



**Mwakinyango v Mwalimo (Civil Appeal E004 of 2024)
[2024] KEHC 9538 (KLR) (17 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E004 OF 2024
GMA DULU, J
JULY 17, 2024**

BETWEEN

JOSEPH MWAKUGHU MWAKINYANGO APPELLANT

AND

GEORGE MKURU MWALIMO RESPONDENT

*(From the judgment in Claim No. E007 of 2023 delivered by Hon.
S. M. Musili on 26th January 2024 at Taveta Small Claims Courts)*

JUDGMENT

1. In a judgment delivered on 26th January 2024 in Taveta Small Claims Court Claim No. E007 of 2023, the learned Resident Magistrate/Adjudicator dismissed the suit of the claimant (now appellant) Josephat Mwakungu Mwakinyango with no orders as to costs.
2. Dissatisfied with the decision of the Small Claims Court, the appellant has come to this court on appeal through counsel Mwazighe & Company Advocates on the following grounds:-
 1. That the learned Magistrate erred in law and in fact in failing to exercise his discretion in favour of the appellant.
 2. The learned Magistrate erred in law and in fact by disregarding the appellant's oral evidence and submissions.
 3. The learned Magistrate erred in law and fact in disregarding the loan agreement that was binding upon the parties when breach led to filing of the claim.
 4. The learned Magistrate erred in law by deciding that the appellant did not prove his claim to the required standard yet the claim was undefended.



5. The learned Magistrate erred in law and in fact by wearing a hat of the respondent in the matter thus arriving at a totally wrong decision.
 6. The learned Magistrate erred in law and facts by overlooking the wording of the loan agreement in which the respondent acknowledged receipt of the loan amount during execution of the agreement.
 7. The learned Magistrate erred in law and facts by deciding that the loan agreement should be transacted through inter bank accounts transfer by noting in the judgment that there were no bank statements to prove the disbursement of the loan amount.
 8. The learned Magistrate erred in law and facts and misdirected himself by acting on wrong and unsound principles and provisions of the law.
3. Though the memorandum of appeal was served, it was not defended as the respondent did not appear. On his part, counsel for the appellant Mwazighe & Company Advocates, filed written submissions to the appeal, which I have perused and considered.
 4. Indeed, as found by the trial court, the burden was on the claimant to prove the claim as required under Section 107 and 109 of the *Evidence Act* (Cap.80).
 5. This being a civil claim or case, the standard of proof is on the balance of probabilities. This standard of proof was talked to in the case of *William Kabogo Gitau =Versus= George Thuo & 2 Others* (2010) 1KLR 526 wherein Kimaru J. stated as follows:-

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in the case are more likely than not, to be what took place.”
 6. In the present case, the appellant pleaded in the Statement of Claim filed in court that the respondent borrowed from him a loan of Kshs. 200,000/= and was to pay back with commission, totalling Kshs. 300,000/= all inclusive by 31st May 2019.
 7. The respondent did not file a response, though he was said to have been served with the claim documents.
 8. Thereafter, the appellant tendered oral evidence in court to support his claim and relied on an agreement signed between the parties, which was also filed.
 9. I have perused the loan agreement signed by both parties dated 4th May 2019 which is short, and the main two paragraphs read as follows:-

“I George Mkuru Mwalimo of ID No. 24683764 (borrower) have received the sum of Kenya Shillings Two hundred thousand only, from Mr. Joseph Mwakughu Mwakinyango of ID No. 13710039 (the lender) which will be refunded with a commission of 50% of the sum total repayment

I George M. Mwalimo have agreed to refund the stated amount above in full plus 50% commission to Mr. Joseph Mwakughu Mwakinyango (the lender) by the end of 31st May 2019.”
 10. The above agreement was also signed by one witness Janeth W. Ngalweny ID No. 22566838.
 11. I note that in determining the case or claim the trial Magistrate stated that there was no evidence of disbursement of the loaned money either through bank statements or Mpesa.



12. In my view, the trial court erred, as firstly the respondent did not contest the allegations of the appellant in court, thus technically a judgment could have been entered without trial, as the suit was undefended.
13. Secondly, there are other modes of payment of money in Kenya, apart from payment through the bank or Mpesa. Thus the absence of bank or Mpesa transaction cannot mean that money was not disbursed.
14. Thirdly, the agreement itself was worded in such a way that it was the acknowledgment of the receipt of the money loaned by the borrower, the respondent herein, and there was no reference in the agreement to agreed payment through the bank or Mpesa. So, in my view the trial Magistrate should not have imputed his own terms to the contract, which were not envisaged or agreed upon by the contracting parties to the loan agreement. That action by the Magistrate amounted to a breach and violation of the same legal principle of freedom of contract.
15. In my view, from the evidence on record, the appellant proved his claim against the respondent on the balance of probabilities and judgment should have been entered in his favour.
16. I thus allow the appeal and order as follows:-
 - i. The appeal herein is allowed.
 - ii. The judgment/decreed herein of the Resident Magistrate/Adjudicator in Taveta Small Claims Court in SCC No. E007 of 2023 dated 26th January 2024 is hereby varied or set aside entirely, and in its place I enter judgment in favour of the claimant/appellant as prayed.
 - iii. The costs of this appeal will be borne by the respondent.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF JULY 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Ms. Kyalo holding brief for Mr. Mwazighe for appellant

No appearance for respondent

