

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**THE CIVIL APPELLATE DIVISION**  
**[Coram: A.C. Mrima, J.]**  
**CIVIL APPEAL NO. E195 OF 2025**

**-between-**

**MARK MBUTHIA NGUGI.....**  
**APPELLANT**

**-versus-**

**FAVOUR HANIM**  
**MOHAMMED.....RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. C. K Ireri (RM) in Nairobi Small Claims Court Commercial No. E6218 of 2024 delivered on 25<sup>th</sup> January 2025)*

**JUDGMENT**

**Introduction and the Appeal:**

1. In its judgment of 24<sup>th</sup> January 2024, the Small Claims Court, ordered *Mark Mbuthia Kariuki*, the Appellant herein, to refund money in the sum of Kshs. 820,000/- to *Favour Hanim Mohammed*, the Respondent herein, which he received from her for purposes of leasing house No. B205 at Astoria Apartments.
2. The Appellant, being dissatisfied with the findings of the Court, lodged the appeal to this Court through the Memorandum of Appeal dated 21<sup>st</sup> February 2025. His grounds of appeal were as follows: -
  1. *That the learned trial magistrate erred in law and in fact by finding that the Appellant received Kshs. 820,000/- from the Respondent solely for the purpose of purchasing House No. B205 at Astoria Apartment, Nairobi, despite evidence to the contrary.*
  2. *That the learned Magistrate erred in law and fact by failing to analyse or consider the facts and evidence presented regarding ownership and payments, leading to an erroneous finding on the matter.*

3. *That the learned Magistrate erred in law and fact by failing to consider the material discrepancies in the evidence, particularly the mischaracterization of the transaction as the purchase of an apartment when in fact it pertained to the acquisition of items within the AIRBNB apartment.*
4. *That the learned Magistrate erred in law and fact by failing to appreciate that the WhatsApp group conversations being forwarded to the group did not constitute proof that the applicant had received money from the Respondent on account of purchase of the alleged apartment but was an accounting arrangement by the parties especially given that the Respondent was the one in charge of the Appellant's finances.*
5. *That the learned Magistrate erred in law and fact by disregarding the conversations and transactions between the parties which showed that money was regularly transferred between them as part of their business dealings and not specifically for the purchase of the alleged apartment.*
6. *That the learned Magistrate erred in law and fact by failing to appreciate that the Appellant had never acted as an agent for the Respondent in any property transaction and the Respondent did not provide sufficient evidence to establish such agency relationship.*
7. *That the learned Magistrate erred in law by failing to appreciate that the Appellant had produced evidence to support his assertions regarding the nature of the financial transactions between the parties, including his claims that he invested in their co-owned property.*
8. *That the Honourable Court erred by failing to recognize that the Respondent had initiated the suit as a retaliatory measure following a romantic relationship fallout, with the intent of frustrating the appellant legally.*
9. *That the Honourable Court failed to take into account that the Appellant has sought restraining orders and is no longer in ownership of the co-owned business which further demonstrates that the dispute between the parties was broader than the alleged apartment purchase.*

10. *That the Judgment was contrary to the weight of the evidence presented, leading to a miscarriage of justice against the Appellant.*
3. In his written submissions dated 3<sup>rd</sup> July 2025, the Appellant claimed that the funds he received from the Respondent were not intended for the purchase of House B205 but were instead advanced to facilitate business operations, specifically the furnishing and equipping of the apartment.
  4. The Appellant relied on the case of *Peter Ndungu Njenga -vs- Sophia Watiri Ndungu* (2000) eKLR to assert the position that a resulting trust could not have arisen in favour of the Respondent. He submitted that no sale agreement was ever executed evidencing intention to jointly acquire property, a fact that undermined the Respondent's claim of a resulting trust. He further stated that the apartment in question has been solely in his name and he has been responsible for handling rent, landlord correspondence, utility bills and maintenance. He claimed that it negated the inference that the Respondent had any beneficial interest.
  5. The Appellant argued that Respondent had failed to demonstrate any express or implied representation by the Appellant that he was holding the premises on her behalf. To that end, he cited the case of *Dhanjal Investment Limited -vs- Shabaha Investment Limited* (2022) KECA (KLR).
  6. In conclusion, he urged that the appeal be allowed as prayed.

**The Respondent's case:**

7. *Favour Hanim Mohammed* challenged the appeal through her Replying Affidavit deposed to on 10<sup>th</sup> March 2025. She also filed written submissions dated 9<sup>th</sup> July 2025. In the Replying Affidavit, she deposed that the Appellant has introduced unsupported new arguments that did not form part of his response at the trial Court. She was categorical that the Appellant was in full knowledge of the reason she transferred to him the money as evidenced by the WhatsApp texts. It was her case that the Appellant failed to substantiate his claim of

contributing the amount of Kshs. 4,000,000/- that would entitle him to 30% return on business he claimed they co-owned.

8. She further deposed that the suit was not a retaliatory one since she filed a separate criminal case at Kibera Law Court to protect herself from domestic violence from the Appellant. In the written submissions, it was her case that it is not disputed that she was previously in a romantic relationship with the Respondent and during that period, she sent him funds from her individual Bank and M-Pesa Accounts for the purchase of an Airbnb which he was to register in their joint names, but he failed to do so.
9. She reiterated that the Appellant had brought in a new argument in his appeal, a claim that did not form part of his evidence at the trial Court. It was her position that this Court has duty to rely only on the existing record of the trial Court. She urged the dismissal of the appeal with costs.

### **Analysis:**

10. From the foregoing discourse, the only issue for determination is whether the trial Court erred in ordering the Appellant to make a refund of Kshs. 820,000/- to the Respondent. The jurisdiction of this Court is as delimited by Section 38 of the Small Claims Court Act and is limited to reconsideration of matters of law.
11. Whereas there has been no universally accepted definition of the term '*matters of law*', there has been some working definitions thereto. The term '**point of law**' may also be referred to as '**matter of law**'. The **Black's Law Dictionary** defines '*a matter of fact*' and '*a matter of law*' as follows: -

**Matter of fact:** A matter involving a judicial inquiry into the truth of alleged facts and **Matter of law:** A matter involving a judicial inquiry into the applicable law.

12. *Lord Denning, J* in **Bracegirdle vs. Oxley** (2) [1947] 1 ALL E.R. 126 at p 130 in espousing the two terms had the following to say: -

.... The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them.

13. Drawing from the above, the Court of Appeal in **Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others** [2014] eKLR sated as under: -

.... That reasoning has been adopted in this jurisdiction. In **A.G. Vs. DAVID MURAKARU** [1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. **This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law.** See also **PATEL vs. UGANDA** [1966] EA 311 and **SHAH Vs. AGUTO** [1970] EA 263.

14. Earlier, the Court of Appeal in **M'riungu and Others -vs- R** [1982-88] 1 KAR 360 observed thus: -

.... We would agree with the views expressed in the English case of *Martin v Glyneed Distributors Ltd (t/a MBS Fastenings)* [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, **an appellate court has loyalty to**

***accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that;\_on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law.***

15. Later, the Court of Appeal in ***Charles Kipkoech Leting -vs- Express (K) Ltd & another*** [2018] eKLR discussed what entails matters of laws as the Court considered its role as a second appellate Court. It observed thus;

*.... Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina -vs- Mugiria [1983] KLR 78, Kenya Breweries Ltd v Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & another v Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, **the Court confines itself to 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.....***

16. And, in ***Peter Gichuki King'ara vs. IEBC & 2 others***, Nyeri Civil Appeal No. 31 of 2013, Court of Appeal held that a decision challenged on the basis of wrongful exercise of discretion raises a point of law. [See also ***Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others***, (2014) eKLR].

17. From the foregoing, an appeal on matters of law calls upon the appellate Court to steer clear of findings of fact derived from primary evidence and to also restrain itself from treating findings of fact as holdings of law or mixed findings of fact and law unless the findings are so perverse as to defeat the object of justice.

18. In discharging its appellate role in matters from the Small Claims Court, the High Court should remain alive to the rationale behind the establishment of the Small Claims Court as a special and unique Court which is different from the

mainstream civil Courts. It must always be remembered that the focal point of the Small Claims Courts is expeditious disposal of cases and that is why the Court is not bound by the strict rules of evidence [**Section 32** of the Small Claims Court Act] and further the Court has power to control of its own procedure in determining any claim before it subject to regard to the principles of natural justice [**Section 17** of the Act]. The High Court, therefore, is duty-bound to assist the Small Claims Court realize it's said objective and it ought to consider appeals from the said Court through those special lenses.

19. Having said so and upon careful perusal of the Memorandum of Appeal which raises 10 grounds of appeal, this Court finds that none of the grounds raises or squarely challenges any issue of law. Conversely, the grounds revolve around the trial Court's appreciation and conclusion of primary facts. As such, and going by the guidance in the several decisions referred to above, this Court is now to determine whether the impugned decision is so perverse that no reasonable Court or Tribunal would have reached that conclusion.
20. Upon review of the impugned judgment, it comes to the fore that the learned Adjudicator considered the parties' cases as presented through documents produced by consent under Section 30 of the Small Claims Act and found that the Respondent established her case based on the evidence whereas the Appellant on the other hand did not substantiate his case. This Court has combed through the decision and finds it well-reasoned and sound. The decision cannot be said to be bad in law and this Court hereby affirms it. As such, none of the grounds of appeal succeeds.

**Disposition:**

21. As the appeal is unsuccessful, the following final orders hereby issue: -

**[a] The appeal be and is hereby wholly dismissed.**

**[b] The Appellant shall bear the costs of the appeal assessed at Kshs. 50,000/= [Read:**

**Kenya Shillings Fifty Thousand Only] to be paid within 30 days of this decision and in default execution to issue.**

Orders Accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 12<sup>th</sup> day of November, 2025.**

**A. C. MRIMA  
JUDGE**

**Judgment virtually delivered in the presence of:**

**Miss Nyanchera, Learned Counsel for the Appellant.**

**No appearance for the Respondent.**

**Michael/Amina - Court Assistants.**