Njeru v Faulu Microfinance Bank Limited & another (Civil Appeal E016 of 2022) [2025] KEHC 6557 (KLR) (19 March 2025) (Judgment)

Neutral citation: [2025] KEHC 6557 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E016 OF 2022

DKN MAGARE, J

MARCH 19, 2025

BETWEEN

AGNES WAIRIMU NJERU .... APPELLANT

AND

FAULU MICROFINANCE BANK LIMITED .... 1ST RESPONDENT

GARAM INVESTMENT AUCTIONEERS .... 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. F Muguongo (SRM), dated 14.03.2022, arising from Nyeri CMCC No. 203 of 2019. The court dismissed the case with costs for lack of merit. The Appellant was the plaintiff in the court below. The appellant filed five grounds of appeal as follows:
    1. That the Learned trial magistrate erred in law and in fact in finding that the Plaintiff had not proved her case on a balance of probability.
    2. That the Learned trial magistrate erred in law and in fact inholding that the repossession of the appellant's motor vehicle was not unlawful yet the Respondents had returned the motor vehicle and the appellant continued to repay the loan.
    3. That the Learned Trial Magistrate erred in law and in fact not finding that the Respondents had irregularly repossessed the motor vehicle, and the same amounted to taking the law into their hands without due process being followed.
    4. That the Learned Trial Magistrate misdirected herself in law and in fact in not finding that the Ksh. 74,000/= paid as auctioneers charges should have been refunded.
    5. That the Learned Trial Magistrate erred in law and in fact in dismissing the Plaintiff's case with costs.

2. The appellant pleaded that she had paid diligently, paid her loan up to June 2019. She fell into arrears in June 2019 but paid the same on 13.07.2019. The Respondent proclaimed and attached motor vehicle registration number KCH 562S, without statutory notification or proclamation. The said motor vehicle was repossessed and riven to the Nyeri police station, causing massive financial loss to the Appellant. She paid for loss of Ksh 3,000/= as daily income. She also claimed for fraud and malice.

3. The plaintiff prayed for the release of the motor vehicle registration number KCH 562S, settle arrears and for loss of earnings from 12.07.2019, and costs.

4. The appellant pleaded that she had diligently paid her loan up to June 2019. Although she fell into arrears in June 2019, she cleared the outstanding amount on 13.07.2019. Despite this, the respondent proclaimed and attached motor vehicle registration number KCH 562S without issuing a statutory notice or proclamation. The vehicle was repossessed and taken to Nyeri Police Station, causing the appellant significant financial loss. She claimed a daily income loss of Ksh 3,000/= and further alleged fraud and malice on the part of the respondent.

5. The appellant prayed for the release of motor vehicle registration number KCH 562S, to be allowed to make settlement of arrears, compensation for loss of earnings from 12.07.2019, and costs.

6. The trial court ordered the release of the suit motor vehicle on 12/07.2019.

7. The defendant filed defence stating that the Appellant was not paying the loan diligently. They also raised a preliminary objection that the matter is sub judice, Nyeri CMCC 243 Of 2017. The preliminary objection was dismissed on 30.07.2020.

8. The plaint was amended to state that the 1st Respondent debited 50,000/= fees without authorization. The defendants also paid 24,000/=.

Evidence

9. The plaintiff testified that the vehicle and logbook were released to her. She was claiming for loss of user for Ksh. 3,000/= for three months.

10. On cross-examination, she stated that she was in arrears and that she regularized the loan immediately.

11. The defence called Ann Kihagi a branch manager. She stated that the appellant started paying Ksh. 29,923/= instead of Ksh. 33,843, that is less Ksh 4,000/=. The loan was thus in arrears all through. The appellant asked for a grace period of 3 months. She stated that the bank does not reschedule the loan. Repossession, the appellant regularized the loan. On reexamination, it was stated that the appellant was in arrears at the time of repossession.

Analysis

12. This being a first appeal, this court must re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence firsthand.

13. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

14. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

15. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> "The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

16. Cases are won on the basis of evidence and pleadings, as set out in sections 107-109 of the *Evidence Act*.

> "107.
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> (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.
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> (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.
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> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
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> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

17. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

18. This was further enunciated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

19. Parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> "
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> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> "…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……
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> …In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."
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> In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -
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> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into

the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

20. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings......'"

21. One of the pleadings in the appellant's file was that she was in arrears. It is therefore surprising that the appellant filed this Appeal. the court cannot re-write the contract for parties. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR as follows: -

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

22. After admitting that the appellant breached the contract with the first respondent, she knew better. It is also fallacious to equate the sale of chattels to the sale of land. The appellant cannot refer to statutory breaches without naming the statute breached. There is no doubt that the appellant was in arrears. Undoubtedly, the 1st repossession was entitled to possess the chattel.

23. It should always be remembered that when loans are given out, they ought to be paid. this enables others to borrow. This was stated in the case of Bank of Africa Limited v Juja Coffe Exporters Limited & 4 others [2018] eKLR as follows;

> The Court observed in the process, that 'a bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.' And so it is in this case.

24. The foregoing is enough to show that the appeal lacks merit. The same is consequently dismissed.

25. The next question will be who will pay for the costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.

26. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

27. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, 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, before, 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.

28. In the circumstances, the appeal is dismissed with costs of Ksh 65,000/= to the Respondent.

Determination

29. The upshot of the foregoing is that I make the following orders: -

a. The appeal is dismissed with costs of Ksh. 65,000/= to the Respondent.

b. 30 days stay of execution.

c. 14 days right of appeal.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 19TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for Parties

Court Assistant – Michael

M. D. KIZITO, J.