



**Necco Society Limited v Mwaura (Civil Appeal E799 of 2021)  
[2024] KEHC 542 (KLR) (Civ) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 542 (KLR)

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

**CIVIL**

**CIVIL APPEAL E799 OF 2021**

**DAS MAJANJA, J**

**JANUARY 31, 2024**

**BETWEEN**

**NECCO SOCIETY LIMITED ..... APPELLANT**

**AND**

**LUCY NKATHA MWAURA ..... RESPONDENT**

*(Being an appeal against the Judgment and Decree of the Co-operative Tribunal at Nyeri dated 4th November 2021 in Tribunal Case No. 5 of 2011)*

**JUDGMENT**

**Introduction and Background**

1. This is an appeal from the Judgment of the Co-operatives Tribunal (“the Tribunal”). Before I consider the substance of the appeal, a summary of the facts before the Tribunal is appropriate.
2. By a Statement of Claim dated 31.01.2021, the Respondent, who at the material time was a member of the Appellant (“the Sacco”) filed suit against the Sacco at the Tribunal. She sought to stop the Sacco from making any deductions from a loan the Sacco claimed was outstanding and due from her. She prayed for an order that the Sacco produce all statements of her loan account from the year 2005 to the date of filing suit. She averred that when she thought she had cleared the loan balance, she went to the Sacco who informed her about the outstanding balance, which amount the Respondent disputed and claimed could not be explained by the Sacco. The Respondent claimed that she had on numerous occasions visited the Sacco’s offices requesting to be provided with statements of the loan so that she could know exactly where the problem is. The Respondent stated that the Sacco had refused /neglected or ignored to provide her with the statement and claimed that the Sacco was threatening to continue deductions without any information to the amount paid and the balance thereof. The Respondent further claimed she had sought the help of a co-operative officer without success.



3. In its defence, the Sacco filed a reply to the statement of claim and a counterclaim. It denied the Respondent's claim and averred that she is still indebted to the Sacco and that sometime in November 2010, she fraudulently and by misrepresentation changed her pay point and thereby removed herself and her salary from the Sacco's accessibility as per the loan contract which stipulated that the loan advanced was to be recovered by check-off system.
4. The Sacco claimed that the Respondent had loan balances with the Sacco amounting to Kshs. 201,206.13 which continues to accrue interest at the rate of 12% per annum. The Sacco further claimed that as a result of the Respondent's insincerity and dishonesty, the Sacco and the general membership continued to suffer damages and loss which they sought against the Respondent for default in payments. Thus, the Sacco summed up its claim against the Respondent as the outstanding loan together with the balances that had become due by virtue of breach and default on the part of the Respondent.
5. The matter was set down for hearing where the Respondent testified as CW 1 and called an auditor, Nathan Makokha as her witness (CW 2). On its part, the Sacco called its Chief Executive Officer, Faith Njeri Muchoki as its witness (RW 1). After the hearing, the court rendered judgment on 04.11.2021. The Tribunal posed two issues for its determination; whether the Respondent completed her loan repayment and if so, what was the Respondent's loan balance.
6. On the first issue, the Tribunal found that from the Sacco's list of documents, document No. 13 dated 26.10.2010 indicated that as at that date, the Respondent's loan amount was Kshs. 259,271.00 whereas at the date of filing its counterclaim the amount allegedly owed was Kshs. 201,206.13 as at March 2011. With this, the Tribunal sided with the Respondent and found that she had repaid her loan in full. Since the first issue was decided in the affirmative, the Tribunal found that the second issue did not count and thus decided the claim in favour of the Respondent. It ordered the Sacco to stop deductions for the purported outstanding loan balance and further produce the statement of loan account within 21 days from the judgment date.
7. The Sacco is dissatisfied with the Tribunal's decision and on the basis of its Memorandum of Appeal dated 03.12.2021. In their written submissions, the parties take the positions stated in their pleadings which I have summarised above. I will only make relevant references to those submissions in my analysis and determination below.

### **Analysis and Determination**

8. In resolving this appeal, I am cognizant that the court derives its appellate jurisdiction from section 81 of the *Co-operative Societies Act* (Chapter 490 of the Laws of Kenya) which empowers the High Court to, to inter alia, exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought or make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal. It is now settled that this court exercising its primary role as a first appellate court is required to re-evaluate the evidence on record and then determine whether the conclusions reached by the Tribunal are to stand or are to be disturbed and give reasons explaining why it has arrived at a particular conclusion making an allowance for the fact that it neither heard or saw the witnesses testify (see *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212 and *Peter Mwangi Chege & 13 others v Joseph Wanyoike & 7 others* ML HCCA No.8 of 2011 [2018] eKLR)
9. The Sacco submits that the Tribunal failed to comprehensively appraise and address itself on the facts, circumstances and evidence before it and as a result rendered an "interim judgment". That the Tribunal ordered it to provide statements of account which were not disputed as they were already on record



and served upon the Respondent. The Sacco submits that the Tribunal ignored these documents and instead relied on the Respondent's "Statement/Accountant's Report" which the Sacco claims is a "work of fiction" and is "full of uncontextualized figures created from thin air". It faults the Tribunal for finding that the Respondent had repaid her loan in full only for it to turn around and state that it could not make a finding without the loan account statement being furnished to it. Further, that the Tribunal never dealt with the Sacco's counterclaim. For these reasons, the Sacco urges the court to set aside the judgment.

10. On her part, the Respondent submits that the Tribunal analysed the evidence and properly concluded that the loan had fully been repaid. That the decree issued by the Tribunal is clear on what would be open to the Tribunal's interrogation, that is, the loan account statement to be supplied by the Sacco. The Respondent submits that if the loan statement was not compliant with the Tribunal's judgment as to the state of indebtedness, then a further adjudication would issue on the non-compliant loan account statement. The Respondent submits that section 78(5) of the Co-operatives *Societies Act* does not exclude the, "concept of a further judgment date upon a party furnishing the tribunal with the requested documents". In sum, the Respondent submits that the appeal lacks merit, that it is a relentless scheme by the Sacco to stretch a debt beyond its elastic limit through devices such as manipulating the time when the loan was advanced, alleging fictitious loans and downright concealment of information. She prays that the appeal should be dismissed with costs.
11. Resolution of this appeal turns on the findings set out in the judgment regarding the extent of the Respondent's indebtedness. At the material part of the Judgment, para. 9, the Tribunal stated as follows:

We note from the Respondent list of documents dated 12/9/2011 and fled on even date document No. 13 in the list dated 26/10/10 as of that date the Claimant loan amount was kshs. 259,271. As at the date of filing the counter claim the amount alleged owed by Claimant to Respondent is Kshs. 201,206.13 as at March, 2011. We are inclined to side with the Claimant and indeed find she has repaid her loan in full and order for prayer in her statement of claim. [Emphasis mine]

12. After issuing the dispositive orders and at the penultimate paragraph of the Judgment, the Tribunal then held as follows:

We are unable to make a finding without the loan account statement & order for the same to be supplied by Respondent 21 days from today.

Mention on 14/2/22 to confirm compliance and some further judgment date. Mention Notice to Issue. [Emphasis mine]

13. From the excerpts of the Judgment I have set out above, it is evident and I conclude that the Judgment is not only inconclusive but contradictory. I accept the Sacco's argument that it was improper for the Tribunal to make a final and dispositive finding that the Respondent had repaid the loan in full and at the same time turn around and state that it was unable to make a finding due to lack of the loan account statement and then direct that the same document be supplied for it make further orders. I hold that Tribunal could not make a finding of indebtedness unless its considered the Sacco's position contained in the statement of account.
14. In her submissions, the Respondent impliedly admits that the judgment was inconclusive and in as much as I agree with her that section 78(5) of the *Co-operative Societies Act* gives the Tribunal discretion to regulate its own procedure, the procedure adopted by the Tribunal must yield substantive justice. In this case, it was prejudicial to the Sacco and against the interests of justice for the Tribunal to make



a final finding and issue dispositive orders before receiving the loan statement it had sought from the Sacco. Nothing prevented the Tribunal from holding off on the judgment, calling for the loan statement and then rendering a judgment after receipt of the said statement. In light of the fact that the Tribunal concluded that it was unable to make a finding without the loan statement, there was therefore no basis for the Tribunal to also conclude that the Respondent had fully repaid the loan.

15. Turning to the facts of the case, I hold that the Sacco had attached statements of account in its list of documents dated 12.09.2011 and further list of documents dated 30.11.2011. The Respondent, through CW 2, also admitted to be in possession of some statements and the Sacco's correspondence of 13.07.2010 of her receiving statements covering the period between 2005-2010 was also not controverted. The statement of 22.11.2011 indicated that the Respondent had a loan debit balance of Kshs. 215,219.13 as at that date. In the quoted paragraphs above, the Tribunal found that as per the statement of October 2010 and the Sacco's date of filing of the counterclaim in March 2011, the Respondent was still indebted to the Sacco, the only difference being the amount of indebtedness. How then and on what basis did it conclude that the Respondent had repaid the loan? Section 176 of the Evidence Act (Chapter 80 of the Laws of Kenya) creates a presumption in favour of a Bank as follows:
  176. A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.
16. Under section 3(1) of the Evidence Act, a Co-operative Society which carries on banking business by receiving deposits and lending money is considered a "bank" hence once the Sacco adduced the said statements, it was incumbent upon the Respondent to counter and dislodge that position by proving that the said statements were incorrect or erroneous by way of evidence. The Respondent attempted to do this through the report prepared by CW 2. In the said report, he admitted that the report was made without the Co-operative Bank statement from the Sacco and that those supplied were apparently faint and incomplete. This means that the said statements were never interrogated and they remained unchallenged. The Respondent was thus indebted to the Sacco and the Tribunal's finding otherwise was definitely an error in their appreciation of the evidence that warrants the court's intervention.
17. I find and hold that from the unchallenged statements of account produced, the Respondent remained indebted to the Sacco at least in the sum of Kshs. 201,206.13 as at October 2011 and that this sum continues to accrue interest, penalties and fees. Having reviewed the material on record as the first appellate court, I hold that the Respondent's claim lacked merit while the Sacco's counterclaim was merited. The Respondent's did not prove that she had repaid the loan and had already received the statements of account that she had sought.

### **Disposition**

18. For the reasons outlined above, I allow the appeal on the following terms:
  - a. The judgment of the Tribunal is set aside substituted with judgment dismissing the Respondent's claim and allowing the Appellant's counterclaim to the extent that judgment is entered for the Appellant against the Respondent for Kshs. 201,206.13 together with interest at the rate of 12% per annum from the date of filing the Counterclaim.
  - b. The Respondent shall pay costs of the claim before the Tribunal.
  - c. The Respondent shall pay costs of this appeal assessed at Kshs. 40,000.00.

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

**D. S. MAJANJA**



## **JUDGE**

Mr Muriuki instructed by Gitonga Muriuki and Company Advocates for the Appellant.

Mr Mwangi instructed by J. M. Mwangi and Company Advocates for the Respondent.

