

REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MIGORI
CIVIL APPEAL NO. E007 OF 2025
FRANCIS OCHIENG OWUOCHA
APPELLANT

- versus -

BEATRICE ATIENO
SHIKUKURESPONDENT

*(Being an appeal from the judgment and decree by
Hon.Angela Munyuny (Adjudicator) in Migori SCCCOMM E194
OF 2024).*

JUDGMENT

The claim herein was filed by the Respondent seeking judgment for Kshs210,000/= being money advanced to the Appellant on 2nd of November 2023 for purposes of supply of sugar cane at the weigh bridges of the factories where he had accounts as a farmer. That the Appellant subsequently became slippery and refused to pay the money. That he was summoned to the DCI Awendo but he declined to attend.

That when he was eventually arrested, and charged and in Rongo PMC CR C NO E278 of 2024 with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code but the prosecution did not proof beyond reasonable doubt that he committed the offence and thus he was acquitted.

The Respondent thus resorted to file her claim in the Small Claims Court seeking for judgment to be entered for the sum of Kshs. 210,000/=

The Appellant entered appearance through the firm of M/S Ogwe and Co. Advocates and defended claim.

The Adjudicator found that the Claimant had proved her case and entered judgment in the sum of Kshs.190,000/= together with costs of Kshs.10,000/=.

The Appellant was aggrieved by the judgment and he lodged appeal vide Memorandum of Appeal dated 17th January 2025 on the following grounds:

1. THAT Learned Trial Magistrate erred in both law and fact in failing to find that there was no valid contract between the Appellant and the Respondent capable of enforcement as it purported to do.
2. THAT the Learned Magistrate erred in law and fact in failing to find that even if there was any contract the Claimant had been supplied with the cane contrary to her allegations and was actually the one owing the Appellant and the Magistrate erred in failing to grant the counterclaim.
3. THAT the Learned Magistrate erred in law and fact in failing to be guided by the law thus wrongly applied the doctrine of stare decicis / precedent
4. THAT the court erred in purporting to discredit the supply and payment statements for the simple reason that they were not certified yet the Claimant did not object to them being produced
5. THAT the Learned Magistrate erred in law and fact in failing to be guided by the law particularly in failing to find that the matter

was already before Rongo CRC No. E278/2024 and was thus sub judice and was an abuse of the court process and thus gave leeway to aid and accommodate a vexatious litigant who can choose whichever court to file suits regardless of the number of suits.

6. THAT the Learned Magistrate erred in law and fact in finding that the Claimant had proved her case on a balance of probability when the evidence on the record showed otherwise.
7. THAT the Learned Magistrate failed to adequately consider the legal principles thereof and the submissions of the Appellant's Counsel and the supporting documents thereof. In fact, the court shifted the burden of proof on the Appellant.

IT IS PROPOSED to pray for orders:-

- a). THAT the appeal be allowed and the judgment be set aside
- b). THAT costs in the court be borne by the Respondent.

The Appellant filed the appeal concurrently with application dated 10th February 2025 seeking for orders of stay pending hearing and determination of the appeal. The said application was compromised on condition that the Appellant deposited 2/3 of the decretal sum in court within 30 days pending hearing and determination of the appeal. When the Appellant defaulted in complying with the condition for stay the order was vacated. On 19th May 2025 Mr. Ogwe Advocate sought for extension of time to deposit decretal sum and informed the court that they had already deposited Kshs100,000/= in court. He also informed the court that motor vehicle Reg. No. KDG 081X which had been

proclaimed prior to deposit of the 2/3 decretal sums had been attached and he prayed that it should not be sold.

On 21st May 2025 the court was informed that the balance of the decretal sum that was to be deposited in court had been deposited. On 4th June 2025 the court ordered that attached motor vehicle be released upon payment of the Auctioneers fees.

On 24th September 2025 directions for hearing of the appeal were taken to the effect that the Appellant was to file and serve Records of Appeal concurrently with Submissions within 7 days.

The Appellant filed his submissions dated 10th October 2025 on 29th October 2025. There is no evidence the said submissions were served and the Respondent has not filed her submissions.

The Appellant's submissions are to the effect that the learned Adjudicator erred in both law and fact in the evaluation of evidence, misapplication of legal principles, and misdirection on the burden of proof.

That there was no valid contract between the parties capable of enforcement. That the court erred in failing to recognize that, if any cane was supplied, it was in fact supplied to the Respondent, making her indebted to the Appellant. That the learned Adjudicator misapplied legal principles and failed to be guided by precedents. That the court wrongly discredited documentary evidence without legal justification. It was also submitted that the claim was sub judice, given that Rongo CR E278/24 involved the same subject matter and parties and that the court shifted the burden of proof to the Appellant contrary to Section 107 of the Evidence Act.

The Appellant identified issues for determination as:

- a. Whether there existed a valid and enforceable contract between the Appellant and the Respondent.
- b. Whether the learned adjudicator erred in disregarding the Appellant's documentary evidence.
- c. Whether the proceedings before the Small Claims Court were sub judice.
- d. Whether the Respondent proved her case on a balance of probabilities.
- e. Whether the trial court misdirected itself in law and fact.

It was the Appellant's submissions that no written or oral agreement was produced before the trial court to demonstrate a legally binding relationship as required under Sections 3 and 4 of the Law of Contract Act, Cap 23. That the court thus erred in enforcing a non-existent contract contrary to the established principles in ***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2011] eKLR*** that courts cannot rewrite contracts for parties.

On rejection of the Appellant's evidence, it was submitted that the Appellant produced supply and payment statements marked DEX 1 and DEX 2 to demonstrate that the Respondent had received cane and was indebted to him. That the trial court discredited these exhibits merely because they were not certified copies, despite there being no objection at the time of production.

The Appellant contended that the law is clear that documentary evidence is admissible once properly produced and marked, as held in ***Republic v Ahmad Abolfathi Mohammed & Another [2019]***

eKLR. The rejection of unchallenged documents was therefore a material error of law.

On the sub judice rule it was submitted that the matter was pending before Rongo CR E278/2024, involving the same parties and subject matter. The learned Adjudicator failed to take judicial notice of this, contrary to Section 6 of the Civil Procedure Act, which prohibits concurrent proceedings over the same issue.

The failure to strike out the matter amounted to aiding a vexatious litigant and an abuse of court process.

On the burden and standard of proof it was submitted that the Respondent bore the burden of proving her claim under section 107 of the Evidence Act. That the court, however, shifted this burden to the Appellant without cogent reasons.

The Appellant argued that the standard of proof in civil matters is on a balance of probabilities, but the evidence adduced by the Respondent fell far below this threshold.

On evaluation of evidence and legal principles it was submitted that the Trial Court ignored material evidence and submissions presented by the Appellant. It is trite law that a court must evaluate all evidence on record before making findings as was held in the case of ***Selle v Associated Motor Boat Co. [1968] EA 123.***

The Appellant submitted that the learned Adjudicator erred in both law and fact, and the appeal should be allowed, judgment of the Adjudicator be set aside and substituted with an order dismissing the Respondent's claim with costs and that the court awards costs of this appeal to the Appellant.

ANALYSIS AND DETERMINATION

As a first appellate court, this Court is obliged to re-evaluate, re-analyse, and reconsider the evidence on record and draw its own conclusions, bearing in mind that it did not see or hear the witnesses. This position was settled in the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**. This court is also aware of the principle that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of evidence or the court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in ***Mwanasokoni - versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga -versus- Kiruga & Another (1988) KLR 348***).

Having carefully considered the record of the trial court, the grounds of appeal and the submissions by the Appellant, the issues for determination are:-

1. Whether the Small Claims Court erred in finding that a valid and enforceable contract existed.
2. Whether the court erred in rejecting the Appellant's documentary evidence.
3. Whether the matter was sub judice in light of Rongo PMC CR E278/2024.
4. Whether the Respondent met the burden of proof on a balance of probabilities.
5. Whether the counterclaim ought to have been allowed.
6. Whether the Adjudicator properly evaluated the evidence.
7. Existence of a valid contract

The Appellant has argued that no written/oral contract was produced and that Sections 3 and 4 of the Law of Contract Act require writing. This argument is legally unsustainable.

Sections 3 and 4 of the Law of Contract Act apply only to contracts involving disposition of interests in land, guarantees, or contracts by agents and not ordinary commercial agreements for supply of goods or services. Commercial transactions may be oral, implied, or partly written and partly oral. The Respondent testified to a business relationship for supply of cane since January 2023, backed by documentary payments (bank statements and M-Pesa). The Appellant admitted receiving money and admitted a supply relationship. In the circumstances, an implied contract existed, based on offer and the same is enforceable.

Courts routinely enforce such implied contracts and this ground of appeal fails.

On whether the court erred in disregarding DEX 1 and DEX2 The Adjudicator appears to have discredited the Appellant's statements for lack of certification. However, certification is only required for public documents as provided by Section 80 of the Evidence Act. Private business records such as delivery notes and statements are admissible once produced through their maker as provided under Section 35 of the Evidence Act. The Respondent did not object to their production.

However, even if admissible, the weight of the said documents is a factual issue and the Adjudicator was entitled to reject them if they were unsupported by origin or verification from Sukari Industries. The Respondent denied receiving the proceeds and the Appellant could not demonstrate that the deliveries actually credited the Respondent's

account. There was also no gate pass, weighbridge receipt, confirmation message, or Sukari pay-out voucher tendered. The Appellant admitted that he did not hand over delivery receipts to the Respondent, making verification difficult. Thus, the court was entitled to find the documents unreliable even if admissible. No reversible error arises. The ground fails.

On whether the claim was sub judice, the Appellant argued that Rongo PMCCCR E278/2024 where the Appellant was charged with the offence of obtaining by false pretense involved the same subject matter. Section 6 of the Civil Procedure Act applies only to civil suits. Criminal proceedings cannot trigger sub judice against civil proceedings.

Kenyan jurisprudence is settled that Criminal and civil matters arising from the same facts may run concurrently and an acquittal in the criminal case does not bar civil recovery claim. The Small Claims Court was correct.

On whether the Respondent proved her case, payments of approximately Kshs 190,000 were proved. The Respondent denied receiving any cane proceeds and no contrary proof was produced by Appellant showing that deliveries were actually credited to her account or that she received any proceeds or that she acknowledged receiving cane.

Respondent had the initial burden under Section 107 Evidence Act but once she proved payment and non-delivery, the evidential burden shifted to the Appellant under Section 112 to Section 113. The Appellant's evidence did not meet that burden. The finding that the Respondent proved her case on a balance of probabilities was sound.

On the issue of counter-claim the Appellant pleaded that the Respondent owed him money (Kshs. 68,000 or more). However, no counterclaim appears to have been formally filed or particularized; even if raised orally, the Appellant tendered no verified delivery records. His own testimony was inconsistent regarding amounts owed. No evidence of credit payments from Sukari to the Respondent was produced. A trial court cannot grant an unproven counterclaim.

On Evaluation of evidence the Appellate interference occurs only where the trial court misapprehended evidence, acted on wrong principles, or reached conclusions no reasonable tribunal could reach (***Selle v Associated Motor Boat***).

In the instant case the Adjudicator considered both parties' evidence. The rejection of Appellant's statements was based on lack of verification and the Respondent's direct evidence was unshaken under cross-examination. There is no basis to conclude that the Adjudicator misdirected herself.

After reviewing the record, statutory provisions, and applicable jurisprudence, the appeal discloses no error of law or fact warranting appellate interference the Adjudicator's judgment in the Small Claims Court is upheld and appeal is dismissed with costs. Decretal sums deposited in court to be released to the Respondent forthwith.

Right of appeal 30 days.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 12TH DAY OF FEBRUARY, 2026.

ANNE ONG'INJO

JUDGE