



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL NO.14 OF 2014

(Appeal arising from the decision of Hon. L. Gicheha in Malindi CM CC No.415 of 2012)

PAULO PALMITESSA.....APPELLANT

VRS

GIUSEPPE CAPUTO.....RESPONDENT

JUDGMENT

The respondent was awarded 3000 Euros by the Malindi Principal Magistrate's Court in Civil Suit Number 425 of 2012. This triggered the filing of this appeal. The grounds of appeal are that:-

- i. The respondent did not prove his case to the standard of probability.
- ii. The trial court relied on the uncorroborated evidence of the respondent.
- iii. The trial court erred in law by finding that a gentleman's agreement is actionable in a court of law.
- iv. The court erred by holding that the appellant issued a cheque to pay for a loan yet the cheque was issued as part share of a joint business venture which never materialised.
- v. The trial court relied on the evidence of PW2 who did not understand the Italian language.

Parties agreed to determine the appeal by way of written submissions. Only the appellant filed submissions as counsel for the respondent withdrew from acting. The respondent opted not to file any submissions. I have gone through the appellant's submissions and they mainly elaborate on the above grounds of appeal. It is submitted that there was an alleged gentleman's agreement that was never reduced into writing contrary to section 3 (1) of the Law of Contract Act, Cap 23 Laws of Kenya.

Counsel for the appellant maintains that the only relevant exhibit produced by the respondent was a torn cheque which had no connection to the alleged gentleman's agreement. PW2 who used to work for Diamond Trust Bank in Malindi testified that the cheque was outdated and he did not receive it. Counsel reiterates that a gentleman's agreement cannot be enforced in a court of law. Counsel relies on the Case of **Gachuki Kimani v Geoffrey Tusime [2012] eKLR** where the court held that an oral lease amounted to a "gentleman's agreement" that could not be enforced by a court of law.

It is further submitted that the respondent did not prove his case on a balance of probabilities. The respondent did not discharge the burden of proof. He did not prove what he alleged.

The record of the trial shows two witnesses testified for the respondent. The respondent's evidence was that on 14/3/2012, he advanced 3000 Euros to the appellant. He initially advanced 2000 Euros cash and 1000 Euros was paid by cheque. The appellant gave him a post dated cheque but kept on postponing payment. The appellant used to send him short messages promising to pay. He presented the cheque at Malindi Imperial Bank on 13/8/2012 but it was not accepted. When he gave out the money, the appellant's wife was present. The appellant went to the Imperial Bank and took the cheque. He tore it.

PW2, Faiza Mohamed was working at Imperial Bank. His evidence was that he saw the cheque for 3000 Euros drawn in favour of the respondent. When the respondent presented the cheque, he was told it could not be accepted as it was the old generation cheque. He called the appellant about the cheque. The two parties went to his office and the appellant told him he did not have the current cheque. The two started fighting in his office and he them to leave.

In his defence, the appellant testified that he deals in import and export business. His company is based in Malindi. The respondent was his customer. The respondent wanted to re-locate to Tahiti and the two agreed on a business venture whereby the appellant was going to import items from Tahiti. The appellant was also to export goods from Kenya to Tahiti. The business venture did not materialise and by then he had given the respondent a 3000 Euros cheque to hold. The agreement was that the cheque was to be banked in Tahiti.

It is the appellant's evidence that he was called by PW2 to go to the bank. While at the bank the respondent assaulted him. There was a scuffle and the cheque got torn. The appellant denied receiving any loan from the respondent.

The main issue for determination is whether the respondent loaned the appellant 3000 Euros and if so, is the arrangement enforceable? The trial court held that indeed the respondent advanced 3000 Euros to the appellant. The respondent's evidence is that he advanced the loan to the appellant. He was given the cheque to bank. the original cheque was produced and is dated 13/08/2012. It was drawn in favour of the respondent. The respondent produced phone messages (sms). The phone messages were interpreted to English. One of the messages is in line with the evidence of all witnesses. This was a message sent on 13/8/2012. This was the date of the cheque. The message reads as follows:

“Paolo come immediately at DTB Bank. I am waiting. You gave me a cheque out of course (expired) which cannot be collected. If you do not come immediately, I will go to the police station immediately. Do you understand.”

The evidence of PW1 and PW2 show that when the cheque was presented, it was rejected as it was the old generation cheque. The cheque is dated 13/8/2012. The appellant testified that he went to the bank and due to a scuffle the cheque got torn. The cheque was not even stamped by the bank.

On 20th July 2012, there is a message presumably from the appellant to the respondent which reads as follows:

“Gao Giuseppe. I am sorry but I could not answer. I am not still ready and I am asking you to be more patient. To deposit the cheque does not help and I beg you do avoid it. The money is not there. I am waiting for customers who are yet to come.”

The defence evidence is to the effect that the cheque was to be banked once the respondent was in Tahiti. That there was no loan advanced and that the cheque was in relation to an import-export business venture. The appellant contends that it was a gentleman's agreement that is not enforceable in law. Section 3(1) of the Law of Contract Act Cap.23 states as follows:-

“No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which such suit is brought or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.”

Counsel for the appellant maintain that nothing was reduced into writing. The provisions of the above section are fulfilled if there is a note or memorandum in writing. There was a cheque which is a written document and this fulfills the provisions of section 3(1) of the Law of Contract Act. The appellant cannot rely on the above section and claim that even if he borrowed the money, he cannot pay because there is nothing in writing.

The trial court evaluated the evidence. There was no shifting of the burden of proof. The respondent alleged that he loaned 300 Euros to the appellant. He produced a cheque that was to satisfy the debt. The contentious by the appellant that the cheque was for a business venture is far fetched. It is not supported by the defence on record. The defence does not mention the business venture or Tahiti. There are also the messages which clearly indicate that the appellant was pleading with the respondent to give him more time. The correspondence does not mention any business venture. What import business van be conducted with 3000 Euros. This is an abuse of the court process. The alleged goods to be exported or imported are not stated anywhere in the evidence. This is nothing but an afterthought. There is evidence that the short messages were sent from the appellant's phone number 0716..... The appellant did confirm during cross-examination that there was communication between the two.

The evidence on record was sufficient for the court to find in favour of the respondent. The appellant's denials show how ungrateful human beings can be. The appellant received the money and is now making it difficult for the respondent to recover it. That is being extremely thankless.

I do find that the respondent did prove his case. The evidence is overwhelming. The trial court did not entirely rely on the evidence of PW2. The evidence of PW2 only strengthens the respondent's message and the short text messages. There is no mention of Tahiti in the messages. When the respondent was being cross-examined, there was no mention of business venture or Tahiti.

In the end, I do find that the appeal lacks any merit and is vexatious. It is hereby dismissed with costs to the respondent. The respondent shall also have the costs awarded by the trial court.

In order to avoid future applications, I do order that the advocates holding the decretal sum do deposit in court the entire amount being held in the joint bank account within seven (7) days hereof. Thereafter the respondent shall be at liberty to apply.

Dated, signed and delivered at Malindi this 12th day of October, 2015.

SAID J. CHITEMBWE

JUDGE