



**Waweru v Shavik Investments Limited (Civil Appeal 778 of 2022)
[2024] KEHC 15962 (KLR) (Civ) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15962 (KLR)

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

CIVIL

CIVIL APPEAL 778 OF 2022

REA OUGO, J

NOVEMBER 28, 2024

BETWEEN

GLADYS NJERI WAWERU APPELLANT

AND

SHAVIK INVESTMENTS LIMITED RESPONDENT

*(Being an appeal from the judgement of the small claims court of Kenya at Nairobi
by Hon. J. W Munene delivered on 17th June 2022 in SCCCOM No. E1105 OF 2022)*

JUDGMENT

1. The Appellant instituted this suit in the Small Claims Court at Nairobi vide a Statement of Claim. The appellant's case was that she entered into a property management agreement with the respondent on or about the 20th day of November 2019 where the respondent was collecting rent and utility bills from tenants on behalf of the appellant. The property management agreement which involved collecting rent and utility bills from the tenants was terminated via a mutual agreement on the 1st day of January 2022 with a one-month notice. As of 31/1/2022, the appellant claimed that the respondent owed her Kshs 483,753/- but the respondent only paid Kshs 100,000/-. Therefore, the appellant claimed a total sum of Kshs 383,753/-.
2. The respondent on its part denied owing any monies to the appellant. It advanced that it was the appellant who owed it Kshs 242,000/-. It was explained that the respondent advanced Kshs 350,000/- to the appellant through a gentleman's agreement but the appellant had only paid back Kshs 108,000/-. The respondent while admitting the claimant's claim in the sum of Kshs 242,000/-, it was advanced that they were entitled to a set off in the sum of Kshs 242,000/- on account of monies advanced to the appellant.



3. The trial court in its decision in favour of the respondent, held that there was evidence of a contract between the two parties for the sum of Kshs 350,000/- and that the Kshs.242,000/- was used as a set off therefore dismissing the claim and allowing the counterclaim.
4. The appellant being dissatisfied with the judgment of the Small Claims Court appeals against the whole judgment and consequential orders on the following grounds:
 1. That the honorable learned magistrate erred in law by placing reliance on the counterclaim filed by the respondent and using the same to reach a finding that the respondents had advanced a loan facility of Kshs 350,000/- to the appellant, whereas there was no evidence on record proving the existence of such an arrangement or proving that any money of such an amount was transferred to the appellant as a loan facility.
 2. That the honorable learned magistrate erred in law by failing to observe that even if there was a loan agreement between the appellant and the respondent, the respondent ought to have provided evidence to the satisfaction of the court to prove the existence of such a relationship and an arrangement. Hence the Hon. Learned Magistrate's over-reliance on the respondent's pleadings /averments without any evidence amounts to substituting the same with evidence, contrary to the rules of the *evidence act*.
 3. That the honorable learned magistrate erred in law by misdirecting herself and finding that the mpesa payments made to one Moses Ngugi kithinji by the appellant were for purposes of paying the alleged loan, whereas, no evidence was produced to prove advancement of such a loan to the appellant, or any document stating that the appellant was indebted to the respondent.
 4. That the honorable learned magistrate erred in law by failing to put into consideration the common law principle of separate legal personality as espoused in company law, hence arriving at a procedurally infirmed decision by finding that the monies sent to one Moses Ngugi Kithinji was meant to offset an alleged loan advanced by the respondent, Shavik Investments Limited.
 5. That the Honorable Learned Magistrate misdirected herself on matters law and evidence hence occasioning a miscarriage of justice against the appellant.
 6. That the learned magistrate erred in law by making an assumption that the appellant owed money to the respondent without any evidence to that effect.
5. The court directed that the matter be heard by way of written submissions and both parties have complied.
6. The appellant in her written submission raised three issues for determination:
 - i. Whether the honorable learned magistrate erred in fact and in law in finding that the respondent had advanced a loan facility to the appellant without any evidence in support of the same
 - ii. Whether the learned magistrate erred in law by misdirecting herself and finding that the mpesa payments made to one Moses Ngugi kithinji were for purposes of paying the alleged loan.
 - iii. Who bears the costs?
7. On the first issue, the appellant cited section 107(1) of the *Evidence Act* which provides that whoever desires any court to give judgment to any legal right or liability dependent on the existence of facts



which he asserts must prove that those facts exist. The appellant relied on the case of *Siribas Ontita vs. Albert Mongare Okwemwa* (2021) eKLR which the judges stated as follows;

“...the governing law in this scenario would be section 107(i) of the *Evidence Act*. Since the appellant is the one alleging advancing a loan to the respondent, it is his responsibility to produce evidence to that effect. The deposit slipis not sufficient proof of there being a friendly loan as it does not indicate the purpose of being deposited and the court should not be seen to be aiding any party in filling this gap.”

8. The appellant stated that the irregular mpesa statements related to additional expenses, generally incurred by landlords, including house repairs, plumbing, electrician services, and garbage collection fees among other nominal expenses. Therefore, the irregular Mpesa transactions did not establish the existence of a debt. There was no evidence by the respondent to substantiate the existence of any gentleman’s agreement. The appellant cited the case of *FKTV GI* eKLR civil appeal no. 1 of 2018 to further her submissions.
9. On the second issue, the appellant cited section 3 of the *Law of Contract Act* which provides that; no suit shall be brought whereby to charge the defendant upon any promise to answer for the debt..... unless the agreement upon which the suit is brought is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. The appellant cited the case of *Patrick Peter Kithini v Justus Mwongela* (2020) eKLR which stated that “an mpesa transaction without further evidence is insufficient to prove a fact on a balance of probabilities.” The appellant therefore submitted that mpesa messages cannot be used to prove the existence of a contract between her and the respondent and the decision of the magistrate was misinformed.
10. Finally, the appellant submitted that she is inevitably entitled to the costs of the suit based on the general rule that costs follow the event.
11. On the other hand, the respondent’s submissions were grounded on two issues namely:
 - i. Whether the court erred in finding that the appellant was indebted to the respondent to the tune of Kshs 242,000/-
 - ii. Whether the trial court erred by failing to put into consideration the principle of separate legal personality.
12. On the first issue, the respondent cited section 38(1) of the *Small Claims Court Act* which provides that a person aggrieved by the decision or order of the court may appeal against that decision or order to the High Court on matters of law. This was buttressed by the pronouncements of Justice Majanja in *Uniglobe Northline Travel Limited v Maverick Picture Works Limited* [2022]. The respondent therefore invited the court to find that issue one was an issue of facts that was dispensed and dealt with accordingly in the lower court and therefore the court should not interfere with the said finding
13. On the second issue, the respondent cited section 35 of the *Companies Act* which provides that a company contract may be made on behalf of the company by a person acting under its authority, express or implied. The respondent also cited the case of *Kimani Kabucho Karugo & co advocates v Sundowner Lodge Limited* [2021] eKLR which reiterated that section 34(1) (e) of the *Companies Act* which states that a contract made between private persons is effectual in law and binding upon the company if one of the persons was acting under the authority of the company. The respondent therefore argued that at all times, the respondent engaged with Moses Ngugi in his capacity as a director of the respondent and not his personal capacity and therefore the doctrine of separate legal personality



cannot be invoked. The respondent concluded their submission by terming the appeal as an abuse of the court process and invited the court to dismiss it with costs to the respondent.

14. Having considered the submission of both parties, I find only one issue for determination; whether the trial court erred in finding the existence of a contract based on the mpesa transaction without further proof.
15. Section 38(1) of the *Small Claims Court Act* provides that only matters of law can be appealed to the High Court and therefore this appellate court will desist from acting as a court of first instance by considering matters of facts, but will only consider matters of law.
16. The parties have not disputed the existence of a property management agreement between themselves. The point of contention is hinged on an alleged loan agreement between the appellant and the respondent where the respondent alleges to have advanced Kshs 350,000/- to the appellant. The respondent has relied on some irregular mpesa transactions to prove that the appellant had been paying a loan therefore arguing that there was a loan agreement. The appellant disputed the allegations. She submitted that the irregular payments were for minor repairs and property maintenance.
17. In *Patrick Peter Kithini v Kamau Kimanzi 2020(eKLR)* the court was faced with a similar case where the appellant had sued for breach of an agreement to refund monies which he claimed he had advanced to the Respondent as a friendly loan. The court held that:

“...there was really very little in the Appellant’s Mpesa statement that could explain the purpose for which the amount was deposited into the Respondent’s Mpesa account...The effect of those allegations by the fact of the Appellant’s case really left his case resting merely on his word against that of the Respondent... The Respondent had no obligation to prove his allegations because I find that the burden for the reasons aforesaid never shifted to him so as to require him disprove what the Appellant had established.”
18. The Mpesa statements by the respondent did not explain the purpose of the transaction. Although the respondent averred that they advanced a loan of Kshs 350,000/- through a gentleman’s agreement to the appellant. No evidence was tendered to prove the existence of the contract. The appellant rebutted the respondent’s case claiming that the payments were meant for garbage collection fees, and house maintenance among other expenses. The respondent therefore failed to prove that it had advanced money to the appellant through a gentleman’s agreement. I am constrained to agree with the holding in the case of *Patrick Peter Kithini v Justus Mwangela (2020) eKLR* as cited by the appellant where the court stated that an mpesa transaction or any other transaction for that matter without further evidence clarifying the basis of the transaction is insufficient to prove a fact on a balance of probability particularly where the recipient gives adequate or satisfactory explanation as to why the money was deposited into his account.
19. The respondent, having failed to establish the existence of a loan agreement, has not provided a satisfactory explanation for failing to remit funds it received for rent and utility bills to the appellant. In fact, the respondent on his own admission advanced that it held on to monies collected on behalf of the Appellant in January 2022.
20. Consequently, I find the appellant proved her case on a balance of probability that there was a property management contract and that the respondent failed to remit the sum of Kshs 383,753/- collected in January 2022. The long and short of this is that this court finds merit in this appeal and it is hereby allowed. The judgment of the trial court is hereby set aside and substituted with a judgment entered in favor of the appellant in the sum of Kshs 383,753/-. The appellant shall have the costs of the appeal.



DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 28TH DAY OF NOVEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Amina - For the Appellant

Miss Faith Imbogo -For the Respondent

Wilkister -C/A

