



**Mburathi & another v Afriduka Ltd & 2 others (Civil Case E153 of 2020)  
[2026] KEHC 435 (KLR) (Civ) (27 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 435 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE E153 OF 2020**

**LP KASSAN, J**

**JANUARY 27, 2026**

**BETWEEN**

**GEORGE KIURI MBURATHI ..... 1<sup>ST</sup> PLAINTIFF**

**JOYCE WAIRIMU MBURATHI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**AFRIDUKA LTD ..... 1<sup>ST</sup> DEFENDANT**

**TONIA NJERI MURAYA YINDA ALIAS ANTONIA KIHARA .... 2<sup>ND</sup>  
DEFENDANT**

**KIURI STEVEN MBURATHI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. George Kiuri Mburathi and Joyce Wairimu Mburathi (hereafter the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiff) filed suit by way of plaint dated 16.10.2020 seeking inter alia the sum of Kshs. 24,708,000/- owing as at the 02.06.2020; costs of the suit; interest on the above at Court rates from 02.06.2020 and date of filing suit; and any other or further relief that the Court will deem fit.
2. It was averred that at all material times relevant to the suit, Tonia Njeri Muraya Yinda alias Antonia Kihara and Kiuri Steven Mburathi (hereafter the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendants) were directors of Afriduka Ltd (hereafter 1<sup>st</sup> Defendant), the latter having been incorporated on 14.03.2019. That on or about March 2019, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant as proposers of the 1<sup>st</sup> Defendant made a presentation to the Plaintiffs, using fundraising slide decks, for their various business ideas whereinafter the Plaintiffs granted the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants the sum of Kshs. 8,820,000/- jointly and severally prior to and post incorporation of the 1<sup>st</sup> Defendant as operational expenses during the period of 23.03.2019 and 14.08.2019.



3. It was further averred that the Plaintiffs advanced additional funds to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant, as guarantors of the 1<sup>st</sup> Defendant, to the tune of Kshs. 10,000,000/- on 20.09.2019 and Kshs. 5,000,000/- on 02.12.2019, to wit, they declared and guaranteed repayment of loan together with costs incurred in processing the loan facility. It was agreed that the Defendants were to make scheduled payments by way of servicing a loan account by the 1<sup>st</sup> Plaintiff at Absa Bank. That despite the aforestated, the Defendants failed to make the scheduled payments.
4. It was equally averred that upon an audit of the 1<sup>st</sup> Defendant being conducted it was discovered that 2<sup>nd</sup> and 3<sup>rd</sup> Defendant were not running the business as pitched to the Plaintiffs, in order to obtain credit facilities, whereas the former were not acting in the best interest of the business and or its creditors, whom included the Plaintiffs. That the Defendants have failed to honor their obligations as agreed, to wit, the debt remains unsettled in the sum of Kshs. 24,708,000/-, which the Plaintiffs claim.
5. The 2<sup>nd</sup> Defendant filed a statement of defence dated 15.01.2021 denying the key averments in the plaint meanwhile averred that without prejudice to averments in its statement of defence, that she was under no obligation to regularize and or settle the loan facility whereas if the Plaintiffs sought a facility, the same was done on their own volition and for their own purposes.
6. The 3<sup>rd</sup> Defendant on his part filed a statement of defence dated 04.02.2021 which was later amended on 09.05.2022 admitting to the fact that the Defendants received funds as detailed in the plaint and that they were aware that the funds were sourced from a loan, save that the sums were investments by the Plaintiffs in the 1<sup>st</sup> Defendant. It was further averred that the 3<sup>rd</sup> Defendant worked diligently in building the business however the 2<sup>nd</sup> Defendant was solely to blame for the mismanagement of funds. The 3<sup>rd</sup> Defendant meanwhile committed to pay half of the sum demanded because the Plaintiffs are his parents are elderly and have lost their retirement funds.
7. The foregoing thus formed the state of pleadings prior to hearing of the suit. That said, on 15.10.2021, upon the Plaintiffs lodging a request of judgment dated 24.03.2021, interlocutory judgment was entered as against the 1<sup>st</sup> Defendant, having been duly served with summons and pleadings failed to enter appearance or file a defence in the matter within prescribed time.
8. The matter was later referred to mediation wherein parties reached a partial settlement agreement dated 30.08.2023, that was adopted as an order of the Court on 15.11.2023. The purport of the settlement agreement referred to this Court a solitary issue for determination being whether the Defendants are liable in respect of the Plaintiffs claim. It is on the premise of the above facts that the suit eventually proceeded for hearing.
9. During the trial, George Kiuri Mburathi testified as PW1. He began by adopting the joint witness statement with Joyce Wairimu Mburathi dated 16.10.2020, as his evidence in chief. He further went on to adduce into evidence the documents appearing in his list of documents of even date as PExh.1-30. The gist of his evidence was that the 3<sup>rd</sup> Defendant was their son and that between 23.03.2019 and 02.12.2019, the Plaintiffs had advanced a total sum of Kshs. 24,708,000/- to the Defendants, for purposes of setting up a business, which loans were at the sole request of the latter whom from time to time would request for disbursements. Reiterating the averments in the plaint, he stated that the Defendants had severally admitted their indebtedness however have refused to make any repayments. That upon an audit of the 1<sup>st</sup> Defendant's accounts being conducted, it was discovered that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant were not running the 1<sup>st</sup> Defendant as they had pitched to the Plaintiffs whereas they had abandoned the business and were not acting in the best interest of the creditors, whom included the Plaintiffs.



10. Joyce Wairimu Mburathi testified as PW2. Identifying herself as a spouse to PW1, she too adopted the joint witness statement with PW1 dated 16.10.2020 as her evidence in chief. It was her evidence that the loan advanced to the Defendants was jointly advanced by the Plaintiffs meanwhile her testimony similar to that of PW1.
11. Chrispin Odera Okinyi testified as PW3. He began by identifying himself as a Public Certified Accountant with over seventeen (17) years of experience. He proceeded to adduce into evidence as PExh.31 an Audit Report dated 02.06.2020 on the 1<sup>st</sup> Defendant. It was his evidence that a total sum of Kshs. 25,000,000/- had been advanced to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant whereas the 1<sup>st</sup> Defendant only managed to turn a profit slightly over Kshs. 180,000/-. That the profit therein cannot be deemed to be prudent financial management of the 1<sup>st</sup> Defendant after an investment of Kshs. 25,000,000/-. He stated that the audit was conducted in 2020 wherein the 1<sup>st</sup> Defendant business was still operational however on the ground there was no actual activity.
12. He confirmed that the directors had made some payments towards the advanced loan thus leaving a balance of Kshs. 23,848,391/- at the close of the audit. That the loan agreement was executed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant, to wit, in the said agreements it did not capture that they were executing the same on behalf of any entity. He concluded by stating that the 2<sup>nd</sup> Defendant personally benefited from the advanced loan whereas it was agreed that the advanced loan was to be refunded.
13. The 2<sup>nd</sup> Defendant, Tonia Njeri Muraya testified as DW1. She began her evidence by stating that her line of work entails working with small scale owners. She proceeded to adopt her witness statement dated 14.03.2022 as her evidence in chief and adduced into evidence the documents appearing in her list of documents as DW1 - Exh.1. It was her evidence that Kshs. 17,710,000/- was advanced to the 1<sup>st</sup> Defendant, funds of which were received from the 3<sup>rd</sup> Defendant parents who are the Plaintiffs. That they had requested for Kshs. 20,000,000/- for a project that entailed food and housing components. She stated that the monies advanced were to be paid by the 1<sup>st</sup> Defendant and not the directors whereas she has never received any money from the Plaintiffs. She conceded that from the advanced funds she only benefited from a salary and school fees for her son. That she was a director of the 1<sup>st</sup> Defendant whereas she did not take up the role before settlement of her son's school fees, which was agreed upon orally.
14. It was her evidence that the Plaintiffs were to be allotted shares in the 1<sup>st</sup> Defendant however the allotment or transfer of shares was not effected. That she did not personally undertake to pay the loan however did so as a director. That she was unaware if the loan had been repaid whereas she had written an email resigning as a director of the 1<sup>st</sup> Defendant. She maintained that the loan was advanced by the Plaintiffs and received by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant on behalf of the 1<sup>st</sup> Defendant. She expressed willingness to pay the loan as advanced however stated that she was not in position to presently settle the same.
15. The 3<sup>rd</sup> Defendant, Kiuri Steven Mburathi testified as DW2. He began by identifying himself as an Architect by profession meanwhile proceeded to adopt his witness statement dated 08.05.2022 as his evidence in chief. He also adduced into evidence the documents appearing in his list of documents and supplementary list of documents as DW2-Exh.2. The gist of his evidence was that he was one of the directors of the 1<sup>st</sup> Defendant and that the Plaintiffs are his parents. He confirmed the Plaintiffs had advanced a loan totaling Kshs. 24,708,000/- towards running of the 1<sup>st</sup> Defendant whereas it had been his intention to settle the advanced sums.
16. That the 2<sup>nd</sup> Defendant caused the collapse of the 1<sup>st</sup> Defendant's business by failing to fulfill her duties as co-director and refusing to sign-off essential operational tasks. He maintained that the monies were



borrowed by 2<sup>nd</sup> and 3<sup>rd</sup> Defendant on behalf of the 1<sup>st</sup> Defendant, sums of which, were to be settled from profits derived from the latter. He further confirmed that the monies were advanced through his account and not the 2<sup>nd</sup> Defendant. However, for dispatch of the funds to be effected both himself and the 2<sup>nd</sup> Defendant had to execute the loan agreements. He stated that school fees advanced to the 2<sup>nd</sup> Defendant was a loan. In conclusion he acquiesced to the fact that he was willing to settle 50% of the audited advanced loan and that the 2<sup>nd</sup> Defendant ought to settle the other 50%.

17. Respective counsel for the parties had an opportunity to cross-examine and re-examine the respective witnesses.
18. At the close of the trial, parties filed submissions, of which, the Court has duly considered alongside the authorities relied in support thereof.
19. Having considered the above, the overarching question for determination is whether the Plaintiffs have on a balance of probabilities proved their case as against the Defendants. And if so, whether the relief(s) sought in the plaint ought to be granted. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. Concerning the latter, the Court of Appeal in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91 observed that-

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

20. With the above in reserve, from the pleadings and evidence, what I garner to be the undisputed facts are-; that the 3<sup>rd</sup> Defendant is a son to the Plaintiffs; that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant at all material times relevant to the suit were business partners and directors of the 1<sup>st</sup> Defendant; that on or about March 2019, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant pitched a startup idea, being the 1<sup>st</sup> Defendant, and later received funding from the Plaintiffs towards setting up and management of the 1<sup>st</sup> Defendant; that the 3<sup>rd</sup> Defendant does not dispute receiving money from the Plaintiffs to the tune of Kshs. 24,708,000/- towards setting up and management of the 1<sup>st</sup> Defendant; and that the loan agreements in respect of the funds advanced by the Plaintiffs were voluntarily executed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.
21. As can be garnered from the Plaintiffs pleadings and evidence, the gist of their contention is that they had advanced monies to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant for the purpose of setting up and running the 1<sup>st</sup> Defendant, in the tune of Kshs. 24,708,000/-. And that despite the agreement that the Defendants would make scheduled payments by servicing the 1<sup>st</sup> Plaintiff's loan account at Absa Bank, the former failed to make the scheduled payment.
22. The gist of the 2<sup>nd</sup> Defendant's case is that there were only two (2) loan agreements advanced to the 1<sup>st</sup> Defendant totaling Kshs. 15,000,000/- meanwhile the total requests made to the 1<sup>st</sup> Plaintiff was 13,090,000/- while the total amount received by 1<sup>st</sup> Defendant was Kshs. 17,710,000/-. She maintained that money was advanced to the 1<sup>st</sup> Defendant and solely payable by it. That she communicated her



resignation from the 1<sup>st</sup> Defendant to the Company Secretary therefore on the premise of the forestated she ought not to be held liable for any such alleged loss.

23. The gist of the 3<sup>rd</sup> Defendant case is simple, that the 1<sup>st</sup> Defendant is liable for the sums advanced and that in any event the Court should find that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant liable, each of the said defendants ought to be held jointly and severally liable to pay 50% of the sums deemed owing to the Plaintiffs.
24. On accord of the forestated, the Court is therefore called upon to determine whether the Defendants are indebted to the Plaintiffs and whether the Plaintiffs are entitled to the relief(s) sought in their pleadings. To the foregoing end, the applicable law as to the burden of proof is spelt out in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

25. While there was no specific contract executed concerning the terms of engagement as between the parties as may concern the 1<sup>st</sup> Defendant, as earlier noted, it was not in dispute that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant executed loan agreement, wherein they later received start-up capital from the Plaintiffs. That said, the role of the Court in adjudicating a dispute arising between contracting parties is well settled. In the oft-cited decision of *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, the Court held that; -

“A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.”

26. At the outset and from the Plaintiffs evidence, it can be noted that the 1<sup>st</sup> Defendant was incorporated on 14.05.2019 whereafter on 20.08.2019, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant executed a loan agreement in the tune of Kshs. 10,000,000/-. The Agreement was titled “Agreement for loan repayment advanced to Afriduka Directors between George Kiuri Mburathi and Afriduka Directors (Kiuri Steven Mburathi & Tonia Njeri Muraya Yinda)”. The agreement that was duly executed by 1<sup>st</sup> Plaintiff alongside the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant captured in part that-;

We directors of Afriduka are in agreement that will partly pay for the loan repayment on a monthly basis and any other costs incurred during the process as per below-;

.....

Standing order to be initiated from account .....under Ariduka Ltd to George Kiuri Mburathi.... (sic)

27. Later, on 02.12.2019, the 1<sup>st</sup> Plaintiff alongside the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant executed a similar loan agreement for the sum of Kshs. 5,000,000/- that equally read in part that-;

We directors of Afriduka are in agreement that will partly pay for the loan repayment on a monthly basis and any other costs incurred during the process as per below-;



.....

Standing order to be initiated from account .....under Ariduka Ltd to George Kuiru Mburathi.... (sic)

28. In respect of the 1<sup>st</sup> loan agreement, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant jointly lodged a request for the transfer of funds to the 1<sup>st</sup> Defendant totaling Kshs. 11,140,000/- whereas with respect to the 2<sup>nd</sup> loan agreement, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant jointly lodged a request for the transfer of funds to the 1<sup>st</sup> Defendant totaling Kshs. 1,950,000/-. Thereby making the total joint request for funds by the 1<sup>st</sup> Plaintiff at the joint request of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant being Kshs. 13,090,000/-. Further, to the foretold, it can equally be gathered that different amounts were advanced directly from the 1<sup>st</sup> Plaintiff to either the 1<sup>st</sup> Defendant or 3<sup>rd</sup> Defendant.
29. That said, by PW3's evidence which was premised on PExh. 31 an Audit Report dated 02.06.2020, the same was to the effect that a total amount of Kshs. 25,000,000/- had been advanced jointly to the directors of the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant in turn advanced to the 1<sup>st</sup> Defendant a total amount of Kshs. 25,462,129.20/- as at 30.04.2020. This report was not disputed and or an alternate report adduced to counter the same. Nevertheless, by the Plaintiffs' pleadings their claim as against the Defendants was specific to the tune of Kshs. 24,708,000/-.
30. The Plaintiffs did not amend their plaint to capture the figures as testified by PW3. It is trite that parties are bound by their pleadings and that the issues arising for determination can only be localized from pleadings. The latter was echoed by the Court of Appeal in *North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others* [2014] eKLR wherein it was observed that; -

“The complaint running through the submissions by the learned counsel for the appellant in this appeal was that the learned judge wrote and delivered a judgement on issues that were not pleaded in the plaint and which were therefore not before the learned judge for determination.

.....One of the issues for determination on appeal in the case of *Abdul Shakoor Sheikh v Abdul Najeid Sheikh* Civil Appeal No. 161 of 1991 (ur) was the complaint that the trial judge dealt with an issue which was not properly before him as it had not been pleaded in the plaint. It was also contended in that appeal that in making this part of the order dependent on a non-existent appeal the judge grossly erred in that he granted a relief which had not been sought. This court differently constituted agreed and held that a plaintiff is not entitled to reliefs which he has not specified in his statement of claim as pleadings play a very pivotal role in litigation. The court cited a quote from the authors Bullen and Leake (12<sup>th</sup> edition) page 3 under the rubric Nature of Pleadings: -

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

31. With the above in reserve, it is not in dispute that what was tendered before the Court were two (2) loan agreements to the tune of Kshs. 15,000,000/- that were taken out by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant in the personal capacity as directors of the 1<sup>st</sup> Defendant. While it appears from both PW1's and PW3's that



the 1<sup>st</sup> Plaintiff advanced monies either to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant jointly or to the 3<sup>rd</sup> Defendant in excess of Kshs. 24,000,000/-, it would be reasonable to conclude that the 2<sup>nd</sup> Defendant would be liable solely to the tune of Kshs. 15,000,000/- that was jointly advanced to her alongside the 3<sup>rd</sup> Defendant as directors of the 1<sup>st</sup> Defendant.

32. While the 2<sup>nd</sup> Defendant attempted to make a case that she has since resigned as director of the 1<sup>st</sup> Defendant, when she executed the request for the transfer of funds on 20.08.2019 and 02.12.2019, she did so, in her personal capacity as a director of the 1<sup>st</sup> Defendant. In my view the loans were visibly advanced by the 1<sup>st</sup> Plaintiff to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant in their personal capacity and not to the 1<sup>st</sup> Defendant notwithstanding the former being directors. Further, it warrants mentioning that while the repayment was meant to be done by the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant somewhat acted as guarantors' for the facilities advanced vide the requests lodged on 20.08.2019 and 02.12.2019.
33. Notably, while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant were jointly on the hook for the sum of Kshs. 15,000,000/- the same leaves a balance of Kshs. 8,848,391/-, premised on PW3's evidence, advanced to the 1<sup>st</sup> Defendant at the behest of the 3<sup>rd</sup> Defendant. The above is on the back drop of the fact that the 1<sup>st</sup> Defendant was incorporated on 14.05.2019 meanwhile the 3<sup>rd</sup> Defendant had started receiving funds towards the 1<sup>st</sup> Defendant's endeavor earlier than 14.05.2019 meanwhile the joint funds transfers for the total sum of Kshs. 15,000,000/- were lodged on 20.08.2019 and 02.12.2019 respectively.
34. That 2<sup>nd</sup> Defendant had equally made heavy weather of the fact that the total funds disbursed was Kshs. 13,090,000/- and not the amount pleaded by the Plaintiffs. It necessitates mentioning that the latter position as advanced by the 2<sup>nd</sup> Defendant appears to be pegged on the transfer of funds requests to the 1<sup>st</sup> Plaintiff dated 29.08.2019, 23.09.2019, 23.10.2019 and 14.01.2020.
35. While the latter are merely requests, the 2<sup>nd</sup> Defendant did not call any rebuttal evidence to PW3's audit report, showing that funds were actually received on account by the 1<sup>st</sup> Defendant. In conclusion and with due reverence to the dicta in the celebrated decision in *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL), the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were the parties to the loan agreements with the 1<sup>st</sup> Plaintiff notwithstanding the fact that the funds received were eventually utilized for benefit of the 1<sup>st</sup> Defendant.
36. Consequently, and in totality of the evidence adduced before the Court, the Plaintiffs suit succeeds in the following terms.
37. Judgment is hereby entered in favor of the Plaintiffs-;
  - a. As against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally in the sum of Kshs. 15,000,000/-.
  - b. As against the 3<sup>rd</sup> Defendant in the sum of Kshs. 8,848,391/-.
  - c. Interest on the above sum from the date of filing suit until payment in full.
  - d. Each party to bear their own costs of the suit given the nature of the dispute.
38. Orders Accordingly!

**DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 27<sup>TH</sup> DAY OF JANUARY 2026.**

**HON L P KASSAN**

**JUDGE**

In the presence of;



Odaro for Plaintiff

Said for 3<sup>rd</sup> Respondent

Carol – Court Assistant

Order

Stay for 30 days granted.

