Mburu v Kiambi & another (Civil Appeal E121 of 2024)
[2025] KEHC 5108 (KLR) (Commercial and Tax) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5108 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E121 OF 2024

RC RUTTO, J

APRIL 25, 2025

BETWEEN

PETER GACHOGU MBURU .... APPELLANT

AND

BEN KOOME KIAMBI .... 1ST RESPONDENT

CAROL MAKENA MUREGA .... 2ND RESPONDENT

(Being an appeal from the Judgment and orders of Honourable Kiongo Kagenyo in SCCOMM/E3666 of 2023, delivered on 17th April, 2024)

JUDGMENT

1. This is an appeal against the quantum. The appeal arises from a judgment and decree in Milimani Small Claims Court, SCCOMM/E3666 of 2023. In the said suit, the Appellant sued the Respondents for breach of an agreement relating to a loan in the sum of Ksh.750,000/=.

2. The Appellant instituted proceedings against the Respondents for defaulting on a loan. He contended that on 17th July 2009, the Respondents approached him with an urgent request for a loan of Ksh.225,000/=. He agreed to extend the loan on the condition that it would be repaid on or before 17th August 2009, with interest accruing at a monthly rate of 12.5%. As security, the Respondents introduced a guarantor, one Ibrahim Njuguna Gichoki, to cover the loan in the event of default by the Respondents. It is alleged that the Respondents failed to repay the loan as agreed, thereby breaching the terms of the agreement.

3. Subsequently, on 9th June 2011, the Respondents approached the Appellant and executed a fresh agreement acknowledging their indebtedness and committing to repay the sum of Ksh.600,000/= effective 31st April 2011. Despite this undertaking, the Appellant alleged that no payment was made.

Once more, on 14th April 2018, the Respondents proposed a revised settlement of the outstanding debt, undertaking to pay the principal sum of Ksh.600,000/= on or before 31st December 2018, with a further Ksh.150,000/= payable by 30th June 2019. It is contended that the Respondents again failed to honour these commitments, prompting the Appellant to file suit seeking recovery of Ksh.750,000/ = together with interest at court rates.

4. Upon hearing the parties, the trial court rendered its judgment on 17th April 2024. The court identified the key issues for determination as: the amount of money advanced to the Respondents, the extent of repayments made, and the timing of those repayments. The Court found that while the Appellant acknowledged that the Respondents had made certain payments, he neither quantified them nor specified when they were made. The Respondents, on their part, contended that records of the repayments were maintained in a book that remained in the Appellant's possession. The Court observed that the questions surrounding the amounts repaid and the timing thereof lay at the heart of the dispute, and that the relevant facts were within the Appellant's exclusive knowledge, and therefore the burden rested on him to disclose and substantiate these details. The Court held that the Appellant had failed in this duty, thereby depriving the Court of essential evidence required to establish his claim. As a result, the suit was dismissed, with each party directed to bear their own costs.

5. The Appellant being aggrieved by this judgment lodged this appeal on the grounds that the Learned Magistrate; erred in law and in fact by failing to determine whether the loan had been repaid by the Respondent or not during the trial; erred by disregarding the Appellant's incontrovertible evidence on record which had been adduced; erred by shifting the burden of proof from the Respondents to the Appellant in finding that the Appellant had not fully established his case against the Respondents; erred in holding that the Appellant had records of payments made by the Respondents while there were none; and erred by dismissing the Appellant's suit after disregarding and failing to take into account the credible and reliable evidence presented by the Appellant.

6. The Appellant prayed that the appeal be allowed and the judgment of the trial Court in Milimani Small Claims Court, SCCOMM/E3666 of 2023 be set aside and the Appellant be awarded costs of the Appeal.

7. The Appeal proceeded by way of written submissions. The Appellant's submissions are dated 18th October, 2024 while the Respondent's submissions are dated 13th November, 2024.

Appellant's Submissions.

8. The Appellant gave a brief background of the facts. He submitted on each ground of appeal. On the first ground, it is urged that the trial court erred by failing to determine the main issue of whether the loan sum had been paid or not. He submits that from his bundle of documents dated 10th May, 2023 and 12th October, 2023 the court can discern the continuous acknowledgements by the respondents of the said debt in existence and their undertaking to pay the same.

9. He submits that the Respondents had been uncandid and deceptive to the court. First, they alleged that they made a payment of Ksh.25,000/- on 17th August, 2009 via an attached Equity Bank statement. However, when confronted with the question of authenticity of the unstamped bank statement, the 1st Respondent changed his testimony alleging that he made payments in cash, cheque and Mpesa but had no proof or dates of when the payments were made. Secondly, the Appellant contends that he was shocked by the change in testimony despite the Respondents having acknowledged the existence of the debt in several documents. He made reference to the cheque dated 17th August, 2009 by Crimson General Supplies which was dishonoured; a letter dated 30th October, 2009, a letter from Crimson General Supplies to Mr. Mburu, the Appellant herein, acknowledging the debt; a letter dated 17th June,

2009 from both Respondents issuing a cheque of Ksh.100,000/-; letter dated 1st February, 2010 from the 2nd Respondent promising to pay installments of Ksh.40,000/= each; and a letter dated 18th March, 2010 from the 2nd Respondent. He also made reference to a cheque from Marketers Haven Limited for Ksh.100,000/= dated 4th February, 2010 which was dishonoured on account of insufficient funds.

10. The Appellant contends that he discharged his burden of proof under Section 107 of the *Evidence Act* and met the standard of proof with his documents. He submits that it was only right for the Respondents to prove whatever loan they had purportedly paid and to whom without shifting the blame to the Appellant. He further contended that on 14th April, 2018, the parties sat down and reconciled the accounts before parting ways and the Respondents acknowledged the existence of the loan and proposed a mode of settling the same with the principal amount of Ksh.600,000 to be paid on or before 31st December, 2018 and Ksh.150,000/- to be paid on or before 30th June, 2019.

11. He further submits that the trial court erred in disregarding his testimony and evidence of several undertakings agreed upon between the parties executed over the year that demonstrated the Respondents owed him money. He also contends that the trial court erred in holding that the Appellant had a record of payments made when there were none yet the Respondents never complained of non-receipting or not getting any acknowledgment of payments from the Appellant. It is argued that the fact that the Respondents continuously gave undertakings over the years contradicts the Respondents' assertion that they had repaid the loan in cash.

12. Additionally, he asserts that if indeed the loan principal and interest had been repaid, there was no need for subsequent engagements. Further, he urges that the trial court erred when it went ahead to shift the blame to the Appellant for failing to give non-existent records when the Respondents could have instead provided the records.

13. The Appellant contends the trial court misdirected itself in shifting the burden of proof to the Appellant to prove the Respondents' assertions. It is urged that the 1st Respondent testified that he made payments via Mpesa, cheques and cash but failed to provide proof of the same, only giving vague answers. Further, that the Appellant acknowledged receiving payment from the Respondent in the form of two cheques which he testified were dishonoured for insufficient funds.

PARA 14.

Finally, he submits that the trial court erred in dismissing the Appellant's suit after disregarding and failing to take into account the Appellant's credible and reliable evidence. On the issue of the in duplum rule, he contends that he adequately submitted on the same, asserting that Section 44 of the *Banking Act* does not apply to non-deposit taking financial institutions or to individuals.

15. Consequently, he prays that his appeal be allowed in terms of the prayers he sought in the Memorandum of Appeal.

Respondents' Submissions

16. The Respondents provided a brief summary of the case. Counsel for the Respondent narrowed down the issues from the five grounds of cross-appeal to two: first, whether the appeal is merited for award of the prayers sought and secondly, who bears the costs of the appeal.

17. The Respondents submitted that they had duly repaid the Appellant a sum of Ksh.275,000/=. It is contended that during cross-examination, the Appellant admitted to having received this payment from the Respondents and acknowledged recording the same in a book. The Respondents argue that, despite being the custodian of this record, the Appellant failed to produce the book as evidence. It is contended that this omission was deliberate and intended to mislead the Court, as producing the book

would have undermined the Appellant's case by clearly showing that the debt had been repaid in full. Citing Sections 107 and 109 of the *Evidence Act*, as well as the decision in Stanley Maira Kaguongo v. Isaac Kibiru Kahuthis [2022] eKLR, the Respondents assert that the Appellant failed to discharge the burden of proof regarding the specific amounts allegedly unpaid, particularly because it was the Appellant who maintained records of the payment transactions.

18. Additionally, the Appellant produced handwritten letters and minutes dated 9th June 2011 and 14th April 2018 respectively, purportedly signed by the Respondents. However, under cross-examination, the Appellant vehemently denied having authored or executed the said documents. Moreover, the handwritten documents were unverified and failed to establish any connection to the alleged loan agreement dated 17th July 2009, which formed the basis of the Appellant's claim that the debt had accrued. The Respondents rely on the decision in Choitram vs Nazari [1985] KLR 327 to argue that it is trite law that acknowledgment of debt must be clear and obvious and without requiring any interpretation. They subsequently argue that the handwritten letters and minutes were not clear and obvious acknowledgment of debt. Therefore, the Respondents were not in breach of contract.

19. On the issue of interest, the Respondents submit that the Appellant advanced a sum of Ksh.225,000/= but was claiming an astronomical amount of Ksh.750,000/= despite the Respondents having repaid an amount of Ksh.275,000/=. The Appellant was essentially claiming Ksh.525,000/= which sum the Respondents urge is unfair, oppressive and significantly more than the principal sum of Ksh.225,000/=. It is submitted that though the courts have taken the position that they cannot rewrite contracts entered into by parties, there are instances when the courts can interfere and one such case is if the contract is deemed unconscionable as was the case in the decision of Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited [2014] eKLR. The Respondents urged this Court not to allow them be burdened with high interest charged, as they had already repaid the principle sum of Ksh.225,000/- plus interest of Ksh.50,000/= amounting to a total sum of Ksh.275,000/=.

20. Consequently, they submit that the appeal is not merited for award of the prayers sought and the Court should dismiss the Appeal dated 3rd May, 2024. Additionally, as costs follow the event, they pray that they be awarded costs of the Appeal.

Analysis and Determination

21. This being an appeal against the decision of the Small Claims Court, this Court as an appellate court is mindful of Section 38 of the *Small Claims Court Act* which limits the jurisdiction of this Court to matters of law only. It provides that:

> " 38.
>
> (1) A person aggrieved by the decision or an order Appeals of the Court may appeal against that decision or order to the High Court on matters of law.
>
> (2) An appeal from any decision or order referred to in subsection (1) shall be final."

22. Consequently, guided by the above, I have considered the appeal and the parties' submissions, and the entire record, I find the following issues arising for determination:

    i. Whether the trial court properly evaluated the evidence on repayment;

    ii. Whether the interest claimed contravened legal principles such as the in duplum rule or was otherwise unconscionable.

iii. Whether the Appellant is entitled to the reliefs sought.

i. Whether the trial court properly evaluated the evidence on repayment

23. This Court notes that under Section 107 of the *Evidence Act*, the burden of proof lies with the party who desires the court to give judgment as to any legal right or liability dependent on the existence of facts. Further, Section 109 provides, that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

24. In this case, the Appellant bore the initial burden to establish that a loan was advanced and that it remained unpaid. Once discharged, the evidential burden should thereafter have shifted to the Respondents to disprove that.

25. It is admitted by both parties that the Appellant advanced the Respondents a loan of Ksh.225,000/= as per the agreement dated 17th July, 2009. Their point of departure is whether the loan was repaid in full, when it was paid and the outstanding balance, if any.

26. The Appellant produced several documents, including letters dated 30th October 2009, 1st February 2010, and 18th March 2010, as well as dishonoured cheques from Crimson General Supplies and Marketers Haven Ltd, all of which, when read together, demonstrated a pattern of acknowledgment of indebtedness by the Respondents as well as continued negotiation. Further, a meeting held on 14th April 2018 produced minutes and an acknowledgment that Ksh.600,000/= was due, with a proposed mode of settlement. This evidence was not sufficiently controverted.

27. The Respondents did not provide any evidence to refute the authenticity of these documents. Further, though he denied drawing the dishonoured cheques, the 1st Respondent admitted that both him and his wife operate the two businesses being Crimson General Supplies and Marketers Haven Limited. He also admitted that the dishonoured cheque of 17th August, 2009 was from the same Crimson General Supplies' bank account indicated in the bank statement that he produced in the Respondents' bundle of documents dated 10th September, 2023.

28. Once the Appellant produced documents suggesting a loan had been issued and partially repaid, the burden shifted to the Respondents to prove full repayment. The Respondents did not prefer any alternative explanation to explain the circumstances of the undertakings entered into outside of the scope of the agreement.

29. The Respondents only offered oral assertions of payment through M-Pesa, cheques, and cash, without providing supporting documentation. Instead, they raised other issues of unconscionable and unjust interest and the applicability of the in duplum rule. Their explanation that the Appellant held the payment records in an alleged record book, which was not produced, was not sufficient to discharge their evidentiary burden under Section 109 of the *Evidence Act*. The law does not allow a party to rely solely on a deficiency in the other party's evidence where they themselves have failed to produce material within their own knowledge or possession.

30. In my considered view, the trial court erroneously shifted the evidential burden back to the Appellant despite his discharging the initial burden. In doing so, the trial court erred by failing to holistically evaluate the evidentiary value of these documents and their cumulative implication on the issue of liability. It is therefore my finding that the trial court erred in dismissing the suit solely on the ground that the Appellant failed to produce one record, without adequately weighing the other documentary evidence and the admission by the Appellant regarding partial repayment.

ii. Whether the interest claimed contravened legal principles such as the in duplum rule or was otherwise unconscionable.

31. The Respondents contest the Ksh.750,000/= sum claimed by the Appellant on grounds that it was exorbitant and oppressive, raising the in duplum rule under Section 44A of the *Banking Act*. The Appellant argues the rule does not apply as he is not a bank or deposit-taking institution.

32. However, it is trite law that the in duplum rule applies only to institutions regulated by the Central Bank. The Appellant, being a private individual, falls outside this category. However, courts retain jurisdiction to interfere with interest claims that are excessive or unconscionable.

33. In this case, the principal sum was revised to Ksh.600,000/= in the 2018 reconciliation meeting. The total claim of Ksh.750,000/=, inclusive of interest, does not strike this Court as oppressive in the context of the time that has lapsed and the Respondents' dishonoured undertakings.

iii. Whether the Appellant is entitled to the reliefs sought.

34. This Court notes that in cross-examination, the Appellant acknowledged receiving some payments from the Respondents. He also admitted that he kept a record of the said payments, which he failed to produce before the trial court or even state how much was repaid. While the omission to produce this record weakens the Appellant's case, it does not fully extinguish it, especially in view of the multiple acknowledgments and promises to pay by the Respondents, some of which are contemporaneous with or post-date the alleged repayments.

35. The agreement captured in the letter dated 14th April, 2018 was the Respondents were to pay Ksh.600,000/= as the principal amount owed on or before 31st December, 2018 and the balance of Ksh.150,000/= was to be paid on before 30th June, 2019. The total sum the Respondents owed as of April, 2018 was Ksh.750,000/=.

36. The only payment the Respondents were able to demonstrate was for Ksh.25,000/= on 18th August, 2009 as per their bank statement.

37. In light of the foregoing, and doing the best this Court can in the circumstances, I am persuaded that while the Appellant failed to produce a record of payments, the existence of such payments was admitted. At the same time, the Respondents failed to provide proof of repayment beyond the Ksh.25,000/= shown in their bank statement. Instead, they concede that they paid a total of Kshs.275,000/- being the principal sum of Kshs.225,000/- together with interest of Kshs.50,000/- in interest.

38. Accordingly, and taking into account that it is not for the Court to rewrite contracts, I find it fair and just to deduct what the Court considers the repayment made from the contracted sum of Kshs.750,000/-. I therefore award the Appellant Ksh.450,000/=, being the balance due from the total debt of Ksh.750,000/= which in my view includes the interest accrued over time from the initial principle and interest as contracted and acknowledged by the parties.

39. The appeal is partially allowed. Accordingly, I make the following orders:

    i. The judgment and decree of the trial court in SCCOMM/E3666 of 2023 is hereby set aside;

    ii. Judgment is entered for the Appellant against the Respondents jointly and severally in the sum of Ksh.450,000/=;

iii. Interest on the said sum shall accrue at court rates from the date of filing suit until payment in full;

iv. The Respondents shall bear the costs of the appeal.

40. Orders Accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL, 2025.

RHODA RUTTO

JUDGE

In the presence of;

....Appellant

....Respondent

Sam Court Assistant