



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

COMMERCIAL APPEAL NO.E002 OF 2024

SIMON GITHII MURIMI.....

APPELLANT

-VERSUS-

FRANCISCA NJERI TIMOTO.....

RESPONDENT

(Being an Appeal from the Judgement of the Chief Magistrate's Court at Nakuru (Hon. Edward Oboge-Resident Magistrate/ Adjudicator) in Nakuru SCCC NO. E1191 of 2023).

JUDGMENT

1. This is an Appeal flowing from the lower court's Judgement delivered on 20th February 2024 by which Judgment on

admission in the sum of Kshs.282,620 in special damages was entered in favour of the Respondent.

2. By Memorandum of Appeal dated 6th March, 2024 the Appellant pleads 7 grounds of Appeal which the court has condensed into 2 as follows:

a. That the trial court erred in law by finding that the Appellant admitted the claim lodged against him.

b. That the lower court failed to appreciate the law relating to evidence.

3. The Appellant prays that the Appeal be allowed; Judgment and/or Decree of the lower court set aside and substituted with an order dismissing the claim with costs.

4. A brief background to the Appeal is that the Respondent sued the Appellant in the lower court for recovery of a loan in the sum of Kshs.347,000 she allegedly advanced to the latter. In his response to the statement of claim, the Appellant admitted only part of the claim in the sum of Kshs.123, 800 which he claims to have repaid. He traversed all the other material particulars of the claim.

5. At the hearing of the claim, the lower court found that the Appellant admitted owing the entire claim of Kshs.3470,000 which the court ordered him to pay less a sum of Ksh. 64, 380 the court found to have been paid to the Respondent, thus provoking this Appeal.

Appellant's Submissions

6. Contrary to the Respondent's submissions, the Appellant contends that the Appeal raises only points of law as required by **Section 38 (1) Small Claims Court Act**. It is suggested that relevant points of law in such an Appeal would include the lower court's misapplication of statutory provisions; misdirection on evidence or errors in legal evaluation of facts.
7. Learned Counsel for the Appellant further submit *inter alia* that admission in law ought to be express or implied on the pleadings or evidence as observed in **Karuga & Another vs Kabiya & 3 Others (1987) KLR 347**. Counsel also point out that by dint of **section 17 of the Evidence Act** admission must be clear, unambiguous and unequivocal in relation to a fact in issue.

8. In regard to the claim for special damages in his Counterclaim, the Appellant contends that necessary proof of payment to him was not offered. The Respondent's reliance on Bank withdrawal receipts as evidencing payment is faulted for the reason that there is no nexus between the withdrawals and disbursement to the Appellant. The Appellant alludes to the judicial determination in **Karanja vs Karanja (2005) eKLR** in which it was exhorted that corroborative evidence of payment was necessary in the circumstances.
9. The lower court is accused of employing "double standards in treating the parties' evidence of payment by discounting the Appellant withdrawals as not proving payment whilst presuming the Respondent's withdrawals as payment/disbursement in favour of the Appellant. According to the Appellant's Advocates Mpesa statements their client exhibited constitute clear proof of repayment of a sum of Kshs.123,800.

Respondent's Submissions

10. Counsel for the Respondent reiterate that the whole claimed sum of Kshs. 347,000 admitted at the hearing of the claim, particularly during cross examination of the Appellant. The Appeal is also dismissed as incompetent for raising points of fact when only issues of law arise for determination (see case law in **Charles & Another Vs Company; Feliben International Limited (Interested Party) (Civil Appeal E654 of 2021) [2023] KEHC 18803 KLR relied upon by the Advocates.**)
11. It is underscored that there must be demonstration that the trial court's findings were based on no evidence, or were arrived at through misapprehension of the law as observed in **Gakere vs Kahiu (Civil Appeal No. 284 of 2023) [2024] KEHC 9323 (KLR) (19th July, 2024)** Counsel cite and rely upon.
12. On the merits the Respondent submits that the Trial Court rightly found the sum of Kshs.282. 620 to have been proven after taking into account the Appellant's admission of liability in the sum of Ksh. 347,000 during cross-examination in court. Although the Appellant by his Advocates' letter dated

previously committed to pay the entire claim of Ksh. 347,000 on a “*without prejudice*” basis, the Respondent submits that disclosure of confidential information or comments thereon in court waives *without- prejudice privilege* (see **Halsbury’s Law of England 5th Edition Vol.17, paragraph 6** alluded to by Counsel).

13. As observed in the often quoted case of **Selle & another Vs Associated Boat Company Limited & Others (1968) E.A. 123**, a first appellate court is enjoined to revisit the evidence that was before the trial with a view to analyzing; evaluating it and come to its own independent conclusion. The Court of Appeal in **Kenya Breweries Ltd Vs Godfrey Odoyo (2010) eKLR** referred to in the Respondent’s submissions underscored the legal position.
14. The first issue to determine is whether the Appeal is defective and ought to be struck out for the reason advanced by the Respondent. By dint of the provisions of **Section 38 (1)** of the Small Claims Court Act, an appeal to this Court from the Small Claims Court is confined to points of law only. Such points of law would include misapplication of statutory

provisions; misdirection on evidence and errors in legal evaluation of facts as noted hereinbefore.

15. Among the Grounds of Appeal herein are that the lower court erred by holding that the Appellant admitted the entire claim of Kshs.347,000 . In my view, whether or not a party to a suit admitted a fact in issue is matter of law as it involves interpretation of the provisions of *inter alia* **Sections 17, 18, 19 and 20 of the Evidence Act** which set out the elements of admission in law.
16. The Court accordingly finds that the Appeal is competent and properly before the court.
17. The second and main issue for determination in this Appeal is whether the Appellant admitted the whole indebtedness of Kshs. 347,000 before the lower court. The Respondent and the trial court rely on evidence the Appellant gave under cross examination by the Respondent's Counsel as captured in the Supplementary Record of Appeal filed herein. In answer to a question as to why he offered to refund the sum of Kshs.347,000 through his Advocate, the Appellant replied:

“Out of my own volition I decided since we have been colleagues for a while beside others was my amount claiming then have made thousands of transactions between us part from the money claimed. I also did not want a case.” (*sic*)

18. The trial court had this to say in relation to the purported admission of the debt of Kshs.347,000:

“.....the Respondent stated that he had agreed to refund the said amount because they had been colleagues in the same institution for quite a long time, besides, he did not want a case with the Claimant.”

19. The Trial Court therefore observed:

“.....the record shows an admission of a debt Kshs.347,000 by the respondent which admission i refuse to turn a blind eye to . So even in the absence of the proposal to settle on a without prejudice basis, there is still an admission of a loan of Khs.347,00 on record.”

20. I agree with the Respondent on the authority of **Halsbury’s Law of England** *supra* that where a party repeats in court a

statement previously made on a without prejudice basis, the statement ceases to be protected as privileged communication. Therefore, if indeed the Appellant admitted the entire indebtedness during hearing of the case, then the defence of privileged communication made on a without prejudice basis would not be available to him.”

Determination

21. It has been underscored in many cases including in **Nairobi High Court (Commercial & Admiralty Division Case No. 301 of 2013) ,Guardian Bank Ltd V. Jambo Biscuits Kenya Ltd**, that admission of liability be clear and unequivocal on a plain reading of the admission. In **Choitram V. Nazari (1984) KLE 327** it was simply put that;

“an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be “ of course there was”.

22. The alleged admission herein is not clear, unambiguous or unequivocal as required by law. The

Appellant only appeared to say he decided to own up because the Respondent was his colleague and they had had many other like transactions before. He also seemed to state that he was willing to settle the claim because he did not want to engage in litigation with the Respondent. I don't understand the Appellant to be stating by these words that he agreed to settle the whole claim because he in fact owed the debt. The statement in question does not therefore amount to an admission and so further corroborative evidence is required to prove the claim. The record does not show such corroboration of the debt.

23. The upshot is that the Appeal succeeds only to the extent that the Appellant is found not to have admitted the entire claim of Kshs.347,000. For avoidance of doubt, the awarded sum of Ksh. 64,380 against the Appellant was proven on a balance of probability as found by the trial court and this court won't interfere therewith.

24. Because of the relationship of the parties and the friendly circumstances surrounding the transaction they entered into they will bear their own costs of the Appeal.

J. M. NANG'EA, JUDGE.

**Judgement dated, signed and delivered virtually at Nakuru
this 26th day of November, 2025.**

In the presence of:

Appellant's Advocate, Ms. Isoe

Respondent's Advocate, Mr. Munyoroku

Court Assistant - Jeniffer

J. M. NANG'EA, JUDGE.