National Bank of Kenya Limited v Onkoba t/a Jafes General Supplies & Contractors (Civil Appeal E121 of 2023) [2025] KEHC 11432 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11432 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E121 OF 2023

HI ONG'UDI, J

JULY 31, 2025

BETWEEN

NATIONAL BANK OF KENYA LIMITED .... APPELLANT

AND

FERDINARD OSIEMO ONKOBA T/A JAFES GENERAL SUPPLIES & CONTRACTORS .... RESPONDENT

(Being an appeal from the Judgment of Hon. L. Arika (CM) in Nakuru CMCC No. 480 of 2018, delivered on 7th December 2021)

JUDGMENT

1. This appeal arises from a Judgment and Orders issued in Nakuru Chief Magistrate Court Civil Suit No. 480 of 2018. In the said suit, the respondent (who was the plaintiff) sued the appellant (who was the 1st defendant) and sought for judgment against the appellant jointly with another for a declaration that the intended sale of all that property known as Nakuru Municipality Block 22/2499 was illegal, wrongful and unlawful. It also sought for costs.

2. The respondent stated in the plaint that vide the letter of offer dated 13th May 2014 the appellant advanced to him banking facilities totaling to kshs. 1,000,000/= being payable by monthly instalments. He further stated that the said banking facilities were secured by way of a legal charge registered against the suit property (Nakuru Municipality Block 22/2499). Additionally, that in satisfaction of his contractual obligations, he had been making payments as agreed under the letter of offer in respect of the aforesaid facilities. However, the appellant purportedly in the exercise of its statutory power of sale, instructed the 2nd defendant therein to sell the suit property. In his view, the intended sale of the suit property was fraudulent and unlawful.

3. On its part the appellant filed a defence where it denied the claim by the respondent and put him to strict proof thereof.

4. The matter was fully heard and the trial magistrate delivered judgment on 7th December, 2021 in favour of the respondent. Being aggrieved with the judgment the appellant lodged the appeal dated 20th June, 2023 on the following grounds:

   i. That the honourable Chief Magistrate erred in Law and fact by finding and holding that the appellant should discharge the Title Number Nakuru Municipality Block 22/2499 held as Security.

   ii. The honourable Chief Magistrate erred in finding that the respondent had cleared his loans or overdrafts.

   iii. The honourable Chief Magistrate erred in allowing the respondent to benefit from illegally altered overdraft records.

   iv. The honourable Chief Magistrate erred by failing to find that the respondent admitted to colluding with a bank staff to siphon money from the respondent's account to the detriment of the appellant.

   v. The honourable Chief Magistrate erred in finding that an acquittal discharge in a Criminal Case against the respondent absolved him of his civil or financial obligation with the appellant.

   vi. The honourable Chief Magistrate erred in law in aiding the respondent break the law and benefit from illegal and unauthorized withdrawals.

   vii. The judgement delivered on 7th December, 2021 fell short of the required standard for failing to appreciate or consider the defence Case.

   viii. The honourable Chief Magistrate erred in Law by holding that the Appellant had breached Section 44A of the *Banking Act* or in Duplum Rule or in deed that that section was applicable in the circumstances of the case before her.

   ix. The honourable Chief Magistrate erred in holding that the statutory notice issued was invalid.

5. The appellant urged the court to set aside the judgment delivered on 7th December 2021 and the respondent's lower court case be dismissed with costs.

6. The Appeal was canvassed through written submissions.

Appellant's submissions

7. These were filed by Kamonjo Kiburi & company advocates and are dated 10th May, 2024. Counsel gave a brief background of the case and submitted on the grounds listed in the memorandum of appeal.

8. Regarding ground 1 and 2 counsel submitted that the trial court erred in law by holding that the respondent had cleared his loan and overdraft. That the total drawings were kshs. 9, 984,784/= while the deposits were kshs. 9, 226,912.68/=. Thus, the debit balance was kshs. of kshs. 757,871.32/= plus interest. He placed reliance on the decision in John Walter Owino v Co-operative Bank of Kenya Limited & Another [2009] eKLR where the facts were almost the same as the present case, it was held as follows;

> " It is not in dispute that the plaintiff overdrew his account to the tune of kshs. 2.5 million. The plaintiff admitted this indebtedness and undertook to repay the overdraft account and issued cheques which bounced. The plaintiff also executed the letter of offer and the letter

of set-off which authorized the 1st defendant to combine the accounts held by the plaintiff and also set-off…Based on the default, the 1st defendant is entitled to realize the security".

9. Regarding ground 3, counsel submitted that the appellant tendered evidence of the financial facilities extended to the respondent. That there was evidence on how the terms of lending and overdraft were illegally altered with the respondent's collusion so that he enjoyed enhanced financial benefits for an extended time. Further, that he admitted in writing to fraudulent activities. He placed reliance on the decision in D. Njogu & Co. Advocate v National Bank of Kenya Limited 2009 eKLR it was

> " The Principle of Public Policy in this: ex dolo malo non oritur action. No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act……"

10. Regarding ground 5, counsel submitted that the trial court erred in finding that the respondent's acquittal in the criminal trial absolved him of any civil Liability. He placed reliance on the decision in Onsase v Omosa [2022] KEHC 13953 (KLR) where it was held that an acquittal or conviction in a criminal case does not absolve one from civil liability as the standard of proof needed in both cases is different.

11. On ground 8, counsel submitted that the In Duplum Rule was not applicable in the circumstances of this case for two reasons. First the amount demanded in the statutory notice comprised an amount actually withdrawn by the respondent plus interest. Secondly the rule only applies when the default occurs. In this case it occurred in 2016 and interest would be calculated from then.

12. On ground 9, counsel submitted that the appellant issued a statutory notice on 24th April, 2017 for the sum of Kshs, 5,009,327.90/=. That the said sum was covered under the charge document plus interest and amounts illegally withdrawn by the respondent on his accounts.

13. In conclusion, counsel submitted that the trial court erred in muting the provisions of the contract. He added that a court of law could not re-write a contract between the parties to the said contract. He urged the court to allow the appeal with costs to the appellant in both the lower court and the appeal.

Respondent's submissions

14. These were filed by Saluny Advocates LLP and are dated 18th October, 2024. Counsel gave a brief background of the case and submitted on the grounds of appeal.

15. Regarding the 1 and 2 grounds, counsel submitted that other than the kshs.1,000,000/=, the appellant mischievously insisted on the respondent having applied and/or enjoyed further 'loans' and/or 'overdrafts' without any evidence. Further, that the appellant's witnesses conceded that the respondent had no access to their system so as to make any transaction in his favour.

16. He placed reliance on the decision in John Walter Owino -v Co-operative Bank of Kenya & another [2009] eKLR where the Court held as follows: -

> " It is not in dispute that the plaintiff overdrew his account to the tune of KSH 2.5 million. The plaintiff admitted this indebtedness and undertook to repay the overdrawn account and issued cheques which bounced. The plaintiff also executed the letter of offer and the letter of set-off, which authorized the 1* defendant to combine the accounts held by the plaintiff and also to set off. Apart from the express authorization, the plaintiff has not even honored the repayment schedules of the loan account called Biashara plus. Based on this default alone, the 1st defendant is entitled to realize the securities held." Emphasis ours.

17. On ground 3, counsel submitted that the evidence on records shows that the respondent applied and was duly granted only two facilities by the appellant. Further, that the respondent's collusion was not proved, nor was the alleged enjoyment of extended facilities established and there was no admission of the alleged fraudulent facilities.

18. Regarding ground 5, counsel submitted that the trial court did not hold that the respondent was absolved of civil liability. That the learned magistrate affirmed that the court was sitting as a civil court and proceeded to consider the evidence on record on a balance of probabilities. She further noted that the issue of fraud, which borders criminality was addressed fully in a criminal matter where the standard of proof is one beyond a reasonable doubt.

19. On grounds 8 and 9, counsel submitted that it was obvious that the principal sum secured by the charge was not increased from Kshs. 1,000,000.00. He stated that the appellant did not produce any evidence to demonstrate compliance with section 84 (3) and (5) of the *Land Act*, 2012. Further, that the appellant did not avail a memorandum varying the principal amount secured by the Charge. He placed reliance on the decision in Kisimani Holdings Limited & another v Fidelity Bank Limited [2013] eKLR where Justice (retired) Havelock held as follows: -

> "Of course, in relation to paragraph 21 above, section 84 of the *Land Act*, 20/2 allows the amount secured by a charge to be reduced or increased but by a memorandum which must be endorsed on or annexed to the Charge instrument which varies the Charge in accordance with the terms of the memorandum. The memorandum must be signed in the case of a reduction by the chargee or, in the case of an increase, by the chargor. It must also state that the principal funds intending to be secured by a charge instrument are reduced or increased, as the case may be, to the amount specified in the memorandum. It is clear that by not specifically (by memorandum) increasing the amount covered by the charge instrument dated 14th February 2011, the defendant was in breach of this sub-clause by including in its statutory demand, the amount of the 2nd plaintiff's current account overdraft and its US dollar account."

20. Counsel further submitted that the illegal overdraft facilities should not be subjected to section 44A of the *Banking Act*. That the said section would only be applied to the facilities sought by the respondent the same being kshs. 1,000,000/=. He concluded by urging the court to dismiss the appeal with costs to the respondent.

Analysis and Determination

21. I have considered the record of appeal, grounds of appeal as well as the submissions and the authorities relied on by the parties. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

22. The law is clear that this court as an appellate court will only interfere with the decision of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held as follows;

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

23. The appellant through its counsel argued that the trial magistrate erred in fact and in law in failing to hold that the respondent had cleared his loan and overdraft. It was further argued that the appellant tendered evidence of the financial facilities extended to the respondent. Additionally, that there was evidence on how the terms of lending and overdraft were illegally altered with the respondent's collusion so that he could enjoy enhanced financial benefits for an extended time

24. On the other hand, the respondent's counsel argued that the appellant mischievously insisted on the respondent having applied and/or enjoyed further 'loans' and/or 'overdrafts' without any evidence.

25. The trial magistrate in her judgment noted that the respondent had already been found not guilty of fraud in a criminal case. Further, that there were no account opening documents for the minor's account where he had allegedly transferred the additional overdraft amounts. Thus, no nexus between the plaintiff and the said account was shown. Additionally, that the facilities advanced to the respondent was kshs. 1,000,000/= and demanding over kshs, 4,000,000/= from him by the appellant was in clear breach of the In Duplum Rule. In the end the trial magistrate held that the respondent had proved his case against the appellant to the required standard. She made a declaration that the sale of the suit property was illegal, wrongful and unlawful.

26. Upon perusal of the evidence tendered before the trial court, this court notes that it is not disputed that the appellant advanced banking facilities to the respondent vide the letter of offer dated 13th May 2014. Further, the appellant does not dispute that the respondent paid up the said loan and was acquitted in the criminal case where he had been charged for fraud. What is in dispute is the additional overdraft facilities which the respondent allegedly obtained through fraudulent means in collaboration with one of the appellant's employee.

27. DW1 the appellant's manager testified that the respondent had two accounts and he produced their certificate of registration (D, Exhibit 1 and 2). He also produced bank statements for the loan account (D, Exhibit 3 and 4) which was separate from those two accounts. He stated that the appellant had discovered that money was withdrawn from one of the respondent's accounts (Jafes General Supplies and Contractors) and credited into a minor's account. Further, that under the two accounts there were unallowed overdraft limits. He added that one of the appellant's employees admitted to have helped the respondent increase the limit.

28. DW1 further testified that the respondent had admitted to owing the bank the alleged money and through a letter dated 8th April 2016 (D, Exhibit 12) he made a proposal for repayment. In cross-examination, he stated that there was no evidence that the respondent applied for other facilities and that in a current account one could get an enhanced overdraft. He further stated that a client could not access online or internal systems to enhance his/her account and that enhancement could only have been done by one of the appellant's employees. He added that the minor's account (vision account) was not opened by the respondent and that the only link was that funds were transferred from the respondent's account to the said account. Also, that he had no proof that the respondent withdrew money from the said account.

29. In re-examination, he stated that money came from the respondent's account into the vision account and the respondent did not complain. Further, that the respondent in his letter dated 8th April 2016 thanked the respondent for its understanding and undertook to pay the money in full for both accounts.

30. On his part the respondent testified as PW1, and confirmed having taken a term loan of kshs. 500,000/= and overdraft kshs. 500,000/=. He stated that he repaid the loan to a tune of kshs. 1,800,000/= but at one time he was given a demand letter dated 14th April 2016 asking him to pay kshs. 4,083,658.50/=. He was later served with a statutory notice dated 24th April 2017 for kshs. 5,009,327.90/= and thereafter a redemption notice from Hegemons auctioneers for 45 days. He was also given a notification of sale. He further stated that he had not requested the appellant for more money other than the initial loan amount. He denied being aware of the account number 01255022004800 belonging to a child by the name Natasha. He added that he never gave any instructions for monies to be deducted from his account to the minor's account.

31. Upon cross-examination he confirmed having been charged together with one of the appellant's employees one Naphtali Ngigi Kariuki for theft of the appellant's money. He stated that in his letter dated 8th April 2016 he committed to clear the debit upon an agreement by both parties. Further, that he never asked Naphtali for any overdraft or gave instructions for monies to go into his vision account. He added that he never complained about the debits from his account because he had no bank statements and he had requested for them in vain. He confirmed having paid the term loan and overdraft in full and that the four million the appellant was claiming had been channeled through his account without his knowledge.

32. In re-examination, he stated that in his letter dated 8th April 2016 he had not admitted to stealing from the appellant or to his land being sold to recover the debt.

33. In Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR, the court in relying on the Supreme Court decision of Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR held as follows;

> " 22. The foregone analysis therefore settles the issue of burden of proof. For clarity, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant.
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> On the standard of proof, the Black's Law Dictionary, (9 th Edition, 2009) at page 1535 defines 'the standard of proof' as '[t]he degree or level of proof demanded in a specific case in order for a party to succeed."

34. In view of the evidence adduced in court by both parties, it is my view that the evidential burden of proof shifted to the appellant to clearly show that indeed there was no negligence on its part regarding how the respondent was awarded additional overdraft facilities. However, it failed to do so and it's witness DW1 admitted to one of the appellant's employees to facilitating the additional overdraft facilities. Further, the said employee was never called as a witness during trial. The observation made by the trial magistrate clearly indicates that no evidence was adduced by the appellant implicating the respondent in the commission of fraud. Further, the appellant does not dispute that the respondent was acquitted in the criminal case where he was charged of fraud and there is no evidence of that Judgment having been quashed or set aside.

35. I therefore do not find any reason to interfere with the trial magistrate's decision.

36. Consequently, the appeal herein is found to be devoid of merit and same is dismissed with costs.

37. Orders accordingly.

DELIVERED VIRTUALLY DATED AND SIGNED THIS 31ST JULY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE