



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CIVIL APPEAL NO.13 OF 2019**

**BETWEEN**

**VITALIS MAKOKHA WAMBIA.....APPELLANT**

**AND**

**CO-OPERATIVE BANK OF KENYA.....RESPONDENT**

***(Being an Appeal from the ruling and order in Busia Chief Magistrate's Court***

***Civil Case No.110 of 2017 by Hon. Maureen A. Odhiambo – Resident Magistrate)***

**JUDGMENT**

1. Vitalis Makokha Wambia, the appellant herein was the plaintiff in Busia Chief Magistrate's Court Civil Case No.110 of 2017. He had filed a claim against the defendant for allegedly unfairly referring him to Credit Reference Bureau (CRB). He alleged that this unfair reference denied him a Bank Loan facility. He therefore sued for general damages.

2. The learned trial magistrate dismissed the claim after hearing both parties in her judgment which was delivered on 28<sup>th</sup> May, 2019.

3. The appellant was not satisfied with the decision and therefore, filed this appeal. The appellant was in person. He filed the following seven grounds of appeal which I have summarized as follows:

- a) That the learned trial magistrate erred in law and in fact by failing to analyze the documentary evidence tendered.
- b) That the learned trial magistrate erred in law and in fact by holding that the respondent had issued him with a notice to list him with CRB when the same was not done.
- c) That the learned trial magistrate erred in law and in fact by failing to appreciate that the loan had been repaid in full within the prescribed period.
- d) That the learned trial magistrate erred in law and in fact by arriving at a decision against the weight of evidence.
- e) That the learned trial magistrate erred in law and in fact by misinterpreting the exhibits tendered by the respondent.

4. The respondent was represented by the firm of Ogejo, Omboto & Kijala Advocates LLP. The appeal was opposed. It was contended that the judgment was supported by the evidence and the law.

5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

6. After perusing the evidence on record and the submissions by both parties only two issues for determination emerge:

- a) Whether the appellant had repaid his loan; and
- b) Whether he was unfairly referred to CRB.

7. In his evidence, the appellant contended that he cleared repayment of his loan in March 2008. He further stated that the bank gave him clearance in 2012. On clearance this is what he testified:

**In my evidence it is clear that I was to clear the loan in March 2008 when I finished payment of the loan. By 2013, 2014 I did not owe the bank anything.**

8. Section 107 of the Evidence Act provides as follows:

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

If the appellant was cleared by the bank to indicate that he had repaid the loan, he did not exhibit this clearance. Instead, he produced exhibits marked "VMW" IV and "VMW" V, These documents show that he had an outstanding loan of Kshs.8503.55 as at 2<sup>nd</sup> September 2016. The learned magistrate therefore based her finding on the evidence on record.

9. In his own admission, the appellant said that he was expected to have repaid the loan by March 2008. There was evidence to show that by 2<sup>nd</sup> September 2016 he had an outstanding loan. He never adduced evidence to the contrary. It therefore means he had defaulted and was rightly referred to CRB.

10. The appeal lacks merit and the same is dismissed with costs.

**DELIVERED and SIGNED at BUSIA this 30<sup>th</sup> day of September, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**