



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 344 OF 2013**  
**CO-OPERATIVE BANK LIMITED.....APPELLANT**  
**- V E R S U S -**  
**ENOS MARTIN ORIENY.....RESPONDENT**

*(Being an appeal from the ruling of the Hon. Ms. Leah W. Kabaria,*

*Resident Magistrate in Milimani CMCC no. 538 of 2010*

*delivered on 24<sup>th</sup> May 2013)*

**JUDGEMENT**

1. Co-operative Bank (K) Ltd, the appellant herein, filed an action before the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi, claiming payment of kshs.1,064,585/70 plus interest at the rate of 16% p.a from Enos Martin Orieny, the respondent herein. The claim is said to have arisen out of the respondent's default in repayment of a loan facility advanced to him by the appellant. The suit proceeded for hearing on the 13<sup>th</sup> day of August 2012 in the absence of the appellant who failed to turn up in court at the time allocated. The suit was eventually dismissed on 28.9.2012 on the basis that the evidence in form of bank statements supplied were contradictory as to the outstanding balances. The trial court found that the bank (Appellant) had failed to establish what amount if any is owed to the appellant by the respondent.

2. The appellant being aggrieved, took out the motion dated 9<sup>th</sup> November 2012 whereof it beseeched the court to review and set aside the dismissal order and substitute it with an order entering judgement in favour of the appellant. The application was opposed. Hon. Kabaria, learned Resident Magistrate considered the application and had the same dismissed on 24<sup>th</sup> May 2013. The appellant being dissatisfied with the decision, preferred this appeal.

3. On appeal, the appellant put forward the following grounds in its memorandum:

***1. The learned trial magistrate erred in law and in fact in dismissing the application in whole and holding that there were no grounds for when the appellant had demonstrated that there was no error on the face of the record and there were sufficient reasons to warrant a review.***

***2. The learned trial magistrate erred in law and in fact in failing to find that there was an error apparent on the face of the record in that the figure claimed of ksh.1,064,585.70 and how it was***

*arrived was clearly shown on the loan statement of account tendered as exhibit at the trial and there was therefore material before the court to support that figure.*

*3. The learned trial magistrate erred in law and in fact in failing to recognize that the loan statement was in two parts and that the credit entry of ksh.825,209.70 on 18<sup>th</sup> September, 2009 in the principal loan account is a book entry which has a corresponding debit entry of a similar amount in the principal arrears account.*

*4. The learned trial magistrate erred in law and in fact in holding that the applicant in its application was seeking to prosecute the suit again when it was seeking review based on legitimate grounds of sufficient reason and errors on the face of the record.*

*5. The learned trial magistrate erred in law and in fact in dismissing the appellant's application for review which decision was wholly against the weight of the evidence.*

4. When the appeal came up for hearing, this court gave directions to have the same disposed of by written submissions. I have re-evaluated the submissions made before the trial court. I have also considered the submissions filed by the appellant. At the time of writing this judgment the respondent had not filed his submissions. Though the appellant put forward a total of five grounds of appeal, the same may actually be reduced to one main ground that is to say whether or not there were sufficient grounds to warrant a review of the judgement of the trial court delivered on 28<sup>th</sup> September 2012.

5. By way of re-evaluation, let me examine the rival arguments and The resultant decision. In its application for review, the appellant raised and argued three grounds in support of the motion dated 9<sup>th</sup> November 2012. **First**, it was argued that there were errors apparent on the face of record that should convince the court to review and set aside the judgment. **Secondly**, it was further argued that there were sufficient reasons to warrant a review and setting aside of the aforesaid judgment. **Thirdly**, that it is in the interest of justice that the said judgement be reviewed and set aside. The learned Resident Magistrate considered the arguments from both sides and concluded in her ruling that there was no error on the face of record. She also concluded that there were no grounds that convinced her to review her judgement. The learned Resident Magistrate also agreed with the respondent's submissions that the appellant was using the application for review to have a second bite in prosecuting its case. The trial Resident Magistrate further concluded that the appellant instead of taking it upon itself to present its evidence in a manner coherent as would be sufficient to establish its claim, opted to throw material at the court and left it to the court to comb through it to somehow make sense out of it and award it judgment. I have also taken time to examine the judgment of the learned Resident Magistrate. She was categorical that the statements of accounts produced as exhibit 1 was confusing as there was absolutely no order to the same. She also stated that there are two contradictory statements as to the balances pending. In fact she pointed out that as of 8.9.2011 the statement produced indicated an outstanding balance of ksh.1.052,564/10 at page 16 while at page 19 of the same document, the cleared balance is indicated to be 0.00 balance as of the same date. Having noted the above discrepancies, the learned Resident Magistrate held that the appellant bank had failed to establish what amount if any is owed to the plaintiff (appellant ) by the defendant(respondent).

6. It is the submission of the appellant that it pointed out the errors apparent on the face of record to the learned trial Resident Magistrate but she failed to appreciate its arguments. In the affidavit of **Anestine Gataka**, the appellant explained what it thought were errors on the face of record. It is argued that statements presented to court were in two parts. The first part was in respect of account no. 016260031238400 which is the principal arrears account and that runs from pages 12 – 16 of PExh. 1. The second part is the principal loan account no. 016C7003138400 which runs from pages 17 to 18 of PExh.1. The appellant further pointed out that page 18 is part of the principal loan account and reflects the balance on that account as of 23.8.2012. The appellant further argued that the two statements of account do not only relate to account no. 01626003138400 which is the principal loan arrears account but also encompass account no. 016C7003138400 which is the principal loan account.

7. In the same affidavit, the appellant explained in detail that the sum of ksh.825,209/60 was the amount

outstanding in the principal loan account no. 016C70003138400 as at 18.9.2009 when a decision was made to call in the entire loan due to the defendant's (respondent's) default. It is said that the book entry was made in the principal loan account for ksh.825,209/60 and the amount transferred to the principal loan arrears account and that is why there is a zero balance indicated in account no. 016C7003138400. In short, the appellant argued that the two statements of accounts are not contradictory but complimentary to each other. The appellant submitted on appeal that the learned Resident Magistrate failed to note the fact that as of 18.9.2009 when the balance on the principal loan account indicated 0.00, a corresponding entry of ksh.825,209/60 was made on the principal loan arrears account. It was also pointed out that the trial magistrate failed to note that at the time when the said ksh.825,209/60 was transferred as aforesaid, the balance on the principal arrears account was ksh.239,376/10 and it is the addition of the two balances that the total add up to the amount claimed by the appellant from respondent of ksh.1,064,585/70. The appellant also argue that the trial magistrate failed to take note that the respondent did make monthly payments of ksh.6,500/= from November 2009 to July 2011 and those payments are reflected in the principal arrears account. The appellant further pointed out that the learned trial Resident Magistrate failed to take note of the fact that the respondent did not claim to have deposited ksh.825,209/60 towards servicing the loan, yet she wrongly inferred that the respondent had done so when the record was clear that the defendant was only making monthly payments of ksh.6,500/= against the agreed monthly instalment of ksh.23,059/75. After a careful examination of the ruling that dismissed the appellant's application for review, it is clear from the ruling that the learned Resident Magistrate expressly stated that the appellant simply threw material at the court and left the same for the court to comb through and make sense out of it. In other words, the learned Resident Magistrate is saying that the bank statements produced and relied upon by the appellant did not make sense but caused more confusion to the court. The trial resident magistrate blamed the appellant for trying to re-establish his case through an application for review. I have carefully examined the witness statement of Anestine Gatakaa together with the documents accompanying the witness statement. I have also perused the appellant's written submissions. It is clear in my mind that the learned Resident Magistrate completely misapprehended the evidence. In fact in her ruling, the subject matter of this appeal, she ran short of condemning the appellant for failing to lay out its claim in a concise manner with clarity. However, a careful consideration of the arguments presented in support of the application for review will reveal that the appellant was able to clearly show the errors which were apparent and glaring from the record.

8. I have spent a considerable amount of time to examine the errors shown to the learned Resident Magistrate. In my considered view, there were sufficient grounds and errors apparent on the face of record which were shown to the trial Resident Magistrate which were sufficient to move the court to review and set aside the order dismissing the suit.

9. In the end, I find the appeal meritorious. It is allowed. The orders dismissing the motion for review dated 9.1.2012 is set aside and is substituted with an order allowing the application in terms of prayers 1 and 2 with costs.

10. Costs of this appeal is awarded to the appellant.

Dated, Signed and Delivered in open court this 10<sup>th</sup> day of February, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent