

IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL APPEAL NO. E018 OF 2023

EMU-INYA **ENTERPRISES**
LTD.....APPELLANT

VERSUS

TITUS **MASIKA** **ODINGA.....**
....RESPONDENT

JUDGEMENT

A. BACKGROUND

1. The Respondent sued the Appellant vide a Plaint dated **1st February 2021**, and filed on **1st April 2021**, seeking the following orders: -
 - a. **A refund of Kshs. 496, 384/= as at January 2021.**
 - b. **Payment of further deductions made from February 2021 until the time of stopping the deduction.**
 - c. **General damages for psychological suffering and torture.**
 - d. **An injunction restraining the Teachers Service Commission and the Appellant from continuing to deduct the Respondent's money.**
 - e. **Costs of the suit.**
 - f. **Interest at Court rates from January 2019 until payment in full.**
 - g. **Any other relief.**

2. It was the Respondent's case that on or about **21st October 2018**, he took a loan facility form the Appellant herein with a payment structure of **Kshs. 13, 510/= for November 2018, Kshs. 13, 510/= for December 2018** and **Kshs. 12,**

044/= for **January 2019** through a check off system. He insisted that he paid off all of his loan and was surprised when he critically analyzed his **January 2019** pay slip and established that he had another loan facility of **Kshs. 841, 614/=** which amount was never explained to him by the Appellant and that the said amount reduced to **Kshs. 662,856/=** from his pay slip of **February 2019** and increased to **Kshs. 893, 606/=** for the month of **March 2019** and then **Kshs. 1, 278,204/=** which sum of money the Respondent never applied for.

3. The Respondent asserted that his pay slip of **May 2019** introduced a second loan of **Kshs. 151, 230/=** which sum of money he never applied for from the Appellant herein and that from **November 2018** to **January 2021**, the Appellant deducted a sum totaling to **Kshs. 496, 384/=** and continued deducting a sum of **Kshs. 19, 863/=** monthly for a loan facility that he never applied for.
4. The Respondent highlighted that due to the respective illegal deductions he suffered pecuniary embarrassment and claimed for damages for psychological suffering and mental torture. Further, it was his case that the Appellant's refusal, neglect and failure to rectify the error and cease further deductions warrants him to seek an order compelling his employer, Teachers Service Commission, to stop the deductions.
5. Finally, the Respondent claimed that the Appellant is expected to refund him the amount unlawfully deducted from his pay totaling to **Kshs. 496, 384/=** as at **January 2021** and that an order be issued requiring the payment of any further deductions with effect from February 2021 until the stoppage of the said deductions.

6. In response, the Appellant entered appearance and filed its respective statement of defence dated **1st November 2021**, wherein it denied all the statements in the Respondent's Plaint. The Respondent contended that a loan facility was issued to the Appellant herein and was to be repaid within 3 months at monthly installments of **Kshs. 13, 510/=**.
7. It was the Appellant's case that sometime in the month of **October 2018**, the Respondent applied for a loan facility of **Kshs. 30,000/=** to be paid in **three (3) monthly** installments of **Kshs. 13,510/=** and the loan was duly disbursed to the Respondent via M-pesa to the mobile number 07*****43. The Respondent duly serviced his loan for two months then on or about **4th January 2019**, the Respondent applied for a loan refinance (Ref. **OA102279**) of **Kshs. 220,000/=** and the same was duly approved with a repayment period of **72 months** at monthly installments of **Kshs. 12,044/=**, making the net proceeds of the Appellant's loan **Kshs. 207, 066/=** which was duly disbursed vide the Appellant's bank account number 0110*****300 Co-op Bank Kakamega Branch via RTGS less **Kshs. 12, 934/=** to settle the Respondent's loan balance reconciling in loan ref. **OA98015**.
8. According to the Respondent, on **28th January 2019**, the Respondent applied for a refinance loan of **Kshs. 94,000/=** from the Appellant which loan was to be repaid over a period of **72 months** at monthly installments of **Kshs. 5,218/=** and at the time of the application the Respondent's balance on loan ref. **OA102279** was **Kshs. 92,224.99/=** which was deducted from **Kshs. 94,000/=** and the amount disbursed to the Respondent was **Kshs. 1,775/=** which was duly disbursed to the Respondent's M-pesa to the mobile number 07*****43 vide transaction receipt number **OA103795**.

9. On **19th February 2019**, the Respondent applied for further refinance loan of **Kshs. 170,000/=** under loan ref. **OA105213** and the same was to be repaid over a period of **72 months** at monthly installments of **Kshs. 9, 336/=** making the net proceeds of the loan to be Kshs. 55,000/= which was duly disbursed to the Respondent via M-pesa to the mobile number 07*****43 vide transaction receipt number **NBJ7YJ8RYP** upon deduction of **Kshs. 114, 740/=** to settle the previous loan **OA103795**.
10. Subsequently, on **18th March 2019**, the Respondent applied for a further refinance loan under Ref. **OA103795** of **Kshs. 230,000/=** which loan was to be repaid over a period of 72 months at monthly installments of **Kshs. 12, 586/=** making the net proceeds of the loan to be **Kshs. 20, 279/=** which was duly disbursed via M-Pesa to the mobile number 07*****43 vide transaction receipt number **NCI8LIQPGC** upon deduction of Kshs. 209,721 to settle previous loan reference **OA105213**.
11. On **1st April 2019**, the Respondent applied for refinance loan under ref. **OA107547** of **Kshs. 330,000/=** which loan was to be repaid over a period of **72 months** at monthly instalments of **Kshs. 18,004/=** making the net proceeds of the loan to be **Kshs. 35,348/=** which was duly disbursed via M-Pesa to the mobile number 07*****43 vide transaction receipt number **ND11WHXTUS** less **Kshs. 294, 652/=** to settle previous loan ref. **OA106745**.
12. Further, on **29th April 2021**, the Respondent applied for a loan facility of Kshs. 37,000/= which was to be repaid over a period of **72 months** at monthly instalments of **Kshs. 2, 130/=** and the same was duly disbursed via M-Pesa to the mobile number 07*****43 vide transaction receipt number **NDT7KKEGBI**.

13. Finally, the Respondent on or about **3rd June 2019**, applied for a refinance loan facility ref. **24111130** of **Kshs. 32,000/=** which was to be repaid over a period of 72 months at monthly installments of **Kshs. 1, 859/=** and the net proceeds of the loan were **Kshs. 4,021/=** which was duly disbursed via M-pesa to the mobile number 07*****43 vide transaction receipt number **OA109033**.
14. The Appellant urged the trial Court to dismiss the Respondent's suit with costs as the same was mere falsehoods and farfetched.
15. The trial Court set the matter down for hearing interparties.

B. SUMMARY OF EVIDENCE

16. PW1, **Titus Masika Odinga**, testified that he is a teacher by profession and adopted his recorded statement and availed documents as his evidence-in-chief. On cross-examination, he told the Court that he refunded the money paid by KCB and that he has suffered pecuniary embarrassment. He told the Court that he verbally requested the Appellant to remedy the situation. On re-examination, he told the Court that his signature has never changed and that he suffered pecuniary embarrassment.
17. DW1, **Bernard Wafula**, testified that he works with the Appellant herein as a Forensic Investigating Manager and adopted his recorded statement and availed documents as his evidence-in-chief. On cross-examination, he told the Court that he worked with the DCI for more than 10 years and he is a retired chief inspector. He told the Court that he did not have any of his certificates with him and he did not avail his report and has no statements from the Respondent to that effect. He told the Court that he spoke to one Patrick Juma but he did not avail any respective report to that effect and that he was the Appellant's branch manager at

Bungoma, and that he is also facing criminal charges of forgery in relation to the claim herein.

18. According to him, the Respondent herein took a loan facility of Kshs. 30,000/= in October 2018 which was to be repaid in 3 months and on 4th January 2019, he was granted another facility of Kshs. 220,000/= which was to be repaid within 72 months. He testified that on 28th January 2019, he took another facility of Kshs. 94,000/= payable within 72 months and on 19th February 2019, he was granted another loan facility of 270,000/= which was again to be paid within 72 months. Subsequently, he was advanced another loan facility of Kshs. 230,000/= on 18th February 2022, but not stamp duty was paid despite it being a necessity.
19. He testified that the Respondent's January pay slip shows that he owed Kshs. 855, 242/= and the said amount was duly given to the Respondent and that they never prepared any documentations to that effect. He told the Court that it was the Appellant's duty to forward the documentation to the borrower's employer to effect deductions. He noted that the 1st loan fronted to the Respondent herein was payable on 31st January 2019, but they only forwarded the document to the Teacher's Service Commission on 4th January 2019 and it was Kshs. 220,000/= as the same was a refinance. He contends that the Respondent denied taking the loan, but the deductions from the Respondent's pay slip were legal and his claim was not genuine.
20. On re-examination, he told the Court that the Respondent took the first loan on October 2018 and the other loans were refinances.
21. In his judgement, the learned trial Magistrate found that from the evidence the Respondent discharged his burden of proof on a balance of probabilities in proving that he was

only advanced a facility of Kshs. 30,000/= which was payable in 3 installments and that there was no cogent evidence adduced by the Appellant that he kept on applying for refinancing and that it was clear there was evidence that the Appellant's manager Bungoma Branch was arrested and charged with fraud. He found the allegations of refinancing were not logical and found that the deductions on the Respondent's pay slip were illegal thus the Appellant could not escape liability. The trial Court proceeded to enter judgement in favour of the Respondent as follows:

- a. A refund of Kshs. 496,384/= as at January 2021.**
- b. Further deductions made from February 2021 until the same is stopped.**
- c. General damages of Kshs. 200,000/= for psychological suffering and torture.**
- d. An injunction barring Teachers Service Commission from making further deductions from the Plaintiff**
- e. Costs of the suit and interest.**

C. APPEAL

22. Dissatisfied with the judgment and decree, the Appellant filed this appeal on the following grounds: -
- i. That the learned magistrate erred in law and fact by failing to consider that the Plaintiff failed to discharge the evidentiary burden to warrant the order sought.**
 - ii. That the learned magistrate erred in law and fact by failing to consider that the Plaintiff failed to prove psychological suffering and torture to award general damages.**
 - iii. That the learned magistrate erred in law and fact by failing to consider that the Plaintiff applied for refinances and the same was uncontroverted.**

- iv. **That the learned magistrate erred in law and fact by failing to consider that the Plaintiff failed to prove that he did not sign the loan application.**
 - v. **That the learned magistrate erred in law and fact by failing to consider that the Plaintiff did not adduce any evidence to demonstrate that he refunded Kshs. 200,066/=.**
 - vi. **That the learned magistrate erred in law and misdirected himself in finding that the deductions were done irregularly.**
23. The Appellant prayed for this Court to allow this appeal; set aside the decision of the lower Court delivered on 16th February 2023, and the Appellant be awarded costs for the appeal.
24. Vide Court directions, the appeal was to be canvassed by way of written submissions. Both parties complied with the Court directive.

D. SUBMISSIONS

25. The Appellant proposed two key issues for the Court to consider:
- i. **Whether the loan agreements and refinances were voluntarily applied for and acknowledged.**
 - ii. **Whether the Respondent discharged the evidentiary burden to warrant the reliefs granted.**
26. On Loan Agreements and Refinances: The Appellant argued that the Respondent voluntarily applied for and signed the loan agreements, as evidenced by the bundle of loan agreements (pages 63-218 of the record of appeal). The disbursement records, loan reference numbers, and transaction receipts were consistent and traceable, showing

procedural loan processing. The Appellant relied on the following cases:

- i. **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123** which established the duty of a first appellate Court to reevaluate evidence afresh and arrive at its own conclusion and **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR** where it was held that Courts should not rewrite contracts between parties unless coercion, fraud, or undue influence is proven.
- ii. **Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR** where the Court held that parties are bound by the terms of their contracts unless fraud, coercion, or undue influence is proven.
- iii. **Ann Wangeci Kamau v Agricultural Finance Corporation & 3 others [2022] KEELC 1248 (KLR)** where the Court held that the burden of proving forgery or invalidity of signatures lies on the party alleging it.

27. The Appellant argued that the Respondent did not plead or prove fraud, coercion, or undue influence, nor did he provide evidence to disown the loan applications or dispute the disbursements.

28. The Appellant argued that the Respondent failed to prove his claims of unlawful deductions and psychological distress. The Appellant relied on the following cases:

- i. **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR** where the Court held that the burden of proof lies on the party asserting the existence of facts.
- ii. **Robert Ouma Njoga v Benjamin Osano Ondoro [2016] KEHC 4494 (KLR)** where the Court held that

the legal burden of proof lies on the party invoking the aid of the law.

- iii. **MKK v CWN [2016] eKLR** where the Court held that the Plaintiff must prove psychological suffering with evidence, such as medical or expert reports.

29. The Appellant argued that the Respondent failed to provide evidence challenging the documented transactions, proof of refund of Kshs. 200,066, or evidence of psychological distress. The trial Court relied on unsubstantiated allegations rather than documentary evidence.

30. The Appellant concluded that the loan agreements and refinances were voluntarily applied for and acknowledged, and the Respondent failed to discharge the evidentiary burden to warrant the reliefs granted. The Appellant prayed for the appeal to be allowed in its entirety, the judgment and decree of the Chief Magistrate to be set aside, and costs of the appeal to be awarded to the Appellant.

31. The Respondent proposed two key issues for the Court to consider:

- i. **Whether the appeal is merited.**
- ii. **Who should bear the costs of the appeal.**

32. On the first issue, the Respondent argued that the purported loan agreements were forged, and the Appellant's branch manager is facing criminal charges for forgery. The Appellant did not provide evidence of loan applications or acceptance by the Respondent.

33. The Respondent urged this Court to dismiss the appeal herein lacks merit and should be dismissed with costs.

E. ANALYSIS AND DETERMINATION

34. Having considered the submissions of the parties in this appeal, this is the view I form of this matter. This is a first appeal. The duty of the first appellant Court was well stated in **Selle and another v Association Motor Boat Co. Ltd and Other 1968 EA 123** where the Court of Appeal stated:

“Briefly put this court must consider the evidence evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect.”

35. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyze the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

36. However, as was appreciated in **Peter v Sunday Post Ltd (1958) EA 424** the Court stated: -

“While an appellate court has jurisdiction to review the evidence, to determine whether conclusion of the trial judge should stand, this jurisdiction is exercised with caution. If there is no evidence to support a particular conclusion or it’s shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or had plainly gone wrong, the appellant court will not hesitate to decide....”

37. The principles guiding the grant of orders for injunction are well settled in the celebrated case of **Giella v Cassman Brown & Company Limited [1973] EA 358**. These are

that the applicant has to demonstrate that it has a prima facie case with a probability of success, that it shall suffer irreparable injury which cannot be compensated by damages if the interlocutory injunction is not granted and that if the court is in doubt, then it shall decide the application on a balance of convenience.

38. In order to determine whether there exists a prima facie case, the Court needs to determine whether the Appellant availed proof on a balance of probability that the ongoing deductions from the Respondent's was proper and a duty to provide a transparent and accurate account of the loan facilities. The issue of the existence of debt is not denied.

39. Doubtlessly, in civil cases, the onus is on the Plaintiff or any other Claimant to prove the position he or she claims on a balance of probabilities. This position is anchored in the Evidence Act under Sections 107,108 and 109 which provide as follows: -

“Section 107: Burden of proof

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

Section 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.

Section 109: Proof of particular fact

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

40. I am guided by the decision of **Nguruman Limited v Jan Bonde Nielsen and 2 others (2014) eKLR**, where the Court of Appeal held that: -

“the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

41. The Respondent insists that he only took out one loan facility of Kshs. 30,000/= and that the same was duly cleared within the agreed term of three months. The Appellant contends that the Respondent initially took out a loan facility of Kshs. 30,000/= in October 2018 which was to be repaid in 3 months and on 4th January 2019, he was granted another facility of Kshs. 220,000/= which was to be repaid within 72 months. The Appellant asserted that on 28th January 2019, he took another facility of Kshs. 94,000/= payable within 72 months and on 19th February 2019, he was granted another loan facility of 270,000/= which was again to be paid within 72 months. Subsequently, he was advanced another loan facility of Kshs. 230,000/= on 18th February 2022, but not stamp duty was paid despite it being a necessity. Further, the Appellant noted that the Respondent’s January pay slip shows that he owed Kshs. 855, 242/= and the said amount was duly given to the Respondent.

42. On my perusal of the Appellant's documents it is clear that the Respondent on several occasions did refinance his loan and the same was duly authorized and disbursed either by M-pesa or RTGs. The Appellant duly updated its records and the Respondent's employer on the Respondent's loans and the same was duly deducted by the Respondent's employer. The Appellant availed evidence in form of documentation showing the Respondent's execution of the refinance documentation.

43. It is trite law that, subject to a few exceptions, parties are bound by the provisions of their contracts and it is not the business of the Courts to rewrite them or help parties to wriggle out of their contractual obligations. In the case of **Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited (2014) eKLR** the Court stated inter alia :

"It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd v Pipe plastic Sankolit (K) Ltd. Civil Appeal No 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract....."

44. The Appellant posits that as per the pre-disbursement information questionnaire, GetBuks quality control, and the agreement part B-terms & Conditions the Respondent was indeed fronted the requested refinancing of loans as asserted by the Appellant and the Respondent was bound to continue repayments vide the deductions by his employers.

45. The trial court issued Injunction orders restraining the appellant from receiving payments from the Respondent through the check off system from his salary. deductions through determining what amounts to a prima facie case, I am guided by the holding of the Court of Appeal in the case of

Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003]KLR 125 (Mrao case), where the Court held as follows:

“In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

46. It is clear that the Respondent obtained a loan facility from the Appellant herein and he even refinance the same on different occasions. I therefore find that the Respondent failed to prove his case on a preponderance of evidence wherefore the trial court erred in entering judgment in his favour. I therefore set aside the judgment of the trial court in it’s entirety. The orders issued on **16th February 2023**, are hereby vacated.

47. The appellant is awarded costs of this appeal and of the case in the lower court.

Delivered, Signed and Dated at Bungoma this 29th day of January 2026.

Mwanaisha.S. Shariff
Judge

In the presence of:

Mr Namude h/b for Mr Ochieng for the Appellant

Mr Wanjala for the Respondent

Peter Machoni - Court Assistant