Case Number:	Civil Appeal 7 of 2014
Date Delivered:	24 Apr 2015
Case Class:	Civil
Court:	High Court at Homabay
Case Action:	Judgment
Judge:	David Amilcar Shikomera Majanja
Citation:	Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR
Advocates:	Mr Okoth instructed by G. S. Okoth and Company Advocates for the appellant. Mr Ojala instructed by P. R. Ojala and Company Advocates for the respondent.
Case Summary:	-
Court Division:	Civil
History Magistrates:	P. K. Rugut
County:	Homa Bay
Docket Number:	-
History Docket Number:	Civil Case 53 of 2012
Case Outcome:	-
History County:	Migori
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT

AT HOMA BAY

CIVIL APPEAL NO. 7 OF 2014

BETWEEN

EVANS OTIENO NYAKWANA.....APPELLANT

AND

CLEOPHAS BWANA ONGARO.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. K. Rugut, Ag SRM in Rongo

Senior Resident Magistrates Court Civil Case No. 53 of 2012 dated 18th March 2014)

JUDGMENT

1. According to the plaint filed in the subordinate court, the appellant averred that on 8th December 2010, the respondent obtained a friendly loan in the sum of Kshs. 130,000/- to be paid on or before 5th January 2011 in consideration for the use of his motor vehicle registration no. KAP 271B ("the motor vehicle") pending payment of the money. The agreement was evidenced by a written note signed by the respondent. As a result of the default the defendant claimed the sum of Kshs. 130,000/-.

2. The respondent filed a defence and counterclaim in which he denied that he obtained a friendly loan and that the agreement dated 5th January 2011 was obtained fraudulently after he was induced and coerced to sign a fake document acknowledging that he owes the appellant Kshs. 130,000/-. In addition, he filed a counterclaim claiming release of the motor vehicle.

3. The appellant, an advocate, testified that on 8th December 2010 he advanced the respondent Kshs. 130,000/- which was to be repaid on or before 5th January 2011 and in consideration, the respondent handed over the motor vehicle as security. He denied that the agreement was a forgery.

4. The respondent testified that the appellant was his advocate and that on 7th December 2010, the appellant rang him and asked to borrow his motor vehicle. He testified that the appellant borrowed his car and never returned it. The respondent denied that he borrowed Kshs. 130,000/-. He also denied ever signing any document to acknowledge that he had borrowed money from the appellant. He stated that he only saw the document when the suit was filed. He stated that he complained to the Law Society of Kenya about the appellant but his complaint was not resolved. He therefore elected to file a counterclaim to recover his vehicle.

5. After hearing the appellant and the respondent, the learned magistrate framed three issues for trial as follows;

a. Whether there was an enforceable agreement between the plaintiff and the defendant.

b. Whether the plaintiff's omission to file a reply to the defence amounted to an admission.

c. Whether the plaintiff had a right of lien over the defendant's motor vehicle.

6. On the first issue that learned magistrate found that the agreement was not enforceable in law as it did not contain an admission of the debt and that it was not attested. On the second issue, the learned magistrate found that having failed to traverse the particulars of fraud, the appellant had in effect admitted the allegations of fraud. On the final issue, the learned magistrate held that there was no basis for holding the respondent's vehicle. As a result the appellant's claim was dismissed and the respondent's counterclaim allowed.

7. The appellant contests the decision on the following grounds set out in the memorandum of appeal.

1. The Learned trial Magistrate misdirected herself on several matters of law and fact.

2. The Learned trial Magistrate erred in law in failing to date the judgment delivered hence making it impossible to extract a proper decree in compliance with Order 21 rule 8(1) of the Civil Procedure Rules.

3. The Learned trial Magistrate erred in matters relating to the law of contract and the provisions of the Law of Contract Act Cap 23 Laws of Kenya.

4. The Learned Trial Magistrate erred in law in holding that by not filing a reply to defence he is deemed to have admitted the claim whereas there was a clear joinder of issues as provided for in rule 10 of Order 6 of the Civil Procedure Rules.

5. The Learned Trial Magistrate erred in law in adopting the inapplicable definition of "lien by an Attorney" to apply as the definition of the word "lien" and thereby arrived at an erroneous conclusion.

6. The Learned trial Magistrate erred in law in deciding the case against the weight of evidence.

8. The duty of the court as the first appellate court is to review the evidence and reach an independent conclusion as to whether the uphold the decision of the subordinate court bearing in mind that it neither heard or saw the witnesses testify (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

9. Before I deal with the substantive issues raised by the evidence, I will consider the technical issue as to whether the failure to file a defence to the counterclaim amounted to an admission of the counterclaim. The learned magistrate relied on the case of ***Mount Elgon Hardware v United Millers Limited*** **KSM CA Civil Appeal No. 1996[1996]eKLR** where the Court of Appeal dismissed an appeal on the ground that;

[T]he respondent denied any form of negligence on its part and in turn, alleged negligence against the appellant. The respondent properly pleaded the particulars of such negligence. The appellant wholly failed to traverse by any further pleadings the particulars of negligence alleged in the respondent's defence. In those circumstances, the learned Judge was perfectly entitled to conclude that the appellant had admitted the negligence alleged in the defence, in terms of Order VI Rule 9 (1) of the Civil Procedure Rules.

10. Unfortunately, the court's attention was not drawn to the subsequent Court of Appeal decision in ***Joash M. Nyabicha v Kenya Tea Development Authority*** **KSM CA No. 302 of 2010 [2013]eKLR** in which it distinguished the ***Mount Elgon Hardware Case*** and held as follows;

A plain reading of Order VI rule 9 (1) shows that an allegation in a pleading may be traversed expressly by the opposing party or there may be a joinder of issue under rule 10 of the same Order which joinder operates as a denial of the issue or issues. Rule 10 (1) and (2) reads as follows:-

10(1) If there is no reply to a defence there is a joinder of issue on that defence (2) Subject to sub-rule (3) -

(a) there is at the close of pleadings a joinder of issue on the pleading last filed, and

(b) a party may in his pleading expressly join issue on the immediately preceding pleading.

Having failed to file a defence to the counterclaim, there was a joinder of issue and not an admission which served to deny those allegations. It is only if the appellant had filed a defence to the counterclaim and failed to traverse the claims contained therein that an admission could be derived (See also *Denmus Oigoro Oonge v Njuca Consolidated Ltd* Civil Appeal No. 310 of 2006 [2012]eKLR and *Katiba Wholesellers Agency (K) Ltd Vs United Insurance Co. Ltd*., Civil Appeal No. 140 of 2002 (UR)).

11. I therefore agree with counsel for the appellant that as there was a joinder of issues on the pleadings filed by the appellant and respondent, the learned magistrate erred in finding that the counterclaim was admitted.

12. The learned magistrate considered the evidence and in her judgment framed three issues for consideration. The first issue is whether there was a contract between the parties. The learned magistrate relied on **section 3** of the ***Law of Contract Act (Chapter 23 of the Laws of Kenya)*** to hold that the contract was unenforceable. The relevant part of **section 3** of the ***Act*** provides as follows;

3(1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

(2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an

auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.

13. The document relied upon by the appellant stated as follows;

FRIENDLY LOAN AGREEMENT

I CLEOPHAS BWANA ONGARO do hereby acknowledge receipt of Ksh 130,000/= (One hundred and thirty thousand shillings) only being a friendly loan from EVANS ODERO NYAKWANA payable on or before 5th January 2011.

In the meantime, I have allowed him to use my motor vehicle Registration number KAP 271B Toyota Station Wagon.

SIGNED

8/12/2010

14. The document was simply an acknowledgment of debt and was sufficient to consummate the parties' understanding of their oral agreement. It falls within the provisions of **section 3(1)** of the ***Law of Contract Act*** as it is a memorandum or note signed by the person charged with repayment of the debt. It was not required to be attested or signed by both parties as it was not a contract for the disposition of an interest in land within the contemplation of **section 3(3)** of the ***Act***.

15. The respondent's defence was that the vehicle was obtained fraudulently and that he was induced to sign a fake document. The learned magistrate held that it was the appellant's to prove that the disputed signature was that of the respondent. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of **section 107(1)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, which provides:

107. (1) 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.

16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in **sections 109** and **112** of the ***Act*** as follows:

109. 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.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

17. The Court of Appeal in ***Jennifer Nyambura Kamau Humphrey Mbaka Nandi*** **[2013]eKLR** considered the applicability of these provisions as follows;

We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms

belong to the Respondent. Section 107 of the Evidence Act 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." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.

18. In this case, it is the respondent who filed the defence and counterclaim and alleged that the document relied upon by the plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay on the respondent. As regards the standard of proof, I would do no better than quote ***Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others*** **NAI Civil Appeal No. 215 of 1996(UR)** where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case.

Likewise in ***Rosemary Wanjiku Murithi v George Maina Ndinwa*** **NYR Civil Appeal No. 9 of 2014 [2014]eKLR**, the Court of Appeal held that;

Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud.

19. The particulars of fraud pleaded by the respondent were as follows;

i. Obtaining the motor vehicle registration number KAP 271B from the defendant with a promise to return the same after use.

ii. Induced the defendant to sign a document that he owes the plaintiff Kshs. 130,000 which amount was never given to the defendant by the plaintiff.

iii. Pretending that he will assist the defendant to handle the defendant miscellaneous criminal case No. 3 of 2010 at Ndhiwa Court and the intended prosecution of the defendant at Kisii Chief Magistrate Court in Kisii Criminal Case No. 1748 of 2010.

iv. Taking advantage of the defendant situation as at that time and forced to sign a blank paper so that the plaintiff could use the same defraud the defendant of his motor vehicle.

v. Making false documents look genuine.

vi. Forcing the defendant to surrender his motor vehicle with a false promise that he will return the same to the defendant.

20. I have considered the counterclaim and it is at variance with the testimony of DW 1 who stated that he had never seen the acknowledgment of the debt. He could therefore not plead that he was induced to sign the document or forced to sign a blank piece of paper. Put another way, either there was an acknowledgment of debt in form of a note or there wasn't, and the appellant cannot plead that he was induced to sign it while at the same time asserting that there no acknowledgement in the first place.

Furthermore, the respondent did not testify as to the circumstances he was induced or tricked into signing the document. I am afraid that the evidence falls far short of the kind required to invalidate the document on the basis of fraud. I therefore find and hold that the document was a valid acknowledgement of the debt of Kshs. 130,000/-.

21. That leaves the issue under what circumstances the appellant obtained and held the vehicle. Mr Ojala, counsel for the respondent, submitted that the appellant could not exercise the right of lien as the lien could only be exercised on account of services rendered. He argued that as services were not rendered, the vehicle could not be held as security. Mr Okoth, submitted that the vehicle was not kept as a lien for services rendered but as a lien for the money the appellant lent the respondent.

22. In my view, I find that the terms upon which the respondent gave the appellant his vehicle are clear in the acknowledgment which stated that, "*In the meantime, I have allowed him to use my motor vehicle Registration number KAP 271B Toyota Station Wagon."* It was clearly the intention of the respondent to give the appellant the vehicle to use pending payment of the debt. DW 1 stated that he merely lent the appellant the vehicle to drive the vehicle to Homa Bay but he did not take any steps to recover the vehicle until the counterclaim was filed in response to the appellant's claim. The fact that he allowed the appellant to use the vehicle is consistent with what was set out in the acknowledgment that he borrowed money and allowed the appellant to use the motor vehicle.

23. The appellant's argument is that he had a lien on the respondent's vehicle. The learned magistrate held that since there was no advocate-client relationship between the parties the *"lien by an Attorney"* was inapplicable and the appellant could not hold the vehicle. The appellant argues that the magistrate took a restrictive view of a lien and limited it to attorney's lien when in fact a lien, according to the ***Oxford Advanced Learner's Dictionary (7th Ed)*** means, *"the right to keep somebody's property until a debt is paid."* to apply as the definition of the word "lien" and thereby arrived at an erroneous conclusion.

24. The classic definition of a lien is to be found in the case of **Hammonds v Barclay (1802) 2 East 227, 235** where Grose J., described it as, *"a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession are satisfied."* A lien does not grant the holder the power to sell the goods to discharge the debt or reduce the debt owed. The right of a lien may be terminated when an action is taken that is inconsistent with the possessory lien or when the owner tenders the outstanding amount.

25. The nature and extent of the lien depends on the circumstances under which it is created whether by express terms of an agreement or implied terms which may arise from custom and usage. In this case, the terms under which lien was created were set out in the acknowledgement which allowed the appellant to use the vehicle as the debt was being paid. It follows that since the appellant has elected to sue for the debt, the lien is lost. It was an action inconsistent with the terms of the lien. The respondent would have recovered his vehicle by simply paying the debt and when the appellant took the step of suing the respondent there was no further justification for holding the vehicle. The appellant cannot have the vehicle and judgment for the debt.

26. Mr Okoth argued that although the judgment was signed, it was not dated and that it is not known when it was signed and the decree that was filed was only drawn by the appellant. He submitted that the judgment was a nullity for failure to comply with the mandatory provisions of **Order 21 rule 3(1)** of the ***Civil Procedure Rules*** which require that a judgment shall be pronounced by a judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it.

27. According to the record the judgment delivered on 18th March 2014 after notice was issued to the

parties. In ***Magana Holdings Ltd v Lilian Njeri Mungai & Another*** **NRB CA Civil Appeal No. 143 of 1996(UR)** the Court of Appeal noted that where from the record of the court concerned the date of the judgment or ruling is clearly discernible, holding that the ruling or judgment is undated was undue restriction of the provisions of **Order 21 rule 3 (1)** of the ***Rules***. In this case there is no dispute that the judgment was delivered hence I hold that the omission was not fatal to the extent of invalidating the substance of the judgment. To hold otherwise would undermine the overriding objective and impose undue and substantial costs on the parties who would have to undergo a re-trial.

28. Before I conclude this judgment, I would like to point out during the proceedings both the appellant and respondent testified twice in respect of the claim and counterclaim. This was wholly unnecessary and a waste of the court's time as the purpose of incorporating the claim and counterclaim in one suit is to have the matter heard as one suit in order to save time for the court and parties.

29. As a result of my findings, I allow the appeal, set aside the judgment and decree of the subordinate court to the following extent;

a. Judgment be and is hereby entered for the appellant against the respondent for the sum of Kshs 130,000/- which shall accrue interest from the date of filing suit until payment in full.

b. The counterclaim is allowed and the appellant shall return motor vehicle KAP 271 P to respondent forthwith.

c. The parties shall bear their own costs in the subordinate court and in this appeal.

DATED and **DELIVERED** at **HOMA BAY this 24th day of April 2015.**

D.S. MAJANJA

JUDGE

Mr Okoth instructed by G. S. Okoth and Company Advocates for the appellant.

Mr Ojala instructed by P. R. Ojala and Company Advocates for the respondent.