Ngugi v Ntinyari t/a Vantage Adventurous (Civil Appeal 249 of 2023) [2025] KEHC 7825 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7825 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 249 OF 2023

FN MUCHEMI, J

MAY 29, 2025

BETWEEN

ANDREW MBUGUA NGUGI ..... APPELLANT

AND

PURITY NTINYARI T/A VANTAGE ADVENTUROUS ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. O. Wanyaga (SRM) delivered on 27th February 2023 in Thika CMCC No. 140 of 2020)

JUDGMENT

Brief facts

1. This appeal arises from the judgment Thika in CMCC No. 140 of 2020 whereby the court dismissed the appellant's claim for want of proof that he had entered into a loan agreement with the respondent for a sum of Kshs. 3,450,000/- as per the plaint dated 27th January 2020.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 8 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in law and in fact by dismissing the appellant's case and finding that the appellant did not prove his case as against the respondent that the money was a loan as opposed to a joint venture.

    b. The learned trial magistrate erred in law and in fact in finding that the loan agreement made on 31st December 2018 entered by the parties was signed under duress.

3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that he proved his case to the required standard by supporting his claim that he loaned the respondent money at a sum of Kshs. 3 million with a copy of the agreement between the parties, receipt of legal fees, his bank statement, demand letter dated 28th October 2019, various correspondence between the parties dated 24th May 2019, 18th December 2019 and screenshots of social media of communication between the parties.

5. The appellant submits that the learned trial magistrate's actions indicated open bias towards him in breach of his right under Article 50(1) of *the Constitution*. Relying on the cases of Kimani v Kimani [1985-1989] 1 EA 134; Ernest & Young LLP v Capital Markets Authority & Another [2017] eKLR; Alnashir Popat & 8 Others v Capital Markey Authority [2016] eKLR and The Committee for Justice and Liberty & Others v The National Energy Board & Others [1978] 1RCS 369, the appellant submits that the test of probability of bias is grounded on the concern that there is no lack of public confidence in the impartiality of adjudicative agencies.

6. The appellant refers to Section 107 of the *Evidence Act* and the cases of Kirugi & Another v Kabiya & 3 Others [1987] KLR and Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR and submits that he presented his testimony and exhibits and the respondent did not rebut any of the documents. Further, the loan agreement was entered into by the parties on 31st December 2018 and is duly executed by both parties yet the respondent wants the court to believe that the contract was illegal as it was procured by duress and threats, yet she could prove the same. To support his contentions, the appellant refers to Section 108 and 109 of the *Evidence Act* and the case of Margaret Ngina Kamau v Christopher Karanja & Another [2021] eKLR.

7. The appellant submits that the respondent failed to prove coercion as she did not report the same to the police and further she did not report the police officers' conduct from Muthaiga Police Station to the OCS Muthaiga Police Station or even request an investigation to be done on the officers for abuse of power.

8. The appellant submits that it was a term of the contract that upon its execution, he would disburse to the respondent Kshs. 3 million and she was to pay the loan on or before 30th June 2020 and to ease her burden she was allowed a monthly instalment of Kshs. 100,000/- commencing June 2019 to be paid to KCB Account No. 1102469181 Thika Branch. The first payment was due on 30th June 2019, 60 days after the execution date but the respondent did not remit any amount. Further, vide a letter dated 24th May 2019, the respondent wrote to him seeking his indulgence on revisiting the terms of the agreement and asked to be allowed to pay Kshs. 75,000/- per month instead of Kshs. 150,000/- per month. Further she requested to be allowed to pay Kshs. 1,500,000/- first and the balance which she termed as an investment to be discussed later.

9. The appellant argues that the respondent acknowledged receipt of the money and further the respondent had not cleared previous disbursements made to her which he included in Clause 3 of the agreement.

10. The appellant relies on the cases of North End Trading Company Limited (Carrying on the business under the registered name of) Kenya Refuse Handlers Limited v City Council of Nairobi [2019] eKLR and CMC Aviation Ltd v Crusair Ltd (No. 1) [1987] KLR 103 and submits that the respondent's defence contained mere allegations without any material proof.

The Respondent's Submissions.

11. The respondent submits that the appellant never raised the issue of the trial court's bias. Further she submits that she gave enough evidence that she and the appellant had a business agreement which the appellant never complained when sharing in the profits but only complained when the business venture encountered losses.

12. The respondent further submits that she was very clear that she entered into the alleged loan agreement under duress though threats from people claiming to be police officers and working under the instructions of the appellant. The loan agreement was signed after the appellant had already entered into the joint business venture and had invested in it.

Issues for determination

13. The main issues for determination are:-

    a. Whether the trial magistrate was biased upon the appellant.

    b. Whether the appellant proved his case in the trial court on a balance of probabilities.

The Law

14. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another v Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " .....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 into account of particular circumstances or probabilities materially to estimate the evidence."

15. In Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR the Court of Appeal stated that:-

    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.

16. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

    a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

    c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the learned trial magistrate was biased upon the appellant.

17. The appellant highlights the trial court's judgment on page 104 and 105 of the Record of Appeal and argues that the learned magistrate deviated from what he is legally bound to do in a case and started to enter inquiries thus entering a realm of speculation which showed bias against him.

18. I have perused the trial court's judgment as a whole and the particular pages 104 and 105 and find no bias on the part of the trial magistrate. The trial magistrate was simply analyzing the case with the facts and the evidence produced and he drew his own conclusion. Notably, the trial magistrate analyzed both the parties documents and arguments and came up with his conclusion. Furthermore, the appellant has not specifically stated how the trial magistrate was biased against him. Additionally, the issue of bias has not been raised by the appellant in the trial court for the learned magistrate to accord himself a chance to recuse himself if need be.

19. It is therefore my considered view that the appellant has failed to establish existence of any bias by the trial magistrate against him during the hearing of the case.

Whether the appellant proved his case in the trial court on a balance of probabilities.

20. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

    Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

21. This degree of proof is well enunciated in the case of Miller v Minister of pensions [1947] cited with approval in D.T. Dobie Company (K) Limited v Wanyonyi Wafula Chabukati [2014] eKLR where the court stated:-

    That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', thus proof on a balance or prepodence of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

22. The appellant's evidence is that he entered into a loan agreement dated 31st December 2018, with the respondent and lent her a sum of Kshs. 3 million whereby she promised to pay back with an interest of Kshs. 10% per annum. The respondent acknowledged receipt of the said sums on diverse dated in the year 2017 and 2018. Since 30th June 2019, the respondent did not make any effort to repay the loan in installments as agreed by he parties..

23. It was the respondent's case that she entered into a business venture with the appellant whereby he was to get his investment back as well as his share in the profits, if any such profits were made, the respondent argued that the amount claimed by the appellant includes amounts he invested in the business and part was returned or he took part in sharing of the profits. The respondent testified that there was no loan agreement and she only signed one in December 2018 when the appellant accompanied by police officers threatened to have her prosecuted for the loss of his share in the investment.

24. It is not in dispute that the loan agreement dated 31st December 2018 was signed long after the appellant had alleged advanced money to the respondent. Although the respondent testified that she signed the said agreement under duress from the appellant in the presence of police officers, it is noted that the appellant did not challenge the said evidence. Neither did the respondent report the alleged duress to

the police as would have been expected. On further perusal of the loan document, the respondent has not affixed her signature at the designated area as borrower.

25. That notwithstanding, the appellant in evidence produced an email dated 24th May 2019 whereby the respondent made reference to an unspecified amount as well as an investment amount of Kshs. 1.5 million. The document shows that the appellant advanced to the respondent's business Kshs. 1.5 million as an investment and not a loan. From the evidence of the appellant, the court cannot ascertain exactly what amount the appellant gave to the respondent and for what purpose. The only sum that can be ascertained in the evidence is Kshs. 1.5 million which was invested into the respondent's business as part of the appellant's shareholding.

26. From the entire evidence, it is established that the parties had business relationship where money passed from the appellant to the respondent. However, the claim for the loan amount has not been proved to the standards required in civil cases. It is my finding that the magistrate did not err in finding that the appellant failed to prove his case.

27. I find this appeal has no merit and is hereby dismissed.

28. Due to the facts of the case to the effect that the parties had a business relationship and that fund exchanged hands between the parties in the course of their business, this court sets aside the order of costs by the lower court and directs that each party met their own costs in this appeal and in the court below.

29. It is hereby so ordered.

JUDGMENT DELIVERD VIRTUALLY, DATED AND SIGNED AT THIKA THIS 29TH DAY OF MAY 2025.

F. MUCHEMI

JUDGE