



**Equity Bank Limited v Kimanthi (Commercial Appeal 011 of 2022)  
[2023] KEHC 19237 (KLR) (Commercial and Tax) (23 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19237 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL 011 OF 2022**

**FG MUGAMBI, J**

**JUNE 23, 2023**

**BETWEEN**

**EQUITY BANK LIMITED ..... APPELLANT**

**AND**

**THERESA WANZA KIMANTHI ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal arising from a judgment of the Small Claims Court delivered on July 27, 2022. The respondent herein was the claimant at the small claims court. She sought judgment against the appellant for Kshs 68,657/=. The dispute arose out of a loan facility that was granted to the respondent by the appellant, following an application dated March 27, 2015. The facility was for Kshs 200,000/= repayable over a period of 18 months. The amount was credited to the respondent's account on April 7, 2015. The respondent's case was that as at November 7, 2015 the outstanding amount was Kshs 137,387/=. On the same date she deposited an amount of Kshs 138,000/= which she stated was sufficient to repay the loan in full and final settlement.
2. Subsequently, the respondent avers that on May 13, 2020 she deposited a further Kshs 70,000/= to account number 0390179660187. The appellant without her authorization deducted Kshs 68,657/= to allegedly offset the loan she had taken with the bank. The respondent's position was that she had already cleared the previous loan and the appellant was wrong to deduct the amount from her account.
3. On its part the appellant averred that the respondent defaulted in repayment of the loan and that as at September 5, 2018 the amount outstanding was Kshs 68,657.12. The appellant claims that the amount was deducted from the respondent's bank credit as provided for in clause 11 of the lending contract which both parties executed.



4. The adjudicator entered judgment in favour of the respondent stating that the appellant, being the service provider, was under an obligation to inform the claimant on how she would clear her loan.
5. Aggrieved by the said judgment, the appellant lodged this appeal citing the following grounds;
  - i. That the Adjudicator erred in law in rewriting the terms of the contract between the appellant and respondent;
  - ii. That the Adjudicator erred in law by giving probative value to unsupported and challenged oral evidence.
  - iii. That the Adjudicator erred in law in disregarding the principles of natural justice, particularly, by disregarding the appellant's case.
  - iv. That the Adjudicator erred in law in finding that the respondent had attained the evidentiary burden of a balance of probability.
  - v. That the Adjudicator erred in law in shifting the burden of proof to the appellant.
  - vi. That the Adjudicator erred in law by awarding the respondent costs as opposed to disbursements only when the respondent appeared in person at all times.
  - vii. That the Adjudicator erred in law in making a determination that was not supported by relevant facts, evidence and authorities and overly against the weight of the evidence before the Honourable Court.
6. The appellant seeks the following orders; -
  - i. That the judgment delivered July 27, 2022 in favour of the claimant/respondent be quashed and set aside and be substituted with an order dismissing the claimant/respondent's case with costs to the respondent/appellant.
  - ii. The order made by the learned Adjudicator in the small claims court in regards to costs be set aside.
  - iii. The Appellant be awarded costs of this appeal.
7. The appellant challenged the respondent's testimony at the trial court where she stated that she had cleared the entire loan amount. The appeal was not opposed by the respondent.

### **Analysis**

8. I have considered the record of appeal, submissions filed by counsel for the appellant as well as all supporting documents. I am aware of the duty of this court to examine matters both of law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand. This was as stated in *Selle v Associates Motor Boat & Co* [1968] EA 123.
9. It is not disputed that the appellant advanced a facility to the respondent for Kshs 200,000/=. I have also perused the evidence presented before the court. The certified bank statement issued by the appellant for the period September 28 to June 6, 2016 and produced by the respondent (p 43 of the Record of Appeal) confirms the deposit of Kshs 138,000/= made on November 7, 2015.
10. There is also evidence that as at November 7, 2015 the loan account stood at Kshs -137,387/= as stated by the appellant.



11. The respondent's testimony was that the amount of Kshs 138,000/= was deposited with the appellant with an aim of offsetting the amount owed to the bank. It would however appear that instead of the appellant deducting the entire amount of Kshs 138,000/=-, the deductions from the loan account continued being periodic which in turn increased the interest payable. On September 5, 2018 the appellant then purported to exercise its rights to deduct the amount of Kshs 68,657.12 from the respondent's credit.
12. The letter dated December 6, 2018 corroborates the respondent's facts. The respondent wrote to the appellant demanding an explanation over the alleged arrears. This letter was responded to by the appellant on September 5, 2019 promising to look into the issue but instead of doing so, the appellant went ahead to deduct the deposit amount of Kshs 68,657.12, in total disregard of earlier instructions that the respondent had given.
13. In the case of *Abu Chiaba Mohammed v Mohammed Bwana Bakari & 2 Others* [2005] eKLR the court held that:

“.....no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man.....he cannot be allowed to take advantage of his wrong.....the law will not and cannot permit such a party to rely on his own wrong to defeat an otherwise valid petition.”
14. From the foregoing, the bank cannot therefore be allowed to benefit from the harm inflicted on the respondent. The intention of the respondent is clear that she wished to settle the loan in full and therefore the Kshs 138,000/= ought to have been deducted at once. The bank had a duty to exercise reasonable care and skill in its dealings with the customer and particularly in carrying out the instructions of the customer.
15. In *Karak Brothers Company Ltd v Burden* [1972] All ER 1210, the Court observed as follows:

[A] bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.

#### **Determination and orders**

16. In the upshot, I find no merit in the appeal and the same is dismissed with costs to the respondent. The court upholds the judgment of the small claims court delivered on July 27, 2022 by Honourable Caroline Ndumia.

**DATED, SIGNED AND DELIVERED IN NAIROBI**

**THIS 23rd DAY OF JUNE 2023.**

**F MUGAMBI**

**JUDGE**

**Court Assistant: Ms Lucy Wandiri.**

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