



**Gitau v Momentum Credit Limited (Civil Appeal E494 of 2023)  
[2025] KEHC 11288 (KLR) (Civ) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11288 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E494 OF 2023**

**DKN MAGARE, J**

**JULY 23, 2025**

**BETWEEN**

**JONATHAN KAIGAI GITAU ..... APPELLANT**

**AND**

**MOMENTUM CREDIT LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the ruling and order of the Honourable D.S. Aswani (RM/Adjudicator) given in Nairobi SCC COMM. No. E6687 of 2022. The ruling was in respect of an application dated 4.5.2023. The Appellant raised the following grounds of appeal.
  - a. The learned magistrate/adjudicator erred in law and fact by failing to appreciate and consider the appellant's replying affidavit that had already been filed before the ruling was delivered.
  - b. The learned magistrate/adjudicator erred in fact by failing to appreciate the fact that the statement of account was highly disputed by the appellant.
  - c. The learned magistrate/adjudicator erred in law and fact by failing to consider any of the appellant's replies to the claim but adopted the claim as filed.
  - d. The learned magistrate/adjudicator erred in law and fact by reviewing its judgment without paying regard to the fact that the appellant's defense ought to have been considered.
2. None of the grounds raise matters of law. The memorandum of appeal is in respect of a ruling of 4.5.2023. This was a post judgment ruling, judgment having been given on 09.02.2023. The court found that there was an annexure related to payment that was missed, hence the dismissal of the claim.



3. The Respondent submitted that there was a loan facility, in 18 monthly instalments. The vehicle which was security was sold for Ksh. 401,519/=. They stated that the appellant is trying to re-write the contract between the parties. Reliance was placed on the case of *Keshavji Jivraj Shah v Kanwal Sarjit Singh Dhiman* [2019] KEHC 4066 (KLR), where the court posited as follows:

Where a money lending bargain appears on the face of it or on the evidence adduced to be unconscionable the lender may have to show that the contract ought not to be altered but that, on the facts of the case, where the borrower was a merchant of mature age and there was no evidence of fraud, trickery, pressure or undue advantage taken on the part of the lender or mental incapacity on the part of the borrower, the latter was not entitled to relief merely on the ground that the bargain was a hard bargain.

65. In the instant suit, the defendant further in support of the "illegality tag" alleged that the Plaintiff had no right of place to lend him money on the terms and in the circumstances he did. Yet, it was the Defendant's own oral evidence that he is the one who sought out the Plaintiff for the loan and they even became friends! A loan similar to the one in this case was approved of and enforced by Ringera J (as he then was) in *Morjaria v Kenya Batteries (1981) Ltd & 2 others* [2002] 1 KLR 406. His Lordship's holding in the matter is apt and relevant. He held at page 409 lines 8 - 30 -

- “ a) Interest was not to be charged if the borrower paid on due date and any adverse consequences arising from levying of interest on the loan were self-inflicted and the borrower could not be heard to complain.
- b) It is not the business of the Court to re-write contract for parties. If the parties have negotiated and agreed on a genuine pre-estimate of the loss one would suffer if the other did not honour its part of the bargain, the defaulting party cannot be heard to complain ...

4. They also relied on the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR as follows:

A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.

5. The Appellant submitted that the loan facility was given and he ought to have paid Ksh 505,983/=. He stated that he was not served with a proclamation notice. Reliance was placed on the cases of *Mercy Nyawade v Banking Fraud Investigations Department & 2 others* [2017] KEHC 9108 (KLR), *Shah & another v Kenya Deposit Insurance Corporation & another* [2023] KEHC 485 (KLR) and



## Analysis

6. This being an appeal from the Small Claims Court, the duty of the court is circumscribed under Section 38 of the *Small Claims Court Act* which provides as doth:

- (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.

7. However, an appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. An appeal on points of law is akin to a second appeal to the Court of Appeal. The duty of a second appellate court was set out in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR: -

“This is a second appeal. 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 they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* (2016) eKLR).”

8. Then what constitutes a point of law? In *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others*, (2014) eKLR, the court stated as doth:

“4. Although the phrase ‘a matter of law’ has not been defined by the *Elections Act*, it has been held in *Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others*, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA) on 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing *Bracegirdle vs Oxney* (1947) 1 All ER 126. See also *Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others*, Malindi Civil Appeal No. 39 of 2013 (Court Of Appeal), (Okwengu, M’inoti & Sichale, JJA) of 23.01.2014 following *AG vs David Marakaru* (1960) EA 484.”

9. All the questions that were raised in this appeal are matters of fact. There are no disputes as to whether the document the court relied on was on record showing a sum of Ksh. 132,319/=. Having the document on the record meant that there was an error apparent on the face of the record. Kuloba J (as he then was) in *Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994*, stated as follows:

“The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence



again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application, it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

10. In the circumstances, given that these are questions of fact, the court has no jurisdiction. The Court of Appeal in *Mwangi v Wambugu* (1984) KLR 453, pronounced itself as follows:

A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence

11. In *Associated Provincial Picture Houses Limited V. Wednesbury Corporation* [1948] 1 KB, Lord Greene M.R, stated as follows:

It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind.

12. In this case, the matter cannot be stated to be such that no reasonable tribunal will have arrived at the same. The appeal has no merit and is accordingly dismissed.

13. The next issue is costs. These are discretionary. They are provided for under Section 27 of the [\*Civil Procedure Act\*](#).

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

14. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR as follows:

- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the



preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

15. The appellant was unsuccessful. He ought to pay costs. The Appellant shall pay costs of Ksh 45,000/= within 30 days, in default execution to issue.

#### **Determination**

16. In the upshot, I make the following orders:-
- a. The appeal is dismissed with costs of Ksh. 45,000/= to the Respondent.
  - b. 30 days stay of execution.
  - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23<sup>RD</sup> DAY OF JULY 2025.**

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Ms. Ng'ang'a for the Appellant

No appearance for the Respondent

Court Assistant – Michael

