



**Misama v Family Bank Limited (Civil Appeal E1328 of 2023)
[2025] KEHC 752 (KLR) (Civ) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 752 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1328 OF 2023

JN MULWA, J

JANUARY 30, 2025

BETWEEN

REBECCA OMEDO LUKE CALVIN MISAMA APPELLANT

AND

FAMILY BANK LIMITED RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. Wendy K. Micheni
(CM) delivered on 19/10/2023 in Nairobi Milimani CMCC No. 6522 of 2015)*

JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 19/10/2023 in Nairobi Milimani CMCC No. 6522 of 2015 (hereafter the lower court suit). The suit in the lower court was filed by Rebecca Omedo Luke Calvins Misama, the plaintiff(s) before the lower Court (hereinafter the Appellant(s)) as against Family Bank Ltd (hereafter the Respondent) seeking inter alia a declaration that the expenses in the sum of Kshs. 36,100/- together with interest and charges thereon on account of a valuation services by Acumen Valuers Limited was not lawfully incurred and is not debt owing to the Respondent and the negative Ref. No. 0xxxxxxx52 be deleted; an injunction restraining the Respondent either by itself, its agents, servants nominees or otherwise from making a negative reference against the Appellant to the Credit Reference Bureau Africa Limited or any other bureau or at all in respect of A/C No. 0xxxxxxx57; general damages; costs of the suit; and interest on latter.
2. The gist of the Appellant's case is that at all material times to the lower Court suit, the Appellant and husband held an account with the Respondent being A/C No. 0xxxxxxx57 held in their joint name to wit sometime in 2011 they sought a facility from the Respondent to the tune of Kshs. 1,000,000/- wherein the latter would be secured by a first legal charge over property LR. No. Kanyada/Kanyada



Kalanya/3413. That despite executing the Letter of Offer to facilitate disbursement of the facility sought and thereafter-issuing reminders to the Respondent, the latter never informed them if the facility would be granted at a later date or at all.

3. It was further averred that sometimes in March, 2014 when the Appellant sought a credit facility with Kenya Commercial Bank (KCB), the Plaintiff was informed that she had been listed as a defaulter whereupon inquiry from the Credit Reference Bureau Africa Limited on details of the said default, was informed that a negative refence being Ref. No. 0xxxxxxx52 had been made by the Respondent as against the Appellant. Upon a further inquiry of the forestated from the Respondent, the Appellant was informed that it had made an adverse reference after the Appellant failed to repay valuation fee amounting to Kshs. 36,100/- in respect of valuation of LR. No. Kaksingri/Kabutu Waregi/1222, to wit, the Appellant averred that at no did it offer the same as security. That the Respondent's decision to list the Appellant as a defaulter was made in bad faith, tainted with illegality, breach of the Respondent's fiduciary duty to the Appellant of which has occasioned the Appellant loss by way of accessing the facility from Kenya Commercial Bank (KCB) and or any other facility.
4. The Respondent filed a defence and amended counterclaim admitting to various facets of the plaint however denied key averments therein meanwhile averred that reporting the Appellant to the Credit Reference Bureau was not in any way malicious and that it was obligated under law and Central Bank regulations to adhere to the Prudential Guidelines. In its counterclaim, the Respondent averred that the Appellant in total and blatant breach of the terms of the agreement failed, refused and or neglected her obligation to offset the outstanding amount or loan that had accumulated to Kshs. 93,417.12/- together with interest and other charges as at 01/02/2015 of which the Respondent claimed until payment in full.
5. The suit proceeded to a hearing during which both parties called evidence.
6. In its judgment, the trial Court found that the Appellant had failed to prove her case on a balance of probabilities as against the Respondent and proceeded to dismiss the suit with each party bearing its own costs.

The Appeal

7. Aggrieved by the outcome, the Appellant preferred this appeal challenging the whole judgment based on the following grounds; -
 1. That the learned Magistrate erred in law and in fact by failing to consider the evidence adduced by the Appellant during the trial and thus arriving at the wrong determination.
 2. That the learned Magistrate erred in law and in fact by issuing a declaration that the Appellant had failed to prove her case against the Respondent.
 3. That the learned Magistrate erred in law and in fact by failing to consider all the issues raised by the Appellant.
 4. That the learned Magistrate erred in law and in fact by finding that the Appellant should have known that she was required to indemnify the Respondent.
 5. That the learned Magistrate erred in law and in fact by finding that the Appellant should have known that she was required to indemnify the Respondent.
 6. That the learned Magistrate erred in law and in fact by only addressing on issue in her judgment whereas the Appellant has presented before it several other issues thus causing miscarriage of justice on the Appellant.



7. That in the circumstance of the case, the judgment entered is against pleadings submissions and the law and the learned Magistrate failed to uphold the law.
8. Upon the aforesaid grounds, the Appellant sought that the appeal be allowed, the trial case judgment be set aside or varied with costs of the appeal being awarded in favour of the Appellant.
9. The appeal was canvassed by way of written submissions that this Court has duly considered alongside the Memorandum of Appeal and the Record of Appeal.

Analysis and Determination

10. This is a first appeal. The duty of this Court as a first appellate Court was set out by the Court of Appeal in *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123. Further, it has since been settled that an appellate Court will not ordinarily interfere with findings of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See:- *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278.
11. The trial Court after considering the respective parties’ pleadings and material relied on in support of the pleadings thereof, stated in its judgment in part that; -

“.....The bone of contention herein involves whether the defendant was justified to charge for valuation of the property. This will also inform the decision by the defendant to list the plaintiff with the Credit Reference Bureau was done in good faith or not.

....it is clear to me that the parties herein made reference to two different loan facilities.

In this regard I am of the view that the plaintiff had knowledge of the terms of the contract that she duly executed that anything paid out of pocket by the defendant required indemnification.

It is clear to this Court that since the other loan facility was not advanced to the plaintiff then there is no contract between the parties in regard to it since the defendant never communicated back to the plaintiff.

In this regard I find that the plaintiff ought to have done her due diligence and not paid up her end of the bargain to settle the amount for valuation....

Secondly, for an injunction to be granted this Court is guided by the case of *Giella v Cassman Brown*....

I am of the view that the plaintiff has not set out a prima facie case with a degree of success as it is clear that she owes a balance to the defendant....

Having considered that the plaintiff has not set out a prima facie case with a degree of success, I find no reason to consider the other two conditions set out by the *Giella v Cassman Brown*....

In the upshot I find on a balance of probability, the plaintiff has failed to prove her case as against the defendant and I hereby dismiss the case herein.”

Appellant’s case

12. Rebecca Omedo Luke testified as PW1.



She adopted her witness statement as her evidence in chief and adduced into evidence the documents appearing in the Appellant's list of documents and further list of documents as PExh.1-18. The gist of her evidence was a restatement of the Appellants' pleadings before the trial Court wherein as per the offer letter from the Respondent who offered to advance to her a secured facility in the sum of Kshs. 1,000,000/-, the facility was to be secured by a property LR. No. Kanyada/Kanyada Kalanya/3413.

13. It was her further case that the Respondent proceeded to incur and charge a different property, and incurred expenses on valuation of the said property at Kshs. 36,100/=-, and proceeded to give diverse, inconsistent and conflicting information and further listed her as a defaulter on the valuation sum of Kshs. 36,100/-, contending that the said valuation was done in bad faith, and therefore illegal and in breach of the Respondent's fiduciary duty.
14. On cross-examination she confirmed that the offer letter was not signed by either party but she acknowledged having signed some documents. Having not signed some documents, and confirmed that the Kaksingri property no. LR. Kaksingri/Kabutuwaregri/1222 subject of the valuation was not registered in her name but in her husband's name.

Respondent's case

15. On behalf of the Respondent, Julius Kipkoech Serem, testified as DW1.
16. He too adopted his witness statement as his evidence in chief and adduced into evidence the documents appearing in the Respondent's list of documents as DExh.1-6. His evidence was that security for the amount sought to be advanced was LR. No. Kaksingri/Kagutu Waregi/ 1222 to which the Appellant was issued with a facility letter dated 15.12.2011; That it was further an agreed term in the facility letter that the costs of the valuation were to be met by the party applying for the loan. He further stated that as per the facility letter the Respondent duly instructed a valuer to which the accompanying report was accompanied by a fee note of Kshs. 36,100/- which was debited to the Appellants' account however the same was never settled prompting the Respondent to facilitate the listing of the Appellant at a Credit Reference Bureau.
17. On cross-examination, he stated that the Bank duly instructed the valuer and confirmed that the loan was not advanced to the Appellant; That before the Appellant was listed on the CRB she was informed and requested to settle the valuation fees of Kshs. 36,100/- which she declined.
18. By way of their written submissions the appellant cited the cases of Total Kenya Ltd v Joseph Ojiem, Nairobi HCCC No. 1243 of 1999, National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, Barclays Bank Kenya Limited v Kepha Nyabera & 191 Other [2013] eKLR and the Prudential Guidelines, 2013 Guidelines on Consumer Protection, arguing that the entire process of valuation was done in breach of the duty owed by the Respondent to the Appellant. Further, while calling to aid The Banking (Credit Reference Bureau) Regulations, 2008, the American decision in Wolf v Superior Court (2003) 107 Cal. App. 4th 25, 29 [130 Cal. Rptr. 2d 860] and Equity Bank Limited & Another v Robert Chesang [2016] eKLR counsel posited that the Respondent was in breach of its fiduciary duty when it unilaterally failed to communicate the appointment of a valuer and by proceedings to list the Appellant as a defaulter with a Credit Reference Bureau without being informed of the same.
19. In urging for an award of damages to the tune of Kshs. 5,000,000/- the Appellant relied on the decisions in Peter M. Kariuki v Attorney General [2014] eKLR, Dorcas Florence Kombo v Royal Media Services Limited [2014] eKLR, C. Metha & Co. Ltd v Standard Bank Limited [2014] eKLR, Christopher



Orina Kenyariri v Barclays Bank Kenya Ltd & Another [2018] eKLR, Eunice Ng'ang'a v Higher Educational Loans Board & 2 Others [2020] eKLR.

20. The Respondent in its submissions found no fault with the trial court judgment, and called to aid the case of National Bank of Kenya Ltd (supra). It argued that the loan agreement provided that a valuation was required of LR. No. Kaksingri/Kagutu Waregi/ 1222 but the Appellant was not coerced into signing of the loan facility. That failure on the Appellant to make good on her account to the tune of Kshs. 36,100/- necessitated the Respondent to facilitate her listing with a Credit Reference Bureau therefore the latter's action was justified.
21. In summation, it was submitted that the trial Court interrogated the evidence on record to appropriately arrive at the decision it did as such the appeal ought to be dismissed with costs.

Analysis and determination.

22. With the above in reserve, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal decision in Mumbi M'Nabea v David M. Wachira [2016] eKLR held that the duty of proving the claim contained in the plaint lay squarely on the Appellant and vice versa with respect to the claim contained in the Respondent's statement of defence.
23. In addition, in Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:-

“ [T]he 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 defendants' 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...-. 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.” (Emphasis added)

24. The dispute between the parties herein was founded on contract. Therefore, at the outset, this Court must first answer the question pertaining to its role while adjudicating over a dispute between contracting parties. This Court's role on the matter requires no restatement as the same was well settled in the often-cited decision of National Bank of Kenya Ltd (supra). With the aforesaid in mind, the trial Court rightly noted that it is evident from the pleadings and evidence relied on by the parties, that they were referring to two (2) different loan facilities going by PExh.1 which was dated 08/12/2011 and DExh.1 which was dated 15/12/2011. By the former, it captured security as LR. No. Kanyada/Kanyada Kalanya/3413 whereas the latter had the security as LR. No. Kaksingri/Kagutu Waregi/ 1222. It is further palpable from the record that PExh.1 was not executed as confirmed through PW1's testimony however DExh.1 was duly executed by the rival parties.
25. Despite the Appellant stating that they executed an offer letter in respect of LR. No. Kanyada/Kanyada Kalanya/3413, none was produced before the trial Court. Further, given that there was no facility advanced on the offer letter dated 08/12/2011 whereas no letters of reminders on the latter were evinced and further compounded by the fact that the offer letter was equally not executed, it can be deduced therefrom that the parties hereto did not contract on the offer letter dated 08/12/2011.



26. The question that consequently begs would be how any accruing rights and obligation that the Appellant viewed as contravened by the Respondent's actions would arise from an offer letter that was not executed between the parties. In response to the aforesaid question, the Respondent answered the same by contending that DExh.1 was the actual facility letter on accord of the same having been duly executed as between the parties. Meanwhile, the property that was offered as security for the facility was LR. No. Kaksingri/Kagutu Waregi/ 1222 and not LR. No. Kanyada/Kanyada Kalanya/3413 as testified by the Appellant. That said, by a cursory review of DExh.1, this Court is reasonably convinced that the dispute appertained to the said offer letter- DExH1.
27. Having arrived at the said conclusion, was the Respondent entitled to act as it did by making an adverse reference as against the Appellant to Credit Reference Bureau Africa Limited for the sum of Kshs. 36,100/- in respect of the letter of offer dated 15/12/2011?
28. Firstly, the Court must interrogate the intention of the parties as per DExh.1. The said letter of offer was duly executed by both parties. Before the trial Court, PW1 did accede to the detail that she signed documents in respect of a Kshs.1,000,000/- facility being sought from the Respondent. She further confirmed that LR. No. Kaksingri/Kagutu Waregi/ 1222 was hers and that she had not transferred the same in her name. It can therefore be reasonably concluded, as the trial Court found, that the Appellant had knowledge of the contract in respect of the facility and its terms thereof. By DExh.1, part of the terms and conditions on approval of the loan facility was a valuation of the security being LR. No. Kaksingri/Kagutu Waregi/ 1222. Adjacent to the said, terms and condition was a clause on Fees and Expenses which provided that: -
- “The borrower shall pay to the lender on demand on a full indemnity basis, whether or not the banking facilities have been drawn down, all expenses including legal charges or the lender and the borrower's advocates, out of pocket expenses together with any taxes thereon incurred in the banking facilities accorded by the lender to the borrower as well as stamp duties, auctioneers fees and other costs and expenses which the lender may incur in taking action for the recovery of any indebtedness by the borrower to the lender.”
29. Going by DExh.4, it is unquestionable that the Respondent incurred costs to the tune of Kshs. 36,100/- that was supposed to be offset by the Appellant given the above clause. The said clause qualified that the same was payable “On Demand” by the Respondent. From the Respondent's evidence, no letter was provided demanding the payment of the said amount upon the said expense of valuation being incurred despite DW1 testifying to the contrary. Further, D.Exh.5, was a response to the Appellant's counsel letter, to wit, the demand made therein by the Respondent was only made after the fact. Equally, having reviewed the correspondences between the parties as evinced before this Court, particularly DExh.5, in the Court's reasoned opinion the mention of Crystal Valuer's Ltd instead of Acumen Valuers Ltd appeared to be a typo graphical error rather than being diverse, inconsistent and conflicting information as averred by the Appellant.
30. Secondly, by a cursory review of PExh.2, PExh.8 and DExh.4, it would appear that between 2012 and 2014 the Respondent was negatively reported by the Appellant to Credit Reference Bureau Africa Ltd for the unpaid valuation sum of Kshs. 36,100/- that was debited to Appellant's account - DExh.6. However, as rightly argued by the Appellant, The Banking (Credit Reference Bureau) Regulations, 2008 as amended by The Banking (Credit Reference Bureau) Regulations, 2013 provided that the Respondent ought to notify the Appellant (customer) within one month before a loan becomes non-performing that it would submit to a Reference Bureau the information on the loan immediately it becomes non-performing. (See Section 28(1)(a) of the former and Section 50(1)(a) of the latter.)



31. Before the trial Court, the Respondent did not produce any such notice being issued to the Appellant prior to her adverse listing at the Credit Reference Bureau Africa Ltd. Therefore, was the Respondent in breach of its fiduciary duty on the backdrop of a customer-client relationship it had with the Respondent?

Black's Law Dictionary, 11th edition, defines a 'fiduciary duty as: -"a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust;... a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person-....Also termed as duty of loyalty, duty of fidelity; duty of faithful service; duty to avoid conflict of interest."

32. As earlier deduced, it would seem that by the Respondent's actions, the Appellant's contestation that the Respondent acted in bad faith, contra-statute and in breach of its fiduciary duty would seem justified. Meanwhile, the trial Court in its judgment failed to appraise itself of the said provisions of The Banking (Credit Reference Bureau) Regulations, 2013 as read with Article 35 of the Constitution. As such, the learned Magistrate must be faulted for doing so.

33. At this juncture, what is left for determination is whether the Appellant was indeed entitled to any recompense by way of damages as claimed in the plaint.

34. PW1 averred and testified that by dint of the negative listing at a Credit Reference Bureau, she missed the opportunity to obtain a facility in the sum of Kshs. 350,000/- from Kenya Commercial Bank (KCB). To shore up the latter, PW1 relied on PExh. 2, which in part captured that KCB was unable to proceed with the Appellant's application owing to a negative report they had received from Credit Reference Bureau Africa Ltd, on being a loan defaulter. Undoubtedly and as earlier found, the Respondent's action was in bad faith, unlawful and in breach of its fiduciary duty when it failed in the first instant to demand for the valuation fees and proceeded to negatively list the Appellant as a defaulter without notice.

35. Earlier, this Court in, *Reuben Kioko Mutyaene v Kenya Commercial Bank Limited; Transunion t/a Credit Reference Bureau Africa Limited (Interested Party)* [2020] eKLR purposefully stated that: -

"As much as Referral of positive and or negative information of a party to the CRB is a legal requirement under the Banking Act and the CRB Regulations, wrongful, reckless and negligence of a defendant in so doing, may affect a party negatively in regard to their creditworthy, with dire consequences."

36. Therefore, it would follow as a consequence of the Respondent's actions, that the Appellant was unable to obtain a financial facility from KCB as evinced by PExh.2. A perfunctory perusal of the latter exhibit, it can be garnered therefrom the declined facility from KCB was Kshs. 350,000/.

37. The nature of loss was clearly identifiable. The Respondent's action must have caused the Appellant some form of embarrassment when having been labelled a loan defaulter in the said letter and thus, the Appellant was justified to claim damages on account of the inconvenience and embarrassment in the circumstances.

38. It would be remiss not to observe that Section 19(1) of The Banking (Credit Reference Bureau) Regulations, 2013 would not offer succor to the Respondent, given that its failure to notify the Appellant of the negative listing to a CRB was not done in good faith. Nevertheless, other than the declined facility, there was no projected loss occasioned by the latter, to wit, an award of damages



to the tune of Kshs. 5,000,000/- as sought for by the Appellant. Therefore, considering the matters in question, the Respondent's actions, inconvenience and possible embarrassment occasioned to the Appellant and award of Kshs. 300,000/- would be reasonably sufficient.

Disposition.

39. In the end, this Court while applying its mind to the facts of the case and the law, finds that the Appellant, on a balance of probabilities has established her case against the Respondent to the required standard and holds that the trial Court was in error when it dismissed the Appellant's case.
40. To that extent therefore, the lower Court's judgment is hereby set aside, and substituted with a finding that the Appellant's suit as filed in the trial court is allowed as prayed, and an award of general damages in the sum of kshs.300,000/= is awarded in favour of the Appellant.
41. The Appellant is also awarded costs of the suit both before the lower Court and before this Court.
Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

JANET MULWA

JUDGE

