



**Absa Bank Kenya PLC v Atieno (Civil Appeal E073 of 2022)
[2023] KEHC 26633 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E073 OF 2022
KW KIARIE, J
DECEMBER 20, 2023**

BETWEEN

ABSA BANK KENYA PLC APPELLANT

AND

JACKTON OSINDO ATIENO RESPONDENT

*(Being an Appeal from the judgment and decree in Homa Bay Chief
Magistrate's CMCC No.59 of 2020 by Hon. T.M Olando–Principal Magistrate)*

JUDGMENT

1. Absa Bank Kenya PLC, the appellant herein, was the defendant in Homa Bay Chief Magistrate's CMCC No.59 of 2020. The respondent had sued for an order of specific performance in respect of account number 202xxxxxxx domiciled at the Homa Bay branch, a declaration that he had cleared his loan repayment, and an order of permanent injunction restraining the defendant from demanding repayment of a loan advanced to him. He also sought general damages for embarrassment, inconvenience, and hardship. He contended that the appellant caused him to be erroneously listed in the Credit Reference Bureau. The learned trial magistrate delivered the judgment in favour of the respondent on the 27th day of July 2022.
2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Oundo, Muriuki & Company Advocates. The following grounds of appeal were raised:
 - a. The learned magistrate failed to appreciate that the terms of the transaction contained in the scheme loan application form dated 16th December, 2009 letter of offer dated 16th December, 2009 and the Scheme loan checkoff authority date 12th December, 2009 were binding on all parties.



- b. The learned magistrate failed to appreciate that under the three contracts, it was the obligation of the borrower, and not the Teachers Service Commission to repay the outstanding loan.
 - c. The learned magistrate erred in both law and fact, in failing to appreciate that retirement is one form in which employment contract is terminated.
 - d. The learned magistrate erred in both law and fact in finding that the loan balance is nil yet the appellant had sufficiently explained that the writing off of the loan balance was only for purposes of book keeping and did not absolve the borrower of the obligation to repay the outstanding amount.
 - e. The learned magistrate erred in law and in fact by considering extraneous factors neither pleaded nor produced as evidence.
 - f. The learned magistrate erred in law and in fact by awarding excessive damages of kshs.200,000/- yet the plaintiff neither pleaded the particulars of embarrassment, inconvenience and hardship nor demonstrated the same in his testimony.
 - g. The learned magistrate erred in fact and law by granting an order of permanent injunction to restrain the appellant from recovering the loan balance yet the plaintiff still has an outstanding loan balance of kshs.110,623/- as at 23rd January 2020.
 - h. On the basis of the evidence led, the learned magistrate erred in finding in favor of the plaintiff as prayed.
3. The respondent opposed the appeal through the firm of M/S Aluoch Odera & Nyauke Advocates, arguing that they had repaid the entire loan and the appeal lacked merit.
 4. As the first appellate court, it is my responsibility to carefully review all of the evidence presented and take into consideration that I did not have the opportunity to observe the witnesses testify and their demeanor. I will follow the principles outlined in the case of *Selle v. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, which states that the first appellate court must examine and assess the evidence that was presented in the trial court, and then come to its conclusions on the matter.
 5. The respondent's case revolved around the issue of whether he had repaid the loan he was advanced or not. The respondent contended he had for the appellant had indicated his loan balance as zero-zero. He also argued that the appellant ought to have tailored the loan repayment to lapse on or before the retirement date.
 6. It is not reasonable for the respondent to argue that the appellant should have made the loan repayment deadline on or before the retirement date. If a loan applicant shows willingness and the ability to repay the loan, the lender will not restrict repayment to the retirement date. The respondent had an obligation to repay the loan even after retirement or if his employment contract was terminated. Clause X of the agreement made this position abundantly clear. It Stated:

If the Borrower's employer fails to remit any monthly installment as and when due, the Borrower shall pay interest on the overdue amount in accordance with condition 10 of the annexed conditions. The Borrower is hereby notified that the remittance of the repayment installments by the borrower's employer is purely administrative and that the legal obligation to repay the loan rests with the Borrower and not the Borrower's employer. In the event of any default in repayment the bank shall have the legal recourse to the Borrower.



The termination of employment or retirement status could not have affected the repayment of the loan.

7. The respondent had sought an order of permanent injunction to restrain the appellant from demanding the repayment of the loan. In the case of *Stanbic Bank & another v. Martin Tumaini Ngala* [2018] eKLR W. Korir J. (as he then was) stated:

28. By approaching the court with a prayer for a permanent injunction restraining the 1st Appellant from repossessing the motor vehicle, the Respondent was seeking the assistance of the court to rewrite the contract between him and the 1st Appellant. One of the terms of the loan agreement was that upon default the 1st Appellant could repossess the motor vehicle for disposal so as to recover the money advanced to the Respondent. A permanent injunction would have therefore denied the 1st Appellant the right to repossess the motor vehicle. The main prayer sought in the plaint was therefore untenable.

8. In the instant case the learned trial magistrate erred in granting the permanent injunction. This had the effect of the court protecting the respondent from the repayment of the loan advanced to him.

9. The defendant through Samwel Njuguna (DW1) testified that the balance of the respondent read zero-zero for the bank had to close the account for the inspection of books and they operated a default account for that purpose. His testimony was that they had communicated to the respondent that he had an outstanding balance of Kshs. 110,693.90. it would appear that the learned trial magistrate did not appreciate the meaning of “write-off” in the banking industry parlance. The Court of Appeal in the case of *Nicholas Mabihu Muriithi v. Barclays Bank Kenya Limited* [2018] eKLR on write-off said:

From the evidence presented by the respondent in the form of the Central Bank of Kenya Prudential Guidelines, we are indeed persuaded that in banking terms, debts are classified into categories depending on their performance. They are either: normal debts, watch debts, substandard debts, doubtful debts or loss. The latter, in which the appellant’s debt fell, constitutes, as the name implies, a loss to the bank, which are considered uncollectible or of such little value that their continued recognition as assets is of no use to the bank.

Because the debt in this dispute was a loss to the respondent, at that stage it wrote it off. Was the appellant absolved from his obligation under the charge or loan agreement? A bad debt that has been written -off does not suggest the absence of a legitimate claim against the debtor whose debt is being written-off. It is done for purposes of taxation and bookkeeping and only if there are no or only slim chances of recovering the debt. See *Mohammed Gulambusseini Farzal Karmali and Another V C.F.C. Bank Limited and Another* (2006) eKLR. But if the debtor’s financial status improves, nothing stops the creditor from pursuing and recovering the debt.

10. The respondent should pay his debt. The judgment by the learned trial magistrate is set aside in its entirety with costs, in the lower court and this court.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER 2023

KIARIE WAWERU KIARIE

JUDGE

