Amwago v Eco Bank Limited (Civil Appeal 49 of 2021)
[2025] KEHC 3477 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3477 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL 49 OF 2021

AC MRIMA, J

MARCH 21, 2025

BETWEEN

DR. JOSH TEDDY AMWAGO ..... APPELLANT

AND

ECO BANK LIMITED ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. S. Makila (PM) in Kitale Chief Magistrates Civil Case No. 228 of 2019 delivered on 22nd September 2021)

JUDGMENT

Background:

1. Through the Plaint dated 2nd July 2019, Dr. Josh Teddy Amwago, the Appellant herein, instituted Kitale Chief Magistrates Civil Case No. 228 of 2019 (hereinafter referred to as 'the suit') against the Respondent, Eco- Bank Limited (hereinafter referred to as 'the Respondent' or 'the Bank'). The Appellant was one of the Respondent's customers who operated a Bank Account with the Respondent in its Kitale Branch.

2. It was his case that sometimes in January 2017, he sought credit facility from Eclof Kenya Limited but was denied on account of the Respondent having enlisted him with Metropol Credit Reference Bureau (hereinafter referred to as 'the CRB') as a customer with a non-performing loan facility. Upon visiting the Respondent, the Appellant learnt that the Respondent had debited his Bank account with some maintenance fees, debit interests and excise duty levy accruing to Kshs. 11,540/- all which were unknown to the Appellant. When the Appellant pressed to know what had transpired in his account, the Bank credited the account with Kshs. 11,540/- thereby righting off the debits.

3. The Appellant posited that in order to have his credit status updated, he was compelled to pay Kshs. 11,877/-. It was his case that on 25th January 2017, the Respondent gave him a letter indicating that his overdrawn current account had been cleared and that his credit status as placed with the CRB would

be updated. The Appellant was aggrieved that the Respondent did not transmit the information about his overdrawn account to the CRB. As a result, the Appellant asserted, the CRB maintained the false information that his account was overdrawn with a balance of Kshs. 3.00/- and that the date of last payment was on 20th December 2013. The Appellant pleaded that he suffered a further damage by being denied a loan facility by KCB Bank Limited offered under KCB-Mpesa Loan scheme.

4. In all, the Appellant claimed that the Respondent breached the law and banking contract by failing to observe bank practice on dormant accounts and failing to notify him of the status of his account and classification as obligated by Standard Banking Practice. It was its case that despite his request, the Bank failed to close his account. He posited further that the bank increased its rate of banking without proper approval of the Cabinet Secretary for Treasury and contrary to Section 44 of the *Banking Act*.

5. The Appellant was further aggrieved that the Bank caused his account to be unlawfully debited with amounts that did not conform to the Banking Regulations as well as failed to comply with the Credit Reference Bureau Regulations by failing to issue a notice to the CRB within the stipulated period of being notified of an error. It was his plea that he had never applied for a loan.

6. On the foregoing, the Appellant prayed for general and aggravated damages and a refund of Kshs. 11,877/- with interests from 25th January 2017.

7. In its Statement of Defence dated 18th November 2019, the Respondent denied the Appellant's claim. It was its case that the Appellant defaulted in repayment of the overdrawn banking facility by failing to pay up the appropriate sums thus putting him into arrears. It also pleaded that the Appellant's name was lawfully submitted to the CRB when he defaulted in repaying the overdrawn banking facility and it could not be blamed for any consequences of the listing. It stated that it had an obligation to share credit information of its customers with the CRB and it cannot be faulted to that end.

8. It was its case further that when the Appellant regularized the overdraft, it wrote the letter dated 25th January 2017 but the said letter was not a guarantee and did not constitute any liability on its part. The Respondent pleaded that the Appellant could not be prevented from taking a loan since, as from 25th January 2017, he had no negative listing.

9. The Respondent alluded malice since the Appellant did not move to Court as soon as he realized he had a negative listing. He first cleared payment of the overdrawn banking facility then came to Court.

10. The Appellant and the Sammy Mirugu, the Respondent's Remedial Officer, were the sole witnesses. Upon assessing the evidence, the trial Court found that as at 29th October 2010, the Appellant's had a credit balance of Kshs. 1536/-. The account attracted monthly maintenance fees and e-banking/ATM fees. The Learned Trial Magistrate also found that as from 30th June 2011, the account was debited with the foregoing fees resulting in Kshs. 11,540/-. It was established that the Plaintiff paid the amount on 20th December 2013 and gave the instructions to close the account on 13th January 2014.

11. Although the trial Court found that the Appellant was wrongly listed at the CRB for failure by the Respondent to notify the Appellant its intention to have him listed, it nevertheless took judicial notice of the fact that Bank current accounts attract monthly maintenance charges. The Court found the Appellant at fault for leaving his account dormant and without sufficient funds to cater for such requisite contractual charges.

The Appeal:

12. Dissatisfied with the trial Court's findings, the Appellant lodged the Memorandum of Appeal dated 1st October 2021. It urged that the trial Court's findings, in so far as it disallowed him damages and costs, be set aside on the following grounds: -

    1. That the learned trial magistrate erred in law and in fact in invoking the tenet of Judicial Notice in concluding that current account was not like an ordinary account while failing to appreciate that various bankers operated accounts on varied terms and conditions.

    2. That the learned trial magistrate erred in law and in fact in finding fault on the part of the appellant while no evidence existed that was led by the Respondent and the same was not an issue pleaded by the parties.

    3. That the learned trial magistrate erred in law and in fact in failing to award damages to the Appellant.

    4. That the learned trial magistrate erred in law and in fact in depriving the Appellant costs of the suit while he was the successful litigant and in failing to uphold the provision of section 27 of the *Civil Procedure Act*, CAP 21 on the principle that costs follow the event.

The Appellant's submissions:

13. In his written submissions dated 29th April 2024, the Appellant argued that the trial Court ought not to have invoked judicial notice on the status of current account as no facts were received. The decision in Gupta -vs- Continental Builders Ltd [1976-80] 1 KLR 809 was relied upon on circumstances that make a Court take judicial notice. The Appellant also claimed that the Respondent had not produced any enabling contractual document entitling it to levy the debit charges to the extent of having the account overdrawn. The decision in Francis Joseph Kamau Ichatha -vs- Housing Finance Company of Kenya Limited (2014) eKLR was cited to buttress the foregoing position.

14. It was his case further that the Respondent, in violation of section 6 of the Banking (Increase of Rate of Banking and other Charges) Regulations, did not prove that that it brought to the Appellant existence of such charges. Regarding the forwarding of his name to the CRB and the claim on wrong listing, the Appellant submitted that he ought to be awarded general damages of Kshs. 2,000,000/- and Kshs. 3,000,000/- for aggravated damages since the Appellant visited the Respondent and requested his name to be removed from adverse false listing but failed to do so for a period of more than 5 years. The case of Joseph Maina Mwaura -vs- Equity Bank of Kenya Limited (2019) eKLR was relied upon where the Court upheld an award of Kshs. 700,000/- for wrongful listing.

15. On the award of costs, the Appellant submitted that he was the successful litigant at the trial Court and that the Court had no reason to decline costs of the action. The trial Court was faulted for failing to give reasons for the order direction each party to bear its own costs.

The Respondent's case:

16. Eco-Bank (K) Limited challenged the appeal through written submissions dated 2nd July 2024. It identified issues for determination namely; whether the Court erred in invoking judicial notice, whether it erred in finding fault on the Appellant, whether it erred in denying the Appellant damages, and whether it erred in in ordering each party to bear its own costs.

17. On the first issue, the Respondent, in reference to Section 59 of the *Evidence Act* and the decision in Gwer & 17 Others -vs- Mediheal Group of Hospitals Ltd & Anor, KEHC 5274 (KLR) submitted that not only can Courts take judicial notice suo moto, but also, judicial notice need not be supported by evidence. It was its case that the Respondent produced before the Honourable Court statement of Account for the period 1st January 2010 to 31st December 2017 which indicated that the Appellant's account accrued monthly maintenance charges of Kshs. 150 and Kshs. 200/- for e-banking and ATM transactions.

18. On the second issue regarding fault on the part of the Appellant, it was submitted that the learned trial magistrate correctly found that the Appellant failed to issue instructions to close the account, a fact that was supported by evidence. The decision in Remtco East Africa Limited -vs- Dominic Mutua Ngozo (2021) eKLR was referred to where it was observed that: -

> .... Apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong based on no evidence or on application of a wrong principle.

19. On the claim that the trial Court erred in failing to award damages, the Respondent pointed out that the Appellant pleaded that the Respondent breached contract and as such, general damages are not awardable in breach of contract. To buttress the position, the Court of Appeal decision in Kenya Tourist Development Corporation -vs- Sundowner Lodge Limited (2018) eKLR was relied upon.

20. Finally, on the issue of costs, it was submitted according to section 27 of the *Civil Procedure Act*, it generally follows the event and that whereas Courts have the discretion, it can depart from the rule where there are good reasons.

Analysis:

21. Having appreciated the respective parties' arguments and authorities cited, the issues that emerge for determination are as follows;

    i. Whether the Respondent erred in debiting the Appellant's account.

    ii. Whether the trial Court erred in invoking the legal principle of Judicial Notice and whether the Appellant's referral to the CRB was unlawful.

    iii. Costs.

22. This Court's role, as a first appellate Court, is well established. The Court of Appeal in the case of Susan Munyi -vs- Keshar Shiani [2013] eKLR observed thus: -

> .... As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

23. Similarly, in Abok James Odera t/a AJ Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates [2013] eKLR the Court set out the role of a first appellate court in the following terms;

> .... This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give

reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.

24. Speaking to the advantage the trial Court has in observing the witnesses and the need for the appellate Court to exercise restraint while differing with the findings of fact, the Court of Appeal of East Africa, in the case of Peters -vs- Sunday Post Limited (1958) E.A 424, observed as follows: -

> ... It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has the advantage of seeing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whenever the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.

25. With the foregoing guidance, the focus now turns to the issues for determination identified above.

Whether the Respondent erred in debiting the Appellant's account:

26. When the Appellant testified, it was his case that on 29th October 2010, he opened the account No. 0100035010XXXXXX with the Respondent at Kitale Branch. He stated that the account went dormant after two years when he left the country. The Appellant did not, however, produce his application to the Bank to operate an Account. No attempt was either made by the Appellant to compel the Respondent to produce such documents at the trial.

27. Be that as it were, on its part, the Respondent produced the Appellant's Account statements since the opening of the account. The statements showed various transactions and confirmed that indeed the Appellant had fallen into arrears over time on account of unpaid charges. The Respondent contended that the contract with the Appellant provided for such charges and that is why the Appellant eventually made his account good.

28. The cause of action was based on a contract. When the constituting document is not produced in evidence, the Court is put in a precarious position and, many a times, it may not have much legal room to ventilate the issues. In this case, the only document speaking to the relationship between the parties is the Account statement. The Appellant contended that the charges therein were unlawful and that was all. There was no attempt to challenge the charges either in the suit or elsewhere. The Appellant only averred, but did not prove the allegations. As such, the Appellant's averment fails and the trial Court was correct in finding as much. This Court, therefore, affirms that the Respondent was right in debiting the Appellant's account with the charges as they appear in the statement on record.

29. The issue is, hence, answered in the negative, in that the Respondent did not err in debiting the Appellant's account.

Whether the trial Court erred in invoking the legal principle of judicial notice and whether the Appellant's referral to the CRB was unlawful:

30. The previous issue resolved that the Appellant's current account attracted various levies which were explicit in the Statement of Accounts which was produced as an exhibit in the suit. The trial Court, therefore, need not have taken judicial notice that current accounts generally attract monthly maintenance fees since it was a fact evident on the face of the record.

31. This Court must, however, hasten to add the trial Court was not per se out of order in utilizing the legal tenet to make its finding. That is so because judicial notice, by definition is, a Court's acceptance,

for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact (See. Black's Law Dictionary tenth edition @ page 975). For convenience, the trial Court in interrogating the statement of accounts rightly arrived at the conclusion that current accounts have operation costs to them.

32. In Gwer & 17 Others -vs- Mediheal Group of Hospitals Ltd & Anor, KEHC 5274 (KLR), a decision relied upon by the Respondent, the Court observed as follows: -

    ..... The party who asks that judicial notice be taken of a fact has the burden of convincing the judge: -

    a. That, a matter is so notorious as not be the subject of dispute among reasonable men.

    b. That, the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy.

33. In this instance, the evidence that the Appellant's current account attracted monthly maintenance fees was readily available. The Statements of account were accurate and indisputable.

34. On whether the Appellant was wrongly listed as a defaulter with the CRB, the Respondent does not contest that the Appellant's name ended up at the CRB. What the Appellant contested was the process leading to the enlistment.

35. The trial Court dealt with this issue in two limbs. The first limb was whether the Appellant's account with the Respondent fell into arrears. The answer was in the affirmative. This Court, as well, agrees with the trial Court on this issue. There is ample evidence that the Appellant failed to put his account into funds to take care of the requisite charges.

36. As to what happened until the Appellant was enlisted, the trial Court also correctly referred to Regulation 25(1) of the Credit Reference Bureau Regulations, 2013 which called upon the Respondent to issue a 30 days' notice to the Appellant before submitting the Appellant's negative information to any of the registered credit reference bureaus. The Court then argued that since the Respondent was under a legal duty to refer such information to the CRB, then it did not err in making the reference unilaterally since it was the Appellant who failed to ensure that his account was always current.

37. Respectfully, that is where this Court parts its legal way with the trial Court. Regulation 18(1) of the Credit Reference Bureau Regulations, 2013 obligates Banks and other financial institutions to share any negative customer information with licensed bureaus. However, the process of enlisting such a customer is subject to Regulation 25(1) of the Credit Reference Bureau Regulations, 2013 which calls upon the Banks and other financial institutions to issue a 30 days' notice to the customer before submitting the customer's negative information to any of the registered credit reference bureaus. There is a reason for such a requirement. The reason must be hinged on the effect of one being enlisted as a defaulter. Such a mark has far-reaching repercussions on the defaulter including being ineligible from accessing any further credit facilities worldwide and loss of one's good standing. No doubt one also suffers pecuniary embarrassment and the lengthy period it takes for one to be delisted even after making good the default. That is why a Bank or financial institution must be certain that it served the appropriate notice of its intention upon the customer and to further accord the customer the 30 days' window to possibly make amends with one's financials.

38. A Bank or other financial institution which fails to undertake the above crucial step of serving the mandatory notice to its customer and instead unilaterally forwards the adverse information to any registered credit reference bureau acts in violation of the law and as equity has it, there can be no wrong without a remedy. This was, therefore, a case in which the Appellant's rights were variously infringed

and the law fragrantly ignored. The result is that the Respondent must be held culpable for such actions hoping that it will be more careful when handling such sensitive issues going forward. The Appellant was entitled to damages on the basis of the procedurally-wrongful referral. In coming up the award of damages under this head, this Court will not lose track of the fact that indeed the Appellant's account was truly in arrears and that was credible negative information on him. In other words, the Respondent only erred in not issuing the requisite notice to the Appellant. To this Court, therefore, such fault on the Appellant disqualifies him from any aggravated damages. Further, this Court has considered several decisions on comparable awards including those referred to by the parties.

39. While still on this discussion, this Court has to say something on the legal position that the remedy of damages is not available in cases of breach of contract. Whereas the position is correct, it is distinguishable in this case in that the Respondent has been found culpable not on the basis of breaching a contract, but instead breaching the law, that is Regulation 25(1) of the Credit Reference Bureau Regulations, 2013. In such cases, damages are one of the available remedies in law.

40. In the end, whereas the trial Court did not err in invoking the legal principle of judicial notice, the Appellant suffered adverse false listing at the CRB.

Costs:

41. The guiding principles applicable in costs were as stated in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, Sup Ct Petition No 4 of 2012; [2014] eKLR where the Apex Court stated that costs follow the event with the discretion of the Court exercised judiciously. The Court stated as follows: -

> (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation....
>
> Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well-illustrated by the considered opinions of this court in other cases.

42. In this case, the trial Court made an order allowing part of the Appellant's claim and ordered each party to bear its own costs. With tremendous respect, the trial Court did not give any reasons for the order on costs. In such a scenario and given that the suit went for full trial, then the discretion was not exercised judiciously. The order ought to be set-aside.

Disposition:

43. The appeal has largely succeeded thereby entitling the Appellant to appropriate remedies.

44. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the

Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.

45. Deriving from the above, the following final orders do hereby issue: -

a. Further to the sum of money awarded in the suit, the Appellant is hereby awarded Kshs. 500,000/= [Five Hundred Thousand Only] as General damages on account of wrongful referral of the Appellant's negative information to the Credit Reference Bureau. Interest on the general damages shall run from the date of this judgment.

b. The Appellant shall have costs of the suit as well as of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 21ST DAY OF MARCH, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for Learned Counsel for the Appellant.

No appearance for, Learned Counsel for the Respondent.

Chemosop/Duke – Court Assistants.