



REPUBLIC OF KENYA



**Otwori v National Bank of Kenya Limited (Civil Appeal 170 of 2021)  
[2024] KEHC 1238 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1238 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 170 OF 2021  
PN GICHOHI, J  
FEBRUARY 15, 2024**

**BETWEEN**

**JARED ASATI OTWORI ..... APPELLANT**

**AND**

**NATIONAL BANK OF KENYA LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree in Kisii CMCC  
No. 389 of 2011 by Hon. E.A. Obina (PM) on 24th November, 2021)*

**JUDGMENT**

1. The Respondent's case at the lower court was that by a loan application form dated 24<sup>th</sup> June, 2009, Respondent applied for a loan facility of Kshs. 780,000/=.
2. The Respondent by a letter dated 23<sup>rd</sup> July, 2009 approved the loan at an interest of 18% and it was agreed that the facility would be paid in monthly instalments of Kshs. 19,807/=.
3. A statement of account tendered in evidence reveals that the loan was disbudded on 31<sup>st</sup> August, 2009. The said statement of account additionally reveals that as at March, 2011, the outstanding loan balance was Kshs. 892,981.10.
4. Arising from the non-repayment of the loan as agreed, Respondent through their advocate issued a demand letter dated 17<sup>th</sup> January, 2011 and subsequently by a plaint dated 28<sup>th</sup> October, 2011 filed suit claiming Kshs. 892,981.10 plus interest at the contractual rate from 1<sup>st</sup> April, 2011, costs of the suit and interest.
5. On the other hand, the Appellant's evidence was that on 24/07/2009, he applied for a loan facility at the Respondent's offices to settle his loan amount with Barclays Bank and Mwalimu Sacco. It was his evidence that the Respondent failed to pay the said loan. As a result, the two (2) lending institutions continued to deduct money from his salary.



6. He maintained that the Respondent did not remit the full sum requested and instead paid an amount between Kshs. 380,000.00 and Kshs. 480,000.00. He was also emphatic that he had repaid Kshs. 220,000.00. He asked the trial court to grant him time to pay for the balance.
7. In his cross examination, he stated that the application for the loan was indicated as that of personal development and not to repay his existing loans to Barclays Bank and Mwalimu Sacco.
8. He further could not furnish with evidence his allegation that the Respondent was to settle his loans with the two (2) lending institutions. He added that he wrote several letters to the Respondent seeking a grace period to repay the loan. He however did not complain that the Respondent had not settled his loan with the other banks.
9. In its judgment dated 24/11/2021, the trial court, the learned trial magistrate found the Respondent's case proved and made the following orders:-
  1. Judgment is hereby entered for the Plaintiff against the Defendant in the sum of Kshs. . 892,981.10
  2. The said amount shall attract interest at the bank rates from the date the borrower fell in arrears until payment in full.
  3. The Plaintiff is advised to supply the defendant with the loan statement within 30 days from today's date.
  4. Parties are advised and encouraged to find a solution to their problem with the assistance of a commercial mediator. A solution that is mediated and agreed is the best , it does not leave behind bitterness. It is a win win for both parties.
  5. Number (4) is only an encouragement and advice.
  6. The costs of the suit shall be on the plaintiff.
10. The Appellant was by the decision of the trial court hence this Appeal dated 20/12/2021 that is based on 8 grounds. In summary, the Appellant maintained that:-
  1. The Respondent failed to discharge his burden of proof to the required standard of proof.
  2. The trial court failed to consider the weight of the evidence adduced particularly that the Appellant furnished his pay slips and bank statements verifying that he had been settling the loan amount.
  3. The trial court was biased for failing to take into account that an agreement was arrived at as to deduct his salary from his employer and forwarded straight to the Respondent.
  4. The trial court failed to appreciate that there were mistakes occasioned by the Respondent since his employer was not informed of the lapse of deductions.
  5. The trial court based its findings on conjectures, suppositions and extraneous matters thus arrived at a wrong decision.
11. In the circumstances, the Appellant prayed that the Appeal be allowed by setting aside the judgment and decree of the trial court.
12. This Appeal was canvassed by way of written submissions.



13. In his submissions dated 16/03/2023, the Appellant submitted that the trial court's findings were illegal, unjustified, untenable, unprocedural and formulated no basis in fact or in law.
14. He submitted that the judgment sum is in excess of outstanding amount. He urged the court to find that he had repaid a sum of Kshs. 212,000/= which ought to have been set off from the outstanding sum.
15. The Respondent filed its written submissions dated 17/04/2023. It submitted that it had discharged its burden of proof being on a balance of probabilities to the required standard. It maintained that it was not disputed that the Appellant obtained a loan facility in the sum of Kshs. 780,000.00 attracting an 18% annual interest and that the Appellant subsequently defaulted prompting the Respondent demand from the Appellant.
16. It was submitted that since no evidence was furnished to demonstrate that the Appellant had fulfilled his obligations, the Respondent sought relief that was properly granted by the trial court. The Respondent urged this Court to uphold the trial court's findings and dismiss the Appeal with costs.

### **Determination**

17. This court has considered the evidence by both parties at the trial court. A perusal of the statement of account tendered in evidence demonstrates that Appellant was given credit for Kshs. 131,565.50. At the hearing, Appellant did not demonstrate that he had paid any amount in excess of the credited sum and more particularly that he had paid Kshs. 212,000/=.
18. Since the paid sum had already been credited, the trial court had no jurisdiction to give a further discount either of the same sum or of the unproved sum of Kshs. 212,000/=.
19. From the foregoing, this Court is satisfied that the trial court's finding that Appellant was indebted to the Respondent in the sum of Kshs. 892,981.10 was well founded.
20. Lastly, this Court notes the issue that arises from the orders of the court which are at variance with the pleadings. The Respondent had pleaded at paragraph 8 of the plaint as follows:-

“The Plaintiff's claim against the defendant therefore is for the unpaid outstanding sum of Kshs. 892, 981.0 plus interest thereon at the rate aforesaid from 01.04.2011 until payment thereof in full.”
21. Indeed, the loan agreement reveals that interest was agreed at 18% p.a and not at “bank rates” as ordered by the trial court. Further, whereas the statement of account demonstrates that Appellant defaulted as early as 2009, the Respondent sought interest not from the date of Appellant fell in arrears as ordered by the trial court but from 1<sup>st</sup> April, 2011.
22. In the case of National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd and Another (2002) EA 503, the Court of Appeal held that the Court only interprets and enforces the intention of the parties but has no jurisdiction to rewrite a contract between the parties.
23. In conclusion this Court makes the following orders:-
  1. This Appeal has no merit but this Court order that interest on the decretal sum due shall be charged from 1<sup>st</sup> April, 2011 until payment in full at the interest rate contracted by the parties.
  2. Costs of the appeal and of the trial in the lower court shall be borne by the Appellant.

**DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 15<sup>TH</sup> DAY FEBRUARY, 2024.**



**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Mr. Mageto for Appellant

Mr. Godia holding brief for Mr. Nyangaca for Respondent

Laureen Njiru / Aphline , Court Assistant

