ARK Development Initiative v Mwange (Civil Appeal E033 of 2024) [2025] KEHC 5439 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5439 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CIVIL APPEAL E033 OF 2024

AN ONGERI, J

APRIL 24, 2025

BETWEEN

ARK DEVELOPMENT INITIATIVE ..... APPELLANT

AND

JOHN MWANGE ..... RESPONDENT

(Being an appeal from Taveta Small Claims Court Case No. E005 of 2023 delivered on 26th March 2024 by Hon. S. M. Musili (RM/Adjudicator))

JUDGMENT

1. The Appellant filed Taveta Small Claims Court Case No. E005 of 2023 seeking a sum of Kshs. 174,850/= being the balance outstanding from a facility of Kshs. 95,000/= which was advanced to the Respondent on 7th October 2017.

2. The outstanding amount was Kshs. 65,175/= with accrued interest at 15% per annum and penalty making the total outstanding Kshs. 174,850/=.

3. The Appellant's evidence was that the Respondent was advanced a loan of Kshs. 95,000/=. The Respondent defaulted and they filed the claim seeking Kshs. 174,850/= which includes interest. They also asked for costs.

4. The Respondent admitted having borrowed Kshs. 95,000/= and he repaid 29,825 leaving a balance of Kshs. 65,175/=. He said he has shares worth Kshs. 26,000/= and savings of Kshs. 18,000/= which he wanted deducted from the amount owed.

5. The trial court found that the Respondent had shares worth Kshs. 26,000/= and saving of Kshs. 17,000/= making a total of Kshs. 43,000/= which should be used to offset the loan of Kshs. 65,175/= leaving a balance of Kshs. 22,175/=.

6. The trial court also directed that the contractual relationship between the Appellant and the Respondent to be ended and the Respondent to pay the balance by monthly instalments until payment in full.

7. The Appellant was 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, disregarding the loan agreement that was binding upon the parties which its breach led to filing of the claim.

   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 Respondent side for the proposal to make payment in installment 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.

8. The parties filed 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).

9. That the court ignored the appellant's oral evidence and submissions, rendering a flawed judgment.

10. That the magistrate rewrote the parties' loan agreement instead of interpreting its clear terms (National Bank of Kenya v Pipeplastic [2001] eKLR referenced).

11. Further, that the appellant met the civil standard (balance of probabilities) but the magistrate wrongly held otherwise (Evans Nyakwana Case relied upon).

12. That the magistrate acted partially by favoring the respondent's proposal for installment payments, contrary to judicial ethics (Bangalore Principles cited).

13. Finally, that the court applied incorrect legal principles, deciding issues beyond the pleadings (Gandy v Caspair [1956] EACA referenced).

14. The respondent submitted that the appeal challenges the Magistrate's decision allowing the Respondent's shares and savings to offset the outstanding loan balance.

15. The Respondent argued that the Magistrate correctly applied the law and facts, and that the appeal should be dismissed with costs.

16. That the Respondent borrowed Kshs. 95,000, repaid Kshs. leaving a balance of Kshs. 65,175/=.

17. That due to financial difficulties, he requested the Appellant to use his shares (Kshs. 26,000) and savings (Kshs. 18,000) to settle the debt.

18. 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.

19. 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).

20. The respondent submitted that the Magistrate's decision was justified as it factored in the Respondent's part-payments and passbook assets.

21. 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.

22. 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.

23. That the Appellant failed to prove its case on a balance of probabilities and the Respondent seeks dismissal of the appeal with costs.

24. This being an appeal from the Small Claims Court, the appellate court can only entertain the appeal on points of law.

25. 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.

26. 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.

27. The trial court found that the parties had not agreed on interest and in the circumstances the interest chargeable ought to be court rates.

28. I find that there is no dispute that the outstanding amount is Kshs. 165,175/=.

29. 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.

30. It is not the duty of the court to rewrite contracts between parties.

31. The Respondent is bound to repay the balance of Kshs. 165,175/= together with interest at court rates from the date of filing suit and costs of the suit.

32. I set aside the judgment of the trial court and replace it with judgment in the sum of Kshs. 165,175/= plus costs of the suit and interest at court rates from the date of filing suit until payment in full.

33. 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.

34. 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