



**Bank of Africa Kenya Limited v Irungu (Commercial Appeal E090 of 2024)
[2025] KEHC 13287 (KLR) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL APPEAL E090 OF 2024
CM KARIUKI, J
SEPTEMBER 26, 2025**

BETWEEN

BANK OF AFRICA KENYA LIMITED APPELLANT

AND

JACKSON NJUGUNA IRUNGU RESPONDENT

*(Being on Appeal against the whole of the Judgment and Decree of
the Small Claims Court in Nairobi delivered by the Hon. Bd. Ofisi
(S.R.M) on 29 September 2023 in SCCOMM NO. E1413 of 2023)*

JUDGMENT

1. This Appeal arose from the Judgment and Decree of the Small Claims court on May 24.5.2024² in Nairobi delivered by the Hon. B.J. Ofisi (S.R.M) on 29 September 2023 in SCCOMM No. E1413 of 2023. The trial court dismissed the Appellant's claim, a decision that forms the crux of this Appeal.
2. The Appellant, being dissatisfied with the trial Court's decision, moved the Court vide a Memorandum of Appeal dated 15 April 2024, raising the grounds hereunder summarised and seeking orders hereinafter stated.
 - a. The court failed to establish that the m/v was sold at ksh 3,100,000
 - b. Failed to consider account statements prove of sale of m/v KCD XXXX for ksh 3,100,000.
 - c. Failed to consider there was a valid loan agreement between parties which respondent defaulted thus appellant entitlement of claim of ksh 770848.11.
 - d. Ignored evidence, affidavits and submissions on record without any justification.

Orders Prayed:



- i. The Judgment and decree of the Small Claims Court at Milimani (Hon. B. J. Ofisi) delivered on 29th September 2023, be partially set aside and substituted with an order allowing the Claimant's claim dated 23th February 2023.
 - ii. This Appeal be allowed and the costs of the Appeal and those of the suit before the Subordinate Court be awarded to the Appellant.
3. In the Claimant's application, the respondent advanced credit facilities of Ksh 1,600,000 on 13.8.2019, whereof the Respondent purchased an Isuzu truck, K C D 989Y, and a chattel mortgage was executed on 5.9.2019. In this regard, the bank interest was registered on the online collateral registry in compliance with the Movable Security Rights Act. On 24.5 2022m/v KCD XXXX/V Was sold for ksh 3,100,000 which was credited in respondent asset finance account. However, the amount did not clear the entire debt, resulting in a deficit of Ksh 770,848.11.
4. The Respondent denied the claim in reply and lodged a counterclaim, claiming Ksh 776,000, among other things. Parties called witnesses to support their claims on each side. The trial court, in its brief judgment, disregarded the parties' testimony and instead focused on the absence of a memo of sale, dismissing both parties' claims because neither party had proven their respective claims.
5. Court Directions
6. Parties were directed to canvass the Appeal via submissions, but only the Appellant's submissions were available on the CTS. The respondents' submission was never found in the physical file nor in the CTS. The Respondent did not participate in the hearing of the Appeal.
7. Appellant Submissions
8. Appellant submits that the trial court wholly failed to consider any of the evidence adduced by the Appellant to prove its case. The learned trial magistrate dismissed the Appellant's suit solely because the Appellant failed to provide proof of the Memorandum of Sale. The sale was undisputed & therefore remained an uncontroverted fact.
9. In any event, the Respondent in its Response to the Statement of Claim at page 125 acknowledged that a sale was made for Kshs. 3 100,000, but merely challenged the price. The Appellant provided account statements that set out that the loan amount was credited to the Respondent's account. Section 176 of the Evidence Act provides that; "A copy of any entry in a banker's book shall in 011 legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.
10. In light of this, it is clear that the credit in the account, combined with the acknowledgement by both parties that the sale occurred, provides clear evidence that the sale was never in dispute.
11. By the trial magistrate basing her decision to dismiss the Appellants' suit solely on the Memorandum of Sale, it is clear that she erred by failing to consider any of the evidence produced before her, as she merely dismissed the suit on that ground alone.
12. It is thus submitted that the failure by the Court to consider the evidence produced before it by the Appellant in its entirety constitutes a denial of its Right to a fair hearing under Article 50 of the Constitution.
13. Furthermore, it is submitted that failure of the magistrate to consider matters she should have considered in arriving at her judgment is a matter of law which this Court must consider by reviewing the evidence produced by the Appellant.



14. The Appellant court varied the loan agreements, which the Respondent confirmed executing at trial. The Respondent began defaulting on servicing his loans, and despite several requests and demands to regularize his account, he failed to do so. The motor vehicles were repossessed, but upon the Respondent making some payments, the same were released back to him, but he once again went into default, and therefore the Bank issued further demand letters/
15. The Bank was able to repossess motor vehicle KDC 263M, but not KCD 989Y, which the Bank was unable to locate. However, the Respondent confirmed that he was seeking to sell it without obtaining the Bank's consent.
16. The Bank therefore proceeded with the sale of KDC 263M at ksh3.1 million, and a valuation report was conducted on the motor vehicle. On 24 May 2022, the vehicle was advertised for sale, and following a successful bid, the vehicle was sold for Kshs 3,100,000, which amount was credited to the Respondent's account.
17. The Respondent's account, however, remained in arrears after the sale, and as such, the Appellant filed a claim in the Small Claims Court to recover the sum of Kshs. 770,848. Moreover, the Appellant argues that the Appellant, on the other hand, failed to prove that the vehicle was undervalued before its sale and/or that the terms of the contracts did not bind him.
18. It is the Respondent who breached the contract between the parties and, as such, is liable to settle the Claim amount as prayed in the Statement of Claim. See The cases of William Kabogo Gitau vs George Theo 2 Others [2010] 1 KLE 526, Palace Investment Ltd —vs. Geoffrey Kariuki Mwenda & Another [2015] eKLR.
19. The Appellant places reliance on the entirety of the evidence, affidavits, submissions, authorities, and oral submissions made by the Appellant in the trial. The Appellant diligently discharged its evidentiary burden before the trial court on a balance of probabilities and proved its case.
20. Analysis and Determination
21. Section 38 of the Small Claims Act provides for Appeals from the Small Claims Court and states as follows:
 - (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.
22. Thus, the nature of an Appeal to the High Court from the small claims court is in the form of a second Appeal as it is based on the Matter of law only. Black's Law Dictionary defines a matter of law and fact as follows:

“Matter of fact as: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law; A matter involving judicial inquiry into the applicable law. ”
23. In the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, the Court of Appeal addressed the duty of a court considering points of law as follows-

“..... 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 Ithigo (2016) eKLR),»

24. In the case of *Mwiti v Wood venture (K) Limited & another* (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) judgement the Court of Appeal while referring to a second Appeal, which is essentially on points of law and thus similar to the duty of the Court under section 38 of the Small Claims Court, stated that:

“This is a second appeal; Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Benard Munene Ithiga* [2016] eKLR, on a second Appeal, the Court confines itself to matters of law only, unless it is shown that the Court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR in which it was held that, “In a second appeal, however, such as this one before us, we have to resist the temptation of delving into matters of fact. This Court, on second Appeal, confines itself to matters of law, unless it is shown that the two 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.”

25. Therefore, it is on this background that this Court evaluates the trial court to determine whether it failed to consider any of the evidence adduced by the Appellant to prove the Appellant

26. From the record, it is apparent that the learned trial magistrate dismissed the Appellant's suit solely because the Appellant failed to produce the Memorandum of Sale. It is manifest in evidence and pleadings that sale was an undisputed & therefore uncontroverted fact. In any event, the Respondent in its Response to the Statement of Claim at page 125 acknowledged that a sale was made for Kshs. 3 100,000, but merely challenged the price. Moreover, the Appellant provided the sale and account statements, which show that the loan amount was credited to the Respondent's account.

27. Section 176 of the *Evidence Act* provides that.

“A copy of any entry in a banker's book shall in legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded”*

28. In light of this, it is clear that the credit in the account, plus the acknowledgement by both parties that the sale occurred, is clear evidence that the sale was never in issue.

29. By the trial magistrate basing her decision to dismiss the Appellants' suit solely on the absence of the Memorandum of sale, it is clear that she erred by failing to consider any of the evidence produced before her, as she merely dismissed the suit on that ground alone.

30. Therefore, the failure by the Court to consider the evidence produced before it by the Appellant in its entirety constitutes a denial of its Right to a fair hearing under Article 50 of *the Constitution*;

A denial of the right to a fair hearing under Article 50 of *the Constitution* of Kenya refers to any violation of the comprehensive due process protections guaranteed to every person involved in a legal dispute. The right is a non-derogable fundamental freedom, meaning it cannot be limited or taken away. Article 50 provides that every person has the right to have a dispute decided in a fair and public hearing before a court or an independent tribunal. It



outlines specific protections for accused persons in criminal trials, but the general principle of procedural fairness applies to all legal proceedings. see sub-Article (2)(d).

31. Thus, it is apt that the failure of the magistrate to consider matters she should have considered in arriving at her judgment is a matter of law which this Court is obligated to consider by reviewing the evidence produced by the Appellant.
32. The Appellant's trial court varied the loan agreements, which the Respondent confirmed executing at trial. The Respondent began defaulting on servicing his loans, and despite several requests and demands to regularize his account, he failed to do so.
33. The motor vehicles were repossessed, but upon the Respondent making some payments, they were released back to him. However, he once again went into default, and therefore, the Bank issued further demand letters.
34. The Bank was able to repossess motor vehicle KDC 263M, but not KCD 989Y, which the Bank was unable to locate. However, the Respondent confirmed that he was seeking to sell the vehicle without obtaining the Bank's consent.
35. The Bank therefore proceeded with the sale of KDC 263 million, and a valuation report was conducted on the motor vehicle. On 24 May 2022, the vehicle was advertised for sale, and following a successful bid, the vehicle was sold for Kshs 3,100,000, which amount was credited to the Respondent's account.
36. The Respondent's account, however, remained in arrears after the sale, and as such, the Appellant filed a claim in the Small Claims Court to recover the sum of Kshs. 770,848. 11.
37. Moreover, the Appellee failed to prove that the vehicle was undervalued before its sale and/or that the terms of the contracts did not bind him.
38. It is evident that the Respondent breached the contract between the parties and, as such, was liable to settle the Claim amount as prayed in the Statement of Claim. In the case of *William Kabogo Gitau vs George Theo 2 Others* [20101 1 eKLR 526, the Court, in answering the question as to what amounts to proof on a balance of probabilities, stated that:

“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 his case are more likely than not to be what took place. In percentage terms, a party who can establish his case to a percentage of 51 % as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable, rather than not, that the allegations he made occurred. ”

39. In *Palace Investment Ltd —vs- Geoffrey Kariuki Mwenda & Another* [20151 eKLR] relied on UK case of *Miller —vs- Minister of Pensions* [19471 2 All ER 372 discussing the burden of proof had. This is to say:

“That degree is well settled. It must carry a reasonable degree of probability, but not to the same extent as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged...”

40. Thus, the Court, placing reliance and reference on the entirety of the evidence, affidavits, submissions, authorities, and oral submissions made by the Appellant in the trial, can safely hold that the Claimant diligently discharged its evidentiary burden before the trial court on a balance of probabilities and proved its case to the required standards.



41. In light of the foregoing, this Court holds that the trial magistrate erred by failing to consider all the evidence adduced before her; therefore, this Court finds that the Appeal is meritorious. Thus, it is this Court's conclusion that the Judgment and Decree of the Small Claims Court in Nairobi delivered by the Hon B.J. Ofisi (S.R.M) on the 29th day of September 2023 in respect to SCCOMM No. E 1413 of 2023 is set aside, and the Appeal dated 1st April 2024 is allowed as prayed.

42. The final orders are thus:

- i. The Judgment and Decree of the Small Claims Court in Nairobi delivered by the Hon B.J. Ofisi (S.R.M) on the 29th day of September 2023 in respect to SCCOMM No. E 1413 of 2023 is set aside as far as it concerns the Appellant's claim.
- ii. The Appeal dated 1st April 2024 is allowed and substituted with an order allowing the appellant/claimant's claim dated 23 February 2023.
- iii. The costs of the Appeal and those of the subordinate Court are awarded to the Appellant.

DATED AND DELIVERED IN NAROK VIA MICROSOFT TEAMS THIS 26TH DAY OF SEPTEMBER 2025

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CHARLES KARIUKI

JUDGE

