



**Timau Ventures Limited v Gichuki (Civil Appeal 223 of 2023)
[2025] KEHC 9541 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 223 OF 2023
BK NJOROGE, J
JULY 3, 2025**

BETWEEN

TIMAU VENTURES LIMITED APPELLANT

AND

PETERSON GICHUKI RESPONDENT

*(Being an appeal from the judgment of the Small Claims Court at Thika
(Hon. V.A. Ogotu, Adjudicator/Resident Magistrate) delivered on 11th July
2023 in Thika Small Claims Court Case No. SCC COMM E570 of 2023)*

JUDGMENT

1. This is a judgement in respect of the Appellant’s Memorandum of Appeal dated 19th July, 2023. The Appellant seeks the following reliefs:
 1. That this Appeal be allowed with costs
 2. That the Judgement dismissing Small Claims Court matter No. E570 of 2023 made on 11.7.2023 and all consequential orders be set aside with costs to the Appellant.
 3. The Appellant be awarded the costs of this Appeal.
2. The Appellant raised the following grounds of appeal;
 1. The Learned Magistrate erred in law and fact in failing to appreciate that there was a valid contract between the Claimant and the Respondent.
 2. The Learned Magistrate erred in law and in fact in failing to hold that the evidence adduced by the Claimant was sufficient to establish a case on a balance of probability that the Respondent was advanced the loan over a Title Deed as Security/collateral.



3. The Learned Magistrate erred in law and in fact in failing to appreciate the long-established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding/conclusion resulting to the dismissal of the Claimant's case.
4. The Learned Magistrate erred in law and fact in dismissing the Claimant/Respondent's Claim in total disregard of the exculpatory and cogent evidence tendered by the Claimant.

Background Facts

3. The Appellant is the original Claimant before the Small Claims Court, while the Respondent was still the Respondent.
4. Through a Statement of Claim dated 2nd May, 2023 the Claimant (Appellant herein) averred that on or about 18th September, 2020, the Claimant entered into a loan agreement with the Respondent. That the Claimant advanced a loan of Kshs.70,000/= to the Respondent. It was to run at a monthly installment of 20%. The same was secured by the Respondent's piece of land title number LOC.12/SUB-LOC.4/164. The Respondent has failed and been adamant in repayment of the loan advanced. This is despite the Claimant having issued him with a demand notice but the same was ignored.
5. The Respondent filed a Response to the Statement of Claim dated 7th June, 2023. He averred that the Respondent denies entering into a money lending agreement with the Claimant. He further denied receiving Ksh.70,000/= from the Claimant or that the amount was to be repaid with 20% interest as alleged. He further averred that the suit herein is fatally defective and ought to be dismissed. This is for the reason that the Claimant's documents filed do not anticipate Court action such as this.

Appellant's Submissions

6. On the issue of whether there was a valid contract between the Appellant and the Respondent, the Appellant submitted that in this instance, the Appellant and the Respondent had entered into a written agreement dated 18th September 2020. In this agreement the Respondent had sought a loan of Kshs.70,000/=. The Appellant's obligation had been to disburse the loan to the Respondent. In return, the Respondent had provided a title deed as security/collateral for the loan. The Learned Magistrate had pointed out that the said application form had been signed only by the Respondent. While it was true that the loan application form had been signed solely by the Respondent, the Respondent's conduct—specifically, leaving his title deed as security for the loan—clearly demonstrated that the contract was binding and enforceable. The Respondent's actions led to the unmistakable conclusion that he had indeed received the money from the Appellant. The contract between the parties had been intended to be binding upon them, and as such, it was—and remained—valid. The contract entered into involved a loan advanced in the amount of Kshs. 70,000/=, which constituted the offer that the Respondent had negotiated for and signed, thereby crystallizing his acceptance of the terms. Reliance was placed on *Rose and Frank Co. vs. R Crompton & Bros Ltd (1923) 2 KB*. Additionally, reference was made to the judgment of Bingham LJ in *The Aramis [1989] Lloyd's Rep 213*, as quoted in the case of *Caleb Onyango Adongo v Bernard Ouma Ogur [2020] eKLR*, and the case of *Reville Independent LLC vs. Anotech International (UK) Ltd [2016] EWCA Civ 443 (Elias, Underhill LJJ & Cranston J)*.
7. On the issue of whether the Trial Court's disregard of the evidence adduced was fair and just, the Appellant submitted that he had produced a loan application form, a copy of the Respondent's identification card, and a copy of the original title deed which the Respondent had used as security for the loan. The loan application form bore the Respondent's passport photo and other personal details, which the Respondent himself had filled in and signed. The Learned Magistrate stated that no evidence had been adduced to show that the money had been disbursed to the Respondent, given that



the Respondent had disputed receiving the funds. However, the Appellant explained that once the money had been disbursed, the title deed was deposited with him. He argued that there would have been no reason for him to retain the title deed if the money had not been disbursed, and pointed out that the Respondent had not informed the Trial Court whether the Appellant had stolen the title deed.

8. In this case, the Appellant stated that he had disbursed Kshs.70,000/= to the Respondent, while the Respondent claimed otherwise. At that point, the burden of proof had shifted to the Respondent to demonstrate that he had not received the amount of money claimed to have been disbursed by the Appellant. If indeed the Respondent had not received the funds, the question then arose: why had he left his original title deed with the Appellant? For what reason and purpose? And if he had lost the title deed, why had he not reported its loss? Further, if the Respondent had not received any money, why had he executed the loan application form? These were pertinent issues that arose from the Respondent's own allegations. The Appellant thus submitted that, since the Respondent had not adduced any documentary evidence in support of his claims, his position remained unsubstantiated, and the Appellant had proved his case on a balance of probabilities. Reliance was placed on *Equatorial Commercial Bank v. Wilfred Nyasim Oroko* [2015] eKLR (Gikonyo J).
9. On the issue of whether the Trial Court's decision to dismiss the Appellant's claim was just, the Appellant submitted that he had a valid claim against the Respondent and that the decision of the Trial Court to dismiss the claim was unjust and unfair. The Trial Court had held that the Appellant had failed to prove his case to the required standard—specifically, that he had loaned the Respondent the amount alleged—and consequently dismissed the claim. The Appellant argued that the standard of proof in civil cases is on a balance of probabilities. The question of what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v. George Thuo & 2 Others* [2010] 1 KLR 526. In the present case, the Appellant submitted that he had indeed proved his case on a balance of probability and that the Trial Court's decision to disregard the evidence tendered was, in the circumstances, both unjust and unfair. Given the facts presented, it was the Appellant's position that the conclusions reached by the Learned Trial Magistrate were not consistent with the evidence on record and were therefore not justified.

Respondent's Submissions

10. The Respondent submitted that the Claim related to a contract involving money allegedly received by the Respondent from the Appellant. In the Claim, the Appellant prayed for judgment in the sum of Kshs. 448,000/= and the costs of the suit. Referring to page 25 of the Record of Appeal, the Appellant had stated that the nature of the Claim was a contract relating to money received by the Respondent in the sum of Kshs. 70,000/=: which amount was to accrue interest at a monthly instalment of 20%. However, in the witness statement of the Appellant's witness—refer to page 29 of the Record of Appeal—the said witness stated that the loan facility was at an interest rate of 20%. This discrepancy in the manner the interest was described formed part of the Respondent's submissions on the inconsistency of the Appellant's evidence.
11. The Respondent also submitted that the documents relied upon by the Appellant before the Adjudicator were not consistent with the evidence presented by the Appellant's witness. In fact, the Appellant had failed to prove its case on a balance of probabilities and could not fault the lower court for its findings. The case before the lower court involved a claim of Kshs.448,000/=. It was incumbent upon the Appellant to demonstrate how this amount had been arrived at, which it failed to do. There was no evidence of any such amount having been disbursed to or received by the Respondent for the Respondent to be called upon to



offer an explanation. As such, the claim was found to be lacking in merit. The Appellant simply failed to prove its case to the required standard on a balance of probabilities, leaving the Adjudicator with no option but to dismiss the claim. Reliance was placed on the decision of the Court of Appeal in Civil Appeal No. 77 of 2012, *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* (as attached to the submissions). Further reference was made to Civil Appeal No. 240 of 2011, *Hon. Daniel Toroitich Arap Moi CGH v. Mwangi Stephen Muriithi & Another*, in which the Court of Appeal clearly set out the standard for proof in civil matters. It was therefore submitted that the learned trial Adjudicator had not misdirected herself in her judgment dismissing the Appellant's claim, having correctly applied the law and the standard of proof required in civil proceedings.

Issues for determination.

12. The Court having read the Memorandum of Appeal, the Record of Appeal and the submissions filed by both Counsel in this Appeal, frames a single for determination.
 - (a) Whether the Trial Court erred in finding that the Appellant failed to establish, on a balance of probabilities, both the disbursement of the loan amount and the Respondent's resulting indebtedness.

Analysis

13. The jurisdiction of the Small Claims Court is set out in the *Small Claims Court Act*. Ipso facto, there is only one chance of Appeal to this court. It is an Appeal on points of law. This is in view of the provisions of Section 38 of the *Small Claims Court Act*, which states as follows: -

“38. Appeals

- (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.”

14. In the case of *Mwita v Woodventure (K) Limited & another* (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal while referring to a second Appeal, which is essentially on points of law and thus similar to the duty of the Court under section 38 of the Small Claims Court, stated as follows: -

“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR in which it was held that: “In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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.”

15. A cursory glance at the grounds of appeal in the Appellant’s Memorandum of Appeal shows that they relate primarily to questions of fact. The Small Claims Court is the queen when it comes to evidence. Applying the above decisions to the instant appeal, it is therefore clear that when dealing with this Appeal, this Court will only confine itself to the issues or points of law as raised in the Memorandum of Appeal. That the factual findings of the Trial Court are to be accepted, unless it becomes apparent, on evidence, that the conclusions on facts reached by the Trial Court, are so unreasonable that no reasonable Court or Tribunal could arrive at the same conclusion.
16. The Court has carefully re-examined the Record of Appeal and given due consideration to the submissions made by the Appellant. The central issue for determination is whether the Trial Court erred in finding that the Appellant failed to establish, on a balance of probabilities, both the disbursement of the loan amount and the Respondent’s resulting indebtedness.

a. Whether the Trial Court erred in finding that the Appellant failed to establish, on a balance of probabilities, both the disbursement of the loan amount and the Respondent’s resulting indebtedness.

17. On Appeal, the question of whether a contract exists is treated as a mixed question of fact and law. An appellate Court reviewing a decision from the Small Claims Court will generally accord deference to the Trial Court’s findings of fact—unless such findings are shown to be clearly erroneous—it undertakes a de novo review of the Trial Court’s legal conclusions. Specifically, the Appellate Court herein will independently assess whether, on the basis of the facts as found, the elements required to establish a valid and enforceable contract have been satisfied.
18. In *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another* [2014] KECA 538 (KLR), the Court of Appeal affirmed the well-established principle that for a contract to be valid and enforceable, three essential elements must be present: offer, acceptance, and consideration. This trite position of the law underscores that the absence of any one of these elements is fatal to the formation of a binding agreement.
19. In the present case, the Trial Court found that the Claimant failed to prove, to the requisite standard of proof, that the alleged loan was duly approved and disbursed to the Respondent. Consequently, the Trial Court dismissed the claim with costs. The judgment of the Trial Court reads as follows:

“In support of its claim he provided a loan application form and told the court that the said document is what was used by the claimant as a loan agreement. I have looked at the said document, and I note that it is an application form and was only signed by the respondent. The respondent having disputed receiving the money, it was for the claimant to provide evidence that the said loan applied for was approved and disbursed, no such evidence was provided and this court has no way of confirming the position. I also note that an affidavit produced by the claimant was never dated nor commissioned this court cannot therefore rely in the said document to make a determination. In the absence of any other evidence to confirm that the amounts were disbursed to the respondent, I have no way of confirming so and I find that the claimant has failed to prove to the required standard that he loaned



the respondent the amounts alleged, and I proceed to dismiss the claim with costs to the respondents.”

20. Consequently, the Appellant failed to establish his case against the Respondent on a balance of probabilities. The loan application constitutes only a preliminary request for credit and does not, in itself, give rise to any contractual obligation. In contrast, a loan agreement represents a formal and binding contract that establishes the rights and obligations of the parties within a lending relationship. While the loan application may initiate discussions or preliminary evaluations, it is the loan agreement that consummates and governs the transaction.
21. If the funds were disbursed through a bank transfer, the Trial Court was not presented with such a document. Nothing would have been easier to produce in proof of disbursement of funds, like the bank transfer forms. The Respondent maintains no funds were disbursed. This Court agrees with the findings of the Tribunal that such evidence was produced.
22. Upon review of the record, this Court finds that the documents submitted before the Trial Court do not evidence the existence of any duly executed loan agreement. Accordingly, this Court finds no error in the decision rendered by the Trial Court and affirms its findings. Pursuant to Section 107 of the Evidence Act, the burden of proof rested with the Appellant, and having failed to adduce evidence sufficient to support the facts as pleaded, he did not discharge that burden. Accordingly, the Appeal lacks merit and is hereby dismissed.
23. As to costs, the same lie at the discretion of this Court. There is no good reason advanced to deny the successful Respondent the costs of this Appeal.

Determination

24. The Appeal is dismissed in its entirety as lacking in merits.
25. The Costs of the Appeal are awarded to the Respondent to be agreed upon or taxed on the lower scale.
26. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 03RD DAY OF JULY, 2025

NJOROGE BENJAMIN K.

JUDGE

In the Presence of

Mr. Wabale for the Appellant.

Mr. Ngeresa for the Respondent.

Court Assistant: Mr. Luyai

