



**Gicimu v Miano (Civil Appeal E117 of 2022) [2025] KEHC 7835 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7835 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E117 OF 2022  
JK NG'ARNG'AR, J  
JUNE 5, 2025**

**BETWEEN**

**GEDION MURIITHI GICIMU ..... APPELLANT**

**AND**

**JOHN KIAM MIANO ..... DEFENDANT**

*(Being an appeal from the Judgement of Chief Magistrate Court at Wang'uru by Hon. A Lorot(Chief Magistrate) delivered on 25th November, 2022 the case being Wanguru CMCC no 151 of 2015)*

**JUDGMENT**

1. What is before the court for determination is a memorandum of appeal dated 13<sup>th</sup> December, 2022 filed by the appellant following a judgement that disfavoured him in the lower court.
2. The facts giving rise to the instant suit can found in the Plaintiff dated 25<sup>th</sup> May, 2015. The appellant who was then the Plaintiff averred that he is the registered owner of Land Registration number Mwea/Mutithi/1983 which he issued as collateral for a loan the Respondent was advance by the 1<sup>st</sup> Defendant in the Plaintiff [Cooperative Bank Limited] of Kshs. 300,000/-
3. The appellant in paragraph 7 of the plaintiff averred that he learnt that the Respondent had defaulted after being served with a notice of sale dated 26<sup>th</sup> March, 2015 which he received on 28<sup>th</sup> March, 2015. He claims in the plaintiff that he visited the bank's Branch and was advised that the respondent herein had only Paid a sum of Ksh. 100,000/-. In Paragraph 11 of the plaintiff the Appellant then plaintiff stated that he was willing to settle any balance that may accrue by March 2015.

**Determination**

4. I have gone through the rival pleadings and submissions of the parties and from my deduction it is common ground that the main issue for determination is whether appeal has merit.



5. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle v Associated Motor Boat Co.* [1968] EA 123 it was held in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts 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. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

6. It is not disputed that a loan facility was taken from the bank and was guaranteed by the appellant and that the appellants title deed was indeed used as a collateral in securing the said loan facility.

7. In testimony and as per the record the Respondent claims that he took the loan on behalf of the appellant and that the appellant actually received the said loan proceeds. The Lower court in relying on *Miller v Minister of Pensions* [1974] ALL ER decided the matter of balance of probabilities.

8. The burden of proof in civil cases on the balance of probability is that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable to absorb liability.

9. I agree with the subordinate court that the privity of contract precluded the appellant from transactions between the bank and the Respondent for reason that he was just a guarantor. It emerged that part of the loan proceeds went to his account let alone the funds alleged to have been transmitted in cash.

10. To this end, I find that the denying that he benefited from the loan proceeds did not deserve the light of day at trial and I therefore agree with the lower court in dismissing the case for lack of merit.

11. I find that this appeal lacks merit and I dismiss with costs to the Respondent.

It is so ordered

**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 5<sup>TH</sup> DAY OF JUNE, 2025 IN THE PRESENCE OF:**

Appellant present in person

Kimata for the Respondent

Siele/Mark [Court Assistants]

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**J.K. NG'ARNG'AR**

**JUDGE**

