

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL APPEAL NO. E246 OF 2024**

**FRANCIS OMER (suing on behalf of CHAP CHAP TWENTY SOLUTION  
COMMUNITY BASED ORGANISATION) ..... APPELLANT**

**- VERSUS -**

**DANIEL ABABU ANDIEGO ..... RESPONDENT**

**(Being an appeal from the judgment and decree of Hon. G.C. Serem  
Adjudicator delivered on the 30/10/2024 in Kisumu SCCC No. E089 of 2024,  
Francis Omer (suing on behalf of Chap Chap Twenty Solution Community  
Based Organisation) v Daniel Ababu Andiego)**

**J U D G M E N T**

1. The appellant filed the primary claim before the trial court vide an amended statement dated **20/5/2024** in which he sought a declaration that he was entitled to a refund from the respondent of **Kshs. 657,000/-** plus interest for breach of contract or in the alternative to be allowed to advertise for sale the security assets offered by the respondent.
2. The respondent filed an amended response to the claim denying that he owed the appellant the alleged amount and instead counterclaimed against the appellant for **Kshs. 313,000/-** being the excess amount recovered from him by the appellant.
3. The matter proceeded to trial and by a judgment delivered on **30/10/2024**, the trial court dismissed both the appellant's claim and the respondent's counterclaim.

4. Being dissatisfied with the said Judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated **26/11/2024** and raised seven (7) grounds of appeal as follows: -

- a) The learned adjudicator erred in fact and law by treating casually and cursorily the entire suit and specifically the appellant's submissions and the evidence on record, therefore reaching a wrong conclusion and/or decision.*
- b) The learned adjudicator erred in fact and law by finding that the appellant did not prove that the loans were given after the receipt dated 25/3/2022 was issued and that the loan dates were before the said receipt was issued, when in reality the said receipt was issued on 25/3/2022 and the respondent was advanced a further loan on 25/7/2022, vide a loan form dated 25/7/2022 and the same was executed by both parties.*
- c) The learned adjudicator erred in fact and law by not finding that the receipt dated 25/3/2022 was in relation to the loan amounting to Kshs. 742,000/- advanced to the respondent on 25/3/2022 vide the loan agreement forms dated 25/3/2022 that were executed by both parties.*
- d) The learned adjudicator erred in fact and law by not finding that the respondent was advanced a further loan on 25/7/2022 of Kshs. 585,000/- vide a loan form dated 25/7/2022 that was executed by both parties.*

*e) The learned adjudicator erred in fact and law in treating the evidence and submissions before her superficially and consequently coming to a wrong conclusion on the same.*

*f) The learned adjudicator erred in fact and in law in failing to appreciate sufficiently or at all that the evidence tendered in favour of the appellant controverted and rebutted the respondent's evidence thus lowering the respondent's probative evidentiary value.*

*g) Consequently, the learned magistrate's decision occasioned a miscarriage of justice.*

5. The respondent swore a replying affidavit on the **26/9/2025** in which he opposed the instant appeal reiterating that the trial adjudicator did not err in arriving at her decision.
6. The appeal was disposed of by way of written submissions. The appellant submitted that when terms of a contract have been reduced to a contract no evidence shall be given in proof of the terms of the contract except the document itself.
7. That as there was no denial by the respondent on the existence of the said contract, the same are valid and the respondent should be compelled to abide by the terms of the said contract and settle the remaining balance of **Kshs. 657,000/-**.
8. On his part, the respondent submitted that he did not dispute that a sum of **Kshs. 244,800/-** was advanced to him on **25/3/2022** but that he did not take the subsequent loans nor did he sign any documentation as alleged. That the subsequent contracts relied on by the appellant were based on forged

documents and meant to fleece him and that the appellant failed to prove that he received the alleged monies.

9. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.
10. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal held that: -

*“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”*

11. Before the trial court, the appellant testified as **CW1** adopting his statement dated **20/5/2024** as his evidence in chief and produced his various documents as exhibits. He testified that he was the Chairperson of Chap Chap Twenty Solution Community Based Organisation. That they did advance the respondent different loans which he defaulted in paying and thus the security he had given could be realised to settle the outstanding balance of **Kshs. 657,000/-**.

12. In cross-examination, he denied repossessing any of the respondent's vehicles as the respondent had paid. That he was not aware of any sale agreement though he had sought to rely on the same as part of his exhibits. He admitted that the receipt dated **25/3/2022** showed payment being made in their office and that he issued the said receipt after receiving the said money.
13. The respondent testified as **DW1**. That he got a loan of **Kshs. 250,000/-** from the appellant on the **25/3/2022**. That on the same day, he received **Kshs. 100,000/-** and **Kshs. 144,000/-** the following day. That he was to pay back the loan with an interest of 30% all totalling **Kshs. 329,000/-**.
14. That he had problems with settling the said sum and requested the appellant to allow him time to settle. However, the appellant refused and his agents repossessed motor vehicle registration number **KAQ 486X**. That the appellant's agents came back after 1 week and forcefully took him to their office around Patel Flats where he was informed to look for a purchaser or allow them to buy the car from him.
15. That being under pressure, he asked them to give him **Kshs. 700,000/-** or **Kshs.600,000/-** but the agents told him the best they could offer him was **Kshs. 370,000/-** from which they recovered their loan and gave him **Kshs. 70,000/-**. That subsequently, the appellant's agent came and took motor vehicle registration number **KAL 311G** which belonged to his step mother and sent her **Kshs. 50,000/-**.
16. In cross-examination, he told the court that the signature on the loan for **Kshs. 585,000/-** and for the loan alleged to have been given on the **25/7/2022** were not his. He reiterated that he only received a loan of **Kshs. 244,000/-** from the appellant.

17. From the foregoing, it is clear that the only ground for determination is whether the trial adjudicator ***failed to appreciate the evidence tendered in favour of the appellant's case thereby arriving at a wrong decision.***
18. The appellant impugned the judgment on the grounds that the trial court failed to consider the evidence he presented especially with regard to the subsequent loans that the respondent had taken.
19. The law is clear that he who alleges must prove. ***Section 107 of Evidence Act*** defines the burden of proof. ***Section 109 of the Evidence Act*** exemplifies the rule in **section 107** on proof of a particular fact. It is to the effect that, the burden of proof as to any particular fact, lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge that burden, then he will not succeed in as far as that fact is concerned.
20. The question therefore is, whether the appellant discharged the burden of proof in support of his case.
21. The appellant pleaded that the respondent obtained a total sum of **Kshs. 1,327,000/-** in loans taken on different dates. These loans were allegedly **Kshs. 585,000/-, Kshs.350,000/-** and **Kshs.392,000/-** on **25/3/2022** and **25/7/2022** and had since defaulted. He testified that the respondent took 3 loans with him. The loan dated **25/3/2022** for **Kshs. 350,000/-**, loan dated **25/7/2022** for **Kshs. 585,000/-** and loan dated **25/3/2022** for **Kshs. 372,000/-**.

22. In support of its case, the appellant relied on loan documents dated **25/3/2022** for **Kshs. 350,000/-**, one dated **25/7/2022** for **Kshs. 585,000/-** and another dated **25/3/2022** for **Kshs. 392,000/-**, respectively.
23. However, in cross-examination, he admitted that he issued the receipt dated **25/3/2022** showing that payment had been made by the respondent in their office. The said receipt showed that the respondent had made a payment of **Kshs. 327,000/-** over a loan of **Kshs. 329,000/-** and that there was a balance of **Kshs. 2,000/-**.
24. Juxtaposed against this was the respondent's pleading denying the allegations made by the appellant but admitting that the appellant had advanced to him only **Kshs. 244,800/-** which plus interest would rise to **Kshs. 325,000/-**.
25. In his testimony, the respondent stated that he got a loan of **Kshs. 250,000/-** from the appellant on the **25/3/2022** and that on the same day he received **Kshs. 100,000** and **Kshs. 144,000** the following day. That he was to pay back the loan with an interest of 30% amounting to **Kshs. 329,000/-**. The respondent denied getting any subsequent loans from the appellant and stated that the alleged subsequent loans were forgeries made by the appellant.
26. I have considered the evidence tendered before the trial court. The standard of proof in civil cases is on a balance of probabilities.
27. I note the contradictions in the appellant's pleadings and his testimony in terms of dates and amounts of monies borrowed by the respondent. Further, in cross-examination, he stated that the respondent came to his premises for a loan on the **25/3/2022**. There was no evidence whatsoever to show that the

respondent ever visited the appellant's offices again after that date. It was not clear where the document dated 25/7/2022 showing that the respondent had obtained a further loan of **Kshs. 585,000/-** was made.

28. Further, it is worth noting that the appellant initially denied then admitted of being aware of a receipt made out to the respondent for the payment of a loan amounting to **Kshs. 327,000/-** for a loan of **Kshs. 329,000/-**. The respondent raised suspicion on the subsequent loans alleged to have been advanced by the appellant which suspicions the appellant failed to address.
29. The upshot of the above is that the appellant failed to prove his claim against the respondent on a balance of probabilities. The evidence adduced by the appellant was at variance with the pleadings and the subsequent testimony.
30. Accordingly, I uphold the trial adjudicator's decision to dismiss the appellant's claim. I find that the appeal lacks merit and dismiss the same with costs to the respondent.

It is so decreed.

**DATED** and **DELIVERED** at Kisumu this 7<sup>th</sup> day of **November, 2025**.

**A. MABEYA, FCI Arb**

**JUDGE**