



REPUBLIC OF KENYA



KENYA LAW
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**Muthoni v Maogoto (Civil Appeal E035 of 2023)
[2025] KEHC 10217 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 10217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E035 OF 2023**

GL NZIOKA, J

MAY 14, 2025

BETWEEN

CECELIA WAITHIRA MUTHONI APPELLANT

AND

RICHARD MARIGA MAOGOTO RESPONDENT

*(Being an appeal from the decision of Honourable E. Cherop Resident Magistrate
delivered on 23rd March 2023 vide Naivasha SCCC No. E025 of 2023)*

JUDGMENT

1. By a statement claim dated 17th February 2023, the claimant (herein “the respondent”) sued the respondent (herein “the appellant) seeking for judgment against the appellant in the sum of Kshs 552,659 with interest from the date of filing the claim until payment in full and costs of the suit with interest at court’s rates.
2. The respondents claim is that, he advanced the appellant a sum of Kshs 552, 659 to establish a wine and spirit shop which she did. That it was the understanding of the parties that, the appellant would refund the said sum of money. However, upon request thereof, the appellant refused and/or declined to refund the same necessitating the claim herein.
3. However, the appellant denied the claim vide an undated response to the claim in which she stated that, she was cohabiting with the respondent and that the money claimed by the respondent was used by him to voluntarily set up a wine and spirit business on her behalf after requesting her to resign from her employment. That she used to earn Kshs 15,000 from her employment. Further, she has also invested heavily in the business. In her oral evidence she stated that part of the money was used to pay for her rent.
4. Upon hearing the parties and considering the respective evidence by the parties, the trial court vide a judgment dated 23rd March 2023, entered judgment in favour of the respondent as prayed for in the



- claim in the sum of Kshs 552,659 with interest from the date of filing the claim until payment in full and costs of the claim awarded to the respondent.
5. However, the appellant is aggravated by the decision of the court and appeals against it on the following grounds: -
- a. That the learned trial Magistrate erred in law and in fact by finding that the appellant is indebted to the respondent for a sum of Kshs. 552,659.
 - b. That the learned trial Magistrate erred in law and in fact by failing to consider and make findings on the evidence led by the appellant both orally and in her written statement.
 - c. That the learned trial Magistrate erred in law and in fact by holding that the money sent to the appellant was not a gift.
 - d. That the learned trial Magistrate erred in law and in fact by relying on the oral agreement which was not properly proved in accordance with the rules of evidence.
 - e. That the learned trial Magistrate erred in law and in fact by holding that the respondent proved his case against the appellant on a balance of probabilities.
 - f. That the learned trial Magistrate erred in law and in fact when she failed to consider the oral and written statement of the appellant and the appellant's witness.
 - g. That the appellant shall seek leave to adduce further Mpesa statements as evidence to prove that the money sent to her by the respondent was not only meant for business but also for her upkeep.
 - h. That the learned trial Magistrate erred in law and in fact by failing to appreciate that the respondents were being untruthful by denying that he was not in a romantic relationship with the appellant and that the money she sent was purely for business.
6. The appeal was disposed of vide filing of submissions. The appellant filed submissions dated 25th September 2023 and argued that the role of the 1st appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion. That the appellant proved that the respondent was on a revenge mission to demand the money after their relationship went sour.
7. Further, the respondent did not prove his claim as required under section 107 and 109 of the *Evidence Act*. She relied on the case of *Hellen Wangari Wangechi v Carumera Muthini Gathu* (2005) eKLR to support the aforesaid. That she did not apply for a loan from the respondent and that, the Mpesa statement produced could not prove the claim.
8. Furthermore that section 3(1) of the *Law of Contract Act* was not satisfied as there is no agreement in writing as required. That, the respondent advanced the money willingly, mutually and in kind without any agreement to repay.
9. However, in response, the respondent in submissions dated 6th October 2023, argued that, the ground of appeal alleging that, the court did not take into account the oral and written statement of the parties has no merit, as the same was considered as indicated at paragraphs 12 to 18 of the trial court's judgment.
10. The respondent relied on the case of *Peters v Sunday Post Ltd* (1958) EA 424, to argue that, the appellant has not proved how the court misdirected itself on the issues of fact and law.



11. That a contract between the parties can be inferred from the conduct of the parties without existence of any words as held in the cases of *Ali Abid Mohammed v Kenya Shell Co. Ltd* (2017) eKLR and *Abdulkadir Shariff Abdirahim & Another v Awo Shariff Mohammed t/a Mohamed Investments* (2014) eKLR.
12. Further, the issue of romance was not proved and that to adduce new evidence at the appeal stage will be prejudicial to the respondent.
13. I have considered the arguments of the parties alongside the proceedings of the trial court. At the outset, the jurisdiction of the court in relation to the appeals from the Small Claims Court is well spelt out in section 38 of the *Small Claims Court Act* that: -
 - “(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.”
14. Pursuant to the aforesaid the appeal can only be considered on points of law. In that regard, I shall consider the grounds of appeal herein. In my considered opinion, ground 1, 2, 3, 4, 5, 6, and 8 are based on evidence adduced in the trial, which is a matter of fact as opposed to matters of law. Secondly those grounds are rather, with due respect, duplicated. For example ground 2 and 6 can be summarized to the effect that, the trial court erred in finding that, the respondent had adduced adequate evidence to prove the case. The two grounds are not distinct.
15. Even if the court were to descend into the arena of evaluating the matters of fact, it is clear that ground 2 and 6 are not factually correct as argued. The judgment of the trial court at paragraph 25 indicates that the evidence of RW2 was considered and at paragraph 29 it is stated that, the respondent (appellant) did not discharge the burden of proving the money was given as a gift. But more specifically the appellant’s case is summarized at paragraphs 12 to 18 of the judgment.
16. As regards the issue of oral agreement, the trial court dealt with the same at paragraph 30 to 33 of the judgment. As to whether there was proof of oral contract, the same was addressed in the afore paragraph of judgment, and the argument that the same was not properly considered is not a matter of law but fact.
17. Furthermore ground 7 seeks for leave of the court to adduce additional evidence being Mpesa statement. To adduce additional evidence is not a matter of law. Even then, there is no room for additional evidence at this stage of trial at appeal. Furthermore by dint of section 38 of the *Small Claims Court Act* this court cannot to descend into arena of facts. The court cannot on appellate stage consider evidence that was to be adduced before the court which has original jurisdiction as this court is exercising appellate jurisdiction over the matter. There is no proof that at the time the case was heard the new evidence was not available. Consequently, ground (7) has no merit.
18. On the last ground 8, the issue of romance was dealt with by the court in the judgment at paragraph 20, 22, to 25. Therefore, the issue of the trial court failing to appreciate or consider the same does not arise.
19. It follows from the afore that there are no grounds of appeal purely on point of law.
20. However, I read through the evidence on record and I note that, although the trial court held the view that, there was a pure business relation, from the evidence herein it is unlikely that the claimant met the respondent as a total stranger and expended on her the kind of money herein for no apparent reason or consideration. The claimant stated that he did not want the money repaid with interest and was to be repaid after one year. That is not normal in a pure business relationship. Furthermore, I don’t think RW2, Esther Njeri was a “coached” witness.



21. In my considered opinion, the relationship between the parties was over and above pure business transition. It is against this background that I hold that, the trial court should not have condemned the appellant to pay interest on the sum awarded and each party should bear its own costs of the suit at the lower court and this appeal. Consequently, the appeal is allowed only to the extent that the order on interest and costs is set aside. The amount awarded shall not be repayable with interest and each party shall meet their own costs.

22. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 14TH DAY OF MAY 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:-

Ms. Mburu for the appellant

Ms. Muli h/b for Mr. Kiplagat for the respondent

Ms. Hannah: court assistant

