

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. E079 OF 2023**

SAMWEL KIMANI NDUNGU.....APPELLANT

VERSUS

ZEKI MOTORS AGENCIES.....RESPONDENT

**JUDGMENT**

*(Appeal from the Judgment dated 28/04/2023 delivered in Eldoret Small Claims Court  
Commercial Case No. E079 of 2023 by Hon. T.W. Mbugua-Adjudicator)*

1. This Appeal arises from the Judgment delivered in the said **Small Claims Court** suit which was dismissed, and in which the Appellant (as the Claimant therein) had sought Judgment against the Respondent for the sum of Kshs 220,000/- plus costs and interest.
2. The background of the case is that by the Statement of Claim dated 2/02/2023, and filed through **Messrs. R.K Limo & Co. Advocates**, the Appellant pleaded that he entered into an agreement with the Respondent wherein the Respondent was to resell the Appellant's Motor Vehicle Registration No. KCF 213R at a total consideration of Kshs 2,200,000/-, that pursuant to the agreement, the Respondent procured a purchaser who paid the entire consideration and the Respondent later remitted the proceeds thereof to the Appellant, save for the balance of Kshs 220,000/-. The Appellant further pleaded that he received a cheque for that amount from the Respondent but the Respondent later instructed him not to deposit the same, with a promise that the amount would be settled in cash. The Appellant claimed that despite numerous demands for settlement, the amount has never been paid.
3. The Respondent, in his Response dated 17/02/2023, and filed through **Messrs Kipsamo & Co. Advocates**, denied that owing the Appellant any such monies, and also denied all the allegations made in the Statement of Claim.
4. The matter then proceeded for trial in which each side called 1 witness.
5. The Appellant, **Samwel Kimani Ndung'u** testified as **CW1**, and adopted his Witness Statement. He stated that the Respondent issued to him the cheque dated 30/06/2017, number 00874, from I&M Bank original whereof he then produced as an exhibit. He testified that the Respondent however requested him to hold on to the cheque presumably because the Respondent did not have sufficient funds in its account, and requested him not to

deposit it until he was informed him to do so, but the Respondent has to date never told him to deposit the cheque. In cross-examination, he stated that the agreement was entered into in 2017. He also testified that the rest of the cheques were paid but he agreed that he did not produce any evidence to show that the one cheque the subject hereof was not paid bounced. He also agreed that although he claims that the Respondent instructed him not to deposit the cheque, he had no evidence that he was so stopped. He however stated that the Respondent told him not to deposit the cheque because the Respondent had initially issued to him an earlier cheque which bounced. In re-examination, he stated that he did not bring the bounced cheque because the Respondent promised to replace it in cash.

6. On his part, the Respondents' witness, **Zeki Wanjala Wanyama**, testifying as **RW1**, too, adopted his Witness Statement, and confirmed that she is in the business of selling motor vehicles. She insisted that the Respondent fully paid the entire contractual sum of Kshs 2,200,000/- to the Appellant, and denied any knowledge of the allegation that the Appellant did not deposit the one cheque the subject hereof. She stated that to her knowledge, all the cheques she issued to the Appellant "went through". In cross-examination, she confirmed that she sold the motor vehicle Registration number KCF 213R Vanguard on behalf of the Appellant which was to be sold at a minimum amount of Kshs 2,200,000/-. She also agreed that the purchaser paid her company but she maintained that the same was channeled to the Appellant. She agreed that she issued 5 cheques to the Appellant, including the cheque the subject hereof. She denied requesting the Appellant not to deposit the cheque, and stated that she would have issued a replacement cheque had she known that the cheque had expired.
7. After the trial, as aforesaid, by the Judgment delivered on 28/04/2023, the Adjudicator found that apart from the alleged unbanked cheque, the Appellant did not produce any contract to enlighten the Court on the terms of engagement and therefore, the Court was unable to establish the existence of a valid contract between the parties. She also found that there was no evidence that the Respondent had instructed the Appellant not to deposit the cheque. In the circumstances, the Adjudicator found that breach of contract was not established.
8. Aggrieved by the Judgment, the Appellant filed this Appeal by way of the Memorandum of Appeal dated 10/05/2023. The 7 grounds listed therein are as follows:
  - i) **That the Learned Magistrate erred in law and in fact in holding that there was no valid contract between the parties for the resale of the motor vehicle in question by the Respondent.**

- ii) The Learned Magistrate erred in law and in fact in disregarding the evidence adduced by the Appellant in court and ignoring the original cheque produced as evidence.**
  - iii) The Learned Magistrate erred in law and fact in disregarding the evidence on record showing that the cheque for Kshs. 220,000/- was not banked and/or deposited under instructions of the Respondent.**
  - iv) That the learned trial Magistrate erred in law and fact by failing to apply herself judicially and adequately evaluate the pleadings, evidence and exhibits thereby arriving at a wrong conclusion in dismissing the suit.**
  - v) That the learned trial Magistrate erred in law and in fact in misdirecting herself in treating evidence and submissions of the appellant hence arriving at the wrong conclusion.**
  - vi) That the trial Magistrate erred both in law and fact in failing to consider that the Respondents in their submissions had admitted to reselling the motor vehicle in question.**
  - vii) That the judgement of the learned Magistrate is in the circumstances unfair and unjust.**
- 9.** The Appeal was then canvassed by way of written Submissions. The Appellant's Submissions is dated 16/08/2025, while the Respondent's is dated 26/08/2025.

#### **Appellant's Submissions**

- 10.** Counsel recited the background of the matter and witness testimonies, and maintained that indeed there was an agreement between the parties for resale of the motor vehicle the subject hereof, that the Respondent's witness confirmed that she sold the vehicle on behalf of the Appellant at Kshs 2,200,000/-, which amount the purchaser paid to his company and which was to be channeled to the Appellant. He also observed that although the Respondent's witness stated that she issued 5 cheques, including the one herein for the sum of Kshs 220,000/-, she could not however demonstrate, through documentation, that the entire amount was debited from his account. Counsel contended that a look at the cheque confirms that the Respondent issued it, and cited the Respondent's witness' testimony that if the Appellant knew that the cheque had expired, he ought to have requested for a replacement cheque.

11. According to Counsel therefore, this is a clear admission by the Respondent of the amount being unpaid, and Counsel urged that from this evidence, it is clear that there was an agreement for resale of the Motor Vehicle at the total consideration of Kshs 2,200,000/-. He cited the decision of the Court of Appeal case of **Ali Abid Mohammed versus Kenya Shell & Company Limited (2017) eKLR**, in which, he submitted, it was restated that a contract does not need to be reduced into writing and may be inferred from the conduct of the parties. He also cited the Court of Appeal case of **William Muthee Muthamj versus Bank of Baroda (2014) eKLR**, and also the case of **Charles Mwirigj Miriti versus Thananga Tea Growers Sacco Limited and Another (2014) eKLR**. He further cited **Section 119 of the Evidence Act**, and also the case of **Mutua v Mbevu; Odero (Third party) (Civil Appeal 157 of 2017) (2024)**. Counsel thus faulted the trial Court for holding that that there was no enforceable contract between the parties when both parties confirmed that there was an offer, acceptance and consideration and thus a contract. Counsel thus submitted that the Appellant having received instructions from the Respondent not to deposit the cheque and thereafter failing to honor the same is outright breach of contract as the Respondent confirmed that the cheque was expired confirming that the amount was not debited in the account. He cited **Section 120 of the Evidence Act** and urged that the Respondent was estopped by its conduct from denying non-payment. He cited the case of **Nairobi Civil Case No. 826 of 1999; Kitui Tobacco Distributors Ltd v Barclays Bank of Kenya Ltd (2001) eKLR**, and urged that it is to be noted that the Appellant produced the subject cheque as an exhibit, the same, as instructed by the Respondent, not having not been deposited as instructed by the Respondent, and having become stale. He also cited the case of **Jane Njeri Gitau V KPLC Ltd (2006) eKLR** and the case of **Prem Lata Vs Peter Muasa Mbiyu [1965] EA 592**. He thus urged the Court to overturn the decision of the trial Court.

### **Respondent's Submissions**

12. Counsel for the Respondent, too, recounted the background of the case and witness testimonies. He then cited the case of **Mohamed Guyo Born v Richard Mwilaria Aritho (2022) eKLR** on burden of proof, and urged that the Appellant is guilty of laches as he came to Court with the original cheque issued to him by the Respondent yet he knew that a cheque expires within 6 months. He submitted that the Appellant never tendered any evidence to prove that the Respondent instructed him not to deposit the cheque, or that the cheque would be paid in cash. He urged that by the Appellant's own admission, all 4 other cheques issued to him were cleared, save for the last cheque, the subject hereof, which the Appellant failed to deposit with no justifiable reason. Counsel also reiterated that there was no proof that

there was an agreement between the parties in the first place. He thus urged the Court to dismiss the appeal.

**Determination**

13. As reiterated in a plethora of cases, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence before the trial Court, and draw its own conclusion (see for instance, the case of **Kenya Ports Authority vs Kuston (Kenya) Ltd [2009] 2 EA 212**).

14. Before I delve into determining the issues in this matter, I observe that the legal description of the Respondent was not disclosed in the pleadings. There is thus no indication whether the Respondent is a company or just a business name, and thus whether, as sued, it even possesses the legal capacity to be sued in its own status. As this issue was however never taken up by the parties, and although it might still pose some challenges during execution, I leave it at that.

15. In view of the foregoing, the one broad issue that arises for determination in this Appeal is ***“Whether the trial Court erred in dismissing the Appellant’s suit which was filed on the basis of the cheque issued by the Respondent.”***

16. Since this is an Appeal from a decision of the **Small Claims Court**, the same can only be entertained on points of law. This is the import of **Section 38** of the **Small Claims Court Act**, which provides as follows:

**“38. Appeals**

**(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.**

**(2) An Appeal from any decision or order referred to in subsection (1) shall be final.**

17. In respect to Appeals that are, by law, limited to only points of law, **Nyamu JA**, in the Court of Appeal case of **Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR**, while dealing with a second Appeal, which is also ordinarily allowed only on points of law, and thus similar to that contemplated under **Section 38** of the Small Claims Court aforesaid, stated as follows:

**“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered**

**matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”**

18. In this Appeal, although all the grounds listed in the Memorandum of Appeal begin with the phrase “*the learned trial Magistrate erred in law and in fact*”, I am nonetheless satisfied that the substance thereof consists of matters of law. The Appeal is thus properly before this Court.

19. In this case, a perusal of the record, pleadings and witness testimonies reveals that the Adjudicator outrightly erred in holding that no agreement between the parties was established. As correctly appreciated by the Adjudicator, a contract need not be in writing and can be simply inferred from the conduct of the parties. This has been restated in numerous cases, which fact the Adjudicator indeed acknowledged, including in the Court of Appeal case of **Abdulkadir Shariff Abdirahim & Another vs Awo Sharrif Mohammed [2014] eKLR** in which the following was stated:

**“There is no general rule of law that all agreement must be in writing. The numerous benefits of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. ....”**

20. Having found as above, I now venture to establish whether the Appellant proved his claim.

21. It is the position in law that proof in civil cases is on a balance of probability, and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in **Section 107 (1) and (2) of the Evidence Act**, which provides that “*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*” and that “*when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person*”, respectively.

22. It is therefore not in doubt that the Appellant, at all times, bore the burden of proving, on a balance of probabilities, that the Respondent owed him the claimed amount. Regarding the possibility of shifting of the burden in some instances, during the trial, and thus the distinction between “*legal burden of proof*” and “*evidential burden of proof*”, the Supreme Court in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR** held as follows:

**“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the Plaintiff, however, “depending on the effectiveness with which he or she**  
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discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

“(133) It follows therefore that once the Court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the Respondent to adduce evidence to prove compliance with the law ...”

23. Similarly, the Court of Appeal in the case of **Mbuthia Macharia v Annah Mutua & Another** [2017] eKLR, guided as follows:

[16] “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? .....

24. As regards application of the “*legal burden*” and “*evidential burden*” principles specifically to a cause of action based on cheques, the Court of Appeal for Eastern Africa, in the case of **Hassanah Issa & Co v Jeraj Produce Store** [1967] EA 55, while considering Section 30 of the Bills of Exchange Act (Tanzania), which is similar to the Kenyan Section 30(2) of the Bills of Exchange Act, Cap. 27, held that:

“[I]n this case in as much as the suit was upon a cheque and in as much as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where there is a suit on a cheque

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and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled.” [Emphasis mine]

25. Similarly, the Court of Appeal in the case of **Paresh Bhimsi Bhatia vs- Mrs Nita Jayesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (unreported)**, while following the **Hassanah Issa & Co v Jeraj Produce (supra)**, and quoting the statement reproduced above, held as follows:

“A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonour be duly taken. ....

..... The appellant's suit is substantially based on the four cheques. The issuance of the cheques is pleaded. The cheque numbers, the date and the amount of each cheque are pleaded. The fact of dishonour is pleaded. It is admitted that the cheques were given. It is also admitted that by the time the cheques were given, the 3<sup>rd</sup> respondent owed the appellant the money shown in the respective cheques. In the circumstances, the onus was on the respondents to show circumstances which he is disentitle the appellant to summary judgment such as fraud, duress, or illegality.” [Emphasis mine]

26. In following the **Hassanah Issa & Co v Jeraj Produce (supra)** above, **F. Gikonyo J**, in the case of **Equatorial Commercial Bank v Wilfred Nyasim Oroko [2015] KEHC 8122 (KLR)**, also found as follows:

“[20] In the face of the above evidence, the court conclude that these cheques were issued by the Respondent to the predecessor of the Applicant and so they constitute an admission of the debt to the extent of the amount of the cheques. Where the cheques are found to have been issued by the Respondent and were dishonoured, it is upon the Respondent to offer an explanation which he thinks will disentitle the Applicant of relief on the cheques. ....”

27. I acknowledge that the above decisions are all based on “dishonoured cheques”. However, they still advance the general position that issuance of a cheque amounts, generally, to presumption of admission of a debt. The Court will not however automatically enter

judgment on that sole basis, as the Defendant will still be at liberty to rebut that presumption, by giving, in his defence, an explanation why the presumption should not be upheld.

28. In this matter, the Appellant's claim is for a sum of Kshs 220,000/- being one alleged unpaid instalment of the proceeds of the sale of a motor vehicle made by the Respondent on his behalf. The Respondent admits that indeed the cheque is one out of 5 cheques that it issued to the Appellant under the terms of their contract. According to the Appellant, he did not deposit the cheque in the bank for payment because allegedly the Respondent asked him not to do so due to insufficient funds in the Respondent's bank account. According to the Appellant, the Respondent asked him to wait until he received the go ahead to deposit the cheque, or in the alternative, to wait for the cheque to be replaced with cash. These promises, according to the Appellant, were however never honoured and the cheque became stale, having expired after the usual 6 months. Indeed, the Appellant produced the original cheque in Court as an exhibit, to prove that he never deposited it for payment. The cheque is thus on record.

29. The Respondent's witness, **Zeki Wanjala Wanyama**, on her part, readily admitted issuing the cheque, but denied issuing any subsequent instructions to the Appellant not to deposit the same for payment. She also denied knowledge of non-payment of the cheque. She did not however produce any evidence to show that the cheque was deposited and paid out. The question is therefore whether her explanation was sufficient to lead to dismissal of the Appellant's claim.

30. In answering the above question, I acknowledge that the Appellant did not produce any of evidence to establish that he was indeed stopped by the Respondent from depositing the cheque for payment. Granted, the instructions, if any, may have been verbal. However, once no further communication proved forthcoming from the Respondent after a reasonable period of time, could he not at the least, have made some kind of written inquiry from the Respondent, or even sent out a demand of any nature, whether by phone text message, or letter or email to document the non-payment or breach of promise? The cheque having been issued in June 2017, why did the Appellant never bother to take any action of any kind until he filed this suit in February 2023, almost a whole 6 years later? Under these circumstances, one may understand why the Respondent assumed, whether wrongly or correctly, that there was no further or outstanding claim from the Appellant. Such long delay and inaction by the Appellant may in proper circumstances, very well attract arguments of the principle of

“*estoppel*” by conduct, or “*waiver*” or “*acquiescence*”, to lead to the conclusion that the Appellant had abandoned his claims, if any.

31. It is however also true that the Respondent’s witness, despite claiming that all the 5 cheques it issued to the Appellant, including the one herein, were all deposited by the Appellant and paid through the bank, did not produce any evidence to prove that contention. Payment or non-payment of a cheque is not difficult to establish. All the Respondent needed to do to establish the correct position was to apply, obtain and/or present copies of bank statements for the relevant period for scrutiny, assuming that she did not have them already. The statements would easily show whether the cheque number 000874 was paid or not. It is the Respondent, as the account holder, who has access to the bank statements and its witness did not allege that she had any encountered any challenges in obtaining the same. The fact that the Respondent did not seek to produce the statements or any other such evidence, yet all was within its easy accessibility, leaves me with the feeling that the Respondent knew very well that the cheque was never paid out. This conclusion is bolstered by the fact that the original cheque was produced in evidence and is still on record. To this end, I find that the Respondent failed to discharge its evidentiary burden, the Appellant having laid a *prima facie* case on balance of probabilities.

32. Although, I agree, the Appellant did not prove that the Respondent stopped him from depositing the cheque, no reason or theory was advanced why the Appellant would deliberately choose to withhold depositing of the cheque for payment. It just does not make sense that one, after chasing payment for a considerable period of time, would, after finally being issued with a current cheque, for no reason at all fail to then deposit it for payment. It would be a far-fetched theory, in the absence of any evidence to that effect, to speculate that the Appellant perhaps just forgot to deposit the cheque, and only realized after the same became stale. This is just not plausible. Considering that proof in civil litigation is on “*a balance of probabilities*”, I am satisfied that the Appellant was truthful when he stated that the Respondent stopped him from depositing the cheque for reason of insufficient funds, and also that he was asked for wait for the go-ahead to deposit the same, but which communication never came until the cheque expired. I have no reason to conclude otherwise.

33. As is apparent from the authorities cited above, by **Section 30** of the **Bills of Exchange Act**, every holder of a bill is *prima facie* deemed to be a holder in due course, and to have become a party thereto for value, unless it is proved that the acceptance, issue or subsequent

negotiation is affected with fraud, duress, force and fear or illegality. Once the Appellant laid a probable basis for his case, the onus then shifted to the Respondent to give reasons why judgment should not be entered on the cheque. The Respondent however failed in discharging this onus.

34. In light of the above, I find that the presumption that the Appellant was a holder in due course for value of the cheque was not displaced. For the above reasons, I find that the Adjudicator erred in finding that the Appellant failed to prove his case on a balance of probabilities. He clearly did. The Adjudicator therefore erred in dismissing the suit.

**Final Orders**

35. The upshot of my findings above is as follows:

- i) The Appeal is allowed.
- ii) Consequently, the Judgment delivered on 28/04/2023 in **Eldoret Small Claims Court Commercial Case No. E076 of 2023** dismissing that suit is hereby set aside, and substituted with an order allowing the suit, and thus entering Judgment against the Respondent for the sum of Kshs 220,000/-, plus interest thereon from the date of filing the suit, and costs of the suit, as sought in the Statement of Claim filed therein.
- iii) The Appellant is also awarded costs of the Appeal.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 16<sup>TH</sup> DAY OF DECEMBER 2025**

.....  
**WANANDA JOHN R. ANURO**  
**JUDGE**

**Delivered in the presence of:**

**N/A for the Appellant**  
**Mr. Kipsamo for the Respondent**  
**Court Assistant: Brian Kimathi**