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Sil Co-operative Savings & Credit Society Limited v Co-operative Bank of Kenya Limited (Civil Case 452 of 2014) [2025] KEHC 12777 (KLR) (Commercial and Tax) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12777 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 452 OF 2014

BK NJOROGE, J

SEPTEMBER 18, 2025

BETWEEN

SIL CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED .... PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA LIMITED .... DEFENDANT

JUDGMENT

1. This is a Judgement in respect of the Defendant's Counter-Claim. This is as per the Amended Statement of Defence and Counter-Claim dated 29th July, 2019.

2. The Defendant prays for the Judgment against the Plaintiff as follows;

   a. Kshs.19,208 732.11 plus interest at Commercial Rates until payment in full.

   b. Costs of the counter-claim

   c. Interest on [b] at Court rats

   d. Any further relief that this Honourable Court deems just.

Background facts

3. The Plaintiff instituted this suit against the Defendant seeking among others the provision of statement of account, refund of Kshs.10,301,581.65, exemplary damages and interest.

4. The suit was defended and a Counterclaim raised as stated above.

5. A fundamental issue took place on 12th June, 2023. Honourable Justice Prof. Sifuna dismissed the Plaintiff's claim for failure to file a trial bundle. The Court noted that the suit had been pending in Court for over eight [8] years without compliance on the Plaintiff's part. The Plaintiff's suit was dismissed with costs. As a saving grace the Court directed that the Plaintiff could apply for reinstatement, upon paying to Court a sum of Kshs.100,000/- before the Plaintiff's suit could be reinstated. The Plaintiff was also to undertake to prosecute the suit within 120 days.

6. There being no application for review or an Appeal against the said order, the dismissal of the Plaintiff's suit still stands. The Court also takes note that no application was made to reinstate the Plaintiff's suit. It therefore remains as dead as the proverbial Dodo bird.

7. The Court therefore frowns upon the Plaintiff's submissions which allude to facts as if the Plaintiff still has a valid action before the Court. Counsel representing parties before Court have a duty to present their case clearly and factually correctly before the Court. If the Court forms an opinion that it is deliberately being misled as to facts, this can lead to serious sanctions. This includes denying such a party the costs of the action.

8. The case therefore proceeded for the hearing of the Defendant's Counterclaim only. The Counterclaim was defended by the Plaintiff who had filed a response to the Defendant's Statement of claim.

9. Each Party called a witness in a bid to prove its respective position before this Court.

The Defendant's Counterclaim

10. The Defendant pegs its case on a Memorandum of Understanding, [hereinafter referred to as "MOU"] between the Plaintiff and the Defendant. The Plaintiff is a Savings and Credit Cooperative [Sacco]. On the basis of this MOU, the Defendant would lend monies to the Plaintiff's members. The Plaintiff's members would only access the monies upon being recommended by the Plaintiff. Thereafter the Defendant would channel the loans through the Plaintiff, who would in turn payout to the individual Sacco members. The repayments for these loans were recovered through the Plaintiff. The Sacco members would pay to the Plaintiff, who would in turn remit the amounts to the Defendant.

11. The Defendant summarises the salient conditions in the MOU dated 14th July, 2006 as follows;

    a. The parties intended for the terms of the MOU to be binding and enforceable upon them.

    b. Members of the Plaintiff Sacco can apply for loans from the Bank upon recommendation of the Plaintiff and further confirmation by the Plaintiff's agents that the applying members belong to its SACCO.

    c. The Bank could thereafter approve or reject the loan application.

    d. Should the Bank approve the loan it would award the proceeds to the Plaintiff's account for onward disbursement to the successful applicants who were the Plaintiff's members.

    e. The loan repayment would be recovered in lump sum from the Plaintiff's account on the 15th day of each month irrespective of whether the loanees deductions would have been received.

    f. The Plaintiff would guarantee repayment of all loans under the scheme and execute a guarantee in favour of the Bank as security for the facility.

12. About 190 members of the Plaintiff applied for loans from the Defendant on the recommendations of the Plaintiff and as per its guarantee. The loans were disbursed.

13. The Plaintiff's members defaulted in repayment and the amount due and owing to the Bank was Kshs.10,301,581.65. On the strength of the MOU, the Defendant recovered this amount by making a deduction of Kshs.10,301,581.65 from the Plaintiff's account to settle these guaranteed accounts.

14. The Plaintiff also applied for various loans from the Bank as follows;

    a. On 9th February 2013 a restructuring of its existing loans and an additional loan of Kshs.3,000,000/- this was approved by the Bank vide a letter of offer of kshs.9,865,710.20 for a working capital loan, which the Plaintiff duly accepted.

    b. On 6th January, 2014, the Plaintiff sought for an Education Savings Scheme Loan from the Bank for a sum of kshs.1,000,000/-. The sum was disbursed on 23rd January, 2014.

    c. The Plaintiff sought for another working capital loan of kshs.4,500,000/-. This was approved vide a letter of offer dated 28th February, 2014. The funds were disbursed on 10th March, 2024.

15. As a result of default in repaying the two working capital loan, the Plaintiff owed a sum of Kshs.15,275,117.39.

16. The Plaintiff also defaulted in monthly payment of the Education Savings Scheme Loan leaving an outstanding debt of Kshs.1,167,178.72

17. The amount due and owing from the various loans advanced to the Plaintiff's members as per the MOU stood at Kshs.2,766,436.00

18. The Defendant claimed from the Plaintiff as follows;

    a. Outstanding amounts from the .... capital loan Kshs. 15,175,117.39

    b. Outstanding amount from the Education Savings Scheme loan Kshs. 1,167,178.72

    c. Outstanding amount from members personal loan as per MOU Kshs. 2,766,436.00

Total Kshs.19,208,732.11

19. The Defendant's witness John Kariuki Githinji testified to the above.

The Plaintiff's Response and Defence to the Counterclaim.

20. The Plaintiff denies that the MOU created any contractual relationship between itself and the Bank.

21. The Plaintiff also maintained that it had diligently been repaying its loans until the Defendant disrupted its cash flow. This was when it deducted the sum of Kshs.10,301,581.65 to recover the monies [individual loans] issued by the Plaintiff's members. The Plaintiff decried that this as an illegal move.

22. It denied that the Education Savings Scheme was a loan maintaining that it was a deposit account. That the funds held therein constituted members savings.

23. The Plaintiff's witness Osoro Mwongera testified that the individual members borrowed loans from the members in their personal capacities. That the acts of default were also personal. The Plaintiff merely introduced the members to the Bank hence it should not be held liable.

24. That by recovering the sum of Kshs.10,301,581.65 from the Plaintiff's account, the Bank was raiding so to speak or targeting the other members deposits held by the Sacco.

25. That this had the effect of rendering the Sacco unable to issue loans to the members. They complained to the County Cooperatives Officer. A meeting was held to resolve the dispute between the Sacco and its members. The Sacco maintained that it did not guarantee any individual members loans with the Bank.

26. The Plaintiff confirmed that it took out loans amounting to Kshs.4.5 million from the Bank as at 3/3/2014. That these amounts were subsequently paid for in full.

27. The witness who was a former chairman until 2021 testified that the Sacco had been struck off from the Register of Cooperatives. He however provided no documentation to support this averment.

Issues for Determination

28. The Court notes that the parties did not agree on the issues for determination. They opted to file separate issues. This Court would encourage parties to strive to engage and file an agreed list of issues. An agreed list of issues has the desired effect of assisting parties conduct a focused trial. They also assist the Court confine itself to the issues that the parties seek a determination. It reduces wandering and meandering during a trial. This saves on precious judicial time.

29. The Court having looked at the pleadings filed as well as the oral submissions, frames the following issues for determination.

    a. Whether the the Memorandum of understanding [MOU] is enforceable.

    b. Whether the the Defendant proved its Counterclaim.

Analysis

30. The general principle of law is that the party who alleges a certain state of facts has to prove.

31. Section 107 of the Law of Evidence states as follows;

    107. Burden of proof.

        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.

        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.

32. Section 108 of the Law of evidence states as follows;

    108. Incidence of burden.

    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.

33. Section 109 of the Law of evidence states as follows;

    109. Proof of particular fact.

    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.

34. In the case of Kamau v Safari Cleaners Limited [2024] KEHC 15000 [KLR] the Court stated as follows;

> " The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:
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> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107[1] of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
>
> "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." The above provision provides for the legal burden of proof.
>
> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
>
> "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."
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
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> "Whereas under section 107 of the *Evidence Act*, [which deals with the legal evidentiary burden of proof], the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."
>
> The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR held that:
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> Denning J, in Miller –v- 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden 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...are equally [un] convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

From the foregoing guiding authorities therefore, it is clear that the duty of proving the averments contained in the plaint lay squarely with the Respondent. In Karugi & Another v Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that:

"

The 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]"

a. Whether the Memorandum of Understanding [MOU] is enforceable.

35. The Defendant pleads that the MOU was the basis upon which it advanced the personal loans to the Plaintiff's members. That on the basis of the MOU and the guarantee given by the Plaintiff, it was entitled to recover any outstanding loans. This is not withstanding that the loans were advanced to the Plaintiff's members and not to the Plaintiff itself.

36. The Plaintiff maintains that the MOU is not a legal contract and cannot be enforced.

37. To determine whether the MOU was a legal contract the Court has a duty to look at the document itself.

38. At clause 4 of the MOU the parties indeed stipulated that the document was meant to bind and be enforceable against either party.

> " The parties intend that the terms of this memorandum of Understanding be and are binding and enforceable against each of them and their respective successors and assigned."

39. The three essential elements of a legal contract are offer, acceptance and consideration.

40. The Court refers to the case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 [KLR]where the Court stated as follows;

> " In the case of William Muthee Muthami v Bank of Baroda [2014] eKLR this Court observed;
>
> "In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

41. The Court notes that these essential elements are well captured in the MOU.

42. The Court is persuaded that this MOU was not a gentleman's agreement and refuses to treat it as such. It created valid legal obligations that flowed from the document. The parties acted upon those legal obligations creating corresponding duties and obligations that could be enforced. The Court follows the decision of H.K Chemitei J in Brisma Africa Limited v.

Hubei Hongyuan Power Engineering Limited [2025] KEHC 18857 KLR at paragraph 25 the Court stated as follows;

> " Was the Memorandum of Understanding binding on the parties.? In my humble view, yes. I state so because it was signed by all the parties and whether it was to secure an extension of the Bid Bond from Family bank or not the terms were well spelt out. The addition by pen by the defendant stating "only for the family bank bid bond" in my view appears cheeky and suspicious. This is for the simple reason that it appears and afterthought and such a serious contract cannot have some insertion without the input of the rest of the parties"

43. The Court also follows the case of Eldo City Limited v Corn Products Kenya Ltd & another [2013] KEHC 5916 [KLR].

44. The Plaintiff also submits that the agreement if any exists is illegal under Sections 44 and 49 of the Cooperative *Societies Act*. The Sections restrict the Sacco from borrowing or charging of the Cooperative Societies properties without a resolution in a special or Annual General Meeting as ratified in the same manner.

45. Section 44 of the *Societies Act* states as follows;

    44. Restriction on borrowing

    A co-operative society may receive loans from persons who are not members only to such extent and under such conditions as may be prescribed by its by-laws or by rules under this Act, and for the purposes of this section a deposit of money under a hire-purchase agreement shall be deemed to be a loan.

46. Section 49 of the Cooperatives Act states the following;

    49. Creating charge over society's property

    A co-operative society may from time to time, charge the whole or any part of its property, if its by-laws expressly empower it to do so, subject to a special resolution by the general meeting.

47. The Court has also read the decision in Roots Capital Incorporated v. Tekangu Farmers' Co-operative Society Ltd & another [2016] KEHC 3735 [KLR]. The Court notes in that suit it was proved by documentary evidence that the Saccos By-laws precluded it from borrowing contrary to its bylaws.

48. The Court notes that the Plaintiff did not seek to be released from the contract if it was illegal and unfavourable. In the Plaint it filed before the Court, it had not sought such an order. Such may not matter so much now seeing that the suit was dismissed before this trial commenced.

49. A reading of Sections 44 and 49 of the *Societies Act* points out to the fact that the Sacco cannot act contra its By-laws.

50. The By-Laws of the Plaintiff as a Sacco have not been exhibited before this Court. It is the Plaintiff who alleges that the Law was not followed. It is for the Plaintiff to place material before the Court to demonstrate that the By-laws were not followed and hence the law was breached.

    The Plaintiff had a duty to present to the Court the By-laws and point the manner in which they were offended. As matters now stand, that appears to be conjecture. It may well be that is what the By-laws state, but the Court has no way of finding out. Therefore, the court remains unconvinced of this issue.

51. Had the Plaintiff proved the illegality, this Court would have been bound by the decision in Kenya Pipeline Company Limited v Glencore Energy [U.K.] Limited [2015] KECA 835 [KLR]. The Court would not enforce an illegal contract.

b. Whether the Defendant proved its Counterclaim.

52. The Defendant produced documents to prove that the Plaintiff applied for loans. The loans were approved and disbursed.

53. Statements of accounts were produced by the Defendant. The Plaintiff has no other statements or evidence to counter these statements. The Plaintiff stood by the averments that it paid its loans in full. This can hardly hold in the face of such detailed statements. The Court would have expected that the Plaintiff would provide a detailed breakdown of when it made payments. Statements prepared by the Plaintiff or its accountants would have shown how the loan kept reducing until it was paid in full.

54. Once again, the Plaintiff has been unable to shake off the evidentiary burden of proof laid by the Defendant in support of its Counterclaim.

55. Section 176 of the *Evidence Act* states as follow;

176. Mode of proof of entries in bankers' books.

Subject to the provisions of this Chapter of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded.

56. The Court has been referred to the passage in Trust Bank Limited v. Paramount Universal Bank Limited & 2 others [2009] KEHE 4030 [KLR].

> " In any event and in addition, these exhibits were Bank records which are admissible under sections 176 and 177 of the *Evidence Act* which provide:
>
> 176. Subject to this Chapter a copy of any entry in a Banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded.
>
> 177.
>
> [1] A copy of an entry in a Banker's book shall not be received in evidence under section 176 unless it be first provide that –
>
> [a] the book was, at the time of making the entry, one of the ordinary books of the Bank; and
>
> [b] the book is in the custody and control of the Bank; and
>
> [c] the entry was made in the usual and ordinary course of Banking business; and
>
> [d] the copy has been examined with the original entry, and is correct.
>
> [2] such proof may be given by an officer of the Bank, or, in the case of the proof required under subsection [1] [d], by the person who

> has performed the examination, and may be given either orally or by an affidavit sworn before a commissioner for oaths or a person authorized to take affidavits."
>
> Under this provision, all the Plaintiff needed to show is that the entries were made from its books, which at the time of making were one of the ordinary books of the Bank, that the books were in the custody and control of the Bank and that the entry was made in the ordinary course of banking business. I am satisfied that the two witnesses called by the Plaintiff to testify for it satisfied fully these requirements."

57. The Court is persuaded that the Defendant has proved its Counterclaim on a balance of probabilities as prayed for in the Counterclaim.

58. This leaves the only other issue outstanding as the issue of costs. The same are awarded at the discretion of this Court. The Court sees no reason to deny the Defendant costs of the Counterclaim. An order for costs of the Plaintiff's suit which was dismissed was made prior on 12/6/2023. The same were awarded to the Defendant.

Determination

59. The Court proceeds to enter Judgment for the Defendant against the Plaintiff on the Counterclaim as follows;

    a. Kshs.19,208 732.11 plus interest at Court rates from the date of filing suit until payment in full.

    b. Costs of the Counterclaim.

    c. Interest on costs at Court rates from the date of Judgement until payment in full.

60. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025.

NJOROGE BENJAMIN K.

JUDGE

In the presence of

Mr. Mugambi holding brief for Mr. Keengwe for the Plaintiff.

Miss Diru holding brief for Mr. Kenneth Wilson for the Defendant.

Mr. Wabwire - Court Assistant.