



**Otieno v Ochola (Civil Appeal E001 of 2024)
[2025] KEHC 8561 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E001 OF 2024**

**DK KEMEL, J
JUNE 19, 2025**

BETWEEN

GABRIEL ONJIKO OTIENO APPELLANT

AND

KENNEDY ODOYO OCHOLA RESPONDENT

*(Being an appeal arising from decision of Hon. JP Mkala (RM)
in Siaya SCCC No. E002 of 2024 dated 8th March, 2024)*

JUDGMENT

1. The appeal arises from the decision of Hon. JP Mkala (RM) in Siaya SCCC No. E002 of 2024 wherein he entered judgment for the Claimant (Respondent herein) in the sum of Kshs194,000/= plus costs and interest against the Respondent (Appellant herein).
2. Aggrieved by the said decision, the Appellant filed Memorandum of Appeal dated 17/4/2024 wherein he raised the following grounds of appeal:
 - i. That the learned trial magistrate erred in law and fact by misconceiving the factual matrix leading to the dispute in the matter that was before him.
 - ii. That the trial magistrate erred in law and fact by concluding that there was an agreement between the two parties and that a sum of Kenya shillings one hundred and ninety-four thousand was given to the Appellant yet there was no evidence to prove the same.

The Appellant therefore sought for the setting aside of the whole judgment and substituting it with an order dismissing the Claimant's suit with costs.

3. This being the first appellate court, its duty is to evaluate the evidence tendered before the lower court and come up with an independent conclusion as to whether or not to uphold the decision of the trial court. See *Selle Vs Associated Motor Boat Company* [1968] EA 123.



4. Kennedy Odoyo Achola (CW1) adopted his statement dated 15/1/2024 and a further statement dated 21/2/2024 as his evidence in chief. He also relied on his list of documents dated 15/1/2024 which comprised inter alia; Mpesa payment transactions, WhatsApp communication and an agreement. He stated that he entered into an agreement with the Appellant herein and signed the agreement in the presence of witnesses namely Richard Omwala as well as George Otieno and Charles Orembo. The Claimant's case is that he was approached by the Appellant with a business of purchasing fingerlings at a cost of Kshs194,500/= to be put in a fish cage in a joint venture project. That based on their cordial relationship, he agreed with the proposal through his mobile phone number 0713XXXXXXX and that he sent the money totaling Kshs194,500/= on several occasions. That he later realized that he had been duped by the Appellant when the Appellant failed to pick his calls forcing him to lodge a report at Usenge Police Station whereupon the Appellant was summoned at the police station and he signed an agreement to refund the money but the Appellant has failed to refund the money and was forced to file the suit.

On cross examination, he stated inter alia; that they both drafted the agreement; the police officers gave them space to negotiate and come up with the agreement; that he reported the case to the police and that the Appellant was arrested and taken to the police station; that the police allowed them to go under a tree and come up with an agreement; that based on the negotiated oral agreement the police officers reduced it into writing; that the witnesses were all present at the police station; that the witnesses were not his since he was alone; that he heads a vocational centre by the name Lucy Onono and that his basic salary is Kshs42,000/=; that he also runs an Mpesa shop; that the Mpesa message dated 8/12/2021 was sent to Mohammed Ochanda for Kshs70,300/=; that Mohammed Ochanda is not a witness as it is the Appellant who introduced him to the said Mohammed Ochanda; that there was no witness when I gave Gabriel the money in cash; that he does not owe the Appellant any money; that the Appellant did not supply the institution with firewood; that he did not sent the Appellant to buy cows but that the Appellant had accompanied him; that when he bought the cows the area chief was not around; that Gabriel went to pick the letter without his knowledge; that the recent agreement which is signed by himself and the Appellant; that Mohammed Ochanda was brought by the Appellant and hence he has sued the Appellant on his behalf; that the fingerlings were to be supplied to the Appellant who was to take care of the business of the Lake.

5. That marked the close of the Claimant's case.
6. The Respondent (Appellant herein) Gabriel Onjiko Otieno (RW1) adopted his witness statement dated 19/2/2024 as his evidence in chief as well as his list of documents filed on the same date which comprised of a chief's letter dated 12/2/2024, copies of Mpesa statements, Demand letter and response to demand letter. He stated that he is a Ward Manager Yimbo East Ward. That he was not in the business of fish cage farming. The summary of his statement is inter alia; that the Claimant who is a manager at Lucy Onono Technical College gave him a tender to supply a firewood to the institution in November 2021 and has been supplying the same and being paid Kshs24,000/= after every two months; that later in February 2022, a friend from Alego who intended to sell his two cross breed cattle to him but he did not have money and so he roped in the Claimant who was interested in purchasing one of the calves; that the Claimant sent him money to purchase the same calf in four instalments; that he proceeded to Komenya village to purchase the two calves and that he also obtained a chief's letter dated 12/2/2022 to enable him move the animals; that he handed over the animals to the Claimant in the presence of the Appellant's friend Richard Ochieng Omwala; that on morning of 12/4/2023 he was apprehended by two police officers in the company of the Claimant who escorted him to Usenge



Police Station from where he was ordered to pay the Claimant Kshs194,000/- in order to secure his release; that he had no option but to sign the agreement in order to secure his freedom; that later he was served with a demand letter from the Claimant's advocate demanding of the said sum; that he does not owe the Claimant any money as alleged but that the Claimant is the one who owes him Kshs24,000/- for the supply of firewood to Lucy Onono Technical Institute.

On cross examination, he stated inter alia; that the Claimant gave him a tender for supply of firewood but he does not have the document to show; that he signed agreement to pay Claimant Kshs194,000/= ; that he works as a Ward Manager; that Richard Omwala is a personal assistant to the Area Member of County Assembly; that George Otieno Sino also signed the agreement and who is a supervisor in Yimbo East Ward; that Charles who is his brother also signed the agreement; that he was forced to sign the agreement; that the witnesses were not forced to sign the agreement; that he does not have an OB from the police; that he does not do any business by the lake; that he had sent a text message to the Claimant's WhatsApp on 19/4/2021; that he did not have any agenda with the Claimant that day; that the text message was prior to the agreement; that his boat engine was stolen.

On re-examination he stated inter alia; that he was forced to sign the agreement at Usenge police station; that the police had arrested him; that George and his brother were not forced to sign the agreement.

7. Richard Ochieng Omwala (RW2) stated that he is a personal assistant to the Area MCA Yimbo East Ward; that he adopted his statement dated 19/2/2024 as his evidence in chief and which were inter alia; that he was informed about the arrest of the Appellant at Usenge police station and he joined his colleague George Sino and went to the said station and found the Appellant already in the police cells; that the Appellant denied entering into a deal with the Respondent for a fish cage business and that the claim for Kshs194,000/= was false; that the police drafted the agreement in which the Appellant was forced to sign and that he and his colleague witnessed it; that he was surprised later to learn that the Respondent had filed a case against the Appellant.

On cross examination, he stated inter alia; that he signed the agreement between the Respondent and the Appellant as a witness; that he did not read the agreement; that upon reading the agreement he has now learned that the dispute is about fingerlings; that he is aware that the agreement talks about money to be paid to the Respondent.

8. That marked the close of the Appellant's case.
9. The trial court pursuant to Section 19 and 32(4) of the *Small Claims Act* summoned certain persons who had been mentioned by the Appellant as having been involved in his transactions with the Respondent. Lilia Rehena was one of those who were summoned and who testified that she knows the Appellant as the Ward Manager East Yimbo as well as the Respondent who is her customer. She stated that she usually sell fish to the Respondent to eat but that she does not have any evidence to show that she was supplying fish. George Opiyo was also summoned and he stated that he is a farmer from Komenya Rabar and that he knows both the Appellant and Respondent. That he sold his cow to both the Appellant and the Respondent when they visited his home.
10. The appeal was canvassed by way of written submissions. Both parties duly complied.
11. Vide submissions dated 10/4/2025, learned counsel for the Appellant raised two issues for determination namely whether the Appellant has made out a case for the grant of the order for setting aside the whole of the lower court judgment and secondly, whether there was proof of payment of money to the Appellant by the Respondent.



12. As regards the first issue, learned counsel submitted that the trial court failed to put into consideration that there was no contract either oral or written indicating the existence or even an intention of creation of a joint venture between the Appellant and the Respondent. It was submitted that the essential ingredient of a contract namely offer, acceptance and consideration are missing in the purported transaction. Learned counsel submitted that it was absurd for the trial court to hold that there was a joint venture yet there was none in existence. It was also submitted that the Respondent unlawfully used the police to coerce the Appellant into signing an illegal agreement and which deprived the Appellant the exercise of free will.
13. As regards the second issue, it was submitted that the trial magistrate relied on wrong principles in arriving at the decision despite the fact that the Respondent did not prove his case as required by Section 107 (1) of the *Evidence Act*. It was therefore submitted that the appeal herein has merit and that the same should be allowed with costs. `
14. Vide submissions dated 22/4/2025 learned counsel for the Respondent submitted that the trial court arrived at the correct conclusion that there was an agreement between the Respondent and the Appellant which was duly signed and witnessed by witnesses who testified before court. It was submitted that the agreement is still valid even though the same was signed at Usenge Police Station. It was also submitted that the Appellant did not present evidence before the lower court of any fraud, misrepresentation, illegality or duress. Further, it was submitted that it was the Appellant who first initiated the issue of the fish venture to the Respondent before the issue of the money was discussed. Finally, it was submitted that the Appellant did not controvert the existence or authenticity of the agreement and therefore the same was binding upon the parties. Learned counsel urged the court to dismiss the appeal with costs.
15. I have considered the record of appeal and the submissions filed. It is not in dispute that both the Appellant and the Respondent knew each other prior to the institution of the suit in the lower court as can be seen from the telephone and WhatsApp communication which were presented to the court during the hearing of their rival claims. It is also not in dispute that the Appellant and the Respondent entered into an agreement at Usenge Police Station wherein the Appellant undertook to refund the sum of Kshs194,000/- to the Respondent. I find the issue for determination is whether the Respondent had proved his case in the lower court on a balance of probabilities.
16. The Respondent being the Claimant in the lower court bore the burden of proof of his claim against the Appellant which is on a balance of probabilities. Under Section 107 (1) of the *Evidence Act*, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. It is trite law that the standard of proof in all civil cases is on a balance of probabilities. In the case of *Hon. Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi* [2014] eKLR the court stated that:

“Even where the Defendant has not denied the claim by filing of defence or an affidavit or even where the Defendant did not appear, formal proof proceedings are conducted. The Claimant lays on the table evidence of facts contended against the defendant and the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

From the foregoing, the Respondent was under obligation to present evidence before the trial court showing that indeed the Appellant was indebted to



him. I have looked at the documents which the Respondent presented before the court and which comprised of WhatsApp messages as well as an agreement entered between the two. It is noted that the Appellant has vehemently maintained that there was no discussion between him and the Respondent over fish cage venture in the lake around Usenge Beach. He has also denied owing any monies to the Respondent regarding the alleged cage fishing venture. The Appellant has taken great exception to the agreement entered into between him and the Respondent at Usenge police station on the ground that he was coerced into signing it. However, from the evidence of the Respondent and the witnesses who were called to testify, I am satisfied that indeed such an agreement was entered into between the Respondent and the Appellant. I find the allegation by the Appellant that he was coerced into signing the agreement not persuasive in view of the fact that even his own witnesses admitted that they were not forced to sign the agreement. Further, I find the Appellant's claim that he is not aware of any fish cage venture between him and the Respondent to be untruthful in view of the fact that there are WhatsApp messages shared between him and the Respondent. Further, the Appellant has not presented any evidence to the effect that he lodged a complaint with any authority over his claim that there was fraud committed by the Respondent in collusion with the police at Usenge leading to the purported agreement. The Appellant has not also presented evidence that he has sued the police at Usenge for unlawful use of force against him and compelling him to sign the agreement with the Respondent. It is clear that there was something between the Appellant and the Respondent prior to the signing of the agreement. I find that the Appellant signed the said agreement willingly and without any coercion, force or intimidation. It is instructive that the Appellant has not filed a counter claim for an order to cancel the agreement. It is trite law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the courts to rewrite such contracts. In *National Bank of Kenya Ltd vs. Plastic Samkolit (K) Ltd* (2002) 2 EA 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

Again, in *Pius Kimaiyo Langat vs. Cooperative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.

From the foregoing authority, the agreement entered into by the Appellant and the Respondent must be respected and deemed to be what they intended to bind them. Even though learned counsel for the



Appellant has maintained that the Appellant did not exercise his free will since he was ordered to sign the agreement at Usenge Police station, it is instructive that the said agreement was entered into in the presence of the Appellant's close friends who have confirmed before the trial court that there was no coercion. Further, the learned counsel for the Appellant has contended that the essential ingredients of the contract were not available namely offer, acceptance and consideration. I am not persuaded by the said submissions since it came out very clearly that the Appellant and the Respondent had lengthy conversations and exchanged WhatsApp messages as well as payments prior to the signing of the agreement. I find that all the ingredients of the contract were in place. The trial court summoned the witnesses mentioned by the parties such as George Opiyo from Komenya Rabar whom the Appellant claimed had sold a cow to the Respondent and who testified that the money for the sale of the calf was paid in cash by the Respondent who passed it to the Appellant who then gave it to him. This was contrary to the Appellant's claim that the money was sent through Mpesa. Further, the Appellant admitted that the WhatsApp messages sent to him by the Respondent were about the fish business at the lake. Hence, it is obvious that the Appellant received the money from the Respondent over the fish cage venture which did not kick off. I am satisfied that the Appellant is indebted to the Respondent to the tune of Kshs194,000/=. Hence, the finding by the trial court was quite sound and must be upheld.

17. The Appellant had sought for a counter claim of Ksh24,000/= which he claimed to have been incurred as a result of supplying firewood to Lucy Onono Educational Institute wherein the Respondent



worked as a manager. However, the Appellant failed to present evidence such as tender documents, invoices and supply documents. I find this was not proved and therefore the finding by the trial court was quite proper.

18. It is also noted that the Respondent sought for the sum of Kshs10,000/= being in respect of a demand letter. However, no receipts of payments to his advocate were produced in support of such claim. Hence, the trial court's rejection of the same was in order.
19. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondent.

DATED AND DELIVERED AT SIAYA THIS 19TH DAY OF JUNE, 2025.

D. KEMEI

JUDGE

In the presence of:

N/A M/s Owenga.....for Appellant

Okello.....for Respondent

Okumu.....Court Assistant

