



REPUBLIC OF KENYA



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Divetsity Microfinance Limited v Michuki & 2 others (Civil Appeal E028 & E045 of 2023 (Consolidated)) [2025] KEHC 5058 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E028 & E045 OF 2023 (CONSOLIDATED)**

TW OUYA, J

APRIL 24, 2025

BETWEEN

DIVETSITY MICROFINANCE LIMITED APPELLANT

AND

ESTHER NJOKI MICHUKI 1ST RESPONDENT

BRAIFUS AUCTIONEERS 2ND RESPONDENT

MOSES MICHUKI NJOKI 3RD RESPONDENT

(Being an appeal against the judgement and decree of the Hon. O.M. Wanyaga (SRM) delivered on 8th November, 2023 in Thika CMCC No. 55 OF 2020)

JUDGMENT

Background

1. The consolidated appeals emanate from the judgment delivered on 08.11.2023 by the lower Court in Thika CMCC No. 55 OF 2020 (hereinafter the lower Court suit). The lower Court suit was instituted via a plaint which was subsequently amended by Esther Njoki, the plaintiff in the lower court (hereinafter the 1st Respondent), as against Diversity Microfinance Ltd, the 1st defendant in the lower court (hereinafter the 1st Appellant) and Braifus Auctioneers, the 2nd Defendant in the lower court (hereinafter the 2nd Appellant) seeking inter alia; that the honorable Court do order the 1st and 2nd Appellant to indemnify the 1st Respondent to the position she was before the illegal sale; general damages for detinue; costs of the suit & interest; and any other relief that the Court may deem fit to grant.
2. It was averred that on or about the 31.10.2020, the 2nd Appellant acting under instructions of the 1st Appellant in the company of several police officers raided the 1st Respondent's farm and proceeded to cart away the 1st Respondent's Friesian Cows on accord of the 1st Respondent's son failure to pay a



loan of Kshs. 50,000/- owed to the 1st Appellant. It was further averred that the 2nd Appellant at all material times did not enter into any agreement with the 1st Appellant or did not sign the offer letter or was she a signatory or guarantor to the loan facility. That on 04.02.2020, the 1st and 2nd Appellant proceeded to auction the 1st Respondent's cows despite the fact that the offer letter by the 1st Appellant indicating the loan facility will be secured by chattel mortgages over household, business and personal guarantors which did not include the Friesian Cows that belonged to the 1st Respondent. She averred that the total value of the six (6) cows had been valued by her veterinary at a cost of 1,200,000/- of which were auctioned on accord of a debt which she was a stranger to.

3. The 1st Appellant filed a statement of defence denying the key averments in the plaint meanwhile averred that the property that was auctioned was in fact owned by Moses Michuki Njoki, the Third Party in the lower Court (hereinafter the 2nd Respondent), who is a son to the 1st Respondent as conceded in the amended plaint and that the property was offered as collateral for a loan of Kshs. 50,000/- taken by the 2nd Respondent from the 1st Appellant.
4. The 2nd Appellant did not file any pleadings before the lower Court. The 2nd Respondent, upon joinder as a Third Party before the lower Court filed a defence denying the key averments in respect of the claim as against him by the 1st Appellant.
5. The suit proceeded to full hearing, during which only the 1st and 2nd Respondent called evidence in support of their respective pleadings. In its judgment, the trial Court found in favour of the 1st Respondent by awarding the latter Kshs. 1,200,000/- being the estimation of the value of the cows and interest on the above sum at Court rate from date of judgment until payment in full; claim as against the 2nd Respondent was dismissed; costs were awarded to the 1st and 2nd Respondent as against the 1st and 2nd Appellant.

The Appeal

6. Aggrieved with the outcome, the 1st Appellant preferred an appeal by way of Thika HCCA No. E028 of 2023 challenging the finding by the lower Court premised on the following grounds in its memorandum of appeal as itemized hereunder: -

- “ 1. The learned Magistrate erred in law and fact in allowing and granting a hefty sum in special damages not sufficiently proved as required by the law.
2. The learned Magistrate erred in law and fact by awarding what was purely speculative special damages with no prove at all.
3. The learned Magistrate erred in law and fact by his reasoning and finding founded on wrong principle as regards award of special damages.
4. The learned Magistrate erred in law and fact in his analysis and fluttered in law by his finding that the 1st Respondent had proved her claim to the required standard whereas the truth and fact that the 1st Respondent was unable to discharge her burden of prove as laid out in law.
5. The learned Magistrate exhibited bias in the matter against the Appellant and was in a haste to give judgment to the plaintiff thus disregarded law and procedure in the proceedings and trial to the detriment of the 1st Appellant.



6. The learned Magistrate in his haste and failure to construe and understand the dispute in Court and the parties legally involved gave a judgment against a non-existence legal entity Diversity Microfinance Limited.
 7. The learned Magistrate erred in law and fact by the manner and way he treated the Third-Party application on and proceedings thus reached a wrong finding and judgment.
 8. The learned Magistrate gave an ambiguous judgment not supported by record or evidence thus materially erred in law.
7. In light of aforecaptioned itemized grounds of appeal, the 1st Appellant prays that the judgment of the lower Court be set aside and it be awarded costs of both the appeal and matter before the lower Court.
8. Equally aggrieved with the outcome, the 2nd Appellant preferred an appeal by way of Thika HCCA No. E045 of 2023 challenging the finding by the lower Court premised on the following grounds in its memorandum of appeal as itemized hereunder: -
- “1. The learned Magistrate erred in law and in fact by totally ignoring the 2nd Appellant’s defence thus arriving at an erroneous conclusion that there was need for an amended defence.
 2. The learned Magistrate erred in law and in fact by failing to find that the 2nd Appellant was never served or notified of any summons to attend Court thus arriving at an erroneous conclusion that the 2nd Appellant failed to attend Court to prosecute his claim.
 3. The learned Magistrate erred in law and in fact by awarding special damages not supported by any evidence tendered before Court thus arriving at a wrong conclusion.
 4. The learned Magistrate misapprehended the law and facts in finding that the 1st Respondent had proved her case to the required standard on a “balance of probabilities” thus arriving at a wrong conclusion.
 5. The learned Magistrate erred in law and in fact by failing to find that the 1st Respondent and the 2nd Respondent are related by fact of being a mother and son and the allegation that the said cows did not belong to the 2nd Respondent was a scheme by mother and son to defeat the process of loan recovery as instituted.
 6. The learned Magistrate erred in law and in fact by failing to find that the 1st Respondent’s plaint and or amended plaint had fundamental flaws and was incurably defective even after pronouncing that the documents before Court could not be termed as a plaint and amended plaint respectively.
 7. The learned Magistrate erred in law and in fact by placing reliance on hearsay and presumptions and thus considering irrelevant factors while disregarding legitimate factors in his judgment thus arriving at an erroneous decision
9. Similarly, in light of aforecaptioned itemized grounds of appeal, the 2nd Appellant prays that: the judgment and decree as delivered on 08.11.2023 and the consequential order be set aside; judgment be



entered for the 2nd Appellant against the 1st Appellant, 1st and 2nd Respondent by holding that the 2nd Appellant acted within the confines of law in recovery of the loan arrears; and that the 2nd Appellant be allowed costs of this appeal and costs before the lower Court.

10. Directions were taken on disposal of the appeal by way of written submissions, of which the Court has duly considered.

Disposition and Determination

11. The Court has considered the records of appeal in both Thika HCCA No. E028 of 2023 and Thika HCCA No. E045 of 2023, the supplementary record of appeal, the pleadings and original record of the proceedings. 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. Further, it is trite 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. That said, a revisit of the memorandum of appeal and submissions by the respective parties before this Court it is evident that the appeal turns on the issue whether the 1st Respondent was entitled the award as sought before the trial Court.
12. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties’ respective cases before the trial Court. See;- Court of Appeal decision in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91. This Court had earlier outlined the gist of the respective parties’ pleadings, as such it serves no purpose restating the same at this juncture. Further, having equally identified what the dispute before the trial Court twirled on, the key query for determination is whether the trial Court’s findings on the issues falling for determination before it, were well founded.
13. To contextualize the latter, it would be apposite to quote in extenso the relevant facets of the impugned judgment. The trial Court after restating the evidence tendered before it addressed itself as follows; -

....“The Court has considered the evidence by the Plaintiff and 3rd Party as well as submissions. This being a civil suit, the standard of proof is on a balance of probabilities.

.....

From the evidence before Court, the defendants went ahead to seize and sell the plaintiff cows despite her resistance. Neither of them can thus escape liability if the said seizure and sale is found to have been unlawful. Unlike land and vehicles, cows do not have title deeds or identification documents. It therefore beats logic as to why the defendants would go ahead and auction her cows without verifying their ownership. From the letter of offer to the 3rd Party, it is clear that the Plaintiff didn’t guarantee the 3rd Party’s loan. Additionally, her assets were not used as security for the loan. There was thus no justification for the defendant’s actions. It is thus clear that the taking away of the plaintiff’s cows was unjustified and unlawful.

No agricultural report to verify the claims on the milk production was presented. No report of the number of calves that would have been produced and the claimed profit margin has been presented. It is all speculation that falls below the standard of proof aforementioned which is “balance of probabilities”. It is however the Plaintiff’s case that each of the six cows was valued at Kshs. 200,000/-. This has not been challenged by the defendants. These total



to Kshs. 1,200,000/-. The plaintiff is thus awarded damages equivalent to the value of the cows illegally seized and auctioned by the defendants

Defendants failed to attend Court to prosecute whatever claim they have against the third party. There is not even an amended defence on record.

The upshot is that the plaintiff's case succeeds....." (sic)

14. With the forestated in reserve, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Whereas, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. See Court of Appeal decision in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR. Hence, the duty of proving the averments contained in the respective parties' pleadings lay with the parties themselves. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that: -

“[T]he burden 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.” (Emphasis added)

15. At this juncture the Court proposes firstly to address the 2nd Appellant's appeal before addressing the 1st Appellant's appeal. It is notable from the proceedings before the trial Court that both Appellants failed to participate in the proceedings before the trial Court. Specifically, the 2nd Respondent did not participate in the proceedings leading up to the instant appeal, a fact of which was purposefully observed by the trial Court. From the 2nd Appellant's grounds of appeal, among the said grounds, the latter has assailed the trial Court's finding on issues canvassed before the trial Court alongside its failure to find that the 2nd Appellant was never served or notified of any summons to attend Court. At the risk of repetition, the duty of the appellate Court was purposefully set out in *Selle* (supra). In exercising the aforecaptioned duty, the appellate Court re-evaluates the pleadings, evidence and findings before the trial Court. Re-evaluating the pleadings and evidence on appeal requires participation of the parties thereto.
16. Here, as earlier stated, the 2nd Appellant failed to participate in the lower Court proceedings meanwhile by its appeal, it is inviting the trial Court to litigate at the appellate stage. That said, it can be observed from the lower Court record that as at entering appearance the firm of M/S Kirubi Mwangi Ben & Co. Advocates entered appearance on behalf of the both the 1st and 2nd Appellant who were the defendants before the trial Court. Shortly thereafter, the said firm of advocates filed a notice of withdrawal from acting for the 2nd Appellant. There's no indication from the record whether directions were ever taken in respect of the 2nd Appellant's appearance and or whether the 2nd Appellant was ever served with said notice of withdrawal for purposes of instructing another counsel or acting in person. Nevertheless, having not participated in the proceedings before the trial Court either by omission of counsel and or failure on issuance of directions as to the status of the 2nd Appellant, the first port of call in respect of challenging summons ought to have been the trial Court and not raising the issue on appeal.



In any event, the issue of service of summons was not an issue canvassed before the trial Court in order for this Court to now render a determination on the same on appeal. It was incumbent upon the 2nd Appellant's participation prior to challenging the trial Court's decision on appeal before this Court. To accord the 2nd Appellant audience on its grounds canvassed on appeal would be tantamount to awarding the latter undue advantage over issues the Respondents did not have an opportunity to challenge before the trial court. Consequently, the 2nd Appellant's appeal is deemed premature, incompetent and is accordingly dismissed with costs.

17. Moving on to the 1st Appellant's appeal, it is undisputed that the 1st Respondent's claim was in respect of unlawful sale of her cows of which she asserts did not constitute a guarantee of the 2nd Respondent's loan. It is equally not disputed that the 1st and 2nd Respondent were mother and son. That said, at the hearing, the 1st Respondent testified as PW1. She identified herself as a farmer and proceeded to reiterate her witness statement thereafter adduced the documents appearing in its list of documents as Pexh.1-3. The 2nd Respondent equally testified by adopting his witness statement meanwhile asserted that he took a loan from Diversity Capital Limited and not the 1st Appellant.
18. Evidently, from the evidence tendered before the trial Court and submissions before this Court, the loan facility was specifically between the 1st Appellant and 2nd Respondent. Further, the guarantees captured in the said facility constituted (3) items- ; (1) chattel mortgage over household and business assets; (2) personal guarantor of Joseph Waweru and; (3) personal guarantor of Johnstone. Indubitably, the facility document did not capture the 1st Respondent as a guarantor of the 2nd Respondent however interestingly the loan application form captured that the 1st Respondent's type of business as Dairy Farming. Further to the above, the 1st Respondent's claim on ownership of the cattle sold in execution was uncontroverted by the Appellants who failed and or opted not to participate in the proceedings before the trial Court. Thus, the trial Court cannot be faulted for finding that the Appellants actions were unlawful for failing to verify and or authenticate ownership of the cattle attached in execution while the 1st Respondent was not a guarantor of the facility taken out by the 2nd Respondent.
19. As to the award of Kshs. 1,200,00 awarded for the six (6) cows attached in execution. It is trite that special damages must be specifically pleaded and proved. See Ouma v Nairobi City Council (1976) KLR 304 and Hahn -v- Singh [1985] KLR 716. Here, the trial Court merely relied on the 1st Respondent's evidence that each cow cost Kshs. 200,000 without any evidence to shore up the same. While the Court understands that it may have proven an arduous task to avail any evidence of value, some effort or attempt ought to have been placed by the 1st Respondent to demonstrate the value of the cows that were attached and sold. On the forestated account, the trial Court's award must be faulted and the award set aside.
20. That said, despite failing to specifically prove special damages, it is not lost on the Court that the 1st Respondent's cows were sold in execution of loan she did not guarantee therefore she must have suffered some form of loss. It is on the premise of the above that it would appear that the 1st Respondent sought general damages for detinue of the cattle attached by the Respondent. Consequently, applying my mind to the facts of the matter and nature of loss by way of detinue and eventual sale thereafter of the 1st Respondent's cattle, an award of Kshs. 400,000 would be nominal and sufficient for the loss suffered by the 1st Respondent. Therefore, the award of Kshs. 1,200,000 is set aside and substituted with an award of Kshs. 400,000.



Determination

21. Accordingly, the 2nd Appellant's appeal is dismissed with costs to the Respondents. Meanwhile the 1st Appellant's appeal partially succeeds with each party bearing their own costs. The award of Kshs. 1,200,000 is set aside and substituted with an award of Kshs. 400,000.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF APRIL, 2025

HON. T. W. OUYA

JUDGE

For 1st Appellant/Applicant.....Kirubi

For 2nd Appellant/Applicant.....Wambugu

For Respondent.....1st & 3rd Present in Person.

Court Assistant...Doreen Njue

