

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E528 OF 2023
DAVID NJOROGE NJENGA.....
.....APPELLANT
VERSUS
INSPIRE CREDIT LIMITED.....
.....RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. V. M. Mochache Resident Magistrate/Adjudicator delivered on 9th June, 2023 in Milimani SCCCOMM No. 669 of 2022 Inspire Credit Limited v David Njoroge.

JUDGEMENT

1. This appeal emanates from the judgement and decree of **Hon. V. M. Mochache** Resident Magistrate/Adjudicator delivered on 9th June, 2023 in Milimani SCCCOMM No. 669 of 2022 Inspire Credit Limited v David Njoroge.

2. The grounds of appeal presented by the Appellant vide the memorandum of appeal dated 19th June, 2023 upon which he seeks to upset the judgement and decree of the lower court are as follows:
 1. **The learned trial Magistrate erred in law and fact by misdirecting herself on several matters of law.**

 2. **The learned trial Magistrate erred in law and fact by finding that the Appellant owed the Respondent Ksh.120,000/-.**

- 3. The learned trial Magistrate erred in law and fact by not appreciating that the Appellant had paid a director of the Respondent the sum of Ksh.120,000/- on the sum of Ksh.100,000/- advanced which was admitted.**
 - 4. The learned trial Magistrate erred in law and fact by failing to appreciate that the jurisdiction of trial court was time bound and ceased by effluxion of time on the 6th day of April 2022, being the last date and day the courts by dint of *Section 34(1) of the Small Claims Court Act*.**
 - 5. The learned trial Magistrate erred in law and fact that the moment 60 days ended the jurisdiction of the court also ended.**
 - 6. The learned trial Magistrate erred in law and fact in dismissing the counterclaim with costs and at the same time ordering return of the Respondent's title, a prayer not sought by the Claimant.**
 - 7. The learned trial Magistrate erred in law and fact by failing to take cognizance of the legal fact that the judgment rendered and returned outside times was without jurisdiction ergo a nullity benefit of any force of law.**
3. The Appellant proposes that the appeal be allowed and that this court sets aside the trial court's judgement.
 4. This being the first appellate court, I am required under *Section 78 of the Civil Procedure Act* and as was espoused in

the case of **Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123** to re-assess, re-analyze and re-evaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

5. In **Selle**, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

6. The duty of the first appellate court was also discussed by the Court of Appeal for East Africa in the case of **Peters v Sunday Post Limited [1958] EA 424** in which it was held that the appropriate standard of review established in cases of appeal can be stated in three complementary principles:

“i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

7. Notably however, this is an appeal from the Small Claims Court and *Section 38* of the *Small Claims Court Act* provides that a person dissatisfied with a decision or order of the Small Claims Court may appeal to the High Court only on matters of law, not on questions of fact, and that once the High Court determines such an appeal, its decision is final.

8. I will proceed to re-assess, re-analyze and re-evaluate the evidence adduced before the trial court and reach my own findings while abiding by the principles set in ***Selle***. While doing so, I will keep in mind the jurisdiction of this court under *Section 38* of the *Small Claims Court Act*.

9. The matter before the trial court, based on contract arising out of a loan agreement said to have been entered into between the Appellant (the Respondent before the trial Court)

and the Appellant (the Claimant before the trial Court) on 5th July, 2022.

10. The Respondent pleaded in the statement of claim dated 27th January, 2023 that the Appellant borrowed from it Ksh.100,000/- on 5th July, 2022 which the Respondent disbursed to the Appellant and which the latter was to repay within a period of one month together with interest of 20%. The Appellant executed the requisite loan agreement.
11. The Respondent further pleaded that the Appellant defaulted on his obligations in the agreement and failed to pay the loan and the agreed interest, effectively breaching the loan agreement, necessitating the suit for the recovery Ksh.120,000/- being the loaned amount together with interest and a further Ksh.34,500/- incurred by the Respondent towards recovery of the amount.
12. The Respondent further sought 10% of the amount claimed, which it pleaded was damages or legal fees incurred, costs of the suit and interest.
13. In his response to claim and counterclaim, the Appellant averred that he only received a sum of Ksh.100,000/- from one **Nathaniel Mwangi**, whom he described as an agent. He denied any knowledge of the Respondent as a legal entity licensed to operate as a lender.

14. The Appellant further disputed liability for Ksh.34,500/- allegedly claimed as administration fees, debt recovery charges and legal costs. The Appellant contended that these sums were not contractually justified and required strict proof. He further denied liability for interest at the rate of 20% per month on the Ksh.100,000/-, asserting that there was no contractual relationship between himself and the Respondent that could give rise to such an obligation.
15. The Appellant denied entering into any binding agreement with the Respondent. He further challenged the validity of the suit on procedural grounds, asserting that the same was incompetent and lacked merit due to the absence of a demonstrated contractual relationship.
16. The Appellant admitted that upon receiving the Ksh.100,000/-, he deposited his title deed for Title No. Nyandarua/Motonyora/466 as security but stated that no transfer documents or land control consents were executed. He demanded the unconditional return of the title deed. He also denied the jurisdiction of the trial court, arguing that the title deed related to land valued at approximately Ksh.5,000,000/- and therefore fell outside the pecuniary and subject-matter jurisdiction of the Small Claims Court. He maintained that the matter ought to have been filed before the appropriate court with jurisdiction over land disputes.

17. Additionally, the Appellant contended that the suit was defective because another entity, Soludel Enterprises Limited, had also laid claim to having advanced him a similar sum of Ksh.100,000/-, thereby creating confusion as to the true lender. While he admitted receipt of a demand and notice of intention to sue, he maintained his objection to the trial court's jurisdiction and indicated that a preliminary objection would be raised at the hearing.
18. In his counterclaim, the Appellant sought the return and release of his title deed for Title No. Nyandarua/Mutonyora/466 from the Respondent or its alleged agent, **Nathaniel Mwangi**. He contended that the title deed had been deposited as security and was demanding its unconditional release.
19. In the alternative, and by way of compromise, the Appellant expressed willingness to refund the principal sum of Ksh.100,000/- without interest. He further stated that he had issued a demand and notice of intention to sue in relation to the continued holding of the said title deed by the Respondent and its agent.
20. The Appellant prayed that the Respondent's suit be dismissed or struck out, and that the counterclaim be allowed with costs.

21. The Respondent called two witnesses – **Nathaniel Mwangi** (CW1) and **Robert Chomba** (CW2). The two witnesses adopted their respective witness statements as their evidence in chief.
22. In his witness statement, CW1 explained that on 6th July 2022, the Appellant approached the Respondent seeking a loan facility. CW1 conducted a thorough assessment of the Appellant’s financial position on behalf of the Respondent, noting his involvement in the transport and rental business and his strong ability to repay. CW1 stated in his statement that he confirmed that the Appellant had previously borrowed from the Respondent and repaid with interest.
23. CW1 stated that the Appellant submitted a loan application for Ksh.100,000/- on 5th July, 2022, which was approved and disbursed by the Respondent from its account to the Appellant’s mobile number. The loan was to be repaid by 6th August, 2022 with 20% monthly interest.
24. CW1 further explained that the Respondent had prior to that transaction requested another loan of Ksh.100,000/- on 24th June, 2022, which was declined because he still owed Ksh.120,000/- from an earlier loan, which he cleared on 4th July 2022. CW1 added that he had referred the Appellant to Soludel Enterprises Limited, which granted him a separate

loan of Ksh.100,000/- in respect of which the Appellant insisted on paying interest through CW1's phone number rather than Soludel's paybill number.

25. CW1 recounted that instead of repaying the principal amount as agreed, the Appellant chose to service interest only, effectively rolling over the principal. This continued until January, 2023, when he stopped making payments entirely. After repeated follow-ups, a demand letter was issued on 10th February 2023, to which the Appellant responded on 12th January, 2023, acknowledging the debt and promising to pay Ksh.120,000/- by 28th February, 2023. The witness noted that this payment was never made, leaving the Appellant indebted to the Respondent.

26. In his further averment in his statement, CW1 refuted the Appellant's claim that the loan was advanced via his (CW1's) phone number alone and asserted that the same was directly paid to the Appellant from the Respondent's account. The witness emphasized that a signed loan agreement existed with clear terms, including the 20% agreed monthly interest.

27. CW1 further disputed the Appellant's claim that he had never dealt with the Respondent, noting multiple in-person visits and signed loan documents. The witness further stated that the Appellant's alleged payments totaling Ksh.120,000/- only represented interest servicing and were spread between

the Respondent and Soludel Enterprises Limited, with no excess payments to the Respondent, leaving additional interest of Ksh.40,000/- accrued for the months of February and March, 2023.

28. CW1 concluded that the Appellant's account was misleading and incomplete, intentionally obscuring that he was servicing interest only and rolling over the principal. He stated that all evidence, including Mpesa statements and loan agreements, supported the Respondent's claim for repayment of the principal and accrued interest.

29. CW1 stated in his further statement that he initially disbursed the money from his mobile number to that of the Appellant, but for the particular loan in this matter, the funds were transferred from the Respondent's Sidian Bank account directly to the Appellant's mobile number. The Appellant deposited his title deed as security, and a formal contract was signed on 5th July 2022.

30. CW1 emphasized that the Respondent was authorized to lend money, operated under the law of contract and was duly registered. He further noted that the Appellant had also received Ksh.100,000/- from Soludel Enterprises, to whom he had been referred and that the title deed would be released upon full settlement of the debt.

31. In his witness statement CW2 stated that he was a director at Soludel Enterprises Limited and explained that on or about 24th June, 2022, he received a customer referral from CW1, a director of the Respondent, regarding the Appellant, who was an existing repeat customer of the Respondent who needed urgent funding for a project.
32. CW2 stated that he met the Appellant, conducted an appraisal of his financial capacity and confirmed that the Appellant had income from rental, farming and public transport activities. The witness stated that the Appellant disclosed that the Respondent was holding a title over his land, which could be used as collateral for the loan.
33. CW2 stated further in his statement that after consulting with Soludel's loan committee, the loan request by the Appellant was approved and Ksh.100,000/- was disbursed from Soludel's bank account to the Appellant's mobile phone number on 24th June, 2022. The parties orally agreed that the loan would carry 20% monthly interest and be payable by 24th July, 2022.
34. CW2 further stated that on the due date, the Appellant did not pay the full loan but sent Ksh.20,000/- as interest only through CW1's mobile phone. This arrangement continued as the norm until December, 2022 when the Appellant stopped making payments entirely. CW2 further stated that Soludel

Enterprises had made repeated attempts to recover the loan, including sending demand letters, but the Appellant denied knowledge of the company.

35. The following documents were produced in support of the Respondent's case:

- Loan/debt acknowledgement agreement dated 5th July, 2022 executed by the Appellant as borrower and the Respondent as lender in which the Appellant acknowledged indebtedness of Ksh.100,000/- and interest thereon of Ksh.20,000/-, binding himself to pay before 5th August, 2022.
- Demand letter dated 10th January, 2023 from the Respondent's Advocates to the Appellant.
- Respondent's Sidian Bank account statement indicating that Ksh.100,000/- was disbursed to the Appellant on 5th July, 2022.

36. In his witness statement and further statement, the Appellant recalled a time when he needed funds to complete a project and approached CW1, whom he believed was an agent of the Respondent, to advance him Ksh.100,000/- via M-Pesa from CW1's phone number to his own mobile number. He stated that he deposited his title deed for Title No.

Nyandarua/Motonyora/466 as security with CW1, without executing any demand agreement, consent or transfer documents. The Appellant offered to refund the Kshs.100,000/- without interest, characterizing it as a friendly loan.

37. The Appellant contended that the Respondent and its agents were attempting to obtain the Ksh.100,000/- without returning his title deed. He alleged that the Respondent was pursuing additional sums of Ksh.34,500/- as administration, debt recovery and legal fees which were not provided for in any agreement.

38. The Appellant denied in his statement the Respondent's assertion of a 20% monthly interest on the loan, stating that he had dealt only with CW1 as an agent and never agreed to any interest in writing.

39. The Appellant claimed that the suit was invalid because the Respondent had not filed a consent to sue and that the Respondent lacked authorization to conduct money lending, having no banking license or registration as a financial institution. He further indicated that Soludel Enterprises Limited had allegedly advanced him the same sum and he reserved the right to join them as a third party if necessary.

40. The Appellant prayed that the claim be dismissed or struck out, or alternatively, that an order be made for the release of

his Title No. Nyandarua/Mutonyora/466 by the Respondent with costs and interest.

41. Further, the Appellant contended that the court lacked jurisdiction because the claim's value exceeded the Ksh.1,000,000/- jurisdictional limit, while the property Title No. Nyandarua/Mutonyora/466 was worth over Ksh.5,000,000/-. He also challenged the authenticity of the Sidian Bank statement produced by the Respondent, noting that it corresponded to CW1's number and not that of the Respondent.

42. The Appellant further stated that he had fully repaid a total of Ksh.120,000/- to CW1's mobile line in six instalments, comprising the principal of Ksh.100,000/- and an excess of Ksh.20,000/-, detailing the payment schedule.

43. The Appellant produced the following documents in support of his case:

- The Respondent's demand letter dated 10th January, 2023 sent to the Appellant.
- Letter dated 12th January, 2023 from the Appellant's Advocates to the Respondent's Advocates offering to pay Ksh.100,000/- and "the disputed interest" of Ksh.20,000/- on

or before 28th February, 2023 and requesting that the Appellant's title deed be released upon such payment.

- Letter dated 31st January, 2023 from the Respondent to the Appellant demanding payment of Ksh.140,000/- loan balance and interest and Ksh.14,000/- recovery fee.
- Letter dated 2nd February, 2023 from the Appellant's Advocates to the Respondent's Advocates, in response to the Respondent's Advocate's letter dated 31st January, 2023 in which the Appellant states that the he has no outstanding loan.

44. Upon considering the pleadings and evidentiary material before her, the learned Adjudicator went on to set out the issues for determination as follows:

“7. From the pleadings and submissions, it is the court's view that the issues that crystallize for determination are the following:

a) Whether the court has jurisdiction to entertain the claim?

b) Whether the Claimant is authorized to lend money?

c) Whether the Claimant has proved its claim on a balance of probabilities.

d) What order the court should make.”

45. The learned Adjudicator then proceeded to analyze the evidence and reached the determinations on the issues, as follows:

“8. Starting with the first issue, the Respondent alleged that since the value of the land whose title he claims to have given to the Claimant as security values at around Kshs. 5,000,000.00; then the court lacks jurisdiction. The court does not agree. The dispute before the court arises from the loan said to have been advanced to the Respondent. It does not arise from the land itself. If it did, the court would not have jurisdiction to deal with matters to do with land. In any case, the value of the land was not proved by the Respondent as to suggest that the same exceeds the pecuniary jurisdiction of the court.

9. On the second issue, the court does not agree with the Respondent that the mere fact that the Claimant is not licensed to offer Banking services, then it cannot lend to third parties. Lending is not a regulated business. Any person can lend; whether natural or juristic.

10. Turning to the third issue, the court finds that on 6th July 2022, a sum of Kshs. 100,000.00 was sent to the Respondent through mobile money from the Claimant's Bank. The question is whether the said sum is outstanding and whether it attracted interest and recovery charges.

11. The Claimant relies on the Debt Acknowledgment Agreement¹⁰ dated 5th July 2022 to support the terms. The stated agreement provides that a sum of Kshs. 100,000.00 was to be lent to the Respondent. Interest is indicated at 20% per month. In addition, there is a default rate of 3%. The agreement bears what appears to be a signature of the Respondent.

12. The Respondent denies having executed the agreement. However, when cross examined, he was at pains to explain himself save for a mere denial. He did not allege that the signature in the agreement was a forgery and did not show any attempts to take legal action if at all the signature was not his. In the end, the court was-20 satisfied that the agreement was duly executed by the Respondent.

13. Therefore, the court is satisfied that the agreed interest rate was 20% per month. The interest was negotiated at arm's length and cannot be said to be illegal and usurious or unenforceable.

14. The next issue is on whether the loan was repaid. The Claimant avers that he paid a total sum of Kshs. 120,000.00; which he claims to be excess by Kshs. 20,000.00. On its part, the Claimant claims that the Respondent used to repay through its director Nathaniel Mwangi. However, he only paid interest and rolled over the principal. In addition, the Claimant told the court that the Respondent also had a loan owed to a company called Soludel Limited of Kshs. 100,000.00 which loan was

advanced to him on referral by the Director of the Claimant.

15. It was stated that the Respondent would pay both loans through Mpesa to PW1. Out of the Kshs. 120,000.00 paid, it was his testimony that both companies had been paid interests of Kshs. 60,000.00 each.

16. From the evidence, I am satisfied with the Claimant's version as-10 the truthful one. From the evidence adduced, it is clear that a sum of Kshs. 100,000.00 was advanced to the Respondent by Soludel Limited on 24th June 2023 which is, however, not the dispute before the court.

17. The Respondent's denial was a mere denial as he did not explain the exhibit showing money being sent to him from the said company.

18. From the agreement above, I am also satisfied that the Respondent had a duty to pay the sum of Kshs. 20,000.00 in interest per month; until payment of the facility in full.

19. In addition, the court finds that in his witness statement, the Respondent admitted the sum of Kshs. 100,000.00 which he indicates that he was willing to pay without interest, once his title deed was released.

20. The court is, therefore, satisfied that the Claimant has proved the sum of Kshs. 120,000.00. However, the court is not satisfied that the administration charges and debt recovery fees were due and payable.

21. With regards to the counterclaim, the Respondent title deed prays that his be released by the Claimant. CW1 told the court that the confirmed title deed was given to the claimant as a simple deposit. This was by the Respondent but who argued that the Respondent had not capacity to take security.

22. From the evidence, it is clear that the return of the title deed would be tied to the Respondent paying the loan due in full and per as the agreement. It is only then that the security document can be putting released back to its depositor. Doing the reverse would amount to the cart before the horse.

23. Accordingly, effect the Claimant's claim partially succeeds with the Respondent that judgment is entered for the Claimant against the in the sum of Kshs. 120,000.00. have cost The Claimant will also counterclaim and interest at court rates from filing until paid in full. The security fails. However, upon payment of the judgment sum, any held by the Claimant is to be released forthwith."

46. With that, the trial court entered judgement for the Respondent for Ksh.120,000/- and dismissed the Appellant's counterclaim. Costs of the suit and the counterclaim were awarded to the Respondent.

47. Now to the present appeal, the same proceeded by way of written submissions, which I have had the occasion to peruse.
48. In his submissions, the Appellant challenges the judgment of the trial court principally on grounds 1, 2, 3 and 6 of the Memorandum of Appeal, while leaving grounds 4, 5 and 7 for this Honourable Court's determination regarding whether the Small Claims Court acted outside its statutory jurisdiction.
49. In appellate practice, if an Appellant fails to argue or make submissions on certain grounds of appeal that are set out in the memorandum of appeal, those grounds are ordinarily regarded as abandoned and are not considered by the court.
50. The rationale behind this approach is that an Appellant must present legal arguments in support of each ground if it is to be entertained. Mere inclusion in the memorandum is insufficient without advocacy at the hearing.
51. Unargued grounds, especially those without distilled issues or submissions, do not form part of the appeal and are effectively removed from consideration. Hence, where an Appellant does not argue some grounds of appeal, those grounds are typically treated as abandoned and the appellate court confines its decision to those grounds that were properly and actively argued (see **Mokono v Maranga (Civil Appeal**

121 of 2022021) [2024]KEHC 1157 (KLR). Thus then. I will treat grounds 4, 5 and 7 as abandoned.

52. The appeal, which proceeded by way of written submissions, contests both the finding that Ksh.100,000/- remained outstanding and the propriety of the court's assumption of jurisdiction in a matter allegedly touching on title to land. The Appellant maintains that the trial magistrate erred in fact and in law in holding that any sum was due to the Respondent.

53. The Appellant submits that although the Respondent was not a licensed financial institution authorized to advance credit or levy interest at the alleged rate of 20%, the Appellant nonetheless repaid the entire principal sum of Ksh.100,000/= through instalments made between 6th September, 2022 and 7th December, 2022, totaling Ksh.120,000/-. According to the Appellant, this constituted an overpayment of Ksh.20,000/-, particularly in view of what is termed as illegal and unconscionable interest.

54. It is argued by the Appellant that the Respondent merely produced a letter from the Central Bank of Kenya indicating no objection to registration of the company, which did not amount to authorization to conduct banking business or charge interest. Consequently, the Appellant contends that the claim was at most a simple debt claim devoid of lawful interest

and that the trial court erred in entering judgment for Ksh.100,000/- without evidential basis.

55. On jurisdiction, the Appellant submits that the Small Claims Court lacked authority to entertain the dispute because the Appellant had deposited the original title deed for Land Parcel No. Nyandarua/Motonyora/466, valued at more than Ksh.5,000,000/-, with the Respondent's director as security. The Appellant had filed a counterclaim seeking release of the title. Although the trial court dismissed the counterclaim, it nonetheless ordered release of the title deed.

56. The Appellant argues that this amounted to the court dealing with issues touching on title to land, a matter expressly excluded from the jurisdiction of the Small Claims Court and reserved for the Environment and Land Court.

57. The Appellant relies on *Section 12* of the *Small Claims Court Act*, which limits jurisdiction to specified civil claims and imposes a pecuniary limit of Ksh.1,000,000/-, and on *Section 13(5)*, which excludes claims founded upon disputes over title or possession of land. It is contended that because the title deed was held as security and the claim was intertwined with rights over land, the dispute fell outside the statutory mandate of the Small Claims Court.

58. The Appellant submits that jurisdiction cannot be conferred by interpretation where statute is clear and that any proceedings conducted without jurisdiction are null.

59. In support of this position, the Appellant relies on the locus classicus decision in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] KECA 48 (KLR)** where Nyarangi JA stated:

“Jurisdiction is everything. Without it, a court has no power to make one more step... A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

60. The Appellant invokes this authority to argue that once the Small Claims Court entertained a matter touching on title to land, it acted without jurisdiction and its proceedings were a nullity.

61. The Appellant further relies on **Palms Resort Limited v Mohammed Mateen Quresh, Kieran Mwash Mwazo and Margaret Njeri Ndungu, Civil Appeal E167 of 2022 (Mombasa)**, to reinforce the argument that courts must operate strictly within the jurisdiction conferred by statute. It is urged that this Honourable Court, sitting as an appellate court from the Small Claims Court, has the mandate to determine that the lower court exceeded its jurisdiction and to set aside its decision.

62. In conclusion, the Appellant prays that the appeal be allowed, the Respondent's claim be dismissed with costs, and the Appellant's title deed be returned unconditionally, on the basis that the alleged debt was fully repaid and that the proceedings before the Small Claims Court were conducted without jurisdiction and are therefore void ab initio.

63. The Respondent submits that on 5th July, 2022 the Appellant applied for and executed a written loan agreement for Ksh.100,000/-, agreeing to repay the same within one month at an interest rate of 20% per month, making the total due Ksh.120,000/- by 5th August, 2022. The funds were disbursed to the Appellant's mobile number from the Respondent's bank account at Sidian Bank, a fact admitted during trial. The Appellant deposited his title deed as a simple security pending compliance with the loan terms; however, no transfer documents were executed and no intention to transfer ownership of the land was ever expressed. The Respondent emphasizes that the transaction was purely contractual and concerned money lent and received.

64. The Respondent further submits that the Appellant was not a first-time borrower. He had previously borrowed Ksh.100,000/- on 2nd June, 2022 at the same 20% monthly interest rate, repaid Ksh.120,000/- in full on 4th July, 2022 and thereafter sought the facility forming the subject of this suit.

Due to internal policy restrictions, the Respondent at one point referred the Appellant to Soludel Enterprises Limited for an additional facility. The Appellant thus had two distinct loans of Ksh.100,000/- each, one from Soludel Enterprises Limited and one from the Respondent. By arrangement, the Appellant opted to service interest only, rolling over the principal sums monthly, with full knowledge that interest payments would not reduce the principal.

65. The Respondent further submits that the Appellant persistently made late and incomplete payments and eventually defaulted, particularly by failing to remit interest due for January, 2023. A demand letter dated 10th January, 2023 was issued. In a response dated 12th January, 2023, the Appellant, through his Counsel, offered to settle Ksh.100,000/- by 28th February, 2023 but failed to honour that undertaking. The Respondent therefore instituted the claim seeking Ksh.134,500/- comprising the principal, unpaid January interest and administrative and recovery costs and that the trial court allowed Ksh.120,000/-, disallowed administrative charges and damages, awarded costs and interest, dismissed the counterclaim and directed that upon payment of the judgment sum any security held be released.

66. On the scope of appellate interference, the Respondent relies on ***Mbogo & Another v Shah [1968] EA 93*** where **Sir Charles Newbold** P. stated:

“A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision... or that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”

67. The Appellant further relies on the decision of **Nkube v Nyamiro [1983] KLR 403** where the Court held:

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles.”

68. The Respondent submits that none of these thresholds has been met.

69. Regarding jurisdiction, the Respondent argues that the claim fell squarely within *Section 12(1)(b)* of the *Small Claims Court Act* as a contract relating to money held and received and states that it was not founded upon a dispute over title to or possession of land *under Section 13(5)*. The title deed was merely deposited as security. Ownership was never contested and no transfer was effected. The Respondent contends that the direction that security be released upon settlement was

issued under the prayer for “any other appropriate relief” and did not amount to adjudication over title and that the trial court never declared itself without jurisdiction and properly confined itself to the contractual dispute.

70. On the issue of the statutory sixty-day timeline, the Respondent maintains that any delay was neither inordinate nor prejudicial to the Appellant. Reliance is placed on **Biosystems Consultants v Nyali Links Arcade [2023] KEHC 21068(KLR)** where the High Court observed that balancing expeditious disposal with the right to be heard may result in overshooting the 60 days and that the timeline is only “aspirational.”

71. Further, the Respondent relies on the case of **Crown Beverages Limited v MFI Document Solutions Limited [2023] KEHC 58 (KLR)** in which the Court held that delay must be shown to be inordinate and prejudicial to warrant setting aside a judgment. The Respondent also cites **Nyagwoka Ogora alias Kennedy Kemoni Bwogora v Francis Osoro Maiko [2004] eKLR** where the Court of Appeal stated that non-compliance with delivery timelines should not automatically vitiate a judgment, observing that voiding such judgments would result in “more injustice than justice” and that the rule “could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard.”

72. On proof of the claim, the Respondent submits that the standard in civil cases is on a balance of probabilities, which it met through documentary evidence and witness testimony, as well as the Appellant's own admissions. It contends that lending is not the exclusive preserve of banks and that, as a non-deposit taking entity, its operations are governed by the law of contract. On that, the Respondent places reliance on the case of **Momentum Credit Limited v Kabuiya (Civil Appeal E035 of 2022) [2022] KEHC 13705 (KLR) (Commercial and Tax) (7 October 2022) (Judgment)** in which the Court held that:

“A court of law could not rewrite a contract with regard to interest as the parties were bound by the terms of their contract.”

73. The Respondent further cites **Garvey v Richards [2011] JMCA 16** where Harris JA stated:

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship... three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration.”

74. Additionally, the Respondent relies on the authority of ***Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR*** in which the Court of Appeal affirmed that:

“...parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

75. The Respondent submits that the Appellant executed the loan agreement voluntarily, did not challenge the authenticity of his signature and did not plead fraud, misrepresentation, coercion or undue influence and that by servicing interest while rolling over the principal, he affirmed the contract and is estopped from denying its terms.

76. *Section 97(1) of the Evidence Act* is invoked by the Respondent to argue that where a contract has been reduced into writing, its terms cannot be contradicted by extrinsic evidence and that the claim that payment of Ksh.120,000/- extinguished the debt is said to be misleading, as those payments constituted interest servicing across two separate facilities and did not reduce the principal owed to the Respondent.

77. In conclusion, the Respondent maintains that the trial court properly exercised jurisdiction, correctly evaluated the evidence and rendered a lawful and reasoned judgment and

characterizes the appeal as unmeritorious and intended to delay enforcement of a valid decree. The Respondent accordingly prays that the appeal be dismissed with costs and that the judgment of the Small Claims Court be upheld in its entirety.

78. Having regard to the memorandum of appeal, the rival submissions by the parties and the statutory limitation imposed by Section 38 of the Small Claims Court Act that an appeal lies only on matters of law, the first issue for determination is whether the Small Claims Court had jurisdiction to entertain the claim and counterclaim, particularly in light of the deposit of the Appellant's title deed as security and the argument that the dispute touched on title to land.

79. The second issue for determination is whether the learned Adjudicator misdirected herself in law in holding that the Respondent was entitled to charge and recover interest at the rate of 20% per month, including whether the Respondent was legally competent to advance the loan and enforce the agreed contractual terms.

80. The third issue for determination is whether the learned Adjudicator erred in law in finding that the sum of Ksh.120,000/- was due and payable by the Appellant to the Respondent, particularly in light of the Appellant's contention

that he had repaid the principal sum and that the payments made extinguished any outstanding liability.

81. The fourth issue for determination is whether the learned Adjudicator acted within the law in dismissing the Appellant's counterclaim for the unconditional release of Title No. Nyandarua/Motonyora/466 and in directing that the title deed be released only upon payment of the decretal sum.

82. The fifth issue for determination is whether, on the whole, the learned Adjudicator committed any error of law warranting interference by this Court in exercise of its appellate jurisdiction.

83. The first issue for determination is whether the Small Claims Court had jurisdiction to entertain the claim and counterclaim, particularly in light of the deposit of the Appellant's title deed as security and the argument that the dispute touched on title to land

84. The foundational principle of jurisdiction in our law is settled: jurisdiction is everything. As was held in ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] KECA 48 (KLR)***:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of

proceedings... A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

85. Jurisdiction is conferred by the *Constitution* or statute and where a statute clearly limits or excludes a court’s authority, that court must decline to hear the matter. In the context of the Small Claims Court, the governing statute is the *Small Claims Court Act*, which defines both the extent and limits of the court’s jurisdiction.
86. *Section 12* of the *Small Claims Court Act* grants jurisdiction to hear certain civil claims up to the specified pecuniary limit of Ksh.1,000,000/-including, *inter alia*, claims relating to the recovery of money.
87. However, *Section 13(5)* of the *Act* expressly excludes from the court’s jurisdiction any claim “*if the cause of action is... founded upon... a dispute over a title to or possession of land...*”, among other exclusions.
88. The exclusion in *Section 13(5)* is categorical: where the cause of action is a dispute over land title, possession or any interest in real property, the Small Claims Court cannot entertain the matter. The Environment and Land Court is the proper forum for such disputes under *Article 162(2)* of the *Constitution* and the *Environment and Land Court Act*.

89. In the present appeal, the Appellant challenges the Small Claims Court's jurisdiction on the basis that although the primary subject of the claim was repayment of money, the proceedings also involved the Appellant's original title deed for Nyandarua/Motonyora/466, which had been deposited as security.
90. The Appellant's counterclaim sought return of the title deed unconditionally, and he argues that the dispute touches on title to land, which he says places it outside the Small Claims Court's jurisdiction.
91. The critical question is whether the Small Claims Court's engagement with the title deed amounted to adjudication of a dispute over title to land. If the court's involvement in the security instrument effectively constituted a determination of land rights, then the statutory exclusion applies and the proceedings are void for want of jurisdiction.
92. Conversely, where the title deed is merely held as collateral security for a monetary obligation and no dispute is raised regarding the validity, ownership, boundary or rights in the land itself, then the primary cause of action remains a contractual debt claim within the Small Claims Court's jurisdiction. In such circumstances, the limited engagement with the title deed is ancillary to the monetary claim and does not invoke the exclusion in *Section 13(5)*.

93. The Respondent's position, which was upheld by the trial court, was that the title deed was held simply as security for the loan and that ownership and title were never contested and that there was no dispute over who owned the land, its boundaries, rights or status. The direction that the title deed be released upon payment of the decretal sum was thus seen as an adjunct to enforcement of the monetary judgement and not a determination of land title.

94. This approach aligns with the position that the mere mention of land in a contractual dispute does not automatically oust jurisdiction where there is no genuine dispute over the title itself. The Small Claims Court may entertain a money recovery claim even if land is used as collateral, provided the court does not make declarations on title or rights in the land itself.

95. On the record before this Court, there was no evidence of contested title, competing claims of ownership over the land or a request for a declaration altering land rights. The Appellant's counterclaim was for return of the title deed, not a declaration of ownership or challenge to title and the return was tied to performance of the monetary obligation.

96. Accordingly, the Small Claims Court did not exceed its jurisdiction by entertaining the Respondent's claim for

recovery of money and ordering release of security upon payment of the judgment sum. There was no genuine contest over the title or ownership of the land itself that would trigger the exclusion in *Section 13(5)* of the *Small Claims Court Act*.

97. The second issue for determination is whether the learned Adjudicator misdirected herself in law in holding that the Respondent was entitled to charge and recover interest at the rate of 20% per month under the loan agreement and whether the Respondent was legally competent to advance the loan and enforce the contractual terms.

98. This issue engages principles of contract law relating to freedom of contract, unconscionability and enforceability of agreed terms.

99. It is a foundational principle of contract law that parties are ordinarily bound by the terms of the contract they have freely entered into. As was held in the case of ***National Bank of Kenya Limited v Pipeplastic Sankolit (K) Ltd 2001 KECA 362 (KLR)***, a court of law cannot rewrite a contract for the parties and that the parties are bound by the terms of their contract. However, contractual freedom is not absolute. Courts will intervene where contract terms, including interest rates are illegal, unconscionable, oppressive or contrary to public policy.

100. In ***Jelangat & another v Mwananchi Credit Limited & another* [2023] KEHC 19922 (KLR)**, the High Court held that while courts enforce contractual terms, they will refuse to enforce terms that are unconscionable or oppressive, especially where interest rates materially exceed what is reasonable.

101. The doctrine of unconscionability has been applied in our jurisprudence to strike down or moderate contractual terms that result in manifestly unfair outcomes. Recently, in ***Dhiman v Shah* [2025] KECA 1264 (KLR)**, the Court of Appeal stressed that where agreed terms lead to punitive or extortionate financial consequences, such as exorbitant compound interest escalating debt to disproportionate levels, courts may declare provisions unenforceable as contrary to equitable principles and public policy.

102. In assessing enforceability of interest provisions, courts examine both procedural and substantive fairness. As noted in ***Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR**, where a clause permits arbitrary variation of interest without notice to the borrower, such terms may be objectionable and contrary to meaningful consent, even where formally executed.

103. In the present appeal, the Appellant's core argument is that the 20% per month interest rate was unconscionable, illegal

and unenforceable. However, the record shows that the Appellant did not plead unconscionability, illegality, fraud, misrepresentation or undue influence before the trial court. As the Respondent correctly submitted, absent such pleadings, the contractual rate agreed in writing generally binds the parties and courts will enforce it.

104. Moreover, unlike in cases where interest rates have been declared unconscionable such as in **Elijah Wachira Mugo v John Muriithi Kinyua [2016] eKLR**, where a 40% per month rate (480% per annum) was found oppressive and unenforceable, the Appellant in this appeal did not expressly challenge the fairness or legality of the rate at trial on such grounds.

105. In the absence of a pleaded and proven unconscionability argument, the learned Adjudicator was entitled to treat the written and signed loan agreement as the authoritative contractual document and to enforce interest at the agreed rate, provided it was clear, unambiguous and voluntarily entered into by both parties. The Appellant's mere denial of the existence of the agreement and the terms, without alleging and proving legal infirmities, cannot, on its own, negate contractual consent.

106. This approach is consistent with the principle in **Momentum Credit Limited v Ambwere (Commercial**

Appeal E137 of 2022) [2023] KEHC 17812 (KLR), where contractual interest provisions were enforced after the court found that the parties had freely bound themselves to the terms and the loan contract was enforceable as written.

107. Accordingly, on the evidence before this Court, the learned Adjudicator did not misdirect herself in law in finding that the Respondent was entitled to enforce the agreed interest terms. There is therefore no substantive basis on the record to strike down or refuse enforcement of the 20% monthly interest rate simply because the Appellant now contends it was unfair. In the absence of pleadings and proof of illegality or unconscionability, the contract terms stand.

108. The third issue for determination is whether the learned Adjudicator erred in law in finding that the sum of Ksh.120,000/- was due and payable by the Appellant to the Respondent, having regard to the Appellant's contention that he had repaid the principal sum and that his payments extinguished any outstanding liability.

109. In appeals under *Section 38* of the *Small Claims Court Act*, this Court's mandate is to determine matters of law only. It is not open to this Court to re-evaluate pure questions of fact. In **Kamunge v Republic [2018] eKLR**, the High Court held that where an appeal is confined to questions of law, the appellate court cannot re-weigh evidence to substitute its own

findings of fact unless there arises an issue of misdirection in law in the evaluation of evidence.

110. For a debt to be due and payable, the creditor must prove on a balance of probabilities that the debtor is liable on the obligation, the amount claimed is correctly calculated and there remains an outstanding balance after accounting for all valid payments. See **Wasuna v Melchizedek Oyier [2017] eKLR**, where the court stated that:

“Where a defendant claims to have extinguished a debt by payments... the burden remains on the defendant to prove on a balance of probabilities that the payments extinguished the debt owed.”

111. In the present appeal, the Appellant contends that he paid a total of Ksh.120,000/- between September and December, 2022 in instalments, which he says represented full settlement of the principal and excess interest, thus extinguishing any outstanding obligation to the Respondent.

112. However, the case as presented before the trial court by the Respondent was that the Appellant had agreed to repay the principal plus interest at 20% per month. Under the terms of the contractual agreement, the Appellant would owe interest each month until full repayment of the principal, and the payments made, including the Ksh.120,000/- referred to, were shown to be interest servicing payments rather than payments

reducing the principal balance. This distinction is crucial in determining whether a debt is extinguished or merely serviced. Where payments received by the lender are accepted only as interest or part of the interest due, they do not extinguish the principal debt unless expressly agreed by the parties.

113. With regard to this appeal, the evidence before the trial court, including the loan agreement, bank statements and the Appellant's own admissions in the letter dated 12th January, 2023 that he was indebted to the Respondent and committed to pay Ksh.120,000/-, all indicated that the payments made of Ksh.120,000/- were in fact interest-related and did not reduce the principal sum owed to the Respondent. The trial Adjudicator found that the Appellant continued rolling over the principal and servicing only interest until January, 2023, when he ceased payments entirely.

114. The Appellant did not explicitly plead at trial that his payments were intended to extinguish the principal in full. Rather, this position was advanced for the first time on appeal in the written submissions. A party cannot, on appeal confined to matters of law only, seek to rely on new factual assertions that were not pleaded and proved in the trial court. See **National Bank of Kenya Ltd v Frontline Plumbers Ltd [2017] eKLR**, where the court held that:

“An appellate court on matters of law cannot entertain new factual contentions not raised and established at the trial.”

115. In the absence of a legally arguable misdirection, such as a failure by the trial court to identify or apply the correct legal test when evaluating payments versus outstanding debt, this Court cannot overturn the trial court’s factual finding that a balance remained due.

116. Moreover, where written agreements expressly articulate the terms of repayment and indicate how outstanding balances accrue and fall due, courts will enforce those terms as written. As stated in ***Momentum Credit Limited v Ambwere (Commercial Appeal E137 of 2022) [2023] KEHC 17812 (KLR)***:

“A court of law could not rewrite a contract with regard to interest as the parties were bound by the terms of their contract.”

117. This position underscores that the agreed repayment mechanism and the characterization of payments – principal versus interest – are matters for the parties to define and the courts will give effect to those definitions if properly proved.

118. On the record before this Court, the Appellant failed to prove that the payments he made fully extinguished the principal and the accrued interest due under the loan

agreement. The trial Adjudicator's finding that a balance remained outstanding was supported by evidence, including:

- The loan agreement and demand letters.
- The Respondent's bank statements showing disbursement of funds.
- Testimony that interest was serviced and principal remained outstanding.
- The Appellant's own conduct and admissions reflecting continued indebtedness.

119. Therefore, there is no arguable error of law in the learned Adjudicator's finding that Ksh.120,000/- remained due and payable, given the evidence and contractual terms and the Appellant's own admission.

120. The fourth issue for determination is whether the learned Adjudicator erred in law by dismissing the Appellant's counterclaim for unconditional release of Title No. Nyandarua/Motonyora/466 and only ordering its release upon payment of the decretal sum. This issue engages principles relating to contractual security interests and equitable enforcement of debts.

121. It is a well-settled principle that parties are free to agree on security for the performance of a contractual obligation. The deposit of title deeds as collateral is recognized in our practice, although any enforcement that affects rights in land must be done lawfully and within jurisdiction.

122. In our jurisdiction, it is not lawful for a lender to take security over land, including title deeds. However, any purported transaction in land must be properly perfected in compliance with the land control regulations and meet statutory formalities. The mere deposit of title deeds as collateral does not in itself confer a proprietary interest in the land to the holder unless the parties intended to create a charge, equitable mortgage or other security interest. In the absence of such intention and formalities, the title deed is simply security held by the creditor and not a transfer or encumbrance of interest.

123. In the present case, the trial record shows that the Appellant deposited his title deed as security for the loan. Crucially, there was no evidence before the trial court that the parties intended to create an equitable mortgage, charge or other proprietary interest in favour of the Respondent that would alter ownership rights under the law. For instance, no land control consent or transfer documents were executed. Thus, there was no substantive dispute over title. The title deed was merely held as collateral.

124. In such circumstances, it is within the contractual matrix for the lender to lawfully hold the title deed until the debt is paid, subject to the terms agreed between the parties. As noted in ***Chacha v Charinda [2013] eKLR***, a debtor who voluntarily delivers title deeds as security cannot insist on unconditional return before the secured obligation is discharged unless the agreement so provides.

125. The Appellant's counterclaim sought unconditional release of the title deed at the outset and, in the alternative, release upon payment of Ksh.100,000/- without interest. However, the Appellant's own pleadings and conduct demonstrate that he acknowledged the debt and offered to repay Ksh.120,000/- through correspondence. Vide his pleadings, he offered to pay Ksh.100,000/-, only if the title deed was returned first. This effectively means he sought release of collateral before performance of his obligation, which is at odds with basic principles of security interests where collateral is held precisely to secure performance.

126. Having regard to the evidence and the contractual matrix, the learned Adjudicator correctly treated the title deed as collateral security and not as the subject of a freestanding proprietary claim. The direction that the title deed be released upon payment of the decretal sum was consistent with the nature of the security interest. It did not constitute an

adjudication on ownership or rights in the land *per se*. This Court has already held that the mere holding of title deeds as security by a lender, where no transfer or encumbrance has taken place, does not automatically give rise to a counterclaim for declaratory relief on title or possession.

127. Importantly, this Court cannot, on an appeal limited to matters of law, re-assess the factual context of how the security arrangement operated unless there is misdirection in law. No such misdirection exists on the record. The learned Adjudicator applied established legal principles on security and contractual obligations in holding that the title deed should be released upon performance of the Appellant's obligation.

128. The Appellant's argument that the trial court should have unconditionally ordered release of the title deed irrespective of payment would in effect compel a lender to relinquish security before performance, contrary to common law principles and equitable practice.

129. Consequently, the learned Adjudicator did not err in law in dismissing the Appellant's counterclaim for unconditional release and in ordering that the title deed be released upon payment of the decretal sum.

130. The fifth issue for determination is whether, on the whole, the learned Adjudicator committed any error of law in the judgment of the trial Small Claims Court that would justify interference by this Court in exercise of its appellate jurisdiction under *Section 38* of the *Small Claims Court Act*.

131. We have seen above that on appeal from the Small Claims Court under *Section 38*, the grounds of interference must be confined to matters of law. An appellate court in such an appeal cannot re-evaluate facts unless there is an arguable error of law in the evaluation of evidence. Where issues of fact are raised on appeal from the Small Claims Court, an appellate court will not substitute its own view unless there is demonstrated misdirection in law in the evaluation of the evidence.

132. Likewise, an appeal on matters of law from a Small Claims Court requires identification of an error of law that materially affected the outcome. Absence of such error renders interference inappropriate.

133. A trial court's decision ought not be interfered with unless it is shown to have misapplied legal principles, failed to consider relevant law, applied wrong tests or made findings that no reasonable tribunal could reach on the evidence.

134. Specifically, this Court has found that the Small Claims Court did not exceed jurisdiction in entertaining the monetary claim and ancillary issues relating to the title deed as security. This is consistent with established statutory interpretation of the *Small Claims Court Act* and principles on collateral security as reflected which holds that title deeds held merely as collateral remain the property of the depositor until proper transfer.

135. The issue relating to enforceability of the contractual interest rate, also fails to demonstrate an error of law. This Court has already held that where contractual terms are clear, voluntarily executed and not successfully challenged as unconscionable or illegal, they are enforceable as written.

136. On the question whether Ksh.120,000/- remained due and payable, this Court has determined that the learned Adjudicator's finding was supported by the evidence and did not involve misapplication of legal tests as to burden or standard of proof.

137. On the counterclaim, the learned Adjudicator's approach to holding collateral security until performance of the obligation was legally sound and consistent with principles in which distinguishes mere deposit of title deed from creation of proprietary rights.

138. There is no arguable misdirection in law apparent on the face of the record that would justify this Court’s interference. The Appellant’s arguments on appeal repackage factual disagreements as legal errors, which is impermissible in an appeal confined to matters of law.

139. Before I conclude, I will briefly address the Appellant’s contention that the Small Claims Court lost jurisdiction over the claim after six months from the commencement of the suit.

140. I note that the Appellant did not pursue this issue in his submissions. Nevertheless, I am persuaded to adopt the approach taken by my brother **Magare J.** in **Biosystems Consultants v Nyalı Links Arcade [2023] KEHC 21068 (KLR)**, where it was held that the 60-day period prescribed under the Small Claims Court Act is merely aspirational. Consequently, the trial court retained jurisdiction to adjudicate the matter despite the lapse of the 60-day period.

141. From the foregoing, the result that I reach is that the learned Adjudicator did not commit any error of law in the judgment under appeal that materially affected the outcome of the case. The trial Court applied the applicable legal principles correctly and reached its decision within the bounds of reasonable legal interpretation.

142. Having considered and determined all the issues, I reach the finding that the appeal is devoid of merit and is hereby dismissed. The judgment and orders of the Small Claims Court are upheld in their entirety. The Appellant shall pay the costs of the appeal to the Respondent.

143. This file is hereby closed.

144. It is so ordered.

DELIVERED (virtually), DATED & SIGNED this 20th day of February, 2026.

JOE M. OMIDO.
JUDGE

FOR APPELLANT: **Mr. Kahuthu.**

FOR RESPONDENT: **Ms. Nasambu** for **Ms. Kamau.**

COURT ASSISTANTS: **Mr. Ngoge & Mr. Juma.**