Habib v Njagi (Civil Appeal E351 of 2024)
[2025] KEHC 16022 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16022 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E351 OF 2024

J NGAAH, J

NOVEMBER 7, 2025

BETWEEN

HUSSEIN ALI HABIB ..... APPELLANT

AND

CHRISTINE KAWIRA NJAGI ..... RESPONDENT

(Appeal arises from a judgment delivered on 2 October 2024 by the Hon. Harrison Adika (Senior Principal Magistrate), in Mombasa Chief Magistrates' Court Civil Case No. E119 of 2023.)

JUDGMENT

1. This appeal arises from a judgment delivered on 2 October 2024 by the Hon. Harrison Adika (Senior Principal Magistrate), in Mombasa Chief Magistrates' Court Civil Case No. E119 of 2023.

2. According to the plaint filed in court, on diverse dates between 7 May 2019 and 1 October 2019, the appellant lent the respondent a total sum of Kshs 2,375,000/= This money was lent in instalments of Kshs. 1,000,000/=, Kshs. 300,000/=; Kshs. 776,000/= and Kshs. 300,000/=. Each of these payments was evidenced by a contract duly signed by the appellant and the respondent, the latter acknowledging in each of them that she received the money.

3. Of the total sum lent, the respondent refunded Kshs. 50,000/= only, leaving a balance of Kshs. 2,325,000/=. The appellant sued for this balance and also sought for costs and interest.

4. The respondent denied the claim and pleaded, inter alia, that in the alternative to their denial, the appellant failed to advance the loan amounts at all despite agreeing to do so. In any event, she pleaded, there was a total failure of consideration on the part of the plaintiff advancing any loan. The contracts signed were, therefore, unenforceable.

5. In his judgment, the learned magistrate held that there was no valid contract for lack of consideration. He dismissed the appellant's suit with costs.

6. The appellant was dissatisfied with the decision and has, therefore, appealed to this Honourable Court. In the memorandum of appeal dated 14 October 2024, he raised the following grounds:

> " a.That the learned Senior Principal Magistrate erred in law and fact in failing to find that the Appellant had proved his case against the Respondent on a balance of probability.
>
> b. That the Senior Principal Magistrate erred in law and fact and therefore arrived at a wrong conclusion and decision.
>
> c. That the learned Senior Principal Magistrate erred in law and fact by disregarding the Appellant's evidence tendered in court.
>
> d. That the Learned Senior Principal Magistrate erred in law and fact disregarding and failing to put into consideration and/or have regard to the pleadings and submissions of the Appellant filed in the matter hence arriving in erroneous conclusion."

7. The appellant has prayed that the appeal be allowed and the judgment of the lower court be set aside. He has also asked for costs of the suit.

8. The lower court record shows that only the appellant testified. He testified that he was friends with the respondent with whom he also entered into four contracts. Under the contracts, he lent the respondent money specified in the contracts and whose repayment was secured by a log-book for the respondent's motor-vehicle registration no. KCG 643. Some of money lent was paid through bank transfers while the rest of the money was paid by cash.

9. The appellant testified that no interest was to be charged on the outstanding sum because he did not intend to benefit from the transaction since the respondent was his friend. Although it was agreed that the money was to be repaid in monthly instalments, the respondent did not repay as agreed. At the time the plaintiff testified, he still held the respondent's log-book as security for the repayment of the loan.

10. In his judgment, the learned magistrate cited William Muthee versus Bank of Baroda (2014) eklr where the Court of Appeal noted:

> " In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

11. The learned magistrate held that the agreements presented before court as the appellant's evidence lacked the vital element of consideration and, therefore, were not valid agreements. To quote the learned magistrate:

> " 6. The plaintiff has presented the signed agreements on which his claim is based. However, I must concur with the defendant that these agreements lack consideration. The plaintiff has failed to establish this crucial element, which would render the agreements a valid contract."

12. Ordinarily, consideration is one of the three essential elements of a valid contract. According to Halsbury's Laws of England/Contract (volume 9(1) (reissue)) para. 727, a promise which is made without consideration may not be sued upon in the law of contract, for it is merely a bare promise on which no such action will lie. Consideration is not necessary, however, in respect of a promise made by deed.

13. The contracts executed between the appellant and the respondent have not been disputed; at least, it was the learned magistrate's finding that they existed, his only concern being that they were not supported by consideration.

14. The first contract signed on 13 June 2019 read as follows:

> " This Agreement entered between Hussein Ali Habib holder of National Identity Card Number 21003002 care of Post Office Box Number 254-80100, Mombasa (hereinafter referred to as the "Lender" where the context so admits) on one hand and Ann Christine Kawira Njagi holder of a Kenyan National Identity Card Number 22237179 care of Post Office Box Number 42730-80100, Mombasa (hereinafter referred to as the "Borrower") witnesseth as follows: -
>
> WHEREAS at the request of the Borrower, the Lender has agreed to lend to the Borrower a further sum of Kenya Shillings Three Hundred Thousand (Kshs. 300, 000/=) to make an aggregate of Kenya Shillings One Million Three Hundred Thousand (Kshs. 1,300,000/=)
>
> It Is Hereby Agreed As Follows: -
>
> 1. The Borrower hereby acknowledges the receipt of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/=) in cash from the Lender on the date and the year hereinafter described.
>
> 2. The Borrower has agreed to pay back the said aggregate amount in installments of Kenya Shillings Fifty Thousand (Kshs. 50,000/ =) repayable in twenty six (26) months from the date hereof To secure the said borrowing, the Borrower herein has agreed to release to the Lender the original log book over Motor Vehicle Registration Number KCG 643C, Toyota Saloon, Chassis Number NZT260-3039882, Year of Manufacture 2008, White in colour
>
> 3. The parties herein have agreed to be bound by this Agreement and Undertaking to its fullest tenor and intent.
>
> In witness whereof the parties have herein under affixed their signatures this 13 June 2019"

15. The agreement was drawn by Messrs. Jane Kagu & Co. Advocates and Jane W. Kagu Advocate is indicated to have witnessed the signatures of the appellant and the respondent, committing themselves to the terms of the contract.

16. Thus, over and above being friends, this agreement signifies that the appellant and the respondent intended to create legal (that is, contractual) relations.

17. Except for the amounts advanced, and, of course the different dates on which they were signed, the rest of the contracts were more or less in the same terms as the contract of 13 June 2019. They were drawn by the same firm of advocates and attested to by Jane W. Kagu, advocate.

18. The contracts clearly show that the respondent acknowledged receiving the sums claimed from the appellant on the promise that the appellant would refund the money. No doubt, in these circumstances, there was some benefit accruing to one party, in this case the respondent, on the one hand, and some detriment suffered by the other party (the appellant). And this is what consideration

is all about. The doctrine has thus been defined in Halsbury's Laws of England (supra) paragraph 728 where it is stated:

> "Valuable consideration has been defined as some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other at his request... Thus, consideration for a promise may consist in either some benefit conferred on the promisor, or detriment suffered by the promisee, or both".

19. It is apparent from the terms of each of the agreements signed between the appellant and the respondent that upon execution of the agreement, the respondent thereby acknowledged receiving the money advanced by the appellant.

20. Yet in her defence the respondent pleaded that:

> "4. Without prejudice that the foregoing and in the alternative in response to paragraphs 4, 5, 6 and 7 of the Plaint the Defendant avers that the Plaintiff failed to advance the loan amounts at all despite agreeing to do so.
>
> 5. Further and without prejudice to the foregoing the defendant avers that there was total failure of consideration on the part of the Plaintiff rendering any loan agreements therefore unenforceable."

21. The respondent did not call any evidence and only the appellant testified. It follows that the evidence that the respondent acknowledged receiving the money claimed from the appellant was not only inconsistent with the respondent's denial but it was also never controverted. The contention by the respondent and the finding by the learned magistrate that the contract was unenforceable for lack of consideration was contrary to and inconsistent with the available evidence. Indeed, there was consideration and the appellant's suit ought to have succeeded.

22. And even if the contract was to be found to be unenforceable, for whatever reason, the respondent could not be allowed to retain and benefit from the money she had received from the appellant when she received it on the understanding or, to use the technical term, on her own promise that she would refund it.

23. Money paid, for instance, under an illegal contract is recoverable. According to Halsbury's Laws of England (supra) paragraph 883 a claim for the return of money paid over in these circumstances may take one of the four basic forms. It may be: (1) a personal action for a debt (for instance, on a loan); (2) a personal restitutionary claim for money had and received; (3) an action in tort for the return of identifiable coins or notes or their value; or (4) a proprietary claim in equity even where the money has been paid into a mixed fund. However, all the cases on recovery of money paid under illegal contracts concern actions in debt or for money had and received.

24. Prior to the United United Kingdom's Supreme Court decision in Patel versus Mirza (2016) UKSC 42, it had long been held that where a plaintiff seeks to recover money paid under an illegal contract the rule was that he would not do so unless he could make out his cause of action without reliance on the illegal contract (see Berg v Sadler and Moore [1937] 2 KB 158).

25. The Supreme Court of United Kingdom in Patel versus Mirza appeared to depart from this age-old principle and restricted the application of the maxim ex turpi cause oritur non actio only to those actions seeking enforcement of what would otherwise be illegal contracts. According to the Supreme Court, just as policy considerations would bar a claimant from enforcing an illegal contract, the same

considerations should not allow a defendant who has benefited from such a contract to possess or keep what he has been paid under the contract; in the Court's view, a cause based on unjust enrichment is sustainable.

26. According to the Supreme Court, a defendant's enrichment is prima facie unjust if the claimant has enriched the defendant on the basis of a consideration which fails. The consideration may have been a promised counter-performance (whether under a valid contract or not), an event or a state of affairs, which failed to materialise.

27. Talking of policy considerations that inform the doctrine of illegality, Lord Toulson who delivered the leading judgment said (at paragraph 99):-

> " Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand."

28. The learned judge cited with approval Bingham LJ in Saunders v Edwards [1987] 1 WLR 1116, 1134, where he addressed this question and said:-

> " Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct."

29. While the Court agreed that the contract between Patel and Mirza was illegal, it was of the view that there was no logical basis why considerations of public policy should require Mr Patel to forfeit the moneys which he paid into Mr Mirza's account, and which were never used for the purpose for which they were paid. Such a result, according to the Court, would not be a just and proportionate response to the illegality. The Court also cited with approval Lord Thurlow LC's passage in Neville versus Wilkinson (1782) 1 Bro CC 543 at page 547 where he said that:-

> " [I]n all cases where money was paid for an unlawful purpose, the party, though particeps criminis, might recover at law; and that the reason was, that if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before."

30. For the foregoing reasons, I would allow the appellant's appeal and set aside the lower court judgment. I substitute the order dismissing the suit with the order that judgment be entered against the defendant in the sum of Kshs. 2, 325,000/= together with costs and interest at court rates from the date of judgment till payment in full. The appellant will have costs of the appeal. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 7 NOVEMBER 2025

NGAAH JAIRUS

JUDGE