Kenya Women Finance Trust v Ngari (Civil Appeal 53 of 2022)
[2023] KEHC 17655 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17655 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 53 OF 2022

JRA WANANDA, J

MAY 26, 2023

BETWEEN

KENYA WOMEN FINANCE TRUST ..... APPELLANT

AND

MARGARET WAITHERA NGARI ..... RESPONDENT

JUDGMENT

1. This Appeal is against the Judgement delivered on 20/08/2020 in Eldoret Chief Magistrate's Court Civil Case No. 140 of 2014. By the said Judgment, the trial Court awarded the Respondent (Plaintiff therein) damages amounting to Kshs 1,609,290/- for unlawful impounding of the Respondent's household goods and a motor vehicle.

2. The background of the matter is that by the Plaint filed through Messrs Magare Musundi & Co. Advocates on 4/03/2014 in the trial Court and subsequently amended on 6/06/2017, the Respondent pleaded that the Appellant is a deposit microfinance entity, the Respondent obtained a loan facility from the Appellant on 5/05/2011 for a sum of Kshs 600,000/-, the Respondent obtained the loan on security of her businesses and of some other chattels together with a requirement to raise savings of at least 1/5 of the loan and legal charges of at least Kshs 30,000/-, aggregating a sum of at least Kshs 160,000/-, the Respondent started repaying at a sum of Kshs 39,000/- per month vide a standing order from end of May 2011, the money was for purposes of expansion of her business to the Republic of South Sudan, the Respondent, in a bid to take care of her business in South Sudan approached the Appellant and informed it through one of its branch Managers, that she will be in the Republic of South Sudan longer than anticipated and requested the Appellant, in her absence, to be taking a monthly sum of Kshs 39,000/- from the proceeds of her motor vehicle registration number KAT 879Y, which was engaged in the business of transportation of passengers (matatu) and be depositing the same into her bank account to pay off the loan, the Respondent also deposited a sum of Kshs 50,000/- to take care of any deficit that may arise from the running of the motor vehicle.

3. The Respondent pleaded further that on or about 13/10/2012, the Appellant, without any colour of right whatsoever, impounded the Respondent's said motor vehicle valued at Kshs 600,000/- and converted the same to its own use, notwithstanding the impounding of the motor vehicle, the Appellant never applied the proceeds of sale to clear the loan which was outstanding at Kshs 389,400/- at the time of seizure of the motor vehicle, the amount outstanding was Kshs 389,400/- had the motor vehicle been sold, albeit illegally, it will have cleared the loan and a sum of Kshs 211,200/- remain in credit, knowing that that the loan had been fully settled, the Plaintiff continued with her life, the illegal impounding of the motor vehicle caused the Respondent massive losses in income from the vehicle and continues to cause losses to the Respondent. On her loss of income, the Respondent pleaded the same at Kshs 2,500/- per day from 13/10/2012 and loss of income to pay for the loan at Kshs 39,900/- per month, further to the foregoing, on or about 30/11/2013, the Appellant, through its agents, again proceeded to the Respondent's residence in Ndalat estate and impounded the Respondent's household items, they also caused damage to the Respondent's property, the impounding of the motor vehicle and household items was illegal, in breach of contract, unlawful and amounted to trespass and conversion.

4. In her Amended Plaint, the Respondent pleaded that pursuant to an interlocutory court order given on 3/07/2014 in the course of the suit, the Respondent received back her said motor vehicle on 31/05/2015 from the Appellant but the same was not in the state it was on 13/10/2013 and that it required substantial repairs which she listed and whose cost amounted to an aggregate sum of Kshs 161,008/-.

5. In her prayers, the Respondent sought a declaration that the impounding of the motor vehicle and confiscation of her household goods were illegal, in breach of contract and without any basis in law. She also prayed for orders that the Appellant pays for the value of the household goods, repairs, damages for conversion, illegal impounding of goods and breach of contract, loss of user of the motor vehicle at Kshs 1,000/- per day from the date of confiscation till return of the motor vehicle. Finally, she prayed for a permanent injunction restraining the Appellant from interfering with her possession and use of the motor vehicle and household goods.

6. Together with the Plaint, the Plaintiff also filed a Witness Statement in which she basically restated the matters set out in the Plaint.

7. On its part, the Appellant through Messrs Kidiavai & Co. Advocates filed its statement of defence on 28/06/ 2014. It denied having impounded the motor vehicle on account of recovering the loan arrears. The Appellant also pleaded, in the alternative, that if at all the motor vehicle and household items were impounded as alleged, but which no admission is made, then the impoundment was carried out in a procedural, lawful and legal manner as the Appellant was exercising its statutory power of sale as per the terms and conditions of the facility advanced.

8. The Appellant relied on the Witness Statement made by one George Odhiambo who described himself as the Appellant's Regional Manager – North Rift Region. He stated that the Respondent was advanced a loan of Kshs 600,000/- by the Appellant in the year 2011, the loan was secured by chattels mortgage dated 5/12/2011 over the Respondent's chattels listed therein and another chattels mortgage of even date over chattels of one Waweru Gicharu, it was agreed as between the parties that in the event of default in repayment of the loan, the Appellant would be at liberty to take possession of the chattels and/or sell them in such manner as the Appellant deems fit without giving the Respondent any notice, the Respondent approached the Appellant in the year 2012 and pledged her said motor vehicle as further security for repayment of the loan, the Appellant incurred costs in storing the motor vehicle, the motor vehicle was later released to the Respondent, the allegation that the vehicle was

illegally possessed and sold by the Appellant is false, the Respondent defaulted in repayment of the loan, the Appellant took possession of some of the Respondent's chattels listed in the chattels mortgage and sold them, at the time that the Appellant took possession of the said chattels, the outstanding loan balance was Kshs 389,354,61, the Appellant realized Kshs 6,450/- from the sale, the Respondent having executed the chattels mortgage freely and voluntarily, is bound by it, the sale of the chattels was thus lawful, the Appellant did not breach the contract and did not damage the Respondent's premises nor did it vandalize the motor vehicle as alleged, the Respondent owes the Appellant to date and has come to Court with unclean hands as she defaulted in repayment of the loan, her suit has been brought in bad faith.

9. After the hearing and determination of interlocutory matters and close of pleadings, the suit proceeded to full hearing. Each side called 1 witness. The Respondent testified as PW1 and the said George Odhiambo testified on behalf of the Appellant as DW1. Both witnesses adopted their witness statements.

10. Upon considering the facts and evidence before it, by the Judgment delivered on 20/08/2020, the trial Court found in favour of the Respondent. The trial Court held that the impounding of the Respondent's motor vehicle was illegal and had no basis in law, the Respondent proved on a balance of probabilities that indeed the said household items were in her house at the time that her property was impounded and were therefore impounded by the Appellant's agents, the Appellant impounded the Respondent's goods beyond what was contained in the chattels mortgage, the Respondent is entitled to general and special damages for conversion, illegal impounding and breach of contract, the Respondent is entitled to loss of user for the motor vehicle, at the time of filing the suit the Respondent was indebted to the Appellant in the amount of Kshs 384,110/=, it would be in the interest of justice that the said amount be deducted from the Respondent's award for loss of user.

11. In summary therefore, the award was in the following terms:

Damages for jewellery impounded	Kshs 1,263,400
Damages for motor vehicle loss of user	Kshs 730,400
Less outstanding loan	Kshs 384,110
Net amount payable	Kshs 1,609,290

12. The Respondent was awarded costs of the suit.

Grounds of Appeal

13. Being aggrieved by the Judgement, the Appellant instituted this Appeal vide the Memorandum of Appeal filed on 6/04/2022. 4 grounds were raised as follows;

    i. The learned Magistrate erred in law and in fact in finding that the respondent had proved her case against the appellant on a balance of probabilities when the respondent had not done so.

    ii. The learned Magistrate erred in law and in fact in awarding the respondent special damages which had not been strictly proved.

    iii. The learned Magistrate erred in law and in fact in finding that the outstanding balance of the loan due and owing from the respondent to the appellants was Kshs. 384,110/= when the

outstanding balance of the loan due and owing from the respondent to the appellant was more than Kshs. 384,110/=.

iv. The learned Magistrate erred in law and in fact by basing her decisions on extraneous considerations.

14. It was then directed that the Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed its submissions on 23/01/2023 and the Respondent filed hers on 7/03/2023.

Appellant's Submissions

15. Counsel for the Appellant submitted that it is trite law that whoever alleges must prove. He cited Section 109 of the *Evidence Act* and urged that it is a settled principle in law that the burden of proof in civil cases is on a balance of probability. He cited the decision of Mativo J in Hellen Wangari Wangechi v Carumera Muthini Gathua [2005] eKLR and also the case of Evans Nyakwana vs Cleophas Bwana Ongoro (2015] eKLR. He then contended that the Respondent did not prove her case on a balance of probabilities. Counsel submitted that as concerns jewellery, the only evidence put forth by the Respondent was the receipt showing the amounts she had purchased the jewellery, the Respondent did not give sufficient evidence to show that the jewellery was actually hers or that it was in the house when the Appellants impounded the chattels, throughout the hearing and filing of documents, the Respondent did not give sufficient evidence linking the Appellants to the allegedly missing jewellery, the simple fact that she has a receipt for the jewellery does not on a balance of probability, indicate that the Appellant illegally took it, as a matter of fact, the Appellants produced before Court a schedule of all items to be mortgaged in addition to the inventory of the chattels which they took possession of, the alleged jewellery is not on either list, the burden of proof therefore shifted back to the Respondent to prove that indeed the jewellery was taken by the Appellant who intentionally did not add it to the inventory of the chattels, the trial Court wrongfully concluded that the Respondent had proven the same on a balance of probability.

16. Counsel submitted further that as concerns the motor vehicle, the Respondent had approached the Appellant in the year 2012 and pledged the motor vehicle as further security for repayment of the loan, on that basis, the motor vehicle was impounded when she defaulted in repayment of the loan arrears, the same was released to the Respondent by the Appellant and the allegations that it was illegally possessed and sold is false, the same allegation was not proved on a balance of probability since the Respondent did not adduce any evidence to corroborate the illegality alleged whereas the Appellant adduced evidence before the Court and during the hearing of the suit to prove that the vehicle was pledged by the Respondent and had been released after being impounded, the burden of proof rested upon the Respondent to disprove the Appellant's assertion, which she neglected to do, the Respondent did not prove her case before the trial Court on a balance of probabilities.

17. On quantum, Counsel submitted that a party cannot merely give oral evidence to the effect that the vehicle was making a certain amount daily whilst claiming special damages from the Court, the Respondent claimed in her Amended Plaint that she incurred massive losses to the tune of Kshs 2,500/= daily after the Appellant impounded her car, she claimed that she earned the abovementioned amount every single day for use of the motor vehicle, however, paragraphs 14(a), 26 and 31(f) all quote different amounts of Kshs. 2,500/=, 2,000/= and 1,000/= respectively. Further, the Respondent did not amend her witness statement which claimed her vehicle brought her a daily earning of Kshs. 2,000/= per day but claimed that she had records for banking only the sum of Kshs. 1,000/=, the Respondent did not produce any bank documents in support of any of the above assertions, the inconsistency in her statements over the daily amounts supposedly brought in by the vehicle predisposes that her claim for special damages not strictly proven. He cited the case of Jackson Mwabili v Peterson Mateli [2020]

eKLR where the Court awarded Kshs. 360,000/= for loss of use over a motor vehicle that brought in a total of Kshs. 3,000/= per day. Counsel submitted that considering the inconsistencies in pleading for special damages and the failure to strictly prove the amounts for loss of use of the motor vehicle, the award of Kshs. 730,000/= was excessive and an exaggeration in the circumstances, the amount of Kshs 300,000/= would have sufficed with regard to the facts of the suit herein.

Respondent's Submissions

18. Learned Counsel for the Respondent submitted that the Respondent's said motor vehicle was impounded and her household goods confiscated by the Appellant in what the Respondent considered to be illegal and unfounded in law, the Respondent had not pledged the motor vehicle in the Chattels mortgage and as such the Appellant had no right whatsoever to seize the motor vehicle on the basis of a "verbal pledge", under Section 13(1)(c) of the Chattels Transfer Act (now repealed and replaced with the *Movable Property Security Rights Act*, 2017) an unregistered instrument shall be deemed fraudulent and void as against the person seizing the chattel or any part thereof. He cited the decisions in George Ndege Okello V K-Rep Bank Limited & Another [2012] eKLR and in Chairlady, Hellen Cherubet & 4 others v Simon Kiptoo Kimoso [2020] eKLR.

19. Counsel added that the Respondent produced bank slips as proof of her repayment of the loan to a total of kshs.484,000/=, the Court ordered that the Appellant return the motor vehicle, the Valuation Report cost her Kshs 5,000/=, she adduced the original receipt from the valuers, the Respondent further produced the original copy of the chattel mortgage dated 5/12/2011 containing the registered pledged items, the Appellant instead proceeded to seize different items from the Respondent's house including jewellery that was valued at Kshs 1,263,400/= for which she produced a receipt, the Appellant's witness admitted that they confiscated the motor vehicle yet it was not listed in the pledged items, the Appellants failed to adduce evidence of the inventory that was taken at the time the items were impounded, the Respondent adduced evidence of loss of the jewellery that was confiscated by the Appellant at the time the pledged items were being impounded, the Respondents adduced valid receipts of the jewellery estimated at Kshs 1,263,400/= , the Appellant's witness admitted that no inventory was taken at the time and further, self-confessed that he was not present when the Respondent's household items were impounded, it was reasonable to deduce that the conduct of the Appellant to ignore taking the inventory and failure to adduce evidence over what items were confiscated, was and is one that is founded on malice and mischief towards the Respondent.

20. In respect to the claim for loss of user of the motor vehicle, Counsel submitted that the Appellant's witness acknowledged in his testimony that the motor vehicle was illegally impounded and kept in the Appellant's custody for about 2 years, it is thus reasonable to deduce that the Respondent has a rightful claim of damages arising out of the Appellant's act of conversion, it is proper that this Court upholds the Judgment by the trial Magistrate, as regards the award for special damages, the Respondent having proven that indeed the motor vehicle was not listed, impounding it was illegal and amounts to conversion, it is trite law that where a Plaintiff has been deprived of his chattel, he is ordinarily entitled to its full value together with any special loss he may have suffered as the result of the unlawful detention or conversion or destruction or loss. He cited the Court of Appeal's decision in Patrick Muturi v Kenindia Assurance Company Ltd (1993) eKLR.

21. On special damages, Counsel urged that the Respondent adduced evidence in support of her claim by producing the valuation report for the motor vehicle and the purchase receipts of the jewellery that was impounded by the appellant illegally.

22. On the outstanding loan, Counsel submitted that according to the Appellant's written statement, the Respondent was indebted to the Appellant in the net amount of 384,110/= to the exclusion of moneys

the Appellant's realized from the sale. He cited the case of Speed Wall Building Technologies Ltd. vs County Government of Migori [2016] eKLR and submitted that the trial Magistrate was justified to offset the aforesaid amount from the Respondent's loss of user based on the evidence on record, the law and the doctrine of equity.

Analysis & Determination

23. This being a first appeal, the Court is enjoined to analyze and re-assess the evidence afresh and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify (see Selle v Associated Motor Boat Co. [1968] EA 123 and Kiruga v Kiruga & Another [1988] KLR 348).

24. Further, being an appeal on the quantum awarded, this Court is aware of the limits of its jurisdiction. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia [1985], the following was stated:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

Issues for determination

25. In my view, the issues that arise for determination in this appeal are the following;

    i. Whether the Respondent proved her claims of unlawful impounding and conversion of her property.

    ii. Whether the Respondent was entitled to damages and if so, whether the assessment award made by the trial Court were merited.

26. I now proceed to analyse and answer the said issues.

i. Whether the Respondent proved her claims of unlawful impounding and conversion of her property

27. The Respondent's case before the trial Court is basically that she was a customer of the Appellant where she held an account, in the year 2011, she used the account to secure a loan, she serviced the loan until sometime in the year 2012 when her business suffered financial challenges and she needed to relocate to South Sudan, before she did so, she approached and agreed with the Appellant that, in her absence, the proceeds of her motor vehicle registration number KAT 189Y which she was using as a public service vehicle for passenger transportation (matatu) be used to settle the loan in monthly instalments of Kshs 30,000/-, however on 13/10/2012, without any justifiable reason, the Appellant instead seized the motor vehicle, the Respondent again approached the Appellant and they agreed that the motor vehicle be auctioned and the proceeds thereof be used to settle the loan balance, however the Appellant did not implement this agreement and instead, on 30/11/2013, through its agents, raided the Appellant's residence, broke therein, proclaimed a number of the Respondent's household items, including jewellery, damaged some and took away the rest. According to the Respondent, as a result of the Appellant's said acts, she suffered huge losses.

28. It is agreed by the parties that there was a chattels mortgage instrument entered into by the parties and which secured the loan with household items belonging to the Respondent expressly listed in the

instrument. It is however also agreed that the motor vehicle and the jewellery were not included as part of the items listed in the chattels mortgage instrument.

29. I note that by an interlocutory order made by the trial Court on 6/05/2014, in the course of the suit, the Appellant was ordered, pending the hearing and determination of the suit, to return the motor vehicle to the Respondent. From the record, I deduce that the Respondent complied with the order and released the vehicle back to the Respondent. I have no indication of when it was returned but the Respondent's claim that the Appellant kept the vehicle for 2 years before returning, does not seem to have been controverted by the Appellant.

30. It is trite law that in a civil claim, the standard of proof is that of a balance of probabilities (see Court of Appeal decision in Kirugi & Anor vs Kabiya & 3 others [1987] KLR 347).

31. The cause of action arose from the alleged impounding of the Respondent's motor vehicle registration number KAT 879Y. The Appellant's contention before the trial Court was that the vehicle was pledged as security for repayment of the loan/financial facility of Kshs. 600,000/ that was advanced on 5/05/2011. During his cross examination of DW1, George Odhiambo, the Appellant's Regional Manager-North Rift, admitted that the vehicle was not in the list of items that were pledged as security on the chattel mortgage produced as the Respondent's Exhibit 1. The Appellant's claim that the Respondent voluntarily pledged the motor vehicle to the Appellant as further security is unconvincing since the Appellant, being a leading player in the loan advancement industry, must no doubt be aware that pledging of security in that manner, particularly of a motor vehicle, requires proof by written documentation and also by execution and registration of a chattels mortgage instrument. Allegation of a "verbal pledge" cannot be a serious submission in a Court of law. In the circumstances I find that the trial Magistrate did not fall into any error of law when she concluded that the motor vehicle was illegally impounded.

32. Regarding the Respondent's household items, it is evident that there was a list of agreed items expressly stated in the chattels mortgage instrument as having been pledged as security. The Respondent produced a list of the items that she claimed were impounded from her house by the Appellant together with their values and aggregating a sum of Kshs1,263,400/-. Challenged to produce an inventory of the items that were taken from the Respondent's house, the Appellant produced a piece of handwritten paper. The same does not seem to have a date nor does it seem to be signed. It does not also even disclose the names of the people who were present during the exercise. The same cannot therefore qualify as an "inventory" at all. As a result of the Appellant's failure to prepare a proper inventory of the items impounded, I agree with the trial Magistrate that the Appellant was unable to controvert the Respondent's allegations on what was impounded. It is my considered view that once the Respondent presented her list of what she claimed to have been impounded, the burden of proof shifted to the Appellant to prove otherwise. In the absence of a proper "inventory" of the items that were confiscated, the Magistrate's finding that the Respondent proved her case to the required standard cannot be faulted.

ii. Whether the Respondent was entitled to damages and if so, whether the assessment award made by the trial Court were merited

33. The trial Court awarded the Respondent damages for jewellery amounting to Kshs 1,263,400/-. It is trite law that special damages must be pleaded and proved. The Respondent produced receipts as evidence of the value of the jewellery. The trial Court found that the Appellant failed to rebut that evidence as it called a witness who was not even present during the impounding and further, as aforesaid, the Appellant did not produce a proper "inventory" of the goods impounded. In the

circumstances, the trial Magistrate's conclusion that the Respondent sufficiently proved her claim and was therefore entitled to the damages awarded cannot also be faulted.

34. On loss of user, the trial Court awarded the Respondent a sum of Kshs. 730,000/-. The Appellant's challenge to this award is based on the alleged lack of accurate evidence on the actual amount that was being earned from the vehicle. The Court of Appeal, faced with a similar scenario in the case of Samuel Kariuki Nyangoti v Johaan Distelberger (2017) eKLR, where the Appellant had claimed loss of user for his public service vehicle (matatu) which had been involved in an accident, held as follows:

> " The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit-making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases." (emphasis)

35. The Court of Appeal also cited with approval the decision of Apaloo, J. (as he then was) in Wambua v Patel & Another [1986] KLR 336, where the Court had found the Plaintiff had not kept proper records of what he earned but stated the following:

> " Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method" .... But a victim does not lose his remedy in damages because the quantification is difficult."

36. In this instant case, the trial Magistrate found that the Respondent loss was a sum of Kshs 1,000/- per day for 2 years. This translates to 730 days. Guided by the above cited authorities, again I cannot fault the trial Court for finding that the Respondent was entitled to total damages for loss of user at the sum Kshs 730,000/-.

37. The Appellant also faulted the learned Magistrate for finding that the outstanding balance of the loan due and owing from the Respondent to the Appellants was Kshs. 384,110/= when according to the Appellant, the outstanding balance was more than that amount. Indeed, from the statement of account produced by the Appellant, the amount that was due as at February 2014, around the time when the suit was filed, was Kshs 384,110.48. However, by September 2014, the debt in the statement had increased to Kshs 851,790.48. It can safely be presumed that the increase was as a result of interest and penalties for default.

38. On this point, the Respondent stated that when her business began suffering challenges, she decided to relocate to South Sudan for some time, she therefore approached the Appellant and agreed on the arrangement that the Appellant would be taking an amount of Kshs 39,000/- per month from the proceeds of the transportation business in which the vehicle was engaged. According to the Respondent, the Appellant was to be using that amount in liquidating the loan. I have perused the record and observe that the Appellant did not seriously challenge this version alleged by the Respondent.

39. From the evidence on record, it appears that the Appellant did not follow the said arrangement and instead, kept seized the vehicle and kept it in a yard unused for 2 years. As a result, the loan remained

unserviced and the arrears continued to accumulate due to the interest levied. There is no evidence on record that the Appellant communicated its apparent "change of mind" to the Respondent or even made the Respondent aware of the non-payment of monies to the account. Since as aforesaid, the Appellant did not challenge this version of events as presented by the Respondent, it follows therefore that the only reason the account remained unseviced and therefore accumulated interest and penalties was simply because the Appellant did not ensure that the vehicle was on the road so as to bring in funds which would have then been utilized in servicing the loan.

40. Further, the Respondent stated that when the Appellant impounded the vehicle and kept it unused at a yard instead of being on the road as agreed with the Appellant, she again approached the Appellant and upon her request, it was agreed that the Appellant would sell the vehicle by auction and use the proceeds to clear the loan. However, according to the Respondent, again, the Appellant did not sell the vehicle as agreed and continued keeping it at the yard unused. Since the Appellant did not also seriously challenge this further version of events, I agree with the trial Magistrate's finding that this failure to implement the agreement to auction the vehicle also added further interest and penalties to the loan.

41. Under these circumstances, the Appellant cannot be heard to claim that the Respondent should settle these additional interest and penalties. Evidently, accrual of the same arose as a result of the Appellant's own actions and omissions which the Respondent cannot be asked to shoulder. In view thereof, again, I cannot fault the trial Court for ordering that only the amount of Kshs 384,110/- that was due as at February 2014 as per the bank statement be offset from the damages awarded to the Respondent in settlement of the loan.

Final Order

42. In the premises, I find that this Appeal lacks merits. The same is hereby dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF MAY 2023

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WANANDA J. R. ANURO

JUDGE