



**Kagwa v Ongwali (Civil Appeal 1413 of 2023)
[2024] KEHC 12115 (KLR) (Civ) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12115 (KLR)

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

CIVIL

CIVIL APPEAL 1413 OF 2023

RC RUTTO, J

OCTOBER 4, 2024

BETWEEN

ANDREW OUMA KAGWA APPELLANT

AND

JOSEPH NYONGESA ONGWALI RESPONDENT

(Being an Appeal from the Judgment and Decree of the Small Claims Court of Kenya at Nairobi delivered by the Hon. Resident Magistrate J.N Githaiga, on the 5th December, 2023 in Nairobi SCC COMM NO E1218 OF 2023)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Nairobi SCC COMM NO E1218 OF 2023. In the said suit, the Respondent herein sued the Appellant seeking refund of monies advanced as a loan.
2. The genesis of this dispute as stated in the Statement of Claim was that on or about 9th April, 2018 the Respondent entered into a business agreement and advanced Kshs.100,000/= to the Appellant. That it was a term of the said contract that the same was repayable with a weekly interest of Kshs. 5,000/=.
3. The Appellant filed his Response to the Statement of Claim dated 13th April, 2023 where he denied owing the Respondent the said amount.
4. Both parties testified and upon taking their evidence, the trial court entered judgment on 5th December, 2023 in favor of the Claimant/Respondent (as Claimant) as follows: -
 - i. That the Claimant is awarded the sum of Kshs 100, 000/=
 - ii. Interest on the above shall accrue from the date of default in payment until payment in full.



- iii. Claimant is awarded costs of the claim and interest thereof at court rates from the date of the judgment until payment in full.
 - iv. Respondent is granted 30 days stay of execution.
5. The Appellant being aggrieved with the entire judgment, lodged this appeal on 16th December, 2023 setting out the following grounds of appeal:
- 1. That the learned Mmagistrate erred in law and fact by making a finding that the respondent herein proved its case on a balance of probability.
 - 2. That the learned Magistrate erred in law and in fact by making a finding that the Respondent herein is not partner in business as per the document signed between them.
 - 3. That the learned Magistrate erred in law and in fact by con-considering and giving undue weight on the hearsay evidence of the Respondent herein as against the strength of the evidence produced by the appellant.
 - 4. The learned Mmagistrate erred in fact by finding that the sum demanded by the respondent herein from the Appellant was duly accessed and payable.
 - 5. The learned Mmagistrate erred in law and fact by finding hat the Respondent has proved its case in view of the evidence before the Honourable court.
 - 6. The learned Mmagistrate erred in fact and in law by ignoring the Aappellant’s evidence and submissions which captures the principal sum paid by the AAppellant.
 - 7. In all the circumstances of the case, the findings of the learned Magistrate are not supported by the evidence adduced in court.
 - 6. The Appellant prayed that the appeal be allowed with costs. Additionally, that the judgment delivered on 5th December, 2023 and subsequent decree be set aside.
7. The appeal was canvassed by way of written submissions. The Appellant’s submissions are dated 11th June, 2024 while the Respondent’s submissions are dated 19th June, 2024.

Appellant’s submissions

- 8. The Appellant submitted on all the grounds of appeal as listed in the memorandum of appeal. On ground 1, the Appellant argued that the finding by the trial magistrate, sitting as an Adjudicator, that the Respondent did not prove that he repaid the monies owed was contrary to the evidence on record. He submitted that the Respondent in his testimony read out the payments made via Mpesa. She relied on Article 159(d) of *the Constitution* to urge that justice shall be administered without undue regard to technicality.
- 9. On ground 2, the appellant submitted that the finding by the trial magistrate that the Respondent failed to adduce evidence to show that the agreement was a business venture was erroneous. Further, that the document on face value did not indicate any loan agreement but stipulated that it was a business agreement. The appellant argued that the Respondent was a partner and they ought to have shared profits and losses.
- 10. In addition, it was submitted that the document was vague and that the weekly interest had no beginning nor end hence could not be said to be a loan agreement. Counsel relied on the cases of Nancy Muthoni Nyaruai V Grace Wanjiku Mugure [2021] eKLR and Danson Muriuiki V Johnson Kabungo



[2017] eKLR to urge this court to find that the interest charged is unconscionable and interfere with the same.

11. On grounds 3, 4 and 5, the Appellant submitted that the trial magistrate denied them a chance to produce documents that confirmed proof of payment. Further, that the learned trial magistrate followed strict timelines so as to conclude the case rather than having administered justice without undue regard to procedural technicalities.
12. On ground 6, it was submitted that the trial court disregarded the evidence and submissions provided by the Appellant, which detailed the principal sum paid. He argues that the mistake of counsel of not filing submissions by the time judgment was being written should not be visited upon the them.
13. On the final ground, it was submitted that the trial court's findings were not supported by evidence adduced in court. Reference was made to pages 4 and 7 of the typed proceedings and submitted that the finding of the trial court was not based on evidence produced by the Appellant hence this Court should conduct a fair hearing on merit and thus set aside the judgment of the Small Claims Court.
14. In conclusion, this Court was urged to allow the appeal, set aside the decision of the learned adjudicator and allow the Appellant tender his documents as evidence of proof of payment for the sum of Kshs. 119,250/=.

Respondent's submissions

15. The Respondent's identified two issues for determination the first one being whether the Appeal had merit and secondly, who bears the costs of this appeal. He relied on Section 38(1) of the *Small Claims Court Act* and submitted that the grounds of appeal are repetitive and relate to primarily issues of facts and not law. He added that this Court did not have jurisdiction to deal with factual issues as raised by the Appellant.
16. The Respondent relied on the case of *Mwita V Woodventure (K) Limited & Another Civil Appeal 58 of 2017 [2022] KECA 628 (KLR)* and submitted that it is trite law that matters confined solely to law should not be blurred with factual details to be proved through evidence.
17. Also relied upon was Section 32(1) and (2) of the *Small Claims Court Act* where it was submitted that the issues raised by the Appellant were not factually correct. It was the Respondent's submission that the Appellant sought to file his documents after the Respondent had already testified hence the trial court disallowed his application to file them out of time.
18. Further, that the Appellant's assertions on repayment of the amount were issues that could not be introduced at the Appellate level when they were not adduced at trial. Counsel cited the case of *Daniel Otieno Migore V South Nyanza Sugar Co. Ltd [2018] eKLR*
19. In conclusion, the Respondent submitted that since the issues raised by the Appellant are factual as opposed to legal, the same were beyond this Court's jurisdiction and ought to be dismissed.
20. On the second issue, the Respondent urged the Court to award the Respondent costs since the appeal lacked merit.

Analysis and Determination

21. To begin with, the duty of this court as the appellate court is squarely regulated under Section 38 of the *Small Claims Court Act* which restricts the jurisdiction of the High Court on appeals from the Small Claims Court to matters of law only. It provides that:



1. A person aggrieved by the decision or an order Appeals. 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.”
22. What constitutes, points of law, has been settled. In the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, where the court stated as follows: -

“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR).
23. I have done a thorough examination of the grounds of appeal as it appears in the Memorandum of Appeal dated 16th December, 2023. On the face of it, the appeal is premised on the grounds that the Learned Magistrate erred in “law and in fact” and calls upon the court to make a reassessment on the issues of fact. The appellant submissions do not provide a clarification by pointing to the issues of law being appealed.
24. An evaluation of the submission shows that the appellant is calling upon this court to re-evaluate and re-assess the trial evidence and submissions placed before the trial court and come up with contrary findings. This is clearly against the provisions of Section 38 of the *Small Claims Court Act*.
25. Further, the appellant has not demonstrated the points of law in which the appeal is grounded. The grounds of appeal demonstrate “an attempt at legal ingenuity to dress up and camouflage purely factual issues with the borrowed garb of ‘legalness’ to evade the restrictions of Section 38 of the *Small Claims Court Act*.”
26. The issues raised contest the lower court’s inferences and decisions on facts rather than exclusively on points of law. Ideally, the Appellant is disputing the trial court’s decision on the written agreement that the parties had and also seeks to introduces documents that were disallowed by the Small Claims Court for being filed out of time. All these are purely factual and discretionary issues that are dependent on material evidence.
27. Consequently, based on the above this court makes the following orders: -
 - i. The appeal is dismissed and the Judgment and Decree of the Honourable J.M. Githaiga made on 5/12/2023 in Nairobi SCCOMM No. E1218 of 2023 is upheld.
 - ii. Each party to bear their own costs.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 4TH DAY OF OCTOBER 2024

For Appellants:

For Respondent:

Court Assistant:

