Little Pesa Limited v Mwangi (Civil Appeal E1250 of 2023)
[2025] KEHC 11032 (KLR) (Civ) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11032 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1250 OF 2023

TW OUYA, J

JULY 24, 2025

BETWEEN

LITTLE PESA LIMITED ..... APPELLANT

AND

NYUTU ANTHONY MWANGI ..... RESPONDENT

(Being an appeal against the judgment and orders of the Honourable B.J Ofisi (SRM and Adjudicator) delivered on 28th October 2022 in Nairobi SCCOMM No. E5454 of 2022)

JUDGMENT

1. The appeal herein emanates from a claim for breach of contract lodged at the Milimani Small Claims Court for recovery of Kshs. 162,705.00 being both the principal sum and interest that had been advanced to the Respondent as a mobile loan. It was alleged Respondent failed to service the loan facility as agreed despite the payments falling due. It was also alleged that the Respondent failed to offer any reasons or payment plan to the appellant despite demand and notice of intention to sue being issued to him. Consequently, the appellant instituted the claim subject of this appeal for recovery of the outstanding amount.

2. The Respondent failed to enter appearance or file a defence despite service. The suit being undefended, the trial court proceeded to enter a judgment in default. The trial court dismissed the appellant's claim on the basis that the same had not been proved on a balance of probabilities as required by law.

3. Aggrieved with the decision of the trial court, the appellant lodged the instant appeal citing grounds that the learned magistrate erred in law and fact in finding that the Appellant had not proved its case on a balance of probability contrary to the evidence on record, in finding that the appellant had not proved disbursement of funds to the Respondent despite the concrete and uncontroverted evidence on record, by failing to grant judgment against the Respondent for breach of the loan agreement amounting

to Kenya Shillings one hundred and sixty-two thousand seven hundred and five (Kshs. 162,705.00) despite the evidence as filed and by failing to analyze the submissions of the Appellant and addressing the issues raised together with the evidence tendered thereby misleading herself on the findings derived therein.

4. The appellant prays that this honourable court grants orders that this appeal be allowed with costs to the Appellant that judgment and decree of the Honourable Senior Resident Magistrate delivered on 28th October 2022 be set aside and substituted with one in favour of the appellant against the Respondent as per the Statement of Claim dated 26th August 2022 plus costs and interests at Court rates and any other relief.

5. The appellant averred that it is a Microfinance Company that extends loans to its clients through the appellants mobile application on certain terms and conditions. These terms and Conditions are stipulated in the Litle Pesa MFI Loaning App. It is averred that the said terms and conditions become applicable upon downloading the App and accepting the terms and conditions therein. Each type of loan has its own terms and conditions.

6. It was further averred that on 17th July 2021, a sum of Kshs 99,940 was disbursed to the Respondent upon deduction of the mandatory service fee of KSh.60.00. it was a term of the Appellant's that the applicable interest would be charged upfront for the first three months upon loan date. Therefore, an interest of Kshs 13,500.00 was charged on the disbursal date and subsequently monthly interest of KShs 4,500.00 charged on the subsequent months. Despite the Respondent's first instalment of KShs 19,500.00 falling due on 17th August 2021, the Respondent failed to pay even a single loan instalment. Thus, defaulting on his loan obligations.

7. According to the Appellant, the Respondent's breach was in his failure to honour the terms and conditions by not repaying the loan as required.

8. The appeal was disposed through written submissions.

9. The Respondent neither entered appearance nor participated in the appeal despite being served.

The Appellant's Submissions

10. The appellant's submissions addressed the issue of breach of contract. It was submitted that the existence of a contractual relationship had been proved by the fact that the Respondent downloaded the appellant's App and the loan was actually disbursed to him through his registered number upon agreeing to the terms and conditions. Citing the case of Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi, the appellant submitted that he had discharged the standard of proof as required by law. Further reliance was placed on the case of *Muthee Muthami vs Bank of Baroda* [2014] eKLR for the proposition that the contractual relationship had been sufficiently proved through the existence of an offer, acceptance and consideration. Therefore, the trial court erred in finding that the appellant had failed to establish the contractual relationship to warrant the award of the prayers sought in the Statement of Claim.

11. The totality of the appellant's submission was that the trial court misled itself for failing to analyze the evidence tendered in support of the existence of the contractual relationship and the disbursement of the loan to the appellant's registered phone number.

12. This being an Appeal from the small claims Court, section 38 of the *Small Claims Court Act* provides that Appeal from the Small Claims Court to the High Court should be on issue of law and not facts.

13. On the other hand, this Court's duty is well cut out as an Appellate court as was held in the case of Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA 123 thus: -

> " 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 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."

14. Black's Law Dictionary defines a matter of fact and a matter of law as follows:

> " Matter of fact as, a matter involving a judicial inquiry into the truth of alleged facts and Matter of law, as a matter involving a judicial inquiry into the applicable law."

15. While addressing the question of whether the Memorandum of Appeal raised factual issues, the Court of Appeal in Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 Others [2014] eKLR, recognized that when faced with a situation where a memorandum of appeal raises factual issues, an appellate Court is at liberty to strike out the offending ground (s) while retaining those that are compliant.

16. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:-

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> (108) the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

17. The burden of proof was discussed in the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR where the court held as follows:

> " As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account as provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant...The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.....In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200 the debt being claimed herein."

18. Therefore, even though the Respondent failed to enter appearance, the Appellant bore the burden of proving its case on a balance of probabilities as required by Sections 107-109 of the *Evidence Act*.

19. Upon analysing the pleadings and submissions herein, the issue for determination is whether there was a contract between the parties.

20. Simply put, a contract is a legal agreement made between one or more people (offer and acceptance) who undertake to do a certain thing or things in a transaction or transactions and where there is a consideration and which is enforceable in law.

21. The basics of a contract are well known and are as stated in William Muthee Muthami V Bank of Baroda, (2014) eKLR. The Court of Appeal observed that:

> " ...In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

22. According to "A Treaties on Law of Contract" 2nd Edition, Samweul Wiliston holds that:

> " A Contract is a promise, or a set of promise, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. This definition may not be satisfactory since it requires a subsequent definition of the circumstances under which the law does in fact attach legal obligation to the promises. But if a definition were attempted which should cover these operative facts, it would require compressing the entire law relating to formation of contracts into a single sentence."

23. In short, there are four ingredients for it to constitute a legal contract. These are namely:

    a. An agreement or promise made between one or more people (offer and acceptance);

    b. An agreement to undertake to do a certain thing or things in a transaction or transactions;

    c. There is a consideration; and

    d. The agreement is enforceable in law.

24. In the instant case, the Appellant has claimed the existence of a contract between the parties by presenting certain Terms and Conditions that mirror the terms and conditions in the Appellant's App. Nevertheless, there is no evidence that the Respondent ever agreed to the said terms and conditions. The Appellant has neither provided any digital signature or mark that could demonstrate to this honourable court that the Respondent intended to be bound by the terms and conditions attached in support of the claim.

25. Furthermore, the Know Your Customer (KYC) form that allegedly precedes the disbursement of a loan facility has not been attached to demonstrate the existence of a contract agreement between the parties. Suffice to say, mere downloading of an App to a mobile phone in and of itself is not proof of the existence of a contractual relationship for disbursement of a loan facility. The Appellant ought to provide documents that demonstrates with clarity the agreement or promise made between the parties desiring to be bound by the terms and conditions of the agreement.

26. In Saad v Tudor Heights Limited & Another (Civil Suit 72 of 2020) [2023] KEELC 21586 (KLR), the court observed that:

> " The law of contract gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily undertaken by the parties."

27. This Court has carefully perused the record of Appeal and noted that there is no contract in writing between the Appellant and the Respondent, neither is there a Contract signed by the parties demonstrating their intention to be bound by any agreement. Further there is no agreement annexed containing the names of the parties, the description of the loan facility, the security document and the

conditions thereto. Therefore, there is no valid contract or agreement that is enforceable by the parties that this honorable court can act upon.

28. I am aware that the appellant produced a statement of accounts to show the respondent's indebtedness. Section 37 of the *Evidence Act* states:

> " Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

29. The Court of Appeal in the case of Five Continents Ltd v Mpata Investments Ltd [2003] eKLR held:

> " The plaintiff mainly relied on the accounts analysis to show the defendant's indebtedness. That accounts analysis was apparently prepared by the plaintiff for use in this suit. It is not itself a book of account regularly kept in the course of business. Even if it were, such a statement would not alone be sufficient evidence to charge the defendant with liability (see Section 37 of the *Evidence Act*). It follows that the accounts analysis on which the learned judge relied has no evidential value."

30. Only entries in books of accounts regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements alone are not sufficient evidence to hold a person liable. Personal statements authored by the Appellant is not sufficient evidence to prove liability.

31. In the instant case, the statement of accounts relied on by the Appellant are those that have been specifically made by the Appellant for purposes of this suit. They do not amount to statements of accounts made in the ordinary course of business. Therefore, the same are not admissible as proof of disbursement of a loan facility to the Respondent pursuant to Section 37 of the *Evidence Act*.

32. On whether the trial court ignored the submission of the Appellant, the trial court indicated that it considered the pleadings, the evidence on record and the written submissions filed in its judgment.

33. In any event, submissions are suggestions that are neither persuasive nor binding on a court. The court makes a decision based on its own interpretation of the evidence and law, even if it contradicts the submissions made by either party. Indeed, the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR stated:

> " Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

34. Accordingly, there is no justification for interfering with the decision by the trial court. As a consequence, this appeal is not meritorious and is dismissed. Given the circumstances of this case, each party to bear own costs of the appeal.

35. Final orders

    i. Appeal dismissed

    ii. No orders as to costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH JULY 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....Ms Nyambura HB Mr Ochieng

For Respondent.....No Apperance

Court Assistant.....brian