

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. 130 OF 2023

K-REP BANK LIMITED -----
APPELLANT

-VERSUS-

JOHN KIMANI MWANIKI -----
RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Bungoma in Civil Suit No. 528 of 2014 delivered by Hon. C. Maundu, Chief Magistrate on 21st September 2023)

JUDGMENT

1. The Appellant filed the present appeal via Memorandum of Appeal dated 18th October 2023, seeking to set aside the trial court's judgment and to have the counterclaim allowed in its entirety. They set out the following grounds of Appeal:

- (1) The Learned Magistrate erred in law and in fact by shifting the burden of proof to the Appellant to show that the Respondent had paid his loan in full.**
- (2) The Learned Magistrate erred in law and in fact by failing to consider the Respondent's admission on record confirming that he had difficulties paying back his loan.**
- (3) The Learned Magistrate erred in law and in fact in relying the non-production of the loan account statement as proof of the Plaintiff's**

case yet the loan account was produced by the Appellant's witnesses.

- (4) The Trial Magistrate erred in law and fact when he selectively applied the principle of proof on the preponderance of probability on the parties hence arrived at a wrong conclusion.
- (5) The Learned Magistrate erred in law and in fact by failing to consider all the evidence on record hence failed to make a finding on the extent the Counterclaim was proved hence arrived at a wrong conclusion.
- (6) The Learned Magistrate erred in law by failing to exercise his discretion in the best interests of justice, equity and fairness.

2. The background of this case is that the Respondent who was the Plaintiff in the trial court sued the Appellants vide Plaint dated 9th July 2013 seeking the following prayers: -

- (1) **A permanent injunction against the defendants' agents, servants or assigns from seeking land parcel No. Kimilili/Kimilili/1920 by public auction or private treaty.**
- (2) **That the Defendant be ordered to furnish the Plaintiff with the loan account bank statement from 2007 - 2013.**
- (3) **Costs and interests.**

(4) Any other relief this honourable court shall be pleased to grant.

3. The Respondent's case was that in April 2007, he approached the Defendant/Appellant with the intention of obtaining a loan facility of Kshs. 1,500,000/=. This loan was to be secured against two parcels of land he owned - KIMILILI/KIMILILI/1910 and 1919. The two parcels were jointly charged on 22nd May 2007, and he continued to update the land rates at Kimilili Municipality until 24th January 2009, when he sold parcel No. KIMILILI/KIMILILI/1919 to Leonard K. Masafu for Kshs. 700,000/= to settle the outstanding loan balance of Kshs. 445,000/=: which he completed on 26th January 2009.
4. It was the Respondent's case that the said parcel was discharged to allow the transfer to the purchaser, and that land parcel No. KIMILILI/KIMILILI/1910 was never discharged because he intended to take a second loan, which he did on 20th March 2009. Since the title was retained by the bank, no second charge was registered over parcel No. 1910. He averred that the Appellant was unwilling to provide a bank loan statement from 2007 to 2013 and that he had fully repaid the second loan of Kshs. 600,000/= and was not in any way indebted to the Appellant. He further averred that on 24th June 2013, he saw an advertisement by Garam Investment with the intention to sell parcel No. 1910, which he regarded as illegal as he did not owe the defendants any money, and that the claim for Kshs. 1,354,666.65/= was untrue.

5. The Defendant/Appellant filed a Statement of Defence and Counterclaim dated 20th September 2013, disputing the Respondent's claim and also counterclaiming for Kshs. 1,354,667.65/= at an interest of 28% p.a. from the date of the Counterclaim, together with costs and interest at court rates.
6. The matter was heard. The Respondent testified and adopted his statement dated 10th June 2014 as his evidence-in-chief. At the close of the Respondent's case, DW1 Paul Owi, the Branch Manager for Sidian Bank (formerly K-Rep Bank in Bungoma), adopted his statement dated 8th March 2022.
7. At the conclusion of the case, the trial court found, on the one hand, that the Appellant had not proven that the Respondent owed them money or defaulted on payment, and on the other hand, that the Respondent had established on a balance of probability that he had repaid his loan. Judgment was entered in his favour, and costs were awarded.
8. The above background forms the basis of this Appeal which was admitted before this Court and canvassed by written submissions.

APPELLANT'S SUBMISSIONS

9. The Appellant argued that Section 109 of the Evidence Act required the Respondent to prove its case regarding the request for a permanent injunction, and contended that the trial court failed to consider the issue of the existing debt. However, the statements presented as D.Exh 1 showed

that he had not fully repaid the loan. It was asserted that the evidence's weight favoured the Appellant, citing the cases of R vs. Madhb Chunder (1874) 21 W.R. Cr. 13 at 19 and Sofaer vs. Sofaer (1960) 1 W.L.R. 1173. It was also argued that the trial court wrongly decided the Appellant's Counterclaim as a preliminary issue and based its findings on that to determine the Plaintiff's case. They submitted that the trial court should have assessed the evidence and drawn appropriate inferences.

RESPONDENT'S SUBMISSIONS

10. On their part, the Respondent submitted that it was not in dispute that the Plaintiff/Respondent took an initial loan of Kshs. 1,500,000/=, which he fully repaid, and its security was released, while the other parcel, which was also used as security, was retained by the bank for the second loan of Kshs. 600,000/=. However, the Appellant did not register a second charge over it. Furthermore, it was submitted that there was no evidence to show that the Respondent ever defaulted in payments and that he had fully settled the loans; therefore, the Counterclaim ought to be dismissed with costs alongside the present Appeal.

ANALYSIS AND DETERMINATION

11. This being a first appellate court, my duty is clearly outlined in the case of Njoroge v. Republic (1987) KLR 19 at p. 22, where the Court of Appeal held thus: -

“As this court has constantly explained, it is the duty of the first appellate court to remember

that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya V. R(1957) EA 336, Ruwalla V. R (1957)EA 570)”

12. Having considered the evidence presented in the lower court, the grounds of appeal, and the rival submissions on the law, the issues for my determination are: whether the Respondent owed any outstanding balances on the loans advanced by the Appellant and whether the counterclaim was merited.
13. As a preliminary matter, it is important to clarify that the burden of proof rest on the person who makes the allegation. Sections 107-109 of the Evidence Act are concise in this regard as follows:

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.

14. I will first examine the Respondent's case to determine whether he proved that he did not owe any money to the Appellant. His evidence was that he had taken out two loans: the first for Kshs. 1,500,000 on 22nd May 2007, secured by property Nos. KIMILILI/KIMILILI/1910 and KIMILILI/KIMILILI/1919, and the second for Kshs. 600,000 on 20th March 2009. He stated that he had repaid the first loan up to an outstanding balance of Kshs. 445,000, which he decided to settle by selling parcel No. KIMILILI/KIMILILI/1919 for Kshs. 700,000. Furthermore, he testified that on 26th January 2009, he went with his purchaser, Leonard K. Masafu, to the bank to settle the loan balance, which is why the title was discharged.
15. I have reviewed the documents presented as evidence, especially the copy of the Green Card for parcel No. KIMILILI/KIMILILI/1919 (P.Exh 2b), which shows entry No. 1 dated 22nd May 2007 as a charge to secure the sum of Kshs. 1,500,000/= in favour of K-Rep Bank. A similar entry is recorded on the title for parcel No. KIMILILI/KIMILILI/1910

on the same date and for the same amount. This evidence alone confirms that the Plaintiff/Respondent was truthful when he stated that the two parcels were charged in favour of the bank to secure the loan of Kshs. 1,500,000/=.

16. The Respondent testified that when he was unable to settle the loan balance of Kshs. 445,000/-, he chose to sell one of the parcels, using the proceeds to clear the debt. I note a payment of Kshs. 445,000/- on 26th January 2009 in his bank statement (P.Exh5), which correlates with the period of the sale of parcel no. KIMILILI/KIMILILI/1919, whose agreement I note is dated 24th January 2009 (P.Exh4). I am therefore satisfied that the Respondent's statements are supported by evidence.
17. Having outlined this, it follows that when the Respondent claimed he left the title KIMILILI/KIMILILI/1910 with the bank instead of clearing it because he wanted another loan, this Court cannot disprove or refuse to believe him. I state this because, after repaying his loan balances, there was no reason not to seek the discharge of the property KIMILILI/KIMILILI/1910, which was no longer subject to any encumbrance. The only reasonable inference the Court can draw on a balance of probabilities is that he needed the title to remain charged to the bank because he sought a subsequent loan of Kshs. 600,000/-, as he testified. This Court finds no reason to doubt him. I note that the Respondent's evidence was that he wanted a loan of Kshs. 600,000/-, which he stated he had also fully repaid. He stated that the Plaintiff had been unwilling to give him his

loan statements from 2007 to 2013. According to DW1, Paul Owi, the Plaintiff failed to service his loan as he had committed to and the same accrued interest at the rate of 28% per annum.

18. I have examined the Appellant's documents presented as evidence. First, there is a handwritten loan application letter by the Plaintiff dated 2nd March 2009, requesting the sum of Kshs. 600,000/-, which was to be secured by title No. KIMILILI/KIMILILI/1910, along with a confirmation letter from the Appellant dated 13th March 2009, in which they agree to lend the Respondent the said amounts with interest at 8% per annum, payable in 18 monthly instalments of Kshs. 39,146.95/=. From the bank statements provided by both the Appellant and Respondent, I note a disbursement of Kshs. 600,000/- on 20th March 2009. Furthermore, on 16th March 2012, the Appellant, through its credit department, wrote to the Respondent demanding immediate payment of Kshs. 1,243,681.85/-, which was the outstanding loan balance. However, in the same letter, the bank indicated that the amount they sought to recover was the loan of Kshs. 1,500,000/- secured by title No. KIMILILI/KIMILILI/1910 and disbursed on 21st May 2007.
19. On the other hand, the Appellant's own branch manager, Mr. Paul Owi, stated in his statement that the loan they sought to recover was for Kshs. 600,000, disbursed on 20th March 2009 and secured by title No. KIMILILI/KIMILILI/1910.

20. My analysis of the above evidence is that the Appellant was unsure about how much they were owed by the Respondent, or whether there was any outstanding balance at all; they were not aware of which loan it related to. The Supreme Court of Uganda in *Departed Asians Property Custodian Board vs. Issa Bukenya t/a New Mars Ware House*, CA No 26 of 1992, stated as follows: -

“...It must be understood that the evidence led is such that, without contradiction by the Defendant, it is sufficient to prove the claim. It is not necessary that the facts alleged should be queried, but the facts alleged must be full and accurate enough to support the plaint...”

21. To further support this finding, I conclude that the Appellant could not have discharged one of the titles securing the initial loan of Kshs. 1,500,000/= if it had not been fully repaid, and then allowed the Respondent to obtain a subsequent loan secured by the undischarged title. It would be illogical for a chargee to release security for which their funds had been lent. My only conclusion is that the first loan had been repaid in full, as well as the second one, as stated by the Respondent.

22. But even if the Plaintiff/Respondent had defaulted on his repayments, I note that concerning the Counterclaim, the Appellant has not presented any evidence of demands made to the Plaintiff. The only evidence supplied was the letter dated 16th March 2012, in which the Appellant demanded Kshs. 1,243,681.85/=:, alleging a default in

repayment. This not only contradicts the principle that he who alleges must prove, but also suggests that the Appellant did not take any steps to recover their funds, if any, before invoking the statutory power of sale. Likewise, they failed to register a second charge over the second loan and were therefore guilty of negligence.

23. Furthermore, I find that the Appellant's decision to invoke the statutory power of sale as a preliminary step is unsubstantiated. They did not provide evidence to demonstrate that they had made demand for the outstanding balances, nor did they rebut the compelling evidence presented by the Respondent regarding his loan transactions with them, which renders the Respondent's evidence unchallenged. Additionally, I also found that the Respondent was consistent in his account of facts and presented sufficient evidence to prove his case on a balance of probabilities. The Appellant, on the other hand, could not even substantiate which principal amount they sought to recover.
24. I therefore find that there are no outstanding balances owed to the Appellant by the Respondent and that the Respondent has demonstrated that he has fulfilled his legal obligation to repay the loans advanced to him. Consequently, the Appellant's Counterclaim must fail.
25. I find further that, although the Respondent did not address their case concerning the principles governing an injunction as outlined in the case of *Giella v. Cassman Brown & Co. Ltd*, there is a need for this Court to intervene and

safeguard his interests in relation to the charged property. Therefore, I direct that the Appellant shall prepare and provide the Respondent with a comprehensive loan statement from 2007 to 2013 within 30 days , and I also direct that the Appellant is hereby barred from disposing of the charged property, unless through other lawful means.

26. In conclusion, I uphold the judgment of the trial court and dismiss the appeal for lack of merit. The appellant shall bear the costs of both the trial suit and the appeal, together with interest at court rates until full payment is made. Orders accordingly.

Dated, signed and delivered at Bungoma this 6th Day of March 2026.

**R.E. OUGO
JUDGE**

In the presence of:

Appellant - Absent

Respondent - Absent

Brenda - C/A