



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 3 OF 2015

MAUREEN WACHERA MACHARIA.....APPELLANT

VERSUS

WINNIE CHIVENYO BEUTTAH.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court

at Nyeri, (Hon, W.A. Juma) dated 21st April, 2015

in

C.M.C.C No. 209 of 2012)

JUDGMENT

On 27th April, 2012, the appellant filed a suit in the magistrates' court seeking for judgment against the respondent for a sum of Kshs. 600,000/= together with costs and interest. According to the averments in her plaint, both the appellant and respondent were workmates at Kenya Power and Lighting Company, at Nyeri. On or about the 8th May, 2009, they entered into a written agreement according to which the appellant lent the respondent the sum of Kshs. 800,000/=. It was agreed that this amount would be refunded on 27th February, 2010.

On 18th August, 2010, about six months after the due date, the respondent paid Kshs. 200,000/= only; according to the appellant, she neglected, refused or ignored to settle the balance hence the suit against her.

The respondent denied the claim and stated in her statement of claim that all she borrowed from the appellant was the sum of Kshs. 200,000/= which she settled in full. Nevertheless, she acknowledged that she entered into an agreement that the appellant referred to in her plaint except that she was coerced into it. Besides the 200,000/=, so she pleaded, she also paid the appellant the sum of Kshs. 50,000/= "as a token of appreciation". She denied owing the appellant any money.

The record shows that the suit proceeded for hearing *ex parte*, in the absence of the respondent and her counsel, after the court was satisfied that the latter had been duly served with the hearing notice but failed to appear.

According to the appellant, she and the respondent were friends and they both worked at Kenya Power and Lighting Company, Nyeri office. The respondent borrowed from her the sum of Kshs. 800,000/= on 8th May, 2009. On the material day, they both went

to the Kenya Commercial Bank, Nyeri branch, where the appellant withdrew the money from her account and gave it to the respondent. She produced the withdrawal slip in proof of the fact of the withdrawal.

The two immediately proceeded to an advocate's office to execute a formal agreement with regard to the transaction between themselves; in that agreement, the respondent acknowledged in writing that she had been lent the sum of Kshs. 800,000/= and had undertaken to refund it on 27th February, 2010. The appellant produced a copy of the receipt showing that the respondent even paid for the legal services for drawing the agreement.

However, she only refunded the sum of Kshs. 200,000/= by a banker's cheque. Copies of the agreement and the banker's cheque were also produced in proof of the appellant's claim. The appellant also produced a copy of the respondent's national identification card in support of the fact that the respondent had surrendered to her the original identity card as security for repayment of the sum borrowed. The appellant denied having coerced the respondent into signing the agreement, as alleged by the respondent.

In her judgment, the learned magistrate dismissed the plaintiff's suit. She doubted that the respondent had been lent money because in her respectable view, the money ought to have exchanged hands in the advocate's office; there was no reason, so the learned magistrate reasoned, why the money was handed over to the respondent in the bank only for the agreement to be signed later. She further held that a clause in the agreement between the appellant and respondent was inconsistent with the plaintiff's testimony. This clause read as follows:

2. THAT the debtor has received the said sum of Ksh. 800,000/= from the creditor upon execution of this agreement so that she can repay her stima loan.

According to the learned magistrate, this clause meant that the money was handed over to the respondent at the time of signing the agreement in the advocate's office and not before.

She also doubted the receipt acknowledging payment for legal fees arguing that, first, such receipt ought to have been in the custody of the respondent and not the appellant since it was the respondent who paid the fees and, second, the receipt did not bear a revenue stamp. Again, the money, according to the learned magistrate could not have been instantly paid since the agreement itself said the money was withdrawn "for onward transmission to the debtor". For all these reasons, the learned magistrate held that the plaintiff had not proved her case on a balance of probabilities and therefore dismissed the appellant's claim.

The appellant was aggrieved by this decision and inevitably appealed to this honourable court on three grounds; first, that the learned magistrate erred in law and fact in disregarding the appellant's evidence completely and therefore arriving at the wrong conclusion; secondly, the decision was against the weight of evidence; and finally, the learned magistrate misdirected herself in law and thereby caused gross prejudice to the appellant.

As far as I understand the evidence before the trial court, there is no doubt that there was a written agreement between the appellant and the respondent. The respondent herself admitted as much save to deny that the agreement was voluntary. The court also appreciated that this agreement was entered into and its only problem with it appears to be either the wording of the contract or its interpretation.

In order to appreciate its import, it is necessary to reproduce the entire agreement here:

DEBT ACKNOWLEDGEMENT

An agreement made this 8th day of May 2009

BETWEEN

WINNIE CHIVENYO BEAUTTAH ID NO. 0811497 OF P.O BOX 106, Nyeri (herein referred the 'Debtor') AND MAUREEN WACERA MACHARIA of ID NO. 5794948, of P.O. BOX 1832 (herein referred a the ('CREDITOR'))

WHEREAS

The debtor is desirously (sic) of borrowing and the creditor is willing to advance the sum of Eight Hundred Thousand (Kshs. 800,000/=) only to the borrower.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

- 1. THAT the creditor has withdrawn from her account with Kenya Commercial Bank (K.C.B) Nyeri Branch, Account No. 1107801222, vide transaction number TT09128SBNVY dated 8th May 2009 a sum of Ksh. 800,000/= for onward transmission to the Debtor upon request and instants(sic).*
- 2. THAT the Debtor has received the sum of Ksh. 800,000/= from the Creditor upon the execution of this agreement so that she can repay her stima loan.*
- 3. THAT the said sum of Ksh. 800,000/= shall be repaid directly to the creditor on Saturday the 27.2.2010 before 5.00 pm.*
- 4. THAT in the event the Debtor refusing to pay the whole amount on its due date, the balance (if any) shall be recovered from the Debtor through a civil suit.*
- 5. THAT the legal fees of Ksh. 5,000/= for this agreement shall be paid by the Debtor.*
- 6. THAT the debtor's (sic) has left her national identity card and her work card identity as security with the Creditor.*

IN WITNESS WHEREOF the parties herein do put forth their respective hands on the date and year above mentioned;

SIGNED BY THE DEBTOR: -

WINNIE CHIVENYOH BEAUTTAH

In the presence of: -

SIGNED BY THE CREDITOR: -

MAUREEN WACHERA MACHARIA

In the presence of: -

SIGNED BY THE WITNESS OF BOTH SIDES: -

JULIUS MUNENE NDERITU ID NO. 3204721

P.O. BOX 1403 NYERI

DRAWN BY:-

ANDREW KARIUKI (A.K) & CO. ADVOCATES

PAMKI HOUSE, 2ND FLOOR, SUITE NO. 33,

KIMATHI WAY,

P.O BOX 2323

NYERI

This was the document that brought the two parties together; everything else being constant, the primary and, what I consider the fundamental question is, looking at this agreement, is it possible for the court to infer the intention of the parties" In my humble view it is possible.

On the face of it, the respondent is acknowledging her indebtedness to the appellant to the tune of Kshs. 800,000/=. The source of this money is clearly specified including the particulars of the bank, the branch and the account number from which it has been withdrawn. It goes further to show that the appellant is the account holder and it is apparent that the money is withdrawn on a particular date.

A withdrawal slip or a debit advice of a cash withdrawal presented by the appellant and admitted by the court in support of her case is consistent with this part of the contract. For avoidance of doubt, it shows that on 8th May, 2009, at 10:07 AM, the appellant withdrew the sum of Kshs. 800,000/=from her bank account at Kenya Commercial Bank, Nyeri Branch.

As I understand it, the agreement goes further to state that the respondent acknowledges having received the sum of Kshs. 800,000/= upon execution of the agreement.

Again, I find this to be consistent with the plaintiff's evidence that as at the time they went to the advocate's office and executed the agreement, the respondent had received the sum of Kshs. 800,000/=. I suppose that if she hadn't, she would not have signed the agreement and if she was to receive the money in future, after the execution, the agreement would certainly have stated so.

The fact that the agreement said that the money was withdrawn "for onward transmission to the debtor" does not necessarily imply the transmission was on some future date. To my understanding, the 'transmission' could, and as it turned out, was effected soon after the withdrawal. All that the agreement was saying is that the appellant was withdrawing the money not for her own use but to lend the respondent thereafter. I find the learned magistrate's conclusion that perhaps the money ought to have been given to the respondent after the signing of the agreement or at the time of signing the agreement to be contrary to the terms of the agreement and without any supporting evidence.

The learned magistrate also took issue with the receipt for legal fees paid for professional services rendered; in her view, that receipt did not carry much weight because it did not bear the revenue stamp and in any event, it could only be produced by the respondent since she's the person who paid the fees.

Having admitted the receipt as an exhibit in support of the appellant's case, it was not open to the learned magistrate to question the authenticity of that piece of evidence. It is true that the receipt was expected to be in the possession of the respondent but it must be noted that the respondent never denied having made the payment for the services rendered by the advocate who drew the agreement. She also never testified or cross-examined the appellant on how she came to be in possession of the receipt herself.

In any event, the payment of the legal fees by the respondent was covered by the agreement itself in clause (5) thereof. Further, it is apparent from the receipt that it was issued by the firm of advocates that drew the agreement. With all this evidence, and without any evidence to the contrary, there was no basis to doubt the credibility of the evidence that the respondent paid for the legal fees for the services rendered.

The contention by the respondent that she was coerced into executing the agreement was not supported by any evidence; in any event, it is an allegation that was not properly pleaded because no particulars were given at all. This was in breach of **Order 2 Rule 10 (a) of the Civil Procedure Rules** which reads as follows:

10. (1) Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party

pleading relies;

If the respondent was unduly influenced, as she alleged, then she ought to have specifically pleaded the particulars of the undue influence and proved the same; she provided neither and therefore this allegation ought to have been dismissed with the contempt it deserved.

Parties are bound by the agreements in which they enter and all that the courts are required to do is to interpret and enforce them as they are rather than attempt to vary them to the detriment of either of the parties.

Having said that, I am satisfied that the appellant presented a formidable case in support of her claim. Considering that the respondent did not testify, the appellant's evidence in support of her claim was not controverted. In the final analysis, based on the evidence available, she proved her claim on a balance of probabilities. I am therefore inclined to allow the appeal and set aside the judgment and decree of the lower court. I would instead enter judgment for the appellant in the sum of Kshs. 600,000/= together with costs and interest at court rates from the date of delivery of the judgment of the lower court. The appellant shall also have the costs of the appeal.

It is so ordered.

Signed, dated and delivered in open court this 21st December, 2018

Ngaah Jairus

JUDGE



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