Magara v Parliamentary Sacco Society Limited (Civil Appeal 103 of 2018)
[2023] KEHC 472 (KLR) (Civ) (24 January 2023) (Judgment)

Neutral citation: [2023] KEHC 472 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 103 OF 2018

CW MEOLI, J

JANUARY 24, 2023

BETWEEN

OMINGO MAGARA ..... APPELLANT

AND

PARLIAMENTARY SACCO SOCIETY LIMITED ..... RESPONDENT

(Being an appeal from the whole Judgement and Decree of the Co-operative Tribunal at Nairobi by - Hon. C. Kithinji - Deputy Chair PPDT, Hon. H. Shidiye and Hon. F.F. Odhiambo - delivered on 26th January 2018 in CTC No. 391 of 2014)

JUDGMENT

1. This appeal emanates from the judgment delivered by the Co-operative Tribunal on January 26, 2018 in CTC No 391 of 2014. The proceedings before the tribunal were commenced by way of a statement of claim filed on September 10, 2014 by the Parliamentary Sacco Society Limited the claimant before the tribunal (hereafter the Respondent) against Hon James Omingo Magara, the respondent before the tribunal (hereafter the Appellant). The claim was for a liquidated sum of Kshs 3,184,114.77/- plus interest from April 1, 2014 until payment in full with costs.

2. It was averred that during his membership with the Respondent, the Appellant took out a loan under the agreed by-laws of the Society. That the Appellant lost his parliamentary seat through a by-election in 2010 before completing repayment of the loan. It was further averred that after the part settlement of the loan, the balance outstanding as at 25.03.2014, including accrued interest stood at Kshs 3,184,114.77/- which the Respondent claimed.

3. The Appellant filed a statement of defence on January 25, 2017 admitting having taken out a loan facility but specifically denied any loan balance. The matter proceeded to full hearing during which the parties adduced evidence in support of their respective pleadings. In its judgment the tribunal found

in favour of the Respondent. Judgment was thus entered in favour of the Respondent in the sum of Kshs 3,184,114.77/-. Aggrieved with the outcome, the Appellant preferred this appeal which is based on the following grounds: -

> " 1. The honorable tribunal erred in law in failing to distinguish that the principal amount outstanding and the interest accrued on the loan subject matter are two different components all which need to be proved independent of each other and which the Respondent failed to prove.
>
> 2. The honorable tribunal erred in law in holding that the Respondent had proved monies owed to it by the Appellant without presenting the loan agreement, loan account statements and documentation showing lending and repayment contrary to the provisions of the Sacco Societies Deposit taking Sacco Business) Regulations 2010." (sic)

4. The appeal was canvassed by way of written submissions. Counsel for the Appellant submitted that the Respondent failed to prove its claim against the Appellant. While citing the provisions of Section 107 & 108 of the *Evidence Act* and Section 28 of the *Sacco Societies (Deposit–taking Sacco Business) Regulations 2010*, counsel argued that the Respondent had not proved the monies claimed and the tribunal failed to take into consideration the fact that the Appellant was entitled to receive statements from the Respondent. That the Respondent did not provide any documentation detailing the principal amount taken, loan account statement, loan servicing records, the interest accruing on the amounts advanced and the period within which the loan was to be paid. Counsel called to aid the decisions in *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR, *M'bita Ntiro v Mbae Mwirichia & another* [2018] eKLR and *Peter v Sundays Post Ltd* [1958] EA 424 as cited in *James Gachoki v Baragwi Farmers' Co-operative Society Limited* [2019] eKLR to submit that the Respondent did not discharge its evidential burden.

5. Addressing the court on the question of the principal amount and interest accrued, counsel contended that the former and latter are two different components of a loan and should be proved separately. It was argued that the tribunal erred when it faulted the Appellant for not issuing a notice to produce documents on the Respondent instead of showing what formula it used in giving judgment in the Respondent's favour that was inclusive of interest. That the tribunal ought to have distinguished the principal amount and the interest accrued. While placing reliance on the on the definitions of 'Principal Balance', 'Simple Interest' & 'Compound Interest' as cited in Halsbury's Laws Dictionary and the decisions in *Premier Bag & Cordage Ltd v National Irrigation Board* [2014] eKLR and *Ongata Works Limited v Attorney General* [2017] eKLR it was asserted that compounding interest is unconscionable and where there is no documentation to prove the contractual relationship between the parties, the least amount of interest should be applied.

6. Counsel went on to submit that the interest is meant to compensate a party for having been kept out of its funds or property for some time and is not intended to enrich such a party or punish another. It was asserted that the initial amount outstanding was Kshs 2,812,290/- and after part settlement to the tune of Kshs 1,118,492/- the Respondent failed to prove how they arrived at the resultant balance of Kshs 3,184,114/-. That the Respondent failed to demonstrate how much was outstanding on the principal amount, interest thereto, interest rate applicable and whether the interest was simple or compounded. In conclusion the court was urged to allow the appeal and be set aside the judgment of the tribunal.

7. The Respondent naturally defended the tribunal's findings. Counsel anchored his submissions on the decision in *Nicholas Mahihu Murithi v Taifa Sacco Limited* [2021] eKLR concerning the principles guiding an appellate court on a first appeal. Counsel asserted that the tribunal's decision was well

reasoned , arrived at after analysing the documentary evidence and oral testimonies presented during the trial. Addressing the first ground of appeal it was submitted that from the evidence on record the Appellant duly acknowledged and admitted to being in arrears. With respect to the second ground of appeal it was asserted that the Respondent failed to prove the repayment of the outstanding debt and that the sale agreements and title deeds which he tendered did not constitute proof that the admitted loan was ever repaid. Counsel reiterated that the Respondent proved its case on a balance of probabilities and the court ought to dismiss the appeal as it was without merit.

8. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this 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.
>
> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

9. It is settled that an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & another v Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. Thus upon review of the memorandum of appeal and submissions by the respective parties, it is the court's view the appeal turns on the key issue whether the tribunal's finding was well founded and justified.

10. Pertinent to the determination of issues before this court are the pleadings, which form the basis of the parties' respective cases before the tribunal. Hence a review thereof is apposite before dealing with evidentiary matters. In *Wareham t/a A.F. Wareham & 2 others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted

and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

11. The Respondent by its statement of claim averred at paragraphs 2 to 12 that:

> " 2. The Respondent in the course of his membership he took out a loan from the claim under the agreed by-laws of the sacco.
>
> 3. The Respondent lost his parliamentary seat through a by-election in 2010 at which point he had not completed repayments of the loan.
>
> 3. The Respondent left a loan balance of Kenya Shillings Four Million Five Hundred and Ninety Two Thousand Two Hundred and Ninety only. He also left a share balance of Kenya Shillings One Million Seven Hundred and Eighty Thousand only.
>
> 4. As of June 2010 the loan balance was Kenya Shillings Two Million Eight Hundred and Twelve Thousand Two Hundred and Ninety only.
>
> 5. The Claimant sent a letter to the Respondent to inform him of the outstanding loan amount on June 29, 2010.
>
> 6. The Respondent on July 7, 2010 acknowledged the debt and gave an undertaking to use Bunge Sacco balance to pay part of the outstanding amount owed to the claimant.
>
> 7. The Claimant sent a reminder to the Respondent on December 12, 2012 upon inaction on his undertaking.
>
> 8. On October 8, 2013 the Respondent received a formal demand letter from ourselves, the Claimants advocate.
>
> 9. On October 9, 2013 the Respondent acknowledged the demand and sent a letter to Bunge Sacco informing them of his intentions to use the shares he has with them to settle his loan with the claimant.
>
> 10. On October 10, 2013 the Claimant received the sum of Kenya Shillings One Million One Hundred and Eighteen Thousand Four Hundred and Ninety Two only form the Bunge Sacco as payment towards the loan. This left a balance of Kenya Shillings Two Million Seven Hundred and Ninety Four Hundred and Ninety Two only.
>
> 11. On October 25, 2013 we sent a letter to the Respondent demanding the balance and inviting him to meet with us in order to reach a settlement on the pending amount.
>
> 12. On March 25, 2014 we sent a further demand letter for Kenya Shillings Three Million One Hundred and Eighty Four Thousand One Hundred and Fourteen and Seventy Seven Cents being the principle amount including the interest that had accrued." (sic)

12. The Appellant filed a statement of defence admitting having taken out a loan but specifically denied having left a loan balance by stating at paragraphs 3 and 4 that:

> " 3. Paragraph 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 all-inclusive of Part B of the claim are hereby admitted in terms of the foregoing and the claimant is put to strict proof of parts not specifically admitted:
>
> i. That the Respondent was a member of the Claimant and that he took a loan from the Claimant.
>
> ii. That the Claimant serviced the entire loan using his shares with the Claimant, a loan from the Bunge Sacco and direct deposits made by the Claimant.
>
> iii. That the Respondent left no balance of Kenya Shillings Two Million Seven Hundred and Ninety Four and Ninety Two as alleged in paragraph 10 of part B of the claim.
>
> 4. The Respondent denies contents of paragraph 11, 12 and 13 of the Claim and the Claimant is put to strict proof thereof." (sic)

13. The Appellant has asserted that the tribunal's finding went against the weight of evidence, especially regarding proof by the Respondent of monies owed, i.e. the principal amount and the interest accrued thereon. The tribunal after restating and analysing the evidence held as follows in its judgment;-

> " We have considered the pleadings, the evidence tendered as well as the rival submissions. The issue for determination is whether the Respondent is or is not indebted to the claimant.
>
> ..... It follows that the Respondent acknowledged the debt outstanding as at 26/6/2010 and proceeded to make part payment in settlement of the debt. The issue is whether the balance of the debt was settled. It is trite law that whoever asserts must prove.
>
> The Claimants on their part have demonstrated that the Respondent acknowledged owing Kshs 2,812,289.20/=. These are issues pleaded. It is thus not an issue as to whether this sum was outstanding. The Claimant is claiming the balance after the Bunge Sacco payment. We find that the Claimant has discharged their burden of proof on the liability of the Respondent. While the Respondent contends that they have paid what he relies on are the title deeds and sale agreements. There is nothing to demonstrate transactions in favour of the Claimant towards settling the balance of the debt plus interest.
>
> 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 averts must prove that those facts exist. Section 109 of the *Evidence Act* places the burden on the party who asserts. The issue of payment or non-payment is a question of fact. Indebtness having been acknowledged and an assertion made that the debt was cleared then it is the Respondents burden to show that he cleared the loan. The evidentiary burden shifts to the Respondent to demonstrate matter pleaded – that he paid in full. He has not discharged that burden.
>
> The sums due in after October 2013 when the Bunge Sacco cheques is dated were substantial. It is unimaginable that the same were obtained paid and no acknowledgment of receipt obtained. The outstanding figure had accrued interest. There has been no notice to produce any documents that the Respondent wished to rely on, in the custody of the Claimant. The Respondents defence is thus not substantiated. It fails

We enter judgment for the Claimant in the sum of Kshs 3,184,114.77/= plus interest and costs. Orders accordingly." (sic)

14. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say;

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
>
> > "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 exists."
>
> The above provision provides for the legal burden of proof. However, Section 109 of the same *Act* provides for the evidentiary burden of proof and states as follows:
>
> > "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."
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & others v. Blue Shield Insurance Company Limited -Civil Appeal No 101 of 2000 [2005] 1 EA 280 where it was held that:
>
> > "Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

15. Further, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR, the Judges of Appeal held that;

> " Denning J, in Miller v Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

16. The duty of proving the averments contained in the statement of claim lay squarely on the Respondent whereas the averments contained in the Appellant's statement of defence lay on him. In *Karugi & another v Kabiya & 3 others* (1987) KLR 347 the Court of Appeal stated that;-

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

17. James Njuguna Gachanja testified on behalf of the Respondent as CW1 and adopting his witness statement testified that, the Appellant was a member of the Respondent , and having defaulted on the repayment of his loan had acknowledged the outstanding debt through a letter dated 07.07.2010 - CExh.1. That the Respondent thereafter instructed its counsel to recover the same through the letter dated 08.10.2013 - CExh.2. He further testified that on 10.10.2013 the Respondent received a cheque for Kshs 1,118,482/- CExh.3 as part payment of the outstanding loan balance. Thereafter the Respondent instructed its counsel through a letter dated 24.10.2013 - CExh.4 who by a demand letter to the Appellant dated March 25, 2014 - CExh.5 demanded to have the outstanding balance settled.

18. In cross examination it was his evidence that the Appellant received top up loans in the year 2008 and 2009 of Kshs 3 million and 3.6 million respectively. That the Appellant had a loan balance of Kshs 4.2 million and after setting off a part of it using his shares, the balance was Kshs 2.8 million. He however he did not have any records of the foregoing in court, documents in respect of the Appellant's loan statement or loan application form or the specific loan amount taken by the Appellant.

19. The Appellant testified as RW1 and similarly adopted his witness statement. He denied the contents of the letter dated October 24, 2013 - CExh.4 culminated from negotiations and asserted that the Respondent having made a demand, he put in place a repayment plan. That as at receiving the demand letter dated March 25, 2014 - CExh.5 he had cleared his debt with the Respondent but he did not receive a statement and was surprised that the claim before the tribunal was filed without reference to his guarantors.

20. He testified that in December 2010 he sold two of his properties to liquidate the debt with Respondent after he had redeemed his shares in Bunge Sacco to pay the debt. He tendered a sale agreement dated November 23, 2014 – R.Exh.1, in respect of land parcel LR. Ngong/Ngong/50691 (RExh.2), sale agreement dated October 11, 2012 – R.Exh.3 concerning land parcel LR. Ngong/Ngong/50690 (R. Exh.4). He asserted that he could not tell how the sums claimed by the Respondent were arrived at noting that his shares with the Respondent ought to have accrued dividends. He stated that despite persistent requests for statements he never received any from the Respondent. During cross-examination he asserted that he submitted to one Mr. Gachanja the documents evidencing payment of Kshs 900,000/- as 1st installment and 2nd instalment in settlement of the debt. That subsequently he misplaced the documents evidencing the foregoing.

21. Undeniably the dispute herein revolves around a loan facility contract or agreement entered into by the respective parties. Curiously, neither party produced any formal documentation evidencing the

particulars or terms of the said contract or agreement. CW1 admitted in his testimony before the tribunal that no loan application form was tendered and that the documents on record did not show the principal amount advanced to the Appellant.

22. Emphasizing the provisions of Section 97(1) and 98 of the *Evidence Act*, the Court of Appeal in *University of Nairobi v Devcon Group Limited* [2016] eKLR highlighted the importance of production of the contract document in instances where a dispute is founded on contract. Indeed, it is a general rule of evidence that the terms of a contract that has been reduced into writing cannot be proved through parole evidence. In this case however, despite the absence of the written contract, there was an express, unambiguous, and unconditional admission of indebtedness to the tune of Kshs 2,812,290/- by the Appellant to the Respondent in C.Exh.1 (letter dated July 7, 2010). An excerpt of the same reads as follows; -

> " Re: Membership and Loan Balance
>
> I acknowledge receipt of your letter dated June 29, 2010. I would like to confirm that I want to remain a member of the Sacco as I organize to liquidate my loan of Kshs 2,812,289.70. As a first step I will move my shares from Bunge Sacco to redeem part of the loan and I will be left with a manageable sum to liquidate quarterly by doing a cheque to yourselves."

23. The Respondent by its statement of claim and testimony by CW1 led evidence to the effect that the Appellant was indebted to the Respondent in the sum of Kshs 3,184,114.77/-. The Appellant on his part refuted the claim and claimed to have completely settled any outstanding debt with the Respondent. As of July 7, 2010 the Appellant acknowledged indebtness to the tune of Kshs 2,812,290.70/-. Evidently this sum comprised the balance outstanding after he had partly settled the initial outstanding loan balance by his shares held by the Respondent as evidenced in CExh.2. (letter dated 8.10.2013). Further, in the letter dated July 7, 2010 - CExh.1 the Appellant had expressed his intention to settle the acknowledged outstanding loan balance of Kshs 2,812,290.70/- using his Bunge Sacco shares which amounted to Kshs 1,118,598/-.

24. The latter sum was eventually paid via a cheque dated 10.10.2013 and drawn by Bunge Sacco in favour of the Respondent - CExh.3 leaving a balance of Kshs 1,693,692/-, which sum was duly acknowledged by the Respondent in its letter dated 25.03.14 - CExh.5 . The letter stated in part:-

> " We write further to our letter dated October 25, 2013 and note that this debt continues to attract interest. The outstanding amount as at today is as follows;-
>
> 1. Principal amount ~ Kshs 1,693,701.00
> 2. Interest accrued ~ Kshs 1,490,413.77
>
> Kshs 3,184,114.77
>
> It is our proposal that you meet the undersigned to discuss way forward towards settlement of this debt.
>
> You may call us to book an appointment at your convenience." (sic)

25. Clearly, the figure of Kshs 3,184,114.77/- demanded of the Appellant included the outstanding balance on the principal and cumulative interest to the tune of Kshs 1,490.413.77/-. In his evidence before the tribunal, C1 did not demonstrate the specific loan amount advanced to the Appellant; the terms of the said loan agreement or contract; the interest to be charged and or how the interest was calculated on the loan balance. Nor produce the statement of accounts on the Appellant's loan.

He relied on correspondence and the cheque from Bunge Sacco that was credited to the Appellant's outstanding loan balance.

26. The Appellant has questioned the total sum of Kshs 3,184,114.77/- claimed by the Respondent and whether the said figure was arrived at in compliance with Regulation of the Sacco Societies (Deposit–taking Sacco Business) Regulations 2010. It appears from its judgment that the tribunal was generally convinced that the Respondent had discharged its burden of proof on the amount owing, noting the Appellant's acknowledgement of indebtedness and his failure to demonstrate that he had settled the outstanding balance.

27. The burden of proof lay with the Respondent to justify the entire claim before the tribunal, and the Appellant's complaint in that regard is not idle. The Respondent's statement of claim avers that it is a registered Sacco Society Limited, under the *Co-operative Societies Act*. Thus, its conduct of business is regulated by the said *Sacco Societies Act* and by extension, given the admitted relationship between the respective parties herein, the *Sacco Societies (Deposit–taking Sacco Business) Regulations 2010*. Regulation 28 of the *Sacco Societies (Deposit–taking Sacco Business) Regulations 2010* provides that;-

> "(1) Except as otherwise provided, these Regulations shall apply to all credit facilities, including loans, advances and overdrafts to members.
>
> (2) A Sacco Society shall have a written credit policy consistent with the relevant provisions of the Act, these Regulations and any other applicable laws, which shall contain the following information—
>
> (i) loaning procedures and their documentation;
>
> (ii) requirements for grant of a loan;
>
> (iii) permissible loan purposes and acceptable types of collateral;
>
> (iv) loan concentration limits;
>
> (v) loan types, interest rates, frequency of payments and conditions;
>
> (vi) maximum loan size per product;
>
> (vii) where collateral is used as security for lending, maximum loan amounts as a percentage of the values of the same;
>
> (viii) appraisal of the borrower's ability to repay the loan;
>
> (ix) terms and conditions for insider lending;
>
> (x) maximum loan approval levels for each officer and committees; and
>
> (xi) guaranteeing requirements.
>
> (3) A member may repay a credit facility prior to its maturity in whole or in part on any business day without being charged full-term interest.
>
> (4) Except as otherwise provided, no director or employee of a Sacco Society, or immediate family member of a director or employee shall receive anything of value or other compensation in connection with any loan made by the Sacco Society.

(5) The board of directors of a Sacco Society shall be responsible for ensuring that the written credit policy remains up-to-date and reflect current lending practices.

(6) A Sacco Society shall provide a sixty days' written notice to every member affected by a change in any term disclosed in the loan contract.

(7) A Sacco Society shall provide each borrower, at least once every six months or on request a statement for each outstanding credit facility that provides adequate detail of each transaction made during the period."

28. The Respondent's evidence did not include material indicative of the loan type, the interest rate, the terms and conditions; and the statement of accounts regarding repayments by the Appellant as required under the provisions of Regulation 28 of the *Sacco Societies (Deposit–taking Sacco Business) Regulations 2010*. Where is the material to justify the demand in the Respondent's letter dated 25.03.14 - CExh.5 seeking interest in the sum of Kshs 1,490.413.77/-? The tribunal did not address itself to the absence of evidence on this score.

29. It is settled that where the rate of interest is in question, it is a matter of fact and evidence must be led in proof of the rate of interest agreed upon by the parties. In this case, the loan agreement was not produced at the trial before the tribunal and the Respondent failed to tender other evidence in proof of the interest rate applicable, or to justify the interest component of its claim.

30. The Court of Appeal in *CFC Stanbic Limited v John Maina Githaiga & another* [2013] eKLR stated as follows; -

> " Sections 26 and 27 of the *Civil Procedure Act*, [CPA], lay down the law relating to the grant of interest and the setting of effective dates thereof. The said provisions provide that the court has a wide discretion to grant interest and to determine the effective dates of payment of such interests.
>
> In Shah v Guilders International Bank Ltd, [2003] KLR, the Court of Appeal regarding S 26 (1) of the CPA held:
>
> > "This section, in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages, namely:
> >
> > (1) the period before the suit is filed;
> >
> > (2) the period from the date the suit is filed to the date when the court gives its judgment; and
> >
> > (3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion, fix.
> >
> > We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the court has not discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."

> Accordingly, the High Court should in its discretion award and fix the rate of interest payable.
>
> Regarding the issue of the commercial rate of interest applicable and the total amount of interest payable could only, in our view, be proved with evidence. From the record, the respondent did not produce any documentary evidence to show the contractual rate of interest applicable. Accordingly, the interest payable would, therefore, be discretionary as provided for by S 26 of the CPA and subject to evidence produced to support the claim....."

31. It is the court's determination therefore that the tribunal ought to have addressed its mind to the interest component and made a determination thereon. However, regarding the principal sum, the tribunal correctly observed that the Appellant had not discharged the burden of proving that he had fully paid. The title copies and sale agreements produced by the Appellant were a poor substitute for real evidence of payment to the Respondent. The claim that he had lost his payment records when he moved houses did not preclude him from obtaining and producing other admissible secondary evidence.

32. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* (2014) eKLR in considering the legal vis-à-vis the evidential burden held inter alia;

> " The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue".

33. In view of all the above, the court is of the considered view that although the Respondent's evidence partially established its claim, to the tune of Kshs 1,693,701.00 regarding the outstanding principal sum, it did not prove the additional sum of Kshs 1,490,413.77/- claimed as interest. On the other hand, the appellant failed to prove that he had paid the sum of Kshs 1,693,701.00 to the Respondent. The Respondent was therefore entitled to the latter sum together with interest calculated at court rates, and reckoned from March 25, 2014, being the date of the Respondent's demand letter. Consequently, the appeal has partially succeeded and the court will therefore interfere by varying the judgment of the tribunal accordingly. Each party will bear its own costs in the appeal and before the tribunal. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF JANUARY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A

For the Respondent: Mr.Maina

C/A: Carol