



REPUBLIC OF KENYA



KENYA LAW
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**Kioko v Wanzina (Civil Appeal E264 of 2024)
[2025] KEHC 12314 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 12314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E264 OF 2024**

**F WANGARI, J
JULY 17, 2025**

BETWEEN

ABED CHUMWA KIOKO APPELLANT

AND

JENIFFER MUMBUA WANZINA RESPONDENT

*(Being an appeal against the Judgment of Hon. J. W. Mwangi (SRM) delivered
on 14th August 2024 in Mombasa Small Claims Court Commercial Suit
No. E571 of 2024, Jeniffer Mumbua Wanzina v Abed Chumwa Kioko)*

JUDGMENT

1. The Claimant/ Respondent filed a Statement of Claim dated 31/05/2024 and filed on 13/06/2024 seeking the refund of Kshs. 426,000 being money advanced to the Respondent/ Appellant, but upon demand for payment after it was due, he refused to pay. That the Claimant reported the matter to Kadzandani Police Station whereby the Respondent was summoned, but even then, he failed to pay.
2. The Respondent/Appellant in his Statement of Response dated 05/07/2024 denied receiving any money from the Claimant/Respondent and that all the three bank accounts/statements as provided by the Claimant did not show any direct transaction /transfer of money from the Claimant's bank account to the Respondent's account. The Respondent /Appellant also denied the agreement dated 14/09/2020 which he considered a forgery because the purported signature of the Respondent did not match his specimen.
3. The Respondent/Appellant also filed a demanding a sum of Kshs. 926,940 being shared commission and profit. It was claimed that the two parties had been in a business relationship for many years. The Counter-claimant stated that he was a director and shareholder of a company called Fly Wood International Adventure which procures and tenders transport and accommodation for dignitaries across the country. That he partnered with the Claimant/Respondent in the course of business



transactions. The Respondent company called Fidex Car Hire Limited offered motor vehicles for transport services.

4. The Respondent/Appellant further stated that some time in year 2021, he proclaimed a tender for provision of transport and accommodation for International Center for Aids Care and Treatment Program (ICAP) and Center for International Program. That the Claimant engaged the Respondent's company and agreed that the Claimant was entitled to 30% of the commission paid.
5. That upon successful delivery of the services, the Respondent/Appellant instructed the Claimant/Respondent to request for payment and that the Claimant/Respondent raised separate invoices of Kshs. 978,600 and Kshs. 633,360. That upon payment being made, the Claimant/Respondent failed to pay the Respondent/Appellant his dues. The Respondent/Appellant therefore prayed that the court dismisses the Claimant's claim with costs to them and enter judgment in favour of the Counterclaimant against the Respondent in the sum of Kshs. 926,940.
6. This suit was heard in the trial court and judgment delivered on 14th August 2024 where the court found: -

“The upshot of the foregoing is that the claimant's statement of claim dated 31st May 2024 is meritorious and judgment is hereby entered in favour of the claimant as against the Respondent for Kshs. 426,000 plus interest at court rates from the date of filing until payment in full. The counterclaim dated 5th July 2024 is dismissed. As costs follow the event, the claimant is awarded costs of the claim.”

7. Being dissatisfied with the Judgment, the Appellant filed the Memorandum of Appeal dated 05/09/2024 on grounds inter-alia the trial court erred in law by heavily relying on circumstantial evidence and holding that the Claimant/Respondent had proved her case on a balance of probability, by misapplying the doctrine of contra proferentem rule and admitting the fraudulent and irregular acknowledgement note whose authenticity was disputed by the Appellant, and in failing to analyse the evidence presented by the Appellant in its entirety and in essence arriving at a conclusion that did not yield a just income.
8. The Appellant prayed for orders that the appeal be allowed by setting aside the judgment delivered on 14/08/2024 and in lieu thereof allow the Appellant's Counterclaim dated 05/07/2024, that costs of the appeal be allowed, and that the court grants any other relief that it may deem fit to grant.
9. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 11/07/2025 on whether the court erred in holding that the Respondent had proved her case on a balance of probability, relied on Section 107 and 108 of the Evidence Act on proof of facts and the burden of proof lying on the person bound to prove.
10. The Appellant stated that the Respondent's claim against the Appellant was for Kshs. 426,000 loan to the Appellant at different intervals. That during cross examination, the Respondent alleged to have withdrawn Kshs. 232,000 at KCB Treasury Building and gave the Appellant Kshs. 230,000. That however, no bank statement was produced as proof of the transaction. That the Respondent admitted there was no written agreement and there were no receipts of goods she claimed to have purchased for the Appellant on loan of Kshs. 196,000 from a hardware owned by Margaret Muema Maingi.
11. The Appellant submitted that the acknowledgement note produced in court by the Respondent is for only Kshs. 230,000 and not Kshs. 426,000, all the amount claimed by the Respondent. That according to the Respondent, she loaned the Respondent Kshs. 230,000 in 2018 and Kshs. 196,000 in 2019.



- That however, the agreement is dated 14th September 2020. That the Appellant disputed the alleged acknowledgement note all along on the basis that no such agreement was ever drawn.
12. On whether the court erred in failing to uphold the principle of *contra proferentem*, the Appellant argued that the guiding principle is that an ambiguity in a contract ought to be construed unfavorably to the drafter. That the court therefore failed on this basis as the wording of the contract was ambiguous in a manner that the acknowledgement note should have been interpreted in the Appellant's favour.
 13. The Appellant on whether the court erred by failing to wholesomely analyse their evidence as well as disregard their counterclaim, contended that in their counterclaim, they produced evidence claiming more amount than what the Respondent was claiming in her statement of claim. That the Appellant further testified how the business he had with the Respondent came about thus giving rise to the amount in the counterclaim of Kshs. 926,940.
 14. The Respondent in their submissions dated 01/04/2025 stated that the trial court rightly considered the testimonies of both parties, the documentary evidence of the Respondent, and the undisputed fact that the Appellant and the Respondent are longtime friends. That the trial court exercised its discretion in making a finding that the Respondent had proved her case on a balance of probability.
 15. On the said burden of proof, the Respondent cited the case of *Anyona v Wells Oil Limited & 2 Others* (Civil Appeal E091 of 2022) [2023] KEHC 26833 (KLR). The Respondent further stated that the relationship between the Appellant and the Respondent, the deposit slip produced by the Respondent bearing the Appellant's name and phone numbers, as noted in the judgment, are among other factors considered by the trial court in its findings that the Respondent had on a balance of probability proven that the Kshs. 196,000 was advanced to and for the benefit of the Appellant.
 16. The Respondent submitted that the Appellant alleged that the agreement dated 14/09/2020 was forged and that the signature did not match his specimen. That the trial court held in its judgment that the evidentiary burden of proving forgery as pleaded by the Appellant shifted to him and that the standard of proof for a serious allegation of fraud is higher than the normal standard as held in the case of *Anyona v Wells Oil Limited & 2 Others* (Supra).
 17. The Respondent also cited the case of *Kenya Railways Corporation v Telkom Kenya Limited* (Civil Appeal 423 of 2018) [2024] KECA 9 (KLR). That the Appellant did not call a handwriting expert to establish authenticity of the said documents on the allegation of forgery. The Respondent further relied on the holding in the cases of *Daniel Gachanja Githaiga v Credit Reference Bureau Africa Ltd & 2 Others* (2020) eKLR, *Kabue v Co-operative Bank of Kenya Ltd* (2024) eKLR and *Co-operative Bank of Kenya Limited v Nyagah* (2022) eKLR.
 18. The Respondent further argued that the Appellant cannot run away from a document he authored especially not by relying on the *contra proferentem* rule whose import is that when a contract contains an ambiguous term, the term should be interpreted against the party who drafted it, who in this case happens to be the Appellant. That in any case, *contra proferentem* is only meant to help the court construe ambiguous clauses or terms in a contract as held in the Court of Appeal case of *Bhogatia v Madison Group* (2024) KEELRC 1587 (KLR). That the trial court did not have to resort to the said rule as the agreement dated 14th September 2020 was clear and precise.
 19. The Respondent on counterclaim stated that the Appellant did not produce any profit-sharing agreement between himself and the Respondent and/or Fidex Car Hire company or any evidence of ever receiving any payment as commission or profit as proof that such an arrangement existed. The Respondent therefore urged the court of uphold judgment of the trial court in its entirety and dismiss the appeal with costs.



Analysis

20. I have considered the Record of Appeal and submissions by the parties. The issues for determination are: -
- a. Whether the Respondent's claim and the Appellant's counterclaim were proved to the required standard
 - b. Whether the court made a proper finding on the principle of contra proferentem rule
 - c. Who should bear costs
21. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle v Associated Motor Boat Co. (1968) E.A 123* as follows: -
- “... 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 ...”
22. This being an appeal from Small Claims Court, the jurisdiction of this court is limited to section 38 of the *Small Claims Court Act* which provides as follows;
- (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.
23. An appeal on points of law only is similar to second appeals at the Court of Appeal. In the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR*, the duty of a second appellate court was set out as follows;
- “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”.
24. The Claimant claimed the refund of money lend to the Respondent. Section 12 (1), of the *Small Claims Court Act* which is the jurisdiction clause provides as follows;
1. Subject to this Act, the rules and any other law, the court has jurisdiction to determine any civil claim relating to-
 - a. contract for sale and supply of goods or services;
 - b. a contract relating to money held and received;
 - c. liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - d. compensation for personal injuries; and
 - e. set-off and counterclaim under any contract.
25. The Appellant stated that the trial court erred in law by relying on the documentary evidence that was improperly produced, to prove that the Respondent advanced money to the Appellant and by



misapplying the contra proferentem rule in admitting a document that was disputed by the Appellant. The Respondent produced a copy of an acknowledgment of debt by the Appellant, signed by both the Appellant and the Respondent. I find that the doctrine of contra proferentem does not apply as there was no ambiguity in the acknowledgment of debt.

26. I find that the Respondent had discharged the legal burden of proof that that was the acknowledgement of debt by the Appellant. It was upon the Appellant to adduce evidence in rebuttal hence shifting the evidential burden of proof. On shifting of evidential burden of proof, the Supreme Court in the case of *Raila Amolo Odinga & Another vs. IEBC & 2 Others* [2017] eKLR held as follows;

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the Plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the Respondent to adduce evidence to prove compliance with the law...”

27. I do concur with the finding of the trial court that the Appellant failed to prove the claim of forgery on his part and mere denial that he signed the debt acknowledgment did not discharge the burden of proof. As for the rest of the debt, the Respondent claimed that the same was given to the Appellant through a deposit in a hardware shop under the instructions of the Appellant. From the analysis of the trial court and making a finding that the evidence of the respondent was believable, I find no reason to interfere with the discretion of the court in making the finding.
28. In regard to the Counter-Claim, the Respondent claimed the commission and profits from the Respondent and the Fidex Car Hire Limited. The Appellant alleges that he was to get his commission after the car hire company was paid. I do concur with the finding of the court that the company is a separate legal entity from the Respondent’s person. I hereby decline to interfere with the finding of the court.
29. On costs, the same follows the event. However, the court retains discretion whether to award the same or not. Considering that litigation must come to an end, and the relationship that both parties had before the fallout, each party is to bear its own costs.

Determination

29. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. That the appeal is hereby dismissed.
 - b. Each party to bear its own costs.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF JULY, 2025

.....

HON. F. WANGARI

JUDGE

In the presence of;

N/A by the Appellant

Respondent p.i.p

Norah, Court Assistant

