



REPUBLIC OF KENYA



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Ushuru Savings & Credit Co-operative Society Limited v Mathenge & 9 others (Civil Appeal E591 of 2024) [2025] KEHC 4903 (KLR) (Civ) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E591 OF 2024

TW OUYA, J

APRIL 24, 2025

BETWEEN

**USHURU SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED APPELLANT**

AND

AGNES GATHONI MATHENGE 1ST RESPONDENT
JULIUS NGARE 2ND RESPONDENT
CHRISTOPHER KURIA 3RD RESPONDENT
TEDDY WAMUYU WAMBURU 4TH RESPONDENT
SERAH GATHIRIMU 5TH RESPONDENT
RICHRD MUSAU 6TH RESPONDENT
BONIFACE MACHARIA NGOCHUA 7TH RESPONDENT
JANE WANJIKU KAMAU 8TH RESPONDENT
SAMUEL KINUTHIA 9TH RESPONDENT
GEORGE MAINA GITHUI 10TH RESPONDENT

*(Being an appeal from the Judgment and Decree of the Co-operative Tribunal
at Nairobi delivered on 19th October, 2022 in CTC No. 514 of 2016)*



JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 19.10.2022 by the Co-operative Tribunal in Nairobi Co-operative Tribunal Case No. 514 of 2016 (hereinafter the tribunal). The cause before the Tribunal was instituted via a statement of claim and later amended by Julius Ngare, Christopher Kuria, Teddy Wamuyu Wamburu, Serah Gathirimu, Richard Musau Boniface Macharia Ngochua, Jane Wanjiku Kamau, Samuel Kinuthia and George Maina Githui the claimants before the Tribunal (hereinafter the 2nd to 10th Respondent), as against Ushuru Savings & Credit Co-operative Society Ltd, the 1st Respondent before the Tribunal (hereinafter the Appellant), and Agnes Gathoni Mathenge, the 2nd Respondent before the Tribunal, (hereinafter the 1st Respondent), seeking inter alia; an order that the recovery of the money owed by the 1st Respondent to the Appellant from the 2nd to 10th Respondents shares in the Appellant is illegal, unlawful and void; and order that the Appellant does restore all the shares held by the 2nd to 10th Respondents in the Appellant's Sacco and reconstitute them in the same position they were prior to the recovery of monies owed by the 1st Respondent to the Appellant on 05.10.2016 from the 2nd to 10th Respondents shares; and that an order to the effect that the 2nd to 10th Respondent are not liable for the guarantees presented by the 1st Respondent to the Appellant with respect to the loans advanced by the Appellant to the 1st Respondent; and costs of the claim.
2. It was averred that the 1st to 10th Respondent are members of the Appellant and that in the year 2014, the 1st Respondent applied for a loan of about Kshs. 1,100,000/- from the Appellant and presented forged, fraudulent documentation to the Appellant purporting that the 2nd to 10th Respondent had guaranteed the said loan. That the 1st Respondent subsequently defaulted in the loan repayment and the Appellant sought to recover the amount advanced to the 1st Respondent from the 2nd to 10th Respondent. It was further averred that the 2nd to 10th Respondent wrote to the Appellant in respect of alleged forged or altered guarantees and further lodged a criminal complaint for forgery against the 1st Respondent. That despite the 1st Respondent's arrest in lieu of criminal charges and agreeing that the guarantees as forged further acquiescing to pay the outstanding amount to the Appellant, the latter proceeded to recover the monies owed from the 2nd to 10th Respondent share deposits in the Appellant. The 2nd to 10th Respondent went on to aver that the Appellant's act of recovering the amounts owed by the 1st Respondent was unlawful and illegal.
3. In response, the Appellant filed a statement of defence admitting to the 2nd to 10th Respondent loan, in question, however averred that between the period of August 2012 and December 2013, the 1st Respondent applied for three (3) separate loans that were guaranteed by the 2nd to 10th Respondent which were defaulted on. The Appellant further averred that the forgery alleged by the 2nd to 10th Respondent was in respect the loan taken out in May 2014 however the latter were bona fide guarantors of the three (3) separate loans taken out between August 2012 and December 2013, to wit, the recovery of the monies from shares was lawful.
4. The 1st Respondent despite being served with pleadings failed to enter appearance or defence to wit judgment in default was entered as against her on 07.08.2018.
5. The claim proceeded to full hearing, during which the respective parties called evidence in support of the averments in their pleadings. In its judgment, trial Tribunal found in favour of the 2nd to 10th



Respondent and ordered that: the recovery of money owed by the 1st Respondent to the Appellant from the 2nd to 10th Respondent shares in the Appellant was illegal, unlawful and void; that the 1st Respondent is personally and wholly liable to pay all the amounts advanced to her from the Appellant; that the 2nd to 10th Respondent are not liable for the guarantees presented by the 1st Respondent to the Appellant with respect to the loans advanced by the Appellant to the 1st Respondent; and costs and interest of the claim. The tribunal went on and allowed the co-indemnity filed by the Appellant as against the 1st Respondent.

The Appeal

6. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the Tribunal premised on the following grounds in their memorandum of appeal as itemized hereunder: -

- “ 1. The Tribunal erred in law and fact in holding that the Appellant failed to avail the 2nd to 10th Respondent, the 1st Respondent’s loan application form upon their request.
2. The Tribunal erred in law and fact in placing the burden of proof on the Appellant to verify and or confirm that the 2nd to 10th Respondent has indeed guaranteed and or signed up to the 1st Respondent’s loan with the Appellant, as guarantors.
3. The Tribunal erred in law and fact in holding that the 2nd to 10th Respondent did not guarantee and or sign up to the 1st Respondent loans with the Appellant.
4. The Tribunal erred in law and fact in alleging that the Appellant may have been privy to the 1st Respondent’s alleged fraudulent conduct.
5. The Tribunal erred in law and fact in holding that the 2nd to 10th Respondent had no contractual obligations to the Appellant.
6. The Tribunal erred in law and fact in holding that the 2nd to 10th Respondent did not sign the 1st Respondent’s loan forms, as guarantors.
7. The Tribunal erred in law and fact in relying on the 2nd to 10th Respondent’s claims of the 1st Respondent’s alleged admission in the absence of her corroboration and or rebuttal before it.
8. The Tribunal erred in law and fact in holding that the Appellant did not exhaust all alternatives in getting the 1st Respondent to repay her loans, prior to pursuing the 2nd to 10th Respondent, as guarantors
9. The Tribunal erred in law and fact in reversing the burden of proof.

7. In light of afore-captioned grounds of appeal, the Appellant seeks before this Court, orders to the effect that: -

“The judgment entered in favour of the 2nd to 10th Respondent be set aside and the cost of the appeal be awarded to the Appellant.



Submissions

8. Directions were taken on disposal of the appeal by way of written submissions, of which parties had an opportunity to highlight meanwhile this Court has duly considered the same.

Disposition

9. At this juncture, it would be apt to observe that the instant appeal was disposed of as part of the Judiciary Rapid Result Initiative (RRI) matters. That said, the original lower Court record did not form part of the record before this Court. Nevertheless, the Court has duly considered the Record of Appeal alongside the respective parties' submissions.
10. This being is a first appeal, the Court of Appeal for East Africa set out the duty of the first appellate Court in *Selle –Vs- 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.
11. 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 in its judgment outlined the gist of the respective parties' pleadings, as such it serves no purpose restating the same at this juncture. Further, having identified what the disputation before the trial Court dwelt on, the key issue for determination is whether the trial Court's findings on the issues falling for determination before it were well founded.
12. 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; -
 - “ 5. Parties were directed to file written submission and the claimant's filed their submissions dated 10/3/22 file on 14/3/22 and 1st Respondent filed their written submissions dated 2/6/22

The issues for determination in this matter having considered the pleading that is amended statement of claim, statement of defence, list of documents and written submissions are thus

Issue One

Whether the claimants signed the guarantees to the 2nd Respondent loans?

Issue Two

Whether the 1st Respondent was justified in having the deductions from the claimants?

6. Issue One

Whether the claimants signed the guarantees to the 2nd Respondent loans?

The claimants claim is that they did not guarantee the 2nd Respondent any loan as advanced by the 1st Respondent.



The claimants claim that they only came to know of the loans when they received notices from the 1st Respondent of the loans taken.

.....

7. The 1st Respondent on their end state the 4th loan that is loan D is where they did not attach or attribute the claimant as guarantees of the 2nd Respondent. They however were silent as to why they did not produce or give the claimants loan application forms for loans A, B, and C to confirm if indeed they signed for the 2nd Respondent.

.....

The claimants immediately they received the notices approached the 1st Respondent to dispute their shares/savings being deducted denying they has guaranteed the 2nd Respondent.

The same cannot be far fetched as they even instituted criminal proceedings against the 2nd Respondent who indeed admitted to forging the claimants signatures and committed to pay the 1st Respondent.

8. From the above we are inclined to agree with the claimants on their claim. The claimants did not wait until there were deductions, however immediately they received the notices from the 1st Respondent they spoke up about the anomaly.

.....

The claimants have been consistent in their assertions and thus agree with them. They did not sign the said forms and this is confirmed by the 2nd Respondent themselves.

9. Issue Two

Whether the 1st Respondent was justified in having the deductions from the claimants

The claimants had no contractual obligation towards the 1st and 2nd Respondent.

.....

The claimant cannot be held responsible for the wrong doing of the 2nd Respondent and the 1st Respondent lack of diligence in issuing loans.

.....

A contract of guarantee requires the guarantors knowledge they would repay the loan in case of default....This acknowledge is done by signing the loan agreement.

....

The claimants have denied appending the signatures, the 2nd Respondent has confirmed the position as a forgery. Thus there is no guarantorship by the claimants against the 2nd Respondent's loan.

....



The tribunal finds its in not justified for the 1st Respondent to make deductions from the claimants as there was no contractual relationship.

We are not persuaded that due process was followed by the 1st Respondent in deducting the claimant's shares.

Judgment is entered in favour of the claimants against the Respondent.....” (sic)

13. 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 in the respective parties’ pleadings lay with the respective parties themselves.
14. On the part of the 2nd to 10th Respondent, the 2nd 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 as CExh.1, in support of the claim. The Appellant equally called one (1) witness, one Frank Robert Odhiambo Omondi, who testified as RW1. He too adopted his witness statement and further witness statement as his evidence in chief and adduced into evidence the list and further list of documents as RExh.1. From both witness statements and evidence before the Tribunal it is undisputed that the Respondents were all members of the Appellant Sacco. The bone of contestation relates to whether the Appellant was entitled to deduct monies and shares from the 2nd to 10th Respondent’s as guarantors towards satisfaction of a facility taken out by the 1st Respondent, of which the 2nd to 10th Respondent assert that the facilities were taken out by the 1st Respondent using forged guarantor signatures.
15. To the foregoing end, the 2nd to 10th Respondent essentially contended through CW1, that they challenged the Appellant because they did not guarantee the 2nd Respondent given that their signature were forged and had reported the matter to the police station. That the 1st Respondent had admitted to the forgery of the signatures and admitted liability to the Appellant, to wit, the former undertook to repay the amounts for the loans and for all guarantors to be discharged. CW1 asserted that despite the above, the 1st Respondent continued to deduct their shares. On cross-examination, he stated that he was present when the 1st Respondent admitted to the forgery meanwhile asserted that the Appellant was supposed to perform due diligence of which it did not. He maintained that he did not guarantee any of the 1st Respondent’s loans and that the details thereto and signature were not his. That his shares or amounts guaranteed were deducted alongside the 3rd to 10th Respondent. Upon re-examination, he reiterated that he did not sign the guarantees in favor of the 1st Respondent.
16. The witness statements of the 3rd to 10th Respondents were adopted into evidence given that they raised similar issues to that of the 2nd Respondent who had testified as CW1.
17. On its part, the gist of the Appellant’s contestation, through RW1 was that the 2nd to 10th Respondent were aware of the procedure of being discharged as a guarantors whereas the 1st Respondent was coerced into her statement as she was in police custody meanwhile he had never been called to give evidence on the purported forgery by the 1st Respondent. On cross-examination, he confirmed that the 1st Respondent had taken four (4) loans, to wit, there was a complaint in respect of the fourth loan. That the letter asserting forgery is a blanket statement and does not refer to any loan in particular. In re-examination, he confirmed the fourth loan was reversed whereas recoveries were done in respect of the monies advanced to the 1st Respondent.



18. With the above in reserve, and as earlier noted, the 1st to 8th 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.”
19. 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.”
20. 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”.
21. Here, the 2nd to 10th Respondent relied on a raft of documents in its list of documents adduced as CExh.1, which included among other documents; loan application forms by the 1st Respondent dated 12.05.2014, 16.08.2013, 11.10.2013 and 16.12.2013, letter from the Appellant to the 2nd to 10th Respondent in respect of the 1st Respondent default on a loan to the tune of Kshs. 1,111,252, request by the 2nd to 10th Respondent to the Appellant on 1st Respondent’s loan application forms. Also, interestingly included in the said bundle of documents was a letter dated 15.04.2016 of acknowledgment and admission by the 2nd Respondent that the guarantees by the 2nd to 10th Respondent were fraudulent and void. Meanwhile, there was an expression therein of personal culpability for the entire loan amount. Further, it was stated therein that the said letter was signed without coercion or duress from anyone. Equally adduced into evidence was a letter of even date addressed to the Appellant stating that stated in part..... “I hereby seek that all guarantors for all the loans advanced to me be discharged. I undertake to pay all the loans allegedly guaranteed by the said persons”.
22. What I gathered herein to be the Appellant’s case was that it indeed conceded to the fact that the fourth loan dated 12.05.2014 was applied for using forged guarantee documents however despite the above, the 2nd to 10th Respondent were guarantors for the earlier loans taken out in 2013, by the 1st Respondent. In defence the Appellant equally relied on documents adduced as RExh.1 which included therein a hand written and typed statement by the 1st Respondent that acknowledged and admitted to personally being culpable to the entire amount of Kshs. 1,111,252 owing to the Appellant.



23. Invariably, what was before the Tribunal was a question of forged and fraudulent guarantees by the 1st Respondent in respect of loan advanced by the Appellant to the former. At the centre of the above was the loan advanced in 2014 to wit the Appellant acquiesced in its pleadings was applied for using falsified guarantor signatures and later the said loan was reversed. The Appellant vide its statement of defence seems to be introducing loans advanced to the 1st Respondent in 2013 to justify their action of recovery, to wit, in the Court's constructions of the 2nd to 10th Respondent's pleadings before the Tribunal, the same did not concern and or appertain the loans advanced in 2013. That said, onus was upon the 2nd to 10th Respondent to prove fraud and or forgery of the guarantees and they ably demonstrated that by the acknowledgment and admission by the 1st Respondent in CExh.1. The Appellant did not offer any retort or object of the production of the said acknowledgement and admission at trial meanwhile equally adduced the same in RExh.1.
24. Had the Appellant intended to prove coercion onus was on their part to demonstrate the same by either calling the 1st Respondent to adduce evidence of the same or any other witness to corroborate the same. Despite the legal burden being on the 2nd to 10th Respondent to prove their claim on a balance of probabilities the evidential burden was on the Appellant to demonstrate coercion of the said acknowledgement and admission that palpably acquitted the 2nd to 10th Respondent of any guarantees in respect of all loans taken out in 2013 or 2014. The latter brings to mind the Supreme Court decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* (2014) eKLR wherein while considering the legal vis-à-vis the evidential burden, the Court 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”.
25. However, notwithstanding the Tribunal's tangential approach at arriving at its decision, it did not err when it noted that the 2nd to 10th Respondent moved with alacrity to raise their concerns once they received notices from the Appellant. Further, the Appellant cannot be heard to state that the acknowledgment and admissions were coerced without evidence to shore up the same. While the 2nd to 10th Respondent would be liable as guarantors in respect on any guarantor contractual obligations, they ought to have had knowledge of their extent on liability concerning the facility taken out by the 1st Respondent. The Appellant failed to deal with the matter on this front whereas the guarantors' signatures were clearly impugned by the 1st Respondent who took out the facilities herself, by stating that the same were fraudulent and void. The Appellant cannot not proceed to impugn the same in order to attach liability and justify its actions of recovery in respect of loans earlier advanced in 2013. The burden of proof was not reversed by the Tribunal however at the risk of repetition the Appellant failed to discharge its burden on the loans advanced in 2013. The Appellant's defence is manifestly undone by the acknowledged and admission of the 1st Respondent who neither participated in the proceedings before the Tribunal nor was she called as a witness. In the end, the Court is not convinced to that it ought to disturb the decision of the tribunal despite its approach.



Determination

26. Accordingly, the decision of the Tribunal is upheld and the instant appeal is dismissed with costs to the 2nd to 10th Respondent.

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

HON. T. W. OUYA

JUDGE

For Appellant/applicant.....Abuya

For Respondent.....Mukathe

Court Assistant...Doreen Njue

