



**Osano v Onyango t/a Susambo Investments (Civil Appeal E110 of 2023)
[2024] KEHC 10629 (KLR) (12 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E110 OF 2023
RE ABURILI, J
SEPTEMBER 12, 2024**

BETWEEN

MARY ACHIENG OSANO APPELLANT

AND

**SUSAN ADHIAMBO ONYANGO T/A SUSAMBO
INVESTMENTS RESPONDENT**

*((An appeal arising out of the Judgment & Decree of the Honourable
G.C. Serem in the Small Claims Court at Kisumu delivered on
the 22nd June 2023 in Kisumu SCCOMM No. E193 of 2023))*

JUDGMENT

Introduction

1. The appellant was sued by the respondent vide a statement of claim dated 11.4.2023 in which the respondent prayed for judgement in the sum of Kshs. 100,000 which amounts were monies allegedly advanced to the appellant on or about the 20.9.2022 vide a contract signed on the even date.
2. The respondent in her statement of claim averred that she had entered into an agreement with the appellant wherein she advanced the appellant a loan of Kshs. 50,000 which money was to be paid on or before the 20th October 2022 and further that the amount advanced would bear interest at the rate of 20% per fortnight from the date of the agreement and thus the amount to be paid by the appellant was Kshs. 70,000 on or before 20th October 2022 and stood at Kshs. 100,000 at the time of filing of the claim.
3. The appellant filed her response on the 5.7.2023 in which she denied signing the said agreement; that the said funds were not disbursed and further stating that the said agreement was not registered in accordance with section 5 of the Chattels Transfer Act and that therefore non-existent for lack of notice under sections 4, 6 and 16 of the Chattels Transfer Act.



4. The matter proceeded under section 30 of the *Small Claims Court Act* and parties proceeded to file submissions.
5. The trial court found that there was a valid agreement between the parties by which both parties were bound and that there was no need to register the said agreement to align it with the Chattels Transfer Act as the Act was repealed by the *Movable Property Security Rights Act* No. 13 of 2017. The trial court further found that as the appellant did not dispute the interest, the respondent was entitled to the full sum claimed of Kshs. 100,000 as well as costs of the suit.
6. Aggrieved by the trial court's judgement, the appellant filed this appeal dated 17th January 2023 in which she raised the following grounds of appeal:
 1. That the trial magistrate erred in law and fact in finding that there was a valid contract between the appellant and the respondent.
 2. That the trial magistrate erred in law and fact in finding that the document was signed and executed by the appellant and therefore there was a claim based on it. The document required legal compliance for it to be effective.
 3. That the trial magistrate erred in law by not taking into account the provisions of the law relating to the salient features of a contract which were not present in this contract.
 4. That the trial magistrate erred in law and fact in finding that there was a disbursement of the said amount allegedly loaned without any substantial proof of the same.
 5. That the trial magistrate erred in law in finding that the document presented by the respondent was an instrument in terms of the law and yet the requirements of registration was still pending.
7. The appeal was canvassed by way of written submissions but only the appellant filed submissions and further, there was no evidence that the respondent participated in this appeal. I will thus consider the evidence, the grounds of appeal, the appellant's submissions and the respondent's submissions filed before the trial court.

The Appellant's Submissions

8. The appellant submitted that she had at the trial, erroneously (through genuine mistake) relied upon the provisions of the Chattels Transfer Act Cap 28 (Repealed) instead of those of The *Movable Property Security Rights Act* of 2017 and now she requests this Court to consider the corresponding provisions of the latter statute as those provisions were carried over to the new Act, and as no miscarriage of justice will occur if those corresponding provisions of the subsequent Act of 2017 are considered.
9. It was submitted that Section 6(3) of the *Movable property Security Rights Act*, 2017, (section 21 of the Chattels Transfer Act Cap 28 (Repealed) provides that the security agreement must be in writing, must be signed by the grantor, must identify the secured creditor, must describe the security/ asset and the secured obligation, otherwise it is unenforceable under sub-section 4 thereunder and that the document dated 20th September 2022 was neither a contract nor an agreement as it was never executed/ signed by the Respondent herein who is not bound by it and is thus barred/ precluded by the doctrine of privity of contract (which binds a non-party or a third party to a contract from suing for its enforcement) from founding its claim on it and that thus, without a contract, there was no foundation or basis for the Respondent's claim which ought to have failed at the outset.



10. The appellant thus submitted that the security agreement dated 20th September 2022 bound neither the appellant nor the respondent as the respondent never executed it. That therefore it could thus not confer any rights to the respondent, or place any obligations upon the appellant.
11. It was further submitted that if the court deems otherwise that the agreement as impugned was a security agreement, then the respondent's right lay only in attaching and selling the secured assets/ collateral rather than in filing a suit before the Small Claims Court, which suit was thus premature and that the respondent had, in any event, never proved that the collateral had dissipated so as to file a suit for recovery of the debt.

The Respondent's Submission in the lower court

12. The respondent submitted before the lower court that there was a valid contract between the parties herein with both parties executing the agreement dated 20.9.2022 and further that the appellant did offer chattels as security and consideration. It was further submitted that the appellant had neither produced any document nor asserted to the contrary and the response by the appellant before the trial court amounted to a mere denial.
13. The respondent further submitted before the trial court that having established that there was a valid contract between the parties herein, then the appellant was liable to settle the claim in accordance with clauses 1, 2 and 3 of the contract. The respondent further submitted that she was entitled to the costs of her claim.

Analysis and Determination

14. This is a first and last appeal from the Small Claims Court. Section 38 of the [*Small Claims Court Act*](#) is clear that appeals to this Court are final and on points of law only. The section provides:
 - “ 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.
15. That said, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions on proof of the claim by way of evidence adduced and the applicable law. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-
 - “ This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
16. I have considered the pleadings, evidence adduced before the Small Claims Court and the grounds of appeal as well as the law applicable and the submissions.



17. It is admitted by the appellant herein that the appropriate law in this case is the *Movable Property Security Rights Act* 2017 and not the Chattels Transfer Act upon which the appellant's whole defence before the trial court was anchored, the latter having been repealed by the former.
18. On this basis alone, which basis is a legal basis, the appellant's defence before the Small Claims Court was misplaced and was correctly dismissed.
19. That notwithstanding, the appellant has offered a defence herein that the said contract between herself and the respondent was not valid as it did not meet the requirements of the Movable Property Security Rights, 2017. This is a point of law which this court is under a duty to consider.
20. Section 6 of the *Movable Property Security Rights Act* 2017 provides for the creation by execution of a security agreement. The section provides as follows:
 6. Creation by execution of a security agreement
 1. A security right is created by a security agreement, provided that the grantor has rights in the asset to be encumbered or the power to encumber it.
 2. A security agreement may provide for the creation of a security right in a future asset, but the security right in that asset is created only at the time when the grantor acquires rights in it or the power to encumber it.
 3. A security agreement shall—
 - a) be in writing and signed by the grantor;
 - b) identify the secured creditor and the grantor;
 - c) except in the case of an agreement that provides for the outright transfer of a receivable, describe the secured obligation; and
 - d) describe the collateral as provided in section 8.
 - (4) A security agreement entered into in accordance with this section is enforceable and creates a security right, irrespective of the satisfaction of the requirements that may be imposed by any other written law.
21. From the provisions above it is clear that there is no need for registration of the security as submitted by the appellant.
22. The evidence of record shows that there was a contract between the parties herein executed on 20.9.2022 and further that the appellant did offer chattels as security and consideration for the loan advanced, contrary to the submissions and pleadings by the appellant.
23. There was, between the parties herein, a contract which bound them and thus upon breach by either of the parties and as the parties failed to provide for dispute settlement clause in the said contract, there was no error or illegality in the respondent approaching the court for redress.
24. It is a venerable principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. See the case of National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, [2011 eKLR.
25. There is no evidence of fraud, coercion, mistake or mis- representation and neither was any of the reasons for vitiating a contract pleaded and proved by the appellant herein.



26. In the circumstances, I find the decision by the Adjudicator in line with the agreement between the parties. I find no reason to interfere with the same. I uphold the decision of the Small Claims Court Adjudicator.
27. In the end, I find this appeal not merited. It is hereby dismissed.
28. As the respondent did not participate in the appeal, I order that each party shall bear their own costs of the appeal herein as dismissed.
29. This file is hereby closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF SEPTEMBER, 2024

R.E. ABURILI

JUDGE

