



**Andrew Mbuya t/a Mobipesa Ltd v Atsiaya (Civil Appeal 60 of 2022)
[2024] KEHC 1524 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 60 OF 2022
PJO OTIENO, J
FEBRUARY 16, 2024**

BETWEEN

ANDREW MBUYA T/A MOBIPESA LTD APPELLANT

AND

VINCENT ATSIAYA RESPONDENT

*(Being an appeal from the judgment of Hon. Caroline Cheruiyot (RM) in
Kakamega SCCC Claim No. E072 OF 2022 delivered on 31st August, 2022)*

JUDGMENT

Background Of The Appeal

1. By a statement of claim filed on 23/8/2022 the appellant sought judgment of Kshs. 79,104/- at the Small Claims Court being the principal amount plus 10% interest and roll over charges on a loan borrowed by the respondent on 2/7/2019 from the appellant.
2. The claim was undefended and in judgment of the trial court delivered on 31st August, 2022, it was a finding of the court that the appellant had failed to establish a claim against the respondent.
3. Aggrieved with the decision of the trial court, the appellant lodged a memorandum of appeal dated 6th September, 2022 which is premised on the following grounds;
 - a. That the learned magistrate erred both in fact and law by holding that the appellant did not prove its case on a balance of probabilities.
 - b. That the learned magistrate erred both in fact and law by relying on the technicalities of law to dismiss the appellant's claim against the provisions of the Small Claims Act.
 - c. That the learned magistrate erred both in fact and law in analyzing the evidence before herself and hence arrived at a wrong finding.



4. The appeal has been canvassed by way of written submissions with only the appellant filing their submissions.
5. It is the submission of the appellant that they proved to the required standard that they disbursed a loan to the respondent through his mobile number 0723684524 and that this claim was not challenged.
6. They further claim that the trial court dismissed their case based on the technicalities of the law yet the Small Claims Court was established to resolve disputes without taking into consideration the technicalities of the law and fault the trial court requiring for more evidence than is provided in the claim form.
7. Lastly, they submit that the honourable adjudicator played the role of the defence counsel in analyzing the evidence before it.

Issue For Determination

8. This court has considered the grounds of appeal, the proceedings of the lower court and the submissions by the appellant and identifies the issue for determination to be whether the appellant established a claim of debt against the respondent.

Analysis

9. The appellant submits that they advanced a loan facility of Kshs. 70,000/- to the respondent attracting an interest of 10% per month. They have submitted that the loan was disbursed to the respondent's phone number. The only document that the appellant produced as evidence to support the allegations was the respondent's account statement with the appellant company.
10. It is trite law that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the existence of facts.
11. The document produced by the appellant was the company's internal document. If at all the money was remitted to the respondent's phone, then a statement from the mobile service provider used to remit the money ought to have been produced to show that indeed a sum of Kshs.70,000/- was disbursed by the appellant in favour of the respondent. The terms of the loan were also not proved since no agreement was produced in this regard or a previous transaction where it could be evidenced that the respondent was given a loan and subjected to a 10% interest which could have been implied in this case.
12. I find the appellant's claim that the Small Claims Court was established to determine disputes without interrogating the facts before it to lack a legal basis. The court still remains a court of law which determines disputes based on evidence as applied to the law. It is also legally wrong for the appellant to claim that simply because the suit was undefended, the court's determination ought to have been in his favour. Courts have a duty to address the merits of a suit, even when undefended in order to administer justice.
13. That said, I find this appeal to lack merit and the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF FEBRUARY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:



No appearance for parties

Court Assistant: Polycap Mukabwa

