



**Fincredit Limited v Muli (Commercial Appeal E132 of 2023)
[2024] KEHC 3854 (KLR) (Commercial and Tax) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E132 OF 2023**

MN MWANGI, J

APRIL 12, 2024

BETWEEN

FINCREDIT LIMITED APPELLANT

AND

EUNICE VILITA MULI RESPONDENT

JUDGMENT

1. The claim against the respondent in the lower Court was that on 14th June, 2016, she applied for a loan facility for the sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) from the appellant, which accepted and disbursed the said loan amount on 23rd June, 2016. That it was agreed that the facility would be repaid in 25 equal monthly instalments. The appellant alleged that the respondent would make irregular loan repayments and the loan fell into arrears. It was stated that the respondent failed to settle the outstanding amount of Kshs.126,082.71, despite demand having been made, which prompted the appellant to file the claim before the Small Claims Court, seeking payment of the outstanding loan amount of Kshs.126,082.71 together with interest thereon and costs of the claim. Although the respondent was duly served with the statement of claim, she did not file a response.
2. In the impugned judgment, the Court dismissed the appellant's claim with no orders as to costs. The Court found that the loan application form had been executed by AAR Health Care (Kenya) Limited and the respondent. The Court reasoned that the loan schedule that was produced, without any proof of disbursement, was not enough to charge the respondent with liability.
3. Being dissatisfied with the said judgment, the appellant filed a Memorandum of Appeal dated 22nd June, 2023 raising the following grounds of appeal-
 - i. That the Learned Magistrate erred in law and in 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 has 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.
4. The appellant's prayer is for this Court to allow the appeal with costs and to set aside the judgment dated 24th May, 2023 and that SCC Comm. No. E1737 of 2023 Fincredit Limited v Eunice Vilita Muli be set down for hearing before any Magistrate other than Hon. J. W. Munene (RM).
 5. The appellant filed written submissions dated 6th October, 2023. The respondent did not participate in this appeal.
 6. The appellant submitted that there was proof of disbursement through the RTGS payment slip which clearly captured its account details, transaction date, particulars of the respondent and her bank account which were sent by her remittance amount of Kshs.94,280.00, following deduction of the commitment and insurance fees and transfer charges of Kshs.5,180.00.
 7. The appellant stated that the appellant changed its name from AAR Credit Services to Fincredit Limited in June 2018. The appellant argued that at no time did the respondent dispute the debt, hence the claim was uncontroverted. The appellant relied on the case of Kanyungu Njogu v Daniel Kimani Maingi [200] eKLR, to assert that it had discharged the burden of proof on a balance of probabilities.

ANALYSIS AND DETERMINATION

8. I have re-examined the Record of Appeal and given due consideration to the appellant's submissions. The issue for determination whether the Trial Court was correct in finding that the appellant had not proved disbursement of the loan amount and the respondent's indebtedness.
9. This Court is alive to its duty to as the first appellate Court to analyze and re-examine the evidence adduce in the lower Court, while bearing in mind that it did not see or hear the witnesses testify, and to arrive at its own independent decision. These principles were set by the Court of Appeal in Peters vs. Sunday Post Limited [1958] EA 424, as follows:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide.” See also *Selle v Associated Motor Boat Company Ltd* [1968] EA 123.”
10. As was noted by the Trial Court, even though the appellant's claim was unopposed, it was the appellant's burden to prove its claim on a balance of probabilities.
11. Section 107 of the *Evidence Act* provides as follows-
 - “(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.”



12. Lord Denning J., in *Miller v Minister of Pensions* (1947) 2 ALL ER 372, elaborated on the burden of proof required of a claimant in a civil case as follows-

“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’, the burden is discharged, but, if the probabilities are equal, it is 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 (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

13. In this case, the Trial Court found that the loan statement that was produced, which had been executed by AAR Health Care (Kenya) Ltd, was insufficient to prove the respondent’s liability for the outstanding loan amount.

14. From the record, I however note that the appellant produced the AAR Staff Loan Application Form which was duly signed by the respondent on 14th June, 2016. From the form, it is apparent that the respondent was an employee of AAR Health Care (Kenya) Ltd. Her loan application was signed by the Head of Department as a recommender. It was also signed by the HR and Risk Departments. The loan disbursement was approved by George and stamped by the AAR Health Care (Kenya) Ltd on 22nd June, 2016.

15. The loan request for Kshs.100,000/- was to be repaid in 24 months inclusive of a credit charge of 30% to AAR Credit Services Limited. The appellant also produced a copy of the Real Time Gross Settlement (RTGS) payment authority dated 23rd June, 2023 for the transfer of Kshs. 94,820.00 from AAR Credit Services Ltd Bank account to the respondent’s Co-operative Bank Account, which she provided through an email of the same date. The appellant further produced a certificate of change of name dated 20th June, 2018 from AAR Credit Services Limited to Fincredit Limited.

16. From the foregoing, I am satisfied that the appellant discharged its burden to prove the respondent’s liability to pay the outstanding loan amount. I find that the Trial Court erred in law and in fact by finding that there was no proof of disbursement of the loan amount and the respondent’s indebtedness. I also find that the Trial Court erred by finding that the appellant had not proved its case on a balance of probabilities.

17. In the upshot, the appeal herein is allowed in the following terms-

i. That the judgment of Hon. J. W. Munene (RM), dated 24th May, 2023 in SCC COMM. NO. E1737 of 2023 Fincredit Limited v Eunice Vilita Muli is hereby set aside;

ii. That judgment is hereby entered in favour of the appellant;**

iii. The respondent shall pay the sum of Kenya Shillings One Hundred and Twenty-Six Thousand and Eighty Two and Seventy One cents (Kshs.126,082.71) together with interest from the date the claim in the Small Claims Court was filed; and

iv. That the costs of this appeal and the costs of SCC COMM. NO. E1737 of 2023 Fincredit Limited v Eunice Vilita Muli are awarded to the appellant.

It is so ordered.



**DATED, SIGNED and DELIVERED at NAIROBI on this 12th day
of April, 2024. Judgment delivered through Microsoft Teams Online
Platform.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Onsare for the appellant

No appearance for the respondent

Ms B. Wokabi – Court Assistant.

Page 2 of 2 NJOKI MWANGI, J

