REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E598 OF 2025

ONTIME LENDING COMPANY.....APPELLANT

VERSUS

CHARLES MAIMBA KAMAU.....RESPONDENT

(Being an Appeal from the Ruling of Hon. Nkurunnah Namunyak (Adjudicator) delivered on 31st January 2025 in Milimani Small Claims Court Case No. SCCCOMM E5632 of 2023)

JUDGMENT

1. The Appellant herein sued the Respondent before the Small Claims Court seeking recovery of Kshs. 452,300, being the alleged outstanding balance arising from a loan agreement between the parties.
2. According to the Appellant, the Respondent obtained a business loan of Kshs. 300,000 on 28th September 2020.
3. The Appellant asserted that the Respondent defaulted in the loan repayment, and that as at 16th May 2022, the outstanding amount had risen to Kshs. 452,300 inclusive of interest.

4. The Respondent filed a response denying liability and contended, inter alia, that there was no proof that the alleged loan had been disbursed and that the Appellant had not demonstrated how the claimed interest was calculated. The Respondent added that the Appellant had not shown the amounts allegedly repaid.
5. After hearing the matter, the Small Claims Court delivered judgment on 14th December 2023 dismissing the claim with costs to the Respondent. The trial court held that the Appellant had failed to prove disbursement of the loan, repayment history and computation of interest.
6. Dissatisfied with the judgment, the Appellant filed an application dated 22nd January 2024 seeking review of the said judgment delivered on 14th December 2023.
7. The said application was dismissed in a ruling delivered on 7th March 2024 where the court held that the application constituted an abuse of the court process.
8. Following the said dismissal, the Appellant filed another application dated 20th March 2024, seeking review of the ruling delivered on 7th March 2024.
9. In a ruling delivered on 31st January 2025, the learned Adjudicator dismissed that application on the ground that it was res judicata thereby precipitating the filing of the present appeal challenging both the reasoning and determination of the trial court.
10. The Appellant raised several grounds of appeal the substance of which may be summarized as follows: -

a) ***The learned Adjudicator erred in law and fact in holding that the application dated 20th March 2024 was res judicata.***
b) ***The learned Adjudicator failed to appreciate that the application dated 22nd January 2024 sought review of the judgment, whereas the application dated 20th March 2024 sought review of the ruling delivered on 7th March 2024.***
c) ***The learned Adjudicator erred in law in invoking the doctrine of res judicata where the issues raised in the subsequent application had not been previously determined.***
d) ***The learned Adjudicator failed to consider that the application before her was unopposed.***
e) ***The learned Adjudicator misdirected herself in law by treating the two applications as identical when they sought review of different orders.***

11. My reading of the grounds of appeal shows that it primarily raises the question whether the doctrine of res judicata, as codified under Section 7 of the Civil Procedure Act (CPA), was properly invoked by the trial court.

12. The Appellant contends that the learned Adjudicator misdirected herself in law by finding that the application dated 20th March 2024 was barred by res judicata when the said application sought to review a different ruling

from that which had previously been the subject of review proceedings.

13. The Respondent did not participate in this appeal however, this being a first appeal, this court is obligated to reconsider the evidence and reach its own independent conclusion.

14. In ***Board of Trustees National Social Security Fund vs. Michael Mwalo*** **[2015] eKLR**, the Court of Appeal stated:

> ***"Being a first appeal, the court has a duty to re-evaluate and re-examine the evidence adduced before the trial court and arrive at its own independent determination."***

15. This court must therefore re-evaluate the material on record while bearing in mind that it did not have the advantage of hearing the witnesses.

16. Having considered the record of appeal, the pleadings, and the submissions I find that the main issue for determination is whether the application dated 20th March 2024 was barred by the doctrine of res judicata.

17. The doctrine of res judicata is codified under Section 7 of the Civil Procedure Act, which provides that:

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties… and**

has been heard and finally decided by such court."

18. The doctrine is founded upon the public policy principle that litigation must come to an end.

19. In ***Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others*** **[2017] eKLR**, the Court of Appeal explained that:

> ***"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed by issues and suits that have already been determined."***

20. The essential elements of res judicata are therefore:
    1. *The matter in issue must be directly and substantially in issue in the former suit.*
    2. *The former suit must have been between the same parties.*
    3. *The issue must have been heard and finally determined.*

21. The central question is whether the issues raised in the application dated 20th March 2024 were the same issues that had previously been determined.

22. The record shows that the application dated 22nd January 2024 sought review of the judgment delivered on 14th December 2023.

23. In contrast, the application dated 20th March 2024 sought review of the ruling delivered on 7th March 2024.
24. I find that the two decisions were distinct as one concerned the substantive judgment, while the other concerned the dismissal of the review application.
25. It is trite that for res judicata to apply, the issue raised must have been directly and substantially determined in the earlier proceedings.
26. In ***John Florence Maritime Services Ltd vs. Cabinet Secretary for Transport & Infrastructure*** **[2015] eKLR**, the Court of Appeal held:

> ***"Res judicata bars not only issues that were raised and determined but also those that ought to have been raised in the earlier proceedings."***

27. However, that principle only applies where the issues relate to the same subject matter.
28. In the present case, the second application sought to review a different order.
29. Consequently, I find that the subject matter of the two applications cannot be said to be identical.
30. The Appellant also relied on the principle of error apparent on the face of the record. In ***Draft and Develop Engineers Ltd vs. National Water Conservation and Pipeline Corporation*** **[2011] eKLR** observed:

"There is a real distinction between a mere erroneous decision and an error apparent on the face of the record."

31. The court further held:

"An error which has to be established by a long drawn process of reasoning cannot be said to be an error apparent on the face of the record."

32. I note that while the merits of the review application were not fully canvassed before this court, it is clear that the trial court dismissed the application without addressing whether such error existed.

33. The Appellant also contended that the trial court dismissed the application *suo motu* despite the Respondent not filing any response. A perusal of the record reveals that the application was indeed unopposed. My take is that while courts have jurisdiction to raise jurisdictional issues on their own motion, they must still apply the law correctly.

34. I note that in the present case, the learned Adjudicator appears to have invoked the doctrine of res judicata without fully interrogating whether its legal elements had been satisfied. To my mind, this constituted a misdirection in law.

35. Having carefully reconsidered the record, this court finds that the application dated 20th March 2024 sought

review of a different order from that which had previously been the subject of review proceedings. This means that the issues raised in the application had not been previously determined and that the doctrine of res judicata was therefore wrongly applied.

36. It is my finding that the learned Adjudicator misdirected herself in law in dismissing the application.

37. Consequently, I find that the instant appeal is merited and I therefore allow it in the following terms: -

a) The ruling delivered on 31st January 2025 in SCCCOMM No. E5632 of 2023 is hereby set aside.

b) The application dated 20th March 2024 shall be heard afresh before a different adjudicator of the Small Claims Court.

c) The Appellant shall have the costs of this appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF APRIL, 2026.

HON. W. A. OKWANY

JUDGE

16/04/2026

FOR APPELLANT Mis Katasi fo Ms Nachuka

FOR THE RESPONDENT No appearance

COURT ASSISTANT Abdirizak

File closed

Lower Court file be sent back to the Lower court