



REPUBLIC OF KENYA



**Nzioki v Muithya (Civil Appeal E132 of 2024)  
[2025] KEHC 2784 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2784 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E132 OF 2024**

**FR OLEL, J  
MARCH 13, 2025**

**BETWEEN**

**JONAH WAMBUA NZIOKI ..... APPELLANT**

**AND**

**PATRICK MUSYOKA MUIHYA ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon Daffline Nyaboke Sure  
(SPM) Delivered on 9th April 2024 in Kangundo CMCC No. E028 of 2024)*

**JUDGMENT**

**A. Introduction**

1. This Appeal challenges the Judgement- decree issued by Hon D.N. Sure (PM) in Kangundo CMCC NO E028 of 2020 dated 9<sup>th</sup> April 2024, where the trial court awarded the respondent a sum of Kenya shillings two million seven hundred and sixty thousand only (Kshs 2,760,000/=) plus costs and interest having found that he had established his case on a balance of probability, to wit; that he had advanced this sum to the Appellant on account of getting him construction Approval permits for land parcel No Ngong/Ngong/15890 and also sent the Appellant money to acquire for him two parcels of land situated with Umoja Area of Nairobi County, which assignments were not delivered.
2. Being dissatisfied with the said award the Appellant filed his Memorandum of Appeal on 3<sup>rd</sup> May 2024 and raised seventeen (17) grounds of Appeal namely;
  - a. That the learned trial Magistrate erred in law and in fact by making a finding that the plaintiff had proved his case on a balance of probability with regards to his claim and thus allowed his suit.



- b. That the learned trial Magistrate erred in law and in fact by making a finding that the deceased had not proved his counterclaim on a balance of probability and a such dismissed the counter claim.
- c. That the learned trial Magistrate erred in law and in fact by failing to take into account the evidence of the defendant before reaching a decision.
- d. That the learned trial Magistrate misdirected herself in law and in facts by making a finding that the bills of quantity produced were not necessary whereas the counterclaim was partly premised on the said bills of quantities.
- e. That the learned trial Magistrate erred in law and in fact by making a finding that the defendant was liable to pay monies that had been allegedly advanced to his wife and this was despite the fact that the said wife was not a party to the suit.
- f. That the learned trial Magistrate erred in law and in fact by failing to make a finding that the defendant was not under law mandated to refund monies not advanced to him.
- g. That the learned trial Magistrate erred in law and in fact by failure to take into account the evidence that the plaintiff indeed acknowledged that he was taken to the two parcels of land purchased for him and shown the plots on the ground.
- h. That the learned trial Magistrate misdirected herself in law and in fact by failure to take into account that the defendant had already spent monies sent to him to do certain work for the plaintiff.
- i. That the learned trial Magistrate erred in law and in fact by failing to account that the monies sent by the plaintiff were used for different projects done by the defendant for the plaintiff and that there was no evidence tendered that the monies claimed in the suit before her were for a particular project.
- j. That the learned trial Magistrate erred in law and in fact by writing a judgment that did not satisfy the requirements of a judgment as provided under the law.
- k. That the learned trial Magistrate erred in law by delivering the judgment on a date that was not initially set and this was without notice of change of date being issued to the defendant or his counsel on record.
- l. That the learned trial Magistrate erred in law by allowing the plaintiff's suit with costs and dismissing the defendants counter claim with costs.
- m. That the learned trial Magistrate erred in law and in fact by failing to make a finding that there was no any agreement in writing for the purchase of land whereas the defendant testified that the two plots belonging to the plaintiff were issued to him by virtue of him joining Gathera Self-help group upon the defendant paying the necessary monies for him.
- n. That the learned trial Magistrate misdirected herself in law and in facts by finding that the defendant could not have used his monies whereas it was already admitted by both parties to the suit that they had a continuing transactional relationship.
- o. That the learned trial Magistrate erred in law and in fact by failure to bring out the issues that arose from the defendant's counterclaim.



- p. That the learned trial Magistrate erred in law and in fact by failing to give weight to the evidence of the defendant that the plaintiff herein had tried to intimidate him by having him arrested even when this matter was pending in court over the same issues.
- q. That the learned trial Magistrate failed to address herself judiciously on the issues as presented to her in the pleadings by the defendant's both on the law and facts and thus giving a judgment which did not favour the defendant.
3. The appellant therefore prayed that the judgment of the trial court be set aside and judgment be entered in his favour as claimed in the counterclaim with costs and all consequential orders arising therefrom.

## **B. Facts of the Case**

4. PW1 Patrick Musyoka Muithya testified that he resided in the USA and relied on his witness statement dated 28.01.2020 and documents attached to his list of documents, which were produced as Exhibit P1-5. He knew the appellant as they went to school together and also had distant familial relationship, given that his mother was the Appellant's cousin.
5. Based on their long-standing relationship, he had trusted the Appellant to run his errands and undertake for him various assignments. In 2017, he first assigned the Appellant to procure construction/building permits to enable him to commence construction of residential flats on his land parcel No Ngong/Ngong/15890 situated within Ongata Rongai.
6. For this assignment, he advanced the appellant a sum of Kshs 1,000,000/=, which was delivered through his wife but despite several promises to deliver he had failed to do. Further they had discussed this matter and the Appellant had promised to refund the sum's owed, but unfortunately had not kept his promise. The respondent also all denied the Appellant's contention that he was to pay him a fee equivalent to 2% of the project sum and stated that there was no discussion to that affect.
7. Further, during their engagements on or about October 2020, the Appellant had informed him that there were parcels of land within Umoja Estate, Nairobi, which were being sold at friendly prices and offered to help him acquire the same. Each parcel of land had a purchase price of Kshs 750,000/= and he sent the Appellant a total of Kshs 1,700,000/= in three installments of Ksh 500,000/= twice and Kshs 700,000/=. These amounts were sent through Money Gram financial services and the extra Ksh 200,000/= was to be used for purposes of extracting cotton soil on the alleged two plots to pave way for construction works.
8. When he arrived back in Kenya, he requested the Appellant to show his parcels and was taken to an open field where no excavation work had been done, nor was he given documents to show ownership of the said parcels of land. He also believed that the two receipts that the Appellant gave him to prove receipt of payment were fake as they were dated before he had even sent the Appellant money for the said purchase.
9. Finally, it was also the respondents contention that he had sent the Appellant more money which was unaccounted for, but only wanted a refund for money sent for these two failed projects. He prayed that his claim be allowed in the sum of Kshs 2,760,000/=.
10. Under cross-examination the respondent confirmed that they had several other financial dealings with the Appellant as he owned a hardware shop and he would buy construction material from the said shop. He had also involved him in purchasing his property situated at Kawatheh and organizing the sinking of a borehole thereon.



11. He would generally send the Appellant money through Money Gram and/or Western Union but for issuance of the building permit he had used his friend Kipsang Rotich who wrote two cheques in favour of the Appellant's wife, Monica M Kalundu. He confirmed that the said Monica M Kalundu was not a party to these proceedings, but the Appellant had not disputed receiving this sum and had met his lawyer severally to discuss repayment schedule of the same.
12. Later when the Appellant did not honour his promise, he filed a complaint with the DCI to investigate this matter but had not followed to know the current status of the investigations. He was also unaware of the recommendations made by the ODPP on his criminal complaint and affirmed that he had not filed the criminal complaint to intimidate the Appellant nor was he misusing the police in a civil matter.
13. PW1 also confirmed that he has sent the first Kshs 500,000/= through Western Union and the rest through Money Gram and referred to his further list of documents filed. He also acknowledged that the Appellant acquired the services of an Engineer, who had the BQ, environmental assessment, and design changed and what the appellant paid for their services, he was not claiming.
14. The Respondent at that point closed his case and DW1 Johnah Wambua Nzioki, took the stand. He testified that he was a Pastor based Redeemed church, Nairobi, and resided at Greenspan Estate. He also confirmed that the respondent was his relative as his grandmother and the respondent's father were siblings. To that extent, the respondent was like his Son. The Appellant adopted his witness statement dated 19.02.2024 and also produced all the documents attached to his list of documents as Exhibit D1 to D12.
15. The Appellant confirmed that he bought for the respondent two plots and was given a certificate of ownership and receipt for payment made. He also physically took the respondent and showed him the plots bought and this had been done in the presence of his cousin Kakui, Gilbert Muli, the respondent's wife, and their surveyor John.
16. He had undertaken several projects for the respondent including digging a borehole for him to the tune of Kshs 3,000,000/= building him a house at Kangundo for Kshs 1,800,000/= buying for him a plot at Kawethei for Kshs 1,800,000/= and all these were done around 2017 or thereabouts. The Appellant further avered that he did not know anything about the Kshs 1,000,000/= allegedly given to his wife and could not be held responsible for the same.
17. It was his further evidence that the respondents claim for refund of Kshs 1,000,000/= used for the Kajiado project was also baseless as he had engaged a quantity surveyor who had done the bill of quantities costed at Kshs 877,445/=-, paid Kshs 150,000/= for environmental impact report and a further Kshs 40,000/= for Architectural design. On top of this he also claimed a further sum of Kshs 30,000/= being transport costs incurred in running the respondents errands directly tied to this project.
18. Finally, the Appellant also claimed that the respondent was to pay him 2% of the project cost as his commission, which sum remained unpaid. He urged the court to allow his counterclaim of Kshs 4,022,262.70/= based on this commission, which he ought to have been given.
19. He did not owe the respondent any money and prayed that the respondent's case be dismissed and his counterclaim be allowed.
20. Under cross-examination, the Appellant affirmed he had used the money sent by the respondent to undertake several activities on his behalf, such as securing the services of a professional quantity surveyor to make the bill of quantities for the Kajiado project. Secondly, the respondent had only sent him a black-and-white house plan of what he wanted to build, and that too had to be amended after



which he had surrendered the building permits and approvals to one, Daniel Kaloki, who was the respondent's manager.

21. The Appellant was further referred to his pleadings and confirmed that he had pleaded that he incurred Kshs 1,000,000/= for the Kajiado project and that it was also true that the respondent had advanced him money to buy land (Saika properties), which was eventually bought though he did not have the sale agreement nor the original title deeds for the said parcels of land purchased.
22. Be that as it may, he had witnesses from Gathera self-help group who could confirm that indeed he had purchased two parcels of land and also had photographs showing the plots were excavated. When challenged by the respondent's counsel he confirmed that he did not produce the photographs in court as part of his exhibits and also had nothing to show that the plots were condemned and/or were situated along the river.
23. Finally, on his claim that he was entitled to 2% commission on the Kajiado project, the Appellant confirmed that they did not have a written agreement on this, but it was something mutually agreed upon as friends.
24. Under re-examination, the Appellant confirmed that he bought for the respondent the parcels of land as agreed and had group certificates and receipts to prove the purchase. He also confirmed that he received Kshs1,000,000/= from the respondent for the Kajiado project but used it to pay for the BQ's, get Nema project Approval and amend the architectural plans.
25. DW2 John Ndunga Katwai adopted his witness statement, wherein he stated that in 2017 he was involved in the identification and allocation of plots within saika estate, which paid up members of Gathera self-help group were allocating themselves. He was the one who introduced the Appellant to be a member of this group and subsequently sold him six plots, four for himself and two for the respondent herein.
26. It was his further evidence that each plot measured 30ft by 60ft, had good access, and were being sold at Kshs 500,000/= per plot, which was good value for money. To his knowledge, the plots were still available, and was surprised by the respondent's allegation that the said plots were not available as they had physically visited the plots in his presence, and he (the respondent) had been satisfied by what he saw and never raised any complaint of being short-changed.
27. DW1 reiterated that the plots were still registered under Gathera self-help group and that he was the ground surveyor who had helped members identify their plots. The Appellant had also assigned him work of removing the cotton soil and he undertook the same.
28. Under cross-examination he reaffirmed his earlier evidence but also confirmed that he did not produce a Bacon certificate to prove work done. The group title deed was Plot 201/70 but he also did not have the title deed for the said parcel of land in court. Finally, he reiterated that excavation works were undertaken and could be confirmed if the court physically visited the plots to confirm the same.
29. DW2 GILBERT NZAU MULI also adopted his witness statement dated 06.05.2021, where he stated that in 2017, the Appellant had informed him that the respondent had assigned him authority to purchase for him property and the Appellant had eventually identified two plots within Saika estate belonging to Gathera self-help group, which he proceeded to purchase for the respondent.
30. In January 2018, he had accompanied both parties herein, the respondent's wife and Kabui to visit the said plots, and in his presence the respondent had confirmed that his plots existed and that excavation works had been carried out. At that point, the respondent was satisfied with the plots he saw and said that he would endeavor to develop his plots.



31. Under re-examination, DW2 affirmed that the two plots are not near a river and it would be a lie for a witness to say that the said plots are in a riparian area.
32. The Appellant at this point closed his case and the trial magistrate upon considering the pleadings and evidence adduced proceeded to enter judgement in favour of the respondent in the sum of Ksh 2,760,000/= plus cost and interest of the suit.

### **C. Analysis and Determination.**

33. I have considered the pleadings, evidence presented and submissions of the parties in this appeal. This court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions. As held in *Selle & Another Vs Associated Motor Boat Co Ltd & others* (1968) EA 123 it was stated that;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abduk Hammed Saif V Ali Mohammed Sholan*(1955), 22 E.A.C.A 270,

34. Also in the court of appeal case of *Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No 77 of 1982{ 1982 -1988}1KAR 278* the appellate court did state that;

“A member of an appellate court is not bound to accept the learned judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

35. The issues which arise for determination in this appeal, are;
  - a. Whether the respondent proved on balance of probability that he did advance the Appellant a sum of Kshs 2,760,000/= which was misappropriated and he was therefore entitled to a refund.
  - b. Whether the Appellant was entitled to set off and also whether he proved on a balance of probability that he was entitled to claim a sum of Kshs 4,022,262.70/= from the respondent for work done and commission of 2% of the value of the Kajiado project.

36. Section 107(1) of the *Evidence Act* provides that;

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts exist.”



37. Section 108 of the *Evidence Act* further provides that ;
- “ The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side.”
38. The two provisions were dealt with in *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:
- “ As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
39. I also refer to *Palace Investments Ltd Vs Geoffrey Kariuki Mwnedwa & Another* (2015) Eklr, Where the learned judges of Appeal referred to “Denning J in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;
- “ That degree is well settled, it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it is more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where the parties.....are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been obtained.”

#### **i. Building Approvals**

40. The respondent’s evidence was that he sent the Appellant Kshs 1,000,000/= in 2017, which was to be used to get building approvals for the Kajiado project. He sent this sum through a friend, known as Kipsang Rotich, who in turn wrote two cheques in favour of the Appellant's wife, one Monica M Kalundu.
41. The Appellant’s response was two-fold. One was that he had not received this sum and therefore the respondent ought to have also sued his wife in these proceedings. This line of evidence cannot hold as during the defense hearing (cross-examination), the Appellant expressly acknowledged receipt of this sum, and stated when referred to his counterclaim that, “It shows I incurred Kshs 1 Million for the Kajiado property. It is true I was given Kshs 1 Million”. Under re-examination, he further stated that “The Kshs 1 Million, I paid for BQ, Nema and architectural plans”.
42. That being the case, the Appellant cannot be heard to claim ignorance of monies sent to him to get the respondent building approvals for the Kajiado project.
43. The Appellants second line of defence was that he utilized the money sent to get the structural drawings done, get Nema approval and also to get the bills of quantities done, which is mandatory before the commencement of the construction.
44. Even though the Appellant did not get the final building plans approved, the evidence adduced confirmed that he embarked on this process. Exhibit D1 to D7 proves that he engaged professionals to do the bills of quantities, had the environmental assessment report done, and finally amended the



Architectural plans. He also paid these professionals Kshs 1,027, 445/= as proved by Exhibits D4 & D5.

45. Based on this evidence, I do find that the trial magistrate fell in error in not considering the fact that getting building approvals, like general elections is a process and not a single event and that during this process there are pre requisite documentation, which has to be submitted before the building plans can be approved.
46. The respondent allowed the Appellant to fully undertake this process and though the final approval was not obtained, the Appellant did adequately discharge the burden on how he spent the money sent towards obtaining approvals and it would be unfair to condemn him to refund the same.
47. Finally, even though the trial magistrate noted some discrepancies on the dates in some of the Appellants documents, it was not denied that they all relate to the Kajiado project nor did the respondent disapprove of the said plans as being not being aligned to what he intended to build. The said dates, then could not be used as a basis to reject the said documents.

### **Purchase of land**

48. The respondent did prove that he sent to the Appellant a sum of Kshs 1,760,000/= for the purchase of land and this fact was not denied by the Appellant. The issue in contention is whether indeed the bought parcels of land exist.
49. The Appellant's evidence was that he bought for the respondent two plots with Saika estate from Gathera self-help group and provided two receipts and a certificate of ownership of the land by the said group (Exhibit D8 & D9) to prove this fact. As correctly noted by the trial magistrate, the certificate of ownership does not refer to any specific parcel number and on cursory look at all the documents presented by the Appellant, one is not be able to tell exactly which parcel of land was being sold and its locality.
50. Secondly under cross-examination, the Appellant admitted that he did not have a sale agreement to prove his purchase of this land and also did not provide a title deed of the said parcel of land. His witnesses also contradicted themselves with DW2 alleging that the said parcels of land were on riparian land next to a river, while DW3 was categorical that it would be a lie for one to allege that the said plots were next to a river.
51. The receipts presented in court by the Appellant to prove payment of the said parcels of land were also dated before the respondent had sent him money to buy these plots, and that also naturally raised suspicion as to their veracity.
52. On this score, the Appellant failed to discharge the evidentiary burden placed on him and I do find that the trial magistrate correctly found that he was entitled to refund the respondent the sums claimed under this header.
41. 2% Commission for work done on Kajiado project
53. The Appellant confirmed that there was no written agreement on this issue and the same was also categorically denied by the respondent. The Kajiado project too, as per the court record had not even commenced and it was therefore preposterous for the Appellant to claim commission for work not undertaken. This claim too was rightly rejected



## **Disposition**

54. Having exhaustively analyzed all the issues raised in this appeal I find that this Appeal is partially successful and do order as follows;
- a. That the Judgment/decreed issued in Kangundo CMCC No 28 of 2020 dated 9<sup>th</sup> April 2024 is partially set aside and the sum of Kshs 1,000,000/= awarded for refund of money advanced for building approvals removed therefrom.
  - b. The said decree issued in Kangundo CMCC No 28 of 2020 is upheld in the sum of Kshs 1,760,000/= plus costs and Interest.
  - c. Interest due will run from January 2019 as the sums sent through Money Gram were sent in small amounts until 23.12.2018.
  - d. The parties herein are close relatives and since this Appeal is partially successful, each party will bear their own costs of this Appeal
55. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MARSABIT THIS 13<sup>TH</sup> DAY OF MARCH, 2025.**

**FRANCIS R. OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 13<sup>TH</sup> DAY OF MARCH, 2025**

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Mr. Jarso Court Assistant

