

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**(CIVIL APPEAL)**  
**HCCA NO. E115 OF 2020**

**JOEL MUSYOKA MUNGAI.....APPELLANT**

**VERSUS**

**MOMBASA PORT CO-OPERATIVE**

**SAVINGS & CREDIT SOCEITY.....1<sup>ST</sup> RESPONDENT**

**KENYA PORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Court below delivered a judgment o **24<sup>th</sup> July 2020** vide which it dismissed the appellant's claim against the respondents. At the penultimate part of the terse judgment, the learned magistrate stated as follows: -

***“Although the 1<sup>st</sup> defendant didn’t avail any witnesses I find that the plaintiffs claim is unproved. It was also important to enjoin the said Komen as a party; he would shed more light on the issue at hand, this is so since disputes between members of a Sacco and the Sacco, member and member, past member and the Sacco are supposed to be dealt with at the Cooperative Tribunal. This is provided for under section 76 of the Cooperative Societies Act, and this Court lacks jurisdiction to entertain***

***the issues. However, since there is a party (2<sup>nd</sup> defendant) which is not covered under the Tribunal's Act that is why the Court has proceeded to determine the case."***

2. The Court went on to hold that: -

**"The plaintiff's claim is found devoid of merit, and with the defence notwithstanding, the same is dismissed with costs."**

3. The appellant was aggrieved by the said decision and filed the instant appeal. The appeal is based on six grounds, to wit: -

1. THAT the Learned Trial Magistrate erred in law and in fact in finding that the document allegedly drawn by Mr. Komen did not have his signature alongside his name yet there was no other evidence to controvert that fact;
2. THAT the Learned Trial Magistrate erred in law and in fact in finding that the alleged fraud by Mr. Komen was not reported to the Police yet the same was notified to the Appellant's Sacco who ought to have notified the police of the fraud in their organization thereby determining the suit on wrong principles;
3. THAT the Learned Trial Magistrate erred in law and in fact in holding that a handwriting expert ought to have been availed to testify and differentiate the signatures claimed to be forged

thereby dismissing the suit on that ground hence she failed to consider all the evidence placed before her;

4. THAT the Learned Trial Magistrate erred in law and in fact and misdirected herself in finding that the matter ought to have been handled by the Tribunal but went ahead and dismissed the matter instead of redirecting the matter to the tribunal;
5. THAT the Learned Trial Magistrate erred in law and in fact disregarding and or failing to consider the Plaintiff's evidence and all the documents placed before her for determination by dismissing the Plaintiffs claim without the 2nd: Defendant availing any evidence contradict the Plaintiffs evidence; and
6. THAT the Learned Trial Magistrate erred in law and in fact by holding that Mr. Komen ought to have been enjoined as a party to the suit yet the Plaintiff only claimed redress was against the Defendants herein and not Mr. Komen since this was a civil claim

4. In the plaint filed in the Court below, the plaintiffs averred that they were employees of the 2<sup>nd</sup> respondent. They stated that they were notified on **16<sup>th</sup> July 2009** that they had guaranteed a loan to a **Mr Nicholas K Komen** to the tune of **Kes.1,200,000/-**. and that they would be deducted **Kes.11,633.00** each per month as the loan was in arrears. Despite showing that the said Nicholas K Komen forged their signatures, they were deducted the **Kes.11,033.00**

each in September and October 2009. They therefore sought an order of injunction barring the respondents from effecting the salary deduction from each of them, as well as the costs of the suit.

5. The 1<sup>st</sup> defendant filed a statement of defence dated **1<sup>st</sup> December 2009**, in which it was averred inter alia that the 1<sup>st</sup> defendant was unaware of the alleged forgery of the plaintiff's signatures. It was stated that the salary deduction was lawful because the plaintiffs had signed the guarantee forms, and that, in the event of default, salary deduction from the guarantors' pay packets was a natural consequence. The 1<sup>st</sup> defendant opposed the suit and prayed that it be dismissed with costs.
6. In its defence, the 2<sup>nd</sup> respondent averred that there was no reasonable cause of action against it and prayed that the suit be dismissed with costs.
7. On **3<sup>rd</sup> April 2011** the 2<sup>nd</sup> Plaintiff died. The appellant pursued the suit as the sole plaintiff.
8. The matter was heard by way of *viva voce* evidence. The appellant called one witness, as did the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent called no witnesses.

9. The appeal was canvassed by way of written submissions. I shall set out the summary of each party's submissions below.

10. The submissions of the appellant are dated **10<sup>th</sup> March 2025**. In the said submissions, the appellant identified issues for determination as being

1. Whether Nicholas Komen ought to have been made a party to the suit.
2. Whether the deductions made by the 1<sup>st</sup> respondent were lawful;
3. Whether the appeal should be allowed as prayed.

11. On the first issue, it was urged that under Order 1 Rule 9 of the Civil Procedure Rules, misjoinder or nonjoinder of a party could not defeat a suit. Counsel relied on the case of **Maureen Onsongo v EOH Limited, an EOH/Copy Cat Limited Company [2021] KEELRC 676 (KLR)**, where Gakeri, J held at paragraph 21 as follows: -

**“There is sufficient judicial authority for the proposition that courts of law are enjoined to sustain suits rather than terminate them on technicalities unless the case appeared hopeless and beyond redemption (see DT Dobie Company (Kenya) Ltd v Joseph Muchina & Another [1980] eKLR. This**

position is underpinned on the need to administer substantive justice which cannot be achieved unless suits are sustained.”

And at paragraph 27: -

“already observed, Order 1 Rule 9 of the Civil Procedure Rules is couched in mandatory terms on the issue of misjoinder, and there is sufficient judicial authority on this point of law.”

12. Reliance was also placed on the case of **William Kiprono Towett & 1597 Others v Farmland Aviation Ltd, Marco Dunn & Toby Dunn [2016] KECA 301 (KLR)**, where the Court of Appeal held that: -

“**Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.**”

13. On the second issue, it was submitted that the 1st respondent needed to show that the deduction was lawful. Mr. Were urged that the 1<sup>st</sup> defendant could do so by showing that there was a default on the part of the borrower that the default had been communicated to the plaintiff and that Section 66(3) of the Consumer Protection Act was complied with Mr Were relied on the

decision of the Court in the case of **Rajnikantkhetshi Shah v Habib Bank A.G. Zurich [2016] KEHC 6740 (KLR)** where it was held that: -

**“On my part, and I have stated this before, this transaction is governed by the law on mortgages. As such, and as a matter of law, where default occurs, the chargee must issue a formal notification and demand; this is the basis for liability and exercise of the chargee’s statutory remedies provided in law. Therefore, it does not matter whether the chargor is a guarantor or the principal obligor. I would state that the statutory notification of default and demand is *sine qua non* liability and basis for seeking payment of the debt.”**

- 14.** Mr Were submitted that there was no proof that the appellant was a guarantor of the loan allegedly taken by Mr. Komen. He urged that what the trial Court did was require it to prove a negative, that is to say, that it didn’t execute the guarantee form. Counsel urged that the uncontroverted evidence was that Mr. Komen admitted to having forged the guarantee forms.
  
- 15.** Based on the foregoing, it was urged that the appeal had merit. It was urged that the judgment of the lower Court be set aside and

that a judgment be entered allowing the appellant's claim in full as per the plaint dated **3<sup>rd</sup> November 2009**.

- 16.** The submissions of the 1<sup>st</sup> respondent are dated **20<sup>th</sup> March 2025**. The 1<sup>st</sup> appellant's counsel urged that no decree appealed against had been filed; hence, the appeal was defective. Further, it was urged that the appeal was filed one day late without leave of the Court.
- 17.** It was urged that the Court below was right to find that there was no signature alongside the name of Mr. Nicholas Komen. Mr Omwenga, learned counsel for the 1<sup>st</sup> respondent, urged that the trial magistrate properly exercised her discretion and cannot be faulted for it.
- 18.** Mr Omwenga urged that a party that alleges a fact must prove it. It was submitted that Mr Komen ought to have been reported to the police for the alleged forgery.
- 19.** Regarding the third ground, it was submitted that the appellant ought to have called a document examiner who would have cast light on who executed the loan guarantee form. For failing to do so, the appellant did not help his case.

20. The 1<sup>st</sup> respondent's counsel submitted that the matter ought to have been filed at the Cooperatives Tribunal pursuant to the provision of section 76 of the Cooperative Societies Act. Reliance was placed on the case of **Abeid Mwamburi v Sokoro Savings & Credit Co-Operative Society Limited [2021] KEHC 2522 (KLR)**.
21. It was submitted in respect of the fifth ground of appeal that the Court below properly analyzed the evidence and made the right decision. Counsel submitted that under section 107 of the Evidence Act, the person who asserted something had a duty to prove it.
22. On the question of joinder, counsel submitted that Mr. Komen was the right party and should have been added as a defendant.
23. I have read the Record of Appeal, the submissions of the parties, and considered the applicable law. This is the 1<sup>st</sup> appellate Court. The duty of the first appellate Court is to review and consider the evidence and to make its own conclusion, bearing in mind that it didn't see the witnesses firsthand. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves

**24.** The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of **Selle and another Vs Associated Motor Board Company and Others [1968] EA\_123**, where their lordships held as follows: -

**“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”**

**25.** Further, in the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows: -

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”**

26. The appellant and the deceased co-plaintiff filed the suit in the Court below. They asserted the following: that they did not execute the deed of guarantee and that Mr Komen had absolved them of blame in an alleged note. What I discern is that it was they who made the assertion, in the hope of convincing the Court that the guarantee was *non est factum*, or at the very least that the signature was a forgery.

27. Having made the assertion, it is my view that the appellant had an obligation under sections 107 to 109 to adduce evidence that what he had asserted was indeed the case.

28. Sections 107 to 109 of the Evidence Act provide that: -

“ **107. Burden of proof.**

**(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.**

**108. Incidence of burden.**

**The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

**109. Proof of particular fact.**

**The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

- 29.** In my view, any person looking at the deed of guarantee would have been satisfied without more evidence being tendered that he appellant was a guarantor. It was the duty of the appellant to displace the above-stated inference through the adduction of evidence, for without proof on his side, his case would fail.
- 30.** The appellant would have discharged the said burden by inter alia having the signature subjected to forensic examination and having Mr. Komen as a party to the suit in the Court below as a defendant.
- 31.** A document examiner would have shown that indeed the signature in the deed of guarantee wasn't that of the appellant, if

indeed that was the case. I therefore agree with the trial magistrate's finding.

**32.** The duty to prove its case lay with the appellant. Since the 1st defendant, now the respondent, adduced no evidence, the situation was analogous to a formal proof. In the case of **Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2013] KEHC 34 (KLR)**, the Court held that:-

**“In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”**

**33.** The appellant urged that Mr. Komen had admitted that he had forged their signatures. This fact was, in my view, a special knowledge that only he knew. The duty of proving that special knowledge lay with him. The appellant ought to have joined Mr Komen as a party or called him as a witness before. In my case of **Nesco Services Limited v CM Construction [EA] Limited [2021] KEHC 12810 (KLR)**, the Court held that: -

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse

inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

**“Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:**

*‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’*

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho –vs- KCB (2003) 1 EA 108* the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

34. In my view, the Court below was correct to find that the non-joinder of Mr Komen weakened the appellant's case.
35. The learned magistrate rightly found that she had no jurisdiction to hear the matter. It has been urged that she should have transferred this matter. With respect, I do not agree. Firstly,

because the subordinate Court has no such jurisdiction. Secondly, for a matter to be transferred, the Court where the matter was first filed must have jurisdiction. This is not the case here.

36. Having read the record, I am satisfied that the learned magistrate properly considered the law and the facts and came to the right decision. I cannot fault her for it. The decision was sound.
37. From the foregoing, the ineluctable conclusion is that the appeal has no merit. The same is dismissed.
38. Costs follow the event. I award the 1<sup>st</sup> respondent the costs of the appeal.
39. It is so ordered.

**DATED and SIGNED at MOMBASA this 20<sup>th</sup> day of November 2025. Delivered virtually through Microsoft TEAMS.**

**Gregory Mutai**  
**JUDGE**

In the presence of:-

Mr Furaha, holding brief for Mr Were, for the Appellant;

Mr Abaja, holding brief for Mr Omwenga, for the 1<sup>st</sup> Respondent;  
Arthur – Court Assistant.

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