



**Keengwe t/a Keengwe and Company Advocates v Masese (Civil Appeal E616 of 2022) [2024] KEHC 11964 (KLR) (Civ) (7 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11964 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E616 OF 2022**

**JM NANG'EA, J**

**OCTOBER 7, 2024**

**BETWEEN**

**SAMUEL B. KEENGWE T/A KEENGWE AND COMPANY  
ADVOCATES ..... APPELLANT**

**AND**

**EVANS NDEMO MASESE ..... RESPONDENT**

*(Being an appeal from the Judgement of the Small Claim's Court at Nairobi (Hon. B. J Ofisi- RM/ Adjudicator) delivered on 22nd July 2022 in SCCC NO. E1445 of 2022)*

**JUDGMENT**

**The pleadings in the lower Court**

1. The appellant herein is challenging the said learned trial court's decision in which it dismissed his claim against the respondent for Kshs. 550,000. The appellant sued the respondent in the lower court for judgement in the said sum of Ksh. 550,000 the former had allegedly advanced to the latter by instalments on diverse dates in the year 2016. The money was to be utilized to procure and subdivide a parcel of land secured by the respondent's Church's Organization, with a promise that the appellant would be given an acre of the land. The parties are said to have further agreed inter alia that the sum borrowed would be refunded on or before 15<sup>th</sup> November 2019 but the refund was not made good, hence the suit.
2. The respondent's defence is that the money in question was intended for purchase of land but the appellant failed to co-operate in the transaction by taking possession of the land sold to him. The appellant is therefore accused of not being forthright and the court was urged to dismiss the claim with costs for not disclosing a reasonable cause of action.



### **The evidence before the lower Court.**

3. On 27/6/2022 the trial court directed that the suit would be disposed of by documentary evidence and written submissions which were duly filed. The appellant's documents include copies of the alleged debt's acknowledgement notes dated 27<sup>th</sup> September 2016, 30<sup>th</sup> September 2016, 2<sup>nd</sup> November 2016 and 14<sup>th</sup> November 2016 representing a total of Ksh. 550,000.
4. On his part, the respondent tendered inter alia a payment receipt dated 5<sup>th</sup> March 2017 for Ksh. 480,000 in respect of 8 plots the appellant purportedly bought and an email from the respondent dated 6<sup>th</sup> February 2017 referring to the appellant's received payment for 5 of the 8 plots and advising him that he could take possession of the 5 of the plots already paid for then.

### **Grounds of Appeal**

5. The appellants' Grounds of Appeal as per Memorandum of Appeal dated 5<sup>th</sup> August 2022 may be condensed as hereunder:
  - a. That the learned trial magistrate erred in law and fact by dismissing the suit against the weight of evidence.  
And
  - b. That the learned trial magistrate erred in law and fact by failing to order refund of the sum in question.
6. The appellant therefore prays that the appeal be allowed and the trial court's judgement set aside and substituted with an order directing refund of the sum of Ksh. 550,000 as prayed in the suit before the lower court.

### **Guiding legal Principles**

7. It is trite law that the appellate court can only interfere with the findings and /or award of the trial court if the court misdirects itself on matters of fact and /or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of *Ocean Freight Shipping Co. Ltd V. Oakdale Commodities Ltd* ( 1997) eKLR Civil Appeal No. 198 of 1995). The appellate court also has the duty of analyzing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle V. Associated Motor Boat Co.* ( 1968) EA 123. The Court of Appeal for East Africa in *Peters V. Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:
  - i. . First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”



## Analysis and Determination

8. In its brief judgement, the learned trial magistrate/adjudicator found that the acknowledgement notes the appellant exhibited did “not prove that the parties entered into an agreement. The Court is unable to decipher the purpose for advancement of the said funds.” The court then dismissed the claim for want of proof to the required legal standard, to wit; on a balance of probability.
9. An appeal to this court from the Small Claims Court is only on a point(s) of law by dint of the Small Claims Courts Act. It would appear that only the appellant filed submissions. As deduced from the pleadings the transaction between the parties seems to have been sale of land. The appellant submits that the respondent admitted the debt vide the acknowledgement notes he purportedly signed. He cites the judicial determination in *Maureen Wachera Macharia V. Mary Anne Wabu Kamau & Another* (2017) eKLR in which similar acknowledgment notes were executed by an alleged debtor which the court accepted as evidence of indebtedness. The appellant, therefore, appears sometimes in this matter to deem the dispute as recovery of a debt as opposed to a land dispute. He seems to ask for refund of the sum of Ksh. 550,000 and also claim land purportedly promised in his favour by the respondent.
10. Section 3 (3) of the *Law of Contract Act* provides that no suit may be brought upon transfer of an interest in land unless-
  - a. the contract upon which the suit is founded-
    - i. is in writing ;
    - (ii) is signed by all the parties thereto; and
  - b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:” This legal position is underscored in *Wambui & 2 Others V. Waweru* ( Environment and Land Appeal E064 of 2022) [2024] KEELC 4226 (KLR) (9 May 2024) ( Judgement) among many other judicial determinations.
11. It is common ground that the respondent did receive the money in contention. Like the trial court, I am in a dilemma as to what the appellant’s case is. If it is a claim for land then this court has no jurisdiction to entertain the appeal as that is the exclusive province of the Environment and Land Court established under Article 162 (2) of the *constitution*. On the other hand, if it is recovery of a debt, the consideration for the advancement of the sum in question to the respondent is not explained. I fully agree with the trial court that the appellant’s claim is vague and thus non-justiciable.

## Determination

12. In the result, the appeal fails on all the grounds and is hereby dismissed. The parties will bear their own costs of the appeal as well as in the lower court.
13. Judgement accordingly.

**JUDGEMENT DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF OCTOBER 2024 IN THE PRESENCE OF:**

The Appellant’s Advocate,

The Respondent’s Advocate,

The Court Assistant,

**J. M. NANG’EA, JUDGE.**

