



**Osienyo v Omondi (Civil Appeal E167 of 2023)
[2025] KEHC 771 (KLR) (Civ) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E167 OF 2023

RC RUTTO, J

JANUARY 31, 2025

BETWEEN

GILBERT OSIENYO APPELLANT

AND

MICHAEL GABRIEL OJIAMBO OMONDI RESPONDENT

*(Being an Appeal from the judgment of the Resident Magistrate/
Adjudicator Hon. C.A Okumu delivered on the 30th June 2023 in the
Small Claims Court at Nairobi Milimani SCCCOMM E6123 of 2022)*

JUDGMENT

1. The appellant seeks to overturn the decision in SCCCOMM E6123 of 2022 Nairobi rendered on 30/6/2023 in the small claims court by Hon. C.A Okumu (RM). In the said case, the claimant had brought a claim vide statement of claim dated 7/10/2022 against the respondent on grounds that the respondent had a debt of Kshs. 682,000/= having been advanced a loan 972,000/= out of which he only paid Kshs. 290,000/=. That the last payment was made on 21/7/2022 and the balance was still owing. The claimant thus sought judgment against the respondent for Kshs. 682,000/= plus costs of the claim.
2. The respondent filed a response dated 29/11/2022 denying the claim. He denied that the claimant loaned him Kshs. 972,000/= or that he had already paid Kshs. 290,000/= leaving a balance of Kshs. 682,000/=.
3. Vide a judgment delivered on 30/6/2023, the Adjudicator found in favour of the claimant and entered judgment in the sum of Kshs. 682,000/= as against the respondent plus costs and interest. The appellant was dissatisfied by that decision and filed this appeal vide the memorandum of appeal dated 28/7/2023. The appeal is premised on the following grounds that;



1. The trial court erred in finding that the claimant had proven his case on a balance of probabilities despite that no evidence was produced to support the money claim to the required standard which provides that special damages must be specifically pleaded and proven;
 2. The trial court erred in finding that the claimant's action was not outside the limitation period despite the allegation that the loan was advanced in 2015 which is approximately 7 years since the cause of action occurred thus the claim was statute barred;
 3. The trial court erred in finding that the claimant had proven his case on a balance of probabilities despite that the claimant failed to provide evidence of the part-payment of Kshs. 290,000/= made by the respondent; and
 4. That the trial court erred in finding that the appellant owed the respondent Kshs. 682,000/= which was contrary to the evidence availed in court whereof Kshs. 3,800/= was not accounted for.
4. Before delving into the substantive issues in the memorandum of appeal, this court notes the respondent submissions on a preliminary issue which if upheld will make it unnecessary to proceed further. The issue raised is whether this appeal was filed within the required time in law and whether there was a legal requirement for the appellant to file a notice of appeal in the Small Claims Court before lodging an appeal.
 5. Appeals from the small claims court are governed by the provisions of section 38 of the Small Claims Act which allows a party aggrieved by the decision or an order of the court to appeal to the High Court in accordance with Order 42 of the Civil Procedure Rules.
 6. Order 42, rule 1 provides that every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. This provision does not require the filing of a notice of appeal but instead allows for filing of a memorandum of appeal, therefore the respondent argument is unfounded and without merit. I also do note that the judgment subject matter of this appeal was delivered on 28th June 2023 and the appeal lodged on 28th July 2023. Arithmetically, this is 30 days from the date of judgment, thus the appeal was filed within time. The respondent arguments lacks merit.
 7. It has already been found that appeals from the small claims court are limited to matters of law only in light of Section 38 of the SCC Act. Black's Law Dictionary defines matters of fact and matters of law as: -

“Matter of fact: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law: A matter involving a judicial inquiry into the applicable law.”
 8. The court in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR while evaluating the difference between the two terms relied on *M'riungu And others Vs. R* [1982-88] 1 Kar 360 when it stated, (per Chesoni AJA) at p366 that: -

“We would agree with the views expressed in the English case of *Martin v Glyneed Distributors Ltd (t/a MBS Fastenings)* [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law.”



9. Though the appellant frames the grounds of appeal as ‘erred in law and in fact’, this Court carefully considered the memorandum of appeal as framed and finds that grounds 1, 3 and 4 are on evidence and are thus purely on matters of fact. They relate to primarily questions of fact and the same do not qualify as grounds that can be determined on appeal.
10. As such, I shall dismiss the same in limine. I draw reference from the case of *Wachira v Mwai (Civil Appeal E022 of 2023)* [2024] KEHC 3173 (KLR) (15 March 2024) where the Court held that: -

“The jurisdiction of the Small Claims Court is set out in the *Small Claims Court Act*. Ipso facto, there is only one chance of Appeal to this court. It is an Appeal on points of law in view of the provisions of section 38 of the *Small Claims Court Act*...”
11. Similarly, in *Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017)* [2022] KECA 628 (KLR) the Court of Appeal while referring to a second appeal which is essentially on points of law and thus similar to the duty of the court under Section 38 of the SCC Act, stated as follows: -

“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse.”
12. Ground 2 however raises a matter of law to wit, whether the claim was statute barred due to time limitations. The appellant in his submissions dated 20/9/2024 submitted that the respondent presented a cheque dated 13/10/2022 which was statutorily barred thus the claim was outside the limitation of actions period as provided under Section 74(a) and b of the *Bills of Exchange Act*. That the cheque was not presented within reasonable time from the date of issue having taken around 7 years from the date of issue. That the Adjudicator thus erred in finding that a loan agreement existed between the parties despite the fact that the cheque was time barred and the suit was not actionable in court.
13. In response, the respondent in its submissions dated 8/8/2024 submitted that the cheque in question was dated 13/10/2022 whereas the case was filed on 7/10/2023 thus the claim was not time barred. That the evidence before court including the MPESA statement indicated that the last payment done by the appellant was on 21/7/2022 and the claim was filed less than a year from the date of the cheque hence the claim was not time barred.
14. Section 4 (1) of the *Limitation of Actions Act* provides: -

“4 The following actions may not be brought after the end of six years from the
 (1) date on which the cause of action accrued:

 - a) actions founded on contract;
 - b)
 - c)
 - d)



- e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

15. Section 26 (c) of the *Limitation of Actions Act* provides: -

“Where, in the case of an action for which a period of limitation is prescribed, either:

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

15. In *Gathoni vs. Kenya Co-Operative Creameries Ltd.* [1982] KLR 104, Potter, JA at page 107 expressed himself thus: -

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

16. As provided by Statute, actions relating to contracts can only be brought to court before the lapse of six years from the time which the cause of action accrued. In the case before Court, though the respondent testified that the loan of Kshs. 972,000/= was advanced sometime in 2015, it was his case that the last payment was made on 21/7/2022 when the appellant failed to pay the balance of Kshs. 682,000/=. The appellant also testified that he last transacted with the respondent sometime in 2022. I further take judicial notice that though the appellant denied taking a loan in 2015, he admitted vide his submissions that he did indeed take a loan from the respondent of around Kshs. 526,000/= in the year 2012.

17. According to Black’s Law Dictionary (10th Edition) the word “accrue” means “to come into existence as an enforceable claim or right.” Therefore, in interpreting the word accrued as per the Statute, the cause of action on breach of contract can only be brought at the time the actual breach occurred. This is when it can be said the time started running. See *South Nyanza Sugar Company Limited v Charles M. Nyantahe* [2022] eKLR wherein the court pronounced thus: -

“Therefore, in interpreting the word accrued as per the Statute, the cause of action on breach of contract can only be brought at the time the actual breach occurred. This is when it can be said the time started running.”

18. In the case of *South Nyanza Sugar Company Limited v Dickson Aoro Owuor* (2019) eKLR the court held that: -

“...It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.”

19. It then follows that time began to run on 21/7/2022 when the appellant stopped making any payments under the contract. Noting that the claim was filed on or around 7/10/2022, I find that the money claim was not statutorily barred under the Limitations of Actions Act as alleged.



20. Going by the above, I find no justification to interfere with the trial court's finding on whether the claim was time barred. The finding was sound as it was based on evidence, and the trial court did not misapprehend any of the evidence and neither did she act on the wrong principles and the same is upheld.
21. Consequently, the memorandum of appeal dated 28/7/2023 is found to be unmeritorious and the same is dismissed with costs to the respondent.

It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 31ST DAY OF JANUARY 2025

For Appellant:

For Respondent:

Court Assistant:

