

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO E147 OF 2023

MAUREEN OLONYI-----APPELLANT

VERSUS

DOSILA KHAJONGA-----
RESPONDENT

(Being an appeal from the judgment and Decree of Hon. C. Cheruiyot R.M. delivered on 25th September 2023 in Kakamega SCCOMM No. E343 of 2023)

JUDGMENT

Introduction.

1. The Appellant instituted proceedings before the Small Claims Court at Kakamega, being SCCCCOMM No. E343 of 2023, against the Respondent.
2. During the hearing, the Appellant testified as the sole witness in support of her case, while the Respondent likewise testified as the sole witness for the defence. Both parties relied on their respective witness statements. Upon the close of the hearing, the trial court found that the Appellant had failed to establish her claim on a balance of probabilities, having adduced no evidence to demonstrate that she had advanced a loan to the Respondent. Consequently, the court dismissed the claim.

3. The appellant, being dissatisfied with the decision of the adjudicator delivered on 25th September 2023, filed an appeal against the judgment based on the following grounds;
 - a) *THAT the learned Magistrate misdirected herself in determining that there was no agreement for loan advancement in the absence of a written agreement.*
 - b) *THAT the learned magistrate erred in law by not appreciating the overwhelming evidence tendered to the court by the Appellant*
 - c) *THAT the Learned Magistrate erred in law in determining that the Appellant had not proved her case on a balance of probability despite the overwhelming evidence tendered by the appellant to the court.*
 - d) *THAT the learned magistrate erred in law by failing to consider the applicable principles of law, thereby arriving at a wrong conclusion.*
4. The appellant prays that the court set aside the judgment by the trial court and allow the judgment in favour of the Appellant for an award of Kshs 200,000/= with interest at the court's rates.
5. The appeal was canvassed by way of written submissions. At the time of writing this judgment, only the appellant had filed their submissions.

Submissions

6. The appellant, in her submissions dated 20th December 2024, asserted that she had advanced to the Respondent Kshs. 200,000, and she was to refund the money on 31st December, 2022. The money was transferred via mobile phone.
7. When she failed to do so, she sent her a formal demand letter dated 17th April 2023. It was wrong for the trial court to dismiss the case on the ground that there was no written agreement and the purpose of the monies lend was not proven.
8. The appellant raised 3 issues for determination. The first issue for determination was whether the trial court erred in finding that the absence of a written agreement invalidated the loan agreement.
9. In her submission, the appellant avers that not all agreements should be written for them to be legally enforceable. She quoted section 3 (1) of the law of contract.
10. She cited the case of **Abdulkadir Sharif Abdirahim & Another vs. Awo Sharif Mohammed T/A as Mohammed Investments (2014) Eklr**, where the Court of Appeal held that money lending agreements do not require to be written.
11. . She also relied on section 120 of the Evidence Act, that the actions can validate verbal agreements.

12. She submitted that the trial court's failure to acknowledge the evidence of the money transaction and the appellant's narrative was a misdirection.
13. On the second issue that the trial court failed to consider the overwhelming evidence, she said her evidence was consistent. She cited the court of appeal case of **Ali Abid Mohammed vs. Kenya shell & company Limited (2017) eklr** and asserted that the loan was advanced in the good faith based on the fact that they were long term friends. That the Respondent could not turn around and say Ksh 200,000/= was for her services, yet she paid Ksh. 20,000/= for the work she did for her.
14. In conclusion, the Appellant beseeches the court to allow the appeal and find that the trial court had misdirected itself in dismissing her claim since she had proved on a balance of probabilities that she had advanced Kshs. 200,000/= to the Respondent as a loan that was not repaid.
15. The trial court, after analysing the case and submissions by the parties, stated that any party that seeks the court to rely on its evidence has to prove its case and quoted sections 107 and 108 of the Evidence Act.
16. The trial court held that the claimant failed to adduce any evidence of any communication with the respondent that she had

borrowed the money as a loan. The court stated that the claimant ought to have made a written agreement for a loan and stated that the appellant/claimant failed to prove that they advanced the respondent the said amount as a loan on a balance of probability and hence dismissed the case.

Issues for Determination

17. From the record and submissions, the following issues arise:
- a) Whether the trial court erred in law in holding that the absence of a written loan agreement was fatal to the Appellant's claim;*
 - b) Whether the Appellant discharged the burden of proof under Sections 107-109 of the Evidence Act;*
 - c) Whether the trial court properly applied the principles relating to oral contracts and proof thereof;*

Analysis

23. As held in **Selle v Associated Motor Boat Co. Ltd [1968] EA 123**, a first appellate court must reconsider the evidence, evaluate it, and draw its conclusions, bearing in mind that it did not see or hear the witnesses.

(a) On the Requirement for a Written Agreement

18. The trial court appeared to give significant weight to the absence of a written agreement. While written agreements provide stronger evidentiary value, Kenyan law does not universally require loan contracts between private parties to be in writing unless they fall under categories prescribed by statute (e.g., land transactions under Section 3(3) of the Law of Contract Act, Cap 23).
19. Section 3(1) of the Law of Contract Act (Cap. 23) applies primarily to contracts of guarantee, not ordinary loans. The Court in **Nyamai v Mbaluka & another (2023)** reaffirmed that “a money-lending agreement need not be in writing for it to be enforceable.
20. In **Basta & Sons Ltd v Compact Freight Systems Ltd (2025)**, the High Court emphasized that oral agreements are valid if they satisfy offer, acceptance, consideration, and capacity; but the party asserting the contract must prove it and its essential terms.
21. Oral contracts are valid under Kenyan law unless specifically excluded by statute. In **Abdi Ali Dere v Firoz Hussein Tundal & 2 Others [2013] eKLR**, the Court emphasized that oral contracts must be proved through consistent testimony and corroborating evidence.
22. In **Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR**, the Court of Appeal reiterated that oral agreements are enforceable provided their existence and terms can be proved to the

requisite standard. Thus, the absence of a written agreement is not by itself fatal but increases the evidential burden on the claimant.

23. While a written contract provides stronger proof, its absence is not automatically fatal to a claim. However, it does raise the evidentiary burden on the party asserting the agreement. The claimant must rely on alternative evidence, such as testimony, banking records, or corroborating witnesses, to prove both the existence of the contract and its essential terms.

24. The law in Kenya does not impose an absolute requirement for a written agreement in loan transactions between private individuals unless expressly provided by statute. The absence of a written agreement should therefore not be treated as conclusive against the claimant. Instead, it should prompt closer scrutiny of the oral evidence and other circumstantial proof available.

25. **Pius Kimaiyo Langat and Nyamai**, oral agreements are enforceable, but the evidential burden in such cases is inherently higher, requiring credible and corroborative proof.

26. The trial court's heavy reliance on the lack of a written agreement suggests a misdirection in law.

(b) Burden and Standard of Proof

27. Section 107(1) of the Evidence Act places the legal burden on the party asserting the existence of a fact.
28. Under Section 109, the evidential burden may shift once a prima facie case is established.
29. **In Charan Singh v Nandi Tea Estates Ltd [2015] eKLR**, it was held that a plaintiff must prove the existence of a contractual obligation and its breach on a balance of probabilities.
30. The Appellant produced evidence of bank transactions showing transfer of funds to the Respondent. The Respondent admitted having received the money and further admitted he used to receive loans from the Appellant from time to time as a friend they never used to reduce the transactions into writing.
31. Though the burden of proof remain constantly to the claimant as held in **Kirugi & Another v Kabiya & 3 Others [1987] KLR 347**, when the claimant establishes a prima facie case, the evidential burden of proof shifts to the Respondent to offer a plausible explanation in rebuttal.
32. In the 2022 Supreme Court of Kenya presidential petition **(Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 7 others)**, the court addressed the shifting burden of proof by reinforcing that the primary legal burden rests on the petitioners (Raila Odinga and Martha Karua), but the

evidential burden can shift to the respondents (IEBC and William Ruto) once specific, verifiable evidence of irregularities is presented.

33. The question to answer is whether the explanation offered by the Respondent is plausible/verifiable .

34. The Respondent said that the money transferred to her by the Appellant was payment for her professional services she offered to the Appellant as a surveyor.

35. During cross examination , she admitted that she was not a professional surveyor meaning that she could not legally charge professional fees for doing so it will amount to committing a criminal offence. Secondly she admitted that she did not issue any receipt to the Appellant reflecting the payment of the Ksh 200,000/= as professional fees neither did she produce any revenue stamp showing that she paid relevant tax to Kenya Revenue Authority for the income received.

36. To me if the trial court had addressed its mind to the doctrine of shifting burden of proof would have arrived to a different finding given the issues I have raised in Paragraph 34 for the explanations given by the Respondent cannot stand the test I have raised in paragraph 33 of this judgment.

37. I find that the explanation given by the Respondent was not plausible at all, it was just an afterthought geared into defrauding the Appellant.

38. The law abhors aiding someone to benefit from an illegality therefore, I find that the trial court erred in finding that the appellant did not advance Ksh. 200,000/= to the Respondent.

Conclusion

40. The trial court did not correctly apply the law on contract law and on the burden of proof. Therefore:-

I. the Appeal is allowed .

II. the Judgment of the Lower Court is set aside.

II. Judgment is entered in favour of the Appellant for Ksh. 200,000/= .

iv. Interest at the court rates from 31.12.2022, the day the loan was supposed to be refunded.

v. Since the parties were friends, I would not disturb the finding by the lower court that it was necessary for each party to bear its own costs of the suit in the lower court and for the same reason I will order that each party bears its cost of this Appeal.

41. Right of Appeal 30 days.

**DATED SIGNED, and DELIVERED in OPEN COURT at KAKAMEGA THIS
30th OF APRIL, 2026.**

S.N. MBUNGI

JUDGE

In The Presence of;

CA: Angong'a/Velma

Parties absent, though aware of the Judgment date.

