



**Gitonga v Mutuma (Civil Appeal E097 of 2023)  
[2024] KEHC 7203 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7203 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E097 OF 2023  
TW CHERERE, J  
JUNE 13, 2024**

**BETWEEN**

**MARKO GITONGA ..... APPELLANT**

**AND**

**MORRIS MUTUMA ..... RESPONDENT**

*(Appeal against judgment and decree in Meru SCC NO.  
E151 of 2023 by Hon. L.W. Maina (RM) on 26th May, 2023)*

**JUDGMENT**

**Background**

1. Sometimes between 06<sup>th</sup> and 16<sup>th</sup> March, 2021, Appellant sold arrowroots to the Respondent. According to the Appellant, Respondent partly paid the purchase price and remained with an unpaid balance of Kes. 193,680/- which was the subject of trial and also the subject of this appeal.
2. In support of his claim, Appellant relied on documentary evidence among others a judgment in Githongo Cr. Case No. E218 Of 2021 in which Respondent was convicted for obtaining 152,000/- from the Appellant in the same transactions that were the subject of trial and also the subject of this appeal.
3. By a judgment dated 26<sup>th</sup> May, 2023, the trial court dismissed the Appellant's claim on the ground that it was not proved.

**Appeal**

4. Appellant has appealed on grounds among others that the trial court did not consider the judgment in Githongo Cr. Case No. E218 Of 2021 in which Respondent was convicted for obtaining money from the Appellant in the same transactions that were the subject of trial and also the subject of this appeal.



## Analysis and Determination

5. I have considered the appeal in the light of the evidence on record and the submissions filed on the Appellant, the Respondent not having filed any.
6. This being a first appeal this court is by law mandated and obligated to proceed by way of a retrial. In doing so the court has the duty to re-examine and reappraise all the facts on record and the law applicable and find for itself a conclusion without the need to be bound by the findings of the trial court. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See *Selle & another Vs. Associated Motor Boat Co. Ltd & others* (1968) EA 123; *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR; *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
7. Section 38 of The *Small Claims Court Act* Chapter 10A provides
  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.
8. What constitutes, points of law, has been settled. In the case of *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others* [2014] eKLR (Civil Appeal 31 of 2013), where Visram, Koome & Odek, JJA) stated as follows: -

“It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the 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 the caveat that the appeal court did not see the witness demeanor – is an issue of law.”
9. Section 34 of the *Evidence Act* Cap 80 Laws of Kenya provides as follows;

Admissibility of evidence given in previous proceedings

  - (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—
    - (a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding—
    - (b) the proceeding is between the same parties or their representatives in interest; and
    - (c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and
    - (d) the questions in issue were substantially the same in the first as in the second proceeding. (Emphasis added).



10. From the foregoing, I find that failure by the trial magistrate to consider the judgment in Githongo Cr. Case No. E218 Of 2021 in which Respondent was convicted for obtaining money from the Appellant in the same transactions that were the subject of trial is a point of law worthy consideration on appeal.
11. The judgment in Githongo Cr. Case No. E218 OF 2021 reveals that the trial magistrate considered the evidence by both parties mathematically and arrived at the conclusion that the Respondent had obtained by false pretenses Kes. 152,000/- from the Appellant.
12. In the end, I find that the appeal has merit and it is hereby ordered:
  1. The order contained in the judgment dated 26<sup>th</sup> May, 2023, dismissing the Appellant's claim with costs is set aside in its entirety and substituted with an order for entering judgment for the Appellant as against the Respondent in the sum of Kes. 152,000/- (One hundred fifty-two thousand).
  2. Costs of the trial and of the Appeal shall be borne by the Respondent

**DELIVERED AT MERU THIS 13<sup>TH</sup> DAY OF JUNE 2024**

**WAMAE.T. CHERERE**

**JUDGE**

Appearances

Court Assistants - Kinoti/Munrne

For Appellant -Ms. Gachohi for Maore Kambura & Co. Advocates

For Respondent - N/A for Vivian Loice Aketch & Co. Advocates

