



**Anyumba v Babior & another (Civil Appeal E052 of 2023)  
[2024] KEHC 11287 (KLR) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11287 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E052 OF 2023  
RE ABURILI, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**TONY ODUOR ANYUMBA ..... APPELLANT**

**AND**

**NEWTON BABIOR ..... 1<sup>ST</sup> RESPONDENT**

**BEATRICE MBOYA ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal arising out of the Judgment & Decree of the Honourable G.C. Serem in the Small Claims Court at Kisumu delivered on the 17th March 2023 in Kisumu SCCC No. 253 of 2022)*

**JUDGMENT**

**Introduction**

1. The appellant instituted suit against the respondents before the Small Claims Court at Kisumu vide a Statement of Claim dated 2.12.2022 seeking judgement in the sum of Kshs. 519,000 being monies he alleged that he lent to the respondents.
2. It was the appellant's case that he came to know the 1<sup>st</sup> respondent through his wife and that the 1<sup>st</sup> respondent had asked the appellant to advance him some money so that he could complete construction developments that he had undertaken. The appellant averred that he advanced the 1<sup>st</sup> respondent over Kshs. 519,000. The appellant denied ever being a tenant to the 1<sup>st</sup> respondent.
3. In cross-examination, the appellant testified that he had been a businessman but stopped in 2022. He testified that he was, back then, a hotelier with a bakery and that he also sold eggs in Kibos in rental premises where he helped his wife in the business. The appellant further testified that his wife wanted a shop in Kondele from the 1<sup>st</sup> respondent but that she did not get the shop. The appellant testified that the 1<sup>st</sup> respondent wanted Kshs. 15,000 from his wife but that the 1<sup>st</sup> respondent was not familiar with his wife and that they had never met physically and that the relationship was not too close.



4. The appellant further testified in cross-examination that the 1<sup>st</sup> respondent got his phone number in 2021 and called him requesting for Kshs. 15,000 which the appellant advanced to the 1<sup>st</sup> respondent in cash. He further stated that the 1<sup>st</sup> respondent subsequently asked for Kshs. 50,000 then Kshs. 200,000 to finish the shop but he, the appellant, informed the 1<sup>st</sup> respondent that he did not have the money. It was the appellant's case in cross-examination that on 19.10.2021, he met the 1<sup>st</sup> respondent at Java in Tusksy Mall and that he gave him Kshs. 54,000 and Kshs. 100,000 on the 25.10.2021.
5. The appellant testified that the money was his although he had no documentation to prove that fact. It was his testimony that the 1<sup>st</sup> respondent asked him to send the money to the 2<sup>nd</sup> respondent's account. He denied ever meeting the 2<sup>nd</sup> respondent.
6. The 1<sup>st</sup> respondent filed his response dated 7<sup>th</sup> January 2023 stating that the money paid by the appellant was paid as rent and attendant charges in the premises that the appellant occupied, owned by the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent filed a counterclaim against the appellant seeking for Kshs. 250,000 being a month's rent in lieu of notice as well as costs of renovation of the premises occupied and unceremoniously vacated by the appellant.
7. It was the 1<sup>st</sup> respondent's case that the amount of Kshs. 519,000 claimed by the appellant was rent for one year that the appellant was settling so as to acquire more prime shops, shops 1 and 2, that were at the front of the 1<sup>st</sup> respondent's rental premises. He testified that he instructed his caretaker to take the appellant and his wife to the lawyer to sign the tenancy agreement which the appellant never did.
8. The 1<sup>st</sup> respondent testified that his relationship with the appellant was only that of landlord and tenant. He further testified that after the appellant left the premises, KPLC inspected the building and noticed that someone had done a direct connection and was thus not paying electricity. It was his testimony further that he filed a notice at the Business Premises Rent Tribunal as the appellant left the premises without notice.
9. In cross-examination, the 1<sup>st</sup> respondent testified that he had not filed any ownership documents and further that the receipts were in his advocates office. He testified that he spent Kshs. 14,000 to join and break into the shop.
10. In her impugned judgment, the trial court found that neither of the parties herein proved their respective cases against the other. She dismissed the suit and the counterclaim with costs to the respondents.
11. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 24<sup>th</sup> March 2023 raising the following grounds of appeal:
  1. That the learned trial adjudicator did not in the alternative consider or sufficiently consider the fact that the respondents had acknowledged receiving money from the claimant without proving the purpose for which the money was received based on the evidence adduced and the submissions filed by the appellants.
  2. That the learned trial adjudicator grossly misdirected herself in failing to find that the burden of proof of the existence of the loan shifted from the appellant to the respondent when the respondents alleged tenancy and failed to prove their only basis for denying the purpose for the money received.
  3. That the learned trial magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.



4. That the learned trial magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the admission of receipt of money by the respondent and failure to prove the purpose of the funds so received.
  5. That the learned trial adjudicator erred by finding that the only defence raised by the respondents was not sufficiently proved yet still dismissing the suit with costs.
  6. That the learned judge misdirected herself on the applicable law and principles in the evaluation of evidence adduced and thereby arrived at a wrong decision in her judgement.
12. The appeal was canvassed by way of written submissions.

### **The appellant's submissions**

13. On behalf of the appellant, counsel submitted that the trial court overlooked the fact that the respondent admitted receiving money from the appellant hence the burden of proof shifted onto the respondent to justify the reason for such receipt of money from the appellant. Reliance was placed on *Fredrick Kigwa Odulah v Titus Wanyonyi Wosianju* 2019] eKLR.
14. It was further submitted that that the respondent never produced any documentary evidence to prove the denial and allegation that the money received was for rent. The case of *Alfred Anekeya Mngula t/s Alfabetty Enterprises v Paul Indimuli & Another* [2022] eKLR was cited on the effect of mere denials by a defendant.
15. Further submission was that dismissal of the suit by the trial magistrate accorded the respondents unjust enrichment which is abhorred considering that the respondent was advanced the loan on a gentleman's agreement as a friend. Reliance was placed on *Macharia Mwangi Maina Kagiri v Davidson Mwangi* CA 6,26 &27 of 2011 and *Chase International Investment Corporation & another v Laxman Keshra & 3 others* [1978] and the treatise by Goff & Jones on restitution cited.
16. On costs, the appellant urged this court to award him costs of the appeal and of the trial court.

### **The 1<sup>st</sup> Respondent's submissions**

17. on behalf of the Respondent, it was submitted urging this court to dismiss the appeal with costs because it has no merit. According to the respondent, the appellant appears to seek to re-prosecute his case through the submissions filed herein rather than confine himself to the evidence and material on record. Further, it was submitted that although this court enjoys the mandate and authority of evaluating the entire evidence and material placed before the trial magistrate in its determination of this appeal, nonetheless, the trial magistrate, guided by the clear evidence on record, determined the matter before her within the provisions of the law and based on the probative value of the evidence as presented by the appellant. The respondent supported the decision of the trial and wholly adopted the submissions made before the trial court dated 13<sup>th</sup> March 2023.

### **Analysis and Determination**

18. This is a first and final appeal from the Small Claims Court to the High Court and this court is expected to consider the appeal on points of law only. Being an appellate court, unlike the trial court, I did not have the advantage of seeing and hearing the evidence first hand. I must therefore give an allowance for that, as I re-evaluate the evidence adduced on record.



19. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
20. From the pleadings and evidence adduced before the Small Claims Court, the only issue before this court is whether the trial court erred in law in dismissing the appellant’s suit and if so, what remedies are available to the appellant.
21. I have considered the trial court record herein. First and foremost, is that an appeal from the Small Claims Court to this Court only lies on points of law and not facts. The question therefore is whether the appellant proved his case against the respondents on a balance of probabilities. The law is clear that he who alleges must prove. Burden of Proof is used to mean an obligation to adduce evidence of a fact.
22. According to Phipson on the *Law of Evidence*, the term ‘burden of proof’ has two distinct meanings:
1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to prove their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
  2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.
23. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. Subsection (2) Refers to the legal burden of proof.
24. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.
25. In the instant case, the onus was on the appellant to prove that indeed, he did lend the 1<sup>st</sup> respondent Kshs. 519,000 as alleged and that the 1<sup>st</sup> respondent was to refund this money. The evidence presented before the trial court by way of bank statements and the admission by the 1<sup>st</sup> respondent was that he did receive Kshs. 519,000 from the appellant. The question is whether this money was advanced by the appellant to the 1<sup>st</sup> respondent as a soft loan refundable by the 1<sup>st</sup> respondent.
26. The 1<sup>st</sup> respondent admitted receiving the money but he denied that this was refundable money. He testified that this was rent received from the appellant as rent and in respect of shops where the appellant and his wife carried out their business. It was upon the appellant to prove that this was not the case and that there was an agreement for the advancement of the said monies to the 1<sup>st</sup> respondent



and that the 1<sup>st</sup> respondent was to refund the same, by when and or on what terms. No such evidence was adduced. Instead, the appellant in this appeal has submitted, urging the court to shift the burden of proof to the 1<sup>st</sup> respondent to prove that the money advanced was for rent. The appellant has also insisted that to find otherwise amounts to according the respondents unjust enrichment and that the doctrine of restitution applies where money was advanced by mistake or by compulsion as stated in the Treatise by Goff & Jones on Laws of Restitution.

27. In my humble view, the appellant's averments that he advanced a whopping Kshs 519,000, to the 1<sup>st</sup> respondent, someone he claimed he did not know well, and only knew him through his wife, while contradicting himself in cross examination that the 1<sup>st</sup> respondent was not familiar with the appellant's wife and that they had never met physically, that he met him once, which money, according to the appellant, was sent through the wife to the 1<sup>st</sup> respondent's account on instructions of the 1<sup>st</sup> respondent yet the appellant claims that he had never met the 1<sup>st</sup> respondent, which money was for purposes of undertaking construction development is rather strange and unbelievable in light of the appellant's own testimony that he and his wife were looking for premises to rent from the 1<sup>st</sup> respondent. Furthermore, the appellant also claimed that they communicated through phone call and SMS yet he did not produce the SMS messages for the trial court to establish whether the sms related to renting of premises or lending the money to the 1<sup>st</sup> respondent.
28. In contrast, the 1<sup>st</sup> respondent's testimony on oath that the appellant's wife rented space from him and paid the monies for rent and deposit, some of the monies being paid through mpesa to the 1<sup>st</sup> respondent's caretaker Grace, was much more detailed and coherent. This evidence was in my view, far more believable, supported by the demand letter dated 14/11/2022 in response to the appellant's letter dated 9/11/2022. This leads this court to reach the conclusion that the monies given to the 1<sup>st</sup> respondent and claimed by the appellant was in respect of rent and not a soft loan advanced and refundable. The allegation in his submissions that he gave a friendly loan on a gentleman's agreement to the respondent as a friend is not supported by any evidence in view of the appellant's own evidence on oath that he was not familiar with or close to the 1<sup>st</sup> respondent.
29. The upshot of the above is that I find that the appellant failed to prove his case on a balance of probabilities that the monies given to the 1<sup>st</sup> respondent constituted a loan that was to be refunded.
30. Additionally, the submission that the 1<sup>st</sup> respondent wanted to unjustly enrich himself and that the doctrine of restitution was applicable to this case does not persuade this court to find in favour of the appellant as it was not proved that the appellant's advancement of the money to the 1<sup>st</sup> respondent was by mistake or compulsion.
31. Turning to the 1<sup>st</sup> respondent's counterclaim, although there is no cross appeal on the same, it was pleaded that the appellant owed the 1<sup>st</sup> respondent Kshs. 250,000 being a month's rent in lieu of notice as well as costs of renovation of the premises occupied and unceremoniously vacated by the appellant.
32. These are special damages which ought to be specifically pleaded and proven. The 1<sup>st</sup> respondent admitted that he had not produced any receipts in support of this claim and as such, this claim rightly failed before the trial court.
33. In the end, I find and hold that the adjudicator did not err in dismissing the appellant's suit as well as the counterclaim by the 1st respondent. I find no reason to interfere with the same.
34. Accordingly, I find this appeal to be devoid of merit and is hereby dismissed.
35. As both the claim and counterclaim failed, I find no reason to award any party the costs of the claim and counterclaim before the adjudicator and or this appeal.



36. I order that each party bear their own costs of the claim and counterclaim in the lower court and of this appeal.

37. This file is closed.

38. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

