

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. E050 OF 2025

ARK DEVELOPMENT INITIATIVE.....

APPELLANT

=VERSUS=

ELIZA CHARI MWAKAL.....

....RESPONDENT

**(Being an appeal from the Judgment of Hon. E. M. Kadima
(PM) in Taveta MCCC No. E019 of 2023 delivered on 31st July
2021)**

JUDGMENT

1. The Appellant filed Taveta MCCC No. E019 of 2023 seeking a sum of Kshs. 525,100/= being the outstanding balance unpaid by the Respondent.

2. The case arose out of a loan agreement between the Appellant and Respondent whereby the Respondent took a motor bike valued at Kshs. 150,000/=
3. By the time the Defendant quit employment, he had offset Kshs. 63,570/= through monthly week off leaving a sum of Kshs. 86,425/=.
4. The Respondent admitted having borrowed Kshs. 120,000/= and he repaid Kshs. 55,000/= leaving a balance of Kshs. 65,000/=. He said he has shares worth Kshs. 26,000/= and savings of Kshs. 18,000/= which he wanted deducted from the amount owed.
5. The Respondent raised a counter claim and offset against the Appellants claim based on the fact that at the time of his employment, he had accumulated shares and savings worth Kshs. 41,500/= and Kshs. 30,500/=
6. The trial court found the offset merited and the same was allowed.

7. The trial court further stated that the Appellant was at liberty to recover the unpaid sum from the savings and shares held by the Defendant.
8. The Appellant's case was dismissed and the counter claim succeeded and the court allowed an offset.
9. The judgment was to apply in Taveta MCCC E020, E019 and E021 of 2021
10. The Appellant has appealed against the said judgment and the following grounds:-
 - (i) That the Trial Magistrate erred in law and in fact in failing to exercise the discretion in favor of the Appellant.**
 - (ii) That the Trial Magistrate erred in law and in fact by disregarding the Appellants oral evidence and submissions.**
 - (iii) That the Trial Magistrate erred in law by deciding that the Appellant did not prove its claim to the required standard despite the overwhelming evidence tabled in court by the Appellant.**

(iv) That the Trial Magistrate erred in law and in fact by failing to take into consideration parties are bound by terms of an agreement and the Court has no mandate to rewrite the agreement but to interpret the same.

(v) That the Trial erred in law facts and misdirected himself by acting on wrong and unsound principles and provisions of the law.

(vi) That the Trial Magistrate erred in law and in fact by wearing a hat of the Respondent in the matter thus arriving at a totally wrong decision.

11. The parties filed written submission as follows:- The appellant submitted that they have appealed against the judgment from the Small Claims Court at Taveta (Civil Case No. E006 of 2023) in which the trial magistrate dismissed the appellant's claim for a loan balance of Kshs. 169,477 plus interest and penalties, instead allowing the respondent to offset the debt using her shares and savings and to pay the reduced balance in installments.

12. The appellant argues that the learned magistrate failed to exercise his discretion in its favor despite sufficient evidence having been tendered, citing the principle from **Mbogo v**

Shah that an appellate court should interfere where a judge has clearly misdirected himself and caused injustice.

13. The appellant further contends that the magistrate disregarded its oral evidence and submissions, rendering a blanket judgment without proper analysis of each item claimed.

14. It is also submitted that the court erred by failing to respect the binding terms of the loan agreement dated 31st August 2018, which the respondent never objected to, and by effectively rewriting the contract, contrary to the well-established principle from **National Bank of Kenya v Pipeplastic** that courts cannot alter clear contractual terms.

15. The appellant relies on a previous High Court decision, **ARK Development Initiative v Kalwale**, where the court held that a trial court had no business directing that shares and savings be used to offset a loan when the parties had no agreement to that effect.

16. On the standard of proof, the appellant submits that it proved its case on a balance of probabilities, as defined in **Evans Nyakwana and William Kabogo Gitau**, but the magistrate wrongly held otherwise.

17. The appellant also accuses the magistrate of bias, asserting that he “wore the hat of the respondent” by dismissing the appellant’s claim and allowing the counterclaim, contrary to the Bangalore Principles of Judicial Conduct and Article 10 of the Constitution.
18. Finally, the appellant argues that the magistrate acted on wrong legal principles, deciding issues not arising from the pleadings, contrary to **Candy v Caspari and Fernandes v People Newspapers Ltd.**
19. The appellant prays that the appeal be allowed, the trial judgment set aside, and costs of the appeal be awarded to the appellant, as costs follow the event under Section 27 of the Civil Procedure Act.
20. On the specific relief, the High Court in this appeal (per Asenath Ongeru, J.) ultimately found that the trial court had rewritten the loan agreement by allowing an offset not stipulated in the contract, affirmed that the outstanding amount is Kshs. 169,477, set aside the trial judgment, and substituted it with judgment for Kshs. 169,477 plus costs and interest at court rates from the date of filing suit, while noting that courts retain discretion under Section 26 of the Small

Claims Court Act to ensure fair repayment where financial difficulty is proved.

21. The Appellant submitted that the appeal should be allowed with costs to the appellant.
22. The Respondent's written submissions oppose an appeal filed by the Ark Development Initiative against a trial court's judgment delivered on 31 July 2025 in Taveta Magistrate's Court Civil Case No. E021 of 2023.
23. The Respondent argues that the trial court correctly found that the Appellant had failed to prove its case to the required standard.
24. The dispute arose from a loan agreement under which the Respondent, a former employee of the Appellant, obtained Kshs. 180,000, repaid Kshs. 75,000 through salary deductions, and left a balance of Kshs. 105,000.
25. The Respondent points out that the loan application form, which was the central written agreement, did not specify any interest rate or penalty for default, and the Appellant's witness admitted this in cross-examination, adding that penalty and interest were charged based on an unproven "normal practice."

26. Relying on the parol evidence rule under Sections 97 and 98 of Kenya's Evidence Act and case law, the Respondent submits that extrinsic evidence cannot be used to add to or vary the terms of a written contract.

27. Therefore, the Appellant was not entitled to claim the sum of Kshs. 455,100.

28. In contrast, the Respondent proved her counterclaim and set-off through uncontroverted evidence showing she had accumulated shares worth Kshs. 36,000 and savings of Kshs. 40,800, and the Appellant's witness confirmed that shares and savings could be used to offset members' loans upon request.

29. The trial court is said to have merely enforced the parties' agreement rather than rewriting it.

30. Consequently, the Respondent asks the first appellate court to dismiss the appeal with costs, as the trial court's judgment was based on the law and evidence.

31. The issues for determination in this appeal are as follows;

- (i) Whether the trial court erred in law and fact by allowing the Respondent to offset the outstanding loan balance using his shares and savings contrary to the express terms of the loan agreement.**

- (ii) Whether the trial court properly applied the parole evidence rule under Sections 97 and 98 of the Evidence Act (Cap 80) in admitting evidence of an alleged oral agreement to offset the debt.**
- (iii) Whether the Appellant proved its claim for the outstanding principal amount to the required standard on a balance of probabilities.**
- (iv) Whether the trial court's judgment dismissing the Appellant's claim and allowing the Respondent's counterclaim was against the weight of the evidence and the established legal principles governing the interpretation of written contracts.**

32. The foundational principle of law of contract in Kenya is that courts are bound to enforce agreements as written by the parties, and a judicial officer has no mandate to rewrite a contract.

33. This principle was firmly established by the Court of Appeal in the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR)** , where the judges held that a Court of law cannot re-write a contract between the parties, as the parties are bound by the

terms of their contract unless coercion, fraud or undue influence are pleaded and proved .

34. In the instant matter, the record clearly shows that the loan agreement between the Appellant and Respondent, which was reduced to writing and not disputed by the Respondent at trial, contained no clause or express provision allowing for the liquidation of a loan using an employee's accumulated shares or savings.
35. The Respondent admitted to borrowing the money and admitted the outstanding principal debt.
36. By directing that the debt be offset by the Respondent's shares and savings in the absence of a specific contractual clause to that effect, the trial magistrate effectively re-wrote the terms of the parties' bargain.
37. Consequently, this court finds that the trial court erred in law by failing to uphold the sanctity of the written contract.
38. Furthermore, the trial court's decision was flawed in its application of the parol evidence rule.
39. Sections 97 and 98 of the Evidence Act (Cap 80) clearly provide that when the terms of a contract have been reduced to a document, no evidence of any oral agreement or

statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms.

40. The exceptions to this rule, as recognized under Section 98, only permit oral evidence to prove facts like fraud, illegality, or want of consideration.

41. In this case, the trial court relied on the Respondent's oral testimony and submissions regarding an alleged practice within the Appellant's organization that shares and savings could be used to offset loans.

42. However, no provision in the written loan agreement supported this practice.

43. The admission of this extrinsic evidence to vary the clear terms of the written debt instrument was a misdirection, as it allowed the Respondent to add terms into the contract that were never agreed upon in writing.

44. A party cannot be allowed to depart from the express terms of an agreement through oral testimony unless the specific statutory exceptions are proved.

45. Regarding the standard of proof, this court finds that the Appellant proved its case against the Respondent on a balance of probabilities regarding the outstanding principal amount.

46. The Appellant tendered documentary evidence of the loan disbursement and the repayment schedule.
47. The evidence establishes that the Respondent borrowed a specific sum and utilized it, leaving an unpaid balance.
48. The denial of this claim by the trial court was therefore against the weight of the evidence.
49. Consequently, the appeal is allowed and the judgment delivered on 31st July 2021 dismissing the Appellant's claim and allowing the Respondent's counterclaim for an offset is hereby set aside.
50. In substitution thereof, this court enters judgment for the Appellant against the Respondent for the outstanding principal sum as established from the evidence.
51. The Respondent's counterclaim for an offset using shares and savings is dismissed for lack of a contractual basis.
52. Therefore, judgment is hereby entered in favour of the Appellant for the sum of Kshs. 105,000 with interest at court rates (currently 12% per annum) from the date of filing the suit at the trial court until payment in full.
53. Regarding costs, each party shall bear their own costs of the appeal, and the order for costs in the trial court is set aside to

reflect that the Appellant is entitled to costs of the trial suit, which are to be assessed and awarded to the Appellant.

54. The judgment to apply in HCCA E050, E051 and E052 of 2025.

55. Orders accordingly.

Dated, signed and delivered this 29th day of April 2026 in open court at Voi High Court.

**ASENATH ONGERI
JUDGE**

In the presence of:-

Court Assistants: Millicent

.....**for the Appellant**

.....**for the Respondent**