



REPUBLIC OF KENYA



**Ngao v Ngonge (Civil Appeal E083 of 2024)  
[2026] KEHC 2689 (KLR) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2689 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL E083 OF 2024  
ACA ONG'INJO, J  
FEBRUARY 26, 2026**

**BETWEEN**

**JOSEPH OWISO NGAO ..... APPELLANT**

**AND**

**PAUL OGODO NGONGE ..... RESPONDENT**

*(Being an appeal from the judgment and decree by Hon. Angela Munyonyi RM  
(Adjudicator) in Migori SCCCOMM E141 OF 2024 delivered on 30th October 2024)*

**JUDGMENT**

- 1 In statement of claim dated 29<sup>th</sup> July 2024, the Respondent sued the Appellant and one Kapopo Okinyi claiming Kshs. 480,500/= being money owed for 430 shatters hired by the Respondent on or about 14<sup>th</sup> September 2023. The Respondent also claimed for return of the said shatters. The Respondent also sought for costs of the claim.
- 2 The Appellant filed response to the claim and said he was not privy to the claim and was not party to the purported agreement and the claim should be dismissed.
- 3 The Trial Magistrate considered the claim and the response as well as the rival submissions by the parties and concluded that the Respondent had proved his case on a balance of probabilities and entered judgment for Kshs. 480,000/= together with costs and interest from date of filing suit. The determination was based on the fact that the Claimants witness Seth Onyango who was a witness to the agreement produced as exhibit by the Claimant said that the same was entered into on behalf of the Appellant who had already made payment of part of the claim being Kshs. 164,500/= and the Appellant did not controvert this fact.
- 4 The Appellant was aggrieved by the judgment and he lodged appeal vide Memorandum of Appeal dated 22<sup>nd</sup> November 2024 on the following grounds:



1. That Learned Trial Magistrate erred in both law and fact in failing to properly analyse or evaluate that the claim of Kshs. 480,000/= did not emanate from a contractual obligation between the Appellant and the Respondent, there was no contract either orally or in writing to warrant such judgment.
2. That the Learned Magistrate wrongly clamped up the Defendants together without analysing who actually entered into the contract thereof.
3. That the Learned Magistrate erred in law and fact without considering that the Appellant was wrongly enjoined in the suit despite the Appellant explaining the same in the pleadings and submissions.

IT IS PROPOSED to pray for orders:-

- a). That the appeal be allowed and the judgment of the trial court be quashed, varied and/ or set aside and substituted with an order dismissing the suit with costs to the Appellant.
  - b). Such further/ or other relief as the court shall deem fit to grant necessary, just and expedient.
- 4 This appeal was canvassed by way of written submissions. The Appellant's submissions are dated 8<sup>th</sup> October 2025. The Respondent's submissions are dated 21<sup>st</sup> October 2025

### **Analysis And Determination**

- 5 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).
- 6 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 a contractual relationship existed between the Appellant and the Respondent.
  2. Whether the Appellant was properly enjoined in the suit.
  3. Whether the Respondent proved his case on a balance of probabilities.
  4. Whether the trial court misdirected itself in its evaluation of evidence.

### **Whether a contract existed between the Appellant and the Respondent**

- 7 The uncontroverted evidence was that the shatters were delivered to and used at the Appellant's construction site. The Appellant did not dispute that the construction was his project, and he offered no alternative explanation for possession or use of the Respondent's shatters.
- 8 Courts have consistently held that receipt and use of a benefit under a contract is powerful evidence of assent, even if the person did not personally sign the contract.



- 9 This principle was affirmed in *Smith v Hughes* (1871) LR 6 QB 597 where it was held that a party is bound by a contract where his conduct leads the other to reasonably believe he assented to it.
- 10 The Respondent produced evidence which was not challenged that the Appellant himself made part-payment toward the hire charges. Part-payment of Kshs. 164,500/= by the Appellant is an unequivocal act of ratification.
- 11 In *National Bank of Kenya v Pipe plastic Samkolit (K) Ltd* [2001] eKLR, the Court of Appeal held that a party who conducts himself in a manner consistent with acceptance or approval of a contract is deemed to have ratified the transaction.
- 12 Even assuming that Kapopo signed the agreement, the law recognizes implied agency and ratification by conduct.
- 13 In *Garnac Grain Co. Inc. v HMF Faure & Fairclough Ltd* [1968] AC 1130 it was held that agency may arise where a principal, by conduct, holds out another as his agent.
- 14 Similarly, in *Kagane v Attorney General* [1969] EA 643 it was held that agency may be implied from circumstances showing authorization or ratification.
- 15 By accepting delivery of the shatters, using them in his construction project, and making part-payment the Appellant not only acquired a direct benefit but also ratified any acts done by Kapopo or Seth Onyango on his behalf.
- 16 In conclusion this court finds that the trial Magistrate was right in finding a contract did exist, either directly between the Appellant and the Respondent, or through implied or ratified agency. Privity was therefore established.
- 17 On whether the Appellant was properly enjoined, a party is properly enjoined where evidence shows he is a direct contracting party, or a principal who authorized or ratified the transaction.
- 18 The Court of Appeal in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 held that a party who benefits from a transaction, or in whose interest the transaction was undertaken, is properly joined.
- 19 The hire of shatters was undeniably for the Appellant's project, and he partially paid for them. In the circumstances joinder was proper.
- 20 On whether the Respondent proved his case on a balance of probabilities, Section 107–108 of the *Evidence Act* places the burden of proof on the party asserting a fact. The Respondent proved the existence of an agreement for provision of shatters, delivery and use of those shatters at the Appellant's site, part-payment by the Appellant, and an outstanding balance of Kshs. 480,500/=. Nothing contradicted this evidence.
- 21 In *Charterhouse Bank Ltd v Frank N. Kamau* [2016] eKLR, the Court of Appeal noted that uncontroverted evidence that is internally consistent may be accepted as sufficient.
- 22 Additionally, in *Kipkebe Ltd v Peterson Ondieki Tai* [2016] eKLR, the court held that liability is properly established where the defendant received the benefit of a service and made partial payment. The Respondent therefore discharged his burden.
- 23 On whether the trial magistrate misdirected herself, the trial court correctly identified the relationship between the parties, appreciated that use of the shatters at the Appellant's school linked him directly



to the transaction, and treated the Appellant's part-payment as ratification. This court finds no misdirection.

24 In conclusion, this court finds that the appeal lacks merit and the same is dismissed with costs to the Respondent.

25 Right of appeal 30 days.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**ANNE ONG'INJO**

**JUDGE**

