



**Mwalimu National Savings & Credit Co-operative Society Ltd v Kimeu & 8 others (Civil Appeal E218 of 2021) [2025] KEHC 621 (KLR) (Civ) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 621 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL E218 OF 2021  
LP KASSAN, J  
JANUARY 23, 2025**

**BETWEEN**

**MWALIMU NATIONAL SAVINGS & CREDIT CO-OPERATIVE SOCIETY  
LTD ..... APPELLANT**

**AND**

**BENJAMIN KIMEU ..... 1<sup>ST</sup> RESPONDENT  
WILLIAM CHENJO ..... 2<sup>ND</sup> RESPONDENT  
HENRY MUCHURA ..... 3<sup>RD</sup> RESPONDENT  
MONICA KINYUA ..... 4<sup>TH</sup> RESPONDENT  
GEOFFREY M'INOTI ..... 5<sup>TH</sup> RESPONDENT  
MARGARET MWAURA ..... 6<sup>TH</sup> RESPONDENT  
GERALD KARIUKI ..... 7<sup>TH</sup> RESPONDENT  
ESTHER NJUE ..... 8<sup>TH</sup> RESPONDENT  
LAWRENCE GITIRA NYAGA ..... 9<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Co-operative Tribunal  
at Nairobi delivered on 25th March, 2021 in CTC No. 521 of 2013)*

**JUDGMENT**

1. This appeal emanates from the judgment and decree delivered by the Co-operative Tribunal (hereafter the Tribunal) on 25.03.2021 in CTC No. 521 of 2013. The proceedings before the Tribunal were commenced by way of a statement of claim filed by Benjamin Kimeu, William Chenjo, Henry



Muchura, Monica Kinyua, Geoffrey M'noti, Margaret Mwaura, Gerald Kariuki and Esther Njue the claimants before the Tribunal (hereafter the 1<sup>st</sup> to 8<sup>th</sup> Respondent) against Mwalimu National Savings & Credit Co-operative Society Ltd, the 1<sup>st</sup> respondent before Tribunal (hereafter the Appellant) and Lawrence Gitira Nyaga, the 2<sup>nd</sup> respondent before the Tribunal (hereafter the 9<sup>th</sup> Respondent) seeking a permanent injunction restraining the Appellant whether by itself or its servants and or agents from receiving and or deducting monies from the 1<sup>st</sup> to 8<sup>th</sup> Respondents salaries towards payment of the loan sum advanced to the 9<sup>th</sup> Respondent or attaching 1<sup>st</sup> to 8<sup>th</sup> Respondents shares; a permanent mandatory injunction directed at the Appellant to return to the 1<sup>st</sup> to 8<sup>th</sup> Respondents all sums attached in form of shares or salaries on account of the alleged guarantee of the sums advanced to the 9<sup>th</sup> Respondent; and costs of the claim plus interest.

2. It was averred that at all material times, the 1<sup>st</sup> to 8<sup>th</sup> Respondent were members of the Appellant's Sacco and that they were purportedly guarantors of the 9<sup>th</sup> Respondent wherein between February 2010 and November 2011, the Appellant advanced to the 9<sup>th</sup> Respondent a total sum of Kshs. 6,552,000/-. It was further averred that the sum of Kshs. 6,552,000/- was advanced to the 9<sup>th</sup> Respondent by the Appellant on the basis of fraud, collusion or negligence on the part of the Appellant to wit the 9<sup>th</sup> Respondent defaulted in loan repayments. That in purporting to realize the guarantee, the Appellant attached the 1<sup>st</sup> to 8<sup>th</sup> Respondents share and in addition deducted sums from the forestated salaries towards recovery of the loan sum advanced to the 9<sup>th</sup> Respondent and in other instances, the 1<sup>st</sup> to 8<sup>th</sup> Respondents employer has remitted the said salary deductions to the Appellant. It was averred that the Appellant illegally and unlawfully attached the 1<sup>st</sup> to 8<sup>th</sup> Respondents respective shares and salaries therefore unless restrained by way of an injunction, the 1<sup>st</sup> to 8<sup>th</sup> Respondents shall suffer irreparable loss and damage for they shall be deprived of their salaries.
3. The Appellant filed response dated 27.11.2013 to the statement of claim admitting selective facets of the claim however denied the key averments in the claim. It was averred that upon default of the loan repayments by the principal debtor, the 9<sup>th</sup> Respondent, the Appellant rights to invoke and enforce the guarantee instrument crystallized culminating into the attachment and recovery of the loan amounts from the respective guarantors, the 1<sup>st</sup> to 8<sup>th</sup> Respondent herein. That the recovery process was fair, justified and within both the legal and contractual parameters.
4. The 9<sup>th</sup> Respondent on his part filed a response to the 1<sup>st</sup> to 8<sup>th</sup> Respondent's claim meanwhile lodged a cross-claim against the Appellant.
5. The suit proceeded to full hearing during which the 1<sup>st</sup> to 8<sup>th</sup> Respondent and Appellant called evidence in support of the averments in their respective pleadings. In its judgment, the tribunal found that the 1<sup>st</sup> to 8<sup>th</sup> Respondent had established a case on a balance of probabilities and proceeded to enter judgment against the Appellant and 9<sup>th</sup> Respondent to the effect that: - the 1<sup>st</sup> to 8<sup>th</sup> Respondent are liable to the Appellant to the extent of their guaranteed sum to the 9<sup>th</sup> Respondent as follows; 1<sup>st</sup> loan – Kshs. 500,000/-, 2<sup>nd</sup> loan – Kshs. 140,000/-, 3<sup>rd</sup> loan – Kshs. 100,000/-, 4<sup>th</sup> loan – Kshs. 300,000/-; a permanent injunction issued restraining the Appellant whether by itself, servant and or agents from deducting any sum from the 1<sup>st</sup> to 8<sup>th</sup> Respondent salaries towards the loan payment for the 9<sup>th</sup> Respondent; an order that the Appellant to refund the 1<sup>st</sup> to 8<sup>th</sup> Respondent all sums attached in form of shares or salaries on account over and above the loans stated above; and the Appellant and 9<sup>th</sup> Respondent to pay costs of the suit with interest.
6. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the tribunal's decision on nine (9) ground itemized in its memorandum of appeal.



7. The appeal was canvassed by way of written submissions of which the Court has duly considered alongside the authorities cited in support of the submissions.
8. That said, alongside the forestated, the Court has considered the record of appeal. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123. It is further settled that an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. Thus, upon review of the memorandum of appeal and submissions by the respective parties, it is the Court’s view that the appeal turns on whether the tribunal’s finding on the issues it identified for determination were well founded and justified.
9. Pertinent to the determination of issues before this Court are the pleadings, which form the basis of the parties’ respective cases before the tribunal and are relevant before dealing with evidentiary matters. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

10. This Court having earlier captured the gist of the respective parties’ pleadings, it serves no purpose restating the same at this juncture. Nevertheless, the gravamen of the Appellant’s contention before this Court is that the Tribunal’s finding went against the weight of evidence before it, in arriving at the conclusion that the 1<sup>st</sup> to 8<sup>th</sup> Respondent had established their claim on a balance of probabilities. The tribunal after restating and analyzing the evidence before it held as follows in its judgment; -

“It is important to note that the 2<sup>nd</sup> Respondent did not participate in the proceedings or give evidence despite him filing a statement of defence and counterclaim.

The issues arising from the case herein are: -

- a. Whether the claimants were guarantors for the 2<sup>nd</sup> Respondent in the loans he took from the 1<sup>st</sup> Respondent;
- b. Whether the claimant proved their case against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to warrant orders for permanent injunction as per their prayers in the statement of claim;
- c. Was there fraud by the 2<sup>nd</sup> Respondent and what is the effect of the same; and
- d. Were the 1<sup>st</sup> Respondent negligent in issuing the loans to the 2<sup>nd</sup> Respondent.



#### Issue No. 1

The claimants can only be held responsible for loans up to the amounts they guaranteed the 2<sup>nd</sup> Respondent of which he has defaulted.

.....

The loan of Kshs. 2,287,000/- should never have been advanced and or approved by the 1<sup>st</sup> Respondent. The anomalies and omissions therein are glaring. Thus these claimants should not be held responsible for this loan amount but for the loan upto Kshs. 500,000/- as stated by the claimant.

.....

We find that the Respondents were not diligent in processing the said loans. The amounts in words and figure are further grossly different as document Page 61 of claimants' documents.

To this as the claimant testified he guaranteed Kshs. 100,000/- for this loan and not Kshs. 2,029,000/-

#### Issue No. 2

....The 2<sup>nd</sup> Respondent loan issued to him in February 2010 of Kshs. 2,285,000/- Vision Loan.

We note that the application form – document Number was not filled properly contrary to the provisions of the Sacco by laws and or regulations.

The members agree with the claimants' submissions that the form sought not to have been dispatched to the 2<sup>nd</sup> Respondent or even approved. At the time of taking the said loan the 2<sup>nd</sup> Respondent failed to disclose he had 3 other existing loans....

#### Issue No.3

The documents produced by the claimants' as evidenced show glaring irregularities. Page 5 and 7 of the claimants bundle of documents confirm there was forgery involved by the 2<sup>nd</sup> Respondents as the two (2) letters are different and the contents therein.

#### Issue No. 4

It is common knowledge when it comes to deductions for salaries persons one cannot have deduction of more than 2/3rds of their salary.

The 1<sup>st</sup> Respondent was negligent in having the same deducted from the 2<sup>nd</sup> Respondent contrary to the *Employment Act*. Evidence as per payslip in page 10 of the claimant's bundle.

The claimant further evidence of the loan bringing form which is attached at page 9 of the claimants' bundle of documents was also not complete to show existing loans and new amounts being sought for.

The 1<sup>st</sup> Respondent was negligent on their responsibility to ensure the documents being presented to them are authentic and cannot seem to pass the blame on the Claimants'

The claimants only came to find out act of the negligence of the 1<sup>st</sup> Respondent when their savings were deducted and as such can not be blamed for agreeing to sign for the 2<sup>nd</sup> Respondent who used documents that were forged.

Upshot



We find that the claimants have established the case on a balance of probability and proceed to enter judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.” (sic)

11. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act* with the standard of proof in civil liability claims in our jurisdiction being reasonably discussed by the Court of Appeal in *Mumbi M’Nabea v David M.Wachira* [2016] eKLR and *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR. However, it is trite that the duty of proving the averments contained in the statement of claim lay squarely with the 1<sup>st</sup> to 8<sup>th</sup> Respondent whereas the averments contained in the Appellant’s response, lay on it. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that; -

“[T]he burdens on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

12. On the part of the 1<sup>st</sup> to 8<sup>th</sup> Respondent, the 1<sup>st</sup> Respondent testified as CW1. He adopted his witness statement as his evidence in chief meanwhile relied on bundle of documents in the list of documents, in support of the claim. The Appellant equally called one (1) witness, Charles Karanja, who testified as RW1. He too adopted his witness statement as his evidence in chief and adduced into evidence the list of documents filed on 23.03.2017 as RExh.1 and the one filed on 02.11.2018 as RExh.2. From both witness statements and evidence before the trial Court it is undisputed that the 1<sup>st</sup> to 8<sup>th</sup> Respondents were guarantors to facilities taken ought by the 9<sup>th</sup> Respondent, from the Appellant. The bone of contestation relates to the specific amounts guaranteed, of which the 1<sup>st</sup> and 8<sup>th</sup> Respondent assert that the 9<sup>th</sup> Respondent obtained the facilities by way of fraud and collusion on the latter’s part and negligence on the part of the Appellant. Specifically, the 1<sup>st</sup> to 8<sup>th</sup> Respondent itemized the particulars of fraud, collusion and negligence at paragraph 6 of the statement of claim.
13. The 1<sup>st</sup> to 8<sup>th</sup> Respondent’s quintessentially contended that they were only liable to the tune of Kshs. 500,000/- and not liable for the amount of Kshs. 2,287,000.00 out of the Kshs. 2,500,000.00; liable to the tune of Kshs. 100,000/- and not liable for Kshs. 2,029,000.00 with regard to the loan of Kshs. 2,100,000.00; liable to the tune of Kshs. 100,000/- and not liable for Kshs. 796,000/- which were all approved and advanced to the 9<sup>th</sup> Respondent. That the loan application forms that they had executed as guarantors were forged to increase the loan guaranteed contrary to what was signed by the guarantors whereas the 9<sup>th</sup> Respondent was completely ineligible to borrow or obtain a further advance on the loans on accord of having not cleared his earlier loans. That on accord of the forestated, anything founded on an illegality is itself illegal and a party cannot benefit from an illegality, let alone its own illegality. It was further argued that the Appellant by advancing the loans to the 9<sup>th</sup> Respondent flouted its own rules and regulations governing the disbursement of loans.
14. The kernel of the Appellant’s contestation is that the 1<sup>st</sup> to 8<sup>th</sup> Respondent were guarantors to the facilities advanced to the 9<sup>th</sup> Respondent whereupon default by the latter, they were entitled to proceed with the recovery from the guarantors. That there was no fraud or misrepresentation in issuing the



loan facilities applied for by the 9<sup>th</sup> Respondent, on the part of the Appellant, for the reasons that fraud alleged by the 1<sup>st</sup> to 8<sup>th</sup> Respondent was not proved. It was further contended that in the grand scheme of the issues, allegations of fraud as alleged by the 1<sup>st</sup> to 8<sup>th</sup> Respondent were baseless noting that no report was made to the police and the Appellant had not been charged with any criminal offence.

15. With the above in reserve, as earlier noted, the 1<sup>st</sup> to 8<sup>th</sup> Respondents claim was fundamentally founded on fraud. The applicable test of proving fraud in civil cases is well settled. Tunoi JA (as he then was), in *Vijay Morjaria vs Nan Singh Madhu Singh Darbar & Another* [2000] eKLR stated that; -

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

16. The standard of proof in respect of the issue is higher. The Court of Appeal in *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows; -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

17. In *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* [2004] eKLR, the same Court held that: -

“Fraud is a serious quasi-criminal imputation, and it requires more than proof on a balance of probability though not beyond reasonable doubt”.

18. Here, the 1<sup>st</sup> and 8<sup>th</sup> Respondent relied on a raft of documents in its list of documents dated 03.04.2017 and 23.01.2018 respectively, which included among other documents; loan application forms, purportedly a genuine and a forged letter of appointment; genuine and a forged payslips. The said loan application forms which were at the heart of the dispute were equally relied on by the Appellant by way of RExh.1, which the former asserts that the applications to wit the loans were advanced were forged whereas the latter maintained that the same were genuine and duly guaranteed. It was particularly contended by the 1<sup>st</sup> to 8<sup>th</sup> Respondent, that upon the guarantors being presented with the loan application forms, the same had different and lower loan amounts to that of which were eventually approved by the Appellant. The letter of appointment was equally at the centre of the dispute, wherein one captured that the 9<sup>th</sup> Respondent was employed on a two (2) year contractual term with the other capturing that the 9<sup>th</sup> Respondent was employed on permanent term. The same contestation as to genuineness of the payslips was likewise advanced.

19. It is notable that at the hearing of the matter, it is only the 1<sup>st</sup> Respondent who testified on behalf of the 1<sup>st</sup> to 8<sup>th</sup> Respondent. There was no other witness who tendered evidence in respect of the contested



documents and authenticity of the same notwithstanding the fact that the 1<sup>st</sup> to 8<sup>th</sup> Respondent suit was predicated on allegation of fraud and forgery of pertinent documents that led to advancement of the impugned facilities. The trial Court though correctly identifying the subject of fraud as an issue for determination did not address the question in depth. It only captured that the documents relied on by the claimant showed glaring irregularities notwithstanding the fact that the crux of the case was founded on fraud, collusion and or resultant negligence on the premise of the foretated. The tribunal's supposition that there was forgery, in respect of the letter of appointment, was not based on any tangible and or reasonable evidence, in order to arrive at the said conclusion, that it did. Aside from the letter of appointment, there were other documents pertinent to the claim that the 1<sup>st</sup> to 8<sup>th</sup> Respondent purported were forgeries, of which the trial Court did not address itself on. It was imperative of the 1<sup>st</sup> to 8<sup>th</sup> Respondent to adduce cogent evidence either by calling the author of the said letter or pay slips to justify the allegation of fraud and forgery. As is, the trial Court conclusively arrived at the determination it did without any comparative analysis of evidence to impeach the authenticity of the purportedly forged letters or document. With respect to the loan application forms, the 1<sup>st</sup> to 8<sup>th</sup> Respondent's evidence equally fell short of impeaching the same without relatable and cogent evidence on whether they were forged and or altered as purported by the 1<sup>st</sup> to 8<sup>th</sup> Respondent.

20. In the instant matter, to justify forgery, altering of documents and fraudulent representation of the loan application forms, it was pertinent that witnesses other than the 1<sup>st</sup> Respondent be availed to shore up the averments in the statement of claim. Here, the 1<sup>st</sup> to 8<sup>th</sup> Respondent opted to singularly rely on the 1<sup>st</sup> Respondent's evidence without more whereas the trial Court appears to have failed to appreciate the 1<sup>st</sup> to 8<sup>th</sup> Respondent's pleadings and the import of the evidence that ought to have been adduced and or relied on to demonstrate the averments in the pleadings. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* (2014) eKLR in considering the legal vis-à-vis the evidential burden held inter alia; -

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.

21. It must be remembered that it is not disputed that the 1<sup>st</sup> to 8<sup>th</sup> Respondent were guarantors to the 9<sup>th</sup> Respondent. What is in dispute is the fraudulent manner in which the 9<sup>th</sup> Respondent obtained facilities from the Appellant, with the 1<sup>st</sup> to 8<sup>th</sup> Respondent as guarantors. This despite the other issues emanating therefore. Thus, without substantiating the allegations of fraud it is difficult to see how collusion or negligence between the Appellant and the 9<sup>th</sup> Respondent would be illuminated without cogent evidence to justify the same, to wit, the tribunal's decision must be faulted. Despite having a clear delineation of what the issues in controversy in the matter were, the trial Court seems not to have interrogated and or juxtaposed the same to the averments in the 1<sup>st</sup> to 8<sup>th</sup> Respondent's pleadings and as a consequence arrived at an erroneous decision. Indubitably, the answer is that the 1<sup>st</sup> to 8<sup>th</sup> Respondent did not discharge their burden of proof as stipulated in *Karugi* (supra) and *Kinyanjui* (supra). It would be mindful, to note that the Court of Appeal in *C O Okere v Esther Nduta Kiiyukia & 2 others* [2019] eKLR while addressing the threshold of establishing fraud observed that “fraud is proved at a higher standard above balance of probabilities. To succeed, the appellant needed not only



to plead and particularize fraud, but also a basis by way of evidence, upon which a trial court would make a finding.”

22. It is worth noting that the part where the guarantors are supposed to sign is in the same page with the amount guaranteed (both in words and figures). These documents were produced as exhibits meaning that there was no contestation on their authenticity and besides its likely that the originals were available. Now, for example if you look at the amount guaranteed of Ksh 250,0000, there is clearly no alteration on the figures and words. There is no erasure at all prompting a question on how possible alteration could have been made. One can argue that alteration would however have been possible because of recent technology to make alteration i.e. by whitewashing the figures and words and printing a copy which comes out without the figures then putting new figures in the printed copy and printing another one - but this cannot alter the original signed copy at all. On the issue of disparity on figures, we all know that not all applications are done perfectly. There could be a mistake here and there but that does not negate the actual issue; - that a certain amount was guaranteed.
23. On the issue of deduction beyond the two thirds, that has a remedy independent of the responsibilities of guarantor.
24. Under Section 107 of the *Evidence Act*, the burden of proof lay with the 1<sup>st</sup> to 8<sup>th</sup> Respondent and if their evidence did not support the facts pleaded, they failed as the party with the burden of proof. See the case of Wareham t/a A.F. Wareham (supra). In the circumstances, the trial Court’s decision ought to be set aside and substituted with an order dismissing the 1<sup>st</sup> to 8<sup>th</sup> Respondent’s claim with costs.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY 2025.**

**HON. L. KASSAN**

**JUDGE**

In the presence of:

Ngethe holding brief Ague for Appellant

Nyako holding brief Maino for Respondent

Guyo - Court Assistant

