



**Fincredit Limited v Mutavi (Commercial Appeal E121 of 2023)  
[2024] KEHC 3037 (KLR) (Commercial and Tax) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3037 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E121 OF 2023**

**MN MWANGI, J**

**MARCH 8, 2024**

**BETWEEN**

**FINCREDIT LIMITED ..... APPELLANT**

**AND**

**BONIFACE MUTAVI MUTAVI ..... RESPONDENT**

*(Being an Appeal from the judgment of the Small Claims Court of Kenya at Nairobi delivered by Hon. J.W. Munene, on 17<sup>th</sup> May 2023 in SCC COMM No. E1820 of 2023)*

**JUDGMENT**

1. The appellant filed suit against the respondent at the Small Claims Court vide a statement of claim dated 9<sup>th</sup> March, 2023, seeking orders that the respondent pays it Kenya Shillings Two Hundred and Seven Thousand (Kshs 207,000/=), being the outstanding loan amount plus interest, and costs of the suit.
2. The appellant's case is that on 1<sup>st</sup> July, 2020, the respondent applied for and was granted a loan facility of Kenya Shillings One Hundred and Eighty Thousand (Kshs 180,000/=) by the appellant. The respondent was required to repay the said facility in thirty-six (36) equal monthly instalments through a check-off system with AAR Healthcare Kenya Limited.
3. The appellant averred that the respondent has since left the employment of AAR Healthcare Kenya Limited, and the last payment he made towards repayment of the loan facility advanced to him was on 1<sup>st</sup> October, 2021. Consequently, the appellant's loan account fell into arrears. It further averred that it notified the respondent of his default and demanded that he regularizes his loan account but the demand elicited no response from the respondent. As a result, the appellant proceeded to instruct its current Advocates on record to demand for the outstanding loan balance of Kenya Shillings Two Hundred and Seven Thousand (Kshs 207,000/=) which demand was equally not responded to.



4. The respondent neither entered appearance nor defended the claim before the Small Claims Court.
5. The Hon. Magistrate (Adjudicator) vide a judgment delivered on 17<sup>th</sup> May, 2023, dismissed the appellant's claim in its entirety on grounds that it failed to prove its case on a balance of probabilities.
6. Aggrieved by the aforesaid judgment, the appellant filed a Memorandum of Appeal dated 16<sup>th</sup> June, 2023 raising the following grounds of appeal -
  - i. That the learned Magistrate erred in law and fact in finding that there was no proof of disbursement of the loan amount and the respondent's indebtedness;
  - ii. That the learned Magistrate erred in law by finding that the claimant had not proved its case on a balance of probabilities; and
  - iii. Such further and other grounds as may be raised at the hearing of the appeal.
7. The appellant's prayer is for the instant appeal to be allowed with costs, for the decision of the Hon. Adjudicator to be set aside and for SCC COMM No E1820 of 2023- Fincredit Limited v Boniface Mutavi Mutavi to be set down for hearing before another Adjudicator.
8. The appeal herein was canvassed by way of written submissions. The appellant's submissions were filed by the law firm of Maina & Onsare Partners Advocates LLP on 17<sup>th</sup> January, 2024. The defendant did not participate in these proceedings despite having been served with the Record of Appeal and having been notified of the date for highlighting of written submissions by the appellant.
9. Ms. Ngui, learned Counsel for the appellant submitted that the appellant produced a copy of the RTGS payment slip as evidence of the fact that the loan amount was disbursed to the respondent through his account held at Co-operative Bank. That from the said RTGS payment slip, it is evident that the appellant disbursed to the respondent Kshs 76,784.00 out of the Kshs 180,000/= loan amount, after deducting Kshs 103,116.00 which comprised access and insurance fees, and payment of the balance of a previous loan. Counsel stated that these charges were provided for in the loan application form duly executed by the respondent, and whose validity had not been contested. To buttress this argument, the appellant's Counsel relied on the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2000] eKLR.
10. She submitted that the respondent agreed to repay the loan advanced to him by way of 36 equal monthly instalments of Kshs 8,000/= but defaulted in his loan repayment obligations as is evident from the respondent's loan account statement. Ms Ngui argued that the appellant's evidence was not controverted by the respondent since he neither filed a defence to the claim nor cross-examined the appellant's witness, and as result, the appellant's claim remains unchallenged.
11. She asserted that the appellant discharged its burden of proof to the required standard by producing copies of the loan application form, proof of disbursement of funds to the respondent's accounts, and the respondent's loan account statement which showed the respondent's indebtedness to the appellant. She cited the case of *Kanyungu Njogu v Daniel Kimani Mainigi* [2000] eKLR and maintained that the appellant proved its case against the respondent on a balance of probabilities.

#### **Analysis and Determination.**

12. This being the 1<sup>st</sup> appellate Court, I have the duty to analyze and re-evaluate the evidence adduced before the Small Claims Court and reach my own independent conclusion, while bearing in mind that I neither saw nor heard the witnesses testify and make due allowance for the said fact. This was the



position held by the Court in the case of *Peters v Sunday Post Limited* [1985] EA 424, which 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...”

13. This Court will only interfere with the finding by the Hon. Adjudicator if the decision is founded on wrong principles of law. To this end, I am bound by the Court of Appeal finding in the case of *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931, where the Court stated as follows -

“Accordingly, on when a finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstratively to have acted on wrong principles in reaching a finding he did, will this court interfere”.

14. I have re-examined the entire Record of Appeal and given due consideration to the written submissions by Counsel for the appellant. The issue that arises for determination is whether the appellant sufficiently proved its case before the Small Claims Court.
15. The appellant’s case is that the respondent applied for a loan facility of Kshs 180,000/= from it, to be repaid by the respondent in 36 equal monthly instalments of Kshs 9,500/=: as is evident from the loan application form produced by the appellant. The appellant contended that the loan amount of Kshs 180,000/=: less Kshs 103,116/= which comprised access and insurance fees, and payment of the balance of a previous loan, was disbursed to the respondent’s account held at Co-operative Bank via RTGS on 13<sup>th</sup> July, 2020. The appellant stated that the respondent serviced the loan until October 2021 when he stopped making the monthly repayments thus causing his loan account to fall into arrears. The appellant submitted that as at 11<sup>th</sup> November, 2022, the outstanding loan amount was Kenya Shillings Two Hundred and Seven Thousand (Kshs 207,000/=).
16. I have perused the evidence adduced by the appellant before the Hon Adjudicator and I note that the appellant produced a copy of an RTGS payment slip in support of its evidence that the loan amount of Kshs 180,000/= was actually disbursed to the respondent. Further, the loan application form shows that the respondent applied for the aforesaid loan facility on 2<sup>nd</sup> July, 2020. The RTGS slip shows that Kshs 76,784.00 was transferred into the respondent’s account held at Co-operative Bank on 13<sup>th</sup> July, 2020.
17. In explaining the variance between the amount that was disbursed to the respondent’s account and the actual loan amount that was processed, the appellant’s evidence was that the entire loan amount was not disbursed to the respondent’s account since Kshs 10,116.00 was deducted to cater for access and insurance fees, whereas Kshs 93,000/= was deducted to fully repay the respondent’s previous loan with the appellant.
18. To prove the said assertion, the appellant provided the respondent’s loan account statements found at pages 28 and 29 of the Record of Appeal. At page 28, it is clear that the appellant fully repaid a loan of Kshs 120,000/= advanced to him by the appellant on 14<sup>th</sup> January, 2020, by making an instalment of Kshs 93,000/= on 13<sup>th</sup> July, 2020. At page 29, it is evident that Kshs 10,116.00 was charged to the respondent as access & insurance fees for the loan of Kshs 180,000/= advanced to him by the appellant.
19. In finding that the appellant did not prove its case on a balance of probabilities, the Hon. Adjudicator at page 2 of his judgment held that there was no proof of disbursement of the advanced amount to



the respondent in the form of a deposit slip or a bank statement from the respondent's bank account where the money was deposited, or the appellant's bank where the money was withdrawn. The Hon. Adjudicator further held that with no other evidence save for account analysis i.e. disbursement charges advise, the respondent could not be held liable. Having considered the documentation relied on by the appellant in support of its case, it is my finding that in arriving at the above conclusion, the Hon. Adjudicator erred in law.

20. The standard of proof in civil cases is on a balance of probabilities. By requiring the appellant to produce a deposit slip or a bank statement from the respondent's bank account where the money was deposited or the appellant's bank where the money was withdrawn, the Hon. Adjudicator raised the standard of proof to that of beyond reasonable doubt. In *Miller v Minister of Pensions* [1947] 2ALL. ER 372 the Court of Appeal stated thus-

“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. 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 unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

21. As explained hereinbefore, the appellant provided a copy of the loan application form which shows that the respondent applied from it a loan of Kshs 180,000/= on 2<sup>nd</sup> July, 2020, and a copy of the RTGS slip showing that Kshs 76,784.00 was transferred into the respondent's account held at Co-operative Bank on 13<sup>th</sup> July, 2020. The appellant has explained by way of documentary evidence why it only disbursed Kshs 76,784.00 to the respondent's account and how the balance was applied. It has gone further to demonstrate through the respondent's loan account statement that the respondent serviced the loan until October 2021 and thereafter the said loan fell into arrears. As at 30<sup>th</sup> June, 2023, the outstanding loan amount due and owing from the respondent to the appellant was Kshs 207,000/=.

22. Section 37 of the *Evidence Act* provides that –

“Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”

23. The respondent's loan account statements showing that the respondent is indebted to the appellant were corroborated by the loan application form and the RTGS payment slip evidencing disbursement of funds into the respondent's account held at Co-operative bank. The appellant also offered an explanation of the difference between the amount disbursed to the respondent's account and the money advanced to the respondent.

24. In the absence of any evidence to the contrary, this Court is satisfied that the appellant proved its case on a balance of probabilities as required by law.

25. In the premise, I find that the appeal herein is merited. I allow it in the following terms -

- i. The judgment delivered on 17<sup>th</sup> May, 2023 by the Adjudicator, Hon. J .W. Munene is hereby set aside;
- ii. Judgment is hereby entered for the appellant against the respondent as prayed for in the statement of claim dated 9<sup>th</sup> March, 2023; and



- iii. Costs of this appeal and the suit before the Small Claims Court shall be borne by the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF MARCH, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Ngui for the appellant

No appearance for the respondent

Ms B. Wokabi – Court Assistant.

