



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Daudi v Nthiga (Civil Appeal E107 of 2023)
[2025] KEHC 2171 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2171 (KLR)

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

CIVIL APPEAL E107 OF 2023

TW OUYA, J

FEBRUARY 13, 2025

BETWEEN

JANE ELIZABETH DAUDI APPELLANT

AND

WILSON NYAGA NTHIGA RESPONDENT

*(Being an appeal from the decree and Judgement delivered by Honourable
Caroline Ndumia (SRM/Adjudicator) on 9th February 2023 in
Milimani Small Claims Court SCCCOMM No. E6988 of 2022)*

JUDGMENT

Background

1. This Appeal emanates from the Judgement delivered by Honourable Caroline Ndumia SRM/ Adjudicator on 9th February 2023 in Milimani SCCCOMM No. E6988 of 2022. The claim was initiated by Wilson Nyaga Nthiga the respondent herein, as against Jane Elizabeth Daudi, the appellant herein arising from a soft loan of kshs.100,000 allegedly lent to the appellant by the respondent and which the appellant failed to pay despite demand.
2. The matter went for trial with the testimony of each of the parties and the court found in favor of the claimant and awarded him kshs. 100,000 together with interest @12% from November, 2022 to February 2023.

Memorandum Of Appeal

3. The Appellant being dissatisfied with the decision of the filed an appeal on the following grounds:
 - i. That the learned magistrate erred in law and in fact in finding and holding that the Respondent had proved his case on a balance of probabilities.



- ii. That the learned magistrate erred in law and in fact in allowing the Respondent's case without sufficient evidence to support the claim.
 - iii. That the learned magistrate erred in law and in fact in failing to appreciate the grounds and arguments advanced by the appellant.
 - iv. That the learned magistrate erred in law and in fact in failing to exercise her discretion in favour of the Appellant.
 - v. That the learned magistrate erred in law and in fact in failing to consider the evidence advanced by the appellant in support of her defence.
4. The Appellants pray for orders that:
- i. The appeal herein be allowed.
 - ii. The Decree of the trial Magistrate allowing the Respondent's case be set aside and be substituted with a decree dismissing the claim.
 - iii. Cost of this appeal be provided for.

Submissions

5. This matter was canvassed by way of submissions by counsel for both parties. Counsel for the Appellant has raised two issues: The jurisdiction of the court and whether or not the trial court evaluated the respondent's evidence to arrive at a correct determination. The Appellant rightly submits on the jurisdiction of this court to entertain this appeal that appeals from the Small Claims Court is on issues of law only. This is pursuant to Section 38 of Small Claims Court. It provides as follows:
- “-38. (1) A person aggrieved by the decision or an order of the court may appeal against that decision or order to the High Court on matters of Law.
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.
6. He submits that in the case of *Mwangi v Kibiu (Civil Appeal 16 of 2023)* (2023) KEHC 18643 (KLR), the Honourable Judge while relying on the case of *Peter Gichuki King'ara v I.E.B.C & 2 others* (2014) Eklr, had this to say in regards to what constitutes matters of law:
- “it was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial Court in denying a prayer of scrutiny is exercising judicial discretion. The court concluded that it would not be feasible for the court of appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor- is an issue of law.”
7. Secondly, the appellant argues that the trial court did not evaluate the respondent's evidence in order to arrive at a correct determination. His argument is that appellant did not discharge his burden of proving that he had advanced the appellant the sum of kshs.100,000 and that the court erred in failing to evaluate the evidence hence allowing the claim and entering judgement against the appellant. He relies on the provision of section 107(1) of the *Evidence Act* (Cap 80 Laws of Kenya).



8. The Respondent on the other hand argues that this court by virtue of being an appellate court can only entertain matters of law emanating from the Small Claims Court. He urges the court to adopt the reasoning of Hon. LJ Janet Mulwa in *Patrick Njuguna Kimondo v Geoffrey Vamba Mbuti (2019)*eklr on the duty of the first appellate court to re-evaluate the evidence and to draw its own conclusions.
9. He argues that the Respondent discharged his burden of proof by producing evidence of withdrawal of the money in question and that the Appellant admitted on oath acknowledging debt. He also submits that oral moneylending contracts are legally enforceable and relies on the authority of *Alfred Anakeya Mang'ula t/a Alfabetty Enterprises v Paul Indimuli & Another (2022)* eklr which borrowed from the Court of Appeal and opined inter alia that:

“The conclusion to draw from the above is that a money lending agreement need not be in writing, for it is enforceable. The fact therefore that the agreement between the appellant and the 1st respondent was not in writing does not make it unenforceable.”

10. He relies further on the authority of *Ali Abid Mohammed Versus Kenya Shell & company limited (2017)* eklr which held that;

“11. It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and king V. King 1920 AD 133* at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of conduct.”

Counsel reasons that the trial court took a holistic view of the respondent’s testimony and made a finding based on bank statement corroborated by text messages, admission of debt and promises to pay thereby proving his case beyond a balance of probability.

11. On whether or not the trial court failed to appreciate the evidence, grounds and arguments advanced by the appellant, the respondent argues that the appellant did not adduce any evidence to suggest there was any romantic relationship between her and the respondent leaving the court with the option of believing that the respondent’s case was more probable. He relies on the case of *William Kabogo Gitau v George Thuo & 2 Others(2010)*1klr where Judge Luka Kimaru held that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

Analysis

12. This court has considered the memorandum of appeal, affidavit and annexures by both parties together with the submissions by counsel for both parties. The court notes that the substratum of this appeal is premised on two issues: The jurisdiction of this court to entertain this appeal and; whether the respondent proved his case on a balance of probability.

Indeed, it is trite that matters emanating from the Small Claims Court are only appealable to the High court on matters of law.



The court in the case of Peter Gichuki King'ara v I.E.B.C & 2 others (2014) Eklr held inter alia that

“...the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor- is an issue of law.”

13. For the above reason this court will entertain this appeal. This court observes that the respondent's claim was premised on proving the existence of an enforceable oral agreement between himself and the Appellant. He then needed to go a step further to prove that not only did he lend the amount alleged but that the borrower did not pay. The two issues are therefore closely intertwined and the court will address them contemporaneously. The totality of the evidence comprises of the respondent's bank statement confirming withdrawal of Kshs. 100,000 which according to his testimony, he handed over to the Appellant as a soft loan to attract interest at the rate of 23% and the amount accrued to kshs. 140,000 within four months. The respondent also relied on a printout of correspondence which logically suggests the existence of a verbal agreement, acknowledgement of debt by the appellant and a promise to pay.
14. In the case of Attorney General of Kenya v Anyang' Nyong'o & 10 others (2010) RC 1 (KLR), the court enunciated on principles under which an appellate court can interfere with the exercise of a discretion by a trial court that:

“ The presiding judge;

- i. Took into accounts some irrelevant factor(s)
 - ii. Failed to take into account some irrelevant factor(s)
 - iii. Did not apply a correct principle to the issue (such as misdirection on a point of law, or misappropriation of facts)
 - iv. Taking into account all the circumstances of the case, the judge's decision is plainly wrong
15. Similarly, in Mohammed Eltaff & 3 others, Vs Dream Camp Kenya limited (2005) Eklr, it was observed that the appellate court has mandate to interfere where a trial court has left certain issues unresolved.
 16. I have carefully considered the testimonies by the parties, the judgement of the trial court and submissions by counsel for both parties. The trial court in its judgement analyzed the evidence in totality and arrived at the conclusion that the Respondent herein had proved its case beyond a balance of probability hence the award in favour of the respondent. I am satisfied that the trial court took into account all the relevant factors and applied the right principles to the issues at hand to arrive at a fair determination. I therefore find no reason to tamper with the trial court findings.
 17. Based on the above reasons, this court orders that:

This appeal is hereby dismissed. Judgement and decree of the adjudicator delivered on 9th February 2023 is hereby upheld with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY 2025

HON. T. W. OUYA

JUDGE

For the Appellant: Alubaka



For Respondent: KariukiHB Njuguna

Court Assistant: Martin Korir

