



**Kigotho v Stanbic Bank Kenya Limited (Civil Appeal E165 & E173 of 2021
(Consolidated)) [2023] KEHC 21462 (KLR) (Civ) (17 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E165 & E173 OF 2021 (CONSOLIDATED)
AN ONGERI, J
AUGUST 17, 2023**

BETWEEN

CONSOLATA WANJERI KIGOTHO APPELLANT

AND

STANBIC BANK KENYA LIMITED RESPONDENT

*(Being an appeal from the judgment and decree of B. J. Ofisi (RM)
in Milimani CMCC No. 9058 of 2019 delivered on 5/3/2021)*

JUDGMENT

1. The appellant, Consolata Wanjeri Kigotho (hereafter referred to as the appellant only) filed Milimani CMCC No. 9050 of 2019 against the respondent, Stanbic Bank Kenya Limited (hereafter referred to as the respondent only) seeking the following remedies
 - i. A declaration that the respondent was in breach of contract for failing to discharge the log book for the appellant's motor vehicle after full repayment of the loan facility.
 - ii. An order compelling the respondent to unconditionally discharge the log book.
 - iii. Special damages of kshs.150,000/=
 - iv. General damages
 - v. Punitive damages
 - vi. Cost of the suit and interest



2. The plaintiff filed a plaint dated 19/11/2019 in which she averred that she entered into an asset finance agreement with the respondent on or about April 2010 for purchase of motor vehicle registration no. KBL 436J and she paid monthly installments of ksh.41,056 from 10/6/2010 to 5/5/2014.
3. She averred that upon completion of the payments she expected the respondent to release her log book and she incurred ksh.250,000 pursuing the said log book hence this suit.
4. The respondent filed a statement of defence and counter claim dated 24/2/2020 stating that the appellant failed to fully repay the facility and further that the appellant was seeking an outstanding loan of amount of 270,089 together with interest at commercial rates from 16/10/2015.
5. The appellant's testimony was that she fully repaid the loan. The respondent said the amount they were claiming in the counter claim arose out of revision of the interest rates.
6. The trial court found that the respondent was entitled to review the interest rates and the appellant's suit was dismissed with interest to the respondent.
7. The appellant filed this appeal on the following grounds;
 - a. That the learned magistrate erred in law and in fact in failing to find that the defendant was in breach of contract for failing to discharge the plaintiff's logbook after full repayment of the loan facility.
 - b. That the learned magistrate erred in failing to find that the plaintiff is entitled to damages.
8. The respondent also filed a cross appeal on the following grounds;
 - a. That the honorable magistrate erred in law and in fact by failing to consider and determine the defendant's counter claim dated 24th February 2020
 - b. That the honorable magistrate erred in law and in fact by failing to enter a judgment with respect to the defendant's counterclaim
 - c. That the honorable magistrate erred in law and in fact by failing to find that the plaintiff was in breach of her contractual obligations by failing to repay the loan facility in full as set out in the letter of offer and the chattels instrument.
 - d. That the honorable magistrate erred in law and in fact by failing to find that the defendant was entitled to the sums that remained unpaid as a result of the loan facilities to the plaintiff and interest thereof
9. The parties filed written submissions as follows; the appellant submitted that the trial court erred when it found in favor of the respondent on the basis that the court could not rewrite a contract between the parties and that the appellant had accepted the increments by virtue of having signed the original contract with the respondent. The appellant argued that it is trite law that once a person has paid off a debt then the charged property ought to be unconditionally discharged.
10. The appellant argued that the respondent acted illegally in purporting to increase the interest without notifying the appellant. that according to paragraphs 7 and 10 of the respondents witness statement, the respondent only alleges that the appellant fell into arrears months after commencing payment which was contrary to the bank statements that they themselves produced in evidence that showed the appellant paid the monthly instalments consistently for 48 months.
11. On the issue of damages the respondent listed the appellant in the Credit Reference Bureau and additionally sent auctioneers who embarrassed the respondent in the presence of her customers and



her employees. That further the appellant can no longer use the motor vehicle due to the damage by the humid air and has not been able to sell the same because of the respondent's refusal to release the logbook.

12. The respondent submitted that it reserved the discretion to vary the interest rate and the appellant understood the contents of the offer letter before executing it. The paramount effect of signing the agreement was that the appellant agreed to be bound by the terms prescribed therein. The bank varied the terms of the interest rate and the appellant was aware of such variation and failure to satisfy the outstanding amount of Kshs. 270,089 amounted to outright breach of the loan facility agreement.
13. On special damages the respondents argued that the appellant failed to prove with specificity the extent to which she was aggrieved by the respondents conduct to warrant special damages. On general damages the respondent argued that it is trite law that general damages cannot be awarded on claims based on contracts. In support the respondent cited Migori High Court Civil Appeal No. 92 of 2015 *James Maranya v. South Nyanza Sugar Co. Ltd* (2017) eKLR dealt with the issue of the remedies in breach of contracts and stated that:

“It is well settled in law that general damages cannot be awarded on a claim anchored on a breach of contract.”

14. On the counter claim the respondent submitted that the trial court having found that the respondent was not in breach of contract it followed that it was entitled to receive orders for payment of Kshs. 270,089 which it had sought vide its counterclaim. It was therefore incumbent upon the honorable court to make a determination on the breach by the plaintiff as it had been specifically pleaded by the respondent.
15. This being the first appellate court, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity of seeing the witnesses. In *Selle –v- Associated Motor Boat Co.* [1968] EA 123 it was held 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 particular 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.”

16. The issues for determination in this appeal are as follows;
 - i. Whether the appellant proved her case to the required standard.
 - ii. Whether the respondent was entitled to increase the interest rate.
 - iii. Whether the respondent is entitled to the amount claimed in the counter claim.



- iv. Whether the appellant is entitled to damages
 - v. Whether the appeal should be allowed.
 - vi. Who pays the costs of the appeal?
17. On the issue as to whether the appellant proved her case to the required standard, I find that the appellant's evidence was that she fully repaid the loan and demanded for her log book but the respondent refused to release the log book and demanded a balance of ksh.270,089 which accrued as a result of change in the interest rate.
 18. I find that there is no evidence that the appellant was notified of the change in the interest applicable.
 19. It is also not clear how the figure the respondents claiming was arrived at.
 20. It is true that parties are bound by the terms of their contracts but when the same are varied, the same must be brought to the attention of the parties.
 21. In *National Bank of Kenya Ltd v. Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

“A court of law cannot rewrite 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”.
 22. In *Pius Kimaiyo Langat v. Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved”.
 23. I therefore find that the appellant proved on a balance of probabilities that the respondent was in breach of contract.
 24. On the issue as to whether the respondent was entitled to increase the interest rate, I find that the respondent was required to write to the appellant to notify her of the increase in the interest rate.
 25. There is no evidence that a letter or any other form of communication was used to notify the appellant that the interest agreed on had been varied.
 26. I therefore find that the respondent was not entitled to increase the interest rate.
 27. In *Housing Finance Co. of Kenya Limited v. Gilbert Kibe Njuguna* Nairobi HCCC No. 1601 of 1999, it was held:

“Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract.”
 28. On the issue as to whether the respondent had proved its counter claim, I find that the answer is in the negative.



29. The respondent did not prove that they had deserved the right to increase the interest and further that they had notified the appellant when and to what rate they intended to change the interest.
30. I accordingly find that the respondents did not prove their counterclaim to the required standard.
31. On the issue as to whether the appellant is entitled to damages, I find that the appellant has sought the following damages
- i. Special damages of ksh.250,000/=.
 - ii. General damages
 - iii. Punitive damages
32. It is trite law that general damages for breach of contract are in the form of special damages and the same must be specifically pleaded and proved.
33. In *Hahn v. Singh*, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;
- “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.”
34. In the current case although the appellant pleaded ksh.250,000/= she did not prove that she incurred a loss of the said sum due to the respondent’s breach of contract.
35. She simply stated that she incurred costs of kshs.250,000 in following up the log book but she did not say how the same was incurred.
36. I also find that general damages and punitive damages are not payable in cases of breach of contract.
37. On the issue as to whether this appeal should be dismissed, I find that the same succeeds partially to the extent that the appellant is entitled to a declaration that the respondent was in breach of contract by failing to discharge her log book and also to an order compelling the respondent to discharge her log book unconditionally.
38. I allow the appeal in the following terms;
- i. A declaration be and is hereby issued that the respondent was in breach of the contract entered between the appellant and the respondent by failing to discharge the log book of the appellant’s motor vehicle registration no. KBL 436J.
 - ii. The respondent be and is hereby ordered to unconditionally discharge the book for motor vehicle registration no. KBL 436J to the appellant within 30 days of this date.
39. On the issue as to who pays the costs of this appeal, since the appeal succeeded partially and since the respondents would have been entitled to the arrears they are claiming from the appellant had they served her with notice of change of the interest rate, I direct that each party bears its own costs of this appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
17TH DAY OF AUGUST, 2023.**

A. N. ONGERI



JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

