REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 015 OF 2020

BETWEEN

K-REP BANK LIMITED.....APPELLANT

AND

WILKISTER ODODA

LABAN ODHIAMBO

JAMES SONYE (Suing

in their capacity as the officials

and members of RODESA SACCO).....RESPONDENTS

(*Being an appeal from the Judgment and Decree of Hon. G. A. Mmasi, SPM dated 28th February 2020 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 1194 of 2014*)

JUDGMENT

Introduction and Background

1. This is an appeal against the judgment of the subordinate court dated 28th February 2020 where the court entered judgment for the Respondents against the Appellant ("the Bank") for KES. 2,915,990.40 and KES. 800,000.00 as special and general damages respectively.

2. The essential facts emerging from the record of appeal are as follows. Ramogi-Ohigla Development Savings and Credit Co-operatives Society Limited ("RODESA") held Account Number 006040001240 with the Bank at its Buruburu Branch. By a Letter of Offer dated 1st December 2009, the Bank advanced RODESA a loan facility of KES. 6,500,000.00 for the purchase of a Motor Vehicle Registration Number KBK 161J, 67-seater bus ("the suit motor vehicle"). The facility was secured by inter alia the joint registration of the suit motor vehicle in the name of the Bank and RODESA; cash collateral of KES. 1,600,000.00 held in the RODESA's fixed deposit account with the Bank; Logbooks for motor vehicle registration numbers KAK 190S and KAB 388B and; personal guarantees of RODESA's previous officials to the tune of KES. 6,500,000.00 each. The loan was disbursed to RODESA's account on 20th January 2010 and was repayable from 20th February 2010 in 36 monthly installments of KES. 225, 325.00 with interest charged at the rate of 15% per annum and an additional 5% interest rate in the event of default.

3. According to the Bank, RODESA failed to make regular installment payments and its account fell into arrears prompting the Bank to sell the suit motor vehicle to recover the outstanding arrears which the Bank stated was Kshs. 4,736,568.00 as at 23rd March, 2011, the date of the sale.

4. The Respondents accused the Bank of continuing to overdraw and debit RODESA's account on several occasions leaving a balance in excess of which was never part of the loan facility, even after the sale of the suit motor vehicle. They further accused the Bank of irregularly charging interest under different heads and irregularly deducted amounts that were credited to RODESA's account. They claim that despite

several requests and demands for the Bank to reconcile RODESA's account and furnish information, the Bank failed to respond to the requests but delivered unsigned and uncertified copies of the bank statements in attempt to confuse them. The Respondents prayed for special damages of KES 3,145,990.40, general damages for breach of contract, costs of the suit and interest.

5. At the hearing, the Respondents called two witnesses, Wilkister Adhiambo Ododa (PW 1) and Wilfred Onono (PW 2), the Managing Consultant of the *Interest Rates Advisory Centre* while the Bank called the Manager of its Buruburu Branch, Simon Tunje (DW 2).

6. In its judgment dated 28th February 2020, the trial magistrate found that the Bank failed to give notice to the Respondents before effecting the 5% interest rate on default hence the same was unlawful, that the Bank's calculations were not free from error and that the Bank did not grant the Respondents indulgence. The court held that the Bank should not have repossessed and sold the suit motor vehicle yet it had already taken cash collateral before it disbursed the loan. For those reasons, the court awarded the Respondents KES. 800,000.00 general damages for breach of contract and KES. 2,2915,990.40 as special damages together with costs and interest.

7. The Bank contests the judgment on two broad grounds set out in its memorandum of appeal dated 25th March 2020. First, that the Respondent did not have the capacity to prosecute the suit. Second, whether the Respondents proved their case and if so, whether they were entitled to special and general damages. The appeal was disposed by way of written submissions with the parties advancing their respective positions. I shall deal with all the three issues accordingly.

Whether the Respondents had capacity

8. The Bank submits that the Respondents did not have the capacity to institute the suit against the Bank as the loan agreement, subject of the suit, was between the Bank and RODESA and that the Respondents were not privy to the agreement. The Bank further submits that this position was affirmed in **Kisumu PMCC 334 of 2010: Wilkister Ododa & 2 others v K-Rep Bank** in which the court dismissed a similar suit filed by the Respondents seeking orders similar to those sought in the suit before the subordinate court. The Bank contends that the trial magistrate disregarded this despite the fact that it was raised during the hearing by way of a Preliminary Objection dated 29th January 2019.

9. In the circumstances, the Bank urges this court to find that the suit was incompetent. It relied on several cases among them; ***Omondi v National Bank of Kenya Limited and Others*** **[2001] EA 177,** ***Joseph Muthuri Ikunyua & 32 others v Co-operative Bank of Kenya Limited & 14 others*** **MERU Civil Suit No. 8 of 2018 [2018] eKLR** and ***Rashid Kogi Muturi(Suing on his behalf and on behalf of members of Thika Muslim Housing Co-operative Society Limited claiming interest over L.R No.10821/531) v Screen Check Limited & 3 others*** **THIKA ELC Case No. 300 of 2018 [2019] eKLR**.

10. The Respondents state that they filed the suit in their capacity as officials of RODESA and not on behalf of themselves and members of RODESA. The Respondents submit that Bank cannot raise this issue because its application on the same basis was dismissed for lack of merit but the Bank failed to file an appeal against the ruling.

11. In the case before the subordinate court, the issue of the capacity to agitate the suit was fundamental. It is not in dispute that RODESA is an entity incorporated under the ***Co-operative Societies Act (Chapter 490 of the Laws of Kenya)***. It is also not in dispute that the loan agreement and therefore the borrowing was between RODESA and the Bank as evidenced by the Letter of Offer dated 1st December 2009 and the documents in support of the facility. A Co-operative Society, like RODESA, is a corporate body incorporated under **section 12** of the said ***Co-operative Societies Act*** provides as follows:

> ***12. Co-operative society to be body corporate***
>
> *Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.* [Emphasis mine]

12. Since the co-operative society is a body separate from its officials, the officials cannot purport to sue on its behalf as they did in this case. I therefore find and hold that the Respondents lacked capacity to present the claim on behalf of the Co-operative. In reaching this conclusion, I adopt the statement of law clearly stated in ***Joseph Muthuri Ikunyua & 32 others v Co-operative Bank of Kenya Limited & 14 others*** **(Supra)** where the court held as follows:

> *[16] Just like a company a co-operative society is recognized as a separate legal entity from its members for it has the capability to own property, to sue or be sued and enter into contracts in its own name. In this regard, the 3rd defendant, as a body corporate, entered into a banking facility with the 1st defendant separate from its members and holds the suit property independent of its members. See* ***Salomon v A Salomon and Co Ltd [1897] AC 22****.*

13. From the record, the Bank raised this issue as a preliminary point in an application dated 23rd January 2019 before the trial magistrate who dismissed it on the ground that it was an afterthought and ought to have been raised during the pre-trial and not after the plaintiff's witness had testified and been cross-examined. While it is true that the Bank did not appeal against the ruling, it is equally true that the court did not rule on the merits of the preliminary objection. This was a live and material issue to any further determination of the matter as I shall demonstrate later in consideration of the other issue.

Whether the Respondents proved their case

14. It is the duty of this court, as the first appellate court, to examine matters of both 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 (see ***Selle v Associates Motor Boat & Co.*** **[1968] EA 123**).

15. The Respondents sought KES 3,145,990.40 derived from the report of an entity called *Interest Rates Advisory Center* produced by PW 2. Included in that figure was the claim for the loss of security deposit amounting to KES. 1,600,000.00, unlawful debits of KES. 559,990.40 and excess amount recovered after sale amounting to KES. 1,000,000.00. Together with the testimony of PW 1 who gave evidence along the lines I have summarized in the introductory part of this judgment, PW 1 told the court that when the suit motor vehicle was repossessed on 12th October 2010, the loan account was in arrears of KES. 149,676.63 only. The trial magistrate accepted this report and the witness testimony as evidence and proof of loss that the Respondents suffered loss, less KES. 230,000.00 already paid to the Respondents upon sale of the suit motor vehicle. The trial magistrate dismissed the claim for loss of user amounting to KES. 67,000.00 claim from 27th October 2010.

16. The Bank stated that RODESA fell into arrears when the second installment fell due but was not paid. It states that RODESA only made sporadic payments and in as much as it sought for more time to repay, the sporadic payments arrears continued which prompted the Bank to initiate the recovery. It realized the KES. 1.6 Million cash collateral which was insufficient to offset the entire loan that was still accruing interest of 20%. The Bank issued two gazette notices dated 24th February 2011 and 7th March 2011 to repossess the motor vehicle but RODESA failed to pay hence it sold the suit motor vehicle by way of public auction at a price of KES. 5,000,000.00 and that at the time, the outstanding balance was KES. 4,736,568.78 meaning a balance of around KES. 230,000.00 remained which was remitted back to RODESA. The Bank denied selling the suit motor vehicle at KES. 6,000,000.00 or KES. 6,500,000.00 and irregularly debiting RODESA's account with Kshs. 1,000,000.00.

17. The record contains a loan account statement and current account statement of RODESA running from 20th January 2010 to 18th July 2011. **Section 176** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** creates a presumption in favour of the Bank as follows:

> *176. A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.*

18. From the said Loan Statement, as at 23rd March 2011, when the suit motor vehicle was being sold, RODESA was in arrears of KES. 4,736,568.78. The Letter of Offer and **Clause 1** of the Chattels Mortgage Agreement stated that RODESA was to make monthly payments of KES. 225,325.00 plus interest. RODESA's Current Account statement indicated that the following transactions were made towards repayment of the loan (principal and interest) between February 2010 and October 2010:

February	Kshs. 225,937.6
March	Kshs. 127,369.89
April	Kshs. 225,937.6
May	Kshs. 79,838.92
June	Kshs. 378,934.73
July	Kshs. 43,102.02
August	Kshs. 57,559.20
September	Kshs. 227,377.78
October	Kshs. 73,074.23
Total	**Kshs. 1,213,420.31**

19. The above demonstrates that the Bank had only recovered the sum of KES. 1,213,420.31 out of the loan amount of KES. 6,500,000.00 as at 12th October 2010 when the suit motor vehicle was repossessed. Even assuming that no interest was charged on the amount advanced, the irresistible that RODESA was indebted and contention by the Respondents that RODESA was only in arrears of KES. 149,676.63 as of the said date is misleading and is not borne out by the statement.

20. I also find that RODESA was not making regular payments towards the loan and the Bank was within its right to repossess the suit motor vehicle and realize the securities as it did as the account was in arrears. Moreover, RODESA's indebtedness is admitted in the letter to the Bank from RODESA's advocates dated 16th December 2012. As stated by the Bank, once the bus was sold, its debt was fully repaid and the excess of KES. 230,000.00 remitted to RODESA. This is supported by the Bank's letter dated 12th October 2011 to the directors of RODESA.

21. To this end, I fail to see what loss was suffered by RODESA in light of the admitted indebtedness and realization of the securities which I find to be lawful. At this stage therefore, I must ask if RODESA did not suffer any loss, what loss would its officials suffer? As I pointed out earlier, even if the trial magistrate had dismissed the preliminary objection, the question whether the Respondents suffered loss was still a live issue as the Respondents, as officials of RODESA, did not have any privity of contract with the Bank and could not suffer any loss due on account of breach of a contract they were not privy to. The Respondents' case was based squarely on breach of contract, yet there was no contract between them and the Bank. They were not even guarantors. Had the trial magistrate paid attention to this issue, the suit would not have seen the light of day.

Disposition

22. Following the conclusions I have reached, it is not necessary to delve into the other issues raised in the appeal. This appeal is allowed, the judgment of the subordinate court is set aside and the suit dismissed. The Respondents shall bear the costs of the suit and this appeal.

DATED and DELIVERED at NAIROBI this 9th day of APRIL 2021.

D. S. MAJANJA

JUDGE

Ms Njiru instructed by Mulondo and Company Advocates for the Appellant.

Mr Maina instructed by Gakoi Maina and Company Advocates for the Respondents.