



**Nzau v Mutythau (Civil Appeal 305 of 2023)  
[2025] KEHC 9049 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9049 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 305 OF 2023**

**EN MAINA, J**

**JUNE 26, 2025**

**BETWEEN**

**PETER NZAU ..... APPELLANT**

**AND**

**PETER NDUNDA MUTYTHAU ..... RESPONDENT**

*(Being an Appeal against the Judgement of the Honourable M Thibaru (Small Claims Court Machakos Law Courts in SCCOMM NO 158 of 2023 delivered on 07/08/2023)*

**JUDGMENT**

1. This appeal arises from a claim by the Respondent for a sum of Kshs 220,000 allegedly advanced to the Appellant as a loan but which the Appellant disputes and asserts was for a business investment made on behalf of the Respondent.
2. Briefly, from the documents filed and relied upon by the Respondent in the Small Claim's court, the said sum was a loan for the Appellant to carry out his business and was payable within three months.
3. The Appellant however contended that the money was to be invested for the Respondent in an online business known as CBSQ in which the Appellant was also just an investor. He contended that members were to earn a commission whenever they introduced a new member into the WhatsApp group to which he himself had been introduced to by an American lady known as Candice. He contended that once a member joined the group, a personal account was opened for them to undertake their transactions. He stated that upon becoming a member, the Respondent also introduced his brother one Stephen Nzau. Both had limited knowledge on how to transact and so they requested him to invest the money for them. It was then that the Respondent sent the money to his Mpesa wallet. He stated that he duly deposited the cash in the CBSQ. However, the CBSQ went offline and members were advised by the Government of Kenya to withdraw their funds from the investment but their attempts to do so proved futile. He stated that he and the Respondent reported the matter to the DCI to no avail.



4. After considering and evaluating the evidence and submissions by both sides the trial Magistrate found in favour of the respondent and ordered the Appellant to refund the money with interest at court rates. The Adjudicator also ordered him to pay the costs of the suit.
5. Aggrieved by the Judgment, the Appellant lodged this appeal on grounds that: -
  - a. The learned adjudicator erred in fact and in law in finding that the amount claimed by the Respondent was a loan to the appellant and not an investment that went wrong.
  - b. The learned adjudicator erred in law and in fact in failing to consider the appellant's evidence and submissions that explicitly demonstrated that the amount of kshs 220,000 was paid by the appellant to an investment on behalf of the respondent and not as a loan to the appellant.
  - c. The learned adjudicator erred in fact and in finding that the appellant was liable to pay the respondent the amount of kshs 220,000 together with costs and interest
  - d. The learned adjudicator relied on misleading evidence from the respondent in arriving at her decision.
6. The appeal was canvassed by way of written submissions.

### **Submissions**

7. Learned Counsel for the Appellant submitted that the Appellant demonstrated in his evidence that the money he received from the Respondent was not a loan but for investment in the CBSQ. Further, that the Respondent had not adduced evidence to prove his claim of a contractual agreement between them. Counsel reiterated that on the other hand the Appellant proved interactions and transactions with the Respondent which demonstrated that the funds were meant for investment. Counsel urged this court to allow the appeal and set aside the judgment of the Adjudicator.
8. On the other hand, learned Counsel for the Respondent submitted that the Respondent was not a party to the dealings by the Appellant and he is lawfully entitled to a refund of the money loaned to the Appellant. He contended that this appeal lacks merit and should therefore fail. He urged the court to dismiss the appeal and uphold the judgement of the trial court.

### **Analysis and Determination**

9. As the first appellate court, I have considered and re-evaluated the evidence that was adduced in the court below while keeping in mind that I did not see or hear the witnesses. I have also considered the rival submissions of the learned counsel for the parties, the cases cited and the law.
10. There is no dispute that the Appellant in fact received the sum of kshs 220,000 from the Respondent. The only issue for determination is whether the said sum was a loan advanced to the Appellant or whether it was intended to be invested on behalf of the Respondent upon his own request.
11. The onus of proof always lies on the Plaintiff, in this case the Appellant, 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 respondent.



The Court of Appeal dealt with the question of the onus of proof in the case of *Mbuthia 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?”

12. To prove his allegation that the money was intended for an investment for the Respondent the Appellant produced screen shots of a group in which he was a member. It was his evidence that once he introduced the Respondent to the investment group he was added to the group. Whereas the Respondent was indeed added to the group there is no indication of his participation in its activities. The mere addition of the Respondent in the group does not in my considered view prove that he was there as an investor. There is nothing to prove that he transacted as a member of the investment as alleged. In his response to the claim, the Appellant states that certain risks attached to the business. However, he did not adduce any evidence to prove that he informed the Respondent about the investment and the risks attached thereto. He did not call or file a witness statement of his brother through whom the Respondent allegedly approached him. The Respondent’s evidence that the money was a loan was not rebutted. I find that devoid evidence to rebut his evidence, the Respondent proved his case on a balance of probabilities.
13. In the premises the appeal is not merited and it is dismissed with costs to the Respondent. The judgment of the Adjudicator is upheld.

**JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 26<sup>TH</sup> JUNE 2025.**

**E N MAINA**

**JUDGE**

In the presence of-

No appearance by Counsel for the parties.

Geoffrey- Court Assistant.

