

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. E086 OF 2025

**ORIPHA KWAMBOKA OGECHI1ST
APPELLANT**

JAMES TISI2ND APPELLANT

VERSUS

**JOSIM INSTANTANEOUS CONSULTIUM LTD
RESPONDENT**

(Appeal from the Judgment dated 21/01/2025 delivered in Eldoret Small Claims Court Civil Case No. E2777 of 2024 by Hon. T.W. Mbugua-Adjudicator)

JUDGMENT

1. This Appeal arises from the Judgement delivered in the said Small Claims Court case in which the Respondent (as the Claimant) sought Judgment against the Appellants for breach of contract.
2. The background of the case is that by the Statement of Claim dated 15th November 2024, one Isaiah Sifuna Walubengo, the Respondent's Director pleaded that on or about the 17th August 2020, the Respondent entered into a loan agreement with the Respondent where to a loan to the tune of Kshs.611,212/= was advanced by the Respondent to paid in monthly instalments of Kshs.203,737/= as follows: Kshs.203,737/= to be paid on or

before 17th September 2020, Kshs.203,737/= to be paid on or before 17th October 2020 and Kshs.203,737/= to be paid on or before 17th November 2020.

3. It was his contention that since then, the Respondent has never received any amount from the Respondents and as a result, the Respondent suffered loss and seeks compensation from the Respondents. He added that as a result of the said breach by the Respondents, the Respondent has suffered loss and damage for which he holds the Respondents liable. He further pleaded that it was agreed that on default, a penalty of 15% per month would accrue. He reiterated that the Appellants have failed and/or neglected to pay the instalments as per the loan agreement and have failed to heed to their various calls and/or demand letters thus necessitating the filing of the suit. He maintained that the Respondents had therefore fundamentally breached the said contract and have as a result necessitated the filing of the suit for recovery of the same. He contended that due the failure to pay, they have lost many business opportunities which would have resulted into income. He thus urged the Court to declare that the Respondents are indebted to them and be ordered to pay. The Appellants did not enter appearance and did also not file their defense ad so that matter proceeded as unopposed.

4. By her Judgment delivered on 21st January 2025, the Adjudicator entered judgment in favor of the Respondent as per the Statement of Claim together with costs and interests at court rates. Aggrieved by the Judgment, the Appellant instituted this Appeal vide the Memorandum of Appeal dated 29th April 2025. The grounds upon which the appeal was premised are as follows:

- 1) **The learned trial Magistrate/Adjudicator erred in law by finding the Appellants liable under contract to pay the Respondent the alleged loan claimed in the Statement of Claim whereas there was no contract inter se between the Appellants and the Respondents.**
 - 2) **The learned trial Magistrate/Adjudicator erred in law by proceeding to hear and determine the suit when it was apparent from the pleadings that the Court had no jurisdiction to hear and determine the matter.**
 - 3) **The learned trial Magistrate erred in law and fact by arriving at a decision that the amount claimed was determinable.**
5. The Appeal was canvassed by way of written Submissions. The 1st Appellant filed the Submissions dated 13th October 2025 while the Respondent did not file any. An Affidavit of Service sworn by Anastacia W. Njuguna sworn on 24th June 2025 indicating that Respondent was served was filed.

1st Appellant's Submissions

6. On the issue that the Appellants were condemned unheard, Counsel submitted that the Appellants were never served with any pleadings from the Small Claims Court and only became aware of the matter after being served with execution documents and arrest warrants. Counsel further submitted that the right to a fair hearing is enshrined in **Article 50** of the **Constitution** and **Article 25(c)** as a non-derogable right. She cited the Supreme Court in the case of **Joseph Ndung'u Kamau vs. Charles Kibogo Gathua [2018] eKLR**. Counsel

submitted that the lack of service renders the entire proceedings null and void *ab initio* warranting the setting aside of the same as held in the case of **James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another [2016] e KLR.**

7. On the issue of lack of privity of contract, Counsel submitted that the 1st Appellant, Oripha Kwamboka Ongechi was not a party to the purported loan agreement forming the basis of the claim. Counsel asserted that the Claimant entered into a loan agreement with other third parties, including Mediheal Hospital and one Philip Makori Ndarera, to which the 1st Appellant was stranger. Counsel further submitted that the doctrine of privity of contract prevents a third party from being bound by obligations under a contract they did not enter into as was held in the case of **Agricultural Finance Corporation vs. Lengetia Ltd & Jack Mwangi [1985] KLR.**
8. On want of jurisdiction, Counsel submitted that the Small Claims Court lacks jurisdiction over a claim that is not founded on any cause of action against the 2nd Appellant. According to Counsel, the Court must determine whether the 2nd Appellant was a proper party and in the absence of any contractual nexus, the Court acted ultra vires. Counsel maintained that jurisdiction is everything and without it, any orders issued are void, citing the *locus classicus* **“Owners of Motor Vessel Lilian “S” vs. Caltex Oil Kenya Ltd [1989] KLR 1.**
9. Counsel submitted that execution is actively ongoing and that the Appellants face imminent arrest and deprivation of liberty due to a judgment rendered without their knowledge or participation. Counsel urged that the prejudice

caused by denying the Appellants the right to be heard is irreparable and unconstitutional.

10.In conclusion, Counsel reiterated that the Appellants were denied a fair hearing and condemned unheard in breach of their constitutional rights. Counsel contended that judgment was entered against a party who was not served and has no legal or contractual relationship with Respondent. According to Counsel, the Respondent misled the trial Court to obtain judgment. Counsel urged that the execution process must be halted to prevent a miscarriage of justice.

Determination

11.It is settled that a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, bearing in mind that it did not see the witnesses. (**See Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**). In this regard, having considered the evidence before the trial court, the memorandum of appeal, and submissions presented by the parties herein, I find that the issues that arise for determination are;

a. Whether the Appellants were condemned unheard.

b. Whether there is a valid contract between the Appellants and Respondents.

12.On whether the Appellants were condemned unheard, my perusal of the proceedings before the Subordinate Court indicate that when the matter came

before the said Court on 9th December 2024, the Appellants herein were not present and Counsel for the Respondent informed the Court that they had been served. Consequently, the Court gave a further date of 21st January 2025. On that material date, Counsel for the Respondent informed Court that Appellants herein had been served and availed an Affidavit of Service to that effect but they had not received any response from them. Counsel thus urged the Court to enter judgment in favour of the Respondent as per the Statement of Claim. The 1st Appellant herein maintained that she was not a party to the purported loan agreement forming the subject matter of this claim.

13. On record, is a copy of an Affidavit of Service sworn by George Wanyama, a Court Process Server dated 29th November 2024. That Affidavit shows that the 2nd Appellant herein, Mr. James Tisi was electronically served vide his telephone No. xxxxxxxx, pursuant to **Rule 13 of the Electronic Case Management Practice Direction Rules and Order 5 Rule 22C of the Civil Procedure (Amendment) Rules, 2020**. However, there is no indication that the 1st Appellant herein, Ms. Oripha Kwamboka Ogechi was served.

14. On whether there is a valid contract between the Respondents and the Appellant, The ***Black's Law Dictionary*** defines a contract as follows: -

An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

15. In **RTS Flexible Systems Ltd vs. Molkerel Alois Muller GmbH & Co, KG (UK Production) (2010) UKSC14**, [45] the Supreme Court of the United Kingdom stated that: -

...The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

16. In **Charles Mwirigi Miriti versus Thananga Tea Growers Sacco Limited and Another (2014) eKLR** the court of appeal stated that it is trite that there are three essential elements for a valid contract. That is an offer, acceptance and consideration. In this case there was a written contract between the 2nd Appellant and the Respondent herein which was listed in the Respondent's/Claimant's list of documents as Loan Agreement dated 17th August 2020.

17. In addressing my mind to the pleadings, the submissions and the proceedings before the trial court, I note that even as the Appellants in the Application the subject of this Ruling contend that they were condemned unheard for reasons

that they were never served with any pleadings from the Small Claims Court and that they only became aware of the matter after being served with the execution documents and arrests warrants, the court notes that this issue of lack of service has not at all been raised in their Grounds of Appeal filed. However, the position in law is that parties are bound by their pleadings which pleading. On Appeal the pleadings are as enunciated in the grounds of appeal in Memorandum of Appeal filed.

18. From the Memorandum filed by the Appellants, the court finds that the issue of lack of service of the Statement of Claim upon the Appellants is not one of the grounds upon which the appeal is premised. It is in fact the foundation of the 1st Appellant's assertion that she particularly was condemned unheard. However, for reasons that this assertion is not founded upon any of the grounds of appeal in the Appellant's Memorandum of Appeal, it is my considered opinion that the submissions by Counsel on this issue have no legs to stand on for reasons that there is no foundation and/or scaffolding upon which the same is anchored. The same are therefore misconceived. In this regard, Appellant's contention that they were condemned unheard is without merit and the same is accordingly dismissed.

19. Even as the court notes that the 1st Appellant in her submissions seems to be speaking for herself to the exclusion of the 2nd Appellant, the record shows that the Appeal has been filed by both parties who were sued before the trial court as defendants and against whom judgement was entered. The Appeal is grounded on the assertion that the learned trial Magistrate/Adjudicator erred in law by proceeding to hear and determine the suit when it was apparent from the pleadings that the Court had no jurisdiction to hear and determine the matter and

further erred in law and fact by arriving at a decision that the amount claimed was determinable has no basis.

20. On these twin grounds, the record of the trial court shows that an Agreement between the Respondent and the 2nd Appellant that duly signed by both parties was availed to court. Therein, the loan amount that was the subject matter of the suit before the trial court was advanced. This is a fact that was not at all rebutted and/or denied by the Appellants for want of appearance and/or defence on their part and this being the case, judgement was entered in favor of the Respondents. This being the case, I find that this ground lacks merit.

21. Moreover, the court also notes that the decretal sum of Ks. 1, 000, 000/- which the trial court awarded in favor of the Respondent is very well within the pecuniary jurisdiction of the Small Claims Court. In light of the above, it is my finding that the Applicant's Application lacks merit in its entirety and the same is accordingly dismissed with costs to the Respondent.

Read dated and Signed at ELDORET on 19th March 2026

E. OMINDE

JUDGE

