



CML v BSK (Civil Suit E016 of 2024) [2025] KEMC 166 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEMC 166 (KLR)

**REPUBLIC OF KENYA
IN THE MARALAL LAW COURTS
CIVIL SUIT E016 OF 2024
AT SITATI, SPM
JULY 24, 2025**

BETWEEN

CML PLAINTIFF

AND

BSK DEFENDANT

JUDGMENT

1. By a plaint dated 29th July, 2024 verified by an affidavit of similar date, the plaintiff prayed for the following reliefs:
 - a. An order for specific performance by payment of the amount due and agreed of Kshs 108,670/ =
 - b. An order for compensation by way of payment of damages for breach of agreement
 - c. Costs of the suit
 - d. Interest on prayer (a), (b) and (c) above at court rates
 - e. Any other relief as the court may deem fit to grant.

Accompanying the plaint included:

Plaintiff list of witnesses dated 29/07/2024
The witness statement of the plaintiff dated 29/07/2024
Plaintiff list and bundle of documents containing the following exhibits: MPESA statement indicating advanced amount via mobile money
Demand letter dated 24th June, 2024 from the plaintiff's advocate to the defendant
WhatsApp conversation between the plaintiff's advocate and the defendant showing service of the demand letter.

2. The defence opposed the suit vide a Statement of Defence and Counterclaim dated 23rd August, 2024 duly verified by an affidavit. In the defence, the defendant denied all liability and prayed for a dismissal of the plaint. Additionally, in the Counterclaim, the defendant prayed for:



- a. A declaration that the plaintiff owes the defendant (counterclaimant) Kshs 500,000/- and should pay the same within 60 days of the Judgement.
- b. The plaintiff to pay the costs of the suit.

The Defence and Counterclaim was accompanied by:-

List of Witnesses containing the witness statements of the Defendant and Simon Lemooge
List and bundle of documents containing Marriage certificate
MPESA Printout

3. The parties were represented by counsel. Lenkidi Law Advocates represented the plaintiff while Kihoro Kimani & Associates Advocates acted for the defendant/counterclaimant.

The Plaintiff's Case

4. PW1 CML adopted her witness statement as her testimony. In summary, she told the court that the defendant was her husband. She stated that on or about June 2023 she loaned her husband Kshs 158, 670/- to enable him purchase stock for his business on condition that he refunds the money afterwards. In her testimony, she said that the money was handed over to the defendant via MPESA and in cash on different dates between 11th June, 2023 and 25th September, 2023.
5. At the agreed time, the defendant on repaid Kshs 50, 000 on 5th June, 2024 but refused to repay the balance of the loan money totalling Kshs 108, 670/- despite persistent pleas from the plaintiff hence the demand letter which gave rise to the present suit. She produced the MPESA statement as proof of the loan and the demand letter as proof of the request for repayment.
6. In cross-examination, the following came to light: The loan was made on the strength of an oral agreement between the parties while both were still cohabiting as husband and wife; The defendant repaid Kshs 50, 000 leaving Kshs 108, 670 unpaid. The parties were still married as husband and wife although there was a pending divorce cause; She told the court that the money came from her personal savings but had not provided the court with proof of the existence of the savings; The bank statement from Equity was unstamped although it does show that Kshs 89,000 was sent to the defendant from her bank account on 25th November, 2023. On 23rd November, 2023 Kshs 3,000 had been sent via bank transfer to the a mobile number which did not bear the name of the defendant
7. In re-examination, the witness affirmed that she was employed as professional civil servant with a regular monthly salary. She affirmed that she operated an EQUITY Bank account and used mobile banking application to dispatch the loan money to the defendant. The plaintiff stated that the loan agreement was oral.
8. PW2 BML a brother to the plaintiff adopted his witness statement of 10th September, 2024. In summary, he told the court that his sister loaned the defendant the money for his business operating capital.
9. In cross-examination, the witness stated that he was present when the plaintiff and the defendant discussed the loan but he did not witness the actual handover the of the cash. He confirmed that the plaintiff only showed him the Mpesa messages after she had sent him the loan. At that stage, the plaintiff closed her case.

The Defence Case

10. DW1 BSK adopted his witness statement dated 23rd August, 2024 as his testimony.

In cross-examination, the following came to light:-



The plaintiff was already formally employed with a regular salary before the defendant married her; He operated a wines and spirits shop while married to the plaintiff; The parties were living separately as of the time of this litigation; While he had sued for Kshs 500,000/- loaned to the plaintiff, he had only proved Kshs 4,400/- in his MPESA statement. He admitted that he handed back to her Kshs 50,000 in the presence of her witness but denied that it was a debt repayment

11. In re-examination, he affirmed that the divorce petition was dismissed and parties were still validly married although they lived separately. He confirmed that the Kshs 4,400 and Kshs 29,779 sent by him to the plaintiff was not a debt but remittance as a husband. He denied taking any loans from his wife during the subsistence of their marriage.
12. At that stage, the defendant closed his defence and parties exchanged written submissions.

The Plaintiff's Submissions Dated 5th May, 2025

13. The plaintiff submitted that the parties had an oral agreement for the loan and this was enforceable. In support of this argument the plaintiff relied on the decision of Abdulkadir Shariff Abdirahim & another vs. Awo Shariff Mohamed t/a AS Mohamed Investments [2014] eKLR (Waki, GBM Kariuki & M'Inoti JJA), where the Court of Appeal held that there was no general rule that all agreements must be in writing, but the Law of Contracts Act required that certain agreements be in writing and these did not include money lending agreements such as the present one.
14. It was submitted that the proof of the loan was manifest in the MPESA Statements and Equity Bank statements showing the total sum of money advanced to the Defendant. Further proof was said to be from PW2 who testified that he was present when the Defendant approached the Plaintiff and borrowed money which was to be repaid. It was argued that since the Defendant did not dispute receiving the said amount but claimed the same is matrimonial property, it was clear that the parties herein entered into a money lending agreement which conferred rights and obligations to the parties herein including to repay the money advanced.
15. The plaintiff argued that it was clear proof of the loan when the defendant admitted that he refunded Kshs. 50,000/= to the Plaintiff in cash before Mr. Lemooge as partial settlement of the loan and that this admission of repayment operated as an estoppel.
16. On estoppel, the plaintiff applied the authority of Serah Njeri Mwobi; Vs John Kimani Njoroge Civil Appeal No. 314 of 2009 as cited with approval in Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others [2014] eKLR where the Court held:-

"The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person...it therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced."

17. The court was urged to find that the loan did not become matrimonial property but remained as a loan repayable at the agreed time. The plaintiff prayed for costs and interest at 14% from date of non-payment till full recovery.



The Defendant's Submissions Dated 29th May, 2025

18. The defendant submitted that the MPESA statement and Equity Bank printout showing the dispatch of money to the defendant did not have any narration that the money was a loan and the court ought to reject the assertion that it was a loan. It was argued that as shown by the defendant's MPESA printout he had also sent money to the plaintiff in the normal interaction of husband and wife and the same treatment should be accorded to the monies sent to him by the plaintiff.
19. The related argument was that all the monetary transactions between the parties ought to be treated as matrimonial property acquired or subsisting between the husband and wife during the pendency of their marriage. The defendant urged the court to regard the Wines & Spirits business as matrimonial property.
20. It was argued that the sub-division of the matrimonial property ought not take place until their marriage was dissolved which is not the case since the divorce petition was dismissed. Reliance was placed on section 2(d) of the *Matrimonial Property Act* No. 49 of 2013. Further reliance on section 15 of the same Act led to the argument that the money was a gift and absolutely belonged to the defendant :-
 15. Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolutely to the recipient
21. The court was urged to reject the testimony of PW2 on the ground that he did not have details of the oral agreement between the parties and further that he did not witness the parties exchanging any monies. It was submitted that there was no oral agreement for the loan within the boundaries of the *Law of Contract Act* requiring: an offer, acceptance and consideration.
22. At the end of the submissions the court called upon to determine the dispute.

Issue for Determination

23. The only issues to be decided are what was the legal status of the Kshs 158, 000 remitted to the defendant by the plaintiff and whether the same was recoverable by the plaintiff from the defendant.

Determination

Legal Status and Recoverability of the Kshs 158, 000 Remitted to the Defendant

24. There is irrefutable proof that the plaintiff who was cohabiting with the defendant as wife and husband remitted to the defendant the Kshs 158,000 as supported by the MPESA Statement, bank statement, PW2's evidence and the Defendant's own admission during cross-examination.
25. On the one hand, the plaintiff pleads that this was a loan but on the other hand the defendant pleads that it was indivisible matrimonial property.
26. The determination of the court on this issue was guided by the provisions of The *Matrimonial Property Act* No. 49 of 2013 as correctly referred to by both Counsel Mr. Lenkidi and Mr. Kihoro. What constitutes matrimonial property is to be found in section of the said Act which provides that:
 6. Meaning of matrimonial property
 - (1) For the purposes of this Act, matrimonial property means—



- (a) the matrimonial home or homes;
- (b) household goods and effects in the matrimonial home or homes; or
- (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

26. As to the ownership of the matrimonial property, section 7 and 9 of the said Act provides that each spouse is capable of individual ownership subject to beneficial interest of the other spouse who contributed to its acquisition or improvement:

7. Ownership of matrimonial property

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

This was buttressed by section 9:

9. Acquisition of interest in property by contribution

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.

The same principle is extended in section 14:

14. Presumptions as to property acquired during marriage Where matrimonial property is acquired during marriage—

- (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
- (b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

27. On the authorities, the court found guidance from the Court of Appeal authority of *AKK –V- PKW (2020) KECA 335 (KLR) (Warsame, P.O. KIage & S Gatembu JJ.A.)*:-

34. A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act. In *PNN vs. ZWN [2017] eKLR*, Waki, JA stated that:

An inquiry may thus made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in *Petit vs. Petit [1970] AC 777*:

“One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one



spouse to another. In a question as to title to property the question for the court was whose is this? And not to whom shall it be given?"

35. The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved."
28. Based on the foregoing facts, legal provisions and the superior court's pronouncement, the court makes the declaration that that the money that came from the plaintiff constituted her property which she had acquired before she got married to the defendant and that the same amounted to a loan as witnessed by PW2 who heard the parties discuss the loan in general terms. In fact, the defendant refunded her partially by paying her back Kshs 50,000/- while both were cohabiting as husband and wife.
29. These pieces of evidence completely rebutted the presumption that the cash was joint matrimonial property. As pointed out by Mr. Lenkidi for the plaintiff, parties can enter into oral money-lending contracts as supported by the cited authority of Abdulakdir Shariff (supra). Notwithstanding this declaration, as the Court of Appeal held in the case of AKK –V- PKW (supra) the property was only recoverable after the parties had procured a divorce. In the present case, the parties have no decree absolute dissolving their marriage and so the declaration cannot be enforced and is held in abeyance until a dissolution of marriage is obtained.
30. On the prayer for damages for the breach of contract, the court declines the same since it is settled law that no general damages are awardable for breach of contract. In the authority of Pwani Telecomms Limited v Taita Taveta County Government (2021) eKLR (Ong'injo J.) had this to state on the issue of payment of general damages for breach of contract:
32. In its plaint, the plaintiff also claimed loss of income and business at Kshs. 2,790,000 and general damages for breach of contract. On loss of income and business, the plaintiff in its submissions conceded that no evidence was adduced to support this claim. Accordingly, when it comes to general damages, it is well settled in law that it cannot be awarded on a claim anchored on a breach of contract. In affirming that position, the Court of Appeal in the case of Joseph Urigadi Kedeva vs. Ebby Kangishal Kavai Kisumu Civil Appeal No. 239 of 1997 (UR) which was cited by the Court in James Maranya Mwita v South Nyanza Sugar Co. Ltd [2017] eKLR emphatically expressed itself thus:
- ".... As to the award of Kshs. 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract.....We respectfully agree. There can be no general damages for breach of contract....."
33. The Court in in the case of Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd [2015] eKLR explained why general damages cannot be awarded in cases of breach of a contract as hereunder: -"The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred.

This principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya



Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR).

Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))”

31. In the result, the court declines to order a release of this money (which is property) for the legal roadblock that their marriage is still pending.
32. As for the counterclaim, the defendant admitted that there was no proof that he ever gifted or loaned the plaintiff Kshs 500,000/- as pleaded in the counterclaim and no further comment is made thereby since their marriage is still undissolved.
33. In the result, the court makes the following orders:
 - a. While declaring that the money was a loan from the wife to her husband, the prayer for the recovery of the Kshs 108, 670 is not grantable at this stage until their marriage is dissolved as explained by the Court of Appeal in AKK –V- PKW citing section 7 of the Matrimonial Property Act.
 - b. The plaintiff’s prayer for general damages for breach of loan contract is dismissed as legally untenable.
 - c. The defendant’s prayer for Kshs 500,000/= is unproven and no orders this way or that way can be made under section 7 of the Matrimonial Property Act.
 - d. Each party to bear her/his own costs.

Right of appeal is 30 days.

DATED, READ AND SIGNED AT MARALAL LAW COURTS THIS 24TH DAY OF JULY, 2025

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

Present

Lenkidi Mpapa Advocate

Lawrence Court Assistant

