

REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT ELDORET
CIVIL APPEAL NO. E034 OF 2025

SIKUKU JAMES WAMBETE JOELAPPELLANT

VERSUS

FAMILY BANK LIMITEDRESPONDENT

(Being an Appeal against the Judgment of the Senior Principle Magistrate Hon. R. Odenyo delivered on 5th December, 2024 at Eldoret CMCC No. E772 of 2021)

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 5th December 2024 by **Hon. R. Odenyo, Senior Principal Magistrate in Eldoret CMCC No. E772 of 2021**. The suit before the lower court was filed by way of a Complaint dated 2nd September 2021 wherein Sikuku James Wambete Joel (now the Appellant) sued Family Bank Ltd (now the Respondent) seeking for orders inter alia, that;

a) **A temporary and permanent injunction restraining the Defendant its servants, agents from advertising and offering for sale LR NO. ELDORET MUNICIPALITY/BLOCK 20 (KAPYEMIT) 607 either by public auction or private treaty.**

b) **An order that the plaintiff has fully repaid the loan due to the defendant and his parcel of land known as LR NO. ELDORET MUNICIPALITY/BLOCK 20 (KAPYEMIT) 607 be discharged.**

c) **Costs and interests of the suit.**

d) Any other relief this court may deem fit.

2. In his Complaint, the Appellant stated that on or about September, 2011 he applied for a secured loan from the Defendant Bank and was advanced Kshs. 1,000,000/= repayable at agreed monthly instalments. That as security for the money advanced, he deposited a title deed in respect of **LR No. Eldoret Municipality/Block 20 (Kapyemit) 607**. The Appellant averred that the Respondent alleging a breach of offer dated 25th August 2011 instructed Pawaba auctioneers who advertised the said land for sale by public auction on 26th November 2014 and the Appellant sought for and obtained an order of temporary orders of injunction restraining the defendant from offering for sale the said parcel of land in **Eldoret CMCC No. 350 of 2014**. That thereafter he fully paid the amount due to the Defendant and the suit fully settled.
3. That on or about 10th December 2014, he was utterly shocked when he came across an advertisement in the Daily Nation placed by PAWABA Auctioneers offering for sale by way of public auction the aforesaid parcel of land on 26th November 2014. The Appellant averred that the purported issuance of Notice of Intention of sale by way of public of auction of his parcel of land is illegal for reasons that the same was issued by the Defendant whilst knowing that the Appellant had fully settled his indebtedness to the Defendant.
4. That the said notice was issued without regard to proper procedure of the law and that the Defendant had applied illegal, unconscionable and

unexplained debits on his account. The court notes that at paragraph 10 of his plaint he averred that there had been previous proceedings in **Eldoret Environment and Land Court vide ELD CASE NO. 350 of 2014** over the same subject matter.

5. On its part, the Respondent filed a Statement of Defence dated 27th November 2021 in which in a nutshell, it stated the Appellant had not fully repaid the loan advanced to him and thus it had the right to sell charged the property in recovering of money advanced to the Appellant. The suit proceeded to a hearing during which both parties called evidence.

Evidence

6. The Appellant testified as **PW1**. He adopted his Witness Statement filed on 14th September 2021. He also relied on his List of Documents filed on the same day. He testified that he had taken a loan of Kshs. 1,000,000/= in 2011. He stated that the repayment amount was Kshs. 30,140/= per month for 24 months and that eventually, the suit was settled by way of a consent which was recorded in Court, which order the Respondent never appealed against. In his witness statement filed before the trial court, of significance is that he stated that he sought for and obtained the orders of injunction herein referred to in **Eldoret Chief Magistrates Court at Eldoret vide ELDORET CMCC No. 350 of 2014**. He stated that he cleared all his debts.
7. In cross examination, PW1 confirmed that he gave out his title deed to **LR No. Eldoret Municipality/Block 20 (Kapyemit) 607** as security for the loan. He stated that there is a statement to show that he finished paying the loan. He stated that by the time the Respondent sent auctioneers, he was still

paying the loan and on 13th May 2021, an order was issued declaring that he had paid the entire loan amount.

8. He confirmed that he has not pursued the Respondent for the return of his title deed. He stated that he repaid and added that he had repaid a total of Kshs. 1,300,000/= . That he paid Kshs. 700,000/= in June, Kshs. 210,000/= in September and that after that he went to Court in 2014, and added that after he went to Court, it was ordered that he pays Kshs. 1,100,000/= which amount he paid.
9. The Respondent testified through **Peninnah Wekesa** who testified as **DW1**. She stated that she works for the Respondent as a Relationship Manager. She adopted her Witnesses Statement dated 8th December 2023 and also relied on her List of Documents filed on 27th September 2021.
10. In cross examination, DW1 stated that the Appellant applied for the loan facility in the year 2011. She confirmed that the loan amount was Kshs. 1,000,000/= . She stated that the client did not honour the repayment schedule. She confirmed that there was a previous case filed by the Appellant against the bank. She told the Court that it was case **No.350 of 2014** and that the bank participated in case.
11. She stated that she is not aware that they were represented by the firm of Gumbo and Associates because she had not joined the bank then. Regarding the said **ELC case No.350/2014**, being marked as settled, she told the Court that she does not know if there was an order of the Court to that effect. She added that they only close a loan account when the same is fully paid by the

customer and that in this case they have not closed the account because the Appellant has not repaid the money.

12. She confirmed that the Appellant had repaid some amount and stated that the interest is generated in the system. She told the Court that the entries between 2015 and 2021 are missing because the Appellant did not make any repayment. The trial Court in its Judgement found no merit in the Appellant's Case and dismissed the suit in its entirety with costs to the Respondent.

13. Aggrieved by the judgment of the trial Court, the Appellant preferred this appeal challenging the whole judgment citing the following grounds;

- 1) **That the learned trial Magistrate erred in law in dismissing the Appellants suit contrary to the facts and evidence tendered in the entire suit.**
- 2) **That the learned Magistrate erred in law and fact by failing to independently analyze and consider all the issues raised by the Appellant.**
- 3) **That the learned trial Magistrate erred in law and in fact by dismissing the Appellant's suit on the grounds ELC Case No.350 of 2014 had any relevance to the Eldoret CMCC No. E772 of 2021.**
- 4) **That the learned trial Magistrate erred in law and fact in failing to consider the entire submissions tendered by the Appellant.**

- 5) **That the learned trial Magistrate erred in law and fact in granting orders which were erroneous, unlawful, primitive and not in the best interest of the Appellants.**
- 6) **That the learned Magistrate erred in law and fact by failing to find that the orders settling the suit in Eld ELC Case No.350 of 2014 had never been appealed against or set aside and therefore had relevance in Eld CMCC No.772 of 2021.**
- 7) **That the learned trial Magistrate erred in law and fact by failing to consider that the loan amount had fully been settled and the Appellant was not in any way indebted to the Respondent.**

14.The Appeal was canvassed by way of written submissions. The Appellant filed submissions dated 22nd September 2025 whereas the Respondent filed submissions dated 9th October 2025.

Appellant's Submissions

15.Counsel for the Appellant submitted that the learned Magistrate erred in law and in fact in dismissing the Appellant's suit contrary to all the evidence and facts presented before him. He then proceeded to restate the said evidence at length and because the court as already having herein summarized the same there is no need to reproduce it.

16.Counsel further submitted that the Respondent alleging a breach of offer dated 25th August 2011 instructed Pawaba auctioneers who advertised the said land for sale by public auction on 26th November 2014 and that the

Appellant sought for and obtained an order of a temporary injunction restraining the defendant from offering for sale the plaintiff parcel vide **Eldoret Environment and Land Court ELC No. 350 of 2014**. Counsel stated that the Respondent was at the time represented by the firm of M/s Gumbo and Associates LLP and that parties opted to engage in negotiations in order to settle the matter amicably.

17.Counsel further submitted that the parties appeared before Court on 28th September 2015 to confirm settlement and that Counsel for the defendant (now Respondent), informed the Court that more time was required and that after the Appellant cleared the loan balance to the tune of Kshs. 1,299,067/= the Court marked the matter as fully settled with no orders as to costs.

18.Counsel contended that that was supposed to be that, but the Appellant was shocked when the Respondent issued a notice of intention to sell the suit property. Counsel added that the Respondent in its submission before the trial Court, stated that a loan statement captures all payments made along with accrued interests and penalties. According to Counsel, one would therefore expect that if the Appellant had not completed payment of the loan, the loan statement would reflect the accrued interests and penalties to date. Counsel stated that however, this was not the case as there was no entry to the loan statement from 2015 to 2021.

19.Counsel argued that this was the surest sign that the loan facility had actually been cleared as there was no other entry to be made and argued that it is still a mystery why the bank did not close the loan account.

20. Counsel observed that the Respondent took eleven years since the purported sale by auction was set aside to issue the notice of intention to sell, which is very unusual as banks are not known to take such long periods. Counsel urged that, in their view, this can only be a telltale sign that the loan facility had fully been repaid. Counsel further submitted that the witness who testified on behalf of the Respondent did not dispute the existence of **ELD ELC NO. 350 of 2014** which had already settled the matter.

21. Counsel added that the witness further stated that the defendant never appealed or applied for a review of the Court order making the matter settled. Counsel urged therefore that the act of issuing the notice of intention to sell was in bad faith and maintained that the Appellant had already fully settled the loan extended to him by the Respondent by paying Kshs. 1,299,067/= and thus the trial Magistrate erred in dismissing the suit.

22. Further, Counsel submitted that the trial Magistrate in dismissing the suit on the grounds that the Appellant was unable to prove that **ELD Case No. 350 of 2014** had any relevance to this present case was indeed made in error. Counsel relied on the order of temporary injunction issued on 24th November 2014 and the order issued on 13th may 2021 marking **ELD/ELC No. 350/2014** as fully settled. Counsel pointed out that from the order of temporary injunction issued, it can be deciphered that the subject matter was the same suit property ***to wit* (ELD/MUN/BLOCK 20 (KAPYEMIT)/607)**, the parties were the same and the cause of action was also the same.

23. Counsel argued that from the Court order marking the matter as fully settled it can be seen that the **Learned Magistrate** (*emphasis mine*) issued an order marking **ELD/ELC No. 350/2014** as fully settled after the Appellant fully

cleared the balance owed to the Respondent bank. Counsel added that it is also clear that the Respondent bank stopped making entries to the loan statement of the Appellant and that this could only be the case if the loan facility was cleared.

24.Counsel further submitted that the trial Magistrate did indeed err in law and in fact by failing to find that the orders settling **ELD Case No. 350 OF 2014** had never been appealed against or set aside and therefore had relevance to **ELD Case No. E772 of 2021**. Counsel placed reliance on the case of **D&C Builders v Sidney Ress [1966] 2 QB 617**, the case of **Edward Achoha v SogeaSatom Kenya Branch &others [2014] eKLR** and the case of **Hausram Limited v Nairobi City County [2013] eKLR**.

25.Counsel also submitted that Appellant also produced his bank statement which upon close scrutiny, shows the value Kshs. 1,299,067/=, which the Appellant had paid to the Respondent to clear the loan. Counsel maintained that the Appellant is therefore not indebted to the Respondent in any way.

26.In the end, Counsel submitted that the learned trial Magistrate erred in law and in fact in granting orders which were erroneous, unlawful, primitive and not in the best interest of the Appellant. Counsel observed that the trial Magistrate dismissed the suit with costs and with that the Respondent can now move on to auction the suit property as a result of which the Appellant will lose his property. He urged that the Respondent has not done enough to counter the claims of the Appellant and as such the orders given were erroneous and unlawful.

Respondent's Submissions

27. On his part, Counsel for the Respondent observed that Appellant contends that the Learned Magistrate erred in finding that **ELC Case No. 350 of 2014** had no relevance to the suit before the lower Court, despite it involving the same parties and the same subject matter and had in fact been marked as settled. Counsel also observed that the Appellant submits that he had instituted proceedings against the Respondent vide **ELC Case No.350 of 2014**, which related to the same loan facility. During the pendency of that suit, the matter was marked as settled with no order as to costs. Counsel argued that however, apart from this order the Appellant did not avail the pleadings filed in that suit or any correspondence to enable the lower Court to appreciate the context of the alleged settlement.

28. Counsel observed that it is a well-established that civil cases are determined on a balance of probabilities. Counsel reiterated that in this case, the Appellant alleged that he had fully repaid the facility and consequently the suit before the ELC Court was marked as settle, however, the Appellant failed to adduce any evidence in support of this allegation despite being best placed to do so, as all relevant documentation was within his possession or readily accessible to him.

29. Counsel submitted that conversely the Respondent produced all instruments relating to the facility, together with evidence of non-performance and the subsequent exercise of its statutory power of sale and that the Appellant did not rebut this evidence to the required standard which warranted the dismissal of the suit. He placed reliance on the case of **Bingwa Sacco Society Limited v Ngatia (Civil Appeal E318 of 2023) [2024] KEHC**

8748 (KLR) (Civ) (15 July 2024). Counsel urged that it is trite law that he who alleges must prove and the Appellant failed to discharge this burden. He relied on case of **Springboard Capital Limited v Njenga &another (Civil Appeal 14 of 2024) [2024] KEHC 7013 (KLR).**

30.Counsel submitted that the Appellant alleges that the settlement was arrived at after the facility had been fully repaid, however, this assertion was never established in evidence. Counsel argued that the Appellant did not produce any bank deposit slips or statement reflecting a zero balance or any correspondence requesting the reversal of the charge entry against his title. Counsel added that it is common banking practice that once a facility is fully repaid, the loan account would reflect a nil or zero balance.

31.Counsel further submitted that the statement produced by the Appellant confirms that the facility remained outstanding, a position further corroborated by the statement availed by the Respondent. Counsel contended that there being no proof that the facility had been repaid in full nor any consent availed detailing the terms of settlement, the Learned Magistrate could not have reached a different inference.

32.Counsel argued that while **ELC Case No.350 of 2014** involved the same parties and subject matter, no nexus was established between the two suits. Counsel submitted that said case was instituted by the Appellant, with its circumstances as well as the proceedings being well within his knowledge. Counsel further nothing would have been easier than for the Appellant to avail the relevant pleadings or documentation for the lower Court's consideration. Counsel urged that having considered the foregoing, the

Appellant indeed failed to discharge his burden of proof or meet the requisite standard applicable in civil cases. Counsel thus submitted that the learned Magistrate was therefore well within his right to find that the ELC case bore no relevance to the lower Court matter.

33.On the issue of there being no appeal in view of the order marking the matter as settled. Counsel submitted that the overlooks the fact that both suits were instituted at his instance and the settlement was therefore entered on account of his own pleas before the Court. Counsel argued that Respondent on its part has no interest in pursuing an appeal or other claim against the Appellant as the loan instruments provide sufficient mechanisms for recovery of the sums owed.

34.In view of the foregoing, Counsel urged that it is evident that the Appellant failed to demonstrate how **ELC Case No. 350 of 2014** bore any relevance to the proceedings or how the alleged settlement extinguished the Respondent's right to recover the outstanding facility. According to Counsel, the Learned Magistrate properly evaluated the evidence before him and arrived at a well-reasoned conclusion.

35.On whether the Learned Magistrate erred in law and fact in finding that the Appellant had not settled the loan, Counsel submitted that the entire appeal is based on the assertion that the loan facility has been fully repaid, a claim with which they strongly disagree. Counsel submitted that the Appellant was granted a facility worth Kshs. 1,000,000/- repayable in equal monthly installments of Kshs. 30,140/= over a period of 48 months. Counsel added that however, since disbursement no payments were made until 24th may 2014 when a sum of Kshs. 1,000 was received, the facility subsequently

matured in September 2014 and due to the consistent default, the outstanding balance has increased on account of the unpaid principal, accrued interest and default interest.

36.Counsel argued that as a result, the Respondent proceeded to exercise its statutory power of sale and duly issued the requisite notices. Counsel submitted that these notices prompted the institution of the suit before the lower Court, wherein the Appellant challenged the intended sale. Counsel urged that it is important to note that the Bank's power of sale is derived from statute and the loan instruments. Counsel added that the law prescribes a clear procedure for the sale of a charged property, which also entails significant costs. He submitted that the bank would have no reason to undertake such a process or incur these expenses if the loan had in fact, been fully settled.

37.Counsel maintained that while the Appellant did make lump sum payments these were made long after the facility had matured. In accordance with standard banking practice, the payments were first applied toward the outstanding interest. Counsel argued that nonetheless, the amounts paid were insufficient to clear the entire loan balance. Counsel thus urged that, while the Plaintiff may contend that he has made significant progress in repayment he must take into account the consequences of his default and the subsequent accumulation of arrears should come as no surprise.

38.Regarding the Appellant's argument that the Learned Magistrate failed to consider the facts and the evidence of the suit. Counsel observed that the Appellant has questioned why since 2015 there were no entries on the loan statement up until 2021. Counsel submitted that as highlighted above, the

facility matured in September 2014, which means that had it been repaid as expected at that time, the repayment would have been completed. Counsel argued that however, that was not the case and that as a result, the facility accrued default interest on top of the ordinary interest thus while the Bank is entitled to levy such interest there are concerns of the in *dupulm rule* which must be taken into consideration.

39. Counsel argued that in compliance with the in *duplum rule*, the Bank ceased charging further interest to remain within the statutory limits and that the subsequent ad hoc charges represent expenses incurred by the Bank following the default which the Appellant expressly undertook to bear, notwithstanding, the statement of account furnished by the Respondent clearly demonstrates that even as at 2015, the facility remained outstanding.

40. Regarding the delay in the bank exercising its statutory power of sale over the security, Counsel submitted that the Bank retains the discretion to exercise its statutory power of sale at any time provided the facility remains unpaid. Counsel argued mere passage of time does not amount to a waiver or relinquishment of the Bank's right of recovery.

41. Counsel argued that the Appellant raises baseless allegations that fall short of demonstrating full settlement. Counsel observed that the Appellant seeks to rely on the passage of time, the same consideration applies to him as his title deed remains in the custody of the bank, a fact he has conveniently omitted. According to Counsel, this omission amounts to an admission that the Appellant was aware he had not fully discharged his obligations. Counsel added that by his own inaction, the Appellant has effectively denied himself the benefit of his property.

42. Counsel urged that in view of the foregoing, the Learned Magistrate in dismissing the suit acted judiciously based on the evidence presented and established legal precedent. Counsel submitted that the Appellant was at all material times aware of the terms governing the facility and the consequences of default, which were clearly stipulated in the offer letter and charge instrument.

43. Counsel submitted that therefore any adverse outcome arising from the dismissal of the suit cannot be said to be unjust or unforeseen as the same flowed directly from the Appellant's failure to honor his contractual obligations. Counsel argued that the Court's decision merely upheld the sanctity of the contract and the Bank's lawful right to enforce recovery.

44. Counsel thus urged that the alleged errors of law and fact raised by the Appellant in the impugned decision have not been substantiated and as such the appeal in its entirety must fail.

Determination

45. This is a first appeal. The duty of this Court as a first appellate Court was set out by the Court of Appeal in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123**. Further, it has since been settled that an appellate Court will not ordinarily interfere with findings of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278**.

46. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial Court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower Court as parties cannot read into those documents matters extrinsic to them.

47. The only issue for determination in my view in light of the pleadings and submissions as herein summarized is as hereunder;

whether the Learned Magistrate erred in dismissing the Appellant's suit.

48. **Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya** provides that:

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

49. It follows therefore that the Appellant had the duty to prove his claim against the Respondents. Courts have belabored the burden and standard of proof in civil cases time without number which I find necessary to lay down as below.

50. In the case of **Karugi & Another v Kabiya & 3 Others (1987) KLR 347** the Court of Appeal stated thus;

The 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. We would therefore venture to suggest that before the trial Court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the Court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. 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." (Emphasis added).

51. In [Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another](#) [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

52. The Appellant therefore was under the primary obligation to prove his case. However, this burden may shift to the Respondent, depending on the circumstances of the case. The question of what amounts to proof on a balance of probabilities was discussed by Kimaru, J in [William Kabogo Gitau v George Thuo & 2 others](#) [2010] 1 KLE 526 where he stated thus;

In ordinary civil cases a case may be determined in favor of a party who persuades the Court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

53. In the instant case, the court notes that whereas the Appellant states that a similar suit was filed in court wherein the parties are the same, the suit property is the same and the subject matter too is the same as already herein summarized, there is a discrepancy in the citation of the suits file in terms that whereas the case number is the same, from the documents produced by the Appellant in support of his assertion that the suit was eventually settled and was marked as such, the various orders that the Appellant seeks to rely on were issued in different courts with different jurisdictions as the court will herein demonstrate.

- i. The Appellant states that when his property was advertised and scheduled for sale on 26th November 2024, he sought for and

obtained an order of a temporary injunction restraining the defendant from offering for sale the plaintiff's parcel before the Eldoret Chief Magistrates Court vide ELDORET CMCC No. 350 of 2014. However, as per his List of Documents, he has annexed as Exhibit No. 2 an order of temporary injunction to that issued in ELC No. 350 of 2024. However, the same was not issued by the Chief Magistrates Court but was issued by Hon Justice A. Ombwayo who is a Judge of the Environment and Land Court.

- ii. Further, whereas the court also notes that the Appellant in the pleadings and submissions consistently stated that the matter was settled in the Magistrates Court and even went ahead to submit that “from the Court order marking the matter as fully settled it can be seen that the Learned Magistrate issued an order marking ELD/ELC No. 350/2014 as fully settled after the Appellant fully cleared the balance owed to the Respondent bank” the court notes that his exhibit to that effect in his List of Documents, which is the order marking the matter as settled in ELC 350 of 2024 was also issued not by the Magistrates Court, but by Hon lady Justice M.A. Odeny who too is a Judge of the Environment and Land Court.

54.In light of these discrepancies that are apparent in the very documents that the Appellant is seeking to rely on to prove that he did pay the entire loan amount to the bank as a consequence of which the matter was marked as settled, it was imperative that the Appellant ought to have gone further to demonstrate in which court exactly the stated suit was filed; whether before the Magistrate's Court sitting as the Environment and Land Court, or before

the Court of equal status to the High Court sitting as the Environment and land Court, by availing the entirety of the pleadings in which these orders were made. This the Appellant did not do and so the court is not able to determine the authenticity of his claim.

55.If these pleadings had been availed, the same would have assisted the court to determine whether the reference to the Magistrates court as the forum in which the suit was filed as opposed to the ELC Court from where the orders annexed emanate is a genuine error that the court can overlook without compromising the merits of the case.

56.But as matters stand, in light of the representations made vis-à-vis the discrepancies that the court has noted in the documents sought to be relied on by the Appellant, the court cannot make this assumption for reasons that it is not for the court to decipher for a party the purport of its pleadings of which the documents produced in support of their case is a crucial and integral part.

57.The above being the case, the only logical conclusion that the court can draw is that there is no credible evidence on record to show that as alleged by the Appellant there was indeed a suit, between these two parties over the same subject matter and with respect to the same suit premises wherein the loan amount owing to the Respondent was paid in its entirety and the suit marked as settled.

58.As has been herein stated, under **Section 107, 108, 109 and 112 of the Evidence Act**, the onus was on the Appellant to prove that which he alleged. In light of my conclusions herein, it is my finding that he has failed to

discharge this burden. For this reason, I find no good cause to upset the judgement of the Learned Trial Magistrate. The same is accordingly upheld and the Appeal is dismissed in its entirety with costs to the Respondent.

Read Dated and Signed at ELDORET on 19th March 2026

E. OMINDE
JUDGE