



Gichuhi v India; Equity Bank Ruiru Branch (Interested Party) (Civil Appeal E070 of 2024) [2025] KEHC 12555 (KLR) (9 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E070 OF 2024
RC RUTTO, J
SEPTEMBER 9, 2025**

BETWEEN

MARY WAMBUI GICHUHI APPELLANT

AND

JENIFFER MWENESI INDIA RESPONDENT

AND

EQUITY BANK RUIRU BRANCH INTERESTED PARTY

JUDGMENT

1. This appeal arises from the judgment and decree in Ruiru Chief Magistrate’s Civil Suit No. E226 of 2023. In that suit, the Appellant sued the Respondent seeking among other reliefs, injunctive orders restraining the Respondent and her agents from transacting, withdrawing, transferring, using or in any other way dealing with funds deposited by the Appellant and held by the Interested Party in Account Number 1520174561516 in the name of Natalie Wambui Ngethe. The Appellant further sought orders compelling the Interested Party to transfer all monies held at Juja Branch to the Appellant’s account and an order directing the Respondent to refund the sum of Kshs.20,000/= allegedly withdrawn without the Appellant’s consent.
2. The Appellant’s case was that since 2017, she deposited funds in favour of her granddaughter, Natalie Wambui Ngethe (a minor), through various means including cash deposits, M-Pesa agents, and M-Pesa transfers, amounting to a total of Kshs.536,537.67/= in Equity Bank Account Number 1520174561516 held in the name of the minor. She stated that the purpose of these funds was to assist the Respondent in meeting the child’s education expenses following the death of the minor’s father, who was the Appellant’s son. The Appellant alleged that the Respondent, being the sole signatory to the said account, has full control over withdrawals and transfers therein, yet she only made the opening deposit of Kshs.7,500/= and no further contribution.



3. The Appellant further averred that the Respondent being the sole signatory failed to utilise the deposited sums solely for the minor's secondary school education expenses, forcing the Appellant to make additional school fees payments. She contended that although she consented to a withdrawal of Kshs.10,000/= on 11th May 2021, the Respondent withdrew additional funds without her consent on two other occasions, namely on 26th October 2018 and 10th May 2021. Consequently, the Appellant sought an order directing that the monies she deposited be transferred to her own account and placed under her control.
4. The Respondent in her statement of defence denied the Appellant's claim and filed a counterclaim dated 12th October 2023. She averred that on 16th October 2017, together with her late husband she opened Equity Bank Account Number 1520174561516 ("the account") in favour of their daughter, Natalie Wambui Ngethe and another account for their son. The purpose of the account, she stated, was to make savings to cater for their children's college education upon completion of high school. The Respondent further averred that upon opening the account, they deposited Kshs.7,500/= as the initial deposit.
5. She alleged that the Appellant became aware of the purpose of the account and of her own volition, deposited various sums into it. The Respondent stated that since the account was opened, only three withdrawals of Kshs.10,000/= each were made on 26th January 2018, 10th May 2021, and 11th November 2021, and that each withdrawal was done in the presence of the Appellant. She further asserted that on several occasions, the funds were placed in a fixed deposit account to earn interest and, upon maturity, were transferred back into the account. The Respondent contended that following the death of her husband on 11th January 2023, the Appellant began making attempts to take control of the account and the funds therein. She further alleged that the Appellant has treated her and her children with contempt and has ensured that they do not benefit from the deceased's estate.
6. In her counterclaim, the Respondent prayed that the Appellant's suit be dismissed with costs, that the funds in the account be applied towards Natalie Wambui's college education as originally intended, and that the Appellant be permanently restrained from interfering with the said funds.
7. In response to the counterclaim, the Appellant filed a reply dated 13th October 2023. She stated that the reason she seeks to have the monies returned to her control is that Natalie Wambui has completed her secondary education and therefore the Appellant's intention in making the deposits has been fulfilled. She further averred that Natalie Wambui is now 18 years old and an adult, that both the Respondent and Natalie Wambui have treated her with disdain and failed to appreciate her assistance and that she herself is 75 years old and no longer engaged in gainful employment.
8. Upon hearing the parties, the trial court entered judgment in favour of the Respondent herein as against the Appellant in the counterclaim. Judgment was in the following terms;
 - a. The suit by the Plaintiff/the Appellant herein against the Defendant/Respondent herein is hereby dismissed.
 - b. The funds on account No. 1520174561516, Juja Branch be utilised to the finance the college education of Natalie Wambui Ngethe.
 - c. An order is issued that the Plaintiff/Appellant herein be permanently restrained from interfering with the said funds.
 - d. Each party to bear their own costs in the suit and counterclaim as this is a family matter.



9. Aggrieved by the judgment, the Appellant herein filed this appeal citing grounds that the Learned Honourable Magistrate erred in law and facts by basing the entire case on the existence and enforcement of an oral contract an issue which was not pleaded, supported by facts or law but lifted from submissions; by finding that there existed an enforceable oral contract where none existed; failed to take into consideration that the Respondent submissions with respect to the existence of an oral contract were completely contradictory to her pleadings where she averred that the Appellant's contribution were on her own volition; grossly misdirected herself in finding that it was the Appellant who advised her son to open a savings bank account contrary to the averments by the parties in their pleadings and trials; holding that the Respondent's counterclaim was uncontroverted since the Appellant had filed a reply to Defence and Counterclaim dated 13th October 2023 and which was not considered by the court; by arriving at a decision which infringed on the Appellants right to hold property as established by Article 40 of *the Constitution* of Kenya; applying Article 53 (2) of *the Constitution* of Kenya while arriving at her decision since Natalie Wambui Ngethe is not a child but an adult; ignoring the Appellants evidence that she fulfilled her desire to cater for her granddaughter secondary school education out of pocket, a fact which was not controverted by the Respondent in her pleading and evidence; by failing to decide the case on the evidence presented before her and in arriving at a decision based on assumptions not supported by evidence or pleaded; failing to appreciate and hold that the Respondent had not proved their case on a balance of probabilities as required by law and in finding that the appellant's claim was not meritorious when there was abundant evidence pointing to the contrary.
10. The Appellant therefore prays that the appeal be allowed and that the judgment of the lower court be set aside in its entirety. She further seeks injunctive orders restraining the Respondent, her agents, or representatives from transacting, withdrawing, transferring, using, or in any other way dealing with funds deposited by her in Equity Bank Account Number 1520174561516. The Appellant also prays for an order compelling the Interested Party to transfer all monies amounting to Kshs.536,535.67/=, deposited by her, to an account appointed by her.
11. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 15th October 2024, while those of the Respondent are dated 27th November 2024. I have summarised these submissions below.

Appellants' Submissions

12. The Appellant commenced her submissions by providing a brief background of the case. She then addressed the grounds of appeal in three categories: Grounds 1, 2, 3, 4, and 6 were argued together; Grounds 5 and 7 were addressed independently; and Grounds 8, 9, 10 and 11 were argued together.
13. On the issue of whether the trial court erred in finding that there existed an oral agreement, the Appellant submitted that the question of the existence of an oral contract was never pleaded by either party, and therefore, the trial court was not at liberty to raise and determine the matter on the basis of an unpleaded issue. In support of this argument, she relied on the case of *Malawi Railways Limited v Nyasulu* cited in the case of *Independent Electoral and Boundaries Commission & Another versus Stephen Mutinda Mule & 3 others* [214] eKLR.
14. The Appellant contended that the trial court wrongly stated in its judgment that the evidence adduced by both parties established the existence of an oral agreement. She invited this Court to peruse the pleadings and note that the trial court's finding was contrary to the parties' averments. She argued that the trial court erred in holding that she advised her son to open the savings account, contrary to what was pleaded and testified to at trial, as she only became aware of the account after its



- opening. Additionally, the Appellant submitted that the issue of an oral agreement was never pleaded before the trial court. She also challenged the Respondent's reliance on the doctrine of promissory estoppel, arguing that it was inapplicable to the circumstances of this case. In this regard, she cited *Carol Construction Engineers Limited & Another v National Bank of Kenya* [2020] eKLR, *Anchor Limited v Sports Kenya; County Government of Kisumu (Third Party)* [2020] eKLR, *Central London Property Trust Limited v High Trees House* [1947] KB 130, and *Combe v Combe* [1951] 2 KB 215.
15. The Appellant argued that no promise intended to create a legal obligation was made by her to contribute to the account, as her contributions were purely voluntary and dependent on her financial ability. She submitted that if she did not make any contribution, no legal implications would arise. Further, she contended that the Respondent had not demonstrated how any alleged promise or commitment induced her to act in a manner that resulted in detriment.
 16. On Ground 5 of the appeal, the Appellant submitted that the trial court's finding that the Respondent did not file a defence to the counterclaim demonstrates that the Appellant's reply to the defence and counterclaim dated 13th October 2023 and the contents therein, were not considered, to her detriment. She argued that in her reply to the defence and counterclaim, she specifically opposed the Respondent's assertion that the monies were contributed for the purpose of college education. According to the Appellant, the intended purpose of the funds was for secondary school education, which was a highly contested issue.
 17. She further submitted that during the hearing, the Respondent confirmed that the bank account was opened in 2017 at a time when Natalie was in Class 7 and had not yet joined secondary school. During cross-examination, the Respondent allegedly admitted that no funds had been set aside for secondary education and that such expenses were to be borne by the Appellant. The Appellant additionally submitted that a perusal of the bank statement shows that her first deposit was made on 28th October 2017, when Natalie was in Class 7, and the last deposit was made on 16th November 2020 when Natalie was in Form 2. She contended that she ceased making contributions at that point because the Respondent had refused to utilise the funds for their intended purpose. The Appellant therefore urged this Court to find that it was unreasonable for the Respondent to claim that the funds were intended for college education, considering that when the deposits were made, the student was still in primary and early secondary school, and no funds had been earmarked for college education.
 18. With respect to Ground 6, the Appellant submitted that during cross-examination, the Respondent admitted that apart from the initial deposit of Kshs.7,500/=, she did not contribute any additional funds to the account. The Appellant argued that the trial court's decision effectively deprived her of the funds in the account, despite her having established proprietary rights over the same. She contended that she proved her claim by producing bank statements showing deposits made by herself, as well as corroborating evidence from Gladys Wangui Njoroge (PW3) and Elizabeth Wambui (PW2). In addition, the Appellant challenged the trial court's reliance on Article 53(2) of *the Constitution*, arguing that Natalie Wambui was 19 years old and therefore not a child within the meaning of the law. On this basis, she maintained that the trial court erred in applying the provisions of Article 53 to the dispute.
 19. In submitting on Grounds 7, 8, 9, 10, and 11, the Appellant argued that the trial court ignored the parties' pleadings, submissions, and the reliefs sought, and instead introduced and determined new issues. She asserted that her evidence demonstrated that she fulfilled her intention of catering for her granddaughter's secondary school education from her own resources, and that this evidence was not controverted by the Respondent. The Appellant further contended that without reference to the pleaded issues, the trial court faulted her for failing to produce documentary evidence relating to Natalie's secondary education, an issue which, according to her, was never in dispute. She also argued



that the court improperly placed emphasis on the strained relationship between the parties in arriving at its decision, a matter that was not pleaded or before the court for determination.

20. The Appellant maintained that the trial court disregarded her evidence regarding the alleged misappropriation of funds in the account. She stated that during examination-in-chief, she confirmed that she only consented to a withdrawal of Kshs.10,000/= on 11th November 2021 yet later she discovered that the Respondent withdrew Kshs.20,000/= on 26th January 2021 and 10th May 2021 without her consent. She submitted that the Respondent failed to produce any evidence to rebut her proprietary rights over the funds or to substantiate the counterclaim, which was nonetheless allowed on the erroneous basis that it was uncontroverted.
21. In conclusion, the Appellant urged this Court to allow the appeal as prayed.

Respondents' Submissions

22. The Respondent commenced her submissions by providing a background of the case as presented before the trial court, outlining the pleadings filed, the manner in which the hearing proceeded, and the contents of the impugned judgment. According to the Respondent, the following facts were not in dispute: that she is the daughter-in-law of the Appellant, having been married to the Appellant's son, Moses Ngethe Kinyanjui; that the Appellant is the grandmother, and the Respondent the mother, of Natalie Wambui Ngethe; that the said Moses Ngethe Kinyanjui passed away on 11th January 2023; that Account Number 1520174561516, held at Equity Bank, Juja Branch, was opened by the Respondent and her late husband on 16th October 2017; that she is the sole signatory to the said account; that the Appellant voluntarily agreed and indeed made deposits into the account to cater for Natalie's education; and finally, that the purpose of the account was to make savings towards the education of Natalie Wambui Ngethe.
23. The Respondent further submitted that the evidence on record clearly demonstrates that the Appellant and her late son agreed that the Appellant would deposit money into the said account for the education of Natalie. The only variance in their evidence, according to the Respondent, was that the Appellant contended that she advised her son to open the account, whereas the Respondent asserted that the account was opened by herself and her late husband. The Respondent argued that this difference is immaterial and does not in any way negate the fact that the Appellant and her late son agreed that the Appellant would contribute funds into the account for Natalie's education. The Respondent therefore submitted that the trial court correctly found that there was an oral agreement between the Appellant and her late son to deposit money for Natalie's education.
24. In response to the Appellant's submission that the trial court conceived its own issues and determined the suit on that basis specifically, the issue of an oral contract which the parties had not pleaded, the Respondent submitted that the existence of an agreement between the parties to deposit money into the account for Natalie's education was indeed pleaded. She pointed out that paragraph 6 of the Appellant's amended plaint and paragraph 7 of the Appellant's witness statement acknowledge this arrangement. The Respondent argued that the only dispute raised by the Appellant from the outset concerned the purpose of the deposits, which the Appellant claimed was for Natalie's secondary school education. The Respondent maintained that paragraph 6 of the Appellant's amended plaint expressly confirmed the existence of an agreement with the Respondent to deposit funds, albeit allegedly for secondary school education.
25. The Respondent further submitted that even if the Court were to find that the issue of the agreement was not expressly pleaded, the trial court was nonetheless correct in determining it, as evidence was



- led on the matter. In particular, during cross-examination, the Respondent stated that the Appellant voluntarily deposited the money after reaching an understanding with her late husband.
26. The Respondent referred to the case of *China Wu Yi Limited & Another v Irene Leah Musau* [2022] eKLR, which held that a court may base its decision on an unpleaded issue where it appears that the issue was fully canvassed at trial. The Respondent submitted that it was not in dispute that there was an agreement for the funds to be deposited to cater for Natalie's education, and that the only divergence between the parties was whether the funds were intended for secondary education or college education. She argued that the trial court, in its judgment, found it unnecessary to draw a distinction on this point, but a holistic review of the evidence leads to the inevitable conclusion that the funds were meant for Natalie's college education.
 27. The Respondent submitted that the Appellant's contention that the funds were not utilised to pay for Natalie's secondary school education because the Respondent allegedly failed to write cheques was untrue. She argued that during cross-examination, the Appellant admitted that she used to accompany the Respondent to the bank when transactions were carried out to deposit the funds into a fixed deposit account. The Respondent further noted that the Appellant continued to make deposits into the account even after the alleged refusal to write cheques. According to the account statement produced in court, the last deposit by the Appellant was made on 16th November 2020.
 28. The Respondent contended that these continuous deposits demonstrate that the funds were intended for Natalie's college education. She further submitted that, even after the alleged failure to pay secondary school fees, transactions involving the Appellant continued in the account, with the last one being on 27th January 2023, when the account was credited with Kshs.530,905.21/= from an interest account long after Natalie had completed secondary school. The Respondent argued that these facts lend credence to her assertion that the account was opened to pay for Natalie's college education. The Respondent also submitted that the trial court did not make the alleged finding that it was the Appellant who advised her son to open the bank account, as claimed by the Appellant. She further argued that the existence or otherwise of a reply to the counterclaim would not have altered the findings of the learned magistrate.
 29. On the ground of appeal alleging that the learned magistrate infringed on the Appellant's right to property under Article 40 of *the Constitution*, the Respondent submitted that once the Appellant deposited the funds into the Respondent's account pursuant to an agreement that the money was for a specific purpose, the funds ceased to be the absolute property of the Appellant and ought to be utilised for the intended purpose.
 30. In response to the ground challenging the trial court's application of Article 53(2) of *the Constitution*, the Respondent submitted that at the time the account was opened, Natalie was a minor, and the fact that she has since attained majority should not prejudice her rights. The Respondent further disputed the Appellant's contention that her allegation of funding Natalie's secondary education was uncontroverted. She maintained that the issue was indeed disputed and that it was incumbent upon the Appellant to adduce evidence, such as receipts, to prove that she catered for Natalie's secondary education. The Respondent noted that during cross-examination, the Appellant admitted that she had no receipts to demonstrate such payments.
 31. Regarding promissory estoppel, the Respondent submitted that this issue does not arise from the grounds of appeal and urged the Court to disregard the Appellant's submissions on it. The Respondent further asserted that the dispute over the funds arose following the death of the Respondent's husband, who was the Appellant's son. She observed that during cross-examination, the Appellant admitted that after her son's demise, she placed a caveat on a parcel of land that she had



previously transferred to him. The Respondent added that upon her husband's death, the Appellant demanded his documents. These issues, she submitted, caused animosity between the parties and explain the Appellant's decision to demand the return of the money. The Respondent stated that the trial court correctly observed that the relationship between the parties became strained after the death of the Appellant's son.

32. In conclusion, the Respondent urged this Court to dismiss the appeal with costs.

Analysis and Determination

33. Section 78(2) of *Civil Procedure Act*, provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted herein. Therefore, my duty as the first appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions. This principle was espoused by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General (2016) eKLR* and in *Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123*.

34. Having read the record of appeal and parties' submissions this court discerns the following issues for determination: -

- a. Whether the trial court erred in finding that there was an agreement or understanding between the parties regarding the deposits and in applying equitable principles to enforce that understanding.
- b. Whether the trial court erred in invoking the best interests of the child and in finding no violation of the Appellant's proprietary rights under Article 40 of *the Constitution* of Kenya.
- c. Whether the trial court determined issues outside the pleadings and or ignored the Appellant's reply to the counterclaim.

a. Whether the trial court erred in finding that there was an agreement or understanding between the parties regarding the deposits and in applying equitable principles to enforce that understanding.

35. Both parties agree that the Appellant deposited money into the account held in the name of Natalie, the Respondent's daughter. The dispute was on the purpose and whether the Appellant retained ownership rights.

36. The pleadings and evidence show a common understanding that the deposits were for the child's education. Even if not expressly termed a contract, the repeated deposits after discussions and the Respondent's uncontested narrative established an arrangement.

37. The trial court reasoned that, even if no formal written agreement was executed, the consistent course of dealing and the admitted purpose of the deposits created a binding obligation enforceable in equity. The trial court held that;

“What would have prompted the Plaintiff to make deposits into Natalie's account that was being operated by the 1st Defendant if not recognition of the terms of the oral agreement? I am of the view that the Plaintiff depositing monies in Natalie's account is an admission of enforceability of the oral agreement between the Plaintiff, the 1st Defendant and her late husband...”



38. The court relied on the principle that equity will not allow a party to renege on a commitment where the other party acted on that representation to their detriment. This reasoning reflects the doctrine of promissory estoppel.
39. On appeal, the Appellant argues that the court “invented” an oral agreement not pleaded. However, both parties led evidence on the purpose of the deposits and the arrangements surrounding the account. It is well settled that an appellate court will not disturb a trial court’s factual findings unless they are based on no evidence, misapprehension of the evidence, or application of wrong principles as was established in the case of *Selle & Another v Associated Motor Boat Co. Ltd* [1968] EA 123. Here, the trial court’s conclusion was based on admissions, bank statements and testimony. I therefore see no need of interfering with the court’s determination on this issue.

b. Whether the trial court erred in invoking the best interests of the child and in finding no violation of the Appellant’s proprietary rights under Article 40 of *the Constitution* of Kenya.

40. The trial court invoked Article 53(2) of *the Constitution* of Kenya stating that the best interests of the child are of paramount consideration. The court noted that the deposits were made when Natalie was a minor and the funds were earmarked for her education. Although Natalie has since attained majority, the court held that applying the funds to her continued education remained consistent with that constitutional imperative. It directed that the funds be used exclusively for Natalie’s educational expenses.
41. The Appellant’s reliance on Article 40 of *the Constitution* of Kenya (protection of property rights) must be considered in context. Article 40 of *the Constitution* of Kenya does not prevent the enforcement of equitable obligations arising from the parties’ conduct. By voluntarily depositing funds into an account opened for a specific purpose, the Appellant relinquished exclusive ownership rights in favour of that purpose. The Appellant could not therefore reclaim those funds as absolute property without reference to the original intention.
42. Therefore, it is this court’s finding that the trial court correctly applied Article 53(2) and did not violate Article 40. The invocation of the child’s best interests was appropriate and the proprietary rights argument cannot override a trust-like obligation attached to the funds. This ground lacks merit.

c. Whether the trial court determined issues outside the pleadings and or ignored the Appellant’s reply to the counterclaim.

43. The Appellant contends that the trial court decided an issue not pleaded by introducing an “oral contract.” However, the record and the impugned judgment show that both parties’ pleadings and evidence addressed the existence and purpose of the deposits. The trial court simply characterized that understanding as an oral agreement. No prejudice has been shown since the issue was fully canvassed at trial.
44. As to the alleged failure to consider the reply to the counterclaim, the trial court’s judgment expressly references and weighs the Appellant’s position that the funds belonged to her absolutely. The mere omission to quote from the reply verbatim does not establish that it was ignored. The court addressed the substance of both sides’ cases.
45. There is no such prejudice demonstrated here. The trial court did not stray into unpleaded territory, nor did it ignore material pleadings. This ground fails.
46. The upshot of all the above is that the trial magistrate’s judgment dated 5th December 2023 is upheld. Given the nature of the relationship between the parties each party shall bear their own costs.



47. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF SEPTEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....respondent

Selina Court Assistant

