

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E264 OF 2024

KINGDOM SACCO LIMITED.....APPELLANT

-VERSUS-

CECILIA WANGARI KAROGI.....1ST RESPONDENT

SAMUEL NJIRI NJUGUNA.....2ND
RESPONDENT

*(Being an appeal from judgment and decree in the Senior Principal Magistrate's Court
at Ruiru (Hon C.K. Kisiangani PM) civil case number E362 of 2023 dated 11th July
2024)*

JUDGMENT

The appellant is a Credit and Saving Cooperative Society while the 1st respondent was its member and the 2nd respondent its employee. The 1st respondent took two tranches of loans from the appellant for purposes of purchasing three properties which she claimed were offered to her by the appellant through the 2nd respondent. The loans which amounted to Kshs 1,950,000.00 were disbursed and despite repayment in full, the 1st respondent got title for only one property. After following up the other two properties in vain, the 1st respondent sued the appellant and the 2nd respondent for refund of Kshs 1,581,982.00 being the money paid to the appellant less the value of the property she got. The trial court entered judgement as prayed.

It is against the above judgement that the appellant has filed this appeal citing the following grounds;

1. *The Hon. Magistrate erred in law and fact in holding that the appellant and the 2nd respondent were liable jointly and severally to pay the plaintiff's claim contrary to the evidence on record which clearly showed that the 1st and 2nd respondents herein entered into a contract independently without involving the appellant.*
2. *The Hon. Magistrate erred in both law and fact in that while appreciating the fact that the appellant was not engaged in the business of selling land but only financed its members seeking finance, proceeded to hold that the appellant was liable merely on the basis that the 2nd respondent was its employee.*
3. *The Hon. Magistrate erred in both law and fact in that while she appreciated that the 1st respondent was negligent in her dealings with the 2nd respondent proceeded to enter judgment against the appellant who was not involved in the sale of land transactions which were between the 1st and 2nd respondents.*
4. *The Hon. trial Magistrate erred in both law and fact in failing to appreciate and hold that the 2nd respondent was an independent contractor and that;*
 - i) *He was not acting in the ordinary course of his duties when he purported to sell the land to the plaintiff.*
 - ii) *He had no authority to make any representation to the plaintiff which he indeed knew to be false that the 1st defendant was selling land along Kangundo Road.*

5. *The Hon. trial Magistrate erred in both law and fact in failing to make a determination on the Notice of Claim by the appellant against the 2nd Respondent which notice was on record and evidence in support of the Notice of Claim presented by the appellant.*
6. *The decision by the trial court was contrary to the evidence given.*

It is trite law that a first appeal must be conducted in form of a re-hearing where the appellate court re-evaluates and re-analyses the evidence produced before the trial court and comes to its own independent conclusion but always bearing in mind that it did not have the advantage of hearing the witnesses first hand and observing their demeanour and give due allowance for that. In ***Mark Oiruri Mose v Republic (2013) KECA 67 (KLR)***, the Court of Appeal restated this position by holding that;

‘It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.’

On the basis of the above holding and the position in law, this court will reproduce the evidence of the parties produced in the lower court as far as it is relevant to this appeal. The appellant called one witness while the 1st respondent was the only witness in her case. The 2nd respondent did not participate in the proceedings interlocutory judgement against him having been entered on 7-03-2024. For better flow of the matter, I will start with the evidence of the 1st respondent.

The 1st respondent's case

The 1st respondent told the court that she held an account with the appellant and on 17th February 2020, she did an email to the appellant through its official address declaring her interest in purchasing properties from it and indicating that she wanted the appellant to finance the purchase. The email was responded to by the 2nd respondent who was the 1st respondent's credit officer and who informed her that the appellant had some plots on Kangundo road which were being sold at Kshs 650,000.00. The 1st respondent added that the 2nd respondent also explained the requirements for the sale and sent her the appellant's loan application forms with instructions that she fills them and send back.

The 1st respondent stated further that she filled the forms applying for Kshs 650,000.00 and sent them back through the appellant's official email which was acknowledged by the 2nd respondent. On 19th February 2020, the 2nd respondent wrote informing the 1st respondent that she had qualified for the loan and sent her the loan repayment schedule which was spread over four years. She then nominated her brother to identify and inspect the plot which process was done seamlessly.

The 1st respondent stated further that on 5th May 2020, she applied for another loan of Kshs 1,300,000.00 for acquisition of two other plots which process like the first one was also done smoothly through the appellant's official email and handled by the 2nd respondent in his capacity as credit manager. The 1st respondent added that

she subsequently made payments of the two loans to the tune of Kshs 2,181,982.00.

It was the 1st respondent's case that after she completed the payments, she wrote to the appellant for guidance on how to commence transfer process but she was shocked to discover that her account had been debited with Kshs 1,950,000.00 to a third party on 19th February 2020 and 8th May 2020. Upon enquiry, she was informed that the money was debited to the unknown person who was to transfer the three properties to her.

Upon the above discovery and her follow up, the appellant promised to follow up the issues and after protracted back and forth in vain, she instructed an advocate to follow up the issue on her behalf. After the advocate followed up, she managed to secure a title deed for Donyo Sabuk/Komarock Block 1/50844 but the appellant failed to either facilitate registration of the other two properties or refund the money paid towards their purchase. She produced a total of seven exhibits which included emails correspondences between her and the 2nd respondent and the appellant, loan application form dated 5th May 2020, demand letter dated 29th October 2022, another demand letter dated 19th June 2023 and her account statement. She concluded by blaming both the appellant and the 2nd respondent.

In cross-examination, she stated that she knew that Saccos sell properties to their members but she did not produce advertisement showing that the appellant advertised for sale of properties. She added that the 2nd respondent was the one who responded to the email and that she was not aware whether the appellant dealt with real estate. She added that she got the title for the Komarock property from

the appellant but she had not filed transfer documents and she could not confirm who was transferor.

The 1st respondent also stated that she did not know who withdrew money from her account and that she came to learn of the withdrawal after she got her statement from the appellant. She insisted that the appellant transferred money from her FOSA account through the 2nd respondent. She reconfirmed that she borrowed Kshs 1,950,000.00 from the appellant with each of the plot going for Kshs 650,000.00. She stated further that she got title deed for one plot worth Kshs 650,000.00.

The appellant's case

The appellant's witness was one Joel Saitoti Kaitwai who said that he was working with the appellant as the ICT manager. He confirmed that the 2nd respondent was working with the appellant but left in 2021. He also confirmed that the 1st respondent who was their member made an enquiry to the appellant asking to be financed to purchase a plot at Koma Hill and in reply, the 2nd respondent told her that limited plots were available which were being sold by Mensa Investments, their partner in land and housing projects.

The witness testified further that the 2nd respondent did not disclose to the 1st respondent the process of purchasing a plot through Mensa Investments where one was required to fill an expression of interest form for plot allocation after which allotment letters were to be issued by Mensa Investment. It would be after this that the member could seek financing from the appellant with the letter as the supporting document.

He added that the 2nd respondent proceeded to engage the 1st respondent exclusively and advised her to apply for a loan to purchase the plots. He processed the loan and the loan was disbursed on 19th February 2020 to the customer's account, upon which he proceeded to transfer the funds to his personal land selling business entity the same day without authorization of the appellant and the 1st respondent.

He claimed that the appellant later learned of the case when on 13th September 2022, the 1st respondent started following up on her title deeds with it at which time the 2nd respondent had left the appellant's employment. The appellant followed up with the 2nd respondent after the 1st respondent's complaint since there were no purchase records and it was then that they learned that the 2nd respondent had sold three plots to the 1st respondent through his personal land selling business entity without disclosing this fact to her. The appellant then advised the client to follow up directly with the 2nd respondent but they later followed up for her and had meetings with the 2nd respondent which bore some fruits when the 2nd respondent transferred one title to the 1st respondent but thereafter, he became unresponsive.

The witness alleged that the acts by the 2nd respondent were not done within the course and scope of his employment but as an independent contractor who took advantage of his position in the Sacco to unjustly enrich himself which was a criminal offence. He prayed for judgement to be entered against the 2nd respondent.

In cross-examination, the witness confirmed that as at 20-02-2020, the 2nd respondent was an employee of the appellant as a credit officer with duties of appraising loans and advising clients on their loan application and whether they

qualified or not. He also confirmed that the 2nd respondent was in communication with the 1st respondent as per the produced emails. He stated that the 2nd respondent is the one who approved the 1st respondent's loans and it was him who disbursed the loan amount to the plaintiff's account. He also confirmed that the 1st respondent repaid the loan in full. He alleged that one title deed was transferred by the 1st respondent but he failed to transfer the other two. He added that the money was transferred to the 2nd respondent's land buying company at which time he was still their employee.

He added that the 2nd respondent did not work as per their policy and did not explain to the 1st respondent the procedure the appellant used to give loans to its members. He insisted that the appellant does not sell land to their members but they had partnered with Mensa Investment to sell land to its members then it finances. The witness maintained the position that the 2nd respondent sold his own land to a member contrary to their policies which resulted to conflict of interest. He also testified that the appellant filed notice of claim against co-defendant and prayed for indemnity from the 2nd appellant.

Analysis and determination

I have read the submissions dated 30th August 2025 by the respondent and 14th August 2025 by the appellant together with the parties' pleadings, evidence and exhibits produced in the lower court. Having done so, I discern that a few things are not in dispute.

It is not disputed that the 1st respondent was a member of the appellant and that she applied for two loans totaling to Kshs 1,950,000.00 which was repaid in full to the tune of Kshs 2,181,982.00 inclusive of interest. It is also not in dispute that the 1st

respondent got only one title deed for property then valued at Kshs 650,000.00 instead of three plots valued at Kshs 1,950,000.00. It is also common ground that the 2nd respondent was an employee of the appellant at the time of the loan and disbursements and he participated in processing of the loans through the appellant's official email which is accepted as an official channel of communication. It is actually not disputed that the 1st appellant is entitled to refund of the money for two plots. What is in dispute is, who between the appellant and the 2nd respondent should refund the money.

In order to answer the question of who is liable to refund, this court needs to interrogate whether the 2nd respondent was in the course of his employment when he took the 1st respondent through the transactions and if not whether the appellant was negligent leading to the loss and whether the 2nd appellant is liable to indemnify the 1st appellant.

The loan application forms produced as 1st respondent's exhibit 3 shows that for the loan to be approved, it needed analysis and recommendation by credit officer, approval and recommendation of credit manager and the approval and recommendation of the management committee. The appellant did not disown the said form. The 2nd respondent was said to have been a credit officer meaning that his role was that of analysis and first recommendation. The appellant did not adduce evidence by whoever was the credit manager and anyone who sat in the management committee denying their approvals.

In ordinary circumstances such approvals would not come without proper documentation and loans would not be disbursed without the approvals. If the disbursement of the loan and payments to the third party were done without these

approvals, it would mean that the process was fraudulent. The appellant did not plead particulars of fraud against the 2nd respondent save for paragraphs 13(ii) of the defence which stated that the transfer to FOSA account was fraudulently done by the 2nd respondent without giving proper particulars.

Where a party desires the court to believe that an act was done fraudulently, it must not only specifically plead particulars of fraud but must also prove them to a standard higher than balance of probabilities but lower than beyond any reasonable doubt. In ***Gichinga Kibutha v Caroline Nduku (2018) KEELC 3981 (KLR)***, the court held as follows;

‘It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.’

Similarly, in ***Jennifer Nyambura Kamau v Humphrey Mbaka Nandi (2013) KECA 423 (KLR)***, the Court of Appeal held that;

*‘In the present case, it is not enough for the respondent to have pleaded fraud; he must tender evidence that prove the particulars of fraud to the satisfaction of the trial court. In ***Mutsonga vs. Nyati (1984) KLR 425***, at pg 439, this Court held: “**Whether there is any evidence to support an allegation of fraud is a question of fact**”.’*

The appellant’s witness who stated that he was its ICT manager did not produce evidence to show that the disbursements were made by the 2nd respondent which I believe he was in a position to produce in form of a report. Paragraph 13(v) of the defence mentions that the 2nd respondent transferred the funds to his co-conspirator without giving details. In his testimony, the witness did not identify this co-

conspirator or produce evidence of the details of the account to which the funds were transferred which must be readily available to the appellant.

It is not disputed that at the time the transaction was done, the 2nd respondent was in employment of the appellant. What the appellant disputes is that the actions were done in the course of employment and according to it, the 2nd respondent was acting as an independent contractor. It is notable that the communication between the two respondents was through the appellant's official email address. The transaction as far as I understand were done within the premises or using working tools provided by and in control of the appellant. The method through which the 2nd respondent accessed the system was provided by the appellant. There is no claim or evidence that the 2nd respondent accessed the information or the data or the account of the 1st respondent unlawfully. The appellant did not produce any documents or report on investigations it conducted after learning that the 2nd respondent acted outside his mandate.

The appellant did not take out third-party proceedings against the recipient of the money yet it is apparent from the witness's testimony that the money did not end up in the 2nd respondent's account. This position in my view paints the appellant as part of the scheme aimed at hiding the true identity of the recipients of the funds and the court is not expected to go on a fishing expedition. The onus of proving the recipients of the funds was on the appellant which it failed to do. In view of the above, I take the position that the 2nd respondent acted in the course of his employment. Whether he did it alone or in conspiracy with the appellant's other employees and external persons is another issue all together.

The above takes me to the second issue of negligence. Even if the 2nd respondent were said to have acted outside his employment boundaries, the appellant would still be liable if it was proved that the acts of the 2nd respondent were enabled, facilitated or encouraged by the negligence of the appellant. A financial institution which fails to observe its fiduciary duty to exercise all precautionary measures to ensure that the customers' funds are safe is liable to its customers for any loss arising from the breach or negligence of its employees. In ***Jambo Foam Mattresses Industries Limited v First Community Bank & 2 others (2022) KEHC 16950 (KLR)*** Honourable Lady Justice R.E Aburili found the respondent liable for having failed to make reasonable enquiries on the operations of the fraudulent account held with it. She stated thus;

'Having considered the evidence in the matter, I am satisfied that the respondent failed to exercise due diligence expected of a banker when it opened and allowed the operation of the account in the manner it was operated leading to loss of money on the appellant's part.'

The evidence available shows that the transfer of the 1st respondent's funds to the unidentified third party was done through the system developed or managed by the appellant. DW1 was the appellant's ICT manager which means that he was in charge or had considerable control of the customer's data held by the appellant. The witness did not tell the court that the appellant's systems, data or process were unlawfully breached or intercepted. The transactions were done by its authorised employee.

In my understanding, processing and ultimate advancing of a loan or asset financing is not a one-person activity or show. The narrative given by the appellant suggests that the whole process from issuance of the loan application forms to the

transfer of the funds to the third party was exclusively done by the 2nd respondent. That means that the 2nd respondent received the emails, sent emails, issued application forms, received the completed forms, appraised the suitability of the 1st respondent, recommended and approved the loan, disbursed the loan to the 1st respondent's FOSA account and transferred money from the FOSA account to the third party.

If the appellant's narrative is true, then it means that the appellant had not put in place a secure mechanisms or system of operation that was not prone to manipulation by a single junior employee. The fact that the 2nd appellant could do all that without detection by the manager or another employee in a position of responsibility points to sheer negligence and lack of security for the customers' data and funds entrusted to the appellant. It would mean that the appellant failed to ensure sanctity of financial dealings which is a duty it owed not only to its customers but the public at large. This position resonates with the holding of the court in ***Samuel Mwamba Ambundo & 7 others v Spell Investment Co. Ltd & 5 others (2019) KEHC 521 (KLR)***;

'However, there are circumstances when the bank can be held liable for breach of duty of care towards a non-account holder. This occurs generally, when a bank opens an account without care and skill and/or collects or pays a cheque to a person who is not entitled thereto. (see; Ladbroke vs. Todd (1914) and Hampstead Guardians vs. Barclays Bank of Kenya Ltd (1923).'

The appellant in my view led the 1st respondent to believe that it was selling plots and the argument by the appellant that it was not engaged in real estate business does not afford it proper defence to the claim. Going through the emails between the appellant and the 1st respondent, one cannot fail to see that they make reference

to Mensa Ridge Estate which was confirmed by the appellant's witness to be their partner in the real estate. I single out email dated 27-09-2022 from Joel Saitoti who I believe is the same person as DW1 which states; *'you will recall that I had indicated to you in a previous email that Samuel did not sell to you Kingdom Sacco plots (evidenced by the fact that Kingdom Sacco did not issue you allotment letter for the plots you purchased), he however sold to you plots through his land selling business.'* An ordinary person would interpret this to mean that the appellant was selling plots and if not, then it was misleading the public that it had some plots for sale.

The 1st respondent's account shows that the loan was diligently paid. The appellant did not decline any of the installments. The account also received interest for the loans and the appellant cannot not turn back and disown its employee's actions at this stage when it made profits from the transactions. My answer to the second issue is therefore affirmative that the appellant was liable for the loss suffered by the 1st respondent.

The appellant claims that the court did not make decision on its claim of indemnity from the 2nd respondent. It is true that the court did not make a decision on that. However, this court has the mandate to make a decision on the claim against the 2nd respondent. In my analysis, the appellant did not prosecute its claim against the 2nd respondent properly. As I have found above, the appellant did not lead evidence to show that the 2nd respondent was acting outside his scope of employment.

The appellant did not conduct investigations on how the transaction was done. If it did, it held back the findings from the court. There must be documentations in support of the transfers yet none was produced. The appellant did not even produce

statement identifying the person who received the money and show how he was related to the 2nd respondent. The appellant should not have expected the court to make a finding in its favour based on mere denials and as such I find that the claim against the 2nd respondent was not proved to the required standards. The most appropriate order in the matter was and is liability jointly and severally.

As I finish, I appreciate that the appellant was in business and therefore entitled to receive the costs of processing the loan and the interest accruing therefrom. It is acknowledged that the 1st respondent received a title deed for one property worth Kshs 650,000.00. Noting that the purchase price for the plots was the same and the fact that the 1st respondent benefited from loan for one property, it is my view that the appellant was entitled to interest commensurate to loan for one plot. In that regard I hold that it is equitable to reduce the amount to be refunded to the 1st respondent by an amount equivalent to a third of the total interest. The 1st respondent paid Kshs 2,181,982.00 while the loan granted was Kshs 1,950,000.00 meaning that the difference of Kshs 231,982.00 can reasonably be assumed to be the interest paid. A third of this is Kshs 77,327.00 which I deduct from the claimed Kshs 1,581,982.00 giving me Kshs 1,504,655.00 as the 1st respondent's entitlement.

The conclusion of the above discussion leads me to make the following orders;

1. Judgment dated 11th July 2024 in Ruiru Chief Magistrate's Court civil case number E362 of 2023 is hereby adjusted to the extent that judgment is entered for the 1st respondent against the appellant and the 2nd respondent jointly and severally for a sum of Kshs 1,504,655.00.

2. The said amount of Kshs 1,504,655.00 shall attract interest from the date of filing the suit in the trial court until payment in full.
3. The appellant shall pay the 1st respondent's costs of this appeal and in the lower court.

Dated, signed and delivered at Nairobi this **14th** day of **November** 2025.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Gikonyo for the appellant and Miss Kariuki for the 1st respondent.