



REPUBLIC OF KENYA



**Mururu v Mwithali (Civil Appeal E181 of 2023)
[2024] KEHC 3234 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3234 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E181 OF 2023
EM MURIITHI, J
MARCH 20, 2024**

BETWEEN

MOSES MURURU APPELLANT

AND

EVANS MUTHOMI MWITHALI RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. W. Maina Mouti (RM) delivered on 17/10/2023 at Meru SCCCOM/ E137 of 2023)

JUDGMENT

1. By a statement of claim dated 14/4/2023, the Respondent herein, the Claimant in the trial court, sued the Appellant herein, the Respondent in the trial court, seeking the sum of Ksh. 260,000 being the principal amount, Ksh. 520,000 being agreed liquidated damages for breach of contract, compensation and costs of the claim plus interest. The Respondent pleaded that on 31st January 2022, he advanced the Appellant a friendly loan of Ksh.200,000, which was to be repaid in October 2022 with an interest of Ksh.60,000. The Appellant's total refusal to pay the said amount is a breach of the agreement, and it was an express condition of the said agreement that whoever breached the said agreement would pay Ksh. 520,000 being the agreed liquidated damages for breach of contract.
2. The Appellant, in his response to the claim dated 13/8/2023 acknowledged that he had already paid the Respondent Ksh. 192,000 leaving an outstanding balance of Ks.8,000 only. He denied agreeing to pay any interest to the Respondent or any damages for any breach of the agreement.
3. Upon full hearing of the claim, the trial court ruled:

“Indeed, the parties herein did enter into a contract (CEX1) and a sum of Kshs. 200,000/= was sent to the Respondent. with regard to payment, the Respondent does claim that he has since paid the Claimant and has indeed adduced proof of mpesa payments at Kshs. 82,000/



= (REX1) all which three payments are paid past October, 2022 which is in contravention of the Agreement, it is out rightly evident that the Respondent did breach agreement by failing to pay the entire sum by October, 2022. Further, the Respondent does claim to have paid Kshs. 100,000/= to pay for a probox to take the Claimant to hospital but no evidence has been adduced to support the claim. with regard to the said Kshs. 100,000/= cash paid in the presence of RW2, the said RW2 stated that he did not know the purpose of the funds and the Claimant denied the said money being received, this does not however affect the default clause in the Agreement. Clause 4 of the Agreement touches on the default clause with states....That I default of any terms of the Agreement herein the debtor shall be at liberty to pay Kshs. 520,000/= with in recovery of the principal amount plus interest...” In plain context this clause essentially and in plain text means that in default of the Agreement, the only sum to be paid is Ksh. 520,000/=. Given that the Respondent did breach the Agreement, the Court does find in favour of the Claimant as against the Respondent at a sum of Ksh.520,000/=. The court having considered the Claim, Response, documentary evidence, witness testimonies, submissions and the analysis abovehand, the Court finds that the Claimant has proven its claim against the Respondent on a balance of probability. Consequently, judgment is entered for the Claimant against the Respondent in the following terms:

- a. Judgment is entered at a sum of Ksh. 520,000/=.
- b. Costs of the Suit and interest at court rates are also awarded from the date of judgment until the settlement in full.”

The Appeal

4. On appeal, the Appellant filed his memorandum of appeal dated 30/10/2023 raising 8 grounds as follows:
 1. The Learned Magistrate erred in law and fact by awarding the Respondent Kshs. 520,000/=.
 2. The Learned Magistrate erred in law and fact in failing to find that friendly Loan agreement dated 31.1.2022 was extremely sharp, oppressive, harsh, unfair and unconscionable against the appellant.
 3. The Learned Magistrate erred in law and fact in failing to appreciate and apply the appellant’s evidence on record before arriving at the Judgment.
 4. The Learned Magistrate erred in law and fact in failing to take into consideration the sum of monies paid by the Appellant.
 5. The Learned Magistrate erred in law and fact in failing to consider the appellant’s written submissions.
 6. The Learned Magistrate erred in law and fact in finding that the Respondent had proved his claim.
 7. The Judgment by the Learned Magistrate is against the weight of the evidence.
 8. The Learned Magistrate erred in law and fact in failing to make finding on the various Legal issues raised by the appellant on the validity of the agreement.



Duty of the Court

5. This being the first appellate court, it has duty to reevaluate the evidence and come up with its own independent finding bearing in mind that unlike the trial Court it did not have the benefit of taking evidence firsthand and observing the demeanor of the witnesses. The principles governing the first appellate court were set out in *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the Court stated as follows: - "...An appeal to this court from the trial court is by way of retrial and the principles upon which the 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..."

Evidence

6. CW1 Evans Muthomi testified that:

"I live in Njoka. I work as a businessman on 14th April, 2023 I did prepare my statement that I wish to be adopted and 15th September, 2023 and documents that I wish to adopt (EX 1) document adopted and statement of banks (Exhibit 2). I did give Moses Kshs. 200,000 cash before Advocate and also sent him 50,000 over and above as per statement on 7th February, 2023. He has never paid me or sent sum for 30,000 which he paid after I instituted this claim. The Kshs. 2,000 he sent was when I was ill and I have no problem refunding him. He did refund me the Kshs. 50,000 I sent him via Mpesa later. There is no money that was sent via Nyumba Kumi. My claim for Moses is as per my claim."

7. On cross examination, he stated that:

"I don't have a license to give out loans. I don't know about the said licenses. On interest I don't know how it touches on the loan. I don't know about bank interest and the right I see. I did lend him the money with interest. The issue of interest was contractual and he agreed to the sum. I claim for breach of agreement as well. Mururu had not paid me before I instituted the claim. The Kshs. 30,000 was sent duly prays. The vehicle which took me to hospital after the account was owed by a said Jeremy but my father catered for the said costs. Jacob Karema is just a fellow village mate. I was never given 100,000 and the said Kanema is not telling the truth. I gave him 50,000 when I was in hospital and my father paid for the medical expenses. The Kshs. 50,000 was sent via bank Mpesa and he did refund me back the said money. The two debts are separate and distinct. The Kshs. 50,000 was given in February 2022 but it was a different debt. The 260,000 is the Principle and the Kshs. 520,000 is the default claim. I would have done a business of selling Miraa if only the respondent had paid me."

8. On re-examination, he stated that, "The agreement on 31st January, 2022 was done by consent of parties' herein. On 7th February, 2022 I did add Kshs. 50,000 over and above and he was to pay me the 50,000 first which he actually did. The money came from my insurance after my accident. The said Jacob is not a chair of the Nyumba kumi but a said Mwithali."

9. RW1 Moses Maruru testified that:

"I live in Linjoka. I know the Claimant he is my son. I do know about the claim. I prepared my statements on 20th September, 2023. (Adopted) and documents that (Rex 1) (statement). The said sum of Kshs. 200,000 I have paid 192,000 so far and my balance is Kshs. 8,000



which I am willing to pay in whole. I don't know about the defaults of the Agreement. I did not read the agreement (Exhibit 1). He gave me the money to me to pay school fees. Mr. Kemu is the Chair Nyumba Kumi in Linjoka Village who did witness the receiving of 100,000. The Ksh. 100,000 was given to him to buy property in the morning. I did not anticipate him saying I did not pay 100,000. My debt is 8,000 which I will pay."

10. On cross examination, he stated that:

"On 31st January, 2022 we did go to an advocate office and we agreed on the terms therein. The money was for school fees Kenya Police to be enrolled. The Kshs. 50,000 was not sent to me and I paid Ksh. 50,000 as part payment of Kshs. 200,000. We did not agree for the money to be paid before an advocate. I paid him as part of the debt. I had been given time to pay the sum but I did not read the agreement in whole to understand it. I did give him cash of Kshs. 100,000 to buy property he was interested in. My nyumba kumi witness is unwell today but he shall come another day."

11. On re-examination, he stated that, "I was given cash of Kshs. 150,000 after agreement of 50,000 was sent to Mpesa as per (Cex 2) to complete the last 200,000."

12. RW2 Jacob Kanee testified that:

"I come from Laare. I know the Claimant and Respondent. I did prepare my statement on 31st August, 2023 (Adopted) I am the Nyumba kumi chair of Linjoka area and I have an identity card as witness."

13. On cross examination, he stated that:

"I do know SK Mwitheli is the Chairman of Nyumba kumi location. My job as a chair of Nyumba kumi is to deal with security. My job does extend being a witness on payment of debts. I deal with anything in the village. I did witness Muthomi being given 100,000 on 29th June 2022. We did not write the transaction on paper. They came in the morning at around 10 a.m. I do have an office myself at Linjoka Central where I stayed. They are the ones who looked for me and the money was exchanged in my office. Evans did not want people to know he had money. My office and house is just 100 meters away. The money was exchanged in the office and the secretary was away hence there was no written record of the transaction but I have not adduced it as evidence. I don't know what the purpose of the money was. Both Moses and Evans came to me to witness the transaction. The two parties were present that day I witnessed the exchange. Muthomi did not come later but came with the respondent."

14. On re-examination, he stated that, "I did witness the exchange of the funds between the office and my house specifically in my office. There is no written record. When the money was exchanged they were all present. We did not record details since they were in a hurry."

Submissions

15. In his submissions filed on 10/1/2024, the Appellant urges that the increase of the total recoverable amount from Ksh. 260,000 was not supported by the plain wording of clause 4 and contradicted the express terms in clauses 1 and 2 of the agreement. He faults the trial court for failing to appreciate that contradiction hence erroneously awarding the sum of Ksh. 520,000 under clause 4. He urges that clause 4 of the agreement was oppressive, harsh and unconscionable, and cites *Margaret Njeri Muiruri v*



Bank of Banoda (Kenya Ltd) (2014) eKLR, Nancy Muthoni Nyaruai v Grace Wanjiku Mugure (2021) eKLR and Danson Muriuki Kihara v Johnson Kabungo (2017) eKLR. He urges that the award of interest of Ksh. 320,000 for a principal amount of Ksh. 200,000 was against the clear provisions of section 44A of the Banking rule which provides that interest stops running when unpaid interests equals the outstanding capital amount. He faults the trial court for failing to consider and apply his evidence of repayment of Ksh. 192,000, thus arriving at a wrong finding.

16. The Respondent urges it had been expressly agreed upon that the Appellant would pay Ksh.260,000 and in default a penalty of Ksh. 520,000. He urges that parties are bound by their contracts and courts cannot purport to rewrite a contract between the parties, and cites South Nyanza Sugar Company Ltd v John Gituki Gomba (2022) eKLR and National Bank of Kenya Ltd v Pipe Plastic, Samkolit (K) (2002) 2 EA 503. He urges that the principle of the duplun rule applies in respect to interest and not penalty on default of payment. He urges that the Ksh. 520,000 was in respect to penalty and not interest on the principal amount and prays for the appeal to be dismissed.

Analysis and Determination

17. The gist of this appeal, as can be deciphered from the 8 grounds of appeal is whether the Respondent proved his case on a balance of probabilities.

18. The Respondent affirmed on cross examination that:

“...I did lend him the money with interest. The issue of interest was contractual and he agreed to the sum. I claim for breach of agreement as well. Mururu had not paid me before I instituted the claim...The 260,000 is the Principle and the Kshs. 520,000 is the default claim.” On re-examination, he stated that, “The agreement on 31st January, 2022 was done by consent of parties’ herein.”

19. The Appellant testified that:

“...The said sum of Kshs. 200,000 I have paid 192,000 so far and my balance is Kshs. 8,000 which I am willing to pay in whole. I don’t know about the defaults of the Agreement. I did not read the agreement (Exhibit 1). He gave me the money to me to pay school fees... My debt is 8,000 which I will pay.”

On cross examination, he acknowledged that, “On 31st January, 2022 we did go to an advocate office and we agreed on the terms therein.”

20. RW2 testified that he was present when the Appellant paid the Respondent a sum of Ksh. 100,000 on 29/6/2022.

21. The Appellant has admitted that out of the Ksh. 200,000 he received from the Respondent, he has managed to pay Ksh. 192,000 leaving an outstanding balance of Ksh. 8,000, which has not been paid to date. Clause 2 of the agreement dated 31/1/2022 provides:

“That the said amount of Ksh 200,000/= (two hundred thousand) shall be paid with an interest of ksh 60,000/= (sixty thousand) totaling to ksh 260,000/= (two hundred and sixty thousand).”



22. By admitting his indebtedness to the Respondent, the Appellant is indeed in breach of clause 3 of the agreement which provides:
- “That MOSES MARURU agree to pay the said amount after duration of nine (9) months that month of OCTOBER 2022 after his son (RONALD MUNENE) get employed according to their agreement.”
23. Since the Appellant defaulted in his obligation to repay the loan as agreed, the provisions of clause 4 of the agreement came into play, which provides:
- “That I default of any of the terms of the agreement herein the debtor shall be at liberty to pay KSH 520,000 with in recovery of the principal amount plus interest.”
24. The Appellant is inviting the court to venture improperly into the sphere of re-writing the contract dated 31/1/2022 which he voluntarily executed and consented to be bound by its terms.
25. In Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd (2017) eKLR the Court of Appeal stated that: - “We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. See National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002]2 EA 503. The primary task of the court is to construe the contract and any terms implied in it. See Megarry, J. in the case of Coco vs A. N. Clark (Engineers) Ltd. - [1969] RPC 41.”
26. This court finds that there was no misapprehension of the facts and the evidence on record by the trial court, to warrant this court’s interference.

ORDERS

27. Accordingly, for the reasons set out above, this court finds the appeal is without merit and it is dismissed with costs to the respondent.

Order accordingly.

DATED AND DELIVERED ON THIS 20TH DAY OF MARCH, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. H. Gitonga for the Appellant.

Mr. F. Gitonga for the Respondent.

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