Gekone v Embassava Sacco Society Limited (Civil Appeal 1 of 2023 & E637 of 2021 (Consolidated)) [2024] KEHC 9391 (KLR) (Civ) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9391 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 1 OF 2023 & E637 OF 2021 (CONSOLIDATED)

DKN MAGARE, J

JULY 30, 2024

BETWEEN

JUSTUS NTABO GEKONE ..... APPELLANT

AND

EMBASSAVA SACCO SOCIETY LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. B. Kimemia, Hon. J. Mwatsama and B. Akusala of the Co-operative Tribunal, delivered on 30th March, 2021 in Tribunal Case No. 30 of 2016)

JUDGMENT

1. This is an appeal from the decision of the Cooperative Tribunal made in CTC 30 of 2016. The file is consolidated. The first matter is HCCA 1 of 2023. It was initially filed as HCCOMCA No. E008 of 2021. The Memorandum of Appeal is dated 29/9/2021.

2. The powers of this court are set out in 81 of the cooperative *societies Act* as follows: -

   (1) Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court: Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

   (2) Upon the hearing of an appeal under this section, the High Court may-

      (a) confirm, set aside or vary the order in question;

      (b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;

(c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or

(d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

(3) The decision of the High Court on any appeal shall be final.

3. The memorandum of appeal is a prolixious 18 paragraph monolith that is unseemly, repetitive and contrary to Order 42 rule of 1 of the *Civil Procedure Rules*. The Memorandum of Appeal is equally dated 28/9/2021. It is contrary to Order 42 Rule 1 of the *Civil Procedure Rules*, which provides are doth: -

> " 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

4. The Court of Appeal had this to say about compliance with Rule 86 of the *Court of Appeal Rules* (which is pari materia with Order 42 Rule 1 of the *Civil Procedure Rules*) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:
>
> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the court of appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013*, this Court stated:

> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

6. There is a certificate filed pursuant to Rule 87(5) of the *Court of Appeal Rules*. I do not know the relevance of such a certificate. The file was transferred to the Civil Division as Appeal No. 1 of 2023.

7. The Appellant in that case is Justus Ntabo Gekone. The Respondent in HCCA 1 of 2023 filed an appeal, being Civil Appeal No. 637 of 2021. The Appellant is Embassava Sacco Society Ltd. The decision was made by Hon. B. Kimemia, Hon. J. Mwatsama and B. Akusala.

8. The claim in the cooperatives tribunal was filed by Justus Ntabo Gekone on 2/3/2016. It was accompanied with an application under certificate of urgency.

9. The Respondent filed defence of 7/3/2016. They stated that the Applicant was granted a loan on 13/9/2012 for Ksh. 2,800,000/= to purchase capacity vehicle. The Sacco granted Ksh. 2,800,000/= where the Appellant was to raise Ksh. 1,214,450/=, that is 30% of the purchase price (meaning the purchase price was Ksh. 4,048,283/=).

10. The appellant applied for another loan of Ksh. 2,200,000/= - Ksh. 407,000/= vide cheque Nos. 001938 and 001928. The said Ksh. 662,072/= reportedly cleared the arrears of the loan of Ksh. 2,800,000/=. A sum of Ksh. 1,030,928/= was utilized to pay the bank over the purchase of Motor Vehicle Registration Number KBS 246 V.

11. It was their view that disbursement of the loan is an activity vested in the Sacco. The claimant took issue that the management recovered sums amounting to Ksh. 1,169, 072 from the Sacco loan of Ksh. 2,200,000/=. The Respondent stated that it was unaware of Ksh. 384,300/= as a bribe.

12. They relied on Order 7 rule 3 to state that their case was casually dismissed. The said order provides as follows: -

> 3. A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.

13. The sum of 1,665,534 was tabulated to constitute Ksh1,541,947.20 and Ksh. 33,589.80 and unpaid insurance for Motor Vehicle Registration Number KBS 246 V.

14. It was their case that the claim by the respondent was not explained. It was their case that this court should not interfere with the contract between parties. In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR as follows: -

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

15. They prayed that I exercised powers under section 81(2) (c) of the Cooperative *Societies Act* to make a finding. The said section provides as follows: -

(2) Upon the hearing of an appeal under this section, the High Court may-

(c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or

Evidence

16. In a statement of claim they stated the claim stating the same issues in the claim. The claimant stated that he was forced to pay a bribe of Ksh. 384,350/=. He stated that Ksh. 2,200,000/= was allowed but only Ksh. 1,690,000/= was disbursed.

17. The claimant stated that he was stopped from operating. Hence the claimant was taking daily collection. He stated that a sum of Ksh. 1,118,193.50/= was confiscated.

18. The Supervisions Committee was summoned over bribery claims. On 3/7/2019 the claimant testified and adopted a statement dated 09/4/2024. He was a member of the Sacco and had saved Ksh. 1,100,684.50/=. A sum of Ksh 2,200,000/= was approved but was given 1,169,072/=. He was given less 1,030,028/= which he alleged was withheld due to cash flow issues.

19. The Appellant prayed that a sum of Ksh. 1,030,028/= was due. He produced exhibits. He admitted that there is a discrepancy between the statement and his evidence.

20. He stated that he took a loan in another Sacco to purchase the motor vehicle in issue. He stated the loan was borrowed from Equatorial Commercial Bank on behalf of the Respondent, though he had no evidence to that effect. He admitted that the vehicle was co-owned with the Appellant contributing 34.37% and security 64%. He paid 1,214,450/=. He did not explain how the balance was paid.

21. He stated that he took possession of the vehicle on 4/3/2018, which was less than 36 months. He stated that a sum of Ksh. 662,071.60/= is equivalent to the amount owing on the vehicle. He also stated that money was paid to Equatorial Commercial Bank to the tune of Ksh. 1,162,072/=. He stated that a sum of Ksh. 1,030,928/= was not given to him.

22. A sum of Ksh. 1,191,409.50/= was recovered. He stated that he had saved Ksh. 1,100,684/50. He knew that the loan attracted interest and did not need to pay any further amount. He stated that the recovery of shares on 17/11/2017, that is Ksh 53, 380, Ksh. 115, 175 and Ksh 949,629.50 all totaling to Ksh. 1,118,184.60 is the amount he is claiming he had paid.

23. He stated that ground fees was 223,330/= while TLB is Ksh. 112,000/= making a total of Ksh. 335,330/=. This is Ksh. 49,050/= less a claim of Ksh. 384,350/= claimed to be paid to the police as a bribe.

24. He stated that the Sacco should have repossessed the security, which was the vehicles and recovered from guarantors and shares before coming for him. His view was that he had not failed to service the loan which was secured on personal savings.

25. I could not fathom that a person who owes, will want recovery from elsewhere, rather than from himself. He stated that his shares were liquidated prematurely.

26. The Respondent testified through CPA James Kabui Ng'ethe who stated that he had worked since 2010 as an Accountant. He produced various exhibits. He stated that at the time of approval the Appellant's savings were 1,160,684/=. He requested the defence to be dismissed. There was a counter claim for Ksh.1,666,534.60/= out of Ksh. 2,200,000/= which continued attracting interest at Ksh. 139,795/=.

27. The witness stated that the Appellant was not involved in signing of hire purchase agreement. He stated that he had only saved Ksh. 59,000/= but deposited Ksh. 900,000/= then sought a loan. The rest of the amount was guaranteed by the Sacco.

28. The tribunal analyzed evidence and made the following decision: -

    a. The refund of Ksh. 1,838,608/= is not proved. The claimant is entitled to Ksh.664,000/= used to clear the loan.

    b. A permanent injunction barring Embassava Sacco officials from harassing the operations of the claimant's motor vehicle.

    c. The claim for Ksh. 1,665,534/= fails. However, the claimant can follow up on the school fees loan and refund of insurance Ksh. 89,587.80/=.

29. Both parties were aggrieved by the decision. The Appellant sought that the appeal be allowed with costs.

30. The Respondent sought the following orders: -

    a. That the award of Ksh.602,000/= in CTC No. 30 of 2016- Justus Ntabo Gekone –V- Embassava Sacco Society Ltd be set aside.

    b. An order allowing the counterclaim sum of Ksh. 1,665,534.60 as prayed together with costs and interests as prayed in the counterclaim.

    c. An order dismissing with costs the Respondent's claim in the Cooperative Tribunal.

    d. In the alternative, the proceedings herein be remitted to the tribunal for fresh trial of the counter claim.

31. The Tribunal noted that the claimant was claiming for a sum of 2,868,792.50/= and this is said to arise from unsupported expenses and unremitted sum of Ksh. 436,946/=. They also stated that the claimant owed the respondent a sum of 1,665,534.60/= as at March 2015.

32. They listed a list of 4 issues for determination which were basically two issues:-

    a. Whether amounts loaned were accounted for.

    b. What reliefs to be issued.

33. The tribunal found that there was no sufficient reason for not remitting the entire sum of Ksh. 2,200,000/=. On issue number (b), 2,200,000/= was received from the respondent and used for payment of a loan when the appellant withdrew.

34. Upon finding that, the tribunal went ahead to find that a sum of 662,000/= was due and issued a permanent injunction against the officials of the Sacco. The counterclaim by the Respondent was

dismissed in limine. The Respondent was required to follow up on school fees money and insurance money.

Submissions

35. The Appellant filed submissions dated 7/11/2023. It was submitted that the Tribunal erred in law and fact in failing to find that the Respondent's assertion that Ksh 1,030,928 was used to pay loan balance was unsupported.

36. It was further submitted that the Respondent's confiscation of the Appellant's shares was illegal and the Tribunal's finding amounted to rewriting the contract between the parties. They relied on Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited (2017)e KLR.

37. It was also submitted from the Appellant that the appellant had proved case on a balance of probabilities as required under Section 107 of the *evidence act*. They thus submitted that Appeal No. E637 was not merited and ought to be dismissed.

38. The Respondent also filed submissions dated 19/2/2024. It was submitted that the Tribunal erred in dismissing the counterclaim. That the counterclaim was correctly filed in accordance with Order 7 Rule 3 of the Civil procedure Rules.

39. It was also submitted that by awarding the Appellant Ksh. 662,000, the Tribunal failed to consider evidence and in fact erred in dismissing the counterclaim. That the Tribunal in so doing acted contrary to the agreement between the parties. They relied on *National Bank of Kenya v PipePlastics Samkolit (K) Ltd* (2001) KLR 112.

Analysis

40. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

41. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

42. Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, stated as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

43. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for

themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

44. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

45. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

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46. The matter herein turns in pleadings. It has been said time and again that whoever wishes the court to enter judgment for them should plead for the same.

47. -Therefore, parties are bound to plead their cases fully. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

> "
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> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

48. In the case of *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The

Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
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> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

49. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

50. On specific aspects of the case, where a party seeks special damages he must not only plead them but also proof the same. They cannot be thrown to the court. In the case of *Swalleh C. Kariuki & another v Viloet Owiso Okuyu* [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in *Hahn V. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

51. In the case of *David Bagine vs Martin Bundi* [1997] eKLR, the Court of Appeal stated as follows: -

> "It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:
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> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

52. A claim must be set out to exactitude for amount specifically owed. This is known as a liquidated demand. In *Sichuan Huashi Enterprises Corporation (East Africa) Limited v Capital Realty Limited; Jacinta Muthoni Machua & another (Interested Parties)* [2020] eKLR, the court stated as follows: -

> 14. In *Cimbria East Africa Limited vs. Kenya Power & Lighting Company Ltd* [2017] eKLR, Ochieng, J stated as follows:
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> > "Black's Law Dictionary defines Liquidated Claim thus;
> >
> > '1.A claim for an amount previously agreed upon by the parties or that can be precisely determined by operation of Law or by the terms of the parties agreement.
>
> 2. A claim that was determined in a judicial proceeding'.
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> 25 . Meanwhile, *Halsbury's Laws of England, 4th Edition Vol. 12*, at paragraph 1109 says;
>
> > '....In every case where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary the damages are unliquidated'.
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> Nonetheless, it is to be noted that;
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> 'A claim does not become a liquidated demand simply because it has been quantified. To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic.'
>
> I adopt the following definition of a debt or liquidated demand from The Supreme Court Practice (1985) Volume 1, at page 33;
>
> > 'A liquidated demand is in the nature of a debt, i.e a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand' but constitutes 'damages'...'
>
> The words 'debt' or 'liquidated demand' do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure. Per Ringera J. (as he then was) in *Trust Bank Limited Vs Anglo African Property Holdings Limited & 2 Others* HCCC No. 2118 of 2000."

53. On the other hand a party who say he does not owe must show that he never owed or has paid. It is not enough to make a general denial. In *Muguga General Stores v Pepco Distributors Limited* (1988-1992) 2 KAR 89 where the Court said: -

> " First all a mere denial is not a sufficient defence in this type of case. There must be some reasons why the defendant does not owe the money, either there was no contract or it was not carried out or it could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

54. The claim as filed sought for a specific amount, that is 1,838,608/=. The amount is broken down as follows:-

a. Ksh. 1,169,000/=

b. Cheque No. 001932 – 40,700/=

c. cheque No. 001932 -Ksh. 662,072

d. Cheque No. 001938 Ksh. 100,000/=

55. The tribunal had already found that the said money was remitted to clear the indebtedness from a previous loan. The said loan was taken by the appellant but guaranteed by the respondent. The respondents were thus entitled to self-preservation.

56. The tribunal therefore does not need to get an explanation on why the Sacco decided to recover through one of the methods and not the other. A sum of Ksh. 662,071/- was disbursed but was not pleaded separate from the main claim therefore entertaining a claim at the appeal is untenable. In the circumstances I dismiss in limine the appellant's suit in the lower court with costs.

57. On the other hand, the appellant has not given an explanation on how the debt of 2,200,000 was cleared. The Respondent has to show how a debt that was admitted is repaid. In The case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per *Jessel M. R. in Thorp v Holdworth* (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in he appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

58. In this case the appellant confirmed that he was challenging the loan given hence he did not pay from 2015. The tribunal erred in finding that the counterclaim was not proved.

59. Therefore, the role of the court in fact finding in adversarial system is severely limited to what parties bring before the court. Indeed, Order 2 Rule 4 (1), tells Defendants what to do when there are issues of payment or satisfaction. It states: -

> " 4. Matters which must be specifically pleaded
>
> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
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> (a) which he alleges makes any claim or defence of the opposite party not maintainable; (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

60. In this case the Appellant in Appeal No. E637 of 2021 confirmed that he was challenging the loan given hence he did not pay from 2015. The Tribunal erred in finding that the counterclaim was not proved. I interfere with the finding of the Tribunal to this extent and set it aside. The loan was not paid. Challenging the loan does not make it paid.

61. The Respondent in Appeal No. E637 of 2021, took a loan and a portion was used to clear his prior indebtedness. He decided to enjoy the benefits of the vehicle for which the Sacco cleared the loan using part of Ksh. 2,200,000/=. Sacco's do not have money of their own. In The Respondent was thus under duty to clear Ksh Ksh 1,665, 534.60/=, which was claimed and was due and owing.

62. In the case of *Bank of Africa Limited v Juja Coffee Exporters Limited & 4 others* [2018] eKLR , the Court of Appeal[ ] stated as follows: -

> " The Court observed in the process, that 'a bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.' And so it is in this case."

63. It is not enough to posit that the same is not payable due to the dispute. In *Lucy Momanyi t/a Momanyi & Co., Advocates v Nyamweya & another (Civil Case 79 of 2013* & 642 of 2011 & 919 of 2003 (Consolidated)) [2023] KEHC 17446 (KLR) (2 May 2023) (Ruling), this court posited as follows: -

It is a fundamental banking rule that debtors must seek their creditors and pay them. It is thus not the duty of the court to ascertain how much rent is due. The party paiting and the party paid should be in a position to know.

24. In *K N v J M T* [2018] eKLR, Justice L Mutende, states as follows: -"The claim herein was a liquidated one. It is pleaded that the Appellant approached the Respondent to advance her a friendly loan of Ksh. 290,000/= on or about 2010, 2015 to be refunded on the 1st March, 2015.The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in Section 107(1)(2) of the *Evidence Act* that provides thus:"(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.(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Section 112 of the *Evidence Act* provides thus: "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."

25. This means that the person who pays rent, has a duty to show rent is paid. The defendant has a simple duty. To show the amount of rent payable and those it has evidence of receiving. Therefore, holding this case at ransom for some auditor to produce non-existent documents.

64. The Sacco debt was due and owing. There was no evidence of payment. Without evidence of payment, the court finds that the counterclaim was proved. In *Muguga General Stores Ltd vs Pepco Distributors Ltd* (1987) KLR 150, the court held that;

> " It is not sufficient to just deny liability without giving some reasons....the defendant has to give a reason as to why he did not owe the money such as the absence of a contract or that payment had been made and could be proved."

Determination

65. In the circumstances I make the following orders: -

a. Appeal No. 1 of 2023 lacks merit and is accordingly dismissed with costs of Ksh. 105,000/=.

b. Appeal No. E637 of 2021 is allowed with costs of Ksh.105,000/=. The counterclaim is allowed. The Respondent in this Appeal is bound to settle the loan of Ksh 1,665,534.60, being loan arrears together with interest from the date of filling on 8/9/2017 until payment in full.

c. The Sacco shall have costs of the suit and counterclaim in the co-operatives tribunal.

d. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF JULY, 2024.

KIZITO MAGARE

JUDGE

Judgment delivered through Microsoft Teams Online Platform.

In the presence of:-

Mr. Getange for the Respondent in 1/2023 and Appellant in 637/2023.

Mrs. Morara for the Appellant in 1/2023 and Respondent in 637/2023.

Court Assistant – Jedidah