indebtedness to the Respondent to the tune of Kshs.22,300/= as he issued four postdated cheques for the said amount. The Appellant admitted having received a loan of Kshs.25,000/= from the Respondent out of which he paid Kshs.2,700/= leaving a balance of Kshs.22,300/= out of which the Respondent acknowledged payment through M-PESA as per evidence of the Appellant leaving a balance of Kshs.10,800/= which the Appellant is ready and willing to repay.

12. In view of the above, I find that the Respondent has not demonstrate that his Advocate duly paid his claim in respect of Maseno PMCC No. 293 of 2005 through the Appellant and he further did not strictly prove that the Appellant received Kshs.50,680/= on his behalf from his Advocate, but that the Appellant received a personal loan from the Respondent of Kshs.25,000/= and after paying that Kshs.2,700/=, the two reduced their loan agreement down in writing and out of the sum due the Appellant paid Kshs.12,500/= leaving a balance of Kshs.10,800/=.

13. The upshot is that the appeal is merited and is allowed. I therefore make the following orders: -

(a) Appeal Allowed.

(b) The Judgment of the Lower Court is set aside and is substituted with Judgment in favour of the Respondent for Kshs.22,300/= less the sum already paid of Kshs.12,500/=, leaving a balance of Kshs.10,800/=.

(c) The Respondent is awarded costs of the Lower Court with interest from the date of filing the suit.

(d) As regards Cost on Appeal, each party to bear its own costs.

DATED AND SIGNED AT SIAYA THIS 5TH DAY OF APRIL 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

In the presence of:

Court Assistants:

1. George Ngayo
2. Patience B. Ochieng
3. Sarah Ooro

Mr. Wanyama: for Appellant

Respondent in person - present

J.A. MAKAU

JUDGE