

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL APEAL NO.E026 OF 2023**

FRANCIS OMWAMI ODUYA-----  
APPELLANT

VERSUS

ELIZABETH ROSE NDIVISI-----  
RESPONDENT

***(Being an Appeal from the judgment of the Small Claims Court, Kakamega Law Courts, Kakamega (hon. Carolyn Cheruiyot (SRM) delivered on the 24<sup>th</sup> day of January,2023, in SCCC NO. E131 of 2022)***

**JUDGMENT**

1. The appellant herein was the respondent at the lower court. He had been sued for compensation for loss or damage to property for an amount of Kshs. 225,600/=.
2. The Respondent instituted proceedings in the Small Claims Court alleging that she entered into a contractual agreement dated 15<sup>th</sup> September 2020 with the appellant for the harvesting of sugarcane. Under the terms of the agreement, the Respondent was to harvest the sugarcane twice, first after 18 months and a second ratoon crop thereafter. In consideration, the Respondent paid the Appellant Kshs. 50,000/=. However, the Appellant allegedly breached the agreement by harvesting the sugarcane only once and then uprooting or destroying the remaining crop, preventing the second harvest. The Respondent relied on a crop damage assessment

report prepared by an agricultural officer, which valued the loss at Kshs. 225,600/= based on 1.2 acres.

3. The Appellant, in his defence, denied entering into any agreement with the Respondent personally, asserting that the agreement was with the Respondent's husband, one Tamson Ndivisi Macharia, to whom he owed Kshs. 40,000/= (comprising two loans of Kshs. 20,000/= each for funeral expenses). He claimed the land was 1.2 acres, that the first harvest occurred after 18 months, and that by the 27th month, the land had been sold by its owners amid a pending land case, rendering the second harvest impossible. He denied destroying the crop, blaming the new landowners, and offered to refund Kshs. 25,000/= for the unharvested portion
4. The trial court analysed the issue and found that there existed a valid contract between the claimant and the respondent, as there was an agreement dated 15/09/2020, which she avers had met all the requirements for a valid contract. She further held that there was a breach of the agreement that the claimant was to harvest the sugarcane twice, where the claimant was to harvest in 18 months, but harvested in 27 months. The court found that there was a breach of the agreement and quantified the damage at Kshs. 225,600/= which she awarded the respondent.
5. The appellant, being aggrieved by the decision of the adjudicator, filed the following appeal based on the following grounds;
  - a) *The Honourable Adjudicator erred in her findings that the claimant had proven her case against the Respondent.*

- b) *The Adjudicator occasioned a miscarriage of justice by awarding damages based on the Crop Damage Assessment, which had glaring errors. According to the evidence on record, it covered 1.2 acres of land, not the one acre that was agreed upon.*
  - c) *The learned magistrate relied on the evidence of a farmer's statement issued to one TAMSON NDIVISI MACHARIA, who had harvested the cane instead of the Claimant, which, in the Appellant's view, was a grave error.*
  - d) *The trial court disregarded the respondent's testimony and misdirected herself as to the contents of the lease agreement.*
  - e) *The court failed to consider the money obtained by the Claimant's husband at the first harvest and the agreed consideration price for the lease, and instead made an excessive award for damages.*
6. The appellant prayed that the judgment of the lower court be quashed and the claim be dismissed with costs to the respondent.
7. The appeal was canvassed by way of written submissions.

**Appellant's submission**

8. In their submission dated 21<sup>st</sup> July 2025, the appellant held that the legal and evidentiary proof lay on the claimant as she was the one seeking compensation for loss of property, and it was their view that she failed to prove the same to the required standard. They further opined that the claimant, who claimed her crops were damaged or destroyed, and it was her testimony that she was prevented from harvesting her crops, and her reliance on the crop assessment report was faulty since there was no damage to the crops.

9. He referred to the crop damage assessment report that covered 1.2 acres of land; however, he avers that the parties had agreed on 1 acre of land in the agreement dated 15<sup>th</sup> September 2020. He stated that the judgment entered for Kshs. 225,000/= was on the 1.2 acres of land instead of the 1 acre which the parties had agreed.
10. The appellant claims that the court erred in relying on the testimony of Tamson Ndivisi as proof of the first harvest, who was never a party to the agreement between the claimant and the respondent and as such, the trial court misdirected itself, causing him a miscarriage of justice.
11. He prays that the lower court's claim judgment and decree be set aside and his appeal be allowed as prayed.

**Respondent's submissions.**

12. The respondent in their submission dated 05<sup>th</sup> September 2025 denied the allegations by the appellant and stated that the adjudicator decision was correct as they found that they had proved their case to the required standard and there was no miscarriage of justice as the court relied on the documentary evidence before it and delivered a well-reasoned judgment as they also took into account what was paid earlier for evidential value and denied the allegations that the evidence of the appellant was ignored or disregarded stating that the judgment was well reasoned and as such the appeal should be dismissed with costs.

**Evidence in brief.**

13. CW1 was Elizabeth Rose Ndivisi, who testified that she had land for the respondent to cut sugarcane twice and that she had only cut it once before the respondent refused. She claimed that the respondent uprooted the crop. She claimed that she had given him 50,000/=, and she went to report the incident to the assistant chief, where the respondent was summoned but refused to avail himself. She stated that the agricultural officer visited the site and valued the crop damage at Kshs. 225,600/=.
14. During cross-examination, she denied the claim by the respondent from his statement that her husband had loaned him Kshs. 40,000/=. She claimed that she only managed to harvest the sugarcane once and denied the claim that her husband had a second cut of the sugarcane. She claimed that she leased the 1 acre of land to plant sugarcane, which she did not plant, but paid him Kshs. 50,000/= to cut the cane.
15. RW1 was Francis Omwami, who relied on his statement. He testified that he knew the claimant through her husband, whom he had leased the land to. He testified that he had borrowed the claimant's husband Kshs. 20,000/= for his brother's funeral and an addition Kshs. 20,000/= for his cousin's funeral, and committed to give him sugarcane to harvest if he had failed to pay back the money. He stated that the land leased was 1.2 acres. He claimed that the first harvest was in 18 months, and when it was the 27<sup>th</sup> Month, there was an existing case in court, although he had not finished payment. He claimed that in the land case, the owners sold

off the land, and he informed the claimant's husband that he was not able to harvest the second round, and he offered to return the Kshs. 25,000/= for the 2<sup>nd</sup> harvest. He denied the allegations that he had destroyed the crop, placing the blame on the owner of the land.

16. During cross-examination, he claimed that the claimant was the one who changed the agreement and avers that it was her husband who had given her the Kshs. 20,000, not the claimant, as he was the one he was dealing with all through.

17. The respondent closed its case, and the trial court found that the claimant had proved its case against the respondent to the required standard, found that the respondent was responsible for the damage to the sugarcane and awarded her Kshs. 225,600/= as damages for the loss/ destruction of her crops. The appellant, being dissatisfied with the decision, has since filed this appeal.

### **Analysis and determination.**

18. As this is a first appeal, the court's duty is to re-evaluate the evidence afresh and come to its own conclusions, while bearing in mind that it did not have the advantage of observing the witnesses' demeanour. This principle is well-established in the case of **Selle v Associated Motor Boat Company [1968] EA 123**, where the

Court of Appeal for East Africa held that an appellate court on first appeal must reconsider the evidence, evaluate it itself, and draw its own conclusions, though it should make due allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

19. From the record, the issues that arise for determination are the following:

*a) Whether the trial court erred in finding that a valid and enforceable contract existed between the parties;*

*b) Whether breach of the said contract was proved;*

*c) Whether the trial court erred in its assessment and award of damages; and*

*d) Whether the appeal has merit.*

20. The first issue for determination is whether there was a valid agreement between the parties. The appellant contended that no valid contract existed between himself and the respondent, asserting instead that any agreement was between him and the respondent's husband, Tamson Ndivisi. The trial court, however, found that there was an agreement dated 15th September 2020, which met the legal requirements of a valid contract.

21. A valid contract requires offer, acceptance, consideration, capacity, and intention to create legal relations, as outlined in Section 2 of the Law of Contract Act (Cap 23). In **National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another [2001]**

**eKLR**, the Court of Appeal affirmed that these elements must be present for enforceability.

22. On privity, the doctrine holds that only parties to a contract can sue or be sued upon it. However, **in Diamond Homes Limited v Shapi (Civil Appeal A118 of 2021) [2024] KECA 1161 (KLR)**, the Court of Appeal held that a lease agreement can be valid even if not fully executed, where conduct such as payment, possession, or performance evidences the parties' intentions. In that case, the court found privity based on a signed letter of offer and subsequent actions, despite the formal lease not being signed.
23. Applying these principles, the lease agreement dated 15/09/2020 bears the names of both parties. The Respondent received Kshs. 50,000/=, and the first harvest proceeded. Even if the initial dealings involved the husband, the written agreement names the Respondent as the lessee. The Appellant's testimony that the claimant's husband "gave" the money to her does not negate her privity. In **Kiplimo & 2 others v Amdany & another (Civil Appeal E004 of 2020) [2024] KEHC 496 (KLR)**, the court upheld privity between original parties despite subsequent sales, emphasising that obligations persist unless expressly transferred.
24. I find no merit in the Appellant's claim of lack of privity. The evidence tilts in favour of a valid contract between the parties on a balance of probabilities. The learned adjudicator did not err in this regard.

25. The second issue for determination is whether there was a breach of the lease agreement. I have perused the agreement by the parties, and it stipulates that there will be a harvest for two seasons. The Respondent testified that only one harvest occurred, after which the Appellant uprooted the crop. She reported the matter to the assistant chief and obtained an assessment from the Agricultural officer. The Appellant admitted the first harvest but claimed the second was impossible due to the land sale and a court case, denying destruction and blaming the new owners.
26. The appellant attempted to attribute the damage to the new landowners. However, it is a trite law that a party cannot escape contractual liability by shifting blame to third parties where no privity exists. In **Trans Mara Sugar Company Limited & another v Ayiamba & another (Civil Appeal 132 of 2019 & 02 of 2020 (Consolidated)) [2020] KEHC 3762 (KLR)**, the court emphasised that sugar cane contracts must be interpreted strictly, and extraneous factors like land disputes do not excuse breach unless provided for in the agreement.
27. Here, the agreement makes no provision for termination due to land sale. The Appellant, as lessor, bore the risk of ensuring the land's availability. His offer to refund Kshs. 25,000/= implicitly admits inability to perform. The Respondent's evidence of uprooting, corroborated by the assessment report, outweighs the Appellant's uncorroborated denial. I therefore find that there was a breach of the terms of the agreement.

28. The appellant further faulted the trial court for relying on a crop damage report allegedly covering 1.2 acres instead of the agreed 1 acre. However, the evidence on record shows that the appellant himself testified that the land measured 1.2 acres. Having taken that position at trial, he cannot approbate and reprobate on appeal.
29. The principles guiding appellate interference with an award of damages are well settled. An appellate court will only interfere where the trial court acted on wrong principles, misapprehended the evidence, or made an award so excessive or so low as to represent an erroneous estimate
30. The trial court relied on a professional crop damage assessment dated 25/09/2022, which was not rebutted by any expert evidence from the appellant. The adjudicator also considered prior payments made and arrived at an award of Kshs. 225,600/=, which in my view was neither arbitrary nor excessive.
31. On the reliance on evidence relating to Tamson Ndivisi Macharia, I find that the trial court did not treat the said evidence as proof of contractual privity, but merely as corroborative evidence on the issue of harvesting. This did not occasion any miscarriage of justice.
32. Upon a careful and exhaustive re-evaluation of the entire record, I am satisfied that the trial court properly directed itself on the law and the evidence. The findings reached were supported by the evidence on record and applicable legal principles.

33. This Court finds no basis for interfering with the judgment of the Small Claims Court.

34. In the result, the appeal herein lacks merit and is hereby dismissed in its entirety.

35. The judgment and decree of the Small Claims Court in SCCC No. E131 of 2022, delivered on 24th January 2023 are hereby upheld.

36. The respondent shall have the costs of the appeal.

37. Right of Appeal 30 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA  
21<sup>ST</sup> DAY OF JANUARY, 2026.**

**S.MBUNGI**

**JUDGE**

**In the presence of:-**

**CA: Angong'a/Wekesa**

In absence of the parties though aware of the Judgment date and the time. The Court Assistant to upload the Judgment in the CTS.