Kenya Women Microfinance Bank v Kering & another (Civil Appeal E007 of 2024) [2025] KEHC 3922 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3922 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E007 OF 2024

E OMINDE, J

MARCH 26, 2025

BETWEEN

KENYA WOMEN MICROFINANCE BANK ..... APPELLANT

AND

JOSEPH KIPCHIRCHIR KERING ..... 1ST RESPONDENT

LEAH JELAGAT ..... 2ND RESPONDENT

JUDGMENT

1. This Appeal arises out of the Judgment delivered on 22/12/2023 in Eldoret Chief Magistrate's Court Civil Suit No. E193 of 2021. The Appellant was the Defendant in the suit, the 1st Respondent and 2nd Respondents were the Plaintiffs.

2. The background of the matter is that by the Plaint filed in the said suit on 12/03/2021 through Messrs G.K Okara & Co. Advocates, the Respondents pleaded that they held an Inuka Transactional Account, Account no. 1004863645 with the Appellant at its Eldoret Branch and in the month of November 2017, they approached the appellant for a loan facility of Kshs. 1,000,000/-. The Respondents offered the logbook for motor vehicle registration no. KBZ 420W in the name of the 1st respondent to secure the facility. The appellant then informed them that Kshs. 630,000/- had been approved as the first instalment and the balance of Kshs. 370,000/- would be topped up in a period of three months. The respondents contended that the balance of Kshs. 370,000/- was never credited to their account and further, that they were not given the letter of offer and loan agreement signed by them despite numerous requests.

3. It was further pleaded that they embarked on repaying the loan by paying Kshs. 37,000/- monthly out of which Kshs. 34,000/- went towards settling the loan whereas Kshs. 3,000 went towards savings. The respondents contended that they paid the defendant Kshs. 1,828,728.54/- the last payment being on 18/11/2020 when the defendant informed them that the loan had been fully settled. They pleaded

that the loan amount they were paying was unknown to them and further, that the appellant refused to release the logbook for the motor vehicle. They sought to have the appellant compelled to release the log book and provide them with the letter of offer and the loan agreement. Additionally, that accounts between the parties be taken and the overpaid amount be released to the respondents.

4. The Defendant filed a defence on 09/04/2021 through the firm of Messrs Mburu Maina & Co Advocates denying the claim and the particulars alleged. After the close of pleadings, the matter proceeded to trial.

Plaintiff's Case

5. PW1 was Joseph Kipchirchir Kering, the 1st Respondent. He stated that the 2nd respondent was his wife and that they borrowed money from the Appellant. He adopted his witness statement and produced the exhibits on record. The witness then adopted his statement and produced the documents as exhibits. He stated that they (The Respondents) borrowed Kshs. 1,000,000/- from the Appellant and Kshs. 610,000/- was disbursed to their accounts. He produced the Bank statement as PExh3. That they used the logbook of their motor vehicle KBZ 424W which was discharged after they filed their case. The Log Book was produced as PExh4. He testified that no letter of offer was given to him despite his request for the same. He also testified that he overpaid the loan.

6. Upon cross examination he stated that he was not given the copy of the loan agreement and was told it can only be traced at headquarters. That he paid a total of Kshs. 1,800,000/- and he used to pay Kshs. 37,000/- any discrepancy. He concluded by stating that the transfer was done later.

7. PW2 was the 2nd Respondent herein, Leah Jelagat. She adopted her witness statement dated 25/02/2021 and stated that the 1st respondent was her husband. Further, that they borrowed Kshs. 1,000,000/- and did not see a loan agreement for Kshs. 630,000/- that was approved. She testified that they were only given Kshs. 610,000/- and have paid back Kshs. 1,828,748.54/- in total. Additionally, that they were given the logbook after they filed their case.

8. In cross examination she testified that the value of the vehicle was less than Kshs. 1,000,000/- and that they were not given the loan agreement. She then stated that she read the loan agreement before she signed and that they paid for 36 months.

9. PW3 was Collins Kipngetich Too, an accountant. He stated that he did calculations based on the statement he produced under the instructions of the respondents herein. Using the simple interpretation his finding was that the respondents were to pay Kshs. 1,046,000/-. Further, that the appellant used case switch and the plaintiff was overcharged by Kshs. 622,522/-.

10. In cross examination he stated that case switch is the ideal scenario and further, that upon looking at the loan agreement, the amount paid was different from the amount in the loan agreement. The plaintiffs closed their case and the defence case commenced.

Defendant's Case

11. DW1 was Festus Kipkorir Kiprotich, a branch manager at KWFT. He adopted his witness statement and produced the list of documents dated 28/06/2021 as exhibits. He additionally produced a supplementary list of documents dated 29/12/2021. He stated that Kshs. 1,227,057/- was the amount recommended and that the amount credited was Kshs. 1,850,152. Further, that in that figure is the loan disbursed of Kshs. 630,000/- and there were other charges including; Kshs. 38,371 – Insurance Cover, and Kshs. 2,620/- Credit life insurance. He averred that the system picks money from the personal account to the loan amount.

12. In cross examination he stated that the clients borrowed Kshs. 630,000/- and that it was the second time they had borrowed. They had cleared the first loan. He averred that the loan payment offer dated 20/11/2017 was a loan advice teaching them about the loan and not a top up. The client was to pay Kshs. 29,100 for the loan advice indicated Kshs. 37,100/- and that the loan advice was not part of the agreement. He stated that they did not overcharge the client and that the client doubled the amount loaned. That the loan was cleared in 2020 and the security was discharged upon request of the customer. Additionally, that there was no evidence of reminder to pay the discharge amount and that they usually insure the client at his expense but there was no communication on the insurance.

13. Upon considering the pleadings, testimonies in court and the evidence tendered, the trial magistrate entered judgment on 22/12/2023 in favour of the respondent to wit;

    i. Kshs. 622,522/- being overpayment be paid to the Plaintiffs.

    ii. The same Kshs. 622,522 to attract interest at the rate of 22% from 20/11/2018 till payment in full.

    iii. An order compelling the defendant to unconditionally discharge the logbook for motor vehicle registration no. KBZ 420W Toyota Saloon.

    iv. The plaintiff shall have costs of the suit.

14. Aggrieved by the said decision, the Appellant filed this Appeal vide the Memorandum of Appeal filed on 10/01/2024. He proffered 9 grounds as follows:

    i. The learned Magistrate erred in law and fact by entering judgment for the Respondents Notwithstanding the fact that the Respondents had not proved their case on a balance of probability.

    ii. The learned trial magistrate erred in law and fact in his analysis of the facts and law on the appellant's right to vary the repayment instalments by the Respondents, thereby amending the contract between the parties and arriving at a wrong conclusion to the prejudice of the Appellant.

    iii. The Learned trial Magistrate erred in law and fact by failing to appreciate the law on award of special damages by awarding the sum of Kshs. 622,522/= as overpayment, a sum that was neither specifically pleaded or proven.

    iv. The learned trial magistrate erred in law and fact in failing to appreciate that the total debits of Kshs. 1,828,728.54/= erroneously relied on as the total repayment amount by the Respondents and their witnesses included the loan drawdown/disbursement sum of Kshs. 630,000/= that was credited to the customer's account and thereafter debited upon withdrawal and/or application of loan/account charges.

    v. The Learned trial Magistrate erred in law and fact by failing to appreciate the Respondents evidence tendered by the Respondents that they had only paid monthly sums of Kshs. 34,000/= for thirty-six months giving a total of Kshs. 1,224,000/= contrary to the accountant's evidence that the Respondents paid Kshs. 1,828,728.54/=.

    vi. The Learned trial Magistrate erred in law and fact by considering the flawed evidence of the accountant in a vacuum thus arriving at the wrong conclusion given the inconsistencies in the evidence tendered by the Respondents.

vii. The Learned trial magistrate erred in law in awarding interest at the rate of 22% from the date of last deduction which it interpreted to be 20/11/2018 when the Respondents had pleaded 18/11/2020 as the date of the last deduction.

viii. The Learned trial magistrate misdirected himself in granting orders compelling the Appellant to discharge the Respondents' motor vehicle which orders had been overtaken by events as admitted by the Respondents.

ix. The learned trial magistrate erred in law and fact by disregarding the Appellant's vital evidence and in generally failing to consider, analyse and appreciate the Appellant's pleadings, submissions and authorities thereby arriving at a wrong conclusion on the issues in dispute between the parties.

Hearing of the appeal

15. The Appeal was canvassed by way of written submissions. The Appellant filed its submissions on 04/11/2024 while the 1st Respondent filed his submissions on 28/01/2025.

Appellant's Submissions

16. Counsel for the appellant in their submissions placed emphasis on the provisions of Sections 107 and 109 of the *Evidence Act* and stated that the provisions therein have been restated in very many civil cases including in Muriungi Kanoru Jeremiah v Stephen Ungu M'mwarabua (2015) eKLR. He further submitted that the standard of proof in civil cases is on a balance of probabilities and that the various contradictions in the respondents' evidence during trial rendered the said evidence insufficient for the court to uphold the claim. He attributed this to the fact that there was no evidence in the account statement to prove the respondents had overpaid the loan amount, yet this was the document most relied on by the respondents.

17. Learned counsel urged that they would contrast the findings of the court sought to be impugned by way of the grounds set out as 4 and 5 in the Memorandum of Appeal against the evidence presented at trial. He submitted that the Respondents at paragraph 10 of the Plaint averred that they repaid a sum of Kshs. 1,828,728.54. That in the 1st Respondent's testimony during cross examination he stated that he paid Kshs. 37,000/= through M-pesa for 36 months which, in the appellants' calculation totalled Kshs. 1,332,000.00/=.

18. He urged that it is clear that the Respondents had, by this testimony, failed to prove the allegation on overpayment as the said figures do not tally. Additionally, Counsel submitted that this is even before their further contention in the same said paragraph that their last instalment was Kshs. 31,450.00/= and their admission at paragraph 9 of the Plaint that out of the payment instalments, Kshs. 3,000/ = went to their savings meaning not all the amounts they paid were allocated to the loan recovery.

19. Counsel urged that the details of payment in the account statement clearly show that not all payments were made by the Respondents through Mpesa and, that the said payments were not made in equal instalments as claimed. Counsel urged the court to undertake its own calculation and reach its own conclusion. He submitted that the court would find that the total Mpesa payments total Kshs. 1,236,294.00 while the other deposits total Kshs. 57,258.00 making the total deposits paid by the respondents to be Kshs. 1,293,552.00. Further, that this admission and fact contradicts the claim that the Respondents paid the sum of Kshs 1,828,728.54 as claimed in the plaint.

20. Counsel referred the court to paragraph 9 of the Plaint, where the Respondents pleaded that out of the Kshs. 37,000.00 a sum of Kshs. 3,000.00 was deductible per month as savings. That this

therefore means that the appellant only applied Kshs. 34,000.00 for a period of 36 months towards loan repayment making a total of Kshs. 1,224,000.00. Having pleaded so, the Respondents were prohibited from giving evidence that departed from their own pleadings and as such, the accountant's testimony that the court heavily relied on, ought to have been disregarded from offending this cardinal principle of law as enunciated in Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR where the Court of Appeal held;

> " Learned counsel for the appellant is with due respect to him, wrong in his submission that the appellant was entitled to proceed on a case that ran contrary to the pleading in its defence. The appellant was bound by the pleadings. The defence which was not amended to allow' for the learned judge to consider issues that the appellants witness was introducing through evidence in court"

21. Counsel additionally cited the case of Adetoun Oladeji (NIG) Ltd v. Nigeria Breweries PLC S.C. 91/2002 cited with approval by the Court of Appeal in Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR. He submitted that from the account statement and the debit and credit entries, it is clear that the court erroneously relied on the amount indicated at the top of the said statement without interrogating the contents of the said debit entries only because an accountant had supported the respondents' case. Further, that had the court taken a keen interest on the appellants' final submissions, it would have noted that the total debits indicated in the account statement comprised of the respondents' payments, cash withdrawal upon loan drawdown and various applicable charges being; loan charge, loan set off charge, standing order fee, maisha plus charge, loan claim among other charges payable as agreed under Clause 13 of the Loan agreement. Clearly, these were not figures representing payments made by the Respondents as the said payments in accounting practice are reflected in the credit side of the account statement.

22. Counsel reiterated the submissions by the appellant in the trial court by specifically referring this court to page 54-64 of the Record of Appeal which contains debit entries number 3 and 8 of the account statement for Kshs. 18,700.00/= and Kshs. 600,000.00/= on account of loan charge and cash withdrawal, which formed part of the figures that are captured as total debits of Kshs 1,828,728.54, taken by the court as the total amount paid by the respondents. He urged the court to find that it was erroneous for the court to find that these amounts were also paid by the Respondents when the transaction reference clearly indicate that they were not received from the Respondent, a fact further supported by the Respondents own testimony that they made 36 monthly instalments which testimony was also reproduced at page 2 of the Judgment.

23. Counsel urged the court to refer to paragraph 11 of the Plaint where the Respondents pleaded that Kshs. 610,000.00/= was disbursed to them and to cross reference this averment with the contents of entry number eight of the debits in the account statement that shows the Respondents withdrew Kshs. 600.000.00/=. He stated that the trial court's error in analysing the entries in the account statement is also seen from the contradicting analysis of the payments made by the respondents on the evidence tendered at page 2, line 20 of the Judgment where it notes the payment of a sum of Kshs. 37,000/= through M-pesa for 36 months and the final findings at page 6 of the Judgment where the trial court then shifts to consider the contradicting and unsupported evidence of the accountant that the respondents paid Kshs 1,828,728.54. The end result of this error was that an order was made for the respondents to be paid money they had withdrawn and money that was agreed to be charged as a loan charge which, if not set aside, would amount to assisting the respondents to unjustly enrich themselves by receiving a double benefit at the expense of the appellant. He cited the case of Samuel Kamau Macharia v Kenya Commercial Bank Limited (2003) eKLR in support of this submission.

24. Counsel submitted that it was erroneous for the court to find that all payments were meant to repay the loan when the respondents themselves had at paragraph 9 of the Plaint pleaded that out of the 37,000.00, a sum of Kshs. 3,000.00 was deductible per month as savings. The failure by the court to consider this fact means even the court did not take into consideration accountant's report it alleges it relied on, as the said report, at the last entry of its conclusion, states the overpayment was Kshs. 514,552.01/= to which then savings of Kshs. 108,000.00 were added to make Kshs. 622,522.01, the total sum the court erroneously found to be an overpayment.

25. Counsel reiterated that the evidence offered by the accountant, PW3, was not in tandem with what was pleaded and it ought to have been disregarded from the onset based on the principle of law that bars a party from adducing evidence contrary to what is pleaded. Further, that in the unlikely event the court opts to give consideration to the said evidence, the said evidence was given in a vacuum, was contradictory, based on illogical and irrational reasoning and based on wrong assumptions.

26. Counsel posited that the Court had no basis in fully relying on this witness without testing his evidence against in the contest of all the other evidence, referring the court to the decision in Christopher Ndaru Kagina v Esther Mbandi Kagina & another [2016] eKLR.

27. On special damages such as the sum of Kshs. 622,522/= awarded to the plaintiff in the judgment, counsel urged that the award was erroneous as it is trite law special damages must be specifically pleaded and proved which did not happen in this suit. He cited the case of China Wu Yi Limited & another v Irene Leah Musau [2022] eKLR which defined special damages in the following terms;

> " Special damages are those damages which are ascertainable and quantifiable at the date of the action."

28. Counsel urged that from the foregoing definition, it's clear that the amount alleged to have been overpaid was ascertainable at the time of institution of the suit given the Respondents had already secured the account statement, were aware of the loan amount disbursed, payments made and had engaged an accountant. Having failed to plead and particularize this alleged specific damage, the court was precluded from making any order on the said amount unless the parties, by consent, had allowed it to do so. No consent to this effect was made. Counsel cited the case of Rosemary B. Koinange (suing as legal representative of the Late Dr. Wilfred Koinange and also in her own personal capacity) & 5 others v. Isabella Wanjiku Karanja & 2 others [2017] eKLR in support of this submission.

29. He further submitted that from the Plaint, the Respondents did not ascertain and quantify their alleged overpayment for the Appellant to adequately respond but only averred at paragraph 13 of the Plaint that they had a feeling they had overpaid the loan without stating the amount allegedly overpaid. The Court took this averment as having met the threshold and counsel urged that this was a matter that was not available for determination through feelings but through specific quantifications. That in awarding the said sum, the court wandered off the pleadings into the respondents' feelings, quantified a specific damage outside the law and made an award of what it thought was a right amount to compensate a loss that had not been suffered. Counsel cited the Court of Appeal's decision in Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd [1992] KLR 177 in support of this submission.

30. Counsel submitted that it was incumbent upon the respondents to prove the specific loss of Kshs. 622,522/= as stated in George & another v Babu (Civil Appeal El30 of 2023) [2024] KEHC 3986 (KLR) (24 May 2024) (Judgment) cited with approval in David Bagine v Martin Bundi [1997] eKLR. Further, that the Respondents failed to meet this burden as no evidence that meets the test of a balance of probabilities was tendered to justify this award. He urged that despite having made prayers for

accounts to be taken, no such exercise occurred as contemplated and therefore, the award of special damages was unjustified.

31. Counsel urged that following the erroneous award of the special damages of Kshs. 622,522/=, the trial court, without any basis proceeded to award the Respondents interest on the said sum at the rate of 22% from the date of the last deduction it stated was 20/11/2018 when the Respondent's pleadings at paragraph 10 of the Plaint had pleaded that the last payment was on 18/11/2020. In doing so, the trial magistrate did not explain why it was granting the respondent interest on amounts they had not remitted to the appellant or why it was amending the Plaintiffs pleadings suo moto without granting the Appellant the right to respond to the amendment.

32. That the date of payments was so fundamental in this suit for the parties to address such that the court was not allowed to make a determination on the same if it was not contained in the plaint. By doing so, the court incorrectly calculated interest on the unsubstantiated loan overpayment amount and awarded compensatory special damage from the wrong date. This act increased the interest without basis and unjustly burdened the appellant. Counsel further reiterated that the Plaintiff had stated that the payments were being made in monthly instalments and that these instalments included savings of Kshs 3,000/= per month which savings were not the subject of the 22% interest rate as it was only applicable to the loan advanced. In doing so, the court ended up unilaterally amending the parties' contract by applying loan interest rate on savings and directing that the Respondents be paid interest for money which they held and were yet to deposit with the appellant, from a date that was not pleaded or supported by evidence. As such, it arrived at an unfair calculation, resulting in a judgment amount that would unjustly enrich the Respondents. In conclusion, counsel cited the decision in National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & Another, where it was held-;

> " A court of law cannot rewrite a contract between parties. The parties are bound by the terms of the contract unless coercion, fraud or undue influence are pleaded and proved."

33. Counsel urged that while testifying in court, the Respondents confirmed that their motor vehicle had been discharged and that they had been given the logbook yet the court ignored this fact in its judgment and made orders directing the appellant to unconditionally discharge the motor vehicle's logbook. The order was therefore not only redundant but also unnecessary as it had been overtaken by events. He urged that this misdirection supplements the submission the trial court did not keenly and properly analyse the evidence it had been presented to it thus causing a miscarriage of justice.

34. On the failure to consider the Appellant's evidence, counsel submitted that the court fell in error when it failed to consider the testimony and explanation on the contents of the account statement by the Appellant's witness in its Judgment. In his testimony, the DW1 explained to the court the contents of the statement and in addition, he provided a loan amortization table all of which the court failed to address in its judgement. In addition, despite being addressed by DW1 that the log book had been discharged, a fact the Respondents confirmed, the court proceeded to order and direct the said logbook to be discharged clearly showing that it did not take the evidence of the appellant into consideration.

35. Counsel submitted that as a banker, DW1's evidence on the entries in the account statement and the transactions that had occurred between the parties ought not to have been disregarded by the trial court. Further, that despite having guided itself properly that it did not have the power to rewrite the contract between the parties, the trial court then (at page 5 of its judgment) then 'super dived' into the arena of the agreement and made opinions and conclusions that basically amended the terms of the loan agreement contract by finding illegalities in the exercise of the appellant's power to vary the repayment instalments which illegalities had not been pleaded or proven, and did not form any part of the contest. This finding was made in total disregard to the contract between the parties. In addition,

the court ignored the submissions made by the appellant which would have aided the court in raising the fundamental issues in the dispute. He urged the Court to find that the trial court fell into error when it failed to adequately assess the appellant's evidence, warranting this court's intervention to set aside the judgment.

36. On costs, counsel urged that they are at the discretion of the court and ordinarily follow the event. He urged the court to find merit in the appeal and to grant the appellant costs both at the Subordinate Court and the Costs of this Appeal.

1st and 2nd Respondents Submissions

37. Counsel for the Respondents submitted that the learned magistrate's judgment was proper and reasonable, that he considered all the evidence tendered in court by both parties and made the right call when granting the orders sought and assessing the special damages of Kshs. 622, 522/= being the total amount overpaid by the Respondents to the Appellant. Further, that the award of ksh. 622,522 / = being the total amount overpaid to the Appellants, was proper given the fact that the respondents were advanced a loan of Kshs. 610, 000/= which loan was to be repaid in monthly instalments of Kshs. 29,100/=, terms which were illegally changed by the Appellant vide a loan advice on 20th November, 2017, revising the terms of payment to Kshs. 37,100/= for 36 monthly instalments.

38. Counsel further submitted that in their testimony before court, the appellant's witness expressly informed court that the initial loan agreement indicated that the respondents were to repay the loan in instalments of Kshs. 29,100/= and not Kshs. 37,100/=. He further confirmed that there was an overpayment of the loan but cleverly failed to avail to the court the Respondents loan account details The Appellant's witness further confirmed that indeed the Respondents were entitled to an order compelling the Appellant to unconditionally discharge the logbook for motor vehicle registration number KBZ 420 W Toyota Saloon since they had cleared their loan satisfactorily and had even made an overpayment.

39. Counsel urged that based on the above, the judgement by the trial court was rightly so and urged the court not to interfere with the said decision. With regards to costs, counsel urged that this Appeal is not merited and the same ought to be dismissed with costs.

Determination

40. From my above summation of the evidence and the submissions, it is my considered opinion that the issues for determination are as hereunder;

    a. Whether the trial court erred in determining the suit in favour of the Respondents

    b. Whether the trial court erred in its award of damages

41. The principles of an Appeal by way of a retrial were set out in the case of Selle v Associated Motor Boat Co. [1968] EA 123 as follows;

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 this 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 based on the demeanour of a witness is inconsistent with the evidence in the case generally."

42. The standard of proof in civil cases is on a balance of probabilities. The burden of proof is as provided in Section 107 and 109 and Section 112 of the *Evidence Act* to the following effect;

Section 107. Burden of proof

(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 fact it is said that the burden of proof lies on that person. 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.

Section 109. Proof of particular fact.

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

Section 112. Proof of special knowledge in civil proceedings.

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

43. Having considered the pleadings, the testimonies of the witnesses and the exhibits availed by both parties, what is apparent is that the fact that an amount of Ks. 630,000/= was loaned to the respondents by the applicant is not in dispute. It is also not in dispute that the interest was at a flat rate of 22% and that the amount was to be paid over a period of 36 months. It is further not disputed that motor vehicle registration number KBZ 420W was offered and accepted as security for the loan and the same was registered in the names of both parties. It is also common ground that the loan was subsequently paid in full, the motor vehicle discharged and the log book released to the respondents.

44. In their claim in the lower court however, the respondents averred that they "had this feeling" that they had overpaid the appellants in their repayment of the loan advanced and asked that the court so finds and orders that the appellants refund the amount overpaid to the respondents. In their plaint dated 25th February 2021, they sought the following orders;

a. An order compelling the defendant to provide the Plaintiffs with a letter of Offer and the loan Agreement and to give disclosure as to whether the rate of the interest applied is within the Central bank of Kenya Regulations

b. Accounts between the parties to be taken and the overpaid amount to be released to the Plaintiffs

c. An order compelling the Defendant to unconditionally discharge the logbook of motor vehicle registration number KBZ 420W Toyota Saloon

d. Costs of the suit and interest

e. Any such and/or further order that this Honourable Court may deem fit and expedient to grant

45. At the conclusion of the trial, the Hon Magistrate found in favour of the respondents on the claim for overpayment to the tune of Ks. 622,522/= and awarded them inter alia the said amount to attract interest at the rate of 22% from 20th November 2018 until payment in full. By way of this appeal, is the appellant's contention in a nutshell, that the Hon Magistrate entered judgement in favour of the respondents notwithstanding the fact inter alia, that the respondent's did not discharge the burden of proving their allegation of overpayment of the loan advanced to the required standard of proof.

46. I have read the impugned judgement of the Hon Magistrate. In the said judgement, after laying out the claim by the respondents, the Hon magistrate summarised the evidence, cited the relevant authorities on the requirement that the court is not under a duty to re-write the contract that parties have entered into and undertook to guard against doing so, cited the relevant law on expert opinion and that it is not binding, stated that he had perused the loan agreement its terms and conditions and summarised its salient points, stated that he noted that there was a loan agreement indicating a repayment amount of Ks. 29,100/= per month and a loan advice followed which essentially indicated the terms of repayment of the loan followed and that the defendant argued that the agreement was separate from the advice duly executed by the parties. The Hon Magistrate then proceeded to make the following finding;

> "It is expected that the loan agreement should be the same. In the present case, the loan agreement indicates that the plaintiffs were to pay Kshs. 29,100, the loan payment advice dated 20/11/2017 indicates that they were to pay Kshs 37,100. These are two different amounts. To me this is an illegality and the overpayment can be traced to this date since the first deductions accrued on this date as indicated in PEXT 3 item number 3 of the loan statement. From the foregoing, having found the payment illegal, the plaintiffs are entitled to interest at the same rate the defendant war(sic) charging them for the loan advance, that is 22% from the last date that deduction was made"

47. The Hon. Magistrate then stated that he was inclined to consider the opinion of PW3 who testified as an expert witness and whose various calculations revealed that the respondents had done an overpayment. He then proceeded to enter judgement as already herein indicated. The said judgement however does not indicate what documentation the Hon Magistrate used to arrive at the amount awarded as the overpayment. Even assuming he relied entirely on the evidence of PW3 who testified as an expert witness, the court notes that in the report that he produced in court as exhibit, the expert witness gave five possible scenarios on how the alleged overpayment could have occurred. The Hon Magistrate did not state which of this scenarios he had been persuaded by and how the chosen scenario assisted him reach the amount that he awarded. Further as prayed by the appellants in their plaint at prayer (b) that accounts between the parties to be taken and the overpaid amount to be released to the Plaintiffs, there is no indication that the court considered and/or reconciled any accounts as between the parties to enable it reach the amount allegedly over paid as awarded.

48. Further to the above, I also note that apart from summarising the testimony of the DW1 in the judgement, from the above summary of the Hon Magistrates reasoning before reaching his determination, it is abundantly clear that the case of the appellants was not considered on its merits at all. In noting this, the court observes just from the basics of the evidence of the DWI that he sought to clarify the entries that were in the account statement to the following effect; that the PW3 in his analysis included the total loan amount that was credited into the plaintiffs account upon approval by the bank before the plaintiff withdrew the same; that upon withdrawal of the loan amount by the plaintiff's, various bank charges started accruing on account of the loan and these were debited

into the respondents account and that there are therefore debit entries in the statement to that effect which ought not to have been factored in the analysis by PW3; that out of the monthly payment of Ks. 37,000/= per month, 3000/= would go towards the plaintiff's savings and only 34,000/= was for the loan repayment and this too was not taken into account; that all these led to PW3 arriving at an erroneous figure as an alleged overpayment which overpayment was non-existent.

49. I have noted from the said judgement that none of these issues raised by the appellant were considered at all. But even that aside, given that the loan account statement referred to and produced by both parties was with respect to an operational account known as Inuka Transactional Account which the plaintiffs held with the bank, (See PExh 3 & DExh6), the onus was on the respondents to highlight to the court all the entries in the said account statement that were specific to the loan advance and subsequent repayment as opposed to all the other entries for the court to be able to adequately appreciate and separate the entries in the said statement to enable it reach a well informed decision based on the facts of the case. From my perusal of the lower court proceedings, it is clear that this was not done at all.

50. Further, the respondents themselves in their contract for a loan advance with the appellants signed the loan application form (DExh1) for a loan of Ks. 630,000/=, the loan agreement indicating that the loan was to be paid over a period of 36 months at an interest rate of 22% at Ks. 29,100/= per month (DExh4), the loan advice revising the repayment to Ks. 37,100/= comprising of Ks. 34,100/= towards a Biashara Loan and Ks. 3000/= towards savings totalling Ks. 37,100/=. The court notes that nowhere in their pleadings have hey challenged the repayment rate of Ks. 37,000/=. Further even as they sought to challenge the interest rate of 22%, they have not at all pleaded any of the grounds that a party needs to demonstrate to warrant this court interfering with the agreement and/or contract as between the two of them to warrant the court interfering with the agreed interest rate as prayed in their prayer (a) of the Plaint as herein above summarised.

51. Additionally, in their own testimony the respondents themselves stated that they did pay back the loan as agreed in 36 instalments of Ks. 37,000/= per month. They did not at all testify that they paid any monies over and above this amount on any given month or after the expiry of the 36 months. In their evidence, they also confirmed the testimony of DW1, that out the monthly payment of Ks. 37,000/=, Ks. 3000/= would go to their savings account therefore leaving Ks. 34,000/= towards the loan repayment. A simple multiplication of the amount of Ks 34,000/= over a period of 36 month comes to Ks. 1,224,000/= which is the amount the DW1 testified was due and owing as full loan repayment. All in all, based on my above analysis of the evidence, it is my finding that there is no evidence at all to support the allegation of overpayment alluded to by the respondents in their Plaint

52. The appellants also confirmed in their testimony that upon completion of the payment, their motor vehicle was discharged and their log book released. In light of all the above, I am satisfied with the submissions by Counsel for the appellants, that the Hon Magistrate found in favour of the respondents notwithstanding the fact that by their evidence as herein analysed, they failed to discharge the burden of proof as placed upon them by the provisions of Sections 107, 109 and 112 of the *Evidence Act*. In a further consideration of the impugned judgement, in light of my finding that the same does not indicate how the amount awarded as overpayment was arrived at and the fact of compelling the appellant in the said judgement to discharge the log book of the motor vehicle that was offered as security yet the respondents in their testimony had confirmed this to have already been done, it is my very well considered opinion that this is a classic case of a court relying on no evidence to reach its determination.

53. In this regard, given my conclusions on the evidence as I have herein summarised, I am satisfied that the appellant's Appeal has merit and the same is now hereby allowed with costs to be borne by the respondent. Consequently, it is my finding that the impugned judgement of the Trial Magistrate is

erroneous in all its aspects and respects and that the trial magistrate erred in entering judgement in favour of the respondents and awarding an amount of Ks. 622, 522/= as overpayment. The said judgement is now hereby set aside in its entirety.

READ DATED AND SIGNED AT ELDORET ON 26TH MARCH 2025

E. OMINDE

JUDGE