

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL APPEAL NO. E019 OF 2024

PETER KOLEE AMOTHE.....

.....APPELLANT

VERSUS

KIMANI

MWANGI.....RESPONDENT

***(Being an Appeal from the Judgment and Decree in
Rumuruti CMCC No. E012 of 2013 delivered by Hon. K.E
Kithinji (RM) on 4th June 2024)***

JUDGEMENT

- 1.** By way of a plaint dated 31st July 2023, the Plaintiff sought the following orders in the trial court;
 - a) Special damages of Kshs. 450,500/-**
 - b) General damages for breach of contract.**
 - c) Costs of the suit and interest.**

- 2.** The Plaintiff's case was that on or about the 5th of August, 2016, the Plaintiff entered into an agreement with the Defendant herein where the Defendant acknowledged to be

owing, and undertook to pay to, the Plaintiff a sum of Kshs. 225,000/- which monies was payable by 30th of July, 2017. That the Defendant defaulted in payment of the said sums of money and is therefore in breach of the contract of 5th August, 2016. He pleaded that by virtue of the breach, the Defendant owes the Plaintiff the principal agreement amount plus interest and special damages which he particularised.

- 3.** The Respondent failed to enter appearance or file a defence even when the court granted him leave to do the same. The court then entered interlocutory judgment on 19th March 2024 and the matter proceeded for formal proof.
- 4.** It was the Appellants' testimony that he lent the respondent Kshs. 300,000 vide an agreement entered into on 5th August 2016 and the defendant was to pay the money back by 30th July 2017. He produced the demand letter of 17th July 2023 and asked the court to allow the claim.
- 5.** The trial court considered the evidence and the pleadings and held that the suit was filed after the end of six years contrary

to the provisions of section 4(1) of the Limitation of Actions Act. Consequently, the trial court dismissed the suit for being time barred.

6. Being dissatisfied with the judgment and decree of the trial court, the Appellant instituted the present Appeal vide a Memorandum of Appeal dated 3rd July 2024, premised on the following grounds;

- 1) **That the learned trial Magistrate erred in both law and in fact in dismissing the Appellant's suit before the trial court when the same was meritorious.**

- 2) **That the learned trial Magistrate erred in both law and in fact and thus occasioned grave miscarriage of justice to the Appellant in failing to take into consideration the provisions of Order 50 Rule 3 of the Civil Procedure Rules.**

- 3) **That the learned trial Magistrate erred in both law and in fact and thus occasioned grave miscarriage**

of justice to the Appellant by failing to consider the Plaintiffs final written submissions dated 6th May, 2024 without supplying grounds for the same.

4) That the learned trial Magistrate erred in law and fact and manifested immense bias in completely disregarding the evidence produced by the Appellant and instead was motivated by irrelevant matters that do not meet the ends of justice.

5) That the trial Magistrate's judgement in this matter was unjust, oppressive and not founded on sound principals of the law or otherwise.

7. The Appeal was canvassed by way of written submissions. The Appellant filed submissions dated 21st July 2025 through the firm of Wanjira Mwaniki & Co Advocates.

Appellants' Submissions

8. Counsel for the Appellant identified the issues for determination and proceeded to submit on the same. Under

the head of whether the Suit was filed within time, Counsel cited Section 4(1)(a) of the Limitation of Actions Act, urging that in the present case, the agreement dated 5th August 2016 required the Respondent to repay the sum of Kshs. 225,000 by 30th July 2017. That the cause of action therefore accrued on 31st July 2017, being the date of default. The Appellant filed the trial court suit on 31st July 2023, exactly six years from the date the cause of action accrued. Thus, the suit was properly instituted and within the relevant timelines.

9. Counsel urged that even if it could be argued that the deadline for filing the suit was 30th of July, 2023 as was held by the trial court, the said 30th July 2023, fell on a Sunday when court registries were closed as a result of which the Appellant filed the suit on the very next day when the registries were open. He cited Order 50 Rule 3 of the Civil Procedure Rules. Counsel further submitted that the High Court has consistently upheld this provision, citing **Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999]**, **Hussein Dairy Transporters Ltd v Board of Trustees Teleposta Pension Scheme [2017]** eKLR and the Court of Appeal

in Kenya Revenue Authority v Export Trading Co. Ltd [2013] eKLR. Counsel therefore urged that it is therefore clear that the learned trial magistrate erred by failing to apply Order 50 Rule 3, contrary to express provisions of statute and binding precedent.

10. On whether a party should benefit from their own breach, Counsel urged the law is equally clear that courts must not aid a party to profit from their own breach of contract. That this principle is well captured by the equitable maxims *ex turpi causa non oritur actio* and *nullus commodum capere potest de injuria sua propria*. She cited **Savings & Loan Kenya Ltd v Odongo [1987] KLR 294** and **Mwangi v Mwangi & Another [1986] KLR 328**. Counsel urged that the Respondent freely admitted the debt in writing. That to dismiss the claim on a mere procedural technicality enables him to benefit from defaulting, which equity does not permit.

11. Counsel urged that the law is settled that a court will not rewrite a contract freely entered into by parties unless fraud, coercion or undue influence is proved. She cited **National**

Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2002] 2 EA 503 and Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR and urged that in this case, the Respondent voluntarily signed a clear loan agreement before an advocate, with no allegations of fraud or coercion. That Section 3(3) of the Law of Contract Act upholds such written contracts where monetary obligations exceed Kshs. 200.

12. Counsel submitted that Article 159(2)(d) of the Constitution obligates courts to administer justice without undue regard to procedural technicalities. That the trial court's narrow reliance on limitation, while ignoring Order 50 Rule 3 and the clear merits, was contrary to this constitutional duty. Reliance was placed on the decision in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2013] eKLR** in this regard.

13. Counsel urged that the Respondent cannot demonstrate any prejudice from the suit being determined on its merits. That the debt is clear and unpaid. The dismissal unjustly enriches

the Respondent at the expense of the Appellant, contrary to fairness and good conscience.

14. The task of a first appellate court was summarized in **Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR** as follows:

“This being a first Appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

15. The sole issue for determination is; Whether the trial court erred in finding that the suit was time barred.

16. The cause of action in the trial court arose from the agreement dated 5th August 2016 between the parties being an agreement for a loan of Kshs. 225,000/-. The agreement was that the principal sum was to be paid back by 30th July 2017

and upon default, the Appellant instituted the suit in the trial court on 31st July 2023.

- 17.** The first port of call is to establish when the breach occurred. Given that the date when payment was to be made was 30th July 2017, that is the date that the breach occurred as a result of payment not having been made by said date. It follows that in computing the time, this is the starting point. The trial court correctly determined that the date of breach was 30th July 2017.
- 18.** The Limitation of Actions Act provides for Limitation of time for a cause of action arising from a contract as follows;

4. Actions of contract and tort and certain other actions (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued;

(a) actions founded on contract;

- 19.** In my calculation, the period of time from 30th July 2017 to the date when the plaint was filed in court; 31st July 2023, was 6 years and one day. Thus the suit was time barred by 1 day.
- 20.** The Appellant argues that the trial court erred as it failed to apply the provisions of Order 50 Rule 3 in computing the time. This argument is spot on. **Order 50 Rule 3** of the Civil Procedure Rules provides as follows;

Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

- 21.** I find that the trial court erred in its computation of time by not taking into consideration the provisions of **Order 50 Rule 3** whereby had the court appreciated the import of this law, it

would have reached the finding that since the last day in the limitation of time fell on a Sunday, it was legally open for the Appellant to file the suit on 31st July 2023. To that extent, the trial court fell to a grave error.

22. The upshot of the foregoing is that the appeal herein has merit. The judgment dated 4th June 2024 is set aside and substituted with the following orders;

1) Judgment is entered in favour of the Appellant against the Respondent for the sum of Kshs. 225,000/- and interest accrued at 14% per annum from 5th August 2016 till payment in full.

2) Costs of the suit and of the Appeal to the Appellant.

Dated signed and delivered virtually this 14th day of May

2026

A.K. NDUNG'U

JUDGE