



REPUBLIC OF KENYA



**Kulevih v Kemboi (Civil Appeal E041 of 2023)
[2026] KEHC 4415 (KLR) (31 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 4415 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E041 OF 2023
RN NYAKUNDI, J
MARCH 31, 2026**

BETWEEN

KADE KULEVIH APPELLANT

AND

HASSAN KIPTOO KEMBOI RESPONDENT

*(Being an Appeal against the judgement of Hon C. Menya (SRM) dated
and delivered on 21st February 2023 in Eldoret CMCC No 148 OF 2020)*

JUDGMENT

1. The brief facts of this appeal are that the Respondent herein who was the Plaintiff at the trial Court filed a Plaint dated 13th February 2020 seeking judgement against the Defendants for: (a) Refund of sums as stated in the particulars of paragraph 12 of the plaint; (b) Costs and Interests of the suit; (c) Any other suitable relief that this Honourable Court may deem fit so to grant. The facts of the case at the trial Court were that the 1st Defendant and the Plaintiff had a verbal agreement that when the Defendant buys fuel, the Plaintiff is to transport to the designated destination and is paid on delivery; that it was further an agreement that the Defendant should pay tax as he was using the Plaintiff's Truck to do the transportation; that sometime in 2017, the Defendant evaded to pay the tax due on the Plaintiff's Motor Vehicle Truck No. KCC 214T/ZF0243; that the same year the Plaintiff's truck was impounded by the Kenya Revenue Authority and the Plaintiff had to pay the said taxes on the goods; that the Defendant is also indebted to the Plaintiff for transportation of the goods sometime in 2017; that the Defendant breached his part of the agreement and has dodged the Plaintiff for over the last 3 years. The Plaintiff at the trial court listed the particulars of breach of contract to include neglecting to pay the tax on his goods on the Plaintiff's Truck; continuing to dodge the client even after several verbal and written attempts to warn him of his dues. Particularly, the Plaintiff averred that his claim against the Defendant is to pay the tax on goods he transported using his truck.



2. The Appellant herein who was the Defendant at the trial Court entered appearance and filed a Statement of Defence dated 30th March 2021 and denied the particulars of the Plaint specifically by stating that he did not have a working relationship with the Plaintiff until he severed communication with the Plaintiff in 2017, denied that he had breached part of the agreement and had dodged the Plaintiff for the last 3 years, denied that he was to pay tax on the goods transported in the Plaintiff's truck. The Defendant further denied that at no point did he receive a demand letter or any notice with respect to the subject matter or any other matter from the Plaintiff or his agents and/or Advocates. The Defendant prayed that the suit be dismissed with costs to the Plaintiff.
3. The matter proceeded for a full hearing and vide a judgement delivered on 21st February 2023, the trial Magistrate held as follows: -

I shall therefore hold that the said contract existed and it is enforceable.

That being the case, I shall proceed to grant the prayers sought in the Plaint and order that the defense pays the Plaintiff kshs. 800,000/= which he paid at the KRA as well as the balance of kshs. 200,000/= for transportation.

The plaintiff shall also be awarded the costs of the suit and interest from the date of filing the suit till payment in full.

4. The Appellant herein Kade Kulevih alias Kade Vihumbira being dissatisfied with the judgement and decree of the trial court delivered on 21st February 2023 appealed against the said decision vide a Memorandum of Appeal dated 1st March 2023 based on the following grounds: -
 - a. The Learned Magistrate erred in law by delivering judgement without notice and in the absence of the appellant's advocate on record.
 - b. The Learned Magistrate erred in law and fact by holding that the Macro Logistics is a Limited Liability Company and the Respondent is the director.
 - c. The Learned Magistrate erred in law and fact by holding that the Respondent transported petroleum from Eldoret, Kenya to Democratic Republic of Congo.
 - d. The Learned Magistrate erred in law and in fact by holding that a contract between the Appellant and the Respondent subsisted.
 - e. The Learned Magistrate erred in law and in fact ignoring the written submission of the Appellant's Advocate dated 24th June 2022.
5. The Appellant sought that the Judgement and or Decree of the trial Court to be set aside. The Appeal was canvassed by way of written submissions.

Appellant's Written Submissions

6. The Appellant filed written submissions dated 26th September 2025. The learned Counsel for the Appellant submitted that the trial court erred both in law and in fact in entering judgment against the Appellant in the absence of sufficient evidence and in misapprehension of the applicable legal principles. Counsel began by outlining the background of the dispute, submitting that the Respondent had moved the Magistrate's Court under a certificate of urgency and obtained ex parte orders for attachment before judgment of a motor vehicle and trailer, which were detained for a prolonged period, thereby occasioning financial loss. Counsel further submitted that the release of



- the said motor vehicle was conditional upon the deposit of Kshs. 800,000 in a joint interest-earning account pending determination of the dispute.
7. On the substance of the appeal, Counsel submitted that the Respondent was bound by his pleadings, which alleged breach of an agreement relating to payment of taxes in respect of transportation of petroleum products. However, it was contended that the Respondent failed to discharge the burden of proof as required under section 107 of the *Evidence Act* (Cap 80), as no credible evidence was adduced to support the alleged transaction.
 8. Counsel further argued that the learned Magistrate erred in finding that a contractual relationship existed between the parties. It was submitted that no written agreement was produced and the alleged oral contract was not supported by any documentary evidence. In particular, Counsel emphasized that the essential elements of a valid contract offer, acceptance, and consideration were not proved. In support of this position, reliance was placed on *Autoexpress Limited Vs Amicabre Travel Services Limited* (Civil Appeal No. 426 of 2018) [2024] KEHC 6280 (KLR), where the High Court held that whether a contract is written or implied, the elements of offer, acceptance and consideration must be established. Counsel submitted that in the present case, none of these elements were demonstrated.
 9. Counsel also submitted that the learned Magistrate erred in finding that the Respondent transported petroleum from Eldoret to the Democratic Republic of Congo. It was argued that such a cross-border transaction would necessarily require strict compliance with statutory and regulatory requirements, including production of export documentation, customs clearance documents, and transit permits under the East African Community Customs Management Regulations, 2010. However, the Respondent failed to produce key documents such as the Certificate of Export, Form C.28, TIR documents or any customs documentation to prove that the goods ever left Kenya.
 10. Further, Counsel submitted that the Respondent's evidence was inconsistent and unsupported by proof. Although the Respondent alleged payment of Kshs. 1,180,399 to the Kenya Revenue Authority and later Kshs. 800,000 after a waiver, no receipts, bank records, or official confirmations were produced. It was contended that a demand letter from the Kenya Revenue Authority could not constitute proof of payment, and the trial court erred in treating it as such.
 11. On the issue of proof, Counsel reiterated that the burden lay with the Respondent to establish that the petroleum was purchased, transported, and delivered to the Appellant, which burden was not discharged. It was further submitted that even under the East African Community Customs Management Regulations, goods in transit must be properly declared using prescribed forms, yet no such evidence was tendered. Counsel also faulted the trial court for ignoring the Appellant's written submissions, which had raised critical issues regarding lack of proof of contract and possible illegality of the alleged transaction. It was submitted that the failure to consider these submissions amounted to a misdirection in law and resulted in an erroneous judgment.
 12. In conclusion, Counsel submitted that the trial court's judgment was based on insufficient evidence, contradictions, and misapplication of legal principles. The Court was urged to find that no contract had been proved, set aside the judgment of the lower court, and order the release of the Kshs. 800,000 held in the joint interest-earning account together with accrued interest to the Appellant.

Respondent's Submissions Summary

13. A look at the court's record and Case Tracking System indicate that the Respondents did not file submissions to canvass the appeal. However, I will determine the appeal on its merits.



Analysis and Determination

14. This matter arises out of the decision of the court in which the proceedings were heard and determined and in a Judgement dated 21.2.2023 the learned trial magistrate pronounced herself as follows:- “ The question is whether the plaintiff discharged the burden of proof in this case.

Looking at the nature of the case and the amount involved as well as the nature of the trade herein there was no way the plaintiff could have transported the products all the way to the DRC for free.

He was supposed to be paid in all honesty.

The defense in my opinion admitted the allegation of the plaintiff that they entered into the contract and that indeed fuel was transported by the plaintiff to the DRC.

As earlier observed, it could not have been free of charge. He simply admitted buying the services of the plaintiff and denied being in a relationship with CONGO UNI. He admitted having paid some dollars but it was not clear for what and he could not tell how much it was. He also cannot pay money for nothing. There must be some goods and services he enjoyed but was not able to adequately state how much he paid and the balances if any. I hold the view that there existed a contract between the parties and there was supposed to be money paid for the same.

The defence was not able to adequately counter the allegations that were missed by the plaintiff. I am live to the fact that section 107 and 108 of the *Evidence act* places the burden on the party who alleges but from the conduct of the defense and his admission they traded and the defense made some money. I shall therefore hold that the said contract existed and it is enforceable

That being the case, I shall proceed to grant the prayers sought in the plaint and order that the defense pays the plaintiff Kshs 800,000 which he paid at the KRA as well as the balance of Kshs 200,000 for transportation. The plaintiff shall also be awarded the costs of the suit and interest from the date of filing the suit till payment in full.

15. Thereafter the Memorandum of appeal was filed to impeach this Judgement as stated by the Appellant. From the trial court record the matter was decided by way of affidavits, documentary and all evidence and submissions from the advocates representing the parties. From the summary of the Plaintiff now Respondent one Hassan Kiptoo Kemboi he was categorical that he knows the defendant whom they worked with in the year 2016 in the business of transporting Petroleum products. He told the court that he traded under the name and style of Marco Logistics which he supported by a way of certificate of registration marked exhibit No. 1. The Plaintiff now Respondent told the court that at the time of the business venture he was using motor vehicle registration No KCC 214T which conveyed the petroleum products to DRC. In their relationship according to the Plaintiff/Respondent the Defendant agreed to buy the Petroleum Products while his obligations was to transport the products to DRC and on delivery was 4500 US dollars per truck. The witness further told the court that he had received Kshs 2500 US Dollars for the first consignment leaving a balance of 2000 US Dollars. In the course of their commercial relationship the witness told the court that the year 2017 he found himself with no work, taxation bills, which he culminated by KRA taking a decision to impound his motor vehicle. He therefore decided to travel to DRC to seek for an assistance from the Appellant in this appeal but no much came into fruition he even went as far as being fined Kshs 1,180,399. In cross examination by learned counsel Lelei the Respondent told the court that he asked for a waiver and he paid Kshs 800,000 through National Bank of Kenya.



16. When it came to Defendant in his re-joinder now Appellant to this Appeal he told the court it is true they had a business venture with the Respondent of delivering petroleum to DRC Congo. He further told the court that he used to clear the Petroleum products at Congo Boarder, however he called that he owned a trailer Registration No. UAU 323N that he later sold. He denied the claim as pleaded by the Respondent. In support of his case the Appellant adduced evidence from PW2 Yanu Kembaya who told the court that he doesn't know the Respondent that he was an owner of Motor vehicle UAR 725 E. He admitted a deposit of 800,000 before this court. This is the basis of the evidence which informed the decision of the impugned judgment.
17. In Kenya oral agreements are legally binding in the formation of business contracts provided they contain the essential elements of a contract, offer, acceptance, consideration, and intention to create legal relations. How have the courts construed validity of oral agreements and conducts:

Validity of Oral Agreements & Conduct

Ali Abid Mohammed v Kenya Shell & Company Limited (2017) eKLR: The court established that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded.

Sainad Limited v Kairu & another (Civil Appeal E030 of 2023):

The Court of Appeal reaffirmed that it is trite law that a contract does not have to be written and can be made orally and by conduct of the parties. *Peeush Premal Mahajani v Yashwant Kumari Mahajan ML HCCC No. 571 of 2015*:

The court held that a signature is not a precondition to the existence of contractual relations, as a contract can be accepted by conduct.

Morjaria v Patel (Civil Case 153 of 2018) [2025] KEHC 2930:

The High Court found a binding contract existed for an investment loan despite the lack of a formal document, relying on the acknowledgment of receipt of funds and bank transfers as evidence of the oral agreement.

Risks of Informal Arrangements (2025):

The High Court preferred evidence, including testimony from an accountant, to prove an oral "Share Agreement" made in 2003, emphasizing that while oral agreements are valid, they create significant evidential challenges compared to written ones.

Intex Construction Limited & 2 others v Suppliers & Services Limited [2025]: The court noted that in cases of oral agreements, a party must adduce evidence to support its contention of the agreement's existence.

18. In my considered view in this matter both parties had an intention to trade in petroleum products between Eldoret and DRC Congo. The agreement was never in writing. The terms are as acknowledged primarily in their testimony before court and reservation clauses raised in the same model of intention and conduct. As to formation this appeal focuses on the essential elements of invitation to treat, offer and acceptance, in contracting relationship based on oral mode of contract. These two persons being the Appellant and the Respondent orally so had agreed to internationally undertake the business of purchase and delivery of Petroleum Products from Eldoret Kenya to DRC Congo. In order to form a contract parties must first reach an agreement. The agreement is reached when one party called the offeror gives an offer that is accepted to the other party receiving the offer. In addition to the agreement there must be an intention to create legal relations and consideration. The



two parties might want to run away from the obligations which formed the agreement by starting to rely on certain technicalities of their own making but my view is this contract was executed by each party consenting to it. Therefore, any such challenges encountered on the way between Eldoret and DRC are issues which were foreseeable and they cannot be introduced to disadvantage another party so that he loses the entire bargain of the terms of the contract. I am unable to agree with the appellant that this was a contractual relationship which was meant to be a walk in naked and walk out naked without any commercial investment and returns to it. The offer and acceptance in oral contracts is not a simple matter by any means, but this is what the parties intended to be the governing canons in their business relationship without insulating the glimmer on the horizon. It is important to observe that the time when the contract was commenced and concluded is of paramount importance, and to me it is very clear from the evidence of both parties.

19. As it is reflected in the evidence the general rule is that for acceptance to be valid it must be communicated to the offeror which was the case here about the payment of 4500 US dollars in which 2500 US dollars was paid as agreed leaving a balance of US dollars 2000. Thus communication is key to acceptance of an offer as such parties cannot turn around and challenge what they had intended to accomplish in the terms of the oral agreement.

20. In the premises for those reasons, I find no tangible and cogent evidence to persuade me to review and set aside the judgement of the trial court. The appeal lacks merit and the same is dismissed with costs.

GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 31ST DAY OF MARCH 2026

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R. NYAKUNDI

JUDGE

