



REPUBLIC OF KENYA



KENYA LAW
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**Githinji v Kiminda (Civil Appeal E048 of 2025)
[2026] KEHC 445 (KLR) (22 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E048 OF 2025
FN MUCHEMI, J
JANUARY 22, 2026**

BETWEEN

JOHNSON KAMAU GITHINJI APPELLANT

AND

JOSEPH KAMAU KIMINDA RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. J. K. Tawai (RM/Adjudicator)
delivered on 29th November 2024 in Ruiru Small Claims Court SCCCOMM No. E583 of 2024)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Ruiru Resident Magistrate/Adjudicator in SCCCOMM No. E583 of 2024 whereby the trial court dismissed the appellant's claim for lack of proof against the respondent on a balance of probability.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds summarized as follows:-
 - a. The learned adjudicator erred in law and in fact in finding that he was asking the court to rewrite the agreement dated 20th September 2021 by asking the respondent to pay Kshs. 231,235/-
 - b. The learned trial adjudicator erred in law by dismissing the claim for lack of jurisdiction as the trial court is clothed with jurisdiction to determine a civil claim relating to a contract of money pursuant to Section 12 of the *Small Claims Court Act*.
 - c. The learned trial adjudicator erred in law in failing to discharge substantive justice in the matter and ensuring fairness and justice in the matter.



- d. The learned trial adjudicator erred in law in awarding costs to the respondent even after determining that his defence was a sham, unsupported by evidence and dismissed his counterclaim.
3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that his evidence in the lower court was uncontroverted which showed that the respondent received a soft loan in cash as per the agreement dated 20th September 2021. The appellant further submits that the amount claimed and proven is Kshs. 231,235/- less Kshs. 5,000/- paid by the respondent during the pendency of the lower court case. The appellant argues that the respondent's evidence in the trial court was untruthful and was filled with inconsistencies. Further, the documents in support of the respondent's defence especially the mpesa statements dated 2020-06-2018 could not be attributed to the loan subject as it relates to other agreements for loans the respondent had previously taken from him.
5. The appellant refers to Section 12 of the *Small Claims Court Act* and the cases of Owners of Motor Vessel 'Lillian S' vs Caltex Oil Kenya Limited [1989] KLR 1 and Gichovi vs Kilem (Civil Appeal E020 of 2024) and submits that the trial court erred by holding that it did not have jurisdiction to determine the claim which arose from a contract relating to money held for a sum of Kshs. 231,235/-.
6. The appellant further relies on the case of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR and submits that the claim was simply for enforcement of an existing contractual obligations and the trial court ought to have applied the maxims of equity and order restitution integral and restore the parties to their precontractual stage. The appellant argues that by offering a certificate of ownership issued by a company that was not in existence the respondent had obtained a loan through fraud and thus the trial court ought to have found that the respondent was meant to pay Kshs. 231,235/- less the Kshs. 5,000/- he had paid before hearing of the claim.
7. The appellant refers to the cases of Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR and Willy Kimutai Kitilit vs Michael Kibet [2018] eKLR and submits that the learned adjudicator having acknowledged that the offices of Transecture Holdings Limited had closed before he could present his documents, she ought to have applied the equitable maxim of equity will not suffer a wrong without a remedy.
8. Relying on the decision in Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR 1, the appellant submits that the learned adjudicator failed to consider his oral testimony, pleadings and submissions. Courts are enjoined under Article 159(2) of *the Constitution* to do substantive justice.
9. The appellant relies on Section 33 of the *Small Claims Court Act* and the case of Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2014] eKLR and submits that having found that the respondent's defence and counterclaim were without merit, the learned adjudicator should not have awarded costs to the respondent.

The Respondent's Submissions.

10. The respondent submits that the appellant's claim was not dismissed for lack of jurisdiction but for failing to prove his case to the required threshold. Further, the respondent argues that his counterclaim was dismissed for lack of jurisdiction as per Section 13(5) which divests the small claims court jurisdiction over a dispute of title or possession.



11. The respondent refers to the cases of Kibugi Farmers Co-op Society vs Philip Mungai t/a Mungai Electrical Ventures (2018) eKLR and National Bank of Kenya Ltd vs Pipleplastic Samkolit (K) Ltd & Another (2002) EA 503 and submits that parties are bound by the terms of their contract. In the instant case, the terms of the agreement entered into by the parties were clear and devoid of any ambiguity and did not require any extrinsic evidence to ascertain what the terms provided. Further, the appellant did not plead or prove fraud on his part in the trial court. The respondent argues that parties are bound by their pleadings and further the appellant cannot adduce additional evidence on appeal by averring that the respondent offered a certificate of ownership issued by a company that was not in existence and thus he had obtained the loan through fraud. Thus, the appellant failed to prove his case to the required standard as he did not adduce any evidence that he advanced money to the respondent. The appellant only produced the impugned commitment to pay which was self executing in the event of default and it is trite law that parties are bound by the terms of their contracts unless coercion, fraud or undue influence are pleaded and proved.
12. The respondent argues that the defence he presented in the trial court was not a sham and nowhere did the learned adjudicator note that the defence was a sham. The respondent further argues that it is the appellant who dragged him to court yet he was unable to prove his case thus the trial court dismissed the same thereby awarding costs to him pursuant to section 33 of the *Small Claims Court Act*. Further, his counterclaim was dismissed for want of jurisdiction which was raised suo moto.

Issues for determination

13. The main issues for determination are:-
 - a. Whether the appeal is defective.
 - b. If not, whether the appellant proved his case on a balance of probabilities.

The Law

14. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR 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 that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

15. In distinguishing between matters of law and fact the Court of Appeal stated in Kenya Breweries Ltd vs Godfrey Oduyo [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. 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.

Whether the appeal is defective.

16. Section 38 of the Act provides:-

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.

17. The Court of Appeal in *Mwangi vs Wambugu* [1984] KLR 453 commented of what amount to points of law as follows:-

A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

18. Similarly in *Peter Gichuki King'ara vs Independent Electoral and Boundaries Commission & 2 Others* [2014] Eklr the court held that:-

Bearing in mind the above principles, the most contentious issues in this appeal is whether the grounds of appeal are matters of law or facts. Having established that we have jurisdiction to determine only issues of law as per the provisions of Section 85A of the *Elections Act*, to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence with of course the usual caveat, that we did not see the witness demeanor is an issue of law.

19. I have perused the grounds in the memorandum of appeal and noted that the appellant largely claims that he loaned a sum of Kshs. 231,235/- to the respondent who failed to pay him back and further declined to authorize Transecture Holdings to transfer his parcel of land which was being held by the appellant as collateral to the loan. These grounds as raised by the appellant touch on matters of fact which will require this court to scrutinize and re-evaluate the evidence once more. However, that is contrary to the jurisdiction of this court sitting as an appellate court pursuant to Section 38 of the *Small Claims Court Act* which provides for appeals only on matters of law.

20. The appellant has further raised the issue of jurisdiction which he claims that the trial court was clothed with jurisdiction to try his claim. From the record, it is clear that the appellant lodged a claim against the respondent for judgment in the sum of Kshs. 231,235/-. The respondent filed a response to the claim and a counter claim for an order from the trial court for the appellant to release Plot Certificate No. 062 upon payment of the balance. The learned adjudicator found that it lacked jurisdiction to issue orders compelling the appellant to release the Plot Certificate No. 062 upon payment of the loan balance as this was contrary to Section 13(5) of the *Small Claims Court Act* which excludes jurisdiction of the court over a dispute concerning title or possession of land. The learned adjudicator further dismissed the appellant's claim on the basis that he did not prove his claim as against the respondent on a balance of probability. Thus, it is clear that the appellant's claim was dismissed for lack of proof and not on the issue of want of jurisdiction as the appellant argues.



21. The appellant is further aggrieved that the learned adjudicator failed to carry out substantive justice by not considering his oral testimony, pleadings and submissions. On perusal of the record, the matter proceeded by viva voce evidence whereby both parties presented their cases and cross examined each other. Parties thereafter put in written submissions and the learned adjudicator in writing down her judgment considered the pleadings, witness statements, documentary evidence and submissions on record. The trial court found that the appellant presented in court a commitment to pay a loan dated 20th September 2021, executed by both parties and the said commitment spelled out the remedy to be undertaken by the appellant in the event the respondent defaulted to pay the loan amount. Thus the respondent having defaulted to pay the loan amount, the learned adjudicator found that the appellant seeking the court to condemn the respondent to pay the loan amount amounted to asking the court to rewrite the agreement between the parties, which powers it did not have. On that premise the learned adjudicator found that the appellant failed to prove his claim on a balance of probability and dismissed the same. It is therefore evident that the trial court considered all the evidence presented to it to reach its determination conclusively.
22. The appellant further faults the trial court for awarding costs to the respondent yet both the claim and counterclaim were dismissed. Section 33(1) of the *Small Claims Court Act* provides that the court may award costs to the successful party in any proceedings. The said claim was lodged by the appellant in the trial court but was dismissed for lack of prove to the required standard. The respondent filed a response to the claim and a counterclaim compelling the appellant to release the plot certificate number 062 upon payment of the loan balance. The appellant did not raise the issue of jurisdiction but the same was raised by the court suo moto. Thus, the appellant was not entitled to costs of the counterclaim. It is therefore my considered view that the respondent being the successful party as the claim against him was dismissed was entitled to costs. Thus, ground number 5 fails.
23. Accordingly, this appeal lacks merit and is hereby dismissed with costs to the respondent.
24. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF JANUARY, 2026.

F. MUCHEMI

JUDGE

