



**Balongo v Chase Bank Limited (in Receivership) & 4 others (Appeal E038 of 2022)
[2023] KEHC 22504 (KLR) (Commercial and Tax) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22504 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
APPEAL E038 OF 2022
FG MUGAMBI, J
SEPTEMBER 22, 2023**

BETWEEN

ANDREA BALONGO APPELLANT

AND

CHASE BANK LIMITED (IN RECEIVERSHIP) 1ST RESPONDENT

SBM BANK KENYA LTD 2ND RESPONDENT

**CREDIT INFO CREDIT REFERENCE BUREAU KENYA
LIMITED 3RD RESPONDENT**

METROPOL CREDIT REFERENCE BUREAU LIMITED 4TH RESPONDENT

CREDIT REFERENCE BUREAU AFRICA LIMITED 5TH RESPONDENT

*(Being an Appeal from the judgment and decree of the Chief Magistrate's
Court at Nairobi (Honourable L.L. Gicheha Chief Magistrate)
dated 28th February, 2022 in Milimani CMCC No. 7840 of 2018)*

JUDGMENT

Background

1. The appeal before the Court was lodged vide a Memorandum of Appeal dated 29th March 2022 listing 17 grounds of appeal. These were summarized by the appellant into the following issues for determination:
 - i. Whether the 1st and 2nd respondents' actions were in breach of the law.



- ii. Whether the appellant suffered financial loss as a result of the illegal actions of the 1st and 2nd respondents.
 - iii. Whether there was a duty of care owed to the appellant by the 3rd, 4th and 5th respondents.
 - iv. Whether the counterclaim filed by the 2nd respondent was legally valid.
2. The appeal sought to set aside the decision of the lower Court and also sought judgment in the sum of Kshs. 18,000,000/= against the 2nd, 3rd, 4th and 5th respondents jointly and severally with interest and costs as well as the removal of the appellant from the adverse listing by the 3rd, 4th and 5th respondents.
 3. A brief background to the dispute is that the appellant was granted a loan facility by the 1st respondent of Kshs. 6,312,900/= for the purchase of a two bedroomed apartment. The loan was disbursed in two tranches. After the 1st respondent released the first tranche of Kshs. 1,200,000/= to the appellant, it issued the appellant with a Letter of Offer dated 3rd April, 2008 in which the appellant was to make monthly repayments of Kshs. 47,638.04/=.
 4. The appellant made repayments until October, 2008 when the second loan tranche of Kshs. 5,112,900/= was released to pay the balance of the purchase price. It was the appellant's case that after this, the 1st respondent did not issue a Letter of Offer for the second loan or an amalgamated Letter of Offer for the two loan tranches as expected.
 5. The appellant faulted the 1st respondent for charging illegal, excessive and punitive interest rates as soon as the second disbursement was paid. He was subsequently listed by the 3rd, 4th and 5th respondents as a defaulter owing Kshs. 146,162,953/= against the sum borrowed which was Kshs. 6,312,900/=, a situation that led to the appellant losing out on a job offer as he could not obtain clearance from the credit reference bureau.
 6. The appellant submitted that the 1st respondent rejected the appellant's proposals for settlement. The appellant further submitted that the information that had been published by the respondents was meant to humiliate him, injure him and this cost him his livelihood. Counsel submitted that the appellant wrote to the 3rd, 4th and 5th respondents informing them of the issue at hand but they failed to investigate the complaint.
 7. According to the 1st respondent, the appellant failed to honor his financial obligations immediately after the second disbursement. This was so even after the loan amount was capped at Kshs. 12,600,000/= in May 2016 so as to comply with the in duplum rule. The 1st respondent was forced to forward the appellant's name to the Credit Reference Bureau for listing as a credit defaulter in the year 2017.
 8. The 2nd respondent opposed the appeal through its written submissions dated 24th April 2023. Before making submissions on the substantive appeal the 2nd respondent argued that the appeal before this Court was fatally defective and incompetent as the appellant had not attached a certified copy of the decree which formed the basis of the impugned decree.
 9. That notwithstanding, it was the 2nd respondent's case that the listing of the appellant was done in full compliance of the law since the appellant failed to meet his obligations even after the interest rate had been capped. This was so noting that the appellant was in meaningful employment during the period of the default. It was therefore submitted that the credit information submitted to them was true and accurate and that the 3rd, 4th and 5th respondents did not violate the duty of care owed to the appellant.
 10. The 3rd and 5th respondents also filed their written submissions to oppose the appeal, dated 6th April 2023 and denied breaching the appellant's duty of care. Counsel submitted that the appellant



failed to provide proper identification and information when asked to do so for purposes of further investigations. As such, the respondents could not be held liable for negligence. Counsel submitted that the 3rd and 5th respondents were agents of the 1st respondent and therefore are entitled to full indemnity for any judgment entered in favour of the appellant.

11. The 4th respondent's submissions were dated 20th April 2023. Counsel submitted that the appellant raised a complaint vide a letter dated 27th June 2017 and was directed to file a formal complaint which he did not until 14th September 2018. Counsel further submitted that the 4th respondent strictly complied with the law and should not be faulted for that. It was the 4th respondent's submissions that the 4th respondent never acted negligently in publishing the appellants credit information.

Analysis

12. I have carefully considered the pleadings, written submissions and authorities cited by counsel in support of their cases. This being a first appeal, parties are entitled to expect of me, a re-evaluation of the facts and the law as was held in *Selle v Associated Motor Boat Co*, [1968] EA 123.
13. Before getting into the substance of this appeal, I must first of all make a finding on the competency or otherwise of the appeal before this Court, especially since it is an issue that was raised by the 2nd respondent and more so because it goes to the question of jurisdiction. It was the 2nd respondents' position that without the decree the court was bereft of jurisdiction.
14. The applicable law is as provided under Order 42 rule 2 of the *Civil Procedure* that:

“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of Act until a copy is filed.”
15. The essence of a Memorandum of Appeal was enunciated by the Supreme Court in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others*, [2015] eKLR. The Court was emphatic that:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”
16. As to what consists of a Record of Appeal, the Supreme Court was emphatic in the case of *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR. The Learned Judges observed that:

“The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it. If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine “the appeal” on the basis of these two, such an appeal would be incomplete and hence incompetent.”



17. Against this background, and back to the appeal before me, I note that the appellant filed the Memorandum of Appeal on 29th March 2022. It was filed without attaching the Record of Appeal and until this time of writing a judgment, the decision and decree emanating from the decision of the lower Court delivered on 28th February 2022 in Milimani CMCC No 7840 of 2018 has not been sighted by this Court. I note that the appellant did not seek leave to file the Record of Appeal at any point and further did not respond to this issue or render any explanation, making it uncontroverted. The Court is therefore unable to exercise its adjudicatory powers over this appeal.

Determination

18. Taking all the foregoing into consideration, I am satisfied that Commercial Appeal No. E038 of 2022 is incurably defective and incompetent. Accordingly, the said appeal is struck out with costs to the respondents. It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22ND DAY OF SEPTEMBER 2023.

F. MUGAMBI

JUDGE

Delivered in presence of:

Court Assistant: Ms. Carolyne Kyalo

