IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MAKHANDIA & MUSINGA, JJ.A.)

CIVIL APPEAL NO. 365 OF 2017

BETWEEN

JAMES MUNIU MUCHERU.....APPELLANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ochieng', J.) delivered on 24th July 2017

in

H.C.C. C. No. 321 of 2016)

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JUDGMENT OF THE COURT

1. **National Bank of Kenya Ltd**, the respondent herein, was the plaintiff in the subordinate court. It filed a suit against **James Muniu Mucheru,** the appellant, seeking to recover **Kshs. 349,906.75/=** being the amount owing from a credit card facility issued to him, together with agreed and applicable interest rate of **3.5 % per month** from 1st October 1999 until payment in full. It also prayed for costs of the suit and interest.

2. The appellant denied owing the sum claimed by the respondent. He averred that he neither applied for nor was he ever granted the alleged credit facility and that the signature appearing on the application form did not belong to him. He stated that the application form did not show the name of the bank official who approved the application at the time. He further claimed that he only came to know of the alleged banking facility on 9th September 2006 when the respondent served him with a plaint.

3. Judgment was nonetheless entered against the appellant by the Principal Magistrate (**S. Atambo),** and a decree issued to that effect. Aggrieved by that decision, the appellant preferred an appeal to the High Court and the learned judge upheld the trial court's decision. It is this judgment that has precipitated this appeal.

4. In the memorandum of appeal dated 24th October 2017, the appellant faulted the learned judge for failing to consider the **in duplum rule**. He also took issue with the order which required him to pay interest that exceeded the principal sum. The appellant further contended that the trial magistrate erred in law by shifting the burden of proof to him. Lastly, the appellant also criticized the learned judge for **"applying a standard of proof that is unknown in law, lower than balance of probability."**

5. The appeal was canvassed by way of written submissions. Learned Counsel for the appellant, **Mr. Gathu**, relied on his submissions filed in this Court, while learned counsel for the respondent, **Mr. Omagwa**, relied on the record of appeal and the submissions filed in the High Court.

6. The appellant condensed his grounds of appeal and submitted on four issues as follows; *whether the learned judge applied the correct standard of proof; whether the learned judge erred in shifting the evidential burden of proof to the appellant; whether the* ***in duplum*** *rule is applicable in this case and whether the award of interest was unconscionable*.

7. On the first issue, the appellant argued that since he had denied having ever applied for the credit facility, the onus was on the respondent to provide proof by way of documentation to show that he indeed applied and utilized the facility. In this regard, he submitted that both courts below applied a standard of proof that was lower than balance of probability. (He claimed that Paul Njeru made the application alleged on his behalf).

8. As regards the issue of shifting the burden of proof to the appellant, the appellant contended that even though the High Court held that the burden of proving that the signature on the application form for the credit facility lay with the respondent, it still went ahead and shifted the burden to the appellant. He criticized the learned judge for finding that the appellant had several signatures and that it was probable that he was present in person at the time the application for the credit facility was made because his passport was presented to the respondent.

9. On the issue of whether the **in duplum rule** is applicable in this instance, the appellant submitted that the decretal sum of **Kshs 2,324,013.75/=** awarded to the respondent went against **Section 44A** of the **Banking Act** which restricts the amount of accrued interest on a loan to the principal amount owing when the loan becomes non-performing. He urged that should this Court find that the respondent proved its case to the required standard then the maximum amount that the respondent is fairly and justly entitled to ought to be **Kshs 699,812/=.** He otherwise prayed that the appeal be allowed**.**

10. Turning to the respondent's position, although Mr. Omagwa did not file any submissions before this Court indicated that he would rely on the submissions that he had filed in the High Court, the record of appeal is clear that the respondent's counsel had not filed any submission before the first appellate court. The respondent's advocates had however filed submission in the Chief Magistrate's court. Those are the submissions that Ochieng, J. considered. In a nutshell, the respondent's contention was that the appellant had applied for a credit facility which was extended to him but he failed to repay it.

11. This is a second appeal. Our mandate is therefore restricted to considering matters of law only and not to interfere with the findings of fact of the two lower courts unless we are satisfied that the two courts below had misapprehended the evidence or that their conclusions were based on incorrect facts. See **Onyango and Another v Luway [1986] KLR 513.**

12. Having revisited the record and considered it in light of the rival submissions and the case law cited by parties, the main issues that fall for our determination are the same issues that the appellant raised in his written submissions namely: Standard of proof applied, shifting of the burden of proof and the applicability of the **in duplum rule.**

13. On the first issue of whether the trial court applied the correct standard of proof, the trial magistrate expressed himself thus; **"Going by (sic) this being a civil matter where balance of probability is the standard required for proof, less than in criminal cases, the defendant needed to get a handwriting expert to establish that indeed the signature thereon does not belong to him. That notwithstanding, the defendant does not come across as being sincere about the claim herein for the very basic reason that if he knew about the so-called fraud in the year 2006, what did he do about it?**

14. The learned judge in the High Court equally held that; "**In Civil cases, evidence is weighed and the standard of proof is on a balance of probability. As I have already held, it is most improbable that Paul Njeru signed on behalf of the defendant, because the defendant testified that Njeru helped him in 1999, which was the year after the bank had granted the credit card. In effect on a balance of probability I find that it is the defendant who signed the application form."**

15. Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the courts will make a finding based on which party's version of the story is more believable. In this regard, we are inclined to agree with the findings of the two courts below. We have no plausible reason to interfere with the findings above. The respondent submitted that the appellant demonstrated to the bank his capability to repay the credit sum applied for and tendered his Passport No. A147451. Further, the passport bore the appellant's photograph and it is on the basis of that the bank official who received his application verified that indeed the appellant was in person at the time. The appellant's denial to have appended his signature, in our view, does not seem well grounded. This ground then fails.

16. Secondly is the issue of burden of proof. The appellant contended that the trial magistrate shifted the burden to him to prove that indeed he was not the one who signed the application and that he ought to have brought an expert in handwriting to aid his case. On the other hand, it was the respondent's argument that the burden of proving that the signature was not his rested upon the appellant as he was the one who alleged that the signature was not his.

17. On matters evidence, ***Madan, JA*** (as he then was) in ***CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103*** stated: ***"…Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...."***

18. The Evidence Act is clear enough upon whom the burden of proof lies. ***Section 107*** provides as follows:

> ***"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 facts, it is said that the burden of proof lies on that person."

Section 109 of the same **Act** further provides:

"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 law that the proof of that fact lie on any particular person."

19. In ***Karugi & Another v Kabiya & 3 Others [1987] KLR 347***, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.

20. In that regard, before a trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities, the court must be satisfied that the plaintiff has adduced some credible and believable evidence which can stand in the absence of rebuttal evidence by the defendant. The plaintiff must adduce evidence, which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities proves the claim.

21. The Supreme Court of Uganda in ***Departed Asians Property Custodian Board v 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…"

22. In the appeal before us, we are cognisant of the fact that burden of proof squarely lies on the party who alleges. From the record, the evidence by the appellant is majorly marred with denials and with respect, we agree with the courts below that taken as a whole, the respondent proved the case on a balance of probability.

23. There was sufficient evidence that the appellant enjoyed the credit card facilities by utilizing the same. From the statements of account, there were some payments that were made to that account on three different occasions. It is highly unlikely that a stranger would have made payments on an account that did not belong to him. Even so, if that were to be the case, the appellant ought to have raised this issue with the bank as soon as he was aware that there were transactions being made via his account.

24. We therefore do not agree with the appellant's contention that the respondent ought to have produced documents to show who had made those payments. Further, in our view, the alleged issue of shifting the burden of proof to the appellant to prove his signature on the application is not material in this instance. While the authenticity of the signature was seriously questioned, we find the evidence regarding the activities on the bank account satisfactory.

25. Finally, regarding **Section 44A** of the **Banking Act** that imports the **in duplum rule**, the same came into force on 1st May, 2007. The suit that gave rise to this appeal was filed on 22nd February 2002, long before **Section 44A** came into operation. **Section 44(1) and (2)** states as follows:

"(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2)

(2) The maximum amount referred to in subsection (1) is the sum of the following-

(a) the principal owing when the loan becomes non-performing;

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes nonperforming; and

(c) expenses incurred in the recovery of any amounts owed by the debtor."

25. **Subsection (6)** has a retrospective effect in that it covers even loans that were advanced before the section came into operation. It states as follows:

"(6) This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation:

Provided that where loans became non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following-

(a) the principal and interest owing on the day this section comes into operation; and

(b) interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and

(c) expenses incurred in the recovery of any amounts owed by the debtor."

26. It is therefore evident that in computing the actual amount that is

due and payable by the appellant to the respondent, the provisions of **Section 44A** of the **Banking Act** must be borne in mind and factored in the computation. It is not for this Court to do the calculation. The respondent must adjust the sum payable in accordance with the law. To that extent only this appeal succeeds.

27. As regards costs of the appeal, we order that each party bears its own costs.

Dated and Delivered at Nairobi this 25th day of January, 2019.

W. OUKO (P)

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR