



REPUBLIC OF KENYA



**Munyendo v Okiyah (Civil Appeal E088 of 2023)
[2025] KEHC 2807 (KLR) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E088 OF 2023
PJO OTIENO, J
MARCH 10, 2025**

BETWEEN

MOSES MUNYENDO APPELLANT

AND

PATRICK OMULAMA OKIYAH RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Caroline Cheruiyot (RM/ Adjudicator) in Kakamega SMCC No. E114 OF 2023 delivered on 8th May, 2023)

JUDGMENT

Background Of the Appeal

1. By way of a statement of claim dated 6th March, 2023, the appellant moved the trial court for judgment in the sum of Kshs 900,000/- against the respondent.
2. The appellant's case was That sometime in the year 2018, he advanced a sum of Kshs. 900,000/- to the respondent for purposes of purchasing motor vehicle registration no. KCQ 055R Toyota Probox, which amount was to be refunded on or before 31st December, 2019 and That the respondent failed to honour his part of the obligation.
3. In a statement of defence and counter claim dated 20th March, 2023, the respondent denied the appellant's claim and asserted That he is the registered owner of motor vehicle registration no. KCQ 055R (Toyota Succeed) (hereinafter referred to as "the motor vehicle") and added That on or about 15.11.2019 at the request of the appellant, he gave the appellant the motor vehicle for purposes of running an errand at his farm in Tanga Kona in Busia County with the verbal undertaking of the appellant That he would return it in good condition.
4. His counter- claim was That the appellant failed to return the motor vehicle and continued to hold the same illegally occasioning him a loss of user of Kshs. 3,000/- per day which he wanted to be



compensated from 15.11.2019 to the date of judgment. He also sought an order directing That the appellant surrenders the motor vehicle to him, costs of the suit and interest.

5. In his defence to the counter-claim, the appellant pleaded That the motor vehicle was surrendered to him on 20.12.2019 as security for a loan of Kshs. 900,000/- advanced to the respondent.
6. The trial court in a judgment delivered on 08.05.2023 dismissed both the claim and counter claim and directed That the appellant surrenders to the respondent the motor vehicle with further orders That each party bears their own costs.
7. Aggrieved with the decision of the trial court, the appellant lodged a memorandum of appeal dated 24.05.2023 seeking orders to have the decision of the trial court set aside with costs and That the appellant's claim in the trial court be allowed with costs of the trial court and the appeal. The appeal is founded on the following grounds;
 - a. That the learned trial magistrate failed to appreciate the fact That there was a clear agreement between the appellant and the respondent and not between the appellant and Buloma Construction Constructors Limited or respondent and Buloma Construction Contractors Limited in respect of who should pay the appellant's debt with the respondent.
 - b. That the learned trial magistrate failed to appreciate the law and fact That the appellant proved the elements of the law of contract That is there was an offer, acceptance and consideration That is, there was an offer by the appellant which was accepted by the respondent and the consideration was Kshs. 900,000/-
 - c. That the learned trial magistrate failed to recognize the respondent was not a reliable witness who had pleaded and testified before court That he only received from the appellant Kes. 600,000/- which was contrary to his admission of the agreement he executed of having received kes. 900,000/- from the appellant.
 - d. That the learned trial magistrate failed to appreciate the fact That the respondent informed the court That he surrendered the motor vehicle to the appellant on 20.12.2019 because he had no logbook yet the log book was registered in his names on 28.05.2018 and further he had the sale agreement dated 28.05.2018.
 - e. That the learned trial magistrate failed to appreciate the fact That the respondent admitted the appellant financed projects to the tune of Kes. 1,400,000/- for Buloma Construction Contractors Limited but there was no document presented before the honourable trial court That Buloma Construction Contractors Limited was to pay for the personal loan of the respondent advanced by the appellant.
 - f. That the learned trial magistrate erred in law and in fact in finding Buloma Construction Contractors Limited paid the appellant the subject debt therein on behalf of the respondent when there was no documentary evidence from the said company's directors'/shareholders' authorizing the said payment.
 - g. That the learned trial magistrate misdirected herself in the law and in fact by appreciating the evidence of the respondent and his witness That Buloma Construction Contractors Limited paid the appellant the subject debt on behalf of the respondent when the respondent and his witness had no authority from Buloma Construction Contractors Limited to testify on its behalf.
 - h. That the learned trial magistrate failed to recognize the fact That the respondent failed to pursue his motor vehicle which he had voluntarily surrendered to the appellant for four years



because he had not refunded the appellant his money and therefore the trial court should not have issued the order That the appellant surrenders the respondent's vehicle before the refund of kes. 900,000/-

- i. That the learned trial magistrate erred in law and fact by failing to appreciate the fact That kes. 2,150,000/- paid to the appellant by Buloma Construction Contractors Limited was in respect to the loan he guaranteed the said company of kes. 2,500,000/- and not in respect to the subject debt the respondent owed the appellant of kes. 900,000/- which huge sum difference the learned trial magistrate failed to notice in her judgment and decree.
 - j. That the learned trial magistrate included in her judgment That the respondent paid Buloma Construction Contractors Limited kes. 3,050,000/- a figure which was not supported by any evidence.
8. The appeal has been canvassed by way of written submissions which the court has anxiously read and given due consideration in this decision. It however suffices to give a summation of such submissions

Appellant's Submissions

9. In summary, the appellant's submissions are That the respondent through an acknowledgment-cum-commitment admitted That he received a loan of Kshs. 900,000/- from the appellant and agreed to repay within one year ending December, 2019 and That the respondent gave the appellant an undated cheque in this regard, evidence That he owed the appellant.
10. He faults the reliance by the trial magistrate on the evidence of the respondent and his witness That Buloma General Construction Company Limited settled the debt yet there was no evidence That the two had authority to testify on behalf of the company nor a resolution by the company to the effect That the company was authorized to settle the debt in question and he insists That the payments from the company were in respect to construction works.

Respondent's Submissions

11. On his part, the respondent submits That the agreement adduced by the appellant is not enforceable for it does not meet the conditions for a valid contract namely offer, acceptance and consideration. He contends That the only witness to the signing of the agreement That is Gerald Ocholla Maloba, testified That no money exchanged hands at the time of signing the agreement contrary to the assertion by the appellant That he gave the respondent cash of Kshs. 900,000/- at the time of signing the agreement.
12. He admits That the appellant advanced to him a sum of only Kshs. 600,000/- for the purchase of the motor vehicle and asserts That he repaid the monies through Buloma General Contractors Limited's bank account.

Issue For Determination

13. Even though the Memorandum of appeal sets out a whopping ten grounds of appeal, the court has considered the grounds of appeal, the proceedings of the lower court and the submissions by the parties and discerns That the only issue for determination to be whether the trial court's judgment was sound as being in tandem with the evidence as applied to the law applicable.



Analysis

14. Pursuant to the provisions of Section 38 of the *Small Claims Court Act*, an appeal from the small claims court to the high court is on matters of law only.
15. From the grounds of appeal, the appellant's contention is That the trial court erred in; a) making a finding That there was no loan agreement for an amount of Kshs. 900,000/- between the appellant and the respondent; b) failing to conclude That the respondent was not a reliable witness; c) failed to address its mind on why the respondent failed to surrender the logbook and; d) That there was no evidence of authority from Buloma Construction Contractors Limited to settle the respondent's loan.
16. Whether these four grounds constitute a matter of law is an issue That was addressed by the court of appeal in the case of Peter Gichuki King'ara v IEBC & 2 Others, Nyeri Civil Appeal No. 31 Of 2013 (Court of Appeal) (Visram, Koome & Odek, JJA) where the court held as follows;

“It was held That it is trite law That the exercise of judicial discretion is a point of law and That the trial court in denying a prayer of scrutiny is exercising judicial discretion. ... the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination That is supported by law and evidence – with the caveat That the appeal court did not see the witness demeanour – is an issue of law.”
17. To the court, the only issues That fall within the definition of 'matters of law' and those which the court is bound to determine are; whether the acknowledgment of loan document amounted to a contract; and whether directors/shareholders of Buloma Construction Contractors Limited needed the authority of the company to settle the respondent's debt. That question will also address whether the money paid by the company to the appellant was for other purposes other than the debt.
18. On whether there existed a loan agreement between the parties for a loan facility of Kshs 900,000/- the trial magistrate at page 2 of her judgment observed as follows;

“It is therefore the courts finding That the parties were bound by their agreement entered into in 2018 and the respondent was to repay the sum of Kshs 900,000/- to the claimant.”
19. It follows That contrary to the appellant's assertion That the trial court found no existence of a contract, the above excerpt of the judgment proves otherwise. The trial court, in fact, confirmed the existence of the loan agreement. The question is how That finding relates to the ultimate decision of the court in the judgment by which the claim was dismissed. The answer is in fact withing the determination of the second issue as isolated by this court.
20. On whether the respondent's debt was settled by Buloma General Contractor Limited and if yes, whether the company needed the authority of its members to settle this debt.
21. In law, a company is a separate legal entity from its members and the decisions of a company are revealed in resolutions passed by the members at the governance organs. Whether or not the company was to guarantee a members loan from another and whether the company finances were to be availed to settle a directors debt required a commitment by the company.
22. To determine how the operations of Buloma General Contractors Limited ('Company') were run, I have perused the respondent's list of documents and observed That the directors of the company; the appellant, the respondent, Silas Okiya and Gerald Ocholla Maloba held a meeting on 23.05.2018 and agreed That the company would procure a loan of Kshs. 2,500,000/- from Faulu Bank and which loan would be guaranteed by the appellant.



23. That document leaves no doubt That the company affairs were run in manner distinct and separate from That of its members. It appears That whenever there was need to commingle the affairs, the board discussed the same, as evidenced by the minutes of the meeting. It is thus obvious to the court That the parties as members of the company appreciated its legal distinction from the members and That had there been intention That the company guarantees and later pays the sums due to the appellant from the respondent, there would have been a resolution to That effect.
24. The court discerns That the delivery note from Ramna International Motors for the purchase of the motor vehicle is dated 28.05.2018. To the court, if there was an agreement That the company was to guarantee the loan by the appellant to the respondent towards the purchase or if it was the intention of the company That the vehicle would be used for its business so as to make the company pay for the purchase price, nothing would have stopped the parties from such a discussion and its capture in the minutes and resolutions.
25. The court finds That the agreement for the loan used to purchase the motor vehicle was between the appellant and the respondent as individuals with no connection with the company. There was no evidence That the company was party to the loan as to acquire the obligation to pay. Because parties are bound by their bargains in the contract, the respondent had the obligation to pay the sum or otherwise show That the contract had been novated to involve the company.
26. Without evidence That the respondent had paid the appellant the loan he advanced to him for the purchase of the motor vehicle, it is a finding by the court That the respondent failed to honour his loan obligations with the appellant. With the finding That there was an advance of the specific sum pleaded and in the absence of evidence of discharge of the obligation, the appellant had proved his case on a balance of probabilities and was thus entitled to a judgment as prayed in the plaint. There was nothing to deprive the appellant of his right to pursue the payment of the loan by the respondent.
27. Flowing from the above findings and conclusions, the judgment of the trial court is adjudged to have taken into account irrelevant matters while ignoring to take into account the relevant evidence let. For That reason, it is set aside and, in its place, the court substitutes a judgment for the appellant against the respondent in the sum of Kshs. 900,000/-.
28. Having succeeded, the appellant is awarded costs of the suit at the trial court as well as those of the appeal. The appellant further gets the interest on the judgment sum from the date of the suit till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF MARCH, 2025

PATRICK J O OTIENO

JUDGE

