Faulu Microfinance Bank Limited v Kilonzo (Civil Appeal E032 of 2024) [2025] KEHC 14937 (KLR) (14 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14937 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E032 OF 2024

RL KORIR, J

OCTOBER 14, 2025

BETWEEN

FAULU MICROFINANCE BANK LIMITED .... APPELLANT

AND

KENNETH MUTEGI KILONZO .... RESPONDENT

(Being an Appeal from the Judgement of Hon. T.W. Wachira- R.M in the Chief Magistrate's Court at Chuka SCCOMM No. E037 of 2024 delivered on 17th September, 2024.)

JUDGMENT

1. This Appeal arises from the judgment of Hon. Wachira Tracy Wanjiku- Resident Magistrate in *SCCOMM/E037 of 2024* delivered on 17th September,2024. By a claim dated 12th July 2024, the Appellant (then the Claimant) sued the Respondent herein seeking the sum of Kshs. 621,209 arising out of a loan lent to the Respondent plus costs and interests of the suit.

2. The Appellant's/Claimant's case is that vide a loan application form dated 17th August 2019, the Respondent applied a loan to which the Claimant accepted and advanced the sum of Kshs. 569,000 which was to be repaid within 84 months subject to an interest rate of 20.53 % per annum and monthly instalments of Kshs. 13,052.73. Details of the loan terms were contained in the letter offer. The Claimant averred that the Respondent failed to service the loan and pay instalments when they were due and by the date of default being in April 2022 had accrued to the tune of Kshs. 621,209.04.

3. The Respondent did not enter appearance or file any response to the claim. Consequently, the matter proceeded for formal proof where the Claimant called one witness and closed its case.

4. The trial court entered judgment in favour of the Claimant in the following terms; -

    i. A sum of Kshs. 145,523.97 on breach of contract

ii. Interests at court rates from the date of default in April 2022 until payment in full

iii. Costs assessed at Kshs. 15,000.

5. Aggrieved with the judgment, the Appellant instituted the instant Appeal on the following grounds;

   i. That the learned trial magistrate erred in law and in fact in finding that that there was insufficient proof of disbursement

   ii. That the learned trial magistrate erred in law and in fact in finding that Section 44 of the *Banking Act* applied to the Appellant despite being a microfinance institution.

   iii. That the trial magistrate erred in law and in fact by failing to award the interest and awarding the sum that was significantly lower than the outstanding citing the duplum rule.

6. It was proposed by the Appellant that

   i. The Appeal be allowed

   ii. The judgment delivered on 17th September 2024 be varied and the statement of claim dated 12th July 2024 be allowed as prayed

   iii. The Appellant be awarded the costs of the Appeal.

7. The Appeal was canvassed through written submissions. The Appellant's submissions were dated 24th January 2025. The Respondent did not file any submissions.

8. The Appellant raised the following issues for determination;

(i) Whether the trial court could rewrite contractual terms in uncontested proceedings.

The appellant submitted that the proceedings before the trial court were uncontested therefore the Claimant's case remained unchallenged and uncontroverted thus there was no basis for the trial court to deviate from enforcing the clear terms of the loan agreement. Further, that the loan terms were clear and unambiguous with no evidence of unconscionability or oppression being presented. It was also submitted that the trial court created defenses that were not pleaded by the Respondent and rewrote the terms of the contract without any legal basis. In support of this issue for determination, counsel for the Appellant cited the following authorities. *National Bank of Kenya Ltd v Pipeplastic Sankolit (K) Ltd* [2001] eKLR and *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd* [2014] eKLR for the proposition that a court of law cannot re-write a contract for parties unless there was coercion, fraud or undue influence.

(ii) Whether Section 44A of the *Banking Act* applies to Microfinance Institutions.

In this regard, counsel for the Appellant submitted that the Appellant is a microfinance institution governed by the *Microfinance Act* 2006 and therefore not bound by Section 44A of the *Banking Act* which should only apply only to banks. It was further submitted that, the trial court by applying Section 44A of the *Banking Act* greatly impacted the quantum awarded as the court improperly limited recovery based on an inapplicable statutory provision whereas the correct approach was to enforce the contractual terms which were freely entered by the parties. In support of this position, counsel cited the following authorities *Desires Derive Ltd V Britam Life Assurance Co. (K) Ltd* [2016] eKLR and *Momentum Credit Ltd v Kabuiya* [2022] KEHC 13705 (KLR) for the

proposition that the Appellant being a micro-finance institution was not bound by Section 44A of the *Banking Amendment Act*.

(iii) Whether the trial court erred in its calculation of the recoverable amount and limiting the recovery to arrears.

On this, counsel submitted that the trial court fundamentally misunderstood the loan structure and the legal consequences of default. That the Respondent's default in servicing the loan triggered the acceleration clause which is provided for in clause 4 of the loan application form. Further, that the trial court confused the amount in arrears with the total liability under the loan agreement. In addition, that the arrears specifically amounted to Kshs. 297,913.96 which includes the principal arrears of Kshs. 145,523.97 and interest arrears of Kshs. 152,389.99. He relied on the case of *National Bank of Kenya v Pipeplastic Sankolit (K) Ltd* [2001] eKLR.

9. The Respondent did not participate in the Appeal and filed no submissions.

10. Having considered the record of appeal, submissions by counsel for the Appellant the following issues arise for determination:-

    i. Whether the claimant proved their case on a balance of probability.

    ii. Whether the trial court erred in finding that there was insufficient proof of disbursement;

    iii. Whether the trial magistrate erred in applying Section 44A of the *Banking Act* to a microfinance institution;

    iv. Whether the trial court erred in its calculation of the recoverable amount by failing to apply the acceleration clause and/or misapplying the duplum rule.

11. In addressing this Appeal, I am guided by the jurisdiction circumscribed by Section 38 (1) of the *Small Claims Court* which provides: -

    (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law only, within thirty days from the date of the decision or order

Whether the claimant proved their case on a balance of probability.

12. The Appellant bore the burden of proving its case and demonstrating that it was owed by the Respondent the sum of Kshs. 621,209.

13. Section 107 of the *Evidence Act* describes the burden of proof as follows: -

    1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

14. In the case of *Mbuthia Macharia v Annah Mutua Ndwiga & Another* (2017) eKLR, the Court of Appeal stated that: -

    > "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden.

Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced."

15. The Appellant contends that its case was uncontroverted. I agree with counsel for the Appellant that uncontroverted evidence bears a lot of weight. However, a claimant in an undefended suit, such as the Appellant's case, must prove their case on a balance of probabilities as is required by law. In the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR the Court held that:-

> " It is not automatic that instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest."

16. Further, in *James Muniu Mucheru v National Bank of Kenya Limited* [2019] KECA 1058 KLR, the court observed that:-

> " In that regard, before a trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities, the court must be satisfied that the plaintiff has adduced some credible and believable evidence which can stand in the absence of rebuttal evidence by the defendant. The plaintiff must adduce evidence, which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities proves the claim."

17. The Appellant has faulted the trial court for finding that there was insufficient proof of disbursement. At the hearing, CW1 the head of legal secretariat produced a personal loan application form duly executed by both parties which indicates that the Respondent had applied for the sum of Kshs. 569,000 with a repayment period of seven years and Kshs. 13,132 per month. He told the court that the Respondent had repaid the loan from 2019 until April 2022 when he started defaulting and as at January 2024, the outstanding amount was Kshs. 621,209.

18. I have perused the impugned judgment. At Paragraph 5, the trial court observed as follows:- "While the court has held that there was sufficient proof of disbursement of the loan at Kshs. 569,000, the court notes that as at January 2024, the total amount that the Respondent had paid when the loan became non-performing due to his default in repayment was Kshs. 425,210 which includes the principal paid at Kshs. 11,346.8. /-, the interest on the principal paid at Kshs. 269,481.20/- as well as the charges paid…"

19. From the Appellant's bank statement produced as evidence before the trial court by the Claimant, as at 15th January 2024, the summary of payments is worked out to a summation of Kshs. 425,210. The bank statement further shows that the loan was disbursed into the Respondent's account on 22nd August 2019. From the above, it is clear that the trial court found the loan amount was disbursed. It is therefore inaccurate to state that the trial court found to the contrary.

Whether the trial magistrate erred in applying Section 44A of the *Banking Act* to a Micro-Finance Institution.

20. The Appellant contends that it is a microfinance institution and not a bank thus governed by the *Micro-Finance Act* and not the *Banking Act*. That therefore Section 44A of the Act does not apply to it.

21. Section 44A of the *Banking Act* provides for the duplum rule. It states "An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2)."

22. Section 2 of the *Banking Act* defines institution to mean: bank, financial institution or a mortgage finance company. There is varying jurisprudence on whether or not the duplum rule was applicable to Micro-Finance Institutions and other lending entities. However, the Court of Appeal held in *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation* [2019] eKLR as follows: -

> "The duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides".

23. In *Jelangant & another v Mwananchi Credit Limited & another* [2023] KEHC 19922 (KLR), the court observed as follows:-

> "In this regard, I hold that the rule is not only applicable to banks and financial institutions under the *Banking Act* but it extends to all lenders. A narrow interpretation of the application of the rule will defeat justice. It will be discriminatory in that, those who borrow from banks will enjoy greater protection leaving those borrowing from elsewhere exposed. Borrowing is borrowing and it would be inequitable for one group in society to be treated differently."

24. It is not in dispute that the Appellant is a money lending institution. Further, I also take judicial notice that the Appellant is categorized as a Deposit-Taking Micro Finance Bank. Bearing this in mind, it is my view that the Appellant falls within the description anticipated by Section 2 of the *Banking Act* which makes Section 44A applicable to it.

25. It is my finding therefore, that the trial court did not misapply the law by finding that Section 44A was applicable to the Appellant. A court of law would not ignore the law whether or not such a defence was raised.

Whether the trial court erred in its calculation of the recoverable amount by failing to apply the acceleration clause and/or misapplying the duplum rule.

26. The Appellant contends that the trial court misdirected itself by failing to apply the acceleration clause but instead applied the duplum. From the foregoing, I have already made a finding that the duplum rule was applicable in this case. It follows that there was no error in not applying the acceleration clause.

27. In the end, I find that the appeal is not merited and the same is hereby dismissed without costs.

JUDGEMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 14TH DAY OF OCTOBER, 2025.

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R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of Ms Kimathi for the Appellant and N/A for the Respondent. Muriuki (Court Assistant.)