

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**(CORAM: R. MWONGO, J)**  
**CIVIL APPEAL NO. E079 OF 2024**

**PETER MURIITHI CRISPUS .....APPELLANT**

**-VERSUS-**

**PERMINUS NJIRU MIKA .....RESPONDENT**

*(Appeal arising from the decision of Hon. M.N. Kinyua in Embu SCCCOMM No. E046  
of 2024 delivered on 24<sup>th</sup> July 2024)*

**JUDGMENT**

**The Memorandum of Appeal**

1. The appellant filed a memorandum of appeal dated 16<sup>th</sup> August 2024, seeking the following orders:
  - a) This Appeal be allowed and the decision of the Small Claim Court aforesaid dated be set aside, and claimants the claim dismissed;
  - b) The cost of both Lower and High Court to the Appellant; and
  - c) Such other and/or further relief be granted as this, Honorable Court might deem fit and just to grant in the unique circumstances of this matter.
2. The appeal is premised on the grounds that:
  - 1) The Learned Trial Magistrate erred in both Law and fact in allowing the claimants claim;
  - 2) The Learned Trial Magistrate erred in both law and fact by failing to consider the various critical issues raised in the Response for the Plaintiff, the witness statement and exhibits adduced;
  - 3) The Learned Trial Magistrate erred in both law and fact by failing to apply the principals set in guiding Courts while considering an award of a liquidated claim;
  - 4) The Learned Trial Magistrate erred in both law and fact by failing to give the claimant opportunity to give evidence and call witness;
  - 5) The Learned Trial Magistrate erred in both law and fact by totally finding in favour of the claimant despite lack of evidence to support his claims;

- 6) The Learned Trial Magistrate erred in both law and fact ended up awarding excessive special damages; and
- 7) The Learned Trial Magistrate erred in both law and fact by failing to recognize that Respondent was only a guarantor and fail to enjoin the principal borrower was fatal to the claim.

## **Background**

3. The respondent filed a statement of claim seeking judgment against the appellant for Kshs.112,500/=. He stated that he had given the appellant a friendly loan of Kshs.45,000/= but the respondent failed to repay the money which had since accrued interest.
4. In his response, the appellant denied having received any money from the appellant. He stated that the fact of the matter was that the appellant gave him a title deed as security for money advanced to on Jackline Wanjiru and that money has since been repaid.
5. Throughout the proceedings, the respondent's advocate was present while there was no appearance for the appellant. The respondent prayed to proceed by way of documents under section 30 of the Small Claims Court Act. This prayer was allowed.
6. In his statement, the respondent stated that on 26<sup>th</sup> February 2019, he entered into a contract with the appellant and his wife where it was agreed that he would lend them Kshs.25,000/= to be repaid with interest. On 27<sup>th</sup> March 2019, the respondent agreed to lend the appellant's wife's sister Kshs.20,000/= to be repaid at an interest. Both soft loans were secured by title deed no. Kaagari/Gitare/T.63 in the name of the appellant. The appellant and his relatives have refused to repay the loans and are no longer reachable on the phone. He produced several demand letters issues to the appellant claiming the money with interest.
7. The appellant filed his statement saying that indeed the respondent gave a loan to his wife but she repaid it. The loan was secured using his title deed but no formal charge was registered. He stated that the respondent was simply trying to unjustly enrich himself through the suit.

8. In its judgment, the court stated that the only interests chargeable were for the period which the contracts were alive. The respondent was awarded Kshs.45,000/= plus one month's interest of Kshs.4,500/= at the rate of 10%.

### **Written submissions**

9. The appeal was disposed of by way of written submissions.
10. The appellant stated that the agreements for lending money were between the respondent and parties other than him, hence he should not have been sued in the first place. He argued that he was not even a guarantor for any loans and that if he was, the respondent should have proved as much and sued him in that capacity. Even if he was a guarantor, he had a right to have been informed of any changes in the interest or status of the loan, but in this case, he knows that the money owed was repaid. He stated that the respondent did not prove his case yet the trial court entered judgment in his favour. The appellant stated that he was denied a chance to defend the suit and call witnesses.
11. The respondent submitted that he lent money to the appellant's wife and his sister-in-law on the understanding that they would repay the money with interest as stipulated in the various agreements. He argued that by giving his land security for the loans, the appellant was not merely a by-stander but he was a guarantor for the loans which were defaulted.

### **Issue for Determination**

12. The issue for determination is whether the appeal has merit.

### **Analysis**

13. An appellate court makes its decision based on the record of the trial court as was held in the case of **Williamson Diamonds Ltd and another v Brown [1970] EA 1**, in which the court held that:

***“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”***

14. The proceedings before the Small Claims Court disclose that the appellant was conspicuously absent throughout the proceedings. He was duly served with the claim and he even entered appearance and filed a response. However, he did not attend court. In fact, he was also absent on the 2 occasions when the respondent's advocate prayed to proceed by way of documents only in reliance on section 30 of the Small Claims Court Act which provides:

***“Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court.”***

15. The appellant cannot therefore claim that he was denied a chance to call witnesses to defend his cause. The strict rules of civil procedure are loosened by the Rules of the Small Claims Court. Still, the small claims court has full control of its procedures but is bound by rules of natural justice. Section 17 of the Small Claims Court Act provides:

***“Subject to this Act and Rules, the Court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the Court shall have regard to the principles of natural justice.”***

16. In the trial Court the respondent produced 2 contracts. The first one is dated 26<sup>th</sup> February 2019. It is between the respondent and wife Jackline Wanjiru for Kshs.25,000/=, to be repaid within 1 month with interest of 10%. The second one is between the respondent and one Pauline Wawira who was borrowing Kshs.20,000/= on the same terms. The appellant does not deny the fact that he provided his title deed as security for the loans which have since been repaid.

17. In his response to the claim, the appellant said that the loans were repaid but he did not produce proof of such repayment. With the documents available to the Small Claims Court, the Adjudicator found it unwise to re-write the contract between the parties. She thus upheld and applied the terms as written. As correctly stated by the Adjudicator, it is not the role of any court or arbiter to infer or re-write a contract between the parties. In **National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR** the Court of Appeal at page 507 stated as follows: -

***“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”***

18. Was the appellant a party to the contract? Privity of contract is what determines its enforceability. This is because it is only the parties to a contract that can enforce it. From the two agreements produced as evidence, the appellant was not a borrower or lender. In the first agreement, the appellant is named within the body of the agreement as the person to secure the ground. The borrower is Jackline Wanjiru. The agreement has taken the form of an affidavit sworn by Jackline Wanjiru. The second agreement is also in the form of an affidavit sworn by Pauline Wawira.
19. It is clear from the affidavits that the appellant, seemingly gave his title deed as security for the loans. He must be viewed as a guarantor. It was he who was sued in the trial Court for the loans allegedly not paid.
20. It appears to me that the appellant, having not attended at the court and the Adjudicator having taken a documents only approach, this was a simple case of a guarantor to fulfil his guarantee. However, to unravel this would require delving into the facts of the case at this stage.
21. An appeal to the High Court is limited to appeals on matters of law only in accordance with Section 38 of the Small Claims Act.
22. I have carefully perused the Memorandum of Appeal. In each paragraph, it challenges the adjudicator’s alleged errors of both fact and law. No distinction is made as to which matters of fact are un-challenged, and which are the matters of law challenged. As I understand it, matters of law are concerned with the interpretation and application of law and legal principles.
23. In my view, in a small claims appeal to the High Court, the appellant must clearly and distinctively disclose which are the matters of law which place the appellant competently before the High Court. Pleadings on appeal must be drawn with clarity and specificity identifying only the matters of law which the court is obliged to determine.
24. In the absence of such particularization and specificity as to matters of law challenged, it is not for the Court to dig through the appeal grounds seeking to sift

the wheat from the chaff in order to determine the issues of law which it is obligated to determine.

**Disposition**

25. In the circumstances, the appeal must be dismissed. Further, given the conduct of the appellant in not even attending at the trial Court, it is not lost on this Court that that the appellant is seeking to re-litigate in the High Court what he failed to defend in the trial Court.
26. In the circumstances, the appeal is dismissed with costs for failure to specify in the appeal, the matters of law which the High Court is competent to determine.
27. Orders accordingly.

**Delivered, dated and signed at Embu High Court this 8<sup>th</sup> day of October, 2025.**

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**R. MWONGO  
JUDGE**

**Delivered in the presence of:**

1. Muchangi for Respondents
2. Peter Murithi Crispus – Applicant in person
3. Francis Munyao - Court Assistant