REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC LA NO. E028 OF 2024

JOSEPHINE MULATYA……

APPELLANT

VERSUS

BETTY AKINYI OCHIENG……1ST

RESPONDENT

IRENE AKOTH OCHIENG……2ND

RESPONDENT

THE LAND REGISTRAR MOMBASA……3RD

RESPONDENT

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. G. Sogomo (PM) dated 01.12.2023 in *Mombasa MCELC E134 of 2020 – Betty Akinyi Achieng and Another vs Josephine Mulatya Sese and Another*. By the said judgment, the trial court allowed the respondent's suit as prayed by, *inter alia*, restoring the ownership of the suit property to them.

B. Background

2. By a plaint dated 14.05.2020 and amended on 03.07.2021 the respondents sued the appellant and the Land Registrar – Mombasa, seeking the following reliefs;

   a. *A permanent injunction to restrain the Defendants whether by themselves, their employees and or agents, or otherwise however from interfering with land parcel No. Mombasa/Mwembelegeza/457*
   b. *Cost of this suit and interest at Court rate.*
   c. *A declaration that the Plaintiff is the lawful joint owner of Title No. Mombasa/Mwembelegeza/457 issued on 23/12/2015.*
   d. *An Order that the Title Deed Serial number 2246939 issued on 22/2/2919 over the suit plot title No. Mombasa/Mwembe1egeza/457 in the names of Josephine Sese Mulatya was acquired fraudulently and is hereby cancelled and directing the land registrar to rectify the land register over the suit by removing entries in favour of the 1st Defendant and revert the title document to the original title being title No. Mombasa/Mwembelegeza/457 that was registered on 23/12/2015;*
   e. *Any other relief this Honourable court deems fit and just to grant*

3. The respondents pleaded that at all material times they were the registered joint proprietors of Title No. Mombasa/Mwembelegeza/457 (*the suit property*). They pleaded that in the year 2016 they entered into a service loan agreement

with the appellant whereby the appellant was to assist them in transferring the suit property from the name of the 1st respondent's late husband into their joint names for an agency fee of Kshs. 520,000/=.

4. It was further pleaded that upon the successful execution of the said assignment, the appellant was to facilitate the transfer of the suit property to one Caroline who was the intended purchaser. It was the respondents' claim that the appellant had, however, altered or doctored the original service loan agreement and fraudulently transferred the suit property into her name absolutely.

5. In particular, the respondents pleaded that the appellant had altered the agreement to make it appear as if they had taken a loan of Kshs. 520,000 from her and then pledged the suit property as security for its repayment. They further pleaded that the appellant had forged their signatures on the transfer document since they had not signed them or consented to the transfer of the suit property. The respondents pleaded several particulars of fraud against the appellant in their amended plaint.

6. The record shows that the appellant filed a defence dated 25.09.20220 and amended on 25.10.2022 denying the respondents' claim. The appellant pleaded that the parties had entered into a loan agreement dated 27.02.2016 whereby the respondents had pledged the title documents for the suit property for cash loan of Kshs. 520,00/= which was advanced to them.

7. The appellant pleaded that the respondents had in addition signed transfer forms and provided other necessary completion documents to facilitate the transfer of the suit property to her in the event of default. It was the appellants' defence that when the respondents defaulted in their obligations she lawfully transferred the suit property in accordance with the terms of the loan agreement. The appellant thus denied any form of fraud, illegality, or wrongdoing in the transfer process.

C. Trial court's decision

8. Upon hearing the evidence of the parties (save the land registrar) the court found and held that the respondents had proved their claim against the respondent solely on the ground that the appellant was an unregistered moneylender who was

conducting banking business without a licence in contravention of **Section 3(1)** of the **Banking Act.** The trial court was thus of the view that the appellant was not entitled to any remedy under the loan agreement because it was illegal in the first place.

D. Grounds of appeal

9. Being aggrieved by the said judgment the appellant filed a memorandum of appeal dared 25.07.2024 raising the following 4 grounds;

   a. *THAT the Learned Trial Magistrate erred in Law and in fact by failing to analyze and appreciate the evidence on record particularly with regard to the nature of exhibits provided by the Appellant hence arriving at a finding of fact that was wholly against the weight of the evidence rendered;*

   b. *THAT the Learned Trial Magistrate erred in Law and fact in making an inference of Shylock business between the Appellant and the Respondents whereas none existed thereby arriving at a wrong verdict;*

   c. *THAT the Learned Trial Magistrate erred in Law and in fact by holding that the Appellant conducted a business by the name Rocki Micro Finance which business is not within the knowledge of the Appellant;*

   d. *THAT the Learned Trial Magistrate erred in Law and in fact by failing to consider the Appellant's Submissions on record which had analyzed the chronology of events leading the*

advancement of loan advanced by the Appellant to the Respondents thus arriving at a wrong decision;

10. As a result, the appellant sought the following reliefs in the appeal;

a. *That the appeal be allowed*

b. *That the judgment and decree of the trial court dated 01.12.2023 be set aside and substituted with a dismissal order.*

c. *Costs of the appeal*

E. Direction on submissions

11. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines, within which to file and exchange their respective submissions. The record shows that the appellant filed submissions on 13.01.2026 whereas the 1st and 2nd respondents' submissions were field on 27.01.2026.

F. Issues for determination

12. Even though the appellant raised 4 grounds in her memorandum of appeal, the court is of the view that the same may be condensed into the following two key issues;

a. *Whether the trial court erred in law and fact in allowing the respondents' claim*

b. *Who shall bear the costs of the appeal*

G. Applicable legal principles

13. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at page126* as follows:

> *"...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of*

fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

14. Similarly, in the case of *Peters –vs- Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P.* rendered the applicable principles as follows:

"...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

15. In the same case, *Sir Kenneth O'Connor* quoted *Viscount Simon, L.C in Watt –vs- Thomas [1947] A.C. 424 at page 429 – 430* as follows:

> *"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a*

whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

H. Analysis and determination

a. Whether the trial court erred in law and fact in allowing the respondents' claim

16. The court has considered the material and submissions on record. The court has also reviewed and re-evaluated the entire evidence on record. It is evident from the material on record that the respondents' claim was essentially based upon alleged fraud on the part of the appellant on the basis of a fictitious loan facility. It was the respondents' pleading that there was no loan advanced to them and that what they signed was *service* agreement whereby the appellant was to be paid an "agency fee" for facilitating transfer of the suit property from the name of the deceased into their joint names.

17. The respondents specifically denied having signed any transfer forms and contended that the appellant had forged their signatures and fraudulently caused the suit property to be transferred without their knowledge or consent. They also contended that the service loan agreement they signed was later on altered or doctored by the appellant and converted into a typical loan agreement. The appellant, of course, denied any fraud or wrongdoing.

18. It is apparent from the judgment of the trial court that it did not consider and determine the real issues in controversy which were raised in the parties' pleadings. The trail court did not

consider and determine what was the nature of the agreement signed by the parties; whether there was any unilateral alteration of the agreement; or whether there was any forgery or fraud in the transfer of the suit property to the appellant.

19. In its judgment, the trial court framed the main question for determination as follows;

> "*Having thus stated the question that comes to the mind of the court is whether the 1st defendant, a confessed shylock, should be permitted to have the Shakespearean pound of flesh from the plaintiffs given the latter's alleged default in payment of the loan advanced.*"

20. The trial court then went on to hold that as the appellant was not a registered money lender under **Section 3 (1) of the Banking Act**, she could recover her money or realize the security offered for repayment of such loan. It is evident from the pleadings on record that the respondents had denied the existence of a loan agreement and they even denied that the suit property was ever given as security for repayment of such loan. It was not their case that the appellant was not a registered money lender under the **Banking Act** or that the so called "service loan agreement" was illegal under the **Banking Act** or any other law.

21. It has been held time and again that a court of law should only frame and determine the issues raised by the parties in their pleadings unless a particular issue falls within any of the recognized exceptions. In the case of *David Sironga Old Takai vs Francis Arap Muge & Others [2014] eKLR* it was held, *inter alia*, that;

> *"It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense".*

22. The court is satisfied that the trial court erred in law and fact in failing to properly frame the issues which were raised by the parties in their pleadings and in failing to consider and

determine them as required by law. As a consequence, the trial court ended up determining matters which were not properly before it whilst leaving the key issues in dispute undetermined. The court is of the view that a miscarriage of justice thereby occurred.

23. There being no decision by the trial court on the real questions which were in controversy, this court is unable to conclusively determine the appeal without the benefit of the trial court's opinion on those issues. As such, the court is inclined to set aside the decree of the trial court in its entirety and remit the suit for hearing *de-novo* on the issues in dispute as pleaded by the parties.

b. Who shall bear costs of the appeal.

24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the *proviso* to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche*

Overseas Trading Co. Ltd [1967] EA 287. However, the court is of the view that it would be unfair to penalize any of the parties in costs since they are not to blame for the failure by the trial court to correctly frame and determine the real issues in dispute. The order which commends itself to the court is that each party shall bear his own costs of the appeal.

I. Conclusion and disposal orders

25. The upshot of the foregoing is that the finds merit in the appellant's appeal. As a consequence, the court makes the following orders for disposal thereof;

    a. ***The appeal be and is hereby allowed.***
    b. ***The judgment and decree of the trial court dated 01.12.2023 is hereby set aside in its entirety.***
    c. ***The matter is hereby remitted back to the Chief Magistrate's court for trial de novo on priority basis before a magistrate with competent jurisdiction other than Hon. G. Sogomo.***
    d. ***Each party shall bear his own costs of the appeal.***

It is so decided.

Judgment dated and **signed** at **Mombasa** and **delivered** virtually via Microsoft Teams on this **23rd day** of April 2026 in the presence of the parties as indicated below.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Mr. Apollo Muinde for appellant

No appearance the respondents