



**Okongo v Opollo (Commercial Appeal E143 of 2023)
[2025] KEHC 476 (KLR) (Commercial and Tax) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 476 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E143 OF 2023
BM MUSYOKI, J
JANUARY 24, 2025**

BETWEEN

FREDRICK OMONDI OKONGO APPELLANT

AND

ESTHER AKOTH OPOLLO RESPONDENT

*(Being an appeal from judgment and decree in milimani Small Claims
Court commercial suit number E639 of 2023 (C. Ndumia) dated 20-04-2023)*

JUDGMENT

1. The respondent instituted a claim in the small claims court against the appellant claiming refund of Kshs 497,000.00 which she claimed to have loaned the respondent between 2019 and 2021. The appellant admitted that he received the money some sent to him and others sent to Med-Express Enterprises but argued that the same was not a loan but was for upkeep and support to their family business as the parties were married.
2. The matter was heard through viva voce evidence where the respondent was the only witness on her part whereas the appellant testified and called one witness who was his brother. The honourable adjudicator found for the respondent and entered judgment for the pleaded sum plus costs and interest. That is what has precipitated this appeal where the appellant has raised the following grounds.
 1. That the learned magistrate erred in law in finding that there existed a valid contract between the appellant and the respondent when the respondent had not proved the main elements required for a valid contract.
 2. That the learned magistrate erred in law in declaring that no subsisting marriage had been proven between the appellant and the respondent.



3. That the learned magistrate erred in law in declaring that a valid money-lending contract existed between the appellant and the respondent when the parties were spouses under customary law and never intended to create a binding legal relationship.
 4. That the learned magistrate erred in law in finding the appellant liable for monies sent by the respondent to a separate registered entity known as Med-Express.
 5. That the learned magistrate erred in law in delivering the judgement outside the statutory time limit and further failed to communicate the judgment to the parties for an inordinate period of time.
3. It would appear that the appellant abandoned the last ground of appeal as the same was not argued. From the remaining grounds, I pick three issues for determination viz: -
- a. Whether there was a valid contract between the parties.
 - b. Whether the parties were spouses.
 - c. Whether the appellant was liable for monies sent to Med-Express Enterprises.
4. According to the respondent, in 2019 the parties entered into an agreement where she loaned the appellant Kshs 497,000.00 to finance his business which money she sent through Mpesa to the appellant and Med-Express Enterprises bank account on diverse days between 2019 and 2021. She produced screenshots of money transfer confirmation messages in her evidence. In cross-examination, the respondent stated that the agreement was oral. She also admitted that she had sued the appellant in a children's court. She added that money for upkeep of children was separate from the loan. She denied being married to the appellant and added that he was married to Beatrice Gitonga. She also stated that the business was owned by the appellant and his brothers and she had not claimed refund from the other partners.
5. The appellant called two witnesses; himself and his brother Paul Steve Otieno Okong'o. The appellant told the court that the respondent was his wife under customary law for fourteen years and denied ever receiving a loan from the respondent. He also admitted that he had never made any payment to the respondent. He added that the respondent relocated to the USA with his assistance upon which she started sending money to her for upkeep of their children. He denied ever entering into an agreement with the respondent and added that any money sent to Med-Express was for support of the family business. He also stated that the respondent had cut ties with the family and sued him in children's case number 1622 of 2022 which to him was an afterthought and a vendetta against him.
6. In cross examination, the appellant maintained that he was married to the respondent and had paid dowry in form of three cows. He admitted having received the money but insisted that the same was for their family business although the respondent was not registered as one of the proprietors. According to him, some of the money was for upkeep of their children and other for the family business. He also admitted that the money the respondent was claiming was not part of what she sent for upkeep.
7. The 2nd witness for the appellant who confirmed that he was his brother stated that the respondent was the appellant's wife. He confirmed that the appellant received money from the respondent but no money was sent to Med-Express by the respondent which business was owned by the appellant, himself and another brother. According to him, any money received by the business from the respondent was a voluntary contribution to the business made through the appellant. In cross examination, this witness at one point denied that the business received money from the respondent but two sentences down the line, he changed tack and confirmed that the business received money from the respondent. The trial court observed that the witness was being evasive.



8. This is a first appeal and this court has a duty to re-evaluate, re-examine and re-analyse the evidence tendered before the trial court and come to its own independent conclusion always noting that it did not take the evidence of the witnesses or observe their demeanour. Further, it should be noted that this being an appeal from the small claims court, the same should be restricted to matters of law only. I have looked at the memorandum of appeal and the submissions of the parties and I am convinced that the issues raised by the appellant are issues of law.
9. The appeal herein was argued by way of written submissions. The appellant submits that the trial court erred in finding that there was a contract between the parties and failing to appreciate that the parties were married and there could not be an enforceable contract between spouses. The appellant further argues that any money sent to Med-Express Enterprises was sent to a company which was a different entity from himself and in the circumstances, he should not have been held responsible for the refunds.
10. In her one paragraphs submissions, the respondent has argued that the appellant had misapprehended the difference between a business name and a limited liability company. That the business Med-Express Enterprises being a business name owned by the three brothers and not a limited liability company was not a separate entity from its owners. For the rest of the issues, the respondent urged the court to adopt her submissions filed in the lower court.
11. According to the appellant, the respondent did not prove that there existed a contract as the vital elements of a valid contract were not proved. I understand this to mean that the respondent did not establish that there was an offer, acceptance and consideration which are the primary elements of a valid contract. On this point he has cited the authority of *William Muthce Muthami v Bank of Baroda* (2014) eKLR.
12. In its response to claim, the appellant had denied that there was a contract to lend money. The agreement pleaded by the respondent was said to have been verbal. The same was collaborated by the messages confirming transfer of money to the appellant and bank account of Med-Express Enterprises. The appellant did not deny that the money was sent to him but averred that the same was sent for the business and was not meant to be refunded.
13. A verbal agreement can be proved through other corroborative evidence such as acknowledgements, admissions or calling witnesses to the agreement. In this case, the appellant and his witness confirmed that the money was sent to the appellant but for purposes of financing their family business. The respondent produced a certificate of registration of the Med-Express Enterprises which shows that its proprietors were the appellant and his two brothers. The respondent does not appear as an owner or beneficiary of the business. The appellant was the one who wanted the court to believe that the money was for the business and in the circumstances, he had the duty to prove that the business was a family business. The appellant had the burden to prove that the respondent was part of the family which owned the business. I do not think that the appellant discharged that duty. The respondent clearly had no interest or control over the business and unless it was shown that she derived direct benefit from the same, she could not be said to have been part of it.
14. I have looked at the money transfer messages which shows that part of the money was sent to the appellant while in other instances some was sent to Med-Express Enterprises. The respondent's witnesses first denied that money was sent to the business and in the same breath stated that any money received from the respondent was contribution for the appellant. Although I did not see the demeanor of this witness, I note that the trial court noted that the witness was being evasive. The recorded proceedings show that on cross examination, the witness was contradicting himself on material aspects. For instance, in one line, he denied that the business received money and in the next he would confirm receipt.



15. In the context of the above, it is my finding that oral agreement existed between the parties and the elements of a contract were established. This court cannot believe that the money was sent to the appellant and their business account without there having been a discussion. The testimony by the respondent's witness that the money sent to the business was a contribution by the appellant is enough proof that the same was sent for the benefit and on account of the appellant. If not, the respondent should have demonstrated why he was receiving money separate from the upkeep of the children. Suffice to say, he is on record stating that the money the respondent was claiming in the suit was not part of what she sent for the upkeep.
16. The conduct of the parties and sequence of events coupled with admissions in the proceedings in the trial court leads this court to make presumption of the existence of the oral contract as allowed by the law under Section 119 of the *Evidence Act*. In doing so I am guided by the decision of the Court of Appeal in *Total Kenya Limited v D Pasacon General Construction & Electrical Services* (2022) KECA 593 (KLR) where it held that;
- ‘In the instant appeal, the respondent has claimed the existence of an oral contract and has further described the circumstances that gave rise to the agreement. We are satisfied that the respondent has properly discharged his burden of proof. This Court relies on Section 119 of the *Evidence Act* which states that:
- The Court may presume the existence of any fact which it thinks likely to have happened, regard being to the common course of natural events, human conduct and private and public business, in relation to the facts of the particular case.’”
17. The second issue is whether the court failed to appreciate that the parties were married and that there could not be an enforceable contract between spouses. It is true that there cannot be an enforceable contract between a married couple. The appellant claimed that he was married to the respondent for fourteen years and she had sued him in the children's court. The respondent denied existence of the marriage and stated that the appellant was married to one Beatrice. The appellant did not tell the court when and where the alleged marriage was contracted. He did not refute the claim that he was married to the said Beatrice. The fact that a children's matter between the parties exists does not amount to proof of a marriage. The details of the court case were not given neither the nature of existing orders. The burden of proving the marriage was on the appellant and I have not seen any piece of evidence in the proceedings and documents produced by the parties that would suggest existence of marriage between the parties. The trial court cannot be faulted on this point as there was no proof of marriage other than the general statements by the appellant and his brother.
18. The appellant also claims that the money lent to Med-Express Enterprises was sent to an entity different and separate from him and in the circumstances, he should not have been held liable for it. I have stated above that the certificate of registration shows a business name which in law is not a limited liability company. It is not an entity separate from its owners. Order 30 Rule 1 of the Civil Procedure Rules allows a suit to be instituted against all or any of the partners in a business as long as the same is not a limited liability partnership. The respondent was therefore within the law and her right to sue the appellant for the refund of money sent to the business account. In any event the money sent to the business was admittedly sent as contribution of the appellant. I find the judgment of the trial adjudicator sound and correct in law.
19. The conclusion from the above is that I find no merits in this appeal and the same is hereby dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.



B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Kiminja for the appellant and in absence of the respondent.

