

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
SMALL CLAIMS APPEAL NO. E002 OF 2025

FREDRICK OCHIEL.....APPELLANT

VERSUS

KENNEDY OKOTH.....RESPONDENT

***(Being an appeal from the judgment of Hon. J.P Mkala
(RM) in Siaya Small Claims Court Case No. SCCMM E026
of 2025 dated 21/3/2025)***

BETWEEN

KENNEDY OKOTH.....CLAIMANT

VERSUS

FREDRICK OCHIEL.....RESPONDENT

JUDGMENT

1. The appeal arises from the judgment of Hon. J P Mkala (RM) in Siaya Small Claims Court Case No. E026 of 2025 wherein he entered judgment in favour of the Claimant for a sum of Kshs145,000/= plus disbursement of KShs10,000/= as well as interest at court rates from the date of judgment until payment in full.
2. The Appellant was aggrieved by the said judgment and who lodged his Memorandum of Appeal dated 16/4/2025 wherein he raised the following grounds of appeal namely:
 - 1) That the learned magistrate erred both in law and fact by upholding that the Appellant owed the Respondent a sum of Kshs145,000/= without disclosing on how the figures were reached or how the contract was interpreted.
 - 2) That the learned trial magistrate erred both in law and fact by disregarding the evidence and submissions of the Appellant thus arrived at a wrong decision.
3. This being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before

the trial court and subject it to an independent analysis and come up with its own conclusion as to whether or not to uphold the decision of the trial court. See **Selle vs. Associated Motor Boat Co. Ltd [1968] EA 123.**

4. The record of the trial court indicates that the Respondent filed his claim for Kshs145,000/= against the Appellant over an oral agreement entered into on 11/9/2024 wherein the Respondent leased to the Appellant an ultrasound machine at Kshs 1000/= per day for a period of 145 days. The Appellant denied the claim and contended that the suit ought to have been lodged in Kiambu County and further that there was no written contract between parties.
5. **Kennedy Okoth Achola (CW1)** testified that he had a phone call conversation with the Appellant on 9/9/2024 and 10/9/2024 and which dwelt on his request to lease an ultra sound machine and that he agreed to lease it to him at a fee of Ksh1000/= per day. That the Appellant later picked the machine from Dagoreti wherein his employee Linder Kalunge handed it over to him. That the agreement was oral and that the Appellant paid him Kshs5,000/= on 16/12/2024 and that no payment was made to date and that the machine was not returned. That at the time of filing the suit, the amounts that ought have been paid stood at Kshs145,000/=. That the Appellant refused to return the machine forcing him to lodge a report at Siaya Police Station.

On cross examination, he stated inter alia; that the agreement was to run from 11/9/2024; that the agreements was oral; that the Appellant has declined to return the machine; that he declined to pick the machine from a third party since it was the Appellant who ordered it from him and should return it himself.

6. **Fredrick Ochiel (RW1)** was the Appellant who testified that he was a biomedical technician. That he picked the machine from Ndonyo and serviced it in his Nairobi office but that it did not work. That there was no agreement on payment of money. That he contacted the Respondent that the machine did not work. That the Respondent directed him to bring the machine to Siaya and he complied and later left it with a friend. That he returned the machine on 25/1/2025 and which is in Siaya. That there was no agreement for payment of ksh1000/=. That new machines cost Kshs 85,000/= from single prompt. That one patient could pay Ksh500/=.

On cross examination, he stated that there was no agreement on money. That the agreement was to send the Respondent something he had requested. That he had not understood about the 60% that the Respondent was talking about.

7. Both parties duly closed their respective cases and exchanged submissions leading to the impugned judgment.

8. The appeal was canvassed by way of written submissions.
9. I have given due consideration to the record of appeal and the submissions filed. I find the issue for determination is whether there was a contract between the Respondent and the Appellant.
10. It is noted from the record of the lower court as well as the pleadings that the dispute relates to an alleged agreement whereby the Appellant leased the Respondent's ultra sound machine at a daily fee of Kshs1000/=. It is further noted that the parties did not sign any written agreement but that there are several short text messages (sms) and whatsup correspondences which were presented by the Respondent as evidence of an oral agreement. It is further noted that the parties herein duly filed and exchanged their documents and went ahead to present oral evidence in support of those documents. The Appellant had earlier lodged a notice of preliminary objection but later withdrew it and agreed to proceed with the hearing without raising any objections if need be. Hence, the parties are deemed to have accepted the documents filed to become part of the evidence. It is trite law that oral agreements which have been made in good faith are legally binding as long as the claimant is able to substantiate in court pursuant to the provisions of Section 107 of the Evidence Act regarding the burden of proof. Indeed, contracts can be inferred from the conduct of the

parties and that it need not be in writing but that the same must meet certain fundamental elements just like a written contract and that the same must contain the requisite requirements namely offer, acceptance, consideration and capacity. A party relying on an oral agreement must present evidence such as witnesses, emails, texts, written communication and conduct.

11. An analysis of the evidence of the Appellant and Respondent as well as the short text messages, whatsapp messages leaves no doubt that there was an obvious meeting of minds between the parties. The parties exchanged a plethora of messages regarding the daily charges over the use of the ultra sound machine and the return of the said machine back to the Respondent. Some of the messages attributed to the Appellant include inter alia; that the Appellant promised to sent money to the Respondent by the 5th; that the Appellant complained that the SHA had led him down and thus he was unable to pay; that the Respondent requested the Appellant to pay at least 60% of the debt wherein the Appellant indicated that he hoped to do so. The Appellant vide his witness statement dated 4/3/2025 confirmed having collected the ultra sound machine from the Respondent and later paid him Kshs5,000/=. This leaves no doubt that there was indeed an oral agreement entered into by the parties herein. The Appellant appeared to have taken the Respondent for a ride as he failed to pay up for the use of machine and then failing to return it to him as requested. I find that the terms of the oral agreement are captured in

the correspondences via sms and whatsup messages bound the parties. There was no evidence that the said agreement was tainted with illegalities or was oppressive and unconscionable. Even though the Appellant has lamented that the amounts demanded by the Respondent are exorbitant as it exceeds the cost of a new ultra sound machine, it is trite that the courts must respect the terms and conduct of the parties. It is unfortunate that the Appellant now wants the court to intervene in the matter of the contract yet he and the Respondent had engaged as friends and entered into the contract of their own free will and volition. It is trite law that courts will not interfere with contracts entered into by two consenting parties and the interest agreed upon unless the terms are on the face of it illegal, unconscionable, oppressive and fraudulent. See **Sanson Muriuki Kihara vs. Johnson Kabungo [2017] KLR.** Also in the case of **Centrurion Engineers & Builders Ltd Vs Kenya Bureau of Standards [2023] eKLR** the court held as follows:

“As this court has severally stated, and now a longstanding principle of law, that parties to a contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts.

*In **National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd [2002] EA 503** it was held that a court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded or proved.”*

12. It is noted that the Appellant had earlier filed a notice of Preliminary Objection dated 27/2/2025 seeking for dismissal of the Respondent's claim on grounds inter alia; that the trial court lacked jurisdiction to entertain the suit; that no written contract had been filed in court and that the sms and whatsup communication had not been backed up with a certificate under Section 106 (B) of the Evidence Act. It is further noted that the Appellant through his Advocate withdrew the said notice of preliminary objection on 28/2/2025 and opted to proceed with the matter. It is also noted that during the hearing and production of documents by the Respondent, the Appellant did not lodge any objections to the production of the sms, whatsup correspondence which had been exchanged between the parties via their mobile phones. The Appellant is therefore deemed to have agreed with the contents of those communications. Indeed, the Appellant admitted in his witness statement dated 4/3/2025 that he paid the Respondent a sum of Kshs5,000/= which is captured in the communications. I have no doubt that the exchange between the parties prior to the filing of the suit. Hence, I find that the admissibility of digital evidence provided by Section 106 (B) of the Evidence Act was complied with.

13. As regards the issue of jurisdiction, it is noted that Section 15 of the Civil Procedure Act provides that a suit ought to be filed within the jurisdiction of the court where

the cause of action arose or where the Defendant resides and works for gain. The evidence revealed that the cause of action took place in Ndonyo area of Dagoreti within Kiambu County while the Appellant resided and worked for gain at Siaya. The Respondent opted to take the second option and lodged suit before Siaya Small Claims Court. Hence, I find that the suit was properly lodged at Siaya Law Courts.

14. In view of the foregoing observations, I find that all the grounds of appeal have not managed to cast doubt upon the Respondent's evidence presented before the trial court. I find the trial court's finding was quite sound and must be upheld. It transpired from the evidence that the Appellant had received the Respondent's ultra sound machine, used it and failed to return it thereby leading the Respondent to suffer loss and that the Appellant took the Respondent for a ride as he used the Respondent's ultra sound machine without making any payments and then failed to return it forcing the Respondent to file suit. The Appellant thus acted in bad faith to the Respondent. I find the Respondent was entitled to the claims as sought.

15. In the result, it is my finding that the Appellant's appeal is devoid of merit. The same is dismissed with costs.

Dated and delivered at Siaya this 19th day of January 2026.

D. K. KEMEI

JUDGE

In the presence of:

N/A Odera.....for Appellant.

Kennedy Okoth.....Respondent.

Maureen/Kimaiyo....Court Assistant.