



REPUBLIC OF KENYA



**Komu v Mwaniki (Civil Appeal E084 of 2024)
[2025] KEHC 7164 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E084 OF 2024
RM MWONGO, J
MAY 28, 2025**

BETWEEN

MERCY WANJIRU KOMU APPELLANT

AND

FRANKLIN MURIITHI MWANIKI RESPONDENT

*(Appeal arising from the decision of Hon. D. Endoo in Embu
SCCCOMM No. E112 of 2024 delivered on 25th September 2024)*

JUDGMENT

The Memorandum of Appeal

1. The appellant filed a memorandum of appeal dated 01st October seeking the following orders:
 1. This appeal be allowed;
 2. The judgement delivered on 25th September 2024 be set aside;
 3. The appellant's claim dated 30th July 2024 be allowed as prayed;
 4. The respondent's counterclaim dated 29th September 2024 be dismissed with costs; and
 5. Costs of this appeal and interest thereon be at court rates.
2. The appeal is premised on the grounds that the learned Magistrate:
 1. Erred in Law and fact by failing to consider and apply the principle of the "balance of probability" in favour of the Appellant despite the fact that all the circumstances of the case demanded the Application of the principle of "balance of probability" to sight and justify determining the issue in controversy between the litigating parties;



2. Erred in law and in fact in failing to properly analyze the evidence on record and find that a contractual relationship can be inferred between the parties despite the absence of a written contract;
3. Erred in law and fact and grossly misdirected herself in finding that the Respondent was wrongly enjoined as a party to the suit yet there was clear evidence of an M-pesa statement proving that the Respondent received part payment of Kshs.320,000/= from the Appellant;
4. Erred in law and fact by making a finding that the Appellant had no justification to hold the Respondent Motor Vehicle as security for payment yet there was clear evidence on record that the Respondent personally delivered the vehicle to the Appellant to be held as security to guarantee payment of the debt owed to the Appellant by the Respondent; and
5. Grossly erred in Law by dismissing the Appellant's Claim against the weight evidence on record and in allowing the Respondent counterclaim as prayed on the basis of the unreliable evidence of questionable and doctored receipt.

Brief Background

3. In the lower Court the plaintiff/appellant filed a statement of claim through which she claimed the sum of Kshs.150,000/= from the respondent. It was her case that in May 2022, she supplied 5,875Kg of macadamia nuts, valued at Kshs.470,000/=. The respondent paid her a total of Kshs.320,000/= through her Safaricom M-pesa number, leaving a balance of Kshs.150,000/=. The respondent then surrendered his motor vehicle registration number KBX 114M to the appellant as security for payment of the balance.
4. After failing to repay the outstanding balance, the respondent refused to authorize the appellant to sell the said motor vehicle to recover the money owed plus interest and incidental charges accruing from keeping the motor vehicle. The appellant claimed for the outstanding balance owed by the respondent, the storage charges amounting to Kshs.400/= per day, from 18th May 2024 up to the date to the claim, a declaration of lien over the motor vehicle or, in the alternative, an order that the appellant has the right to sell the respondent's motor vehicle through auction to recover the money owed together with the incidentals.
5. In his response to claim, the respondent stated that he is only an employee of the company where the appellant supplied the macadamia nuts. Thus, he cannot be held liable for the actions of his employer. That the respondent did not send money to the appellant at any point and the appellant did not have any document to prove that she supplied the goods to the company. Further, no M-pesa statements were produced to prove that the respondent sent the appellant money.
6. The respondent counterclaimed for the sum of Kshs.162,000/= for car hiring expenses because the appellant has been withholding his car at her compound. He stated that he has been denied access to his car because of money owed by his employer and not by him.
7. The parties proceeded by way of documents in accordance with section 30 of the *Small Claims Court Act* (SCCA). The appellant stated that the respondent is a broker who buys macadamia nuts from farmers and sells them to companies. That he himself delivered his car at the appellant's home as collateral, in the event that the appellant's money is not paid. According to the respondent, his car developed mechanical problems while he was on the way to Meru near the appellant's home. He was assisted by some passersby and he managed to park the motor vehicle at the appellant's home as he sought for a mechanic to repair it.



8. When he later returned with the mechanic, the appellant refused to let him leave with his motor vehicle. Allegedly, she had supplied macadamia nuts to the respondent's employer, Privamnuts, which company had not paid her for the goods. The appellant believed that the respondent had influence over the payment. The respondent reported the matter to the police station but did not get much help. He wrote a demand letter to the appellant for release of his motor vehicle but then, the appellant sued for the amount owed by the respondent's employer while intending to hold the respondent's motor vehicle as lien.
9. The SCC adjudicator found that the respondent was not a party to whatever contract or agreement the appellant had with the respondent's employer. She found in favour of the counterclaim and awarded the respondent Kshs.162,000/=.

Written submissions

10. The appeal was canvassed by way of written submissions.
11. The appellant relied on the case of *Ali Abdi Mohamed v Kenya Shell & Company Limited* [2017] KECA 590 (KLR) and submitted that an implied contract existed between her and the respondent for supply of macadamia nuts. That the respondent did not prove that he was an employee of the said company. She urged that the respondent paid her part of the money from the existing contract but failed to pay the outstanding amount which was the subject of her claim.
12. She relied on the 4th edition Halsbury's Laws of England and argued that she was entitled to hold the respondent's motor vehicle as lien in the circumstances. She stated that the respondent is liable because he accepted to negotiate the repayment with the police and local authorities. The appellant faulted the trial court for quickly accepting the respondent's documentary evidence but refusing the appellant's claim.
13. The respondent relied on the cases of *Abok James Odera v John Patrick Machira t/a Machira & Co. Advocates* [1999] KECA 198 (KLR) and *Munya v Kithinji & 2 others* [2014] KESC 30 (KLR) and section 107 (1) of the *Evidence Act*. He stated that the appellant failed to prove that indeed she supplied the macadamia nuts to the respondent but the truth is that she supplied to the respondent's employer, and that the appellant sued the wrong party. He submitted that there was no error on the adjudicator's part and he urged this Court to dismiss the appeal with costs.

Issues for Determination

14. The core issue for determination is whether the appeal has merit.

Analysis and Determination

15. It is worth reiterating that this being a fresh appeal, this Court is duty bound to revisit and re-evaluate the evidence presented before the trial Court to arrive at its own independent conclusions. In so doing, this Court should bear in mind that unlike the trial Court, this Court did not have the advantage of seeing and hearing the witnesses and due allowance must be given for that disadvantage. See *Selle & Another v Associated Motor Boat Company Ltd & others* [1968] EA 123;
16. The appellant sued the respondent for Kshs.150,000/= being the balance of the purchase price after she supplied macadamia nuts to him. She stated that the respondent brought his motor vehicle to her home to serve as collateral in the event that the said balance was not paid. The respondent counterclaimed for money spent on hiring a motor vehicle after the appellant refused to let him leave her home with his motor vehicle. The respondent's rendition of the facts is that his car developed mechanical problems



and he left it at the appellant's home. Later, the appellant withheld the car because she was owed money by the respondent's employer.

17. The appellant wanted the Small Claims Court to imply a contract between her and the respondent. According to her M-pesa statements between 01st January 2022 to 31st December 2023 which were produced as evidence, there is a series of payments from 'salary payment from 222112- Family Bank Ltd Pesa Pap.....'. The appellant highlighted 4 of those payment totaling to Kshs.320,000/= and urged the court to consider that the money was received from the respondent. I have carefully perused the said bank statement. From it, the source of the funds is not clear and the respondent's name does not appear as the sender.
18. This is why the respondent's defense is believable, when he added that the appellant supplied the macadamia nuts to his employer. It is possible that the payments were made to the appellant from an institution, but there is definitely no evidence they were made by the respondent. There is indeed a contract in existence, an implied contract. One between the appellant and somebody else besides the respondent. The conduct of this person and the appellant easily suggests that the court can imply a contract. Halsbury's Laws of England 4th Edition (Reissue), at paragraph 778 provides as follows:

“In addition to the terms which the parties have expressly adopted, there may be other terms imported into the contract, these latter being generally known as 'implied' terms, ... As a general rule, the Courts will enforce not only the terms expressly agreed between the parties, but also those which are to be logically implied from those express terms including from any recitals... The question of whether a term is to be logically implied from the express terms of the agreement is a matter of construing the intention of the parties”.

19. Additionally, in *Lamb v Evans* [1893] 1 Ch 218, Bowen LJ stated:

“The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorises us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile”.

(see also the case of *Ali Abdi Mohamed v Kenya Shell & Company Limited* (supra))

Conclusions and Disposition

20. Given the circumstances of this case, a contract cannot be implied between the appellant and the respondent. The appellant was under duty to prove the existence of a clear contract between the appellant and the respondent. The terms thereof should concern the supply and purchase of macadamia nuts. It is also possible that the respondent was indeed an employee of the company which received the goods from the appellant. Even that is not clear herein. What is clear is that the appellant definitely sued the wrong party.
21. In the case of the respondent's counterclaim, the respondent made out a case against the appellant for the amount of money he spent on his transportation, when the appellant withheld his motor vehicle from him. Both parties gave a different version of events leading to the respondent's motor vehicle being left at the home of the appellant. Following these events, the respondent stated that he incurred money for car hiring since he could not use his car which was held at the appellant's home.



22. The respondent produced a car hire agreement and invoices as proof that he hired the said motor vehicle for the period when he could not use his own vehicle. His counterclaim succeeded on the strength of evidence availed. From a re-examination of the evidence, the respondent did prove his case on a balance of probabilities. On this finding, the trial court did not err.
23. In the result, the appeal lacks merit and is hereby dismissed with costs to the respondent.
24. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 28TH DAY OF MAY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Kiranga for Respondents.
2. Mwaura holding brief for Njiru for Appellant.
3. Francis Munyao - Court Assistant

