REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. E270 OF 2024

SILAS MURIITHI…….
……APPELLANT

VERSUS

LOICE WAMBOI…….
RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. C. L. Adisa (SRM) delivered on 11th September 2024 in Ruiru CMCC No. E403 of 2023)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Ruiru Senior Resident Magistrate in CMCC No. E403 of 2023 in a claim regarding a loan agreement of Kshs. 5 million whereby the trial court held that the respondent do submit to the appellant the bankers cheque in settlement of Kshs. 5 million being the balance of the loan amount within 45 days upon receipt of the original lease L.R. SAMURU/MWITINGIRI BLOCK 1/812 from the appellant. The appellant was ordered to release to the respondent the original lease for L.R. SAMURU/MWITINGIRI BLOCK 1/812

offered as security within 45 days from the date of the judgment. It is noted that

although the magistrate referred to the document as a title deed, the document produced in court was a certificate of lease.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 14 grounds of appeal summarized as follows:-

a) The learned trial magistrate erred in law and in fact in allowing the counter claim by the defendant against the plaintiff despite the same having not been proved.

b) The learned trial magistrate erred in law and in fact by misdirecting herself in misinterpreting the contractual obligations of the parties to arrive at a wrong conclusion.

c) The learned trial magistrate failed to take into account the oral evidence by both parties and rendered a decision contrary to the oral evidence taken at trial. The trial magistrate ignored the admission by the respondent that she had been in breach of the loan agreement between the parties.

d) The learned trial magistrate erred in law and in fact in rendering a decision that is contrary to Article 40 of the Constitution of Kenya which protects the appellant's

right to property which had vested to him following the breach of the contract by the respondent.

3. Parties put in written submissions.

The Appellant's Submissions

4. The appellant relies on the case of **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] KECA 362 (KLR)** and submits that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. The appellant submits that the loan agreement dated 7th April 2022 set out the parties' bargain in unambiguous terms. The appellant submits that he advanced Kshs. 5 million to the respondent repayable on 29th April 2022 with interest of Kshs. 1 million and the loan was secured by the Certificate of Lease for L.R. No. SAMURU/MWITINGIRI BLOCK 1/812. Upon default, the security would automatically vest in him as a means of recovery. The appellant argues that they were bound by the said terms noting the absence of any coercion, fraud or undue influence. The appellant further argues that the trial court however disregarded the said terms and substituted them with its own directions requiring him to release the title deed first before repayment, which varied the parties contractual bargain therefore altering the terms of the agreement. To support his contentions, the appellant relies on the cases of **Pius Kimaiyo Langat vs Co-**

operative Bank of Kenya Limited [2017] KECA 152 (KLR) and **Centurion Engineers & Builders Limited vs Kenya Bureau of Standards [2023] KECA 1289 (KLR)**.

5. The appellant further submits that a reasoned judgment in compliance with Order 21 Rule 4 of the Civil Procedure Rules is required to contain a concise statement of the case, the points for

   determination, the decision thereon and the reasons for such decision. The appellant argues that the trial court's judgment fell short of the said standard as it failed to reconcile the evidence
   adduced at trial, including the respondent's clear admission of indebtness and his documentary proof of the loan and partial repayment. The court did not explain why despite such evidence it found it appropriate to impose a return of title first arrangement which was neither pleaded nor supported by the record.

6. The appellant submits that the respondent during cross examination expressly admitted to having received the loan amount advanced to her and to having defaulted on repayment. She further conceded that she understood that the title deed would only be released upon full repayment of the loan amount. The respondent's own pleadings corroborate the said position. The appellant further submits that vide a letter dated 24th July 2023, the respondent's advocates wrote to his advocates proposing

to issue cheques in exchange for the title deed. The appellant argues that cheques do not constitute legal tender and do not amount to payment until they are cleared. As such, the respondent's proposal could not be deemed as settlement of the outstanding debt as there was no assurance that the cheques would clear for him to release the only security he had for the loan.

7. The appellant further submits that the respondent further alleged that she had been granted an extension of time to repay under Clause 3.5 of the agreement however no evidence of such extension was produced nor was there any correspondence,

   acknowledgement, or formal variation of the contractual timelines as required under Clause 4.2 of the said agreement. The appellant
   argues that the respondent having advanced a counterclaim seeking the release of the title deed bore the legal burden to prove the basis for that claim including proof of payment which she failed to do. Despite the clear admissions of debt and absence of proof of full repayment of the loan, the learned trial magistrate allowed the counterclaim directing him to release the title deed before receiving payment which contravened the equitable maxims that he who seeks equity must do equity and he who comes to equity must come with clean hands. To support his contentions, the appellant relies on the cases of **Republic vs Nzioka [2025] KECA 288 (KLR) and**

Owino vs Ogolla & 2 Others [2023] KECA 1370 (KLR).

8. The appellant submits that the trial court's orders were legally unenforceable as the said title deed was not in his possession having been retained by DCI pursuant to an earlier criminal investigation conducted in Republic vs Loice Mburu MCCR No. E497 of 2023 aimed at establishing whether the said title was genuine. The trial court ordered that he release the said title within 45 days which order is incapable of performance contrary to the long standing principle that courts do not issue orders in vain. To support his contentions, the appellant refers to the cases of **Kenya National Examination Council vs Republic *ex parte* Geoffrey Gathenji Njoroge & 9 Others [1997] KECA 58 (KLR)** and **Ongere & Another vs Mulabe & 3 Others [2025] KEHC 2797 (KLR)**.

9. The appellant argues that by virtue of Clause 3.4 of the loan agreement, the property automatically vested in him upon the respondent's default in repayment on 29th April 2022. The trial court thus erred and effectively rewrote the contract between the parties by disregarding the clear contractual provisions and issuing an order for the return of a title which by express agreement had already vested in him following the respondent's default. The appellant further argues that although the respondent alleged that the title deed currently in the custody of the DCI was not the same document she provided to him as security, she

did not file any documentary evidence to show the distinction between the two. Further, the trial court's order directing that the respondent to issue banker's cheques to him in settlement of the outstanding debt was unreasonable as a cheque does not constitute payment in law until cleared. Additionally, the purpose of security in a loan transaction is to guarantee repayment and protect the lender against default. Thus the trial court's order requiring him to release the title prior to repayment completely negated the purpose.

10. The appellant argues that the trial court failed to properly appreciate the commercial character of the transaction. The Certificate of Lease for L.R. No. SAMURU/MWITINGIRI BLOCK 1/812 was pledged precisely to safeguard repayment and the respondent's failure to pay the balance of Kshs. 5 million meant his right to retain the security had crystallized. Further by ordering the release of the title deed without first ensuring satisfaction of the

debt, the trial court deprived him of his proprietary security interest without due process of the law.

11. The appellant refers to the cases of **Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Limited [2016] KECA 56 (KLR)** and **Kenya Revenue Authority vs Export Trading Company Limited [2022] KESC 31 (KLR)** and submits that costs follow the event and he has been compelled to institute and pursue

the instant appeal as a consequence of the trial court's misdirection and the respondent's persistent default in honouring her contractual obligations. Thus he has incurred substantial legal expense, time and inconvenience in seeking to vindicate his rights.

The Respondent's Submissions

12. The respondent submits that the actions and inactions by the appellant and particularly his refusal to produce the original title amounted to a material breach of the loan agreement and rendered her compliance with the terms therein untenable. The title deed constituted the security underpinning the contractual relationship between the parties and its production was integral to the reciprocal performance obligations under the agreement. The respondent refers to the decision in **Patrick Mukiri Kabundu vs Miliki Limited [2016] KECA 256 (KLR)** and argues that a party in breach cannot seek to enforce performance against the other party. The appellant having failed to comply with both the contractual framework and the express orders of the trial court requiring the deposit of the original deed, cannot purport to demand performance by her while

    remaining in default of its obligations. The appellant's continued refusal to avail the original title deed disentitles him from equitable relief.

13. The respondent submits that the appellant's insistence that she deposits the bankers cheques to him in the

absence of compliance with the trial court's orders is an exercise in futility. Without the production of the title deed, the contractual equilibrium contemplated by the parties cannot be restored, rendering any order for specific performance incapable of practical implementation.

14. The respondent refers to the case of **Justus Mungumbu Omiti vs Walter Enock Nyambati Osebe & 2 Others [2010] KECA 475 (KLR)** and submits that the appellant failed to follow the due process applicable to land transactions prior to accepting the title deed as security for the loan facility and thus cannot seek refuge in allegations of fraud in order to escape compliance with the terms of that agreement. The respondent submits that the loan agreement was drafted by the appellant's advocates showing that the appellant was an informed and legally advised party fully aware of the standard legal and conveyancing implications attendant to a loan secured by land.

15. The respondent submits that the appellant cannot approach this court alleging fraud or forgery in respect of title when he failed in the first instance to conduct the standard legal and conveyancing inquiries required prior to the disbursement of the loan principal or acceptance of the title as security. The respondent further relies on

the case of **Ndinda vs Kioko (Environment and Land Appeal E030 of 2024) [2025] KEELC 18428 (KLR) (18**

December 2025) (Judgment) and submits that where a party abstains whether deliberately or negligently from making inquiries that a prudent purchaser or transactor of land would ordinarily make, such a party is fixed with constructive notice and cannot rely on ignorance as a defence. Furthermore the respondent argues that fraud must be strictly proved and the burden lay squarely on the appellant pursuant to Section 107 of the Evidence Act, which he failed to discharge.

16. The respondent submits that the loan agreement dated 7th April 2022 provided that the appellant would advance Kshs. 5 million to the respondent repayable on or before 29th April 2022 together with interest of Kshs. 1 million and that the loan would be secured by Title No. SAMURU/MWITINGIRI BLOCK 1/812 and the trial court was alive to the said contractual terms and it never undertook a rewriting of the said terms. Instead the court rendered her to settle the outstanding principal sum of Kshs. 5 million by way of banker's cheques within 45 days upon receipt of the original title deed. The order did not substitute or amend the repayment obligation but merely structured its enforcement in a manner consistent with the parties' original intentions. The respondent argues that the trial court compelled the appellant to first discharge its reciprocal obligation under the agreement by availing the original title deed held as security before demanding repayment. Relying on the case of **Mogo Auto Limited & Another vs Onsare (Civil Appeal E189 of 2024)**

[2025] KEHC 18507 (KLR) (16 December 2025) (Judgment),

the respondent submits that courts do not rewrite contracts for parties. The learned magistrate's judgment was an exercise of judicial discretion in contractual interpretation and equitable enforcement in line with the authority delegated to it under Article 159(2) of the Constitution and not contractual reconstitution.

17. The respondent argues that courts are empowered to intervene where necessary to prevent injustice, particularly where strict enforcement of contractual terms would operate oppressively or inequitably. Such intervention does not amount to rewriting a contract but rather ensuring that the contract is implemented fairly and in accordance with its commercial purpose. The respondent refers to the case of **Kenfreight (EA) Limited vs Nguti (Petition 37 of 2018) [2019] eKLR** and submits that the trial court's orders were informed by the reality that the title deed was not presented by the appellant before the court as ordered. Thus in the absence of the title, compelling unconditional repayment would have defeated the mutual understanding upon which the loan was advanced.

18. Relying on the case of **Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another [2016] eKLR**, the respondent submits that the costs of the appeal should be awarded to her.

Issue for determination

19. The main issue for determination is whether the appeal has merit.

The Law

20. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

"…..this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

21. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well

settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

22. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b) That 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 it; and

c) That 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.

Whether the appeal has merit.

23. It is not in dispute that the parties herein entered into a loan agreement dated 7th April 2022 where the appellant was to lend the respondent a sum of Kshs. 5 million to be

paid back as Kshs. 6 million being the amount borrowed together with interest. The terms of the agreement as stipulated in Clause 3 provided that the borrower who is the respondent herein, shall refund the lender, the appellant, the sum of Kshs. 6 million on or before 29th April 2022. It was a further term of the agreement that the borrower placed as security her title deed for parcel number SAMURU/MWITINGIRI BLOCK 1/812 which she was the registered owner. The agreement further provided that in the event the borrower defaulted to repay the loan on 29th April 2022, the said land was to automatically vest upon the appellant. The appellant was at liberty to extend the payment period beyond 29th April 2022 upon the request by the borrower to extend the same.

24. The respondent did not honour the agreement and proceeded to refund the appellant Kshs. 1 million on 13th April 2023 leaving an outstanding sum of Kshs. 5 million. It is my view that the agreement
automatically vested the title of the security to the appellant, however instead of transferring the land to himself he instituted a criminal case being MCCR No. E497 of 2023 against the respondent on the basis that the title deed was fake. The appellant thereafter proceeded to institute civil claim against the respondent for the sum of Kshs. 5 million. It is therefore evident that since the appellant instituted the claims against the respondent he cannot now claim that the lower court rewrote the agreement. Furthermore, it would amount to unjust

enrichment for the court to allow the appellant keep both the title deed and seek the repayment of Kshs. 5 million.

25. On further perusal of the record, parties tried to settle the claim out of court but they failed to agree on the issue of depositing bankers cheques. The lower court on 6th June 2024 directed that the appellant deposit the security document, the title deed before the court by 2pm and the respondent deposit the bankers cheques in court by 2pm of the same day. The appellant failed to attend court thereafter for purposes of confirming compliance and the lower court directed that the cheques to be released to the respondent and the matter proceeded for hearing.

26. From the record, it is evident that the respondent owes the appellant Kshs. 5 million, a fact she admitted. She further intimated that she was ready and willing to pay the appellant back and produced bankers cheques to show her readiness to repay the entire loan on condition that the appellant returned her title deed.

27. It is not disputed that the lease for LR. No. SAMURU/MWINTIGIRI BLOCK 1/812 was offered by the appellant as security for the loan. The respondent testified that she gave the appellant the original title deed and she produced in evidence the certificate of lease in respect of land parcel SAMURU/MWITINGIRI BLOCK 1/812 which shows that she is the registered proprietor of the land. From the record, the respondent informed the lower court that the criminal case against her was withdrawn under Section 87(a) of the Criminal Procedure Code.

28. It is further not in dispute that the respondent admitted the debt she owes to the appellant and that she further told the court that she is ready and willing to pay the loan of KSh.5,000,000 as per the parties agreement dated 7th April 2022. The appellant said he handed over the title deed to the DCI who was handling the Criminal Case on failure to pay the loan. The appellant explained that the title deed was found to be fake and could not be released to the appellant. The title deed having been declared fake, it was a misdirection for the magistrate to tie the repayment of the loan with the fake title which the appellant did not receive back from the DCI. It was also a misdirection by the magistrate to order that cheques be given to the appellant for repayment of loan in that cheques could bounce for lack of sufficient funds in the account of the drawer. The appellant says the said cheques were never given to him as the order of the court tied them with the return of the title deed which was not available or in the hands of the appellant at the time judgment was delivered. With this kind of order, the appellant who had approached the court for a remedy was denied justice since the said order by its very nature and content was not capable of being implemented.

29. The entire loan was to be paid by 29/04/2022 as per the agreement of the parties. But when the respondent declared she was unable to repay the loan within the agreed period, the parties orally agreed to extend time for repayment which was not disputed. The variation of the

initial agreement was validated by the conduct of the parties. A payment of Ksh1,000,000/- as the accrued interest on loan was made by the respondent to the appellant after the variation of the agreement by the parties. It is noted that the respondent did not make any further repayments and this led to the filing of the recovery suit which is the subject of this appeal.

30. The counter-claim of the defendant was for specific performance by way of return of the title. The magistrate gave this order and tied it with the repayment of the loan which was a misdirection in my view. The appellant had given evidence that the title was fake and was not in his possession but in the hands of the DCI who had investigated the criminal case. The court ought to have known from the evidence of the parties that issue of an order for return of the title which was in the hands of the DCI and which could not be returned for want of authenticity, was not in the interest of justice for either party. Even assuming that the said security was authentic,

it did not make sense to return it to the respondent who had not repaid the loan. The respondent had given the land as security for the loan. The magistrate erred in giving the said order in favour of the respondent. The said order was unlawful, unimplementable and contrary to the parties' loan agreement.

31. The appellant submitted that the magistrate rewrote the parties agreement by issuing orders that contradicted the terms the agreement of the parties. Firstly, the return of the security before repayment of the loan (whether genuine or fake) had nothing to do with the parties agreement. The return of the title was premature since the agreement of the parties contemplated return after the respondent had fully paid the loan.

32. The agreement of the parties was that the loan would be repaid in cash as per clause 3. For the court to order that cheques be given to

    the appellant for payment was not within the agreement of the parties.

33. I am of the considered view that the magistrate rewrote the agreement for the parties in respect of the mode of repayment of the loan as well as the return of security which was beyond her judicial duty. The evidence of the parties was therefore, not taken into consideration and especially in regard to the content of the agreement.

34. Consequently, I find the appeal successful and hereby set aside the entire judgment of Hon. C. L. Adisa delivered on 11th September 2024.

35. I find that the evidence on record proves the case of the appellant on the balance of probabilities against the respondent. I enter judgment in favour of the appellant as follows: -

    a) That the respondent shall repay the loan advanced to her by the appellant of Kenya Shillings Five Million (Ksh.5,000,000) together with interest within 45 days.

    b) Upon full repayment of the loan, the appellant shall surrender the lease certificate to the respondent or in the alternative sort out the issue with the Thika DCI Office.

    c) That the appellant shall have the costs of the suit.

36. The appeal is hereby allowed.

37. It is hereby so ordered.

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

F. MUCHEMI

JUDGE