



Mbugua t/a Director Maximum Protective Security Services v Njoroge (Civil Appeal E203 of 2024) [2026] KEHC 3706 (KLR) (19 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E203 OF 2024
FN MUCHEMI, J
MARCH 19, 2026**

BETWEEN

CATHERINE KIOMA MBUGUA T/A DIRECTOR MAXIMUM PROTECTIVE SECURITY SERVICES APPELLANT

AND

RAHAB NYOKABI NJOROGE RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. A. Z. Ogange (RM/Adjudicator) delivered on 29th July 2024 in Thika Small Claims Court SCCCOMM No. E194 of 2024)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCCOMM No. E194 of 2024 whereby the trial court dismissed the appellant's claim on the grounds that the appellant did not prove that there was a valid contract capable of enforcement between her and the respondent.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 9 grounds of appeal summarized as follows:-
 - a. The learned adjudicator erred in law and in fact in failing to appreciate the rights of parties to enter into a contract as per the terms agreed by the parties and hence ultimately failed to uphold the sanctity of privity of contract between the parties.
 - b. The learned trial magistrate erred in law and in fact by failing to award the claimant the amount of Kshs. 350,000/- already expressly acknowledged by the respondent as money lent to her and which she has not repaid.



- c. The learned adjudicator erred in law and in fact by failing to consider the acknowledgement of debt dated 1st July 2022 duly executed by the parties whereby the respondent acknowledged a debt of Kshs. 500,000/- which she did not repay.
 - d. The learned adjudicator erred in law and in fact in pronouncing itself that the contract dated 1st July 2022 was illegal due to the interest charged despite the respondent not availing any such evidence of illegality and failing to exercise the court's discretion on the issue of interest.
 - e. The learned adjudicator erred in law and in fact in failing to harmonize her judgment with the evidence produced and the testimony of the witnesses specifically the 4th witness who was the advocate who drew the contract in question.
 - f. The learned adjudicator erred in law and in fact in disregarding the appellant's pleadings, evidence, submissions and supporting law.
3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that the trial magistrate erred in law in pronouncing facts she did not argue by declaring that she was a person conducting financial and/or banking services despite no evidence being produced to support the same. The appellant argues that the court failed to acknowledge that she advanced monies to the respondent on a friendly basis but required some sort of security due to the huge amount of money advanced. Further, the respondent admitted to having received a soft loan from her.
5. The appellant relies on the cases of *Jiwaji vs Jiwaji* [1968] EA 547 and *Curtis vs Chemical Cleaning & Dyeing Co. Ltd* [1951] ALL ER 631 and submits that the learned adjudicator speculated on the validity of the agreement without requiring the respondent to produce a report of the document examiner. Further the trial court ignored the appellant's witness CW4 an advocate who drafted the impugned sale agreement who testified that the said agreement was signed by both parties in her presence. Relying on the cases of *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd* (2002) 2 EA 503 (2011) eKLR and *Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd* (2017) eKLR, the appellant submits that it is not the business of courts to rewrite contracts between parties. Furthermore the respondent did not deny entering into a contract with her where she was loaned monies.
6. The appellant refers to Sections 109 and 112 of the *Evidence Act* and the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR and submits that the issues raised by the respondent that the documents produced in court were a forgery were not substantiated. The onus was on the respondent who sought to rely on alleged forgery of the agreement and acknowledgement of receipt to prove to the court that she did not sign any of the documents relied upon by her. Further, the appellant argues that the respondent throughout the pleadings admitted to owing her Kshs. 350,000/- and thus the learned adjudicator failed in awarding her the said sum already acknowledged by the respondent as money lent to her and which she had not repaid.
7. The appellant argues that the respondent did not present any evidence of forgery on the acknowledgment of debt dated 1st July 2022 executed by both parties. Further, the respondent did not deny having executed the said acknowledgement neither did she adduce evidence of forgery of her signature to challenge the validity of the document. The court in its judgment did not determine the validity of the said document.



The Respondent's Submissions

8. The respondent relies on the cases of Standard & Chartered Bank Ltd vs Intercom Services Ltd [2004] eKLR; Joseph Kamau Kiguoya vs Rose Wambui Muthike ELC Case No. 203 of 2016 and Mistry Amar Singh vs Kulubya (1963) EA 408 and submits that the learned adjudicator did not err in finding that the contract was illegal and void despite her not pleading to the same in her pleadings. The appellant produced to the court an agreement enumerating interest charged on the loan at Kshs. 150,000/- and produced the security for the loan which were an application for land control board, a transfer document, copies of her PIN and ID which are all evidence of conducting banking business in contravention of the law. Further, the appellant directly admitted that she was conducting banking activities contrary to the provisions of Section 3 of the *Banking Act*.
9. The respondent argues that the trial court declared the contract illegal and it could therefore not be effected. The respondent submits that the agreement filed in the CTS does not have a thumb print while the one produced in evidence had a thumbprint which gives credence to the doubts cast by her that the signature was not hers. Even on the face of no proof of forgery, it was apparent that there were two differing agreements before the court raising suspicion in the mind of the trial court. Further, the pages in the alleged agreement did not follow a sequence as the one produced in court had pages numbered 1-3 while the one on the CTS did not have page 3 at the execution page thus causing a glaring discrepancy.
10. The respondent submits that there was a further discrepancy related to the dates and time of disbursement of money where PW4, the advocate allegedly drawing and witnessing the agreements stated that she witnessed Kshs. 400,000/- changing hands at the time of drafting the acknowledgement. She also took instructions on the loan agreement and instructed CW3 to type it after the respondent acknowledged receipt of a total of Kshs. 1 million but she did not see the second payment being made and did not refer to acknowledgement in the agreement dated 1st July 2022 while the appellant talked of several initial mpesa disbursements. The respondent submits that she produced her mpesa statements to the contrary showing money was sent to her on 14/6/2022 and not 1/7/2022 as per the alleged contract. Therefore by finding that the contract was suspicious and invalid, it could not be enforced.
11. The respondent submits that the learned adjudicator reproduced the appellant's and her witnesses' evidence and analysed it fully. Relying on the cases of Jiwaji vs Jiwaji [1968] EA 547; Nancy Muthoni Nyaruai vs Grace Wanjiku Mugure Civil Appeal No. 8 of 2018 and Danson Muriuki Kihara vs Johnson Kabungo (2017) eKLR, the respondent submits that the rate of interest in the contract was Kshs. 150,000/- per month translating to 180% per annum was geared towards fleecing her and gaining her parcel of land unjustly

Issues for determination

12. The main issues for determination are:-
 - a. Whether the appeal is properly before the court.
 - b. If not, whether the appellant proved her case on a balance of probabilities.

The Law

13. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of



the second appellate court in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

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

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

15. Section 38 of the Act provides:-

A person aggrieved by the decision or an order of the court may appeal against that decision or order to the high Court on matters of law.

16. I have perused the grounds in the memorandum of appeal and noted that the grounds relate primarily to questions of fact. The appellant is aggrieved that the learned adjudicator found that the agreement between the appellant and the respondent was illegal and therefore not valid rendering it incapable of enforcement. The learned adjudicator in dismissing the claim considered the evidence presented by both parties and their oral testimonies and found that the appellant's case was based on the impugned contract and no extrinsic evidence had been led to show that in the absence of the contract, the claim would suffice. The grounds as raised by the appellant are on matters of fact which requires this court to scrutinize and re-evaluate the evidence once more. Section 38 of the *Small Claims Court Act* provides for appeals only on matters of law but not matters of fact. The appeal is therefore, misconceived and incompetent.

17. The appeal is hereby struck out with costs to the respondent.

18. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF MARCH 2026.

F. MUCHEMI

JUDGE

