

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMMERCIAL APPEAL NO. E239 OF 2023

FINCREDIT LIMITED.....

APPELLANT

AND

GABRIEL DZUYA CHENGA.....

RESPONDENT

***(Being an appeal from the Judgement and Decree of Hon. J.W
Munene, RM/ Adjudicator dated 25th August 2023 at the Small
Claims Court, Nairobi in SCC Claim No.E4031 of 2023)***

JUDGMENT

Introduction and Background

1. In a judgment by the Small Claims Court dated 25th August 2023, the Appellant's claim for Kshs. 282,000.00 against the Respondent was dismissed. The Appellant is aggrieved with this judgment and appeals against it to the court through its Memorandum of Appeal dated 25th September 2023 which appeal has been canvassed by

way of written submissions. Before delving into the appeal, I believe a brief highlight of the case as presented before the subordinate court is apposite. In its Statement of Claim, the Appellant averred that on or about 24th June 2014, it advanced the Respondent a loan facility of Kshs. 300,000.00 for development purposes and that the loan was for a period of twelve (12) months from 24th June 2014 to 24th May 2015, payable in monthly instalments. That the loan agreement stipulated an accruing interest charge at the rate of 5% per month on any outstanding amount and the Respondent partially repaid the loan but neglected and/or refused to fully settle the instalments.

2. The Appellant claimed a total of Kshs. 282,000.00 with Kshs. 171,000.00 being the outstanding loan balance and Kshs. 111,000.00 being the accrued loan penalty for late repayment calculated as at 14th November 2022 at the contractual interest rate of 5% per month. The Appellant also sought interest on the outstanding amount at court rates from 14th November 2022 until payment in full and costs of the claim.
3. The Respondent did not file any response to the claim but the subordinate court mandated the Appellant to file written

submissions on the claim nevertheless. In its judgment, the subordinate court found that while the Appellant produced a Loan Application Form, Disbursement Charges Advice, and Payment Details, it failed to produce any proof that the loan monies were actually disbursed. Specifically, the subordinate court noted the absence of an *M-Pesa* statement, cash voucher, or bank statement from either the Appellant's bank or the Respondent's bank showing the money was deposited.

4. The subordinate court held that the Disbursement Charges Advice and Payment Details were "**books of account regularly kept in the course of business...**" by the Appellant and, under **section 37** of the **Evidence Act**, cannot alone be sufficient evidence to hold the Respondent liable. The subordinate court relied on the Court of Appeal decision in **Five Continents Ltd v Mpata Investments Ltd [2003] KECA 156 (KLR)** to support this position. The subordinate court further noted that the Loan Application Form and Payment Details were in the name of "*AAR Credit Services Ltd*," but the Appellant was now "*Fincredit Limited*" and it found there was no evidence that had been produced by the Appellant of change of name.

5. For the above reasons, the subordinate court found that the Appellant had failed to discharge the evidentiary burden of proof under **section 107** of the **Evidence Act** as read together with **section 37** of the same **Act** and the claim was therefore dismissed with no order as to costs.
6. As stated, the judgment forms the basis of the instant appeal to which I now turn and I note that the Respondent did not participate in the same.

Analysis and Determination

7. The court's jurisdiction in dealing with appeals from the Small Claims Court is limited by **section 38(1)** of the **Small Claims Court Act(Chapter 10A of the Laws of Kenya)** which provides that '**A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.**' A court limited to matters of law is not permitted to substitute the subordinate court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (**John Munuve Mati v Returning**

Officer Mwingi North Constituency, Independent Electoral and Boundaries Commission & Paul Musyimi Nzengu [2018] KEHC 8738 (KLR)]

8. The Appellant submits that **section 27** of the ***Small Claims Act*** allows the court to enter judgment for the claimant when a respondent fails to respond within the prescribed period and that the dispute involved a liquidated claim which the Respondent never denied. That in the absence of any defence or counterclaim, the trial court had no basis to dismiss the suit. It contends that the Respondent was properly served but failed to enter appearance, the Appellant's evidence was uncontroverted due to the Respondent's default and that in civil cases, the standard of proof is balance of probabilities, which the Appellant met.
9. The Appellant further submits that **section 32** of the ***Small Claims Act*** excludes strict rules of evidence in the Small Claims Court and that the court can admit any credible or trustworthy evidence, even if inadmissible in other courts. It faults the subordinate court for wrongly requiring strict proof through bank statements and M-Pesa statements instead of relying on the loan agreement and disbursement records produced. It submits that

parties are bound by their pleadings and that the court cannot assume facts not pleaded. It accuses the subordinate court of wearing the shoes of the Respondent by raising issues the Respondent never raised. For these reasons, the Appellant urges the court to allow the appeal, set aside the subordinate court's judgment and substitute it with judgment in favour of the Appellant as prayed in its Statement of Claim. It also seeks costs of both the appeal and the subordinate court proceedings

10. I have gone through the record and the Appellant's submissions. As stated, the subordinate court dismissed the claim because there was no proof of actual disbursement of the loan and that the disbursement documents were the Appellant's own internal records, which under **section 37** of the ***Evidence Act*** "***shall not alone be sufficient evidence to charge any person with liability***". Further, that there was no evidence of the change of name from *AAR Credit Services Limited* to *Fincredit Limited*. These are findings of fact based on an evaluation of the evidence presented and as I have highlighted before, this court cannot re-evaluate the weight of that evidence unless the findings are so perverse that no reasonable tribunal would have arrived at them.

11. In any event, I find that the Appellant has totally misconstrued the effect of default of appearance and filing of a defence. The learned magistrate was properly guided by superior court decisions when she held that the burden remains on the plaintiff to prove their case on a balance of probabilities, even in a formal proof hearing, and that it is not automatic that uncontroverted evidence means the claimant wins as they must still discharge the burden of proof (see **Karugi & another v Kabiya & 3 others [1983] KECA 38 (KLR)**, **Avtar Singh Bahra & Amarjit Kaur Bahra v Raju Govindji Ganatra T/A Sweetbite Manufacturers [2001] KEHC 375 (KLR)**] and **Motex Knitwear Limited v Gopitex Knitwear Mills Limited [2009] KEHC 4017 (KLR)**). The Appellant's submission that once the Respondent has failed to enter appearance, a default judgement should be entered without necessitating it to the look of the substratum of the case at all is plainly wrong in law. Even undefended claims require formal proof especially where, as here, the claim dates back to 2014 and the documentary evidence has evidentiary weaknesses.

12. I note that the Appellant has also relied on **section 32** of the ***Small Claims Act***

which provides as follows:

32. Exclusion of strict Rules of evidence

(1) The Court shall not be bound wholly by the Rules of evidence.

(2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.

(3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.

(4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.

(5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.

(6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.

(7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.

13. From my reading of the aforementioned provision, whereas it allows the subordinate court to admit evidence that might otherwise be inadmissible, it does not lower the standard of proof which is that on a balance of probabilities and it does not excuse a claimant from producing credible evidence. The subordinate court did admit the Appellant's documents but it simply found them insufficient to prove disbursement. This was a finding of weight of evidence, not admissibility of the said evidence and I find that the learned magistrate explicitly cited **section 107** of the **Evidence Act** on the burden of proof and **section 37** of the **Evidence Act** on the weight of evidence in arriving at its decision. It further cited the Court of Appeal decisions in **Karugi(supra)**

asserting that the burden of proof remains with the Appellant as the claimant and; ***Five Continents Ltd(supra)*** that accounts analysis alone has no evidential value. I find these to be correct statements of law and the subordinate court did not misdirect itself on the law as it applied binding authorities appropriately to the facts before it. The Appellant produced a loan application and internal disbursement advice, but nothing from the banking system such as *M-Pesa*, bank transfer, cheque, cash voucher showing the Respondent actually received Kshs. 300,000.00 in 2014. A reasonable tribunal could certainly conclude that this is insufficient proof, especially given the passage of time and the name change issue.

14. In summary, it is my finding that the Appellant is essentially asking this Court to re-evaluate the sufficiency of the evidence which is an appeal on a matter of fact, not law. The subordinate court's judgment was sound, properly reasoned, and applied binding precedents.

Conclusion and Disposition

15. The upshot is that the appeal is devoid of merit and it is dismissed in its entirety but with no order as to costs.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this
8th DAY of MAY 2026**

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**J.W.W. MONGARE
JUDGE**

IN THE PRESENCE OF

1. Ms. Nyaloti holding brief for Mr. Kinyanjui for the Appellant
2. N/A for the Respondent
3. Amos- Court Assistant