IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 87 OF 2014

CHARTERHOUSE BANK LIMITED (UNDER STATUTORY MANAGEMENT).....APPELLANT

AND

FRANK N. KAMAU...RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi, (Koome, J.) dated 28th January 2011

in

HCCC NO. 263 OF 2008)

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JUDGMENT OF THE COURT

The central question in this appeal is whether a trial court is *ipso facto* obliged to enter judgment for the plaintiff once the defendant elects not to call any evidence, after the close of the plaintiff's case. ***The appellant, Charterhouse Bank Limited (Under Statutory Management)*** thinks so and faults the High Court for holding that despite the failure by ***the respondent, Frank N. Kamau,*** to call evidence in support of its defence, the appellant's claim was not proved. The respondent on the other hand retorts that it was not obliged to call evidence to rebut what was not a *prima facie* case.

On 19th May 2008, the appellant**,** then under statutory management, filed a claim in the High Court against the respondentclaiming a sum of ***Kshs.18, 075,270.50*** as of 30th November 2007 and interest at the rate of 14.75% p. a. until payment in full. The appellant averred that at all material times, a bank-client relationship existed between them on the basis of which the respondent operated two bank accounts, ***Current Account No. 01-000741*** and ***Savings Account No. 10-1000564***. At the respondent's request on 30th July 2005, the appellant averred, it extended to him an overdraft facility of Kshs.18 million to develop his property in Ongata Rongai, which the respondent subsequently refused or failed to repay.

By a defence dated 11th December 2008, the respondent admitted the existence of a banker-client relationship between the parties, but denied operating the two accounts referred to above. The respondent further denied having applied or received any overdraft facility from the appellant or any indebtedness to the appellant for the sum claimed or at all.

Koome, J. (as she then was) heard the suit in which the appellant called one witness and the respondent

elected not to testify or present any evidence. By a judgment dated 12th March 2014, the learned judge was not persuaded that the appellant had established its case on a balance of probabilities and dismissed the suit with costs to the respondent.

The substance of the appellant’s case, as presented by its sole witness, ***John Maina Warikwa*** was that the respondent had two bank accounts with the appellant, namely Current Account No. 01-0000741 and Savings Account No. 10-1000564. While the respondent was allowed to overdraw from the Current Account, the Savings Account had to be maintained on credit balance. By a letter dated 30th July 2005, the respondent applied to the appellant for Kshs.18 million to put up a residential cum shopping facility on his property in Ongata Rongai. He offered as security his 3-acre farm in Rongai, Nakuru. That letter was produced as Exb. No.1 on 3rd August 2005, the respondent submitted to the respondent an application for credit facility of Kshs.18 million. He indicated the purpose of the loan to be development and he offered his Mangu farm as security. He proposed a repayment schedule of Kshs.300,000 to Kshs.350,000 per month with effect from September. That application was duly signed by the respondent and was produced in evidence as Exb. No. 2.

On 23rd August 2005, the appellant sent to the respondent a letter of offer of the facility subject to the terms and conditions set out therein. Some of the terms and conditions were that the appellant would give the respondent two loans for Kshs.10 million and Kshs.8 million each to finance the development of his property in Ongata Rongai; that as regards loan1 a moratorium on the principal repayment would be allowed up to 30th August 2007 but interest would be serviced monthly; that as regards loan 2 the facility was to be repaid in monthly instalments of Kshs.190,000 inclusive of interest with the first instalment due on 30th September 2005; that interest on the facility was to be charged at 14.75% p.a. calculated on a reducing balance basis and debited monthly in arrears; that all overdue and missed instalments would attract additional interest of 22.75% p.a. as liquidated damages; and that the respondent would provide his properties in Ongata Rongai and Nakuru as security.

By clause 4 the appellant reserved the right to revise the applicable and excess rate at any time without notice and to levy further interest on all amounts outstanding or over the sanctioned limit at its sole discretion. The respondent was requested to sign and return a copy of the letter of offer together with the commitment fee. The letter further provided thus:

> ***“This offer will remain subject to contract unless and until the facility agreement is signed and exchanged (except that the paragraph entitled “Costs” in this letter shall become binding upon you signing the enclosed copy of the letter.”***

The appellant did not sign this letter of offer, but nevertheless the respondentin purported acceptance, signed the same after initialling every page. It appears that the respondent also signed other documents headed ***“Promissory Note”,*** “***Letter of Undertaking”***, and ***“Letter of Instalment”,*** which were produced as exhibits, making various promises and undertakings regarding repayment of the loan. Although the respondent signed those documents, they were all undated and blank in pertinent parts, without for example, any indication of the amount, for which the respondent was indebted to the appellant, or the amount he was undertaking to pay, the rate of interest, or the period of repayment.

It appears that no other “contract” was entered into between the parties or exchanged regarding the facility as contemplated by the letter of offer. Even the securities that were contemplated were never perfected; the respondent merely handed over to the appellant the documents of title to his property in Rongai. Nevertheless, the appellant claims thatit allowed the respondent to access the proceeds of the loan facility, by transferring money from the respondent’s current account to the savings account, from which the respondent would issue cheques and withdraw the money.

The appellant produced in evidence some 37 cheques signed by the respondent withdrawing monies from Account No. 10-1000564 on diverse dates between 14th September 2005 and 13th May 2006. Although the appellant did not bother to add up the total amount in these cheques, they add up to a total of Kshs.5,447,846.80. Those cheques, it was contended were honoured and paid by the appellant. The appellant also produced some petty cash vouchers as evidence of payment of sums of money to the

respondent, although there is no evidence of acknowledgement of payment by the respondent and some are too faint that they do not indicate the amount that was allegedly paid to the respondent.

Cross-examination of the appellant's witness by the respondent's advocate elicited the astounding response that the respondent's Current Account No. 01-0000741 was opened orally rather than formally, as is the normal practice. In addition, the appellant's witness admitted that he was not conversant with the respondent's affairs and had merely been handed over the exhibits that he had produced in evidence.

After the appellant was placed under statutory management, it demanded from the respondent vide a letter dated 7th February 2007 ***Kshs.15,806,072.04*** being the outstanding loan as of 31st December 2006 in respect of the Savings Account. By his reply dated 27th February 2007, the respondent merely stated that he was unable to transact with the appellant because it was shut down and expressing the wish to continue business with the appellant. To the appellant, that constituted an admission of the debt, otherwise, it contended, the respondent would have expressly denied indebtedness to the appellant.

At the conclusion of the appellant's case the respondent elected not to call any evidence. However the respondent's advocate had cross-examined the appellant's witness at length and, like counsel for the appellant, filed written submissions for consideration by the learned judge before she rendered her judgment.

As we stated earlier, the crux of this appeal is whether the learned judge erred by holding that the appellant had failed to prove its case on a balance of probabilities, notwithstanding the fact that the respondent had not called any evidence to rebut the appellant's case. Prosecuting the appeal, ***Mr. Mbaluto*** submitted that having failed to call evidence, the respondent's defence was rendered a mere statement, leaving the plaintiff's case completely uncontroverted. He relied on several judgments of the High Court, which he submitted supported the proposition that failure by the defendant to call evidence meant that the plaintiff's case stood unchallenged, thus entitling him to judgment. Among those decisions are, ***Gabriel Mwashuma v Mohammed Sajjad & Another, HCCC No 79 of 2012 (Mombasa); DT Dobie & Co (K) Ltd v Wanyonyi Wafula Chebukati, HCCA No 88 of 2009 (Mombasa)***; and ***Stephen Gachau Githaiga v. Margaret Wambui Weru & Another, HCCC No 17 of 2014 (Nyeri).*** Counsel also cited ***Kimotho v Kenya Commercial Bank [2003] 1 EA 108,*** another decision of the High Court, and invited us to draw the inference that failure by the respondent to call any witness meant that if any witnesses were called, they would not have assisted his case.

The judgment of the High Court was additionally impugned for holding that there was no bank-client relationship between the parties whereas the parties had not framed that as one of the issues for determination; for entertaining and determining issues not framed by the parties; for ignoring that fact that the bank-client relationship was expressly admitted in the defence; for failing to hold that on the totality of the evidence on record, the respondent was indebted to the appellant for Kshs.18,075,270.05; and for placing on the appellant a more exacting and onerous standard of proof instead of that of proof on a balance of probabilities.

Mr Gitau, learned counsel for the respondent supported the judgment of the trial court, submitting that the evidence adduced by the appellant did not discharge the onus of proof on the appellant under sections 107 and 109 of the Evidence Act. Citing the judgments of the High Court in ***Kipkebe Ltd v. Peterson Ondieki Tai, HCCA No. 80 of 2015*** and ***Sanganyi Tea Factory v. James Ayiera Magari, HCCA No 60 of 2015***, counsel submitted that the appellant was duty bound to prove its claim whether or not the respondent elected to testify. According to counsel, the evidence adduced by the appellant's single witness was full of gaps, among them being that the appellant neither produced the forms that were used to open the two accounts nor the mandate pursuant to which they were operated; that the appellant's evidence that one of the accounts was opened orally was not believable; the purported letter of offer regarding the loan was not signed by the appellant; that the loan was "subject to contract" and no contract was entered into as contemplated; that the cheques produced in evidence were drawn on the savings account which had a credit balance; that there was no evidence connecting the respondent to the vouchers which were produced in evidence; that there was no evidence to support the claim that the respondent owed the appellant Kshs.18,025, 270/-; and that the appellant's witness did not have any personal

knowledge regarding the bank statements that were produced in evidence, having admitted that they were just handed over to him by another employee. Counsel added that under ***sections 176*** and ***177*** of the ***Evidence Act***, the bank statements were not admissible.

As regards whether the court could draw any adverse inference on the respondent's failure to call witnesses, counsel relied of the judgment of the High Court in ***Susan Mumbi v. Kefala Grebedhin, HCCC No. 322 of 1993*** and submitted that no such inference could be drawn because the appellant was obliged to prove its case on a balance of probabilities, whether the respondent testified or not.

We have anxiously considered the record of appeal, the judgment of the High Court, memorandum of appeal, the submissions by learned counsel both before the trial court and this court, and the various authorities that they cited. This being a first appeal, it involves both issues of facts and issues of law. We are obliged to reconsider the evidence that was adduced by the single witness, re-evaluate and reappraise the same and come to our own independent conclusions on the same. We are however equally obliged to bear in mind that on matters touching on the credibility of that witness and the believability of the evidence that he tendered, we do not have the same advantage as that enjoyed by the trial judge, who saw and heard him as he testified. We must accordingly defer to the conclusions of the trial court unless there are compelling reasons to differ with those conclusions. ***(See Selle Another v. Associated Motor Boat Co Ltd & Others [1968] EA 123).***

The appellant relies on a number of decisions to press the view that in the absence of rebuttal evidence by the respondent, its case must automatically be taken as proved. We have already alluded to some of those cases in this judgment. In ***Linus Nganga Kiongo v. Town Council of Kikuyu, HCCC No. 79 of 2011, Odunga, J.*** considered a number of decisions in support of the proposition relied upon by the appellant and stated as follows, which we reproduce *verbatim*and *in extenso*:

> ***"What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:***
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> ***"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail".***
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> ***Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and unchallenged. In the case of Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988***
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> ***Makhandia, J. held:***
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> ***"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon".***
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> ***The case of Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 said:***

"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations… Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".

Similarly in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000 Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. If one is still in doubt as to the legal position reference could be made to the case of Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996where Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff. The plaintiffs have given evidence on oath supported by documentary evidence, which go to prove their case.

Accordingly, in the absence of any evidence to the contrary and as proof in civil cases is on a balance of probabilities, I find that the plaintiffs are entitled to succeed."

First and foremost, there can be no quarrel with the statements in the above judgments that averments by the parties do not constitute evidence. ***Madan, JA*** (as he then was) made this abundantly clear in ***<u>CMC Aviation Ltd v. Crusair Ltd (No1</u>) [1987] KLR 103*** when he stated:

"The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. 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... The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."

The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant's failure to testify when he had filed a defence and a counterclaim. While the defendant's failure to testify has fatal consequences for the counterclaimbecause the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.

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."

A simple illustration will suffice to demonstrate that it is not in every case where the defendant had not called evidence that the plaintiff's case must invariably be deemed to be proved on a balance of probabilities. ***A*** sues ***B*** for damages claiming that ***B*** is vicariously liable for actions of ***C***. ***B*** files a defence pleading that ***C*** is not his employee, or in the alternative, that the actions of ***C*** in question were not in the course of his employment. ***A*** testifies, but does not lead any evidence whatsoever that ***C*** was indeed an employee of ***B*** or that he was acting in the course of his employment. ***B*** does not testify. The court cannot enter judgment for ***A*** merely on the basis that ***B*** did not call any evidence, when ***A*** had not first proved some essential ingredients of the tort of vicarious liability. Under the law of evidence, the burden is upon ***A*** to satisfy the court on a balance of probabilities that when he suffered damage at the hands of ***C***, ***C*** was an employee of ***B*** and acting in the course of his employment. All that ***B***'s failure to testify does is to lessen the burden of proof on ***A*** in the event he has adduced *some* relevant evidence, which stands unchallenged. If ***A*** has adduced evidence that is not credible or believable by and of itself, judgment cannot be entered in his favour on the basis of ***B***'s failure to testify.

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.

We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, 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. Where the defendant has subjected the plaintiff or his witnesses to cross-examinationand the evidence adducedby the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in ***Karugi & Another v. Kabiya & 3 Others (supra)*** is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgement, irrespective of the quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis.

The Supreme Court of Uganda addressed the same issue in ***Departed Asians Property Custodian Board v Issa Bukenya t/a New Mars Ware House, CA No 26 of 1992*** where the proceedings were *experte* and the trial court merely stated as follows:

> ***"The evidence adduced has not been controverted. I have perused the exhibits with particular care considering the fact that proceedings have been ex parte. In the circumstances I have no alternative but to enter judgment for the Plaintiff as prayed..."***

Speaking for the Court, ***Platt, JSC*** stated thus:

> "***I should, however, draw attention to the duty of the Court when conducting ex-parte proceedings. If allegations are made in the plaint so that the facts alleged support the prayers asked for, and when the prayers called for are legally justified, then all that is necessary is for the trial Court to hear evidence which proves the facts and hear submissions of law that the remedies are justified... 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. A Judge may assist the Plaintiff in pointing out that the evidence so far***

> ***adduced is not sufficiently full and accurate, and that other evidence, documentary or oral, may be needed to support the claim. What cannot be done is that remedies are granted as prayed, which are not supported by the pleadings... In this case the learned Judge should have observed that the pleadings did not support the remedies wanted..."*** *(*Emphasis added).

In the appeal before us, the evidence by the appellant's witness was subjected to cross-examination and, with respect, we agree with the respondent that taken as a whole, it did not prove the case of breach of contract pleaded by the appellant on a balance of probabilities. If anything, the evidence on record shows that in its dealings with the respondent, the appellant acted in a very casual and cavalier manner.

The appellant did not sign the offer that the respondent was intended to accept; yet there was provision in the relevant document for the appellant's signature. Although the offer expressly stated that it was subject to contract, no formal contract was signed and exchanged between the parties as contemplated. The security that the respondent purportedly gave to secure the loan was never perfected for no apparent reason. The "Promissory Note", "Letter of Undertaking", and "Letter of Instalment" that were allegedly signed by the respondent were all blank as pertains to material particulars such as the amount of the loan, the monthly instalments, the repayment period, the rate of interest, and were undated.

In addition, the cheques and vouchers that were produced to support the claim fell short in proving on a preponderance of evidence that the appellant had advanced to the respondent the Kshs.18,025,270/- that it was claiming from him. The cheques and the vouchers did not add up to that amount claimed, while the authenticity of the latter was seriously questioned. The evidence regarding the two bank accounts was utterly unsatisfactory, with the appellant's witness incredulously testifying that one of them was opened orally.

And the clincher was his admission that he was not conversant with the documents he was relying on, having merely received them from another employee of the appellant. In our view this evidence could not prove the appellant's claim on a balance of probabilities. It was a shoddy case, which did not require rebuttal evidence from the respondent before it could collapse on the weight of its own gaps and inconsistencies.

Having determined this central issue, we do not deem it necessary to address the other peripheral issues raised by the appellant for it will not change the outcome. For example while we agree with the appellant that there was evidence on a balance of probabilities of the existence of a bank client relationship between the parties, that alone would not be sufficient to prove the appellant's claim of breach of contract as pleaded. In the event this appeal has no merit and is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 4th day of November, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR</u>