



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 79 OF 2017

BAHATI MURWA.....APPELLANT

VERSUS

FAULU KENYA LIMITED.....RESPONDENT

[An appeal from the Judgment of the Chief Magistrate's Court at Kisumu

(Hon. W. K. Onkunya SRM. delivered on the 10th November, 2017

in CMCC NO. 310 of 2016]

JUDGMENT

The Appellant, **BAHATI MURWA**, has lodged an appeal to this Court following the dismissal of the suit he had instituted against the Respondent, **FAULU KENYA LIMITED**.

1. By a Plaint dated 23rd May 2014, the Appellant had asserted that he was the registered owner of a motor vehicle **KAR 667Z, RENAULT PRIME MOVER**.
2. It was the Appellant's case that the Respondent registered a financial facility with themselves, without his consent, authority or knowledge. He emphasized that he had never applied to the Defendant for any financial facility.
3. Therefore, the Appellant asserted that by charging a financial facility to his name, the Respondent perpetuated fraud and negligence against him. He set out 7 particulars of the alleged fraud and negligence.
4. Furthermore, the Appellant set out 5 particulars of alleged "*illegalities*" which were done by the Respondent, leading to the theft of the Appellant's identity.
5. He stated that the Defendant had knowingly charged his vehicle to an anonymous person or a fictitious name, leading to injury being occasioned to the Appellant.
6. In the result, the Plaintiff prayed for the unconditional return of his log book, and for General Damages. He also prayed for the costs of the suit.
7. In answer to the suit, the Defendant filed a Defence.
8. First, the Defendant pointed out that the motor vehicle **KAR 667Z RENAULT PRIME MOVER** was registered in the joint names of the Plaintiff and the Defendant.
9. According to the Defendant, it had granted financial facilities to **LINDA BRENDA ATIENO WANJALA**, and that the Plaintiff had personally guaranteed the said facilities.
10. The Defendant conceded that the Plaintiff was not a customer of theirs, as the Plaintiff had only guaranteed the borrower named **Linda Brenda Atieno Wanjala**.
11. The Defendant denied all the particulars of the alleged fraud and negligence which the Plaintiff had attributed to it.

12. The Defendant asserted that it had an elaborate system of handling loan applications and also of approving securities and perfecting them. Therefore, the Defendant insisted that there was no mistake whatsoever in regard to the motor vehicle in issue.
13. The Defendant said that the person, **Linda Brenda Atieno Wanjala**, whom the Plaintiff had guaranteed, was not a fictitious person.
14. The Defendant's contention was that there was a separate understanding between the Plaintiff and the customer, pursuant to which the said customer would pay to the Plaintiff, an unspecified consideration.
15. However, when the customer failed to pay to the Plaintiff the percentage of the loan, as had been agreed him and the customer, the Plaintiff complained to the Defendant that the customer had duped him.
16. It was the Defendant's case that the Plaintiff had made up a fictitious, dishonest and ambitious claim, which he had calculated to reap from the Defendant.
17. Therefore, the Defendant asked the court to dismiss the suit.
18. After a full trial, at which the only person who testified was the Plaintiff, the trial court dismissed the suit.
19. Being dissatisfied with the Judgment, the Plaintiff filed a Memorandum of Appeal, raising six grounds of appeal, which can be summarized as follows;

(1) The trial court failed to consider the issue of fraud, which the plaintiff had raised against the defendant.

(2) The trial court ought to have held that the plaintiff's log book was fraudulently registered in the joint names of the plaintiff and the defendant.

(3) The defendant did not discredit the evidence or allegation of fraud, as the defendant did not adduce any evidence in that regard.

(4) As no evidence was produced by the defendant, that constituted the lack of a defence.

(5) The trial court misdirected itself on the standard of proof.

(6) The trial court misdirected itself when it dismissed the suit with costs.

20. In considering the appeal, I am obliged to re-evaluate all the evidence on record.
21. **PW1** is the Plaintiff. He testified that he was the registered owner of the motor vehicle **KAR 667Z Renault Prime Mover**.
22. He testified that since the year 2011, he had used the said truck to get facilities from various banks. However, he had never applied for any financial facility from the Defendant. Notwithstanding that fact, the Plaintiff testified that the Defendant had registered a facility in his name.
23. He testified that the Defendant had negligently, fraudulently, illegally and without his knowledge, charged the truck **KAR 667Z** to an anonymous person.
24. As a consequence of the Defendant's alleged negligence, the Plaintiff asserted that he had suffered huge financial loss, causing him to be unable to run any of his projects.
25. He also told the trial court that the negligence of the Defendant caused him to incur huge interest with banks, which he had been unable to service.
26. The Plaintiff testified that the NIC Bank had repossessed his Mercedes Benz Trailer, after he had failed to pay his monthly instalments: He attributed that to the Defendant's actions.
27. It was the evidence of the Plaintiff that his monthly income was as follows;

KSHS	FROM
(a) 600,000	Rural Electrification Authority
(b) 500,000	Kenya Power

(c) 300,000	Bondo University
(d) 200,00	Great Lakes University, Kisumu

28. During his testimony, the Plaintiff denied ever having visited any offices of the Defendant. He said that he had no idea how his log book found its way into the Defendant's hands.

29. When he was being cross-examined the Plaintiff said he never guaranteed a loan to Linda Belinda Otieno Wanjala. He described her as a stranger.

30. Although the Plaintiff did not know how the log book got into the hands of the Defendant, he did not report to either the Kenya Revenue Authority or the Police or any other authority about it, and about the forgery which appeared to make him the guarantor for the facility granted to a stranger.

31. Having given due consideration to the evidence on record, I find that the Plaintiff did not prove that the Defendant was guilty of any fraud as alleged or at all.

32. It was common ground that the Plaintiff did not have an account at Faulu Kenya Limited. I am therefore unable to understand how the Defendant could therefore have allowed transactions in an account which did not exist.

33. The Plaintiff did not lead any evidence to show the lack of due diligence on the Defendant's part, in the verification of information about any of its customers.

34. There was also no evidence to show that the Defendant;

(i) did not understand the financial dealings of its customer; or

(ii) failed to verify or validate the customer's identity; or

(iii) did not have policies, procedures or controls designated to detect identity theft; or

(iv) failed to detect or identify suspicious transactions; or

(v) failed to know its customers as by law required.

35. I further found no evidence that the identity of the Plaintiff was stolen as alleged or at all.

36. Although the Appellant made submissions based on alleged "*partially filled forms*" such forms were never produced in evidence.

37. As the Appellant submitted, a bank owes its client a duty of care when carrying out its transactions.

38. Indeed, there is no doubt that when carrying out the customer's instructions, the bank is under an obligation to exercise reasonable skill and care.

39. However, as the Appellant stated very categorically in this case, he was never a customer of the Defendant. In the circumstances, the Appellant has not demonstrated to the court that the Defendant owed him a particular duty of care; and that the Defendant failed to discharge the said duty.

40. The Appellant is well conversant with the evidentiary burden, hence his submission that;

"He who alleges must prove"

41. Therefore, when the Appellant alleged that there was an illegality, it was incumbent upon him to prove it.

42. On the other hand, the Defendant submitted that the failure by the Plaintiff to explain his relationship with the borrower can only lead to one conclusion, that the Appellant knew who the borrower was and the fact that the borrower was unable to repay the loan.

43. I am afraid, I failed to find any nexus between the Plaintiff's assertion that he did not know the borrower, and the suggested conclusion that he not only knew the customer, but also knew that she was unable to repay the loan.

44. The Plaintiff testified that the borrower was a stranger to him.

45. At no time did the Defendant cross-examine the Plaintiff about his alleged nexus with the borrower.
46. The Respondent urged this court to find and hold that the Appellant was still under an obligation to satisfy the loan facility advanced to Linda, who had defaulted.
47. However, the case before me did not have any counter-claim lodged by the Defendant.
48. And in any event, the Defendant failed to produce any evidence before the trial court, which would then have enabled the court to make a determination on the alleged debt owed by the Defendant's customer.
49. Furthermore, the Defendant's said customer was not a party to the case before me, therefore, the court cannot make a determination that would have a direct effect upon her, when she has neither been sued, nor been given an opportunity to be heard.
50. In conclusion, I find that the learned trial magistrate was right to have concluded that the Plaintiff;

(a) failed to prove that he suffered immensely because he was unable to secure a loan using the truck, to improve his business;

(b) failed to prove that he was in business, and that he consequently suffered loss and damage;

(c) failed to prove the particulars of the alleged fraud or negligence or illegalities;

(d) failed to prove his case on a balance of probabilities.

51. Accordingly, the appeal has no merit, and it is therefore dismissed.

52. I uphold the judgment of the learned trial magistrate.

DATED, SIGNED AND DELIVERED AT KISUMU

This 22nd day of April 2021

FRED A. OCHIENG

JUDGE