



REPUBLIC OF KENYA



**Mwakweka v Mwaghali & another (Civil Appeal E058 of 2021)  
[2023] KEHC 22279 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22279 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E058 OF 2021  
GMA DULU, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**PATREMY MWALUMA MWAKWEKA ..... APPELLANT**

**AND**

**NANCY WAVUA MWAGHALI ..... 1<sup>ST</sup> RESPONDENT**

**KENYA WOMEN FINANCE TRUST ..... 2<sup>ND</sup> RESPONDENT**

*(From the judgment delivered by Hon. Wangeci (PM)  
on 4th October 2021 in Voi PMCC No. 178 of 2018)*

**JUDGMENT**

1. In a judgment delivered on October 4, 2021, the trial court found that the plaintiff (now appellant) had failed to prove his case on a balance of probability, and dismissed the suit with costs to the 2<sup>nd</sup> defendant, as the 1<sup>st</sup> defendant not having entered appearance.
2. Dissatisfied by the decision of the trial court, the appellant Patremy Mwaluma Mwakweka, who was the plaintiff in the trial court, has come to this court on appeal relying on an Amended Memorandum of Appeal on the following grounds: –
  1. That the judgment of the court does not satisfy the mandatory requirements stipulated in the rules and is otherwise not determinative of the dispute between the parties herein.
  2. The learned Judge (should be Magistrate) erred in law and fact (by) failing to find that the appellant proved his case against the respondents and/or the 1<sup>st</sup> respondent.
  3. The learned Judge (should be Magistrate) erred in law and fact by failing to evaluate the evidence of both the 2<sup>nd</sup> respondent and the appellant, the law and facts by accepting the 1<sup>st</sup>



respondent's evidence and in failing to give reasons for rejecting the appellant's case, evidence and submissions.

3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Odhiambo S. E & Company Advocates for the appellant as well as the submissions filed by Sherman Nyongesa & Mutubia Advocates for the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent did not file written submissions. I note that the 2<sup>nd</sup> respondent's counsel relied on a number of decided court cases such as *Bandari Sacco Ltd v Christopher Okwi & others* (2018) eKLR and *Joseph Ndirangu Wabebo t/a Zeeco Auto & 2 Others v Cooperative Bank of Kenya Ltd* (2019) eKLR.
4. This being a first appeal, I am required to reconsider all the evidence on record and come to my own conclusions and inferences – see *Selle v Associates Motor Boat Company Ltd* (1968) EA 123.
5. At the trial, only one witness testified for the appellant. It was PW1 Patremy Mwaluma the appellant who stated that he was a retired teacher. It was his evidence that the 2<sup>nd</sup> defendant – Kenya Women Finance Trust did not advance him a loan of Kshs 200,000/= and that he was only a guarantor of the 1<sup>st</sup> defendant Nancy Wavua Mwanghali, and pledged a letter of allotment as security. He denied receiving notice before the Kenya Women Finance Trust took his household items. He stated that he paid 2<sup>nd</sup> respondents over Kshs 200,000/= and demanded repayment of that amount and interest.
6. On the part of the 2<sup>nd</sup> respondent Kenya Women Microfinance Bank Ltd, they also called one witness DW1 Mutonde Evans the branch manager Voi branch. He stated that the plaintiff guaranteed the loan of Kshs 200,000/=. According to him, the loan was to accrue interest for 24 months, and when Nancy defaulted in payment, they proceeded to auction the items pledged by the appellant as security for the loan. In cross-examination, he stated that they did not produce the proclamation of sale in court nor a certificate from the auctioneer. He stated that he could not contest the evidence that Patremy (appellant) paid a final amount of Kshs 16,000/= less Kshs 2,500/=.
7. I have perused and considered the pleadings and the record of the trial court, as well as submissions of counsel for all parties. With regard to the contest on request for entry of judgment against the 1<sup>st</sup> respondent Nancy Wavua Mwanghali, who was 1<sup>st</sup> defendant in the trial court – indeed it is on record on page 20 of the typed proceedings that judgment was entered as follows:-

“From: Principal Magistrate's Court Civil Registry at Voi Case No. 178 of 2018.

For your perusal and direction on the request of judgment filed herein on 24<sup>th</sup> day of June 2021.

Remarks:

I am satisfied with service. Interlocutory judgment is hereby entered against the 1<sup>st</sup> defendant who has failed to enter appearance within the stipulated period of time”

D. Wangeci – PM”

8. It is thus abundantly clear to me from the above, that judgment was entered by the court against the 1<sup>st</sup> respondent herein. Thus the trial court erred in not concluding in the final judgment, that judgment had been entered against the 1<sup>st</sup> respondent as prayed.
9. With regard to the trial court's finding that the appellant did not prove his case on the balance of probabilities, against the 2<sup>nd</sup> respondent, indeed the burden was on the appellant to do so, as required under Section 107, 108 and 109 of the *Evidence Act* (Cap.80).



10. When the appellant stated in evidence that he provided a Letter of Allotment as security for the guarantee, I note that provision of such security was not pleaded by him in his plaint. As parties are bound by their pleadings, such evidence from the appellant could not help him as it was irrelevant to the suit. It is also of note that he did not produce any evidence to support the same, other than his word of mouth which was not supported by his pleadings.
11. I now turn to the complaint of the appellant that the attachment and sale was irregular. The appellant stated in his evidence and submissions, that he was not given notice before his items, that is a deep freezer, fridge guard, weighing machine and scales, decoder, a dvd were taken by agents of the 2<sup>nd</sup> respondent, who claimed that there was a balance of Kshs 16,000/= to be paid to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent.
12. I note that though DW1 the witness for the 2<sup>nd</sup> respondent stated that they could not produce in court any notice or demand to Patremy (appellant) informing him that Nancy had defaulted to pay, the burden was still on the appellant to show on a balance of probabilities, that there was an obligation for 2<sup>nd</sup> respondent to issue such notice. The appellant did not do so, nor did he ask for production or discovery of such documents from the 2<sup>nd</sup> respondent.
13. On my part, having perused the loan agreement, I note that the Loan Agreement signed on September 30, 2013 between the 1<sup>st</sup> and 2<sup>nd</sup> respondents has a default clause numbered 11, wherein it is provided that if the borrower defaults and no stay of execution is in force:-  

“Then KWFT either by its officers or by agents or servants shall without consent by the grantor and without giving the grantor any notice or without waiting any time exercise all the rights provided by Clause 7 of the Third Schedule of the Chattels Transfer Act which includes the rights to enter upon any lands or premises wherein the chattels may be

  - i. and take possession, sell or dispose of them or any part thereof by private sale or public auction and in such a manner as KWFT deems expedient.
  - ii. undertake all deeds and actions in regards to stocks and or crops as provided in Clause 10 and 11 of the Third Schedule of the Chattels Transfer Act.”
14. It is apparent from the above signed agreement therefore, that no prior notice was envisaged before possession and sale of the assets used to guarantee the loan.
15. With regard to how much money was recovered by the 2<sup>nd</sup> respondent, and whether any amount is due or payable to either the 2<sup>nd</sup> respondent or the appellant, that is not an issue that arises from the plaint or other pleadings filed. It was thus not for determination by the trial court and I will not delve into that. I will thus dismiss the appeal against the 2<sup>nd</sup> respondent.
16. Consequently and for the above reasons I dismiss the appeal filed by the appellant against the 2<sup>nd</sup> respondent herein and award costs of appeal to the 2<sup>nd</sup> respondents against the appellant.
17. I however, allow the appeal of the appellant against the 1<sup>st</sup> respondent, and enter judgment in favour of the appellant against the 1<sup>st</sup> respondent for Kshs 200,000/= I award costs of appeal and the trial court proceedings to the appellant against the 1<sup>st</sup> respondent.

**DATED, SIGNED AND DELIVERED THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2023 AT VOI IN OPEN COURT VIRTUALLY.**

**GEORGE DULU**



## **JUDGE**

### **In the presence of:-**

Alfred/Nusura – court assistants

Ms. Osewe holding brief for Mr. Mutubia for 2nd respondent

