# Ngao Credit Limited v Kitsao & another (Civil Appeal E197 of 2023) [2024] KEHC 8611 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8611 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL APPEAL E197 OF 2023**

**DKN MAGARE, J**

**JULY 11, 2024**

**BETWEEN**

**NGAO CREDIT LIMITED ..................................................................... APPELLANT**

**AND**

**ABEL BAHATI KITSAO .............................................................. 1ST RESPONDENT**

**HARRISON MKANYI KATANA ............................................... 2ND RESPONDENT**

## JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. J.B Kalo– (CM) dated 23/6/2023 arising from Mombasa CMCC No. 828 of 2020.
2. The Memorandum of Appeal set out grounds that the learned magistrate erred in law and fact in:
   a. Allowing the 1st Respondent's suit.
   b. Failing to consider the Appellant's evidence that the motor vehicle was offered as security.
   c. Allowing loss of user at Kshs. 500,000
   d. Failing to consider the written agreement on the loan.
   e. Upholding forgery without proof.
   f. Failing to consider submissions of the Appellant.
3. The Appellant was the 2nd Defendant, the 1st Respondent was the Plaintiff and the 2nd Respondent was the 1st Defendant in the lower court suit.

**Pleadings**

4. The Plaintiff sought the following reliefs in the suit in the court below:

i. A declaration that the repossession of the by the Defendant of the Plaintiff's motor vehicle registration no. KBW 224B was unlawful and void

ii. Immediate release of the motor vehicle

iii. Costs of storage

iv. Kshs. 3,000/- per day from 21st November 2019 being loss f user of the motor vehicle

v. Permanent injunction restraining repossession

vi. Ksh. 271028/- as cost of repairing the motor vehicle

vii. Cost and interest

5. In the Plaint, the Plaintiff averred that in March 2019, the 1st Defendant borrowed Kshs. 500,000/= from the 2nd Defendant and the Plaintiff executed a personal guarantee for the loan as security.

6. That the 1st Defendant subsequently colluded with the 2nd Defendant and took a loan of top up of Kshs. 560,000/- using the motor vehicle as security without the Plaintiff's consent and through acts of fraud and forgery of the Plaintiff's signature. The 1st Defendant defaulted and the 2nd Defendant moved and repossessed the motor vehicle.

7. Therefore, the Plaintiff maintained that he did not guarantee the top up loan.

8. The 1st Defendant entered appearance denying the averments in the claim and praying that the suit be dismissed.

9. The 2nd Defendant also filed Defence denying the averments in the plaint and also pleaded that the motor vehicle was jointly registered in the name of the Plaintiff and the 2nd Defendant and that the Plaintiff signed consent and personal guarantee conforming loan of Kshs. 560,000/-.

**Evidence**

10. The Plaintiff testified as PW1. He reiterated his witness testimony and relied on the documents filed and produced in court. In cross examination, it was his case that the motor vehicle was held for 2 years and released without paying storage charges. He denied signing guarantee. That he had no evidence to prove loss of user of Kshs. 3,000/- per day.

11. The 1st Defendant called DW1, Harrison Mkanyi Katana who adopted his witness statement. In cross examination, it was his testimony that the motor vehicle was repossessed because of the loan top up of Kshs. 560,000/-.

12. DW2 was Jimmy Yeri., the branch manager of the 2nd Defendant. He relied on his witness statement and produced documents per the list of documents filed in court as exhibits. In cross examination, it was his case that the Plaintiff's loan was fully settled and closed. That he did not witness the Plaintiff sign the guarantee. The log book was surrendered by the plaintiff on account of the first loan.

**Analysis**

13. I have looked at the record of appeal and the submissions and authorities filed by the parties in support and opposition of their respective cases.

14. The issue is whether the learned magistrate erred in his finding that the Respondent had proved his case and allowed it.

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

16. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

17. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

18. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

19. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein 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..."

20. I now proceed to establish whether the Respondent was entitled to the reliefs awarded. In David Bagine v Martin Bundi [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited (1948) 64 TLR 177), where he that:

> [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note 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.
>
> in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

21. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> 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.

22. Therefore, it follows that the 1st Respondent herein had the duty to prove his claim against the Appellant and the 2nd Respondent. Courts have belabored the burden and standard of proof in civil cases which I find necessary to lay down as below.

23. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

24. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case.

25. Further, in Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

26. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " 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 that 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."

27. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

28. Furthermore 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 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 loose because the requisite standard will not have been attained.”

29. The 1st Respondent pleaded that he did not consent to the loan top up and in fact did not sign any personal guarantee for the top up. From his testimony, DW2 confirmed that he did not witness the 1st Respondent sign the personal guarantee form. It was also his case that the log book for the suit motor vehicle was surrendered by the 1st Respondent on account of the first loan. It was also his confirmed case that the 1st Respondent had cleared the first loan and there were no arrears.

30. Consequently, it is clear that the 1st Respondent never consented to the purported loan top up. I also note that the Appellant never called one Eunice Wanja Munyiri who was said to have received the loan top up guarantee form to testify in evidence, this could not be for any other reason other than the evidence of the said Eunice Wanja Munyiri being adverse to the Appellant’s case.

31. Under Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) it is provided as doth:-

> “ No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.”

32. However, I am equally persuaded by the reasoning of Odunga, J as he then was in Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR where the learned judge stated as follows:

    53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.

33. Consequently, I find and hold that the 1st Respondent proved his case in the lower court to the required standard and the learned magistrate arrived at a proper decision in accordance with the facts, evidence and the law before him. The 2nd Respondent clearly sneaked behind the back of the 1st Respondent and obtained the loan top up with the 1st Respondent as guarantor, without the authority of the 1st Respondent. How this happened was in the knowledge of the Appellant and the 2nd Respondent who

hoped to get away with their sins but not long until the 1st Respondent brought them to account in the eyes of the law.

34. Indeed the testimony of the DW2 was calculated to force a position that was plainly misleading and thwarted by the overwhelming evidence produced by the 1st Respondent. It is such conduct on the part of a witness like DW2 that Odunga J (as he then was), alluded to in the case of Kioko Peter v Kisakwa Ndolo Kingóku [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of N vs. N [1991] KLR 685. The Learned Judge lamented as follows:

> Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 when he expressed himself in the following terms:
>
> > "I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

35. The Appeal is therefore devoid of merit.

**Determination**

36. In the upshot, I make the following orders:

    a. The Appeal is devoid of merit and is dismissed *in limine*.

    b. The 1st Respondent shall have the costs of the Appeal at Kshs. 85,000/-

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM**.

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Ms. Kamau for the Appellant

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

Court Assistant – Jedidah