



**Kopo Kopo Inc v Isandula (Civil Appeal E023 of 2024)  
[2025] KEHC 7258 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7258 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CIVIL APPEAL E023 OF 2024**

**JR KARANJA, J  
MAY 23, 2025**

**BETWEEN**

**KOPO KOPO INC ..... APPELLANT**

**AND**

**JOSEPH TSISAGA ISANDULA ..... RESPONDENT**

*(Being an appeal against the entire judgment of Hon. Kibet Sambu,  
Chief Magistrate delivered on 4th July 2024 in MCCC NO. E110 of 2023)*

**JUDGMENT**

1. This appeal arises from the judgment of the Chief Magistrate at Kapsabet delivered on 4<sup>th</sup> July 2024 in MCCC No. E110 of 2023 in which the Appellant, Kopo Kopo Inc, was the Defendant having been sued by the Respondent, Joseph Tsisaga Isandula, as the Plaintiff.

2. The Plaintiff's claim was for a permanent injunction order to issue against the Defendant Company restraining it from recovering a sum of Kshs. 219,871/- from the Plaintiff who also prayed for costs and interest of the suit.

The Defendant denied the claim on the basis of the grounds contained in its statement of defence and counterclaimed against the Plaintiff for the same amount of money as of the 6<sup>th</sup> July 2023 together with interest at commercial rate from the date of the judgment until payment in full.

3. The matter proceeded to a full hearing and after trial the trial court entered judgment in favour of the Plaintiff [Respondent] against the Defendant [Appellant] and dismissed the Defendant's counterclaim.

Being aggrieved, the Appellant/ Defendant preferred the present appeal on grounds set out in the memorandum of appeal dated 1<sup>st</sup> August 2024 and prayed that the appeal be allowed and that the counterclaim be determined on its merits. Further, that the judgment and decree of the trial court be set aside.



4. The hearing of the appeal was by way of written submissions which were duly filed by both parties through their respective advocates i.e. Messrs Rilani Advocates LLP and Messrs. Korir, Jepleting & Company Advocates.

The appeal and the grounds in support thereof was given due consideration by this court in light of the rival submissions for and against the appeal.

5. Being a first appeal, this court was duty bound to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

In *Selle and Another Vs. Associated Motor Boat Company Limited & Others* [1968] EA 123, the court stated as follows: -

“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of trial and the principles upon which this court act in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.....”

6. Accordingly, this court reconsidered the evidence availed by the Respondent/ Plaintiff through his person [PW1] in which he stated that he was a businessman in Kapsabet loan and was previously undertaking business transactions with the Appellant/ Defendant. At some point in the course of business he obtained a loan of Kshs. 100,000/- from the Appellant which he repaid in full and obtained an additional loan of Kshs. 275,000/- which he also fully repaid. He thereafter terminated such engagement on account of high interest charges.

7. The Plaintiff contended that as at the 5<sup>th</sup> July 2023, he had already cleared all his outstanding loans, but was later to receive a phone call from the Defendant claiming from him a sum of Khss. 155,000/-. He revisited his e-mail account on the loans advanced to him and noted that one Leah Otieno had accessed his till number to secure loans from the Defendant/ Appellant.

The Plaintiff contended further that he only maintained one till number 0716181977 for all his transactions with the Appellant/ Defendant Company and that he never obtained the amount claimed from him by the Defendant, which amount was fraudulently obtained from the Appellant by the stranger lady called Leah Otieno.

8. The Defendant/ Appellant testified through its head of credit, Grace Nyambura [DW1], who stated that the company offers loans for business to their clients through its cash advance facilities and that the Plaintiff/ Respondents was their merchant and did apply and was advanced a loan under the aforesaid facility after executing the relevant credit agreement. In the process, the Plaintiff availed his mobile phone numbers and PIN for security purposes and on 5<sup>th</sup> July 2023 he applied for a loan advance of Kshs. 155,000/- which was advanced to him within a span of thirty [30] minutes after receipt of the application.

9. It was further stated by the credit officer [DW1] that the Plaintiff had previously taken two loans which he fully paid, but he failed to pay the material third loan of Kshs. 155,000/- which the Defendant demanded from the Plaintiff together with interest and costs of this suit.



10. After considering both the Plaintiffs and the Defendant's evidence, the trial court in conclusion rendered itself as follows:-

“I do hold and find that the Defendant, under the agreed terms and conditions of the executed loan agreement with the Plaintiff had the greater responsibility and obligation to ensure that the appropriate administrative and technical safeguards were made and put in place to secure the Plaintiff's personal data and account with the Defendants by inter-alia cross checking the Plaintiff's provided log in credentials in all transactions made and to inform him of any intrusions detected in his Account.

It is for this reason, that I ultimately find the Plaintiff having proved his claim against the Defendant on a balance of probability as required by law, which claim is hereby allowed in terms of prayers sought in the filed plaint dated 7<sup>th</sup> August 2023, with costs to the Plaintiff.

The Defendant's written statement of defence and counter claim dated 25<sup>th</sup> September 2023 for similar reasons is hereby dismissed with costs to the Plaintiff.

Judgment accordingly.”

11. In the opinion of this court the issue that commended itself for determination was whether the Plaintiff/ Respondent did receive a loan of Kshs. 155,000/- from the Defendant/ Appellant and if so, whether the amount was ever repaid to the Defendant in accordance with the terms and conditions of the applicable agreement.

It was evident that the transaction pertaining to the said loan as between the Plaintiff and the Defendant was undertaken by way of mobile phone applications.

12. It was also evident that such similar transactions had previously been conducted between the two parties and for that purpose the Plaintiff maintained a Till No. 0716181997 whose accessibility was secured by a password only known to the Plaintiff.

13. It was indeed admitted by the Plaintiff during cross-examination that his account with the Defendant had a password which was accessible to him only and that his transactions with the Defendant were undertaken with the usage of his personal mobile phone. However, he denied having applied for and received the loan of Kshs. 155, 000/- from the Defendant and contended that on the date that the loan was advanced i.e. 5<sup>th</sup> July 2023, all his outstanding loans with the Defendant had been cleared.

14. Notably, the Plaintiff did not deny that the material loan amount was actually released and paid out using his account's security credentials. His contention was that it was not him who received the amount but a stranger called Leah Otieno. He said that the stranger accessed his till number to obtain the loan from the Defendant. He denied having obtained necessary information from the Defendant through his mobile phone on any strange transactions in his account or having received his account statements from the Defendant.

15. The Plaintiff also denied any linkage with the lady stranger who accessed his account by way of a marriage relationship and further that he added the name of an additional person to get access to his account.

In essence, the Plaintiff was saying, yes the loan of Kshs. 155,000/- was advanced by the Defendant but not to me. That, the Defendant should pursue the culprit lady for the money instead of him. He implied that the loan was wrongly advanced to a third party due to the Defendant's negligence in safe guarding client's accounts and securing credentials or personal data.



16. The Defendant however, contended that the disputed loan was paid out to the Plaintiff and that on the day of the necessary application and pay out of the money the Plaintiff reached the Defendant by 11:00am on confirmation of the loan application.

In cross-examination, the Defendant's witness [DW1] admitted and confirmed that their records showed that the disputed amount was cashed out by one Leah Otieno, the stranger alluded to by the Plaintiff. She [DW1] said that an OTP message was sent to the Plaintiff on the material 5<sup>th</sup> July 2023 at 10:00am for him to reset the account number to add an additional user.

17. The witness [DW1] further said that the Defendant normally ensured that their date is safe by confirming the mobile phone numbers, but admitted that they did not call the Plaintiff to inform him that they [Defendant] were about to disburse the loan amount Kshs. 155,000/- to the said Leah Otieno.

18. From the foregoing it was evident that the person known as Leah Otieno was an intruder in the transactions involving the Plaintiff and the Defendant and that the intrusion was facilitated by her accessibility to the Plaintiff's account using the Plaintiff's security credentials and/ or personal data kept by himself and of course, the Defendant.

The question would therefore arise as to who between the Plaintiff and the Defendant was responsible for the breach of the Plaintiff's personal data and/or security credentials by the intruder.

19. The trial court found that the Defendant was greatly responsible for the breach by its failure to safeguard the Plaintiffs personal data and security credentials with regard to his account with them thereby breaching the terms and conditions of the applicable agreement in that regard.

20. In his pleadings the Plaintiff averred that his till through which he received payments for his electronic shop within Kapsabet town was in the month of July 2023 hacked by the stranger Leah Otieno who ended up withdrawing all his money in the till and then proceeded to take a loan of Kshs. 155,000/- through the same platform. He contended that the money was not received by him as it was never sent to his registered mobile phone No. 0716181997. He also contended that at no time did he enter into an agreement with the Defendant requesting for the loan.

21. The Plaintiff further pleaded that the claim of Kshs. 219871/- by the Defendant against him was fraudulent as he never entered into an agreement with the Defendant for the loan amount and that the Defendant fraudulently deducted money from his business till payments without his consent and without exercising due care. He therefore conceded that the Defendant's actions against him were ill motivated and actuated by malice.

22. In denying the Plaintiff's allegations, the Defendant in its statement of defence pleaded that the Plaintiff in applying for the Defendant's services and obtaining or setting up an account on the Defendant's platform provided information about his business including his phone number which he was made aware would serve as the contact number where SMS notifications on all activities in his account would be sent. That, the Plaintiff managed the funds received on his business lipa na M-Pesa till including the transfer of funds to a designated bank account or "M-Pesa" number known as the settlement account.

23. The Defendant also pleaded that the Plaintiff was the administrator of his account and was at all times at liberty to update information on his account including the settlement account mobile number and his password. That, while it [Defendant] maintained appropriate administrative and technical safe guards to secure user data, the Plaintiff had a responsibility to ensure that it was only him who could access his account and log in information and to also ensure that he did not share any account information with third parties and that the account information was secure. In that regard, the



Defendant relied on paragraph 6[h] of the applicable terms and conditions and denied of having any knowledge of the person known as Leah Otieno.

24. In the counter claim, the Defendant alleged that the Plaintiff was in breach of the applicable cash advance agreement after the disputed amount was disbursed into his Till, but he defaulted in its repayment thereby incurring a debt of Kshs. 219871/- which remained due and owing as at 6th July 2023 when the Plaintiff ceased all repayments and using his till.

25. The onus to establish the claim against the Defendant lay on the Plaintiff. Similarly, the onus to prove the counterclaim against the Plaintiff lay with the Defendant.

With regard to the main claim, the evidence availed by the Plaintiff was insufficient in the opinion of this court to prove the allegations of fraud made against the Defendant.

26. Apart from establishing that the Defendant disbursed the disputed amount to a wrong party, a fact acknowledged by the Defendant, the Plaintiff did not demonstrate how that erroneous action amounted to fraud. Further, he did not show how the action was ill motivated and actuated by malice.

27. There was no substantial denial from the Plaintiff that there was in existence a commercial agreement between himself and the Defendant based on the applicable terms and conditions. He could not therefore allege that the Defendant's action of claiming a sum of Kshs. 219,871/- based on the agreement was fraudulent, even though he was able to show that the main amount of Kshs. 155,000/- was not paid to him but wrongly to a third party, Leah Otieno.

28. It is settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowed to leave the element of fraud to be inferred from facts [See, Vijay Morgania Vs. Nansingh Madhusingh Darbar and Another [2000] eKLR

The allegations of fraud must be strictly proved on a standard of proof above balance of probabilities, but below reasonable doubt [See, R.G. Patel Vs. Lalji Makenji [1957] EA 314] and Moses Parantai & Peris Wanjiku Mukuru Vs. Stephen Njoroge Macharia [2020] eKCLR.

29. Herein, rather than demonstrate fraud on the part of the Defendant with cogent or substantial evidence, the Plaintiff merely demonstrated that the disbursement of the amount of Kshs. 155,000/- was erroneously effected on a wrong account by the Defendant as a result of fraudulent activities of a third party in the person of one Leah Otieno. Indeed, the Plaintiff said that this stranger hacked his account and accessed his personal data and security credentials.

30. It was clear from the facts of this case and the evidence from both parties that just as much as the Defendant was required to safe guard the Plaintiff's personal data and security credentials in their possession, the Plaintiff was equally required to safeguard his personal data and security credentials in relation to his account with the Defendant and in accordance with the agreement between himself and the Defendant.

It would therefore follow that both the Plaintiff and the Defendant fell victim to a cyber or digital fraudster called Leah Otieno and both suffered loss in one way or the other.

31. This court does hereby find that both the Plaintiff and the Defendant were equally responsible for the apparent loss of Kshs. 155,000/- in the hands of a stranger to their commercial relationship. Consequently, the Plaintiff's claim against the Defendant could not stand and so could the Defendant's claim against the Plaintiff. In fact, the Defendant ought to have treated the loss simply as a bad debt.

32. In sum, the Plaintiff's claim against the Defendant is hereby dismissed together with the Defendant's counterclaim.



The judgment of the trial court made in favour of the Plaintiff against the Defendant is hereby quashed and set aside and substituted for a judgment dismissing both the Plaintiff's claim and the Defendant's counter claim.

The costs of the trial court and this appeal be borne by the parties respectively i.e. each party to bear their own costs.

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF MAY 2025**

**HON. J. R. KARANJAH**

**JUDGE**

