



**Shariff v Kinyingo (Civil Appeal 343 of 2019)  
[2024] KEHC 1856 (KLR) (Civ) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1856 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 343 OF 2019**

**DAS MAJANJA, J**

**FEBRUARY 29, 2024**

**BETWEEN**

**AIDARUS SHARIFF ..... APPELLANT**

**AND**

**JOHN KINYINGO ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. B. J. Ofisi, SRM dated 24th May 2019 at the Nairobi Magistrates' Court, Milimani in Civil Case No. 2694 of 2017)*

**JUDGMENT**

1. By a judgment dated 24.05.2019, the Subordinate Court dismissed the Appellant's claim for USD 27,891.00 against the Respondent. In the suit, the Appellant sued the Respondent herein claiming USD 27,891.00 based on an agreement made in September 2009 ("the Agreement").
2. According to the Complaint dated 23.05.2017, the parties entered into the Agreement and based on it, the Appellant remitted USD 90,000.00 in installments of USD 80,000.00, 3,000.00 and 6,000.00 in September 2009, 24.06.2012 and 04.07.2012 respectively. According to the Appellant, under the Agreement the Respondent was to use the funds exclusively according to the instructions of the Appellant but he failed to abide by the Appellant's instructions and utilized the funds for his own use. Subsequently, the Respondent refunded the Appellant USD 61,109.00 leaving a balance of USD 27,891.00 which formed the basis of the claim.
3. In his statement of defence dated 22.06.2017, the Respondent denied ever entering into the Agreement. He however, acknowledged receiving funds from the Appellant but stated that all funds were utilized according to the Appellant's instructions and the balance deposited in the Appellant's bank account as directed.



4. The Appellant and Respondent testified as PW1 and DW1 respectively. After considering the parties' testimonies and written submissions, the trial court rendered judgment. Upon evaluating the evidence tendered before it, the trial court found that based on the statement of account and demand letter produced by the Appellant, it could not decipher whether the Respondent owed the Appellant any money as pleaded hence the court dismissed the suit for want of proof.
5. The Appellant is aggrieved by the judgment and in his Memorandum of Appeal dated 21.06.2019, he raises 19 grounds of appeal. He prays that the judgment be set aside and that his suit be allowed as prayed with costs. Both parties have filed written submissions in support of their respective positions. Even though the Appellant has raised 19 grounds of appeal, the issue for determination is whether the Appellant proved that the Respondent owed him USD 27,891.00 as prayed in the plaint.
6. Before I deal with the substance of the appeal, it is important to recall that this is a first appeal. The court is guided by the principle that it is the duty of the court to re-evaluate the evidence independently and reach its own conclusion as to whether to uphold the judgment. In doing so, the court must make an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123).
7. The Appellant argued that the Respondent was his agent. Except for specific types of agreement provided for in law, there is no requirement in law for an agreement to be in writing (see *Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan]* [2017] eKLR). An agreement may be inferred from the conduct of the parties including documents exchanged between the parties in fulfilment of the agreement. Although the Respondent admits that he received money from the Appellant, the documentary evidence tendered by the Appellant does not show that he sent money to the Respondent with instructions to undertake specific tasks on his behalf. The burden is on the Appellant to tender evidence to prove the basis on which he sent the money to the Respondent. I hold that simply because the Appellant sent money and the Respondent admitted to receiving it does not amount to an agency agreement.
8. Even if I accept that there was an agency agreement, the Appellant still had to prove that he was entitled to USD 27,891.00 as prayed in the plaint. The Appellant stated that he sent USD 89,000.00 to the Respondent on diverse dates between September 2009 and 04.07.2012 and that the Respondent refunded USD 61,109 leaving a balance of USD 27,891.00. At the hearing, the Appellant testified that he sent USD 80,000.00 through Dahabshiil but he did not produce any documentary or other evidence of such remittances. It is also not clear how the other USD 9,000.00 was remitted.
9. The Appellant contended that the refunds were done by depositing money in his personal bank account. To this effect he produced a bank statement from the Gulf African Bank Ltd. I studied the statement and make the following observations. First, the USD Account statement is for the period between 01.05.2013 and 31.07.2014. Second, a total of 7 deposits were made during the period out of which 4 were by the Respondent for USD 29,800.00 and one deposit by the Respondent's wife of USD 20,000.00. These deposits were not captured in the pleadings. Further, the Appellant did not produce the account statement for the deposits made on 31.08.2010, 22.08.2011, 14.08.2012 and 24.01.2014.
10. While the Respondent does not dispute receiving money from the Appellant, he has stated that all the money was utilized as per the Appellant's instructions and he refunded the balance. The Respondent stated that he did not keep records of his transactions. It is however trite that the burden of proof always lies with the Plaintiff and only shifts to the Defendant once the Plaintiff meets the threshold of establishing his case.



11. Having re-evaluated the evidence tendered by the Appellant I find it wanting in two respects. First, as I have observed, there is no connection between his pleadings and his evidence. Second, the Appellant did not produce any evidence to show how much he remitted to the Respondent, when the remittances were made, what instructions he gave to the Respondent and how much he expected to be spent by the Respondent. Without this evidence, this court is unable to make a finding as to whether the Respondent is indebted to the Appellant. Consequently, I find that the Appellant did not discharge his burden of proof to the required standard.
12. I do not find any merit in the Appeal. It is dismissed with costs. The Appellant shall pay costs assessed at Kshs. 40,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF FEBRUARY 2024.**

**D. S. MAJANJA**

**JUDGE**

Mr Wamalwa instructed by F. N. Wamalwa and Company Advocates for the Appellant.

Mr Kimathi instructed by Kimathi Wanjohi Muli and Company Advocates for the Respondent

