



**Muthusi v NIC Bank Limited (Civil Appeal E086 of 2022)  
[2024] KEHC 17085 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 17085 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E086 OF 2022**

**DKN MAGARE, J**

**MAY 7, 2024**

**BETWEEN**

**RITA NDUKU MUTHUSI ..... PLAINTIFF**

**AND**

**NIC BANK LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The case herein was filed on 28/11/2022. It was filed together with a notice of motion dated 28/11/2022. The court dealt with the interlocutory application. an order of injunction pending hearing and determination of the suit was given. There was a rider that the suit had to be by 27/4/2024.
2. The case was heard and concluded before the said date. The matter is now due for Judgment today. The question of current indebtedness is not in dispute. The two questions that the court was to have to grapple with is whether: -
  - a. The defendant is bound to have the portion of the loan belonging to the deceased written off by dint of death of the co-owner.
  - b. The orders that are available to the parties.
3. However, though the first limb was pleaded, there was no prayer in respect thereto. I shall therefore deal with the prayers sought in the plaint.

**Pleadings**

4. Vide a pliant dated 28/11/22 the plaintiff sought for: -
  - a. A declaration that the advertisement for sale through public auction on the Daily nation on the 29<sup>th</sup> day of August, 2022 is illegal, null and incapable of enforcement.



- b. A permanent injunction restraining the Defendant whether by themselves, their employees and/or agents or otherwise from selling, alienating and or transferring the suit property.
  - c. An order compelling the Defendant to reverse all of the plaintiff's debits other than the loan's interest.
  - d. General damages.
  - e. Cost of the suit
5. The plaintiff and her deceased husband were registered as proprietors of land parcel whose number was not given in the paint. It was said to be charged to the Defendant NIC Bank, Now NCBA Ltd. The plaintiff's husband was principal borrower and the payer of a loan and faithfully paid the loan till by demise. The plaintiff was barely involved in payment. The Plaintiff requested for the loan statement and mortgage protection insurance but the Defendant refused to supply but Advertised properly on 14/4/2022.
  6. A preliminary objection was raised in a matter filed in the lower court CMC Elc E50 of 20201. The preliminary objection related to the value being over Kshs. 20,00,000/=. The suit was withdrawn.
  7. The property was advertised for sale on 29/11/2022. The Plaintiff stated that she was not served with statutory Notices to rectify any default. The plaintiff stated that the Defendant refused to produce mortgage protection. She stated that the deceased's estate is yet to be administered but a suit had been filed in Nairobi E957 of 2020.
  8. The plaintiff also stated that she was not served with a notification of sale. She stated that Defendants actions was actuated by malice. One stuck contrasts with all complaints I have seen in these kind of matters, is that there were no particulars of breach of contract, breach of trust and circumstances giving rise to damages.
  9. In the Notice of Motion Land Reference No. MSA/Ms/ Block/2337A was indicated as the subject matter. The application set out breach of contract that raised a prima facie case. Unfortunately, the same cannot be said of the plaint. It is wanting in details. It does not even refer to the true subject matter of the suit.
  10. The defendant filed defence denying liability and positing that the suit is an abuse of the court process. They filed all their documents for compliance. Upon issuance of the interlocutory orders, parties sought to settle but could not. I heard their evidence.
  11. The Plaintiff adopted her evidence in chief and stated that she also filed a supplementary statement dated 20/1/2023. She produced a bundle of documents. She was cross examined. She admitted that the loan was not paid in full. She noted that the documents in the defence bundle showed she was served.
  12. She stated that the bank refused to give her a statement. She equally attached that she was not repaying the loan. She referred to the mortgage probation but said nothing much about it.
  13. The defence called 3 witnesses Peritah Owendi Mukuma testified and adopted her statement. She adopted the Defence list of documents and a supplementary list dated 7/11/2023. She stated that they were their insurance cover on 18/9/2022.
  14. She stated that the client picked his insurance and then changed his mind. She stated that the bank did not make a unilateral decision on change of premiums.



15. The valuer and the process Server testified before the case was closed. Parties filed comprehensive submissions.

### **Submissions**

16. The Plaintiff filed submissions. It was submitted that the Plaintiff was never served with the Statutory Notices as required under section 90 and 96 of the Land Act save for the auctioneers notice of sale dated the 7th day of February, 2022.
17. Reliance was placed on the case of Nyagilo Ochieng and Another v Fanuel Ochieng and 2 Others [1995-1998] 2 EA 260 as follows:

“The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the chargee to make sure that there is compliance with the requirements.... That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. It must be understood that in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya.”

18. It was also submitted that intended sale was therefore premature, illegal and void as it did not comply with the stipulated regulations as required under the provisions of the Land Act and thus a great violation to the Plaintiff's right as guaranteed under Article 40 of the Constitution of Kenya, 2010.
19. Further, it was submitted that the property was grossly undervalued. They relied on *Minolta Limited v National Bank of Kenya Limited* KJD HCCC No. 32 of 2018 [2018] eKLR where the court held that the Kenyan Market as far as the sale of property is concerned rarely depreciates in value.
20. Further that the Defendant through its Supplementary bundle of documents produce an incomplete insurance policy which was contested and ought not to be admitted and relied upon in evidence.
21. Reliance was placed on the case of *Kenneth Nyaga Mwigie v Austin Kiguta & 2 others* [2015] eKLR thus:

“The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind



to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

22. They urged me to allow the Appeal.

### **Defendant’s submissions**

23. The Defendant filed submissions dated 19/1/2024. They stated that they served all notices properly. Reliance was placed on the case of Samson M. Aketch & another v Sidian Bank Limited [2021] eKLR.

24. They stated that there was no undervaluation and cogent evidence was not produced to that effect. They relied on the case of ZumZum Investments Limited V Habib Bank Limited (2014) eKLR, Beatrice Atieno Onyango v Housing Finance Company Limited & 3 others [2020] eKLR.

25. It was their case that the Plaintiff in her submissions whilst citing the case of Palmy Company Limited v Consolidated Bank of Kenya Limited ML HCCC No. 527 of 2013 [2014] eKLR admitted that there has to be evidence of undervaluation that is cogent. They blamed the Covid-19 pandemic for changes in value of the valuations.

26. They also dealt with the mortgage protection cover, though not pleaded in the final prayers. Reliance was placed in the case of Keziah Njambi Maingi TA Arrivals Textile Shop v Barclays Bank of Kenya Limited 2018 eKLR.

27. They prayed that I dismiss the suit and award them costs.

### **Analysis**

28. The burden of proof is on the party who alleges. Unfortunately, none has alleged. In a beautifully worded Notice of motion dated 25/11/2022, the application was able to show that she was entitled to an injunction pending hearing and determination of the suit.

29. I was hoping against hopes that the plaintiff will see her fully and align her evidence with pleadings. In a 32 paragraph long plaint various allegations are made. They are not concretised into anything. However, there is no specific claim made.

30. In the plaint, the particulars of illegality of the notices are not referred. The plaintiff completely mute on the said notices.

31. Secondly, injunctions do not issue unless a certain right contract or other obligations are breached. I do not see any serious allegations in that respect. On reversal of changes, there are no particulars of anything that was budded into the account. The plaintiff a bid to obtain an injunction produced two diametrically opposed documents. Her evidence does not touch on any allegation in the plaint. Parties must know that before proving, they must plead specific breaches.

32. Whereas a plaint is required to be concise, the 32 paragraph one is not concise and does not address all the issues. Even issues raised in the plaint are not prayed for. Section 107 – 109 of the [Evidence Act](#) provides as follows:-

“ 107.



(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.

108. 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.

109. 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.”

33. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

34. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

“Denning J. in *Miller Vs 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 the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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 loose, because the requisite standard will not have been attained.”

35. Parties must plead first before they prove. In other words, Pleadings must be followed by evidence and not the other way round. Evidence that is not supported by pleadings is otiose and is of no use to the parties and the court. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, A C Mrima stated as follows: -

“ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral*



and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

36. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

37. The court cannot act on evidence, even where it is established, in the absence of pleadings. In the recent presidential Election Petition, the Court of Appeal of Nigeria sitting as the election court, in Peter Gregory Obi & another versus Senator Bola Ahmed Tinubu & INEC & 3 others consolidated with petitions no. 4 and 5 both of 2023, stated as follows: -

“In *Belgore Versus Ahmed* (2013) 8 Nwlr (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable(sic), omnibus and general in terms. The Apex court specifically held as follows: -

“Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent.

38. I do not find any basis laid for any of the prayers sought. The prayers are at variance with the evidence tendered. It is not possible to grant the orders sought in absence of specific breach of contract.
39. The Defendant served requisite notices on the parties. The defendant could have been guilty of several matters. However, they were not pleaded.



40. Order 2 rule 10(1) requires that a party pleads precisely what their grievances are and what breach the defendant is said to have committed. The said order provides as follows: -

- (1) Subject to sub-rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —
- a. particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
  - b. where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

41. There is no breach of contract that has been alleged. The only allegation relates to service of statutory notices. These were served on the defendant. The question whether the co-owner was served, could not be dealt with in absence of specific pleadings.

“The parties have a contract between them. It is not the duty of the court to rewrite it. National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR, the court of Appeal was of the considered position that: -

his, in our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

42. There are no allegations that there are illegal charges being added to the account and if so, how much. The issue of valuation, though mentioned is not pleaded with precision or prayers sought in relation thereto.

43. No prayer is sought in relation to the valuation. The court cannot embark on evidence that is unsupported by pleadings. I am unable to countenance a scenario where an injunction is given in absence of a background.

44. The sale of 29/8/2022 is already past. There are no pleadings on particulars of illegality. How then is the court supposed to find the same is illegal. In any case, evidence tendered was to the effect that notices were properly served and valuation carried out. Without breach, the court cannot gratuitously stop transfer. There were no allegations that transfer is being illegally done.

45. Finally, on the reversal of charges, there was no evidence tendered to that effect. The duty to prove the allegations lay with the Plaintiff. They failed to do so.



46. Before I depart, I need to address the question of general damages. It must be remembered that the duty to prove damages is on the party alleging. However, damages cannot be proved in absence of particulars of breach. In case of special damages, they must be specifically pleaded and proved. They cannot be thrown to the court. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the court of Appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it”

47. However, there can be no general damages for breach of contract. In *Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd* (2015) eKLR as follows:

“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitution in integrum* (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR*). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))”.

48. Other than pleading evidence of loss must be led. In this case the prayers were just thrown at the court without evidence being led. Court of Appeal stated in *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR

“The appellant apart from listing the alleged loss and damage, it did not... lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.



49. There was suit is consequently untenable. It is dismissed with costs to the plaintiff.

**Determination**

50. The upshot if the foregoing is that I Make the following orders: -

- a. I find no merit in the suit herein and the same is dismissed with costs to the Defendant.
- b. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7<sup>TH</sup> DAY OF MAY, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Mrs. Omote for 1<sup>st</sup> defendant

Mr. Ngetich for the Plaintiff

Court Assistant- Norah

**M.D. KIZITO, J.**

