

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC LAND APPEAL NO E042 OF 2023

NCBA BANK KENYA LIMITED.....
APPELLANT

VERSUS

NELLY CHEPKEMOI KIRUI.....
RESPONDENT

(Being an Appeal from the judgment and decree of Hon. R. KEFA, Principal Magistrate, delivered on 23rd November, 2023 in Nakuru, Chief Magistrate’s Court in MELC NO E035 OF 2023)

BETWEEN

NELLY CHEPKEMOI KIRUI.....PLAINTIFF

VERSUS

NCBA BANK KENYA LIMITED.....DEFENDANT

JUDGMENT

1. This appeal arises from the Judgment and decree dated 23rd November 2023, by Hon. R. KEFA Principal Magistrate Nakuru delivered in Nakuru MELC NO E035 OF 2023. The Appellant, being aggrieved by the judgment, lodged a Memorandum of Appeal dated 11th December 2023, and listed the following twelve grounds:

1) The Learned Trial Magistrate erred in fact and in law and seriously misdirected herself, in failing to consider and appreciate the averments made in the Statement of Defence

dated 14th August 2023 and evidence tendered by the Appellant in response to the Plaintiff's suit.

- 2) The Learned Trial Magistrate erred in fact and in law by shifting the burden of proof on the veracity of the Respondent's claim to the Appellant, to call the Lands Registrar, in a bid to establish the ownership of the suit property, contrary to the express provisions of the Evidence Act.*
- 3) The Learned Trial Magistrate erred in fact and in law and seriously misdirected herself by ignoring the Respondent's evidence tendered, proving how the property was charged to the Appellant, failed to appreciate that the burden of proof laid with Plaintiff, to prove how she came to own the property and proceeded to find that she was the registered proprietor, without calling the Registrar of titles, to ascertain the authenticity of the documents, in determining the true owner of the subject property. (sic)*
- 4) The Learned Trial Magistrate erred in law and in fact and seriously misdirected herself, in holding that the Respondent has proved her case on a balance of probabilities that she is the registered proprietor of the suit property.*
- 5) The Learned Trial Magistrate erred in law and in fact and seriously misdirected herself, in holding that the Respondent had proven that the Appellant had defamed her in issuing the demand letter of 21st June, 2022.*
- 6) The Learned Trial Magistrate erred in law and in fact and seriously misdirected herself, in awarding the Respondent*

Kshs 700,000.00, as aggravated damages for defamation by the Appellant, whereas no evidence of Defamation was led by the Respondent as against the Appellant.

- 7) The Learned Trial Magistrate erred in law and in fact and seriously misdirected herself, in holding that the Appellant's advertisement in the daily nation newspaper in exercise of its statutory power of sale in respect to the suit property, was defamatory.*
- 8) The Learned Trial Magistrate erred in law and in fact and seriously misdirected herself, in failing to hold that the Plaintiff had failed to prove the tort of defamation as against the Appellant as is well settled in law.*
- 9) The Learned Trial Magistrate erred in law and in fact and seriously misdirected herself, in awarding the Respondent Ksh 1,000,000.00 as general damages for the defamation claim as against the Appellant.*
- 10) The Learned Trial Magistrate erred in law and in fact and seriously misdirected herself, in holding that the Respondent adduced evidence to show she was treated for hypertension as well as mental condition known as anxiety depressive illness whereas there was no medical expert called as witness by the Respondent to link any illness by the Respondent to the Appellant's actions of exercising its Statutory Power of Sale.*
- 11) The Learned Trial Magistrate erred in law and in fact and seriously misdirected herself, in holding that the Plaintiff has proved her case on a balance of probabilities that she is*

entitled to injunctive orders as sought against the Defendant from publishing or causing to be published the advertisement and notices for sale of the suit property.

12) The Learned Trial Magistrate erred in law and in fact in granting the orders as sought by the Respondent against the Appellant whereas the Plaintiff failed to prove her case on a balance of probabilities as required in law.

2. The Appellant prayed for the following orders:

a) The Appeal be allowed.

b) This Honorable Court be pleased to set aside the entire Judgment and Decree of the Honorable Ms. R. Kefa, Principal Magistrate, delivered on 23rd November 2023 in Nakuru Chief Magistrate's Court, MCELC No E035 of 2023.

c) The Respondent's Complaint dated 24th February 2022 and filed on 23rd February 2023 and assigned Case No MCELC No E35 of 2023 be dismissed with costs to the Appellant.

d) Costs of this Appeal be awarded to the Appellant.

e) Any other or further orders and directions this Honorable Court deems just and fit to issue.

3. The Respondent had sued the Appellant in the lower court vide Complaint dated 24th February, 2022, seeking the following orders:

a) A declaration do issue that the plaintiff is the lawful and registered owner of the parcel of land known as NAKURU MUNICIPALITY BLOCK 27/179.

- b) A declaration do issue that the respondent's actions of illegally advertising for sale the plaintiff's parcel of land known as NAKURU MUNICIPALITY BLOCK 27/179 is in contravention to the various articles of the constitution.*
- c) A declaration do issue that the respondent's action of illegally advertising for sale the plaintiffs parcel of land known as NAKURU MUNICIPALITY BLOCK 27/179 looked as a whole is defamatory.*
- d) An order declaring the charge or any purported charging or charge of the Plaintiff's property known as NAKURU MUNICIPALITY BLOCK 27/179 in favor of the defendant is unconstitutional, illegal, null and void.*
- e) That any charge created and registered against the title to land parcel No NAKURU MUNICIPALITY BLOCK 27/179 in favor of the defendant be cancelled or revoked.*
- f) That an order does issue directing the District Land Registrar Nakuru to destroy and or remove any records parallel to the plaintiffs interest in the parcel of land NAKURU MUNICIPALITY BLOCK 27/179.*
- g) General damages on account of constitutional infractions.*
- h) General damages on account of defamation.*
- i) General damages on account of Psychological and mental anguish and emotional distress.*
- j) General damages on account of Aggravated and exemplary damages.*

- k) General damages on account of bodily harm and sickness to the plaintiff.*
- l) Reimbursement on medical expenses incurred and those to be incurred in future for treatment.*
- m) Payment in lieu of apology.*
- n) An injunction restraining the Defendant and each of them by themselves, their servant or agents or otherwise howsoever from further publishing or causing to be published the illegal advertisement and notices defamatory and or misleading in respect to the Plaintiff herein.*
- o) Interest on g-m from the date of commissioning of the acts at court rates till payment in full.*
- p) Costs of this suit.*
- q) Interest on costs.*

4. The suit was heard and trial court found that the Respondent had proved her case on a balance of probabilities and issued the following orders:

- I. I hereby declare that the Plaintiff is the lawful and registered owner of land parcel Nakuru Municipality Block 27/179.*
- II. I hereby declare that the Defendant's actions of advertising for sale the land Nakuru Municipality Block 27/179 is defamatory.*
- III. The charge against Nakuru Municipality Block 27/179 in favour of the Defendant is illegal and the same to be revoked.*

IV. The District Land Registrar Nakuru is hereby ordered to remove any parallel record to the Plaintiff's interest in the parcel of land Nakuru Municipality Block 27/179.

V. The Plaintiff is entitled to the following damages:

**a. Defamation Ksh
1,000,000**

**b. Psychological and mental anguish
and emotional distress, bodily
harm and sickness Ksh
700,000**

**c. Aggravated and exemplary damages Ksh
700,000**

**Total Ksh
2,400,000/=**

VI. An injunction is hereby issued restraining the Defendant from further publishing or causing to be published the illegal advertisement and notice of sale in respect to the suit property.

VII. The Plaintiff shall have costs of the suit plus interest at court rates from time of delivery of judgment until payment in full.

VIII. Stay of execution 30 days.

APPELLANT'S SUBMISSIONS

5. Mr. Raingo, counsel for the Appellant filed submissions dated 28th March, 2025 and identified the following issues for determination:

a) Whether the appeal is merited?

b) Who should bear costs in this Appeal?

6. Counsel submitted that the Appellant, presented duly executed and authentic documents to support their case in the lower court, namely, a duly executed sale agreement that was signed by the original owner of the suit property and Richard Cheruiyot Koech. Counsel submitted that the Respondent to date has neither availed any documents to show the sale of the suit property between her and the former owner of the premises nor from the Land Registrar, to confirm ownership.
7. It was counsel's further submission that the trial court misdirected itself by issuing orders against the Appellant for defamation, which had neither been proved nor argued by the Respondent in this case. Additionally, that the trial Magistrate erred in granting the prayers for damages of Kshs. 2,400,000.00 which were not proven by the Respondent during the entire trial process as is required in a case for damages for defamation.
8. Counsel further submitted that the trial court erred in fact and law by granting the Respondent's prayers sought in plaint and relied on the cases of **James K. Kamau vs Nairobi City Council [2018] eKLR**, **Adetoun Oladeji (NIG) Ltd vs Nigeria Breweries Plc S.C 91/2002**, **Galaxy Paints Co. Ltd vs Falcon Guards Ltd (2000) EA 885**, **Independent Electoral and Boundaries Commission & another vs Mule & 3 others [2014] KECA 890 (KLR)**, **RN vs MAO [2023] KEHC 22155 (KLR)** and urged the court to allow the Appeal with costs to the Appellant.

RESPONDENT'S SUBMISSIONS

9. Mr. Koome, counsel for the Respondent filed submissions dated 24th May, 2025, and submitted that the appeal does not have merit as the appellant failed to avail crucial documents. Counsel submitted that no grounds as stated in the Memorandum of Appeal was canvassed at all and no evidence or arguments were presented to demonstrate how the court had erred in both law and fact.

10. Counsel relied on the cases of **Akiba Micro Finance Ltd vs Ezekiel Chebii & 14 Others [2012] eKLR**, **Selle & another vs Associated Motor Boat Co Ltd & Others [1968] EA**, **Kenya Commercial Bank Ltd vs Thomas Ondiek [1992] eKLR**, **Uhuru Highway Development vs Central Bank of Kenya & 2 others [1996] eKLR**, **Kipruto Arap Kirwa vs Isaac Ruto & another [2013] eKLR** and **Kenya Power & Lighting Co Ltd vs Kigen [2018] eKLR** and urged the court to dismiss the Appeal with costs to the Respondent.

ANALYSIS AND DETERMINATION

11. The issue for determination is whether the appeal has merit. This being a first appeal, the court is cognizant of its role in re-evaluation, reassessment and reanalyzing the extracts of the record and then determining whether the trial court's decision should stand or be overturned and give reasons as was held in the case of **Abok James**

Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, where the court held as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

12. The Appellant listed twelve grounds of Appeal and urged the court to find that the Trial Magistrate erred in fact and law in granting the orders sought in the Plaint without proper evidence and proof.
13. The background of this case is that the Respondent filed a suit in the lower court where she alleged that she is the registered proprietor of the suit land, known as Nakuru Municipality Block 27/179, which was offered to secure a loan facility of Kes.13,590,881.61/= and that the Defendant’s actions of exercising its statutory power of sale threatened her right to property under Article 40 of the Constitution and additionally that the Bank’s actions were defamatory and caused her immense damages.
14. It was the Appellant’s case that they filed a Statement of Defence dated 14th August 2023, and produced documents produced as exhibits in support of the Defendant’s case, that the suit land was initially owned by

Sylvia Wairimu pursuant to a certificate of lease issued on 21st June, 2013, that Richard Cheruiyot Koech bought the land vide a sale agreement dated 20th March, 2017. Further that before purchasing the land, a search was conducted on 27th March, 2023, which indicated that Sylvia Wairimu was the registered proprietor, Richard Cheruiyot then approached the Defendant for a loan facility of Kes. 6,825,000/= and offered the property as security, which amount was disbursed upon registration of a charge in favour of the Defendant on 24th April, 2023, that the chargor then defaulted on loan repayments which prompted the Defendant to exercise its rights under the charge.

15. Looking at the pleadings and the proceedings in the lower court, the Respondent claimed that she was the registered owner of the suit land, but did not produce or lead any evidence to prove the same. She filed a list of documents dated 24th February 2023, which she neither led evidence on nor produced as exhibits before the court. If the court considered them, then it was unprocedural, as documents filed and not produced as exhibits are like a defence filed with no witness to tender any evidence to refute the claim by the Plaintiff. It is like a document, which has been marked for identification and not produced. It does not add any evidential value to the case.
16. In the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR**, where the Court of Appeal stated as follows:

“18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and

articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.”

17. This is exactly what happened in the trial Court, the record does not show where and when the documents in the list of Documents were produced. Further there is also no evidence to show that the Respondent led any evidence to prove the prayers sought in the Plaint, for general damages for defamation, Psychological, mental anguish, emotional distress, bodily harm, sickness, aggravated and exemplary damages.

There was no medical report or a Doctor called to come and give evidence on the purported illness and whether it was a result of the alleged advertisement for sale of the suit property. The court cannot assume or presume evidence, as it is incumbent upon he who alleges to prove.

18. Sections 107, 108 and 109 of the Evidence Act provide as follows:

“107 (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. 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 said.

109. 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 be on any particular person.”

19. The Respondent did not attempt to prove her case in the lower court, these were serious allegations which needed proof of ownership, the root of the title, medical evidence to prove mental anguish, psychological, emotional distress, sickness and bodily harm. I have perused the list of documents that was never produced and did not see any medical report or notes. Where did the trial Magistrate get the evidence that the

Respondent had suffered emotional distress, bodily harm and mental anguish?

20. Similarly, how did the trial Magistrate conclude that the Respondent had been defamed, hence, was entitled to damages? I find that the Trial Magistrate erred in fact and in law by finding in favour of the Respondent and yet the Respondent failed to prove her case on a balance of probabilities. This is case where the court must interfere with the Trial Court that came to a flawed and wrong conclusion.

21. I have considered the record of Appeal, the submissions by counsel, and find that, the Appeal has merit and is therefore allowed. I therefore issue the following orders:

a) The Appeal is hereby allowed.

b) The entire Judgment and Decree of the Honorable R. Kefa, Principal Magistrate, delivered on 23rd November 2023, in Nakuru Chief Magistrate's Court, MCELC No E035 of 2023 is hereby set aside.

c) The Respondent's Complaint dated 24th February 2022, and filed on 23rd February 2023 and assigned Case No MCELC No E35 of 2023 is hereby dismissed with costs to the Appellant.

d) Costs of this Appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 1ST DAY OF DECEMBER 2025.

A handwritten signature in black ink, consisting of a large loop on the left and a horizontal line extending to the right, with a vertical stroke crossing the horizontal line.

M. A. ODENY

JUDGE