



REPUBLIC OF KENYA



KENYA LAW
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**Muinde v Mbithi (Civil Appeal E086 of 2024)
[2025] KEHC 7813 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7813 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E086 OF 2024

EN MAINA, J

MAY 29, 2025

BETWEEN

JUSTUS M MUINDE APPELLANT

AND

DIXON W MBITHI RESPONDENT

(Being an Appeal against the Judgement of the Honourable M Thibaru (Small Claims Court Machakos Law Courts in SCCOMM no. 085 of 2022 delivered on 05/06/2023)

JUDGMENT

1. The Appellant unsuccessfully sued the Respondent in the Small Claims Court for compensation for an allegedly unpaid loan of Kshs. 520,000/- which he purported to have advanced to the Respondent on 18th April 2017 but which remains unpaid.
2. While relying on his witness statement dated 20th March 2023 the Appellant stated that on 18th April 2017 he and the Respondent executed a loan agreement for a sum of Kshs.520,000/- payable on or before 18th May 2018 in default of which the Appellant was authorized to attach a motor vehicle KXJ 468 or any other moveable assets belonging to the Respondent even without moving to court.
3. The Respondent however vehemently denied that he received any money from the Appellant or that he signed any loan agreement and contended that the signature which it is alleged he appended to the agreement produced by the Appellant was a forgery.
4. After considering the evidence and submissions by both sides the trial Magistrate found that Appellant had not proved his case as against the Respondent on a balance of probabilities and dismissed it with costs to the Respondent.



5. Aggrieved by the Judgment, the Appellant lodged this appeal on grounds that: -
- a. The learned adjudicator erred in fact and in law by holding that the appellant had failed to prove his case on a balance of probability.
 - b. The learned adjudicator erred in law and in fact in wholly relying on the evidence and arguments advanced by the respondent and wholly disregarding the arguments by the appellant.
 - c. The learned adjudicator erred in fact and in law by delivering a judgement against the weight of the evidence.
 - d. The learned adjudicator erred in fact and in law by considering extraneous factors which were not material to the case.

Submissions

6. The appeal was canvassed by way of written submissions. Learned Counsel for the Appellant submitted that the Appellant had discharged his duty of proving his claim on a balance of probabilities and placed reliance on the case of *Re Estate of Sospeter Kimani Waitbaka (deceased)* [2010] KEHC 3175 KLR and the case of *Kuria Kiarie and two Others v Sammy Magera* [2018] KECA 467 (KLR).
7. Counsel reiterated that from the evidence tendered it was highly probable that the Appellant and the Respondent entered into a friendly loan agreement and that the respondent on the other hand had failed to discharge his burden of proving forgery. Counsel urged the court to allow the appeal since the weight of evidence tilted in favour of the Appellant.
8. For the Respondent it was submitted that the Appellant had not discharged the burden of proof of existence of a debt. Learned Counsel for the Respondent submitted that as the Respondent had denied signing the agreement, in the absence of a document examiner's report, the alleged friendly loan agreement relied upon by the Appellant remained invalid, defective and a forgery. Counsel placed reliance on the case of *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR.

Analysis and determination

9. As the first appellate court, I have considered and re-evaluated the evidence adduced in the court below while keeping in mind that I did not see or hear the witnesses (see the case of *Selle & another -v- Associated Motor Boat Co. Ltd & Others* [1968] [EA 123]). I have also considered the rival submissions of learned Counsel for the parties, the cases cited and the law.
10. The issue for determination by this court is whether or not there was a valid and binding loan agreement between the Appellant and the Respondent.
11. The onus of proof in civil cases always lies on the party who brings the claim and the standard of proof is on a balance of probabilities. In other words, the legal burden of proof in this case fell on the Appellant. Only once that legal burden is discharged and a prima facie case exists does that the evidential burden shift to the Defendant – (see Section 112 of the *Evidence Act*).
12. The Court of Appeal dealt with the question of the onus of proof in the case of *Mbutia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR and stated;

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden.



Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift” to the party who would fail without further evidence?”

13. The Appellant produced a loan agreement dated 18th April 2017 but the Respondent denied signing that agreement or receiving any money from the Appellant. He contended that the signature purported to be his was a forgery and put the Appellant to strict proof. It was therefore incumbent upon the Appellant to prove that the Respondent had in fact signed that agreement.
14. At the hearing the Appellant also stated that he paid the money to the Respondent in cash and had no evidence of withdrawal.
15. A clear scrutiny of the friendly loan agreement adduced by the Appellant reveals a gap as to whether the money was paid or not as it states that and that the loan shall be advanced, which is clearly referring to a future date. It is my finding that the Appellant ought to have gone a notch higher to call expert evidence to prove firstly that the signature on the agreement belonged to the Respondent and that he in fact paid the money to the Respondent. Moreover, the manner of that agreement appears to me to have been illegal as the Appellant purported to take collateral for the sum “loaned” and to charge interest yet he did not adduce evidence that he was licensed by the Central Bank to lend money. The contract would therefore have been illegal in any event.
16. In the premises this appeal cannot succeed and it is dismissed with costs to the Respondent.

It is so ordered.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF MAY 2025.

E.N. MAINA

JUDGE

In the presence of:

Mr. Muema for the Appellant

Mr. Ngolya for the Respondent

Geoffrey – Court Assistant

