



REPUBLIC OF KENYA



**Fainan Credit Limited v Kabaru (Commercial Appeal
E002 of 2023) [2025] KEHC 6342 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
COMMERCIAL APPEAL E002 OF 2023
FN MUCHEMI, J
MAY 15, 2025**

BETWEEN

FAINAN CREDIT LIMITED APPELLANT

AND

PETER KABARU RESPONDENT

*((Being an Appeal from the Judgment and Decree of Hon. Sylvie A. Wayodi (RM/Adjudicator)
delivered on 12th October 2023 in Thika Small Claims Court SCCCOMM No. E819 of 2023))*

RULING

Brief facts.

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCCOMM No. E819 of 2023 whereby the trial court dismissed the appellant's claim for the sum of Kshs. 435,318/- being balance of an unpaid loan together with interests.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in dismissing the appellant's claim.
 - b. The learned trial magistrate erred in failing to hold that the burden of proving that payment had been received for the debt owed to the appellant lay on the respondent.
3. Directions were issued that parties put in written submissions and the record shows that the appellants complied by filing submissions on 25th November 2024. The respondent on the other hand had not filed his submissions by the time of writing this judgment.



The Appellant's Submissions.

4. The appellant submits that its evidence as to the sum advanced, the contract for monies advanced and the monies accrued was elaborately laid out in its witness statement and documentary evidence filed in court. The appellant further submits that the amount advanced is clearly laid out in the loan application form and the interest is provided.
5. The appellant argues that the trial court ought to have interrogated the credibility of the respondent's evidence as he stated that he never had a direct relationship with the appellant contrary to the loan application form. Further, upon the agreement entered into subsequent to the loan agreement in which the respondent agreed that the rent collection could be done by the appellant's agent, statements were provided setting out the payments received from the tenants. The appellant argues that the respondent's evidence to the effect that the rents received satisfied the debt owed was not supported by any evidence. No counter statement was produced in support of the said evidence nor was the evidence of the tenants provided to rebut its evidence that the monies received as rent were insufficient to satisfy the outstanding debt.
6. The appellant argues that the evidence of PW2 did not aid the respondent as PW2 was simply the drawer of the agreement but was not involved in the receipt of the monies or the accounting. Thus PW2's evidence did not carry any weight.
7. The appellant further argues that the evidence of PW2 to the effect that there was no complaint from them was incorrect as the WhatsApp exchanges between its director and the respondent showed that the respondent admitted owing the sums due. The said exchanges also support its assertion that the monies received as rent from the respondent's property were insufficient to satisfy the respondent's debt to it.
8. The appellant submits that the learned magistrate misdirected herself in failing to hold that sufficient evidence had been furnished to make a finding in its favour and that the evidence favoured the respondent on a balance of probabilities.

Issues for determination.

9. The main issues for determination are twofold: -
 - a) Whether this appeal is properly before the court.
 - b) If the appeal is properly before this court, the court shall determine the merits of the appeal.

The Law.

10. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

11. I am in agreement with the dictum of the Otieno & Co. Advocates case that this though it is the first appeal, it is restricted by the provisions of Section 38 of the Small Claim's Act thus:



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.”
11. A cursory look at the five (5) grounds of appeal, shows that all the grounds of appeal, concern the evidence adduced in the court below and the challenge on the court that is that it did not analyse the evidence so as to arrive at a correct finding. All these matters are matters of fact and not of law.
12. As such, this court need not delve in matters of fact in this appeal because the subject of this appeal is outside the mandate spelt out in Section 38 of the Act. It is evident in the judgment of the honourable magistrate that the court analyzed the evidence before it before pronouncing the verdict.
13. I find that this appeal is misconceived and incompetent. It is therefore, dismissed. Each party to meet their own costs.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT

THIKA THIS 15TH DAY OF MAY 2025.

F. MUCHEMI

JUDGE

