REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 185 OF 2018

JOSEPH GICHUKI MUTHUI.....PLAINTIFF/APPELLANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT/RESPONDENT

(Being an Appeal from the Judgment delivered by the Honourable E. Muchoki - Resident Magistrate on the 22nd August, 2018)

JUDGEMENT

1. The appellant herein, who was plaintiff before the lower court, sued the Respondent seeking the refund of Ksh. 217, 861/= together with the costs of the suit. The appellant's case was that he had a bank/client relationship with the respondent and that pursuant to the said relationship, he secured loans from the respondent between 2006 – 2009 which loans he fully repaid by check-off system by October 2015 but that despite clearing the said loans, the respondent continued to effect illegal deductions on his account to the tune of Kshs. 217,861/= thereby precipitating of the suit before the lower court.

2. In its statement of defence dated 25th April, 2018, the respondent denied the appellants' claim and stated that the appellant obtained 2 separate loans for the sum of Ksh. 240,000/= and 300,000/= on 3rd November 2006 and 12th September 2009 respectively and that both loans were merged so that the appellant could pay them together. The respondent's case was that the appellant's pay slip could not however accommodate both loans and as a result, the appellant only serviced the 2nd loan and abandoned the first loan which continued to accrue interest.

After considering the evidence presented by both parties, the lower court dismissed the appellant's suit on the basis that it was not proved to the required standards thereby triggering the instant appeal in which the appellant listed several grounds of appeals wherein he faults the trial court for failing to properly analyse the evidence presented before him thereby arriving at an erroneous finding.

In his written submissions filed on 26th April 2019, the appellant reiterated the grounds set out in the Memorandum of Appeal and submitted that the trial court did not properly consider and evaluate all the evidence presented before him in dismissing the appellant's suit for lack of evidence. The appellant argued that he established that he fully repaid the loans advanced to him through both oral and documentary evidence which showed that the first loan was amalgamated and overpaid from the second top up loan.

3. The appellant faulted the trial court for failing to consider the law and precedent governing the chargeable interest rates which, according to the appellant, cannot exceed the principal loan. It was submitted that in line with the provisions of Section 112 of the Evidence Act, the respondent was under a duty to demonstrate that the appellant had defaulted on his loan arrears thereby attracting the penalties and interest.

4. The appellant argued that as a financial institution, the respondent was under an obligation to prove to the court how it arrived at its figures and to notify the appellant of the new figures/charges imposed on the loan. For this argument, the appellant relied on the decision in the case of ***Givan Okello Ingari & another v Housing Finance Co. (k) Ltd*** (2007) 2 KLR 232 wherein Warsame J.(as he was then) held as follows;

> ***"The primary complaint is that the defendant has unilaterally and in breach of the express provisions of the charge instrument levied unsanctioned interest rates, penalty charges and default charges on the loan account, which have erroneously increased the plaintiffs' indebtedness thereby frustrating and/or clogging the efforts of the plaintiffs to redeem the charge property. Such grave accusation needs and/or requires rebuttal from the defendant. However the defendant says that the charges were levied in accordance with the implied terms of the charge document, prevailing customs and trade usage in the banking and financial industry... There is no dispute that the defendant varied the rate of interest without the consent, knowledge and permission of the plaintiffs. There is no evidence that each time there was variation, the plaintiffs were informed. In my view any rate of interest to be charged on a loan account must be provided by the contractual document and must be in accordance with the parties' agreement I have gone through the charge document and there is no provision that allowed the defendant to levy or vary the rate of interest or to charge the rate of interest it so charged on the account of the plaintiffs. In my view if the defendant, applied default charges on the plaintiffs account but which was not permitted or provided by the charge document then that is prima facie uncontractual or illegal. There is nothing as prevailing customs or trade usages, which can allow the defendant to commit***

acts of fundamental breach to the contractual document... The charges debited in the plaintiff's account were done without any legal basis and in my humble view made the account irredeemable. It is my position such debits could only have been made with the consent of the plaintiffs or being a provision in the charge document that allowed the defendant to do so. By engaging in acts outside the contractual document, the defendant made it difficult for the plaintiffs to perform their part of the bargain. The acts of the defendant, in my view amount to muddling the waters that were for the benefit of all parties. This Court cannot force the plaintiffs to drink from a well muddled by the hands and legs of the defendant To do so would be inequitable...When parties to an instrument of charge have a clear agreement on the interest and charges to be charged on the facility, parties must be guided by the terms and conditions as set out in the charge document, in my humble opinion, a party in breach of the contractual document cannot be allowed to benefit from his own transgression... The contention of the plaintiffs which is particularly admitted by the defendant is ail the charges levied to the account of the plaintiffs is contrary to the express provisions of the charge document. And in my view that is why the loan has grown to astronomical figures which can be said to be beyond the redemption powers of the plaintiffs. It would be difficult to redeem a loan which is loaded with figures at the discretion of one party. The other party interested in the redemption exercise would definitely find impossible to measure to the discretionary powers or decisions of the party interested in the beneficial result. It is in the benefit of the plaintiffs for the defendant to load figures only provided by the contractual document..Equally it is not in the interest of the defendant to milk the plaintiffs dry and drain all blood from them. The Court exists for the sole purpose of determining as who is entitled to what. In my view the defendant cannot be allowed to engage in acts or omissions, which are in contravention of the law. Equally the defendant cannot be allowed to breach the terms and conditions of the contractual document and at the same time use the statutory power of sale that emanates from the statute to defeat the rights of the plaintiffs...The charge document in its entirety does not provide for default charges that were levied on the account of the applicants. The consequence of such a conduct is that it is an act outside the contractual agreement, hence there is no legal basis for doing so. The imposition of penal interest or default charges without the permission or knowledge of the applicants greatly impedes or inhibits the redemption rights of the applicants. I think it is pertinent to give a chance to the parties to contest their dispute at a full hearing, where evidence will assist the Court to reach a proper verdict as to the rival positions... To my mind the equity of redemption has been clogged by the acts or omissions of the defendant by engaging in acts contrary to the terms and conditions of the charge agreement. Prima facie the loan account would become irredeemable if charges outside the contractual agreement are loaded into the account. I am therefore satisfied that there is ample and uncontroverted evidence to show that the defendant was involved in activities that would make it difficult for the applicants to honour their obligations in the charge agreement."

5. The appellant also faulted the trial court for failing to comply with the provisions of order 21 Rule 4 of the Civil Procedure Rules which requires that judgment in a defended suit must contain concise statement of the case, points for determination, the decision thereon and the reasons for the decision. It was submitted that the impugned decision did not contain the reasons explaining how the decision was reached.

6. On its part, the respondent submitted that the appellant was well aware of the fact that he was servicing two loans but that his pay slip was only sufficient to service one loan and that the amount of Ksh. 7,350/= paid from his account was only sufficient to pay the second loan. It was the respondent's case that the dispute between it and the appellant was one of accounts or mathematics and not one on excessive and or illegal charges.

7. It was submitted that the pay slips produced by the appellant were testimony of the fact that he only serviced one loan at a time and that it was therefore not possible that he could have fully paid off both loans at the agreed time.

8. I have considered the record of appeal and the submissions made by the parties' respective counsel. As the first appellants court, I am aware of my duty to review and re analyze the evidence presented before the trial court with a view to determining whether the conclusion reached upon by the said court should stand. It is also of critical importance that in reviewing the evidence, this court must be careful not to substitute its own findings of fact for that of the trial court unless there is no evidence to support the finding or the judge can be said to have been outrightly wrong***. (See Kiragu v Kiragu & Another*** (1988) KLR 384 ***and Peter v Sunday*** (1958) E.A 429.)

9. The appellants testimony was that he was the respondent's customer for a period of about 15 years and that in November 2001, he secured a loan of Ksh. 240,000/= form the respondent which was to be repaid through direct check off system from his pay slip for 48 months via his bank account held with the respondent at the rate of Ksh. 7,350/= per month. He testified that as at September 2009, when the loan balance was Khs. 132,000, he took a top-up loan of Ksh. 200,000/= thereby making total loan due Kshs. 522,864 inclusive of interest and that he was to service the loan for 72 months from September 2009, at the rate of Ksh. 7,262/= which time was to lapse by October 2015 but that the respondent continued to make the monthly deductions up to the time of the hearing of the suit.

10. The appellant produced copies of his pay slip for April 2007, May 2007 and October 2009 as exhibits and further stated that as at August 2015, his arrears was Ksh 14,524 as shown in the pay slip produced as exhibit 2. The appellant further testified that to his utter surprise his pay slip of September 2015 (exhibit3)indicated that the loan balance was Ksh. 549,751. He also produced bundle of pay slips to show that monthly deductions of Ksh 7,262/= continued to be reflected on his pay slip and that as at the time of hearing of the case, the sum of Kshs. 232,285 had been deducted from his account over and above the loaned amount which he had repaid in full.

11. DW2, Latifa Mohamed , the respondent only witness testified that before taking the second loan, the appellant had one year left to complete repayment of the first loan and that the loans were amalgamated on 30th May, 2011. He confirmed that as at August 2015 the loan balance was Ksh. 14,524/= but that as at September 2015, the balance was Ksh. 559,751/=.

12. I have carefully analysed the evidence presented by both sides. It was not disputed that the appellant obtained two loans from the respondent with the first loan of Ksh. 240,000/= having been received on or about April 2007 and the second loan for Ksh. 300,000/= or about October 2009. It was also not disputed that according to the appellant's pay slip for October 2009, the loan balance outstanding and due on his account was Ksh. 132,300. This means that as at the time he was advanced the second loan, the appellant had one year to go before he could clear the first loan.

13. The respondent's witness conceded that the second loan taken in October 2009 was a top-up loan and that as at November, 2009, the amount due from the appellant's was Khs. 515,602/= which according to the pay slip produced in court as exhibits, the appellant repaid at the

rate of Ksh. 7,262/= per month.

14. The respondent's witness further confirmed that as at August 2015, the balance due from the appellant was Kshs. 14,/=. The repondent's witness' testimony was as follows;

> ***"Before taking the 2nd loan, the plaintiff had 1 year to fully pay the 1st loan. The loan was amalgamated on 30.5.2011.***
>
> ***The system determines or picks which contract to pay.***
>
> ***We advise the customer when the loan is in arrears. Plaintiff's pay slip for October 2009 the loan balance is 132,300/= pay slip of November 2009 the loan balance is 515,602. There was interest and penalty on the loan. Plaintiff's pay slip for August 2015 balance was 14,524/=. Plaintiff's balance as at September 2015 was 559,751/="***

15. From both documentary and oral evidence presented before the trial court by both parties, it is clear that after amalgamating the two loans, the appellant paid the same by way of direct check off system from his pay slip and that as at August 2015, the balance due to the respondent was Ksh 14,524/=

16. This court is therefore at a loss as to the respondent's assertion that in September 2015, exactly one month after the balance due was indicated to be Kshs. 14,524/= the loan balance grew to a staggering Kshs. 559,751/= On re-examination, the respondent's witness explained the big discrepancy between the balance due for August and September 2015 as follows;

> ***"We were deducting Kshs. 7,350/=. After 2nd loan Ksh. 7,262/= after the 2nd loan deductions for the 1st loan stopped. The plaintiff was expected to pay kshs. 515,602 for the 2nd loan"***

17. My finding is that the respondent's claim that deductions for the first loan stopped after the 2nd loan does not correspond with its witness' testimony that the 2nd loan was a top-up of the first loan and that the two loans were amalgamated, meaning that they were considered as one. Black's Law Dictionary (10th Edition) defines amalgamation as:

> ***"The act of combining or uniting; consolidation> amalgamation of two small companies to form a new corporation."***

18. From the above definition, I find that the respondent's claim that the 2nd loan was considered and paid as a separate loan from the 1st loan does not correspond with their own testimony that the two loan were combined or united with the 2nd loan topping up the first loan. I further find that the respondent did explain when deductions on first loan were stopped after the second loan considering that the second loan was a top up. In addition to the above findings, I further note that at no time prior, to September 2015 did respondent inform the appellant that his loan was in arrears or that the amount in his pay slip was not sufficient to service the two loans.

19. In a nutshell, I find that the respondent's explanation on the huge loan balance existing in the appellant's account in September 2015 barely one month after the balance was shown to be Ksh. 14,524 is not plausible or supported by any tangible evidence.

20. My further finding is that in common parlance, a top-up loan is not a stand-alone item but is part and parcel of the initial loan, thus the title top-up. It therefore beats all logic as to why the respondent, a banking institution of repute, could opt to suddenly stop deductions recovered for a first loan and settle for recovery of the second loan.

21. The trial magistrate stated as follows in the impugned judgment of 22nd August 2018:-

> ***"The plaintiff has not given any evidence to show that he had fully repaid first loan before he applied for 2nd loan"***

22. In my view and with all due respect to the trial court, I find that the issue in contention was not whether the appellant proved that he had settled first loan before he could apply for the second loan, as it was not in dispute that the 2nd loan was a top-up of the first loan.

23. I have carefully perused the respondent's document marked **"LM-2"** which is the respondent's letter to the appellant dated 17th September 2009 accepting the appellant's request for the second loan of Kshs. 300,000/=. In the said letter the respondent clearly stated as follows:-

> ***"Re: KCB PERSONAL LOAN APPLICATION – Mvita Branch.***
>
> ***We refer to your application dated 12.09.2009 and are pleased to advise having agreed to grant a KCB Personal Loan of shs. 300,000/= to be repaid at Kshs 7,262/= per month over 72 months. The facility has been granted to finance the following:***
>
> ***1. Debts amounting to Ksh. 156,105.04 owed to the following:***
>
> ***Outstanding Balance***
>
> ***Financial Institution***

KCB 152,775.04

KENYA POLICE SACCO 3,330.00

The debt amount will be disbursed as indicated above and cheques will be issued payable to the respective institution (s)

2. House construction amounting to Ksh. 143,894.96

The loan portion of Ksh. 143,894.96 for House construction will only be released to you upon receipt by the Bank of documentary evidence that all the indebtedness to these institutions has/have been cleared."

24. From the contents of the respondent's letter it is clear that a substantial part of the second loan being Kshs. 152,775/= was earmarked for the settlement of the outstanding loan balance due to the respondent. The respondent has not explained or claimed that the appellant owed it any either debt other than the first loan of Ksh. 240,000.00 whose balance, they conceded, stood at Ksh. 132,300/= as at the time the appellant applied for the 2nd loan. I therefore find that the respondent's own document shows balance due on the first loan was offset by part of the 2nd loan and that such settlement was a precondition to the advancement of the 2nd loan.

25. The respondent did not state that it did not recover its debt of Kshs. 152,775/= as at the time it disbursed the second loan to the appellant. Section 112 **Section 112** of the **Evidence Act** provides that in civil proceedings when any fact is within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon such party. The burden of proof therefore rested on the respondent to prove that it had not recovered the balance on the first loan.

26. In conclusion and having regard to the findings that I have made in this judgment, I find that the instant appeal is merited and I therefore allow it in the following terms:-

a) ***The decision of the trial court entered on 22nd August 2018 is hereby set aside and is substituted by an order allowing the appellant's claim for the sum of Ksh. 217,861/=***

b) ***I award costs of the appeal including the costs of the lower court to the appellant.***

c) ***The appellant is also awarded interest on (a) and (b) above at court rates from the date of filing the suit till payment in full.***

Dated and signed at Nairobi this 29th day of October 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Mombasa this 14th day of November 2019.

ERIC OGOLA

JUDGE

In the presence of:

Mr. Omondi holding brief Kithi for respondent

No appearance for appellant

Mr. Kaunda – Court Assistant