



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muiruri v Gitau & another (Commercial Appeal E011 of 2024)  
[2025] KEHC 12698 (KLR) (9 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12698 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
COMMERCIAL APPEAL E011 OF 2024  
FN MUCHEMI, J  
SEPTEMBER 9, 2025**

**BETWEEN**

**WILLIAM KAMANDE MUIRURI ..... APPELLANT**

**AND**

**VERONICA NYAMBURA GITAU ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIS MUNGAI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. V. A. Ogotu (RM/Adjudicator)  
delivered on 16th March 2023 in Thika Small Claims Court SCCCOMM No. E923 of 2022)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCCOMM No. E923 of 2022 whereby the court entered judgment in favour of the 1<sup>st</sup> respondent as against the appellant for the sum of Kshs. 860,000/- with costs and interest from the date of judgment until payment in full.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 12 grounds summarized as follows: -
  - a. The learned adjudicator erred in law and in fact in finding that the 1<sup>st</sup> respondent had proved her case on a balance of probabilities.
  - b. The learned trial magistrate erred in law and in fact in finding the appellant solely liable to settle the sum claimed while there was a third party who was not incorporated in the original pleadings.



- c. The learned adjudicator erred in law and in fact in relying on an agreement that was entered into through coercion and duress.
  - d. The learned adjudicator erred in law and in fact by failing to consider that the appellant had actually acknowledged a debt of Kshs. 260,000/- but he was forced to acknowledge a debt of Kshs. 1 million.
3. Parties disposed of the appeal by way of written submissions.

### **The Appellant's Submissions**

4. The appellant submits that the 2<sup>nd</sup> respondent was part of the deliberation of the visa processing as he received a total of Kshs. 540,000/- from the 1<sup>st</sup> respondent. Thus the 2<sup>nd</sup> respondent is equally liable to pay the said sum to the 1<sup>st</sup> respondent.
5. The appellant submits that he was forced to execute the debt agreement as a condition for his release. Furthermore, he produced Mpesa statements reflecting that he had received Kshs. 260,000/- and that he had repaid Kshs. 258,000/- back to the 1<sup>st</sup> respondent. The appellant submits that he admitted to owing the 1<sup>st</sup> respondent a sum of Kshs. 260,000/- and he was able to demonstrate that he paid back Kshs. 258,000/- thus remaining with a balance of Kshs. 2,000/-.

### **The 1<sup>st</sup> Respondent's Submissions.**

6. The 1<sup>st</sup> respondent submits that she filed the correct pleadings in the trial court which were in compliance with the established rules of pleadings and framed the dispute accurately. The 1<sup>st</sup> respondent further submits that the appropriate procedure for enjoining a third party was not invoked at trial and thus does not vitiate the trial court's decision regarding the appellant's sole liability. The reference to the third party's Mpesa statement by the appellant is immaterial to the central issues of the case as he had an opportunity to enjoin the alleged third party and provide the necessary evidence but failed to do so.
7. The 1<sup>st</sup> respondent further submits that the trial court gave full consideration to all the written submissions tendered by the parties and the appellant's assertion that such submissions were disregarded is incorrect and does not alter the soundness of the judgment.
8. The 1<sup>st</sup> respondent argues that the trial court carefully examined the circumstances surrounding the debt agreement and its execution and determined that evidence did not support any assertion of illegitimacy regarding its formation. Thus there is no basis for reversing the trial court's findings on that ground.
9. Relying on the case of *Vinayak vs Santokh & 2 Others* [2023] KECA 1433 (KLR), the 1<sup>st</sup> respondent submits that once a contract is executed by both parties, it is unequivocally binding in accordance with the legal maxim *pacta sunt servanda*. Further, the trial court considered the disputed debt amount and found that the appellant's acknowledgement was consistent with the overall evidentiary record.

### **Issues for determination**

10. The main issues for determination are:-
  - a. Whether the appeal is defective.
  - b. If not, whether the 1<sup>st</sup> respondent proved her case on a balance of probabilities.



## The Law

11. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR as follows:-

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 that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

12. In distinguishing between matters of law and fact the Court of Appeal stated in *Kenya Breweries Ltd vs Godfrey Odoyo* [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. 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.

## Whether The Appeal is Properly Before This Court

13. Section 38 of the Act provides: -

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.

14. The Court of Appeal in *Mwangi vs Wambugu* [1984] KLR 453 commented of what amount to points of law 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 or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

15. Similarly in *Peter Gichuki King'ara vs Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR the court held that:-

Bearing in mind the above principles, the most contentious issues in this appeal is whether the grounds of appeal are matters of law or facts. Having established that we have jurisdiction to determine only issues of law as per the provisions of Section 85A of the *Elections Act*,



to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence with of course the usual caveat, that we did not see the witness demeanor is an issue of law.

16. I have perused the grounds in the memorandum of appeal and noted that the grounds relate primarily to questions of fact. The appellant is aggrieved that the learned adjudicator found that he was indebted to the 1<sup>st</sup> respondent for a sum of Kshs. 860,000/- pursuant to a debt settlement agreement dated 18<sup>th</sup> April 2022 yet the said agreement was procured through fraud and coercion. The grounds as raised by the appellant touch on matters of fact which will require this court to scrutinize and re-evaluate the evidence once more. However, that is contrary to the provisions of Section 38 of the *Small Claims Court Act* which restricts the jurisdiction of this court to hearing only on matters of law. As such, these grounds are not properly before the court in that this court lacks jurisdiction to deal with them on appeal.
17. The only ground that touches on matters of law is the enjoining of the 2<sup>nd</sup> respondent. The appellant claims that the 1<sup>st</sup> respondent failed to enjoin the 2<sup>nd</sup> respondent at the trial suit yet she paid him Kshs. 540,000/-. Order 1 Rule 15 of the Civil Procedure Rules provides for enjoining of a third party whereby a defendant claims as against any other person not already a party to the suit. The appellant as the defendant in the lower court case ought to have made an application in the trial court within fourteen days after the close of pleadings for leave of the court to issue a third-party notice to bring in the 2<sup>nd</sup> respondent to participate in the suit. However, the appellant failed to join the said 3<sup>rd</sup> party at the stage allowed by the law. This ground has been raised at the appellate stage while it ought to have been raised and determined before the trial court. In absence of joining a 3<sup>rd</sup> party during the trial the appellant should not raise the issue at appellate stage.
18. Having considered the foregoing issues, I hereby strike out all the grounds of appeal save for ground 5 which I have already dealt with and found it not plausible.
19. Accordingly, the instant appeal lacks merit and is hereby dismissed with costs to the 1<sup>st</sup> respondent.
20. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**F. MUCHEMI**

**JUDGE**

