



REPUBLIC OF KENYA



**KENYA LAW**  
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**Atieno v Kenya Women Finance Trust Ltd (Civil Appeal  
E040 of 2021) [2023] KEHC 1504 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1504 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E040 OF 2021**

**KW KIARIE, J**

**MARCH 7, 2023**

**BETWEEN**

**ADONGO DOROTHY ATIENO ..... APPELLANT**

**AND**

**KENYA WOMEN FINANCE TRUST LTD ..... RESPONDENT**

*(Being an Appeal from the judgment in Mbita Principal Magistrate's PMCC  
No. 16 of 2018 by Hon. Jacinta A. Orwa–Senior Principal Magistrate)*

**JUDGMENT**

1. Adongo Dorothy Atieno, the appellant herein was the plaintiff in Mbita Senior Resident Magistrate's PMCC No. 16 of 2018. She had sued to have orders to stop the respondent from selling her parcel of land number Kaksingiri/Kagutu/Waregi/2160. She claimed the attempted sale was for recovery of a loan she never received. The trial court dismissed the suit with costs.
2. The appellant was aggrieved by the said judgment and filed this appeal. She was represented by the firm of G.S. Okoth & Company Advocates. She raised the following grounds of appeal:
  - a. The learned trial magistrate misdirected herself on several matters of law and fact.
  - b. The learned trial magistrate erred in law and in fact in failing to distinguish the difference between Asset Finance Loan and Business Advancement Loan since the two were different and distinct loans which were being settled separately in different accounts and difference amounts.
  - c. The learned trial magistrate erred in law in failing to acknowledge that by deducting part of the business loan and purporting to transfer the same to the asset finance loan, the respondent was in fact acting in breach of the contract for borrowing the business loan which was kshs.2,000,000/- and not kshs.400,000/- as released to the appellant.



- d. The Learned trial magistrate erred in law in holding that the appellant entered into one commercial contract whereas there were two distinct commercial contracts.
  - e. The learned trial magistrate erred in law of evidence in failing to note that at no time did the loanee agree to the consolidation of the asset finance loan and the business loan.
  - f. The learned trial magistrate erred in law of procedure and practice in condoning the irregular procedure adopted by the employees of the respondent of purporting to manage the business loan of 2,000,000/- on behalf of the borrower whereas the borrower was quite capable to manage her finances alone and by so doing the respondent's employees defrauded the appellant and caused her to incur losses.
  - g. The learned trial magistrate erred in law in failing to note that the whole transaction of crediting the appellant's Inuka Account with ksh.2,000,000/- and the transfer of a sum of kshs.1,600,000/- out of the same to SPA LTD was done solely and fraudulently by the respondents who abused the business trust the appellant had placed on them.
  - h. The learned trial magistrate erred in law and fact in failing to note that the loan of ksh.7,227,924/- should have paid for the complete asset (lorry) and that the letter of offer dated 15<sup>th</sup> August 2015 does not indicate anywhere that the appellant was to pay a sum of kshs.1,600,000/- in addition to the loan for completing the building of body of the asset
  - i. The learned trail magistrate erred in law in failing to note that as the asset which was the subject of the asset finance loan was involved in a road accident wherein the appellant was as well injured, the insurance contract became applicable and the loan and its terms were to be equitably applied and therefore the respondent sold the lorry prematurely before the asset finance loan became non-performing loan as defined in rule 2 of the *Credit Reference Bureau Regulations, 2013*.
  - j. The learned trial magistrate erred in law in failing to note that the report of particulars of the appellant to the Credit Finance Bureau (CRB) was in the circumstances premature, unconstitutional and inequitable and the subsequent attachment of the lorry immediately after being repaired was a calculated move to defraud the appellant.
3. The respondent was represented by the firm of Abisai & Company Advocates. She opposed the appeal on the following grounds:
    - a. That the appeal introduced matters that were not before trial court.
    - b. That the appellant did not discharge the burden of proof on the issues pleaded.
    - c. That the appellant was in breach of contract.
  4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co Ltd* [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
  5. On 12<sup>th</sup> September 2015, the appellant and Cleophas Adongo Ajwoga took a loan of Kshs. 2,000,000.00 and charged land parcel number Kaksingiri/Kagutu/Waregi/2160. From the agreement, the appellant was expected to pay monthly instalments of Kshs. 101,934.00. Clause 4 of the loan agreement indicated that the loan was for a period of 30 months.



6. Both the appellant and her husband contended that the respondent only advanced Kshs.400, 000.00 and which at the time of the threatened sale of the charged property had been fully paid.
7. The respondent's document (Exhibit 1) indicate that the respondent credited into her account Kshs.2, 000,000.00. This is contrary to her averment that only Kshs.400, 000.00 was actually advanced to her. Indeed she confirmed during cross examination that Kshs.1, 600,000.00 was transferred from her Inuka Account to her Asset Account with her knowledge. The learned trial magistrate cannot be faulted on finding that she was actually advanced the agreed loan amount.
8. Section 109 of the *Evidence Act* provides:

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.

9. In the instant case, the appellant did not discharge her burden to show that she had repaid the loan advanced to her. She was therefore in breach of contract and the respondent were entitled to execute.
10. At the trial court the issue of existence of two distinct loans did not arise and was not contested. The appellant conceded that there was transfer of funds from her Inuka Account to her Asset Account with her knowledge. This issue was equally not pleaded. Parties are bound by their pleadings. In *Global Vehicles Kenya Limited v Lenana Road Motors* [2015] eKLR the Court of Appeal stated:

Pleadings serve several fundamental purposes. Firstly, they define the nature and contours of the dispute that the parties have submitted to the court for resolution.

Secondly it is through pleadings that the fair hearing that is promised by article 50(1) of the Constitution is actualized. That provision guarantees every person who has a dispute that can be resolved by the application of the law, the right to have it decided in a fair and public hearing by a court or independent and impartial tribunal or body. That right to a fair hearing comes alive in pleadings, which make known to each party the exact case it has to prove or rebut.

Thirdly, pleadings contribute immensely to speedy resolution of dispute and cost-efficient delivery of justice. Because pleadings ensure that the dispute is focused and precisely defined, they not only eliminate ambushes and surprises, but also wastage of time and unnecessary expenses involved in calling witnesses to prove or disprove matters that are not in dispute before the court. It can therefore be argued that pleadings also contribute immensely to the realization of the cardinal constitutional principle that justice shall not be delayed.

This rests the issue and my finding is that this was not an issue before the trial court. It cannot be brought up on appeal.

11. The upshot of the foregoing analysis of the evidence is that the appeal lacks merit. The same is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 7<sup>TH</sup> DAY OF MARCH, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

