M'ithinyai v M'anara (Civil Appeal 212 of 2018)
[2023] KECA 1416 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1416 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 212 OF 2018

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

NOVEMBER 24, 2023

BETWEEN

CHARLES MEEME M'ITHINYAI ..... APPELLANT

AND

JOANA MUTHIAINE M'ANARA ..... RESPONDENT

(Being an appeal from the Judgment of the High Court at Meru (B. Thuranira Jaden, J.) dated 18th September 2018 in Civil Appeal No. 53 of 2016)

JUDGMENT

1. Both the Senior Resident Magistrate at Maua and the High Court at Meru (B. Thuranira Jaden, J.) found that, vide a written agreement dated 13th April 2010, the appellant Charles Meeme M'Ithinyai, through his brother Sammy Michubu M'Ithinyai (now deceased) loaned the respondent Joana Muthiaine M'Anara Kshs.300,000/= which was to attract an interest of Kshs.30,000/=. The loan was to be repaid within 6 months. It was agreed that if the respondent defaulted in repayment she would pay liquidated damages of Kshs.600,000/=. The appellant filed a claim before the subordinate court claiming that the respondent had failed to repay the loan. He sought to recover the money as per the agreement. The respondent defended the claim, saying that she had repaid the loan through Sammy. Sammy had since died. The court heard the evidence of the appellant, the respondent and the respondent's witness Patrick Kiraithe Joana and, upon consideration, found that the respondent had not repaid the loan.

2. The respondent was aggrieved by the determination, and appealed to the High Court. The High Court reconsidered and evaluated the case and allowed the appeal by finding that the respondent had repaid the loan through Sammy; and that Sammy having died, the appellant's case that he had not been repaid had not been proved on balance of probabilities.

3. The appellant was dissatisfied with this finding and appealed to this Court on the following grounds:-

> " 1) The learned Judge erred in law and in facts in allowing the appeal against the evidence on record.
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> 2. The Honorable Judge erred in law and facts in failing to find that the respondent had not proved that he had paid the debt to the appellant or his deceased brother.
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> 3. The Honorable Judge erred in law and in facts in going out of her way and bringing in extraneous issues which had not been raised in the appeal and as a result she arrived at the wrong findings."

4. Learned counsel Mr. Kimathi appeared for the appellant while learned counsel Mr. Jido appeared for the respondent. Each filed written submissions which were highlighted during the hearing before us.

5. According to the submissions by learned counsel Mr. Kimathi, the learned Judge erred when she failed to find that the burden of proof rested on the respondent who, after the appellant had proved that indeed he advanced the loan money, had not shown that she had refunded the same. Learned counsel submitted that the trial court had been right in finding that the respondent had received the money which she had failed to refund.

6. On his part, learned counsel Mr. Jido submitted that the learned Judge had correctly found that the loan agreement did not provide for the mode of its repayment; that it was upon the appellant to prove that the repayments were not made, which he had not done; that the principal-agent relationship between the appellant and his brother Sammy had not been defined; and that upon death of Sammy there was no knowing whether the loan had been repaid or not. Orally before us, the learned counsel raised the issue that the appellant's record of appeal that was served on the respondent did not contain the proceedings before the trial court, and did not contain a certified copy of the decree, and therefore that the appeal was incompetent. This issue can be dealt with straight away. No application was before us to strike out the appeal for being incompetent on the grounds raised. Counsel conceded that the record of appeal was served with the stated defects, and that no immediate action or issue was taken with them. Directions were taken in the presence of parties on the basis that the appeal was competent, and ready for hearing. The respondent is, by his own conduct, estopped from raising the issue of the competence of the appeal this late in time.

7. On the merits of the appeal, we consider that this is a second appeal. This Court shall confine itself only to matters of law, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse (*Charles Kipkoech Leting –v- Express (K) Ltd & Another* [2018] eKLR; *Maina –v- Mugiria* [1983] ELR 78).

8. We reiterate that there was no dispute that the appellant was acting through Sammy when he gave a loan of Kshs.300,000/= to the respondent which the later was to repay with interest of Kshs.30,000/= within six months. The question was whether the loan was repaid. The trial court found that the loan was not repaid, but the High Court overturned the finding and dismissed the claim.

9. We are alive to the fact that the learned Judge, in reversing the finding by the trial court, was conscious of his jurisdiction as directed in *Selle –v- Associated Motor Boat Co. & Others* [1968] EA 123, that it was to reconsider and evaluate afresh the evidence before the trial court and come to its own independent conclusions, while bearing in mind that the trial court had the advantage of seeing and hearing the

witnesses as they testified before it. This was the advantage that the learned appellate Judge did not enjoy.

10. The trial court received the evidence of the appellant, on one side, and that of the respondent and her witness, on the other side. The record shows that the appellant was categorical that the respondent had not repaid the loan, either through Sammy or at all. The respondent's version was that she had repaid the entire loan through Sammy in the agreed instalments of Kshs.55,000/=, and that during each payment there was a witness. She called only one witness, Patrick Kiraithe Joanna, who stated that he was a witness to only one instalment of Kshs.55,000/=. Patrick was cross-examined and said that he did not know what the money he saw the respondent give to Sammy was for. He apparently did not know about the loan between the appellant and the respondent. The respondent did not call the other witnesses to the payment of the balance of the loan. The trial court considered why, now that the loan had been advanced following a written agreement, the repayments had not been reduced into writing. The court found that the respondent and her witness were not honest witnesses, disbelieved them, and found that the loan had not been repaid. The court had the feel of the witnesses, and the case generally. To be able to determine whether, on the recorded evidence, the loan was repaid, the learned Judge was required to reconsider the evidence of the appellant and that of the respondent and her witness, to be able to make an independent conclusion on which side was believable, bearing in mind it had not seen or heard the witnesses. However, all that the learned Judge did was to observe that, since Sammy had died –

> "it was not possible to verify what arrangements he had made with the appellant for the repayment."

The learned Judge did not find that the conclusion that the trial court had reached on the truthfulness of the respondent and her witnesses was erroneous. The trial court had accepted that the evidence of the appellant that he had not been repaid was believable, and on it had allowed the claim. The learned Judge did not make a contrary conclusion on that evidence.

11. Our considered view is that, the learned Judge erred in allowing the appeal against the evidence on record. We agree that, the appellant had the burden under section 107(1) of the *Evidence Act* to prove his case. The case was that he loaned the respondent Kshs.300,000/= which she had not repaid. He provided the written agreement to show he gave out the loan which the respondent signed for. The respondent, in defence, stated that she had repaid the loan, and that each repayment had been witnessed. She produced one witness to one of the repayments. She did not produce the other witnesses. There was nothing in writing. The trial court discounted the evidence of the witnesses. Under section 109 of the *Evidence Act*, we find, that the burden was on the respondent to show that she had repaid the loan. Under section 112 of the *Act*, whether or not she had repaid the loan was a fact within her knowledge. This evidential burden on the part of the respondent was not discharged.

12. In conclusion, we allow the appeal with costs and set aside the judgment and decree by the learned Judge dated 18th August 2018. In its place, we reinstate the judgment and decree dated 19th October 2016 by the Senior Resident Magistrate at Maua.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF NOVEMBER 2023.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify this is a true copy of the original.

Signed

DEPUTY REGISTRAR