



Kahindi v San Marco Savings & Credit Co-operative Society Limited (Civil Appeal E077 of 2023) [2023] KEHC 25975 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25975 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E077 OF 2023
M THANDE, J
NOVEMBER 30, 2023**

BETWEEN

SAMUEL KIBONI KAHINDI APPELLANT

AND

**SAN MARCO SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED RESPONDENT**

*(An Appeal from the Judgment of Hon. James Ongondo, Senior
Principal Magistrate on 10.5.23 in Malindi CMCC NO. 32 of 2020)*

JUDGMENT

1. The Appeal herein arises from the Judgment of Hon. James Ongondo, Senior Principal Magistrate on 10.5.23 in Malindi CMCC NO. 32 of 2020. The Appellant instituted the suit in the trial court against the Respondent, a savings & credit co-operative society, of which he is a member, claiming overpayment of loans advanced to him through deductions and underpayment of interest on his deposits. He thus sought the following orders which are reproduced hereunder:
 - a. A declaration that the Respondent has an obligation to issue statements to the Plaintiff in that the Plaintiff has been under paid interest on deposits since the year 2014.
 - b. Damages.
 - c. Costs.
 - d. Interest at Court rates.
 - e. Any other Suitable Relief that this Honourable Court may deem fit.
2. In his plaint dated 5.5.2020, the Appellant claimed that in 2011, he borrowed from the Respondent, the sum of Kshs. 230,000/=. He was last issued with a statement in 2016. On 8.12.18, during the



Sacco Budget day, he demanded Sacco statements from the Respondent for 2017-2018. He also sought the statement for what he referred to as the “2015 February loan from the then Chase Bank of Kshs. 238,750 and the 2016 August normal loan of Kshs. 300,000/=.” He alleged that his loan repayment deduction rose from Kshs. 14,425 in August 2019, to Kshs. 16,811 in September 2019. Further that the statement issued by the Respondent for the year 2014 did not reflect deposits of Kshs. 1,500 for 5 months from August to December despite having been deducted in his pay slips. This resulted in his deposits and loan balance remaining constant at Kshs. 55,000 and Kshs. 124,582 respectively.

3. The Respondent filed its defense dated 20.7.2020 in which it denied all the allegations by the Appellant. The Respondent further averred that the Appellant’s claim was full of innuendo and that no documents had been produced to support his claim.

4. In his brief judgment of 10.5.2023, the learned Magistrate dismissed the suit and stated:

I have carefully considered the plaintiff’s evidence *viz a viz* the pleadings and contents of the plaint. The plaintiff has complained that the defendant issued a statement for the year ending 2014 and the same did not reflect in the Sacco’s statement deposits for 5 months from August to December, 2014. The plaintiff however produced pay slips for two months only in August and September, 2019 thus the court was unable to decipher what the plaintiff’s grievances were.

In seeking judgment for statements for 5 months in 2014 and providing pay slips for August and September 2019, I find that the plaintiff’s claim does not disclose a reasonable cause of action.

I consequently order the suit dismissed forthwith. Each party to bear own costs.

5. Being aggrieved by the decision of the trial Magistrate, the Appellant filed the appeal herein dated 30.5.23. The grounds of appeal are reproduced hereunder:

1. That the Honourable Magistrate erred in Law and in fact and in failing to find that the Claimant’s payslips for the year 2014 were indeed filed in Court on 20th of May, 2020 in the Claimant’s list of documents in page 13 of the Claimant’s bundle of documents dated the 5th of May, 2020 under Skk 2 b. (xxxxxix) from pages 34 to 36 of the Claimant’s bundle of documents filed on 1st March, 2022.
2. That the Honoural Magistrate erred in law and in fact when he failed to find and consider the Loan Defaulting Letter dated the 20th of March, 2018 in page 20 of the Claimant’s bundle of documents amounting to Kshs.237,555 as at December, 2017 without statement based evidence; the incomplete loan form without part (1) and (j) as loan receipt and breakdown, the strange loan form in which the handwriting and the signature does not match those of the Claimant and the loan form in which no money was received in pages 91, 92 and 98 respectively as can be referred from the Respondent’s bundle of documents.
3. That the Honourable Magistrate erred in law and in fact by not awarding full special damages to the Applicant for the period of nine (9) years and four (4) months form the year 2014 up to the date of Judgement that the claimant has been economically frustrated at work.
4. That the Honourable Magistrate erred in law and in fact when he failed to award damages in favour of the Applicant for obligatory failure by the respondent to issue to the Claimant his rightful Loan Accounts Statements as per the Respondent’s By-Laws, Credit Police, the Kenya Co-operatives Act and *the Constitution* of Kenya.



5. That the Honourable Magistrate erred in law and in fact when he failed to take into account the Claimant's Loans repayment deductions by the Respondent having gone beyond the Loans advanced and his demand for the Sacco Loan Accounts Statements for the years 2017 up to date remains unattended to by the Respondent despite the referral to Court Annexed Mediation vide the MLD/MED/023 of 2022 Order before Honourable Ivy Wasike – Deputy Registrar of the High Court issued on the 16th June, 2022.
6. That the Honourable Magistrate erred in law and in fact when he failed to find fit to issue an order to the Respondent to cease deductions as Claimant's Loan Repayment.
6. The Appellant prayed that:
 - a. The said Judgment of the Honourable Court be set aside and this Court do make its findings thereof.
 - b. This Honourable Court do set this for re-trial before another Court of competent jurisdiction.
 - c. The Respondent to refund the Claimant all his Loan Repayment deductions having been effect up to date.
 - d. The Respondent to cease deductions as Claimant's Loan Repayment.
 - e. The costs of this Appeal be borne by the Respondent.
7. Parties filed their written submissions which I have duly considered.
8. The Appellant's key complaint is that the learned Magistrate erred in law and fact in failing to find that his pay slips for the year 2014 were filed in court on 20.5.2020 in his list of documents. He urged the Court to set aside the judgment of the trial court. He also sought re-trial before another court of competent jurisdiction. The Appellant cited numerous authorities which I have duly considered.
9. For the Respondent, it was acknowledged that there are more than 2 pay slips but contends that there is no proof of foul play on its part by delaying the issuance of the statements. The Respondent went on to justify its conduct and submitted that the Appellant did not prove any injury occasioned by its conduct, to warrant the award of damages. The Respondent argued that the Appellant can easily be supplied with statements and wondered why he is bent on pursuing the matter in court. The Respondent urged that the Appeal be struck off as it is in bad faith.
10. I have carefully perused the record. I note that the pay slips in question for the period August – December 2014 were actually filed by the Appellant, contrary to the finding of the trial Magistrate. In light of this, I agree with the Appellant that the trial Magistrate was clearly in error in finding that although the Appellant sought judgment for statements for 5 months in 2014, he only provided pay slips for August and September 2019.
11. The power of this Court exercising its appellate jurisdiction to order a new trial is stipulated in Section 78 (1)(e) of the [Civil Procedure Act](#), which provides:
 1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - (e) to order a new trial.



12. Order 42 Rule 26 of the Civil Procedure Rules further provides the power of the Court to order new trial as follows:

If upon the hearing of an appeal it shall appear to the court to which the appeal is preferred that a new trial ought to be had, it shall be lawful for the said court, if it shall think fit, to order that the judgment and decree shall be set aside, and that a new trial shall be had.

13. The purpose of a retrial is to correct defects in a trial. This Court has found that the trial Magistrate clearly misdirected itself by finding that the Appellant had not filed the pay slips in question, when all along they were in the court record. The trial Court did not give due consideration to the Appellant's claim against the Respondent. This failure on the part of the trial court occasioned a clear failure of justice. As a result, there was violation of the Appellant's right to a fair trial as guaranteed in Article 50 of *the Constitution* which provides:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

14. The Appellant has the right to have his dispute resolved by the application of law and decided in a fair and public hearing and to have all the evidence he presents to the court taken into account, before a final decision made.

15. In the case of *Josphat Muthuri Kinyua & 5 others v Fabiano Kamanga M'tirikia [2021]* eKLR, Muriithi, J. allowed a retrial and stated:

28. In the present case, this Court finds that the hearing at the trial Court proceeded, based on a mistaken view, now corrected by this Court, that it was not necessary to call evidence on liability. Despite knowing that this was required, the trial Court failed to bring this to the Appellants' Counsel attention. The mistake in failing to call evidence, was primarily one of Counsel in his misinterpretation of the provisions of Order 10 Rule 6 on entry of interlocutory judgment and his failure to take note of the provisions of Order 10 Rule 9 requiring hearing in all other undefended claims.

16. I concur with the learned Judge. In the instant case, the issue was not failure to call evidence but failure by the learned Magistrate, to consider evidence that was on record and stating that the same had not been provided. The failure to take into account evidence that was on record calls for the setting aside of the impugned decision and a retrial of the Appellant's case. In light of this, this Court shall not analyze the evidence on record or the rival submissions, particularly on whether the Appellant proved his case in the trial court. To do so will prejudice the retrial.

17. The inevitable conclusion drawn by this Court is that the circumstances of the case and the wider interests of justice require the Court to order a retrial of the case pursuant to the provisions of Section 78(1)(e) of the *Civil Procedure Act* and Order 42 Rule 26 of the Civil Procedure Rules.

18. The upshot is that the Appeal succeeds and the Court makes the following orders:

- i. The Appeal is allowed to the extent that the judgement of the trial court dated 10.5.23, is hereby set aside.
- ii. There shall be a retrial of the Appellant's case by a Magistrate other than Hon. James Ongondo.



- iii. The lower court record shall be returned to the trial court and the parties are directed to appear before the Hon. Chief Magistrate on 22.1.24 for directions on the retrial.
- iv. There shall be no order as to costs.

DATED AND DELIVERED IN MALINDI THIS 30TH DAY OF NOVEMBER 2023

M. THANDE

JUDGE

In the presence of: -

..... for the Appellant

..... for the Respondent

..... Court Assistant

