

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

HCCA SUIT NO. E042 OF 2024

CYRUS NGATIA MUCHEMI.....APPELLANT

-VERSUS-

PAUL MUNENE KING'ORI.....RESPONDENT

JUDGMENT

- 1.** This appeal emanates from the decision of the trial court where Hon. C.M. Muhoro SRM, entered judgment in the sum of Kshs.701,100/- claimed by the Respondent herein together with interest and costs.
- 2.** The claim resulted from an agreement entered into by the parties dated 21st January, 2020, where the Respondent advanced the Appellant Kshs.800,000/- and the money was to attract interest of Kshs.44,300/- per month. The money was to be refunded to the Respondent in full. However, according to the Respondent, the Appellant breached the agreement and the claim was for what was outstanding as at 6th December, 2021, when he filed the claim in court.
- 3.** The Appellant disputed the claim arguing that the contract subsisted during the work that was being done in Nairobi which ended in October 2020, that he was obligated to pay the Respondent interest for the period from 21st July, 2020,

to 15th October, 2020. That the accrued interest was paid per the terms of the agreement.

4. Based on evidence adduced the trial court reached a finding that the allegation that the Appellant had paid the principal amount including the interest as detailed was wanting hence the finding that the Appellant had breached the agreement.
5. Aggrieved by the decision of the court, the Appellant preferred the instant appeal on grounds that;

1) The learned Magistrate erred in law and fact by failing to find that the parties had by conduct varied the terms of the agreement dated 21st July, 2020.

2) The learned Magistrate erred in law and fact by failing to find that the Appellant performed his contractual obligations.

3) The learned Magistrate erred in law and fact by failing to find that the Respondent was made aware of the date when the construction contract was completed.

4) The learned Magistrate erred in law and fact by failing to give a breakdown of the figure of Kshs.701,100/-.

5) The learned Magistrate erred in law and fact by failing to find that the payment of Kshs.701,100/- would amount to unjust enrichment on the part of the Respondent.

6) The learned Magistrate erred in law and fact by failing to find that the Appellant was making payments to the Respondent bank account even after the termination of the construction contract.

7) The learned Magistrate erred in law and fact by failing to find that the Respondent had not proved his case to warrant a judgment of Kshs.701,100/-.

8) The learned Magistrate erred in law and fact by dismissing the Appellant's defence and entering judgment in favour of Respondent with costs.

6. The appeal was canvassed through written submissions which I have duly considered.

7. The duty of the first appellate court is to re-evaluate and examine evidence before the trial court afresh and to reach an independent conclusion. I must internalize the fact that I neither saw nor heard witnesses. This position was articulated in the case of **Selle & Another v Associated Motor Boat Company Ltd & Othes [1968] EA 123** as follows;

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of

circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

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 it 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."

- 8.** The Appellant opted to condense all the grounds of appeal which were combined and argued in single cohesive argument. It is not in dispute that the Respondent advanced the Appellant the sum of Kshs.800,000/- and he was to pay some interest of Kshs.44,000/- per month. The question is whether the Appellant complied with the terms of the

agreement and hence not having breached the contract between them. He urges that the Respondent failed to interpret the agreement appropriately and similarly the trial Magistrate in entering judgment in his favour failed to consider evidence that the parties later entered into an arrangement where the Appellant paid off the outstanding balance of Kshs.450,000/- after he paid the initial Kshs.400,000/- plus interest of Kshs.148,430/-.

9. It is however argued by the Respondent that even after they entered into an arrangement where a loan of Kshs.450,000/- from Tower Sacco was credited on his account to be serviced by the Appellant he continued servicing the loan which was being deducted from his pension. That the Appellant stopped paying the loan leaving a sum of Kshs.400,000/- half the principal amount and Kshs.301,100/- arrears of interest up to December 2021, agreed upon.

10. The mutual agreement between the Respondent and Appellant was valid hence a well-grounded contract existed between them. It is urged that after the Respondent performed his part of the obligation the Appellant did not fully perform his part as agreed. It is hence crucial for the court to revert to the terms of agreement so as to establish if the Appellant either performed or failed to perform his contractual obligations.

11. The agreement in issue was for money lent to the Appellant by the Respondent to carry out a contract in Nairobi. For avoidance of doubt, it reads thus;

“The above agreement entails money for contract work currently based in Nairobi.

This then it is as follows;

- (1) That Paul Munene King’ori of ID No. 4896733 has given Cyrus N.G. Muchemi of ID No. 0316578 Kshs.800,000/- (eight hundred thousand) this day of 21st July, 2020.***
- (2) The money has been deposited into Mr. Muchemi’s Acc No. 0160190240926 of Equity Bank Nyahururu in form of a cheque No. 002627. Amounting to six hundred thousand and Kshs.200,000/- (two hundred thousand) in cahs deposited into Mr. Muchemi’s KCB Acc No. 1103724525 Nyahururu.***
- (3) The money is expected to earn Mr. Paul Munene King’ori a profit of Kshs.44,000/- (forty four thousand) each month that the contract is on.***
- (4) The money should be refunded to Mr. Paul Munene Ki’g’ori in total after the completion of the contract.***

(5) The above profit will be paid through Mr. Paul Munene account in Family in Acc No. 0160101243874 per month.”

- 12.** The agreed on interest was applicable in the sum of Kshs.44,000/- per month as long as the contract continues and the total amount was to be refunded to the Respondent on completion of the contract.
- 13.** The nature of the contract undertaken by the Appellant in Nairobi was not disclosed. It was averred by the Appellant that the contract for work based in Nairobi ended in October 2020. Therefore, the Appellant was obligated to pay the Respondent interest for the period running from the 21st July, 2020, to 15th October, 2020 and upon completion of the contract the Appellant refunded the principal sum. It was upon him to establish the assertion.
- 14.** The Respondent who moved to court for adjudication of this claim was legally bound to prove the claim on a balance of probabilities. What is evident was lack of disclosure when the contract in Nairobi was expected to end. Documents adduced by the Appellant indicated he signed a sub contract/agreement with one Charles Miano Thaithi dated 15th June, 2020 and the taking over/handing over document was dated 19th October, 2020.
- 15.** The Appellant correctly argued that he paid the Respondent Kshs.400,000/- on 23rd January, 2021 which was half of the principal sum. This sum is reflected on the

statements of accounts in the name of the Respondent at Equity Bank. He further argues that he had paid him Kshs.98,430/- as part of the interest and he informed the Respondent verbally on the question of completion of the contract in Nairobi. The allegation was not discredited in cross examination at all. It was not very clear how the total interest was paid, however, after the Kshs.400,000/- was paid parties entered into another arrangement where the pending sum was to be paid through a borrowed facility. On cross examination the Respondent admitted having been paid Kshs.148,430/- being interest.

16. The argument put forth by the Appellant was that he paid at the outset Kshs.98,430/- leaving a balance of Kshs.50,000/- that is how the Appellant was advanced Kshs.450,000/- which was credited in the account of the Respondent. That Kshs.400,000/- was the outstanding part of the principal sum while Kshs.50,000/- was the remaining part of the interest.

17. At the point of entry of the agreement it was agreed that the money was to be refunded to the Respondent in total after completion of the project/contract. If the contract was completed as agreed then the total sum ought to have been refunded by the 19th October, 2020. But this was not the case. Hence the arrangement of payment of Kshs.450,000/-.

18. The Appellant was required to settle the loan by repayment of the money. Although parties did not reduce

the agreement into writing, by conduct and actions it is demonstrated that parties intended to reach a binding agreement. As submitted, there may have been an implied agreement though not comprehended by parties.

- 19.** The Appellant committed himself to settle the sum of Kshs.450,000/- which was to settle the delayed sum - part of the principal and the pending interest. The learned trial Magistrate was required to consider the statements of accounts for both the Respondent and Appellant which was not done. The court stated thus;

“During trial, the Defendant said that his contract ended in October 2020. He paid half of the principal sum in January 2021 and took a loan from Tower Sacco to pay the other half which the Plaintiff was demanding. These two narratives are definitely contradicting and inconsistent. The Defendant’s defence is therefore misleading and ought not to be relied upon.”

“The agreement dated 21stJuly, 2020, provided that the principal sum was to be refunded in full at the completion of the Defendant’s contract. This never happened hence the suit herein. Nothing was produced before the court to show that the Defendant had informed the Plaintiff when the contract ended and refunded the principal amount in full. He simply defaulted

and/or failed to comply with the terms of agreement. I find no valid reason to deny the Plaintiff the sum of Kshs.701,100/- as prayed.”

20. The Appellant adduced evidence where some money was transferred to the account held by the Respondent. According to the Respondent the Appellant paid in money from 1st April, 2021 and stopped making payments thereafter which necessitated the instant case.

21. According to the authenticated documents, the account statement for the Respondent from Tower Sacco Society it is indicated that the Appellant made payments as follows;

- 25th February, 2021 - Kshs.10,010/-
- 31st March, 2021 - Kshs.10,010/-
- 27th April, 2021 Cyrus Muchemi credited the account Kshs.10,010/-
- 22nd May, 2021 - Cyrus Muchemi - Kshs.10,010/-
- 25th June, 2021 - Kshs.1,010/-
- 30th June, 2021 - Kshs.9,000/-
- 27th July, 2021 - Kshs.10,010/-
- 30th November, 2021 - Kshs.10,010/-

22. The total sum as at the point of filing of this suit was Kshs.70,070/- making the outstanding balance Kshs.379,930/-. Thereafter the Appellant continued to deposit the money in court whilst the court process was on without a court order, another sum of Kshs.70,070/-.

23. It is urged by the Respondent and rightly so that parties resorted to the agreement of borrowing money since the Appellant had breached the agreement and was not willing to pay. Yet, he required to purchase shares from the Tower Sacco.

24. There was no agreement that the Appellant was to settle money by instalments and the period to be settled as it was specifically stated in the initial agreement. This meant that at the time of filing of the suit, the Appellant stood in breach of payment of the sum standing at Kshs.379,930/-.

25. Therefore, judgment of the lower court is set aside and substituted with judgment in the sum of Kshs.379,930/- plus interest and costs at the lower court.

26. Since there has been partial success of the appeal, each party shall bear their costs on appeal.

27. It is so ordered.

Dated, signed and delivered virtually this 17th day of February, 2026.

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L.N. MUTENDE

JUDGE