



**Onyango v Oketch (Civil Appeal E043 of 2023)  
[2025] KEHC 6066 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6066 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E043 OF 2023**

**BM MUSYOKI, J  
MAY 15, 2025**

**BETWEEN**

**ELLY OCHIENG ONYANGO ..... APPELLANT**

**AND**

**CALVINCE OKETCH ..... RESPONDENT**

*(Being appeal from judgment and decree of Chief Magistrate's Courts at  
Kisumu (G. Serem RM) civil case number E208 of 2021 dated 8-03-2023)*

**JUDGMENT**

1. By amended plaint dated 18<sup>th</sup> July 2022, the respondent prayed the subordinate court for judgment against the appellant for Kshs 361,610.00, costs of the suit and interest at 30 per cent on the principal sum from the date of agreement dated 5-12-2019 and at court rates on costs from the date of filing the suit until payment in full. The cause of action was an agreement between the parties dated 5-12-2019 in which the respondent had lent the appellant the pleaded sum which was to be paid with interest. The court found that the amount owed by the appellant was Kshs 121,812.00 and entered judgement for the same with interest at court rates from the date of filing suit until payment in full.
2. The appellant was dissatisfied with the judgement and filed this appeal citing the following eight grounds;
  1. THAT the learned Magistrate erred both in fact and in law by failing to consider the evidence on record and the testimony of the witnesses.
  2. THAT the learned Magistrate erred both in fact and in law by failing to consider the MPESA statements showing that monies were sent to the Plaintiff's Advocate.
  3. THAT the learned Magistrate erred both in fact and in law by shifting the burden of proof to the Defendant.



4. THAT the learned magistrate erred both in fact and in law by failing to determine the matter based on the weight of evidence on record and on the required standard of proof.
  5. THAT the learned Magistrate erred both in fact and in Law by failing to appreciate the laws governing the Small-Claims matters.
  6. THAT the learned Magistrate erred both in fact and in law by failing to determine that the Claimant had been paid in full and that the Respondent could not rely on an agreement it was not party to.
  7. THAT the learned Magistrate erred both in fact and in law by awarding costs and interest to the Plaintiff in a matter that had been fully paid way before litigation.
  8. THAT the learned Magistrate erred both in fact and in law by failing to consider the monies which passed form the Defendant to the Plaintiff's Advocate had not been accounted for.
3. This is a first appeal and this court has the duty to re-evaluate the evidence produced in the trial court and come to its own independent conclusion always giving allowance to the fact that it did not hear the witnesses neither did it have the advantage of observing their demeanor. In discharging that obligation, which of course will be guided by the grounds of appeal, it is important that I lay down an abridged version of the evidence tendered by the parties.
  4. According to the proceedings, the respondent told the court that the appellant approached him for a loan of Kshs 350,240.00 which was to be paid with 30 per cent interest and within a period of three months from 5-12-2019 with the latest payment being due at the end of February 2020. The total debt inclusive of interest came to Kshs 455,312.00 with the respondent being at liberty to pay anytime within the said period. The respondent added that the appellant paid the first installment of tranches of Kshs 200,000.00 within one and half weeks. The appellant surrendered his car as a collateral but he collected it later without paying the whole amount.
  5. In cross examination, he maintained that he was demanding Kshs 361,610.00 although his reply to defence pleaded that the outstanding balance was Kshs 116,610.00. He also admitted having been paid a further Kshs 60,000.00 and confirmed that line number 0721XXXXXX82 belonged to him through which he confirmed receipt of Kshs 10,000.00 on 29-05-2022. He also admitted that he hired Oriwa Arnold to follow up the payments for him and that the appellant informed him that he was making payments to his said advocate who received Kshs 3,000.00, 17,000.00, 10,000.00 and 34,000.00 and proceeded to give his advocate's telephone line number as 0729XXXXXX2. He added that he did not know whether 0702XXXXXX4 belonged to his advocate. He however stated that his advocate had not told him that he had received any money.
  6. The appellant in his witness statement admitted having been advanced Kshs 350,240.00 which he paid in 9 installments as follows; Kshs 200,000.00 on 17-12-2020 in cash; Kshs 65,000.00 in February 2020 through an equity agent; Kshs 50,000.00 in cash through the respondent's advocate on undisclosed date; Kshs 17,000/- through mpesa to the respondent's advocates on undisclosed date; Kshs 3,000.00 through mpesa to the respondent's advocate on 3-10-2021; Kshs 10,000.00 through mpesa to the respondent's advocate on 30-10-2021 and Kshs 34,000/= to the respondent's advocate's line number 0702XXXXXX4 and Kshs 32,000.00 through the plaintiff's number 072XXXXXX2 on 29-05-2022.
  7. He confirmed that the agreement was for Kshs 350,000.00 which he was to pay in three months together with interest all totaling Kshs 455,312.00. He confirmed in cross examination that he did not pay the whole amount within 3 months safe for the Kshs 200,000.00 which he had paid within one and half weeks.



8. The second defence witness was one Jane Akinyi who was wife to the appellant. She adopted her short statement dated 20-08-2022 which stated that on 27-01-2022, the appellant gave the respondent's advocate a sum of Kshs 50,000.00. She was not cross examined and that was the close of the appellant's case.
9. Ground 5 of the memorandum of appeal has no basis since as much as I understand and see the case, it was not before the small claims court. I also do not understand what the appellant means by the magistrate failing to appreciate the law governing small claims court matters. The submission on that issue are equally irrelevant to this appeal.
10. I have read the evidence, submissions of the parties and the memorandum of appeal and I discern that there is no dispute that the appellant was advanced Kshs 350,240.00. There cannot be dispute that the amount which was agreed to be paid back was Ksh 455,312.00 which was inclusive of interest. This is because paragraphs 2, 3, 4 and 5 of the agreement were explicit that the amount advanced was Kshs 350,240.00 and interest to be paid was Kshs 105,072.00. It is also clear to me that the agreement did not provide for penalties or consequences of failure to pay within the three months which in my opinion means that there was no justification for the respondent to ask for interest from the date of the agreement. As far as I understand the case, the only dispute herein is whether the appellant paid Kshs 455,312.00 in full.
11. Going by the testimony of the respondent, the following payments are acknowledged;
  - a. Kshs 200,000.00 within one and half weeks of the agreement.
  - b. Kshs 60,000.00 on a date not disclosed in the proceedings.
  - c. Kshs 10,000.00 on 29-05-2022.
12. The above leaves a sum of Kshs 185,312.00. This means that the respondent had no basis for filing suit for Kshs 361,610.00 and insist on being awarded the same amount even where his reply to defence pleaded Kshs 116,610.00. Where a party in its testimony admits a specific contested fact, the trial court has no business in returning a finding different from what the party has stated especially where the burden of proof of that particular fact is on the said party.
13. The above now leaves the contest to Kshs 185,312.00. If indeed the appellant claims that the debt was fully settled, he should be able to demonstrate that there were payments other than the admitted ones which amounted to or was more than this figure. Sieving through the testimony of the appellant as against the aforesaid admitted payments, the following were made but not taken into account by the trial court in its judgment;
  - a. Kshs 65,000.00 in February 2020 through an equity agent;
  - b. Kshs 50,000.00 in cash through the respondent's advocate on undisclosed date;
  - c. Kshs 17,000/- through the respondent's advocate through Mpesa on 30-10-2021;
  - d. Kshs 3,000.00 through mpesa to the respondent's advocate on 30-10-2021;
  - e. Kshs 10,000.00 to the respondent's advocate on 30-10-2021 through Mpesa;
  - f. Kshs 34,000/= to the respondent's advocate's line number 0702XXXXX4;
  - g. Kshs 34,000.00, to the respondent on undisclosed date; and
  - h. Kshs 32,000.00 through the plaintiff's number 0721XXXXX2 on 29-05-2022.



14. I do not think that there is evidence that the monies in 'a' and 'b' were actually paid. This is because the same are not supported by any evidence. The appellant and his witness stated that Kshsh 50,000.00 was given in cash and no receipts or any acknowledgment was given or produced. Without evidence of such payments, this court cannot hold that the same were paid as courts act and make decisions based on evidence and where it is lacking, there cannot be any alternative but to hold against the party claiming existence of the fact in issue. The conversation between the respondent's advocate and the appellant does not disclose admission of receipt of the Kshs 50,000.00. True, the appellant is seen asking for receipts but I see no commitment or acknowledgement of the payment by the advocate.
15. The same goes for the Kshs 65,000.00 said to have been paid through an equity bank agent. I have gone through the documents filed in court but I have not seen any in proof of this alleged deposit. The appellant has also not directed or pointed to the court a specific document or transaction which makes reference to payment of the said amount in February 2020 or any other date.
16. The respondent admitted that he appointed Arnold Oriwa advocate to follow up and collect the debt for him. If indeed there is evidence that there was money sent to the said advocate, that is as good as payment of the debt. The appellant cannot be blamed for failure of the advocate to account to the respondent. The appellant submits there was evidence that Kshs 68,000.00 was sent to the respondent's advocate and faults the magistrate for holding that there was no proof that the number to which the money was sent belonged to the respondent's advocate. I have gone through the documents specifically mpesa statement which shows that telephone number ending with 2204 was registered in the name of Arnold Oriwa. It is therefore my position that the monies sent to that number on 27-01-2022 were part payment of the debt. The bank statement at page 141 of the record of appeal shows two payments to this number for Kshs 34,000.00 each made to the advocate's number. That knocks off Kshs 68,000.00 which is reflected in items 'f' and 'g' leaving a balance of Kshs 117,312.00.
17. At page 34 of the record of appeal is an mpesa statement which shows three transactions of Kshs 20,000.00 covering items 'c', 'd' and 'e'. It is clear to me that these amounts were sent to the respondent's number from the appellant's mobile number 0725XXXXX857. This brings the amount down to Kshs 97,312.00.
18. For item 'h', I have also looked at the mpesa statement for the appellant's line for 29-05-2022 which date the appellant claimed to have sent Kshs 32,000.00 to the respondent. The statement shows that only Kshs 10,000.00 was sent to that line on that date. I am unable to see where the Kshs 32,000.00 in the mpesa statement but in the equity bank statement at page 147 of the record of appeal shows a transaction of Kshs 32,500.00 sent to telephone number 0721XXX8382 which the respondent admitted was his line. These two payments bring down the amount due to Kshs 54,812.00.
19. As I conclude, I would wish to state that this was a case of simple account reconciliation which would have been solved by amicable settlement. The hardline stands taken by both parties did not help any of them if the costs associated with the litigation is anything to go by. Parties should be encouraged to settle such matters out of court in order to save precious judicial time and costs.
20. Based on the above analysis, I find that the amount proved to have been owed by the appellant was Kshs 54,812.00 and I consequently set aside the trial court's judgment dated 8<sup>th</sup> March 2023 and substitute therefor an order entering judgement for the respondent against the appellant for a sum of Kshs 54,812.00 with interest at court rates from the date of filing suit in the subordinate court until payment in full.
21. Since some of the payments were done after filing of the suit, the respondent shall have the costs of the suit in the lower court but each party shall bear their own costs of the appeal.



**DATED SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT**

