National Bank of Kenya Limited v Tako (Civil Appeal E177 of 2023) [2024] KEHC 8313 (KLR) (5 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8313 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E177 OF 2023

RE ABURILI, J

JULY 5, 2024

BETWEEN

NATIONAL BANK OF KENYA LIMITED ..... APPELLANT

AND

SILVANUS ONYURO TAKO ..... RESPONDENT

(An appeal arising out of the Judgment & Decree of the Honourable M.I. Shimenga, SRM in the Chief Magistrate's Court at Kisumu delivered on the 5th October 2023 in Kisumu CMCC No. E210 of 2022)

JUDGMENT

Introduction

1. The respondent vide an amended plaint dated 6.6.2022 sued the appellant seeking the following orders;
    a. A declaration be issued that the defendant is only entitled to recover the principal sum plus interests as at 1st May 2007 in the borrower's account.
    b. An order that the defendant pay to the plaintiff a sum of Kshs. 1,842,838.80 with interest at 17% per annum from 23.11.2021.
    c. Costs of the suit.
    d. Interests on (3) above from the date of filing of the suit till payment in full.
    e. Any other just and other equitable relief that this Honourable Court may deem fit to grant.
2. It was the respondent's case that on 23rd September 1991, he guaranteed Mr. Colombus Sao Awello a loan of Kshs. 20,000 advanced by the appellant by charging land parcel number Kisumu/Kasule/2003 as security for the due performance and payment of the loan amount.

3. The respondent averred that the appellant wrote a letter to him demanding payment of Kshs. 2,089,426 as the outstanding amount plus interest for the loan he had guaranteed and that with constant threats to realize the security, on the 23.11.2021, in protest, he paid the whole sum as demanded so as to save his property from the unlawful sale and subsequently managed to discharge his property.

4. It was the respondent's case that the demand for payment of Kshs. 2,089,426.80 violated the statutory provisions of section 44A of the *Banking Act*, was unlawful and illegal.

5. The appellant filed its statement of defence dated 26th July 2022 averring that the plaintiff guaranteed an overdraft facility of Kshs. 100,000 advanced to one Awelo Colombus Sao through a legal charge dated 23.09.1991 over the suit property, Kisumu/Kasale/2003. It was further averred that soon after the facility was availed to the borrower, the borrower defaulted in his obligation and as early as 22.5.1993, the appellant issued a 3 months' statutory notice demanding the account be regularized and that subsequently, it made several attempts of recovering the debt from the borrower prior to his death and even obtained judgement in Kisumu HCCC No. 26 of 1997 *National Bank of Kenya Ltd v Colombus Sao Awelo*.

6. It was the appellant's case that by virtue of the legal charge dated 23.9.1991, various statutory notices and correspondences between itself and the respondent, the respondent had at all material times been fully aware and conversant with his obligation to the Bank and that subsequently on his own volition and being aware of the outstanding amount at the time of Kshs. 2,089,426.80, the respondent asked that he be given a period of 90 days within which to settle the entire amount and he did so.

7. It was the appellant's case before the trial court that it had no record of the respondent protesting and/or denying being liable to pay the sum of Kshs. 2,089,426.80. It further denied that it was liable to pay the sum of Kshs. 1,842,838.80 and prayed that the suit be dismissed with costs.

8. In her judgement, the trial magistrate found that the loan advanced to the borrower was Kshs. 20,000 as the appellant had failed to prove that it advanced Kshs. 100,000; that the appellant was in breach of the in duplum rule thus violating section 44A of the *Banking Act* as it was only entitled to recover the principal amount and interest chargeable as at 1st May 2007, Kshs. 247,646.05 and that therefore the appellant illegally and unlawfully charged Kshs. 2,089,428.80. The trial magistrate subsequently granted to the respondent the orders sought in his plaint.

9. Aggrieved by the said judgment and decree, the appellant filed a memorandum of appeal dated 27th October 2023 raising the following grounds of appeal:

    a. The learned trial magistrate erred in law and fact in holding that the appellant failed to comply with section 44A of the *Banking Act* and charged the plaintiff excess amount when there was no evidence before the court establishing the excess amount and the particulars thereof making the said excess amount.

    b. The learned trial magistrate erred in fact by misunderstanding the purpose and effect of the 'transaction inquiry slip' which is an internal working memo of the defendant as a result of which she disregarded the statement of account produced in evidence before the court and reached an erroneous finding that the loan that was to be repaid was Kshs. 247,646.09 and not Kshs. 2,089,426.80.

    c. The learned trial magistrate erred in law and fact by failing to determine the principal amount, interest and any costs incurred under section 44A of the *Banking Act* as of 1.5.2007 based on evidence before court; this being a prerequisite before determining whether or not the

defendant was in breach of section 44A of the *Banking Act* in relation to the Kshs. 2,089,426.80 paid by the plaintiff in full settlement of the account.

d. That the learned trial magistrate erred in law in shifting the burden of proof to the appellant by holding that "..it is clear that the defendant has failed to produce a statement of account to show whether the borrower's outstanding loan has been fully settled" in the circumstances of the suit wherein the defendant produced a statement of account in evidence showing the total amount due under the loan account as Kshs. 2,089,426.80 which was duly paid by the plaintiff following negotiations and agreement with the appellant.

e. That the learned trial magistrate misapprehended and misapplied the evidence before the court as a result of which she reached the erroneous finding that "based on the transaction slip for the borrower's account as at 12.3.2021, the defendant stopped running interest on the said date in compliance with section 44A of the *Banking Act* and therefore the recoverable sum is Kshs. 247,464.05."

f. The learned trial magistrate misdirected himself in law in holding that Central Bank of Kenya Guidelines of 2013 do not apply to the suit and cannot guide the court in determining the issues before. despite the said Guidelines providing guidance in the interpretation and application of section 44A of the *Banking Act* and in particular the description and interpretation of 'non-performing loan' account and 'performing loan' account and the same being duly provided for in section 44A (5) (c)of the *Banking Act*.

g. The learned trial magistrate erred in law in applying the in duplum rule under section 44A of the *Banking Act* in favour of the plaintiff despite evidence before the court showing that through an agreement reached between the plaintiff and the appellant, the loan due from the plaintiff (a debtor) was renegotiated and or restructured and the terms thereof modified by settling on the total amount due as Kshs. 2,089,426.80 and the time for payment of the same extended for 90 days from the date of the agreement and in exchange the defendant undertook not to exercise its power of sale over the plaintiff's charged property being title number Kisumu/Kasule/2003 despite the said property fully securing the loan; per clause 1.4.16 of the CBK Guidelines.

h. The learned magistrate erred in law and fact in holding that "...As for the interest rate, the Legal Charge document provided that the interest rate chargeable was 17% p.a. and therefore I allow the same as parties are bound by the contract" when the Legal Charge interest rate of 17% p.a. was not pleaded by the plaintiff in its pleadings as a basis for the claim of rate of interest on the claimed amount of Kshs. 1,842,838.80

10. The parties filed written submissions to canvass the appeal.

The Appellant's Submissions

11. The appellant submitted that the trial magistrate erred in law and fact in holding that the appellant failed to comply with section 44A of the *Banking Act* and charged the respondent excess amount when there was no evidence before the court establishing the excess amount and further that the trial magistrate erred by failing to determine the principal amount, interest and any costs incurred under section 44A of the *Banking Act*. Reliance was placed on the case of *Tormor Kibore Tanui v National Bank of [K] Ltd* [2019] eKLR where it was held that it is not the duty of the court to establish and calculate how a claimed sum is arrived at and or which portion thereof comprises the principal and which other portion comprises interest and expenses and then determine whether the calculations are in tandem with requirements of section 44A of the *Banking Act*.

12. It was submitted that the respondent could not benefit from the in-duplum rule as the loan became non-performing before the operationalization of section 44A of the *Banking Act* as was held in the Tormor Kibore Tanui supra case.

13. The appellant further submitted that the in duplum rule under section 44A of the *Banking Act* does not cover and or apply to the payment of the sum of Kshs. 2,089,426.80 by the respondent to the appellant, the same having been paid voluntarily and without coercion or undue influence pursuant to an agreement reached by the parties herein following a renegotiation of the loan as provided for under Clause 1.4.8 and 3.2 (a) of the CBK Guidelines.

14. It was further submitted that the trial court erred by shifting the burden of proof on a fact/issue that was neither pleaded nor joined between the parties.

15. The appellant submitted that the trial magistrate erroneously disregarded the borrower's statement of accounts produced in evidence contrary to section 176 of the *Evidence Act* and the case of *Ecobank Kenya Limited v Liberty Graphics Kenya Limited & 3 Others* [2021] eKLR and instead relied on the 'transaction inquiry slip' which is an internal working memo.

16. It was submitted that the statement of accounts clearly reflected that the appellant stopped levying interest as at 31.7.2001 at what time the outstanding loan was Kshs. 2,089,441.37 which was the sum paid by the respondent and which had been due since 2001.

17. The appellant submitted that the respondent never pleaded that 17% p.a. as the interest applicable under the charge therefore forming the basis of his claim as parties are bound by the pleadings filed as was held in the case of *Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd* [2015] eKLR.

The Respondent's Submissions

18. It was submitted that the defendant totally violated the provisions of section 44A of the *Banking Act* specifically section 44A (1) & (2) as read together with section 44A (6) of the *Banking Act* in demanding and receiving the sum of Kshs 2,089,426.80/= from the respondent for the loan amount of Kshs. 20,000/= that the respondent guaranteed. Reliance was placed on the Court of Appeal case of *Housing Finance Company of Kenya Limited v Scholarstica Nyaguthi Muturi & Another* (2020) eKLR.

19. The respondent submitted that for the non-performing loans before section 44A of the *Banking Act* came into force; the Appellant Bank was required to only recover the principal amount and interest as at 1st May 2007 when Section 44A of the *Banking Act* came into force and thus the only recoverable sum from the respondent was Kshs. 247,646.05/= which was the amount due as at 10/7/2007.

20. It was submitted that demanding Kshs 2,089,426.80/= from the plaintiff was thus illegal and unlawful and that the true amount which ought to have been demanded was Kshs. 247,646.05.

21. The respondent submitted that the trial court did not disregard the statement of account (D exhibit—10) but found it not to be believable when the trial court observed and correctly that the statement of account (D exhibit—10) showed that the overdraft amount that the borrower took was Kshs. 100,000/= which was inconsistent with the legal charge (which was produced in evidence by all the parties) which showed that the loan amount was Kshs. 20,000/=. It was submitted that in the absence of the account number detail, it was questionable as to whose account the statement relates to, given that it is in evidence that the loan guaranteed was Kshs 20,000/= and not Kshs 100,000 as alleged by the defendant.

22. The respondent submitted that the CBK guidelines of 2013 do not apply to the circumstances of this case and that in any case, they are subordinate to the *Banking Act*.

Analysis and Determination

23. 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, bear in 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. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

24. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

25. The basic facts of this case before the lower court are not disputed. The respondent herein offered up the suit property as security for a loan of Kshs. 20,000 taken by one Awelo Colombus Sao as is evident from the legal charge dated 23.9.1991. From the record herein, the said borrower went into default and subsequently, the appellant started following up on the same as early as 22.5.1993. The appellant reached out to the respondent via various letters and notices informing him of its intention to sell off the charged suit property if he did not settle the claim that had now risen to Kshs. 2,089,426.80. The respondent then wrote to the appellant seeking to renegotiate payment of the said loan which he subsequently did. After the respondent had settled the claimed sum of money, he filed suit subject of this appeal, seeking to recover Kshs. 1,842,838.80 from the appellant on the ground that the same was illegally and unlawfully recovered from him by the appellant.

26. The established principle of law is that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

> " A court of law cannot rewrite 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."

27. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

> " We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

28. In this case, the respondent willingly offered up his property as security for his friend's loan. Following the default by his friend, the respondent eventually settled the claim by the appellant, after negotiating.

The respondent alleged that as a result of settling the said claim, the appellant illegally received Kshs. 1,842,838.80 over and above the sum it was entitles to and in breach of section 44A of the *Banking Act*.

29. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

30. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

31. In support of his case, the respondent produced the borrower's death certificate, the charge document, demand letters from the appellant and pay slips for the default amount claimed by the appellant.

32. However, the respondent did not produce any statement on how he arrived at the sum of money that he was claiming from the appellant as being an overpayment.

33. I must reiterate, and in this I agree with the appellant, that it is not the duty of the court to establish and calculate how a claimed sum is arrived at and or which portion thereof comprise the principal amount and which amount comprise the interest and expenses. See the case of *Tormor Kibore Tanui supra*.

34. In *Daima Bank Limited (In Liquidation) v David Musyimi Ndetei* [2018] eKLR Civil Appeal No.171 of 2010 the Court directed that:

> " 26. As all these involve reconciliation and tabulation, we are not in a position to establish how much is owing between the parties taking into account the payments made. Having established the basis for the calculation of the interest as above, it is incumbent upon the parties to reconcile the position in order to tabulate the exact figures conclusively. This reconciliation should take into account the various advices on interest changes advised by the appellant from time to time as noted above".

35. The Court in the above case further stated that:

> " 26. It is therefore evident that in computing the actual amount that is due and payable by the appellant to the respondent, the provisions of Section 44A of the *Banking Act* must be borne in mind and factored in the computation. It is not for this Court to do the calculation. The respondent must adjust the sum payable in accordance with the law. To that extent only, this appeal succeeds". See *James Muniu Mucheru V. National Bank of Kenya Limited* [2019] eKLR.

36. In this case, the respondent did not demonstrate how the amount claimed was arrived at. Based on the above decisions, I find that the trial court erred by upholding the respondent's claim. In my view, the respondent failed to prove his case on a balance of probabilities. Furthermore, there is no evidence of how the appellant unlawfully obtained from the respondent the amount that the respondent paid. There is also no evidence of the respondent protesting the claim by the appellant. To the contrary, the respondent negotiated with the appellant on the sums due and he settled the same. See the letters dated 15th September, 2021, 4th November, 2021 after the appellant had written to the respondent demanding for payment and later, seeking to have the payment resolved amicably.

37. The respondent did not provide any statement of accounts prepared by him or his accountant, showing how the amount that he paid to the appellant was illegally received of how the in duplum rule was violated. This is evidenced by the appellant's supplementary list of documents, document number 2 filed on 19/8/2022 which is the summary of the statement of account for Columbus Awello from 15/9/1991 to February, 2002 showing the amount due.

38. It was upon the respondent to demonstrate that the amount due was not what was claimed and therefore what he paid was an overpayment.

39. The in duplum rule provides that arrears interest ceases to accumulate upon any amount of the loan owing once the accrued interest equals the principal amount owing when the loan becomes non-performing. The respondent did not adduce any evidence to show that the appellant continued to charge interest after 1st May, 2007 as alleged, when the the Banking (Amendment Act) Act No.9 of 2006 came into effect, introducing the in duplum rule. All the interest charged was prior to 1st may, 2007.

40. The upshot of the above is that I find this appeal merited. It is hereby allowed. Accordingly, I set aside the trial court's judgment and substitute it with an order dismissing the respondent' suit against the appellant. I however order that each party bear their own costs of the appeal and of the dismissed suit.

41. This file is closed.

42. The judgment to be uploaded in the e-portal and the file be returned to the lower court with a copy of judgment. The order to be extracted.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 5TH DAY OF JULY, 2024

R. E. ABURILI

JUDGE