Murori v Standard Chartered Bank Limited & another (Civil Appeal 361 of 2018) [2023] KEHC 1099 (KLR) (Civ) (23 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1099 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 361 OF 2018

JN MULWA, J

FEBRUARY 23, 2023

BETWEEN

JEREMY ARIMBI MURORI ..... APPELLANT

AND

STANDARD CHARTERED BANK LIMITED ..... 1ST RESPONDENT

MARTIN KINOTI KINYUA ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrates Court at Nairobi in CMCC No. 7281 of 2009 delivered by Hon. E. Wanjala (SRM) on 6th July 2018)

JUDGMENT

1. This appeal arises from the trial court's judgment delivered on the 0n July 6, 2018 in Milimani CMCC No 7281 of 2009. In the Plaint dated October 5, 2009 and filed in court on October 16, 2009, the 1st Respondent sought judgment against the Appellant for:

    a. The sum of Kshs 1,142,859.20 plus interest thereon at the rate of 20.5% per annum from September 17, 2009 until payment in full.

    b. Costs of the suit and interest at court rates

    c. Any other relief that the court may deem fit to grant.

2. According to the 1st Respondent, the amount claimed was on account of a bank facility advanced to the Appellant which the latter had defaulted on and refused to repay despite several reminders and demand.

3. In his Statement of Defence dated February 15, 2010, the Appellant denied that there was any sum of money due and owing to the 1st Respondent by him.

4. Upon hearing the suit, the trial court found that the Appellant was wholly liable for the sum of Kshs 1,142,859.20/- plus interest at the contractual rate of 18.75% as per the loan application from 17/9/2009 until payment in full. The court also awarded the 1st Respondent the costs of the suit.

5. Aggrieved by the said decision, the Appellant preferred the instant appeal vide a Memorandum of Appeal dated 2nd August 2018 in which he raised ten (10) grounds of appeal summarized as:

    1. The learned magistrate erred in law and fact by failing to find that the 1st Respondent did not prove its claim against the Appellant to the required standard.

    2. The learned magistrate erred in law and fact by entering judgment for a sum which the 1st Respondent admitted had been reduced by Kshs 467,853/- subsequent to the filing of the suit.

    3. The learned magistrate erred in law and fact by failing to find that the Bank exceeded its authority in its dealing with the Appellant's Bank Accounts.

    4. The learned magistrate erred in Law and fact by finding that the Appellant did not enjoin the 2nd Respondent as a 3rd Party in the proceedings.

    5. The learned magistrate erred in law and fact by failing to consider the evidence adduced by the Appellant in support of his defence.

    6. The learned magistrate erred in law and fact in awarding the 1st Respondent interest on the sum claimed at the rate of 18.75% p.a. yet the Central Bank of Kenya through the Banking (Amendment) Act of 2016 capped interest rates at 14% for all credit facilities in Kenya.

6. PW1, Boniface Machuki was one of the managers in the Consumer Credit Recovery and Risk Management Unit in the 1st Respondent Bank. He testified that the Appellant is the sole proprietor of a business known as Wavecom which applied for and was granted banking facilities by the 1st Respondent amounting to Kshs 2,000,000/-to which the loan amount was disbursed to account number xxxxx to which the Appellant and one Martin Kinoti Kinyua (hereinafter referred to as Martin) were joint signatories. The Appellant and the said Martin applied for a transfer of the loan facility to Martin's account but the same was not affected. The loan therefore stood outstanding in the name of and in the Appellant's account. It was his further testimony that there was no contractual agreement to pursue Martin since he only signed for the money jointly with Appellant but was not a joint owner of Wavecom to whom the facility was given. Further, he stated that at the time of taking the facility, the Appellant did not disclose that it was for the benefit of the said Martin.

7. On cross-examination, PW1 stated that in the statement adduced in evidence, the loan account is No xxxxxxx whereas account No xxxxx to which the loan was disbursed on 4/3/2008 was a current account. In addition, he clarified that the loan agreement number was for a distress account for non-performing loans and was meant to stop interest from piling up. He also stated that the statements of accounts indicate that the Appellant was the one who was servicing the loan. Additionally, PW1 averred that it is impossible to transfer a loan facility and as such, the bank sued the appellant as he was the principal party dealing with bank.

8. The Appellant, DW1, Jeremy Arimbi Murori testified that he used to use the business name Wavecom, but it has now been converted into a limited liability company. He testified that Martin approached him in January 2008 and requested to use his business name Wavecom to seek prequalification for power line construction and installation with Kenya Power and Lighting Company, and that Martin further requested him to help him obtain a loan with a clear understanding that Martin would service the loan. They jointly applied for a loan facility of Kshs 2 million which was disbursed to a new account number xxxxx in which Martin was the sole proprietor and operator. They also opened a fixed account No 142263376500 in which Kshs 600,000/- deducted from the advanced loan was placed to serve as security for the loan and could not be withdrawn.

9. Martin started servicing the loan from March 2008 and after about one year, they decided to transfer the loan facility from the Appellant/Wavecom's account to an account held by Martin's newly incorporated company known as Wavecom Electrical Contractors so as to discharge DW1 from liability. They approached the bank and Martin was asked to write a letter of commitment of loan facility to the bank which he did through a letter dated 18/9/2008. They also wrote a joint letter dated 29/9/2008 to the bank asking for transfer of liability to Martin's new company. The Appellant made a follow up by talking to the Manager of the 1st Respondent's Meru branch to ensure that the loan facility had been transferred to the new account and he got a verbal confirmation.

10. In January 2009, the appellant received a call from one Brian of Meru Branch who alleged that he had defrauded the bank of Kshs 600,000/- and the matter had been referred to the Credit Section for investigations, upon which he was blocked from operating the account. Further he testified that on 16/1/2009, he got a call from the Bank's Credit Centre Nairobi accusing him of withdrawing Kshs 600,000/- from his account that was meant to offset the advanced loan. He responded through a letter dated 19/1/2009, telling them that he withdrew money from his personal account as opposed to the fixed deposit security account, hence the issue of fraud could not arise as he thought that the money in his personal account was payment from his other businesses.

11. Upon being unblocked, he checked his account and established that Kshs 305,000/- was missing. He wrote a letter dated 1/2/2009 complaining about unexplained loss of money from his personal account. The bank wrote back telling him that he had not paid the loan that was supposed to have been transferred from Wavecom loan account Noxxxxx to the account held by Martin's company, over five months earlier. The bank also acknowledged debiting his account with Kshs 467,853/- without his knowledge. He responded that he did not have any loan. He stated that Martin should be held liable as he was the one who was operating the joint account to which the loan was disbursed.

12. On cross-examination, DW1 stated that Martin was well known to him and that they opened a joint account with two signatories being himself, and that Martin was not involved in the repayment of the loan. He reiterated that the bank took 467,000/- from his account and he has never recovered the said money.

13. The Appeal was canvassed by way of written submissions with minimal oral highlighting. The court has considered the said submissions alongside the grounds and Record of Appeal. The issues that arise for determination are:

    a. Whether the failure to include the Decree of the lower court in the Record of Appeal is fatal

    b. Whether the Appellant enjoined the 2nd Respondent as a 3rd Party to the suit in the lower court?

    c. Whether the 1st Respondent proved its claim as stated in the plaint against the Appellant to the required standard?

Whether the failure to include the Decree of the lower court in the Record of Appeal is fatal

14. In his written submissions, the Respondent contended that this Court lacks jurisdiction to entertain the appeal because the Appellant has not included the decree of the subordinate court in the Record of Appeal, which is a fatal omission that renders the appeal as incompetent.

15. Section 65(1)(b) of the *Civil Procedure Act* provides that:

> "(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court -
>
> ...
>
> (b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;"

16. Order 42 Rule 2 of the *Civil Procedure Rules* provides as follows:

> "Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed."

17. Order 42 Rule 13(4) (f) of the *Civil Procedure Rules* provides;

> "(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
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> (a) the memorandum of appeal;
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> (b) the pleadings;
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> (c) the notes of the trial magistrate made at the hearing;
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> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
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> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
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> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal."

18. In the instant case, a perusal of the Record and Supplementary Record of Appeal shows that the Appellant attached certified copies of the judgment and the lower court's proceedings but no certified copy of the Decree was attached. This court appreciates that a competent record is that which contains all the documents stated under Order 42 Rule 13(4) (f) above. However, the court holds the view that failure to attach a certified copy of the Decree from the decision of a subordinate court in the record of appeal is not incompetent or fatal if a certified copy of the judgment is filed with the Record of Appeal. This is because a Decree is extracted from the judgment and is therefore a summary of the Orders embodied in the judgment appealed from. Striking out an appeal which was duly admitted

and has already been heard with all the parties actively participating in the proceedings, on the basis of failure to attach a Decree would in this court's view amount to elevating procedural technicalities over substantive justice.

19. The court notes that the Respondent participated in the appeal proceedings fully and never raised the matter or pointed to the court the said omission. That would no doubt be against the spirit of Article 159(2) (d) of the *Constitution* which this court is expected to promote, for substantive justice.

Whether the Appellant enjoined the 2nd Respondent as a 3rd Party to the suit in the lower court?

20. The court records and documents show that sometime in July 2015, the Appellant applied and obtained leave of the trial court to issue a Third Party Notice dated 25/2/2016 which was filed and served to the 2nd Respondent but which upon service the 2nd Respondent failed to enter appearance nor file a Third Party defence in the matter. Consequently, on 26/2/2018 the Appellant lodged a Request for Judgment dated 19/2/2018 against the 2nd Respondent but none was entered and the reason for the failure to do so is not discernible from the proceedings of the trial court. When the matter came up for the on 22/8/2016, counsel for the Appellant sought third party directions but the Hon. Kabaria informed him that such directions could only be taken if the third party had appeared and ordered that the matter proceeds in the normal manner.

21. From the foregoing, it is evident that whereas the Appellant did take out third party proceedings and made some effort to enjoin the 2nd Respondent herein as a third party to the suit in lower court, the same was not actualized. As a consequence, the 2nd Respondent herein did not participate in the trial court proceedings. In her judgment, the learned magistrate noted that the Appellant had admitted that he knew the third party very well but avoided enjoining him to the suit to answer to the claim. It was for that reason that the court held the Appellant wholly liable for the claim which in this court's view was not erroneous, as it was based on the pleadings and evidence adduced before the court.

Whether the 1st Respondent proved its claim against the Appellant to the required standard?

22. There is no contestation that Wavecom was the Appellant's business name registered on August 16, 1993 as evidenced by the Certificate of Business Registration adduced in evidence. It is also not contested that the Appellant and one Martin Kinoti Kinyua, through Wavecom, applied for a loan of Kshs 2 million from the 1st Respondent bank sometime in January 2008 which amount was to be repaid within 24 months. The 1st Respondent produced a loan application form signed by the Appellant and Martin indicating that said facility was disbursed to Wavecom's bank account number xxxxxx held in the 1st Respondent's bank. The 1st Respondent also tendered in evidence a Statement of Account for Wavecom dated 28/6/2010 showing that Wavecom defaulted in repaying the loan.

23. The Appellant does not deny that the loan was not repaid as agreed. He however denies being liable to repay the loan on various grounds. Firstly, the Appellant claims that he applied for the loan on behalf of Martin and the same was being serviced by Martin. Further, the Appellant alleged that the loan was transferred to an account held by Martin's Company, Wavecom Electrical Contractor, at the 1st Respondent's Harambee Avenue Branch, Nairobi, and thus should be repaid by Martin only.

24. In the court's considered view, the evidence on record reveals that there only existed a contractual relationship between Wavecom who is the Appellant herein and the Bank. The Appellant is the one who had an account in the bank to which the loan was disbursed and thus was the only answerable person that could be pursued by the bank in case of any default. His private dealings with Martin concerning the advanced loan did not in any way affect his obligation to the bank. Indeed, it is noteworthy that the Appellant has not tendered any proof that the loan was actually transferred to

Martin's account and that he was formally discharged from any liability for the loan as a consequence. All that has been adduced are letters written by himself and Martin to the bank requesting for that to be done. In fact, the Appellant even admitted during his examination in chief that he learnt through one of the letters from the bank that the loan had not been transferred as earlier requested and he was still expected to repay the loan. This position is supported by PW1 who testified that it is impossible to transfer a loan to someone else.

25. In addition, although the Appellant claims that the 1st Respondent admitted to debiting his account with Kshs 467,853/- in a letter dated 20/1/2009 and crediting the same to the loan account, he did not adduce any evidence to show that the said amount cleared the outstanding loan and/or discharged him from any liability to the bank. The court therefore finds that the Appellant did not sufficiently show that he was discharged from any liability arising from the loan he was advanced by the bank.

26. The Appellant further took issue with the Statement of Account adduced by the 1st Respondent. He claims that the Statement of Account was not comprehensive as it did not include all the accounts held by him in the 1st Respondent bank and there was no indication that it belonged to his account. The court notes that during cross-examination, PW1 explained the statement adduced was for a distressed account that the Bank opens for non-performing loans in order to stop interest from piling up. Further, the Appellant has not shown that he requested the bank for further particulars and/or a comprehensive statement. This means that he was satisfied with what was adduced and cannot purport to raise the issue at this appeal stage.

27. Further, the Appellant contends that the learned magistrate erred by failing to make a determination that the 1st Respondent exceeded its authority in the way it dealt with the transactions in the Appellant's accounts without his knowledge and consent. From the record, it is evident that the Appellant did not file any counterclaim against the bank in this regard that would have required the learned magistrate to pronounce herself on. He simply put in a Defence denying liability for the amount claimed by the Appellant. In the premises, the court finds that this ground of appeal lacks basis and is unmerited.

28. On interest, the Appellant contends that the rate of 18.75% awarded by the trial court violated the provisions of Section 3 of the Banking (Amendment) Act of 2016. He argued that the learned magistrate ought to have capped the interest rate at 14% since the law was already in place as at the time when the judgment was delivered on 6/7/2018. From the terms and conditions on the loan application form signed by the Appellant herein on 17/1/2008, it is clear that the bank reserved the right to change the interest rates from time to time. As a general rule, all statutes are prospective hence do not apply retrospectively unless it is expressly stated so in the *Act*. As regards the repealed Section 33B of the *Banking Act*, courts have taken the position that the amendment did not provide for retrospective application of the capped interest rates for previously valid rights nor was it meant to inhibit the existing rights and obligations of parties; see *Longonot Ventures Ltd v Jamii Bora Bank Ltd* [2020] eKLR, *Vehicle and Equipment Leasing Ltd v Jamii Bora Bank Ltd* (2017) eKLR and *National Bank of Kenya Ltd v Pipe plastic Samkolit Ltd & another*. What this means is that the said provision was not applicable to the Appellant's case as the loan was advanced way back in the year 2008. The learned magistrate cannot therefore be faulted for failing to cap the interest rate at 14%.

29. The upshot is that the appeal lacks merit, and it is hereby dismissed with costs to the 1st Respondent.

Orders Accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2023.

J.N. MULWA

JUDGE.