



**Bett v Ndege Chai Cooperaive Savings and Credit Society Ltd (Civil Appeal
15 of 2022) [2025] KEHC 1757 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1757 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL 15 OF 2022
JR KARANJA, J
FEBRUARY 27, 2025**

BETWEEN

CLARA CHEPNGETICH BETT APPELLANT

AND

**NDEGE CHAI COOPERAIVE SAVINGS AND CREDIT SOCIETY
LTD RESPONDENT**

JUDGMENT

1. The appeal is against an interlocutory order/decision or ruling made on the 7th February, 2022 by the Resident Magistrate in Kericho CMCC No. 292 of 2015. The supporting grounds are set out in the amended memorandum of appeal dated 28th November, 2023 as follows: -
 1. That the Learned Trial Magistrate erred in law and facts in denying the Appellant leave sought to file an amended notice of motion after dismissing the Appellant notice of motion dated 25th October, 2021 and amended on 10th November, 2024 seeking the arresting of the judgement as being overtaken by events.
 2. That, the Learned Trial Magistrate erred in law and fact in denying the Appellant her right of fair hearing.
 3. That, the Learned Trial Magistrate erred in law and fact by shutting out the Appellant from the proceedings in Kericho CMCC No. 2092 of 2015 despite her presence in court.
2. The Appellant prays that the appeal be allowed and that the impugned order of the 7th February, 2022 and all its consequential orders be set aside. However, the Respondent opposed the appeal which proceeded to hearing by way of written submissions. The Appellants submissions were filed herein by Enock Anyona Miruka & Co. Advocates while those of the Respondent were filed by Mutai Kiprotich & Co. Advocates.



3. The appeal was given due consideration by his court on the basis of the supporting grounds and the rival submissions. The courts duty was to re-visit what transpired at the Trial Court and arrive at its own conclusions. This was aptly put by the Court of Appeal in *Abok James Odera T/a A.J Odera & Associates v John Patrick Machira T/a Machira & Co. Advocates* [2013] eKLR, in the following terms:-

“This being a first appeal, we are reminded of our primary role as a first Appellate court namely, to e-evaluate, re-assess and re-analyze the extracts of the record and then determine whether the conclusions reached by the Learned Trial Judge are to stand or not and give reasons either way”

4. Basically, in the main suit the Respondent vide the plaint dated 15th July, 2015 sued the Appellant and for (4) others for the loss of a sum of Ksh. 1,733,436/46 through unlawful and fraudulent acts. It was pleaded that the Appellant Second Defendant was at the material time an employee of the Respondent/Plaintiff designated as an M-pesa administrator and while in the course of her duty did misappropriate or fraudulently and/or negligently caused the loss of the Respondent’s Ksh 1,733,436/46.
5. It was also pleaded that the Appellant in a bid to make up for the loss jointly with another paid Ksh 631,760 and committed themselves in writing to clear the balance of Ksh 916,819 by 27th February, 2015, but later refused, neglected and/or otherwise failed to pay the amount.
6. The Respondent therefore prayed for judgment against the Appellant for the amount of Ksh 950,000 and Ksh 916,819/= respectively. The Appellant denied the claim in her statement of defence dated 24th August, 2015 and prayed for its dismissal with costs.
7. The Trial Court record indicates that several interlocutory applications were made before and during the hearing of the suit from the 18th December, 2018. The Respondent/Plaintiff called a total of four (4) witnesses and closed its case on 25th October, 2021. It was on that date that the Respondent called its last three witnesses and proceeded with the case in the absence of the Appellant/second defendant and her advocate. The Trial Court noted that the hearing date had been fixed by consent and directed that the hearing do proceed. The Appellant’s absence was never explained.
8. After the closure of The Respondent’s case and in the absence of the Appellant the Trial Court ordered and marked the Appellant/Defendant’s case closed along with that of the Respondent. Thereafter, the matter was fixed for mention for submissions on 2nd November, 2021 by which date the Respondent’s submissions had been filed, but not those of the Appellant.
9. Instead, the Appellant on that 2nd November, 2021 brought to the attention of the court that she had filed an application vide a notice of motion dated 29th October, 2021. In the circumstances, the court ordered that the application be heard first and by way of written submissions to be filed within fourteen (14) days. The ruling in respect thereof was by consent fixed for 30th November, 2021 but was on that date rescheduled to the 7th December, 2021 when it was delivered in the presence of all the parties.
10. This appeal is against that ruling delivered and dated 7th December, 2021 and not 7th December, 2022 as erroneously indicated in the amended memorandum of appeal dated 28th November, 2023. Undoubtedly, the error was typographical and excusable. It does not touch on the substance of this appeal, but left the Respondent unamused as may be deciphered from its submissions herein.
11. Be that as it may, the impugned ruling dealt a blow to the Appellant’s application dated 29th October, 2021 which was thus dismissed with costs for being an abuse of the court process and for want of merit.



The question here is whether indeed the application was an abuse of the court process and/or whether it lacked merit for exercise of the court's discretion in favour of the Appellant.

12. The Notice of Motion dated 29th October, 2021, was for orders that the writing and delivery of the judgement be arrested and that the proceedings and orders of the 18th October, 2021 be reviewed and/or set aside for the matter to be re-opened and to start as fresh.

The grounds for the application were set out in the body of the notice of motion and supported by the Appellant's averments contained in her supporting affidavit dated 29th October, 2021.

13. The Respondent opposed the application on the basis of the grounds and averments contained in its replying affidavit deposed by its chief executive officer/manger, Gilbert Bett on the 4th November, 2021. Both parties filed their response submissions in support and opposition to the application. These were given consideration by the Trial Court which then dismissed the application for the reasons stated hereinabove.
14. Having reconsidered the application on the basis of the supporting grounds, the rival submissions and the material on the court record, this court is of the view that with regard to the prayer for arresting the writing and delivery of the judgement respecting the main suit, it was premature and misconceived for reasons that the matter was not fully complete and ripe for judgement writing and delivery. Final submissions had not been received from both sides and no date had been set for delivery of the judgment. In any event, a judgment which has not been conceived or not existent cannot be arrested.
15. In fact, when the matter was mentioned on 2nd November, 2021 for purposes of confirming the filing of submissions by both sides and for having a judgment date, it was put to a halt to await the hearing and determination of the Appellant's impugned application dated 29th October, 2021.
16. It was after the ruling of the 7th December, 2021 that the proceedings related to the main suit continued and a date for judgment was fixed [i.e 1st February, 2022]. The judgment was however, delivered on 8th February, 2022, thereby paving way for the appellant to file a substantive appeal if aggrieved or dissatisfied with the judgement.
17. With regard to the prayer for review or setting aside the proceedings of the 18th October, 2021 in the impugned application dated 29th October, 2021, this court is of the view that the prayer was pure misconception as the court record does not allude to any proceedings having been conducted by the court on 18th October, 2021. Instead the record alludes to the proceedings conducted on 12th October, 2021 and 25th October, 2021.
18. The purported amendment of the impugned application to accord with the proceedings of the 25th October, 2021 was improperly and irregularly sneaked into the court record, hence could not alter or make any positive impact on the impugned application for which the impugned ruling of 7th December, 2021 related. In any event, the Appellant did not satisfy the applicable principles for setting aside orders or proceedings as enunciated in the case of *Mbogo v Shah* EALR [1968]13.
19. As a whole, it is this court's opinion that the Appellants impugned application was unmerited and primarily meant to buy time and delay the expeditious disposal of the suit. This court would therefore agree with the Trial Court that the application was an abuse of the court process and devoid of merit. In the circumstances, the three grounds of appeal are unsustainable.

In sum, this appeal must and is hereby dismissed with costs to the Respondent.

20. Ordered accordingly.



J.R. KARANJAH

JUDGE.

DATED AND DELIVERED IN 27TH DAY OF FEBRUARY, 2025.

