



REPUBLIC OF KENYA



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

**ARK Development Initiative v Kalwale (Civil Appeal E032 of 2024)
[2025] KEHC 5441 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E032 OF 2024
AN ONGERI, J
APRIL 24, 2025**

BETWEEN

ARK DEVELOPMENT INITIATIVE APPELLANT

AND

RAHEL RUTA KALWALE RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. S. M. Musili (RM/Adjudicator)
in Taveta Small Claims Court Case No. E006 of 2023 delivered on 26th March 2024)*

JUDGMENT

1. The Appellant filed Taveta Small Claims Court Case No. E006 of 2023 seeking a sum of Kshs. 563,477/= in respect of a loan of Kshs. 300,000/= which was advanced to the Respondent on 19th August 2016.
2. The Appellant's evidence was that the Respondent paid Kshs. 130,523/= leaving a balance of Kshs. 169,477 plus interest at 15% per annum and penalty making the total outstanding Kshs. 563,477/=
3. The Respondent admitted default and asked that her shares of Kshs 79,000/= plus savings of Kshs. 12,000/= totaling Kshs. 91,000/= be used to offset the loan balance.
4. The trial court found that the issue of interest and penalty is not reflected in the loan application form.
5. The trial court also found that the Respondent had financial difficulties and allowed her to offset her savings and shares from the balance of the loan (Kshs. 169,477/= less Kshs. 93,450/=) leaving a balance of Kshs. 76,027/= which she was allowed to settle by monthly instalments of Kshs. 5,000/= until payment in full.
6. The Appellant is aggrieved with the judgment and has appealed on the following grounds:-



- i. That the Learned Magistrate erred in law and in fact in failing to exercise his discretion in favor of the Appellant.
 - ii. That the Learned Magistrate erred in law and in fact by disregarding the Appellants oral evidence and submissions.
 - iii. That the Learned Magistrate erred in law and in facts by failing to take into consideration parties are bound by terms of an agreement and the Court has no mandate to rewrite an agreement but to interpret the same.
 - iv. That the Learned Magistrate erred in law by deciding that the Appellant did not prove this claim to require standard despite the overwhelming evidence tabled in Court by the Appellant.
 - v. That the learned Magistrate erred in law and in fact by wearing a hat of the Respondent in the matter thus arriving at a totally wrong decision.
 - vi. That the Honorable Learned Magistrate erred in law and facts by taking the Respondent's side for the proposal to make payment in installments and deciding the payment to be paid in installments.
 - vii. That the Honorable Learned Magistrate erred in law and facts and misdirected himself by acting on wrong and unsound principle and provisions of the law.
7. The parties filed written submissions as follows:- The appellant submitted that the magistrate failed to properly weigh evidence in favor of the appellant, leading to injustice (*Mbogo v Shah* [1968] EA 93 cited).
 8. That the court ignored the appellant's oral evidence and submissions, rendering a flawed judgment.
 9. That the magistrate rewrote the parties' loan agreement instead of interpreting its clear terms (*National Bank of Kenya v Pipeplastic* [2001] eKLR referenced).
 10. Further, that the appellant met the civil standard (balance of probabilities) but the magistrate wrongly held otherwise (*Evans Nyakwana Case* relied upon).
 11. That the magistrate acted partially by favoring the respondent's proposal for installment payments, contrary to judicial ethics (*Bangalore Principles* cited).
 12. Finally, that the court applied incorrect legal principles, deciding issues beyond the pleadings (*Gandy v Caspair* [1956] EACA referenced).
 13. The respondent submitted that the appeal challenges the Magistrate's decision allowing the Respondent's shares and savings to offset the outstanding loan balance.
 14. The Respondent argued that the Magistrate correctly applied the law and facts, and that the appeal should be dismissed with costs.
 15. That the Respondent borrowed Kshs. 300,000, repaid Kshs. 130,523 leaving a balance of Kshs. 169,477.
 16. That due to financial difficulties, she requested the Appellant to use her shares (Kshs. 79,000) and savings (Kshs. 12,000) to settle the debt.
 17. On the issue as to whether the Magistrate exercised judicial discretion properly – The Respondent argues the decision was fair, based on evidence, and aligned with contractual interpretation principles.



18. On the issue as to whether the Magistrate's decision was wrong – The Respondent contends the judgment was legally sound, considering the facts and applicable laws (e.g., the in duplum rule on interest).
19. The respondent submitted that the Magistrate's decision was justified as it factored in the Respondent's part-payments and passbook assets.
20. That the Trial court rejected unjustified penalties that exceeded the principal loan (violating the in duplum rule under the *Banking Act*) and interpreted the loan agreement's implied terms to allow offsetting the debt with the Respondent's shares/savings.
21. That the Magistrate relied on documented evidence (loan records, M-Pesa statements, passbook entries) and ignored unsubstantiated claims of accrued interest due to lack of proof and ensured fairness by recognizing the Respondent's financial constraints.
22. That the Appellant failed to prove its case on a balance of probabilities and the Respondent seeks dismissal of the appeal with costs.
23. This being an appeal from the Small Claims Court, the appellate court can only entertain the appeal on points of law.
24. The sole issue for determination in this appeal is whether the trial court was right in its determination that the savings and shares be utilized to offset the outstanding loan.
25. I find that the trial court rewrote the loan agreement by allowing an offset not stipulated in the contract. The principle in *National Bank of Kenya v Pipeplastic* [2001] eKLR holds that courts cannot alter clear contractual terms.
26. The trial court found that the parties had not agreed on interest and in the circumstances the interest chargeable ought to be court rates.
27. I find that there is no dispute that the outstanding amount is Kshs. 169,477/=.
28. The trial court had no business directing that the shares and savings be used to offset the loan when the parties had no agreement to that effect.
29. It is not the duty of the court to rewrite contracts between parties.
30. The Respondent is bound to repay the balance of Kshs. 169,477/= together with interest at court rates from the date of filing suit and costs of the suit.
31. I set aside the judgment of the trial court and replace it with judgment in the sum of Kshs. 169,477/= plus costs of the suit and interest at court rates from the date of filing suit until payment in full.
32. However, courts have discretion under Section 26 of the *Small Claims Court Act* to ensure fair repayment, especially where the debtor proves financial difficulty and the parties are at liberty to agree on reasonable installments.
33. The appeal is allowed with costs to the Appellant.

DATED, SIGNED AND DELIVERED THIS 24TH APRIL 2025 VIRTUALLY VIA MT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE



In the presence of:-

Court Assistants: Maina/Millicent

