



**First Capital Limited v Wekesa (Civil Appeal E350 of 2023)
[2025] KEHC 12059 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 12059 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E350 OF 2023
F WANGARI, J
FEBRUARY 27, 2025**

BETWEEN

FIRST CAPITAL LIMITED APPELLANT

AND

EVANS MURUMBA WEKESA RESPONDENT

(Appeal from the Judgment of the Small Claims Court (Honourable N. Gatambia) dated the 31st day of October 2023 in SCCOMM No. E199 of 2023)

JUDGMENT

1. This is an Appeal from the above Judgment of the Honourable Gatambia Ndungu (RM)- Adjudicator delivered on 13/06/2024 in Mombasa Small Claims Court Commercial Case No. E347 of 2024 where its claim was dismissed with costs to the Respondent.
2. Dissatisfied with the said Judgement, the Appellant filed a Memorandum of Appeal dated 30/11/2023 prayed that the appeal be allowed, the judgment in issue be set aside and this court do substitute it with its own judgment.
3. The Appellant based the appeal on grounds inter-alia, that the trial court failed to appreciate the fact that the Respondent had admitted his debt towards the Appellant, that parties are bound by the terms of their agreement and that the Notice of withdrawal of suit filed in the matter was not complete/ effective as no consent by the parties was filed nor leave of court granted to discontinue the suit.
4. Both the Memorandum of Appeal and Record of Appeal was served upon the Respondent. The Respondent did not enter appearance, and the appeal was undefended. Nevertheless, the court has a duty to determine this appeal on its own merits.



Analysis

5. The appeal was disposed off by way of written submissions. I have considered the appeal as well as submissions and authorities filed in court. The issues are as follows;
 - a. Whether the Trial court erred in dismissing the Claimant's claim
 - b. If the above is negative, whether the Claimant is entitled to the reliefs sought as per his Statement of Claim.
6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
7. The Claimant in his Statement of Claim dated 12/04/2023 claimed Kshs. 1,000,000 being the maximum claim under the Small Claims Court. The Claimant stated that it had advanced the Respondent a loan of Kshs. 1,207,790 with interest of 6.5% per month, and an additional interest of 4% of outstanding amount in case of default when the payment falls due. As at the time of filing this suit, the amount due to the Claimant was Kshs. 1,520,619.50. The Claimant waived the amount in excess of Kshs. 1,000,000, excluding interests and costs.
8. The Respondent filed his Response to the Statement of Claim dated 07/06/2023. He disputed the jurisdiction of the Small Claims Court as the money said to be owed was above Kshs. 1,000,000. He also disputed the interest claims as it was against the provisions of the *Banking Act* and the Central Bank Act. he also claimed that he had paid back the full amount and did not owe the Claimant as claimed.
9. The Claimant later filed and served the Notice to Withdraw Suit dated 26/06/2023. The Claimant relied on Section 34 of the *Small Claims Court Act*, requiring matters to be heard and determined within 60 days upon filing of suit. The 60 days had already lapsed and the hearing date fixed was already time barred. The Claimant intended to file the suit afresh.
10. The Claimant proceeded to file a fresh suit in Mombasa SCC Commercial Suit No. E509 of 2023. The Respondent filed a Notice of Preliminary Objection dated 27/07/2023 stating that the matter was sub judice as this matter was still pending hearing and hearing date already fixed. By consent, SCC Commercial Suit No. E509 of 2023 was withdrawn by consent before Hon. V. Muthoni, and the parties were directed to proceed with this suit.
11. The matter proceeded by way of document and upon retiring to write the judgment, the trial magistrate found that the suit had been ‘withdrawn’. He found that the Claimant abused the court process by withdrawing the suit and thereafter presenting itself as ready to proceed with the matter. The Claim was dismissed with costs to the Respondent. The Claimant was dissatisfied with the said judgment and filed this appeal. The Respondent did not enter any appearance.
12. I have perused through the written submissions filed by the appellant. I do concur with the Appellant that the filing of the Withdrawal of Suit was not an abuse of the court process bearing in mind that this court has pronounced itself that Section 34 of the *Small Claims Court Act* is in mandatory terms and matter filed in the Small Claims Court must be concluded within 60 days upon filing of suit.



13. It cannot be ignored that the parties in SCCCOM No. E509 of 2023 had the suit withdrawn by consent so as to pursue the claim in this suit. By this time, there was a new decision by the High Court directing that matters in Small Claims Court could now be heard and determined past the 60 days period.
14. Furthermore, the Notice of Withdrawal of suit had not come to completion as the court had not marked the suit as withdrawn as the same had not been endorsed by the court. I make reference to the case relied on by the Appellant in Church Road Development Company Limited v Barclays Bank of Kenya Limited & 2 others [2006] eKLR. I find the steps taken by the Claimant were not intended to abuse the court process but to ensure that the Claimant was not locked out of the seat of Justice by virtue of legal technicalities.
15. I have now perused through the pleadings and the exhibits filed. It is not denied that the Respondent received Kshs. 1,207,790 as per the loan application form dated 13/08/2021, the Letter of Offer dated 17/08/2021 and the admission by the Respondent in his response.
16. The Respondent claims that he had paid all the money due and owing to the Claimant. However, he did not attach any evidence to support his claim. I have perused through the terms of the loan facility in the Letter of Offer. The Respondent did not object to the same especially the interest rates to be charged, hence the contract was binding.
17. In reference to the documents filed by the Claimant in the lower court, the Appellant in the witness statement dated 23/05/2023 recorded by the Recoveries Officer, Raphael Osogo, gave an account of the money paid by the Respondent towards the loan and the balance to be paid. He attached the loan application form, letter of offer, statement of accounts and the demand letter.
18. The Claimant has opted to forgo the amount above the Kshs. 1,000,000 to avoid further losses. Even though the Respondent said the move was to 'hoodwink the court into sanitizing interest that is unlawful, unclear and illegal, I find that no prejudice has been occasioned on the Respondent, and to the contrary, it is for his own benefit as the money due from him has reduced considerably.
19. I find that the Claimant's claim has merits as the claim has been proved on a balance of probabilities.

Determination

20. In the circumstances, I make the following Orders:
 - a. The Appeal has merits and is allowed on the following terms
 - i. That judgment of the lower court dated 31/10/2023 dismissing the Claimant's claim is hereby set aside.
 - ii. That judgment is now entered in favour of the Claimant for Kshs. 1,000,000 with interest from date of filing suit.
 - b. Costs in both the lower court and this appeal awarded to the Claimant/Appellant.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF FEBRUARY, 2025.

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F. WANGARI

JUDGE

In the presence of:



Ms Muisyo Advocate for the Appellant

Ms Maiga Advocate for the Respondent.

M/S Salwa, Court Assistant

