

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**THE CIVIL APPELLATE DIVISION**  
***(Coram: A.C. Mrima, J.)***  
**HCCSCCC APPEAL NO. E133 OF 2025**

**-between-**

**KENNEDY**  
**NDAMBIRI.....APPELLANT**

**-versus-**

**FREDRICK**  
**AFWAYI.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. V.K. Momanyi RM/Adjudicator in Milimani Small Claims Court Commercial Case No. E44228 of 2025 delivered on 4<sup>th</sup> July 2025)*

**JUDGMENT**

**Background:**

1. *Fredrick Afwayi*, The Respondent herein, sought the recovery of Kshs. 400,000/- he claimed to have advanced *Kennedy Ndambiri*, the Appellant herein in *Milimani Small Claims Court Commercial Case No. E44228 of 2025* [hereinafter referred to as '**the suit**']. The Respondent characterized the money as a personal loan disbursed *via* various modes, including Mpesa.
2. In his defence, the Appellant herein contended that the funds were not a personal loan but rather a business investment by the Respondent intended to secure and execute a fibre installation tender from Prime Tech in Kiringiti, Kiambu. The Appellant maintained the funds were utilized for mandatory training required by the Kenya Power and Lighting Company (KPLC) and other operational expenses.
3. Upon hearing the dispute, the trial Court found in favour of the Respondent, concluding that the Appellant had failed to provide credible documentation to prove the existence of a business partnership. Aggrieved by this decision, the Appellant lodged the instant appeal.

## **The Appeal:**

4. Through a Memorandum of Appeal dated 10<sup>th</sup> July 2025, the Appellant challenged the whole of the trial Court's judgment on the following grounds: -
  1. *That the trial Magistrate/adjudicator erred in law by failing to properly consider and evaluate the weight of evidence tendered during trial in reaching a determination in favour of the respondent.*
  2. *That the trial Magistrate/adjudicator erred in law by reaching a determination that was not supported by either law or evidence.*
  3. *That the trial Magistrate/adjudicator erred in law by finding that the respondent had dispensed with the legal and evidential burden placed upon him during trial.*

## **The Submissions:**

5. The Appellant urged his case further through written submissions dated 5<sup>th</sup> August 2024. He argued that the trial Court erroneously shifted the legal and evidential burden of proof from the Respondent to him. He submitted that as the party seeking relief, the Respondent bore the initial burden to prove the transaction was a loan, which he failed to do in the absence of a written agreement or cogent evidence. To support the principles of the burden of proof, the Appellant relied on the Court of Appeal decision in *Mbuthia Macharia -vs- Annah Mutua & Anor* [2017] eKLR, which held that the legal burden remains constant while the evidential burden may shift during trial.
6. The Appellant further drew support from the case of *Evans Nyakwana -vs- Cleophas Bwana Ongaro* [2015] eKLR, to advance the argument that the legal burden lies upon the party who substantially asserts the affirmative of an issue pursuant to Section 107 of the Evidence Act. To that end, the Appellant submitted that an Mpesa transaction, without further evidence clarifying its basis, is insufficient to prove a loan on a balance of probabilities. The Appellant referred to the decision in *Patrick Peter Kithini -vs- Justus Mwangela* [2020] eKLR, where the Court

held that such transactions require additional evidence to establish the underlying agreement.

7. The Appellant further argued that the trial Court failed to appreciate the circumstances of the fibre installation tender and the training certificates on record, which corroborated the Appellant's version of events. In that regard, the Appellant cited *Manyara -vs- Odhiambo* (Civil Appeal E975 of 2023) [2024] KEHC 11880 (KLR), emphasizing that Courts must consider whether a personal relationship exists that would justify a soft loan *versus* a likely business link. Finally, the Appellant relied on the case of *Housing Finance Co. of Kenya Limited -vs- Gilbert Kibe Njuguna* Nairobi HCCC No. 1601 of 1999 to argue that the trial Court effectively endorsed a variation of the parties' actual agreement without a meeting of the minds.
8. The Appellant prayed that the appeal be allowed, the judgment be set aside and the suit be dismissed with costs.

#### **The Respondent's case:**

9. The Respondent did not file any response or submissions in opposition to the appeal. Nevertheless, this Court will proceed to examine the appeal.

#### **Analysis:**

10. Having considered the grounds of appeal, the Appellant's submissions, the submissions thereto alongside the record of appeal, the sole issue for determination is whether the trial Court's application of section 107, 108, 109 and 112 of the Evidence Act was sound.
11. This Court's jurisdiction is constrained by Section 38(1) of the Small Claims Court Act and to only matters of law. In ***M'bagine -vs- Nyaga*** (Civil Appeal 172 of 2019) [2026] KECA 335 (KLR), the Court of Appeal outlined its role as an appellate Court on a second appeal which appeal is limited to matters of law as follows: -

*.... For second appeals, this Court has repeatedly stated the limiting principle in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR and Stanley Maore v Geoffrey Mwenda [2004] eKLR: that interference with concurrent factual findings is not warranted unless the conclusions are plainly wrong in law on the recognized exceptions.*

*The same approach is reflected in Karingo v Republic [1982] KLR 213 and M’Riungu v Republic [1983] KLR 455, where the Court emphasised that a second appeal must be confined to points of law, and that a complaint about facts only becomes a point of law if the findings are unsupported by evidence or disclose a misdirection in principle.*

*The Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR restated that an issue may be one of law where there is a misapplication of legal principle or a conclusion not supported by the evidential record.*

12. In the case of **J N & 5 Others -vs- Board of Management, St. G School Nairobi & Another** [2017] eKLR, the Court discussed points of law in the following fashion: -

*... In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a “finding of fact”) usually depends on particular circumstances or factual situations.*

13. With the foregoing guidance, the issue at hand squarely comes out as a matter of law thereby seizing this Court with the requisite jurisdiction to deal with the appeal.
14. Having so said, and due to the centrality of this Court will reproduced Sections 107, 108, 109 and 112 of the Evidence Act in this appeal, a reproduction thereof is imperative, and as follows: -

**107. Burden of proof.**

(1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

**108. Incidence of burden.**

*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

**109. Proof of particular fact.**

*The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

**112. Proof of special knowledge in civil proceedings.**

*In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him*

15. The above provisions govern the aspect of the burden of proof. For clarity, there are two limbs of the burden of proof being *the legal burden of proof* and the *evidential burden of proof*. Whereas the legal burden of proof is always static on the claimant, the evidential burden of proof initially rests on the claimant, but may shift to the other party depending on the weight of evidence adduced by the claimant. A detailed discussion on this aspect was undertaken by the Supreme Court in **Raila Amolo Odinga & another v IEBC & 2 others** {2017} eKLR and the Court of Appeal in **Mbuthia Macharia - vs- Annah Mutua Ndwiga & another** [2017] eKLR, among other decisions.
16. Returning to this matter, the Respondent provided Mpesa records, a fact the Appellant did not deny. The Respondent also gave an explanation on the money transfer. That, in itself established a *prima facie* case that indeed money changed

hands and as such, the evidential burden of proof shifted to the Appellant. This Court notes that while the Appellant relied on the case of **Patrick Peter Kithini -vs- Justus Mwongela** [2020] eKLR to argue that the Mpesa transaction is insufficient proof, that case also clarified that an Mpesa transaction is insufficient only where a recipient gives adequate or satisfactory otherwise explanation. For clarity, the Court observed thus: -

*... An MPESA transaction or any other transaction for that matter without further evidence clarifying the basis of the transaction is insufficient to prove a fact on a balance of probability particularly where a recipient gives adequate or satisfactory explanation as to why the money was deposited in his account. In this instance I find that the explanation given by the Respondent that the money deposited was in repayment of debt, really changed the equation and left the Appellant's case hanging on his word against that of the Respondent. In such an instance the only conclusion that can be drawn is the fact that a case has not been proved to the required standard in law.*

17. According to the impugned judgment, the trial Court, as the fact finder, determined that the Appellant's explanation was not satisfactory because it lacked credible documentation. Under the various provisions of the Evidence Act captured above, and referring to the above discussion, when a fact, in this instance the reason for the transaction, is especially within the knowledge of a party, then the evidential burden of proving that fact is upon that party.
18. The Appellant asserted a complex business arrangement involving KPLC training and third-party tenders. Without a written agreement or any piece of documentation or any other admissible evidence, substantiating the assertion, the trial Court was legally correct to conclude that the Appellant had not displaced the Respondent's claim that the money was a loan. To hold otherwise would allow any recipient of funds to avoid repayment by simply alleging a verbal investment without proof. To that end, the Appellant failed to adduce evidence to shift the evidential burden of proof back to the Respondent thereby resulting to proof of the Respondent's case.

19. This Court, therefore, finds and hold that the trial Court properly applied the law on the dynamics regarding legal and evidential burden of proof to the extent that whereas the Respondent proved the transfer, the Appellant failed to prove the specific facts of his defence. The appeal is, therefore, not merited.

**Disposition:**

20. As I come to the end of this judgment, I wish to apologize to the parties for the late delivery of this decision. The delay was occasioned by my engagement at the Judicial Service Commission where I serve as a Commissioner given that the Commission has been running interviews since December 2025 to date. Once again, galore apologies.

21. In the end, the following final orders hereby issue: -

**[a] The appeal is hereby dismissed.**

**[b] The Judgment and Decree of the Milimani Small Claims Court Commercial Case No. E44228 of 2025 dated 4<sup>th</sup> July 2025 is hereby upheld.**

**[c] Costs of this appeal to the Respondent.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 15<sup>th</sup> day of May, 2026.**

**A.C. MRIMA  
JUDGE**

**Judgment virtually delivered in the presence of:**

**Mr. Mutua**, Learned Counsel for the Appellant.

**Amina** - Court Assistant.