



**Kitise v Kenya Commercial Bank Limited (Civil Appeal E826 of 2021)  
[2024] KEHC 874 (KLR) (Civ) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 874 (KLR)

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

**CIVIL**

**CIVIL APPEAL E826 OF 2021**

**CW MEOLI, J**

**JANUARY 31, 2024**

**BETWEEN**

**GRACE MWELU KITISE ..... APPELLANT**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of Kagoni, E.M., PM delivered  
on 7th December 2021 in Milimani CMCC No. 336 of 2019)*

**JUDGMENT**

1. This appeal emanates from the judgment delivered on 7<sup>th</sup> December, 2021 in Milimani CMCC No. 336 of 2019. The suit was commenced by way of the plaint dated 23<sup>rd</sup> July, 2019 by Grace Mwelu Kitise, the plaintiff in the lower court (hereafter the Appellant) against Kenya Commercial Bank Limited, the defendant in the lower court (hereafter the Respondent). The claim was for refund of the sum of Kshs. 2,258,640.98, damages, and founded on alleged breach of contract inter alia.
2. It was pleaded that at all material times, the Appellant and the Respondent enjoyed a bank-customer relationship, by virtue of which the former held two bank accounts, namely, Salary Account No. 1130920887 (the salary account) and Loan Account No. MG0925400209 (the loan account), respectively with the Respondent. It was further pleaded that the loan account was serviced through a check-off system by which the Respondent would deduct monthly monies towards repayment of the principal loan sum and interest.
3. The Appellant averred that sometime on or about 7<sup>th</sup> November, 2013 she entered into an loan agreement with the Respondent, for the sum of Kshs.702,225/- to be advanced to her. However, despite the agreement, the Respondent only advanced the sum of Kshs. 454,841/- to the Appellant. That subsequently, the Appellant noted various transactions in her accounts indicating instances of



irregularities or fraud, allegedly committed by the Respondent, under the guise of loan top-ups and deductions, purportedly, regarding loan sums which had never been advanced to the Appellant.

4. That as a result of the irregular and unauthorized transactions, the Appellant suffered loss/damage particularized as follows in the plaint:

DATE	TRANSACTION DESCRIPTION	DEDUCTED AMOUNT
30/06/2013	Loan	1,806,462
15/08/2013	Loan top-up	158,132
31/12/2013	Loan repayment	247,364
17/10/2015	Loan top-up	1,400.48
14/11/2015	Loan top-up	45,282,50
TOTAL		2,258,640.98

5. The Respondent filed the statement of defence dated 30<sup>th</sup> October, 2019 which was amended on 15<sup>th</sup> January, 2020 to introduce a counterclaim. In its defence, the Respondent denied the key averments in the plaint and liability. The Respondent also denied making the irregular deductions and/or transactions on the Appellant's subject accounts as pleaded in the plaint, or at all. The Respondent further denied the averments regarding breach of contract and by way of counterclaim, sought the sum of Kshs. 934,022/- with interest at the rate of 24% p.a., being the outstanding loan sum owing from the Appellant as of 15<sup>th</sup> February 2017.
6. The Appellant in a reply to amended defence and defence to counterclaim dated 27<sup>th</sup> May, 2020 denied the key averments in the counterclaim and joined issue with the amended defence.
7. The suit proceeded to a full hearing during which the Appellant testified. The Respondent on its part summoned (1) witness. Upon the close of the trial, the court dismissed the Appellant's suit with costs, while allowing the counterclaim as prayed.
8. Aggrieved with the outcome, the Appellant preferred this appeal which is based on the following grounds:
1. "That the Learned Trial Magistrate erred in fact and in law in creating a cause of action exclusively and solely based on fraud when the Appellant's suit was primarily premised on breach of statutory duty and bank customer relationship and in so doing drafted and determined his own pleadings contrary to the Appellant's case.
  2. That the Learned Trial Magistrate misdirected himself on the applicable standard of proof by preponderance of probabilities by importing fraud as the sole basis of his determination leading to miscarriage of justice.
  3. That the Learned Trial Magistrate fell in grave error of law and fact and contradicted himself in finding that the Appellant had pleaded fraud under paragraphs 7,8,11 and 14 of the Plaint but that the Appellant had failed to plead fraud and give particulars.



4. That the Learned Trial Magistrate erred in fact and in law in failing to take into consideration the full tenor and effect of the Plaintiff dated 23<sup>rd</sup> July 2019.
  5. That the Learned Trial Magistrate erred in fact and in law in framing and determining issues that were contrary to the cause of action advanced by the Appellant.
  6. That the Learned Trial Magistrate erred in fact and in law in failing to appreciate bank-customer relationship as statutory and contractual obligation which the Respondent had breached to the detriment of the Appellant.
  7. That the Learned Trial Magistrate erred in fact and in law in disregarding the evidence adduced by the Appellant to support her case for the Respondent's breach of bank-customer relationship and statutory duty which was at the core of the suit.
  8. That the Learned Trial Magistrate erred in fact and in law in introducing to the detriment of the Appellant an extraneous concept of negligence which was not pleaded by the parties and ended up taking into consideration and determining an irrelevant matter to the detriment of the Appellant.
  9. That the Learned Trial Magistrate erred in fact and in law in failing to take into consideration the written submissions filed by the Appellant which vividly supported the cause of action in the Plaintiff.
  10. That the Learned Trial Magistrate erred in fact and in law in allowing the Respondent's counterclaim without basis and evidence.
  11. That the Learned Trial Magistrate erred in fact and in law in dismissing the Appellant's suit." (sic)
9. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decision in *Mursal & another v Manesa* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) on the duty of a first appellate court. Counsel argued that the Appellant had proved on a balance of probabilities that the Respondent had breached the bank-customer relationship which subsisted between the parties herein, by acting without the Appellant's instructions and undertaking irregular transactions on her accounts.
  10. Counsel further argued that in the absence of evidence by the Respondent to controvert the claim, the trial court ought to have found in favour of the Appellant. To support this argument, counsel relied on the cases of *Daniel Moses Mageto Okebiro v Standard Chartered Bank (K) Limited* [2018] eKLR and *Equity Bank Limited & another v Robert Chesang* [2016] eKLR where the respective courts laid emphasis on the contractual duty owed by banks to their customers.
  11. It was also submitted that the trial court erred in failing to find that there was evidence pointing to breach of contract on the part of the Respondent. Here, counsel citing the decision in *Eunice Wairimu Muturi & another v James Maina Thuku & another* [2018] eKLR to the effect that a bank cannot act independently of its customer's instructions. On those grounds, the court was urged to allow the appeal accordingly.
  12. Counsel for the Respondent relied on the decision in *Susan Munyi v Keshar Shiani* [2013] eKLR on the principles undergirding the court's exercise of its appellate jurisdiction on a first appeal. Counsel also relied on the decisions rendered in *Veronica Gathoni Mwangi & another v Samuel Kagwi Ngure & another* [2016] eKLR and *Gervas Mutiso v Thomas Maingi Muia & 4 others* [2019] eKLR as well



as Order 15, Rule 1 of the Civil Procedure Rules, 2010 to support the submission that a court can exercise discretion by framing its own different issues for determination, as the trial court rightly did. It was contended that pursuant to the contractual relationship existing between the parties herein, the Respondent acted on the instructions of the Appellant at all material times, and thus there was no evident breach of contract on its part.

13. Moreover that, while the Appellant pleaded fraud in her plaint, she did not set out any particulars thereof and hence the trial court acted correctly by dismissing the suit for want of particulars and/or proof thereof. Reference was made to the decisions in *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR and *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another* [1979] eKLR. Counsel for the Respondent further supported the decision by the trial court allowing the counterclaim, and consequently urged the court to dismiss the appeal with costs, and to uphold the decision of the trial court.
14. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa spelt out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

“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 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 demeanor of a witness is inconsistent with the evidence in the case generally.”

15. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was unfounded, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.
16. The legal position is that the burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be



adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

17. The gist of the parties’ respective pleadings has already been stated elsewhere in the judgment. During the trial, the Appellant adopted her executed witness statement dated 23<sup>rd</sup> July, 2019 as her evidence-in-chief and further produced her list and bundle of documents as P. Exhibits 1-7. Under cross-examination, she stated that she had obtained loan advances from the Respondent in the years 2009, 2011 and 2013 respectively. She further stated that she had cleared the loan advanced in 2009 and that by the year 2012 her loan balance stood at zero. This notwithstanding, the Respondent ignored her protests regarding the deductions which were maintained on her accounts.
18. In re-examination, she testified that she had applied for a loan in the sum of Kshs. 1,900,000/- from the Respondent in the year 2013, but that she received only about Kshs. 400,000/-.
19. The Respondent in turn called its Makindu Branch employee, Stephen Masita, as DW1. His evidence-in-chief was based on his witness statement and the Respondent’s documents dated 9<sup>th</sup> February, 2021 which were tendered as D. Exhibits 1-8. During cross-examination, the witness testified that the 2011 loan advancement made to the Appellant was not paid in full, adding that the outstanding sums arising therefrom were sought from the Appellant by way of the counterclaim.
20. The trial court after restating and analyzing the evidence concluded as follows in respect of both the claim and counterclaim:

“I have considered the pleadings filed before this court, the parties’ testimonies as well as their submissions and in my view, the issues for determination are;

Whether the Plaintiff’s failure to plead fraud is fatal to her suit

I have read and reread the Plaintiff’s statement of claim dated 23.07.2019 and find the same does not contain particulars of fraud despite alleging under paragraph 7, 8, 11, 14 and 18. What was particularized was breach of contract. It has been held that fraud and negligence are two different causes of action with different evidential standards of proof. Whereas negligence is proved on a balance of probabilities, fraud is proved at a higher standard above balance of probabilities. To succeed, the plaintiff needed not only to plead and particularize fraud, but also lay emphasis by way of evidence, upon which a trial court would make a finding. In the instant case, failure by the plaintiff to plead fraud and to give particulars thereof is fatal to submissions founded on fraud. This court has no pleadings and particulars to consider and determine any allegations of fraud. [See the decision of the Court of Appeal in *C O Okere v Esther Nduta Kiiyukia & 2 others* [2019] eKLR]

Having found failure to plead fraud and give particulars is fatal and the court has no pleadings and particulars to consider and determine any allegations on fraud, the Plaintiff’s suit collapses.

Whether the Defendant is entitled to the orders sought in the Counterclaim

DW1 told the court that the Plaintiff did not repay her loan as per the contract that she left the loan in arrears of Kshs. 186,732 with an outstanding amount of Kshs. 934,022 as at February 2017 and the loan remains unpaid to date. In response to this, PW1 told the court that she has fully repaid the loans i.e. the 2009, 2011 and 2013. I have perused the statement



of account dated 13.01.2020 and at the principal outstanding amount on 15.02.2017 the sum of Kshs. 934,022 was still outstanding. I thus find the said amount sufficiently proved.

Reasons wherefore Judgment is hereby entered as follows;

- a. The Plaintiff's suit is hereby dismissed.
- b. The Defendant's Counterclaim is allowed at Kshs. 934,022.00.
- c. Interest on (b) is allowed at court rates until payment in full.
- d. The Defendant is awarded the costs of this suit with interest at court rates until payment in full." (sic)

21. The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the [Evidence Act](#). The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides as follows:

"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." The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

"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."

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

"Whereas under section 107 of the [Evidence Act](#), (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

22. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. See also *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR.

23. 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. From the grounds of appeal set out in the memorandum of appeal, the Appellant is challenging the trial court's decision on the following three key limbs. The first limb of the appeal touches on whether the trial court erred in dismissing the suit for want of particulars of fraud and/or negligence, none of which were issues for determination to begin with, according to the Appellant. Reviewing the record, it is apparent that the Appellant's claim was primarily premised on alleged breach of contract, the particulars of which were set out in the plaint. And additionally, or alternatively, the Appellant averred fraudulent conduct on the part of the Respondent, but without particularizing the alleged fraud.
25. The court is of the view that even if the claim based on fraud failed for want of particulars, there remained outstanding, the cause of action premised on breach of contract, and which was particularized in the plaint. This claim was not considered by the trial court. Moreover, from the record, there was no averment of negligence in the plaint, as suggested in the judgment of the trial court. Consequently, the court finds that in dismissing the suit for want of particulars of fraud alone, the learned trial magistrate failed to consider all the aspects of the Appellant's claim before him and related evidence. This partial consideration of the claim amounted to an error.
26. The second limb of the appeal relates to the question whether the trial court ought to have found that the Appellant had proved her case for breach of contract against the Respondent. It was not in dispute that a bank-customer relationship existed between the parties herein, at all material times. It is equally not in dispute that the Appellant had obtained various loan facilities with the Respondent in the years 2009, 2011 and 2013. The point of departure in the parties' respective positions is that on the one hand, the Appellant claimed that all outstanding loans had been cleared but that the Respondent had continued unlawful and irregular transactions in her subject accounts, in breach of their contractual relationship. The Respondent on the other hand, asserted that the loans had not been fully settled and the disputed transactions in the Appellant's accounts were aimed at recovering the outstanding loan sums.
27. According to the record, the Appellant took out a loan facility with the Respondent vide the loan application form dated 12<sup>th</sup> November 2013 (P. Exhibit 1-7) for the sum of Kshs. 1,900,000/- payable in 60 monthly instalments in the sum of Kshs.48,223/-. The said loan form indicated that at the time of applying for the said loan sum, the Plaintiff had a prior outstanding loan balance of Kshs. 1,215,481.62 although none of the parties indicated when the said loan was advanced, or whether it was a cumulation of sums outstanding from previous loans.
28. Be that as it may, the Appellant's pay slip for the month of June, 2013 produced as exhibit (P.Exh. 1-7) reflected a loan sum of Kshs.1,806,462/-. The record also shows that deductions were made on the Appellant's salary, towards offsetting the said loan amount, initially in the monthly sum of Kshs. 30,618/- from June 2013 to March, 2014, which sum was later increased to monthly deductions in the sum of Kshs. 46,683/- from October 2014.
29. Upon considering the Appellant's contention that no such loan amount was ever applied for or received by herself, the court revisited the statement of account in respect of the loan and salary



accounts respectively. The said sum of Kshs.1,806,462/- was not reflected on either account, contrary to oral assertions by DW 1. This, despite the Respondent's claim that the same was advanced to the Appellant but a portion thereof was used to retire outstanding loan amount owed by the said Appellant. Furthermore, no concrete evidence was tendered to demonstrate that the Appellant had applied for an advance in such or other related sum in the material period, or the application of the sums as claimed by the Respondent.

30. Concerning the loan top-ups cited in the plaint, namely, the sums of Kshs. 158,132/- (15<sup>th</sup> August 2013); Kshs. 1,400.48 (17<sup>th</sup> October 2015); and Kshs. 45,282.50 (14<sup>th</sup> November 2015), these were indicated to have been drawn on the loan account, but no explanation was proffered by the Respondent to either demonstrate that the Appellant had applied for or consented to the said loan top-ups. Nor was any indication given as to where the monies went or how they were applied. After all, the Respondent had custody of all records of transactions on the accounts including supporting documents and the Respondent could have presented these at the trial, together with an analysis of the accounts to demonstrate the claims made by them.
31. In the premises, the court is persuaded that it is more plausible than not that the actions taken by the Respondent in respect of the Appellant's accounts were unauthorized and constituted a breach of contract.
32. However, concerning the loan sum of Kshs. 702,205/- which the Appellant claimed to have applied for, only to receive a lesser sum of Kshs. 454,841/-, the Respondent offered a reasonable explanation of how the balance of the funds was utilized before remitting the net sum of KShs. 454,841/- to the Appellant. Namely, to offset certain outstanding sums and charges owed by the Appellant.
33. In the result, the court is satisfied that the Appellant established, on a balance, the breach of contract by the Respondent, which would entitle her to a refund of the sums which were unlawfully deducted from her respective accounts. These include deductions of Kshs. 1,806,462/- (30/06/2013); Kshs. 158,132 (15/08/2013); Kshs. 1,400.48 (17/10/2015) and Kshs. 45,282.50 (14/11/2015), whose total is Kshs. 2,011,276.98.
34. That said, the Appellant would not be entitled to general damages as sought in the plaint. General damages are not awardable, in principle, in respect of claims founded on a breach of contract. In *Kenya Tourist Development Corporation v Sundowner Lodge Limited* (2018) eKLR, the Court of Appeal held that:

“... as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *DHARAMSHI vs. KARSAN* [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be.”
35. The third limb relates to the question whether the trial court acted correctly by allowing the Respondent's counterclaim for the sum of Kshs. 934,022/-. The Respondent's contention being that the loan account had fallen into arrears as of 15<sup>th</sup> February 2017. The trial court's finding that the counterclaim had been proved was evidently based on the statement of account which reflected the said outstanding amount. The said statement of account pertaining to the loan account (found on page 103 of the record of appeal), indicates that the Appellant's account was in arrears to the tune of Kshs. 934,022/- as of 15<sup>th</sup> February, 2017.



36. However, an examination of both the salary account and the relevant pay slips reveals that regular deductions had been made on the said salary account, towards repayment of the loan, at all times preceding the 15<sup>th</sup> February, 2017. Evidently, the contents of the pay slips are inconsistent with the entries in the statement of account tendered to support the counterclaim. No analysis or reconciliation of the accounts was tendered, and the Respondent seemingly left it to the Court to figure out how the sums accrued.
37. Besides, no proof was tendered by the Respondent of demands made to the Appellant prior to the institution of the suit, for payment of any such arrears. The Appellant on her part maintained that she had cleared all outstanding loan sums in full and hence the counterclaim was without basis. Save for the entries in the statement of accounts relating to the loan account, no additional concrete evidence was produced by the Respondent in support of its counterclaim. The onus of proof was on the Respondent in that regard.
38. Given the foregoing, the court is of the view that the finding by the trial court regarding the Respondent's counterclaim was arrived at without a proper review of the totality of the evidence before the court and was without foundation. It cannot stand. In the result, the court is satisfied that there is a reasonable basis for interfering with the decision by the trial court.
39. Consequently, the appeal is hereby allowed. The judgment of the trial court in Milimani CMCC No. 336 of 2019 is hereby set aside. The court substitutes therefor an order allowing the Appellant's suit in the lower court and enters judgment in favour of the Appellant against the Respondent, in the sum of Kshs. 2,011,276.98 (Two Million Eleven Thousand, Two Hundred and Seventy-six Cents Ninety-eight) with costs and interest, while simultaneously dismissing the Respondent's counterclaim with costs. The Appellant is awarded the costs of the appeal.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**C.MEOLI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:**

For the Appellant: Mr. Omoiti h/b for Mr. Kilonzo

For the Respondent: Ms. Mathenge

C/A: Carol

