National Bank of Kenya Ltd v Nandi (Civil Appeal E015 of 2022)
[2023] KEHC 22749 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22749 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E015 OF 2022

WM MUSYOKA, J

SEPTEMBER 28, 2023

BETWEEN

NATIONAL BANK OF KENYA LTD ..... APPELLANT

AND

JAMES ASIKE NANDI ..... RESPONDENT

(An appeal arising from the judgment of Hon. PY Kulecho, Senior Resident Magistrate, SRM, in Busia CMCCC No. 244 of 2018)

JUDGMENT

1. The suit, at the primary court, was by the respondent, against the appellant. In the plaint filed, on 28th September 2018, he sought payment of Kshs. 79,536.00, being excess monies wrongfully deducted from his salary by the appellant; unliquidated special damages; interest and costs; and any other relief. The plaint was subsequently amended, on 15th July 2021, to give particulars of the special damage, at a total of Kshs. 468,536.00, broken down as Kshs 55,000.00 for transport costs to Nairobi, Kshs. 304,000.00 for accommodation in Nairobi, Kshs. 30,000.00 consultation fees paid to Interest Rates Advisory Centre, IRAC, and Kshs. 79,536.00 for the withheld funds or the funds deducted in excess of what was agreed. The prayers were also amended to remove the substantive prayer for Kshs. 79,536.00, and to reduce the claims to just 2, for Kshs. 468,536.00 and costs and interests.

2. The appellant filed a defence, on 14th May 2019, dated 30th April 2019, where it denied the allegations made in the plaint, except that it conceded the advancing of a loan to the respondent, which was the foundation of the claim.

3. An oral hearing was conducted. 2 witnesses testified, 1 for each side.

4. The respondent testified, as PW1, that he had taken a loan from the appellant, where he maintained an account. It was for Kshs. 330,000.00, with interest at a fixed rate of 18% per annum, payable in 60 months. He stated that the entire amount repayable was Kshs. 502,791.00, and that the loan was to be

and was repaid by checkoff system from his salary. He asserted that he did not default in repayment, and that he had repaid the loan in full. His case was that after the full repayment, the appellant did not stop the deductions, as after he completed repayments, in August 2015, the deductions did not stop, hence the appellant wrongfully withdrew funds from his savings account. He stated that he was not notified, by the appellant, of any changes in the terms of the contract. When he approached the appellant, he was informed that the interest rates had been changed, and he had been notified through the media and gazette notices. He approached the Central Bank of Kenya, who referred him to the IRAC, at Nairobi. The IRAC advised him that the appellant had recovered an excess of Kshs. 79,936.00 from his account. He also asserted that the appellant had withdrawn Kshs. 60,000.00 from his account without authority. He asserted that his total claim against the appellant stood at Kshs. 137,197.00. He stated that he had excluded the additional bank charges from the computation of Kshs. 137,197.00. He testified that he followed up the matter in Nairobi, with the appellant, and in the process he incurred expenses, of Kshs. 55,000.00 and Kshs. 302,000.00, on travel and accommodation, respectively. He also stated that he expended Kshs. 30,000.00 on the consultation with IRAC. He produced bundles of receipts, to support those 3 claims. Copies of 3 opinions by IRAC, dated 23rd June 2017, 27th June 2017 and 5th February 2018, were marked for identification, and so was a statement.

5. Mr. Ezra Omari Ondieki testified for the appellant, as DW1. He worked there as a sales manager. He stated that the respondent had received a loan of Kshs. 330,000.00, at 18% interest per annum, from the appellant. The respondent was to repay the same in monthly instalments of Kshs. 8,379.83, over a period of 3 months. He stated that the interest rates were changed in 2011, upwards to 23% per annum, and that remained the position until 2016, when Parliament capped interest rates at 16%. He asserted that the respondent was notified of those changes, by the appellant, through letters, 2 of which were dated 25th April 2017 and 18th July 2017, respectively. He stated that the respondent had fully serviced the loan, and that the last instalment was paid on 30th October 2016. He said that he was not privy to the interest calculations by the IRAC. He asserted that the appellant did not owe the respondent any money, adding that the appellant only recovered what it was entitled to.

6. The trial court delivered a judgment, on 8th April 2022. It was concluded that the respondent had not adduced adequate evidence to establish that the appellant had debited his account with Kshs. 60,000.00, and had deducted a sum of Kshs. 79,936.00 from the salary account. The court found that the claim for Kshs. 60,000.00 was not specifically pleaded nor strictly proved; and that the case for Kshs. 79,936.00 was not proved. It was concluded that, although the respondent had failed to strictly prove the claim regarding the excessive loan instalment deductions, he had demonstrated, on a balance of probability, that the appellant had deducted some money in excess of what it was entitled to, contrary to the loan contract, and the respondent was thereby entitled to some relief. That relief did not take the form of general damages, for the same had not been pleaded, but recovery of special damage, by way of the money he spent in pursuit of his right, that is to say Kshs. 387,000.00, being Kshs. 55,000.00 for transport, Kshs. 302,000.00 for accommodation, and Kshs. 30,000.00 for the consultation fees paid to the IRAC. So, judgment was entered for Kshs. 387,000.00, with costs and interests.

7. The appellant was aggrieved, hence the appeal. The grounds are set out in the memorandum of appeal, filed herein on 5th May 2022, dated 28th April 2022. It is averred that the trial court arrived at wrong conclusions, it erred in finding the appellant liable without fault, failed to find that the respondent had failed to prove his case on a balance of probability, the decision was self-contradictory, the trial court had failed to find that the alleged amounted allegedly deducted was not determinate neither was the deduction proved, and awarding special damages that were not substantiated, among others.

8. Upon being served with the appeal, the respondent filed a notice of cross-appeal, dated 9th May 2022, on 11th May 2022, where it argued that the trial court erred in not awarding the respondent the sum of

Kshs. 79,536.00 wrongly withheld, and praying that that judgment be awarded in his favour in respect of the said amount.

9. Directions were given on 17th April 2023, for canvassing of the appeal by way of written submissions. Both sides complied, by filing their respective written submissions.

10. The appellant submits on 6 grounds: that pleadings are mere allegations to be proved by evidence, parties and the court are bound by pleadings and cannot digress, special damages must be specifically pleaded and strictly proved, there can be no liability without fault, the judgment was contradictory, and some expenses allegedly incurred by the respondent were exaggerated and unnecessary. The appellant argues that the principal claim is that the appellant had deducted a sum in excess of Kshs. 79,936.00 from the respondent's salary account, and the respondent was seeking refund of that sum. It is submitted that the respondent had failed to prove that the appellant had deducted a sum in excess of Kshs. 79,936.00 from his salary account. It is further submitted that the conclusion by the trial court that some money had been deducted in excess of what it was entitled to was not supported by any evidence. It is submitted that the respondent did not plead to be awarded a sum of money in excess of the pleaded Kshs. 79,936.00. It is further submitted that the trial court granted a prayer that had not been pleaded. It is also submitted that the judgment was contradictory, to the extent that it stated that the respondent had not proved that the appellant had deducted a sum in excess of what was contracted, and then went on to say that there was some proof that more money was deducted than what should have been the case. It is submitted that having found that the appellant was not at fault, with respect to the alleged excess deductions, there was no basis for the trial court to find the appellant liable to pay the respondent damages with respect to the alleged transport, accommodation and consultancy expenses. Finally, it is submitted that the expenses incurred by the respondent, as represented by the receipts put in evidence, were exaggerated.

11. On his part, the respondent supports the judgment to a large extent. He submits that the delay on the part of the appellant to resolve the matter caused him to incur expenses. He avers that the trial court erred in not awarding to him the sum of Kshs. 79,536.00.

12. My understanding of the dispute before the court was that the respondent felt that the appellant had recovered more than what it was entitled to by way of repayments for the moneys loaned. He sought to recover the alleged excess payment, which he put at Kshs. 79,536.00, plus the costs that he had incurred in the process of pursuing the matter, being in respect of transportation, accommodation and consultancy fees. My interpretation of it is that there are 2 claims. The primary claim is for the value of the excess deductions, and the secondary claim is for recovery of the damage suffered in pursuing that claim. The trial court was not convinced that the primary claim had been proved, and it dismissed it. It was persuaded that the secondary claim was proved, and allowed it. The appeal, as I understand it, is that the trial court went wrong, for having disallowed the primary claim, there was no basis for it to allow the secondary claim. The cross-appeal asserts that the primary claim ought to have been allowed.

13. So, should the trial court have allowed the primary claim? I do not think so. No evidence was placed before the trial court to demonstrate that the appellant recovered Kshs. 79,536.00 in excess of what it was entitled. The excess can only be the difference between what the appellant was entitled to recover and what was actually recovered or deducted. So, was there an excess? It was up to the respondent to demonstrate that to the court. He did not. He did not place any computations before the court to demonstrate that what was recovered was in excess of what should have been recovered, and that the excess amounted to Kshs. 79,536.00. I understand the respondent to have been telling the court that he got the IRAC to work out those figures for him, and that the IRAC did so, and that he had reports, which bore those figures. There were 3 of them, dated 23rd June 2017, 27th June 2017 and 5th May 2018. When the respondent testified, on 25th October 2021, he referred to those reports or opinions, but he

did not produce them as exhibits, for they were only marked for identification. When he concluded his testimony, he said "IRAC is not my witness." The said reports or opinions did not amount to evidence, to the extent that they were not produced as exhibits, by either the respondent or a witness from the IRAC. They were in the court record alright, as lists of documents, dated 15th July 2021, and filed on 22nd July 2021, but the mere filing of these documents, and their service on the appellants, did not make them evidence. They had to be formally introduced as documents at the trial, and produced, to pave way for their testing during cross-examination. That never happened. They never became evidence that the trial court could rely on in its judgment. So, they did not provide proof of the alleged excess payments that the respondent was talking about.

14. The respondent could also rely on a statement from the bank on the payments made on that account. He could then take the court through the statements, and demonstrate the payments recovered, and seek to establish that the recoveries went beyond what was expected. He could also have presented calculations or computations based on the recoveries made in that statement, to demonstrate the excess recoveries. The respondent did not present a statement from the bank. The bank statement was not among the documents in his list of documents, dated 15th July 2021. He did not present a schedule of analysis of such a bank statement, to demonstrate that excess recoveries were made from his account. When he testified on 25th October 2021, he did not produce or refer to any bank statement. The trial notes refer to a statement that was marked as MFI-6, but that reference is vague on the nature of the statement in question. It is not clear from the testimony of DW1, who testified on behalf of the appellant, on 21st February 2022, as to whether he referred to any bank statement on that loan account. When he was cross-examined, by the Advocate for the respondent, no reference was made to any bank statement, as a basis to bring out the fact that the moneys recovered from that loan account were in excess of what the appellant was entitled to recover from the respondent, and that the same totalled, Kshs. 79,536.00.

15. In view of the above, the trial court came to the correct conclusion, that there was no proof that the appellant recovered more from that loan account than it was entitled to. There was no proof that Kshs. 79,536.00 was recovered from that account. The burden was on the respondent to prove his allegation about the excess recovery; he did not discharge that burden. I agree with the appellant, that the judgment is self-contradictory, for having found that the respondent had not proved the excess recovery, the trial court had no basis to find and hold that there had been recovery of some money in excess. Curiously, although it was concluded that some excess money was recovered, the trial court did not go on to identify the specific figure of the amount of money that it said was recovered, nor the date or dates when the deductions or recoveries were made. The 2 findings by the trial court on the primary claim were inconsistent. They could not possibly stand together. What is clear, from the trial record, is that that primary claim was not proved, and the proper thing should have been to dismiss it, and leave it at that.

16. Was there basis for grant of the secondary claim, relating to accommodation, transport and consultancy fees? I do not think so. The secondary claim rested or hinged on the primary claim. It was an appendage to that primary claim. Once that primary claim was dismissed, the secondary claim was left without a base or foundation. The said expenses were allegedly incurred in the process of pursuing reimbursement for or refund of the alleged excess payments made to the appellant by the respondent. The respondent failed to prove before the trial court that the alleged excess payments existed. That failure meant that whatever expenses he might have incurred in pursuit of the alleged excess payments or recoveries became unjustified, and were not recoverable. It is in respect of that that the appellant argues that there can be no liability without fault. It was not demonstrated that the appellant was at fault, to the extent that it had not been proved that it had recovered excess moneys from the respondent's loan account. The appellant could not, therefore, be held liable to settle the respondent's

expenses, incurred when he was pursuing that alleged claim, which claim he failed to prove before the trial court. The trial court ought not have awarded that secondary claim. It is true that documents were produced in court, to support those expenses, and those documents were not challenged by the appellant. However, those expenses were unjustified, so long as the respondent did not prove or lost the primary claim.

17. Overall, there is merit in the appeal herein, and no merit in the cross-appeal. I shall allow, accordingly, the appeal, and dismiss the cross-appeal. The final order is that the order, by the trial court, in the judgment of 8th April 2022, in Busia CMCCC No. 244 of 2018, awarding the respondent a sum of Kshs. 387,000.00, is hereby set aside, and substituted with an order dismissing the claim on the alleged expenses. The appellant shall have the costs, both here and at the trial court. Orders accordingly.

JUDGMENT IS DELIVERED DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 28TH DAY OF SEPTEMBER 2023.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Messrs. Olendo Orare & Samba LLP, Advocates for the appellant.

Mr. Juma, instructed by JV Juma & Company, Advocates for the respondent.