



Warika v Luseneka (Civil Appeal 4 of 2024) [2025] KEHC 8531 (KLR) (18 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CIVIL APPEAL 4 OF 2024**

RPV WENDOH, J

JUNE 18, 2025

BETWEEN

CHEPOCHEPOS WARIKA APPELLANT

AND

ERNEST WANYONYI LUSENEKA RESPONDENT

JUDGMENT

1. The appellant, Chepochepos Warika was the defendant in Kapenguria CMCC 9/2020 where the Respondent, Ernest Wanyonyi Luseneka had sued him for Kshs.63,400/=
2. By a plaint dated 12/5/2020 and filed in court on 13/5/2020, the Respondent claimed Kshs.63,400/= from the appellant being survey fees which he paid to the County Surveyor, West Pokot to facilitate subdivision of the appellant's shares in title No. West Pokot/Siyoi 'A'/346; that it was mutually agreed that the appellant would refund the sum to the Respondent upon finalization of the survey and subdivision but the appellant declined or refused to refund, prompting the suit.
3. The appellant filed a defence dated 1/4/2021 denying the claim and put the Respondent to strict proof, the appellant is a stranger to the estate of Kiptoo Kitany who is the registered owner of title West Pokot/Siyoi 'A'/346 and the Respondent is not a beneficiary of the said estate.
4. After a full hearing, the trial court entered judgement in favour of the Respondent as prayed in the plaint. The appellant is dissatisfied with the said Judgment and preferred this appeal dated 12/9/2021, based on the following grounds:
 1. That the trial magistrate erred when he failed to recognize that the plaintiff's cause of action which arose in 2012, was time barred;
 2. That there was no privity of contract between the appellant and the Respondent;
 3. That the trial court erred by not considering the evidence tendered by the appellant;



4. That the court erred by not finding that there was no agreement between the appellant and respondent;
 5. That the court erred by not agreeing with the evidence of the appellant and area Chief;
 6. That the court erred when it allowed the Respondent's claim without supporting evidence.
5. The appellant prays that the appeal be allowed by setting aside the judgment and decree of the trial court with all consequential orders and dismiss the lower court's case with costs to the appellant. This is a first appeal and it behoves this court to examine afresh all the evidence tendered in the trial court, analyze and evaluate it and arrive at its own independent conclusions though this court should make allowance for the fact that it neither saw nor heard the witnesses testify in the lower court. This proposition is supported by the decision of *Selle & Another -V- Associated Motor Boat Company Limited* (1968) EA 123, where the court said, "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 principles 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 conclusions though it should 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 judges' findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstance 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".

The Respondents case:

6. In the lower court, The Respondent called a total of three (3) witnesses. The Respondent testified as PW1. He adopted his written statement as evidence. He stated that he is a businessman in Bungoma; that his sister Judith was married to one Kiptoo Kitany Warika (Lerika) who had five wives who include the appellant; that after Kiptoo died, a dispute arose over the distribution of his land (estate); that the beneficiaries wanted the land surveyed but did not have money; that his sister Judith approached PW1 to assist them by paying the surveyor after which the beneficiaries to Kiptoo's estate would refund PW1 the survey fees; that the Surveyor charged Kshs.133,000/= and wrote a note confirming that he had been paid the said sum (P.Exh.3) and a letter dated 29/11/2012 which confirmed that the survey was done; that the respondent demanded for payment and the appellant with one other beneficiary declined to pay him. The matter was reported to the Chief PW2 Mr. Kiplimo, who held a meeting with all the beneficiaries of Kiptoo's estate where the appellant denied that the Respondent paid for him Surveyor's fees.
7. PW2 Joseph Kiplimo, Chief of Kaibos Location produced the minutes of a meeting dated 17/12/2019 which he wrote (P.exh.5). He said that the Respondent complained to him on 5/11/2019 about the appellant declining to pay him Kshs.63,400/= together with other beneficiaries. After discussions in the meeting, only the appellant and one other declined to pay the survey fees. He did not know if indeed money was paid on behalf of Kiptoo's beneficiaries. PW2 was shown a receipt for payment for survey.
8. PW3 Henry Lumasai, a Surveyor at Kapenguria used to work for the County Government as a Surveyor between 2003 -2023; that in 2012 the appellant and Respondent and beneficiaries of Kiptoo's estate went to his office as they wanted to have the land Siyoi 'A'/346 surveyed; the owner of the land was deceased Kiptoo Kitany; that the respondent sat in his office with the appellant and other beneficiaries and agreed on breakdown of the costs; that the land was to be subdivided into ten (10) portions and the Respondent advised them that it would cost Kshs.133,000/=; that out of the land the appellant was to get 17.78 Ha; that the Respondent paid for the survey and it was agreed that the parties refund



the Respondent and he issued a receipt to PW3 on 29/11/2012. He also produced it as P.Exh.2 and a document confirming that he carried out the survey on 3/12/2012 signed by one Sang who worked under him; that the receipt was written by one Sang a Surveyor, but PW3 received the money.

Defendants case.

9. DW1, Chepochepos Warika, the appellant, denied knowing the Respondent and only knew him after he sued her. She denied that the Respondent is the beneficiary of her deceased husband's estate which is undergoing Succession proceedings. The appellant denied giving the Respondent instructions to get a surveyor nor did she ask him to pay for the Surveyor. In cross examination, DW1 admitted that her husband had five (5) wives; that one of them was Judith who is a sister of the Respondent. She denied that they ever agreed to split any costs arising from survey nor could she recall anybody paying money. She denied knowing why the Respondent went to her home.

Both parties filed submissions, Mr. Kaosa, filed submissions on behalf of the appellant,

10. It was submitted that there was no document to support the Respondent's claim of Kshs.63,400/= nor did the appellant sign any document confirming that she borrowed the said sum; that PW2 confirmed that when he heard the dispute, the appellant denied owing the said sum; that PW3 did not produce any document to confirm that the appellant gave any money to the County Government Survey office; that the Respondent's evidence was not sufficient to find in favour of the Respondent; and the court was urged to allow the Appeal.
11. On the other hand, Mr. Wanyonyi, the Respondent's Counsel submitted that the issue of the suit being time barred was never raised in the defence or by way of preliminary objection; As to whether there was privity of contract between the appellant and the respondent, it was submitted that there was sufficient evidence adduced by PW1, 2 and 3 confirming that survey of Kitony's land was done after the respondent paid the Surveyor. The Surveyor (PW3) confirmed that fact; that the appellant first denied knowing the Respondent at all and only knew him after he sued her but in cross examination, she admitted that the Respondent is a brother to the co-wife; that the admission that the Respondent is her co-wife's brother is evidence of dishonesty; that the trial court believed that survey was done and there was an oral contract. Counsel relied on the decision of Mamta Peeush Mahajan (suing on behalf of the estate of the late Peeush Premial Mahajan) -V- Yashwant Kumari Mahajan (sued personally as Executrix of the Estate of and beneficiary of the estate of the late Krishan Lai Mahajan (2017) e KLR where the court referred to the words of Steyn L J in G. Percy Trentham Ltd V Archital Luxfer Ltd (1993) (iLYOYDS) Rep 25 where the court held. That it is trite law that not all agreements are in writing. Counsel submitted that the consideration in the case is the agreement that the Respondent would meet the costs then seek a refund.
12. I have considered the grounds of appeal, the pleadings, the evidence tendered in the trial court and submissions of both sides.
13. In a civil case the standard of proof is on a balance of probability. The burden lies on the party alleging the existence of a fact which he wants the court to prove
14. Section 107 (1) and 2 of the [Evidence Act](#) provides as follows;-
Part 1 - Burden of Proof 107.
(1) 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.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
15. In *Miller -V- Minister of Pensions (1947)* ALL ER 372 Lord Denning put the standard in the following terms;
- “that degree is well settled. It must carry a reasonable degree of probability, but not as high as required in criminal cases. If the evidence is such that the tribunal can say; “we think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof 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 both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained”.
16. Blacks Law Dictionary 10th Edition at page 1373 describes such evidence as the evidence with the most convincing force, or a party that has stronger evidence and it does not matter however slight the edge may be. The question is whether the Respondent’s evidence was stronger than the appellants, however, slight.
17. The first ground of appeal is that the Respondent’s suit was time barred. However, the appellants counsel did not address that ground at all. Even if not addressed or pleaded in the defence, this court still needs to consider it even at this stage because it goes to the issue of jurisdiction. From the pleadings, it is not clear when the cause of action arose. Even though the money for survey was paid in 2012 as evidenced by P.Exh.2 a & b dated 14/2/2024 and 29/11/2012, the Respondent did not tell the court when the debt was to be repaid. Under the Limitations of Actions Act section 4(1), a claim in contract may not be brought after the end of six (6) years from the date the cause of action accrued. This suit could only be time barred if the date when the debt was due was disclosed. Without knowing that date when the cause of action accrued, the suit cannot be said to be time barred.
18. According to the respondent, the debt was incurred during Succession proceedings in the Estate of Kiptoo Kitany (Lorika) who was a husband to five (5) wives including the appellant and one Judith, who is a sister to the Respondent. That fact has not been denied. Although the appellant did not specifically admit it, I find that there is overwhelming evidence that Survey of the land, West Pokot / Siyoi ‘A’/346 the property of the deceased, Kiptoo Kitany was carried out. PW2, the area Chief was aware of the succession cause and had even tried to mediate this dispute.
19. PW3 corroborated PW1’s testimony that the appellant, Judith and other beneficiaries of the deceased’s estate went to his office in 2012 for purposes of Survey of West Pokot/Siyoi ‘A’/346. According to PW3, the land was to be sub divided into ten (10) portions and that the appellant was to get 17.78 Ha, and that the respondent paid for the survey. It is PW3 who received the payment and acknowledged receiving through the note produced as P.Exh 2(a). He signed the note as County Surveyor, West Pokot. The court has no idea why no official receipt was issued but the same receipt was shown to PW2 when the Respondent complained to him about the appellant and some beneficiaries refusing to pay him for survey work he had done for the beneficiaries of Kiptoo’s estate. This evidence was not controverted.
20. The appellant in her testimony denied knowing the Respondent and only knew him after he sued her. She also denied that he was known to Kiptoo’s estate. Indeed, the Respondent is not a beneficiary of late Kiptoo’s estate. In cross examination however, the appellant admitted that Judith Nasimiyu Kiptoo was the 5th wife of Kiptoo and that she was her co-wife. From this admission, it is apparent that



the appellant was not truthful. Her evidence is inconsistent and contradictory which is evidence that she was not candid.

21. PW2 told the court that after he summoned the beneficiaries over the Respondent's alleged debt, others agreed and paid their portions except her and one other. I doubt that the Respondent just made up this claim against the appellant, a person he had association with her.
22. The appellant challenged the Respondent's case for reason that no written agreement was produced. I agree with the Respondent's position that it is trite law that not all contracts are in writing. Section 3 of the Law of the Contract Act sets out the contracts that need to be in writing. I agree with the observation in the case of Mamta Peeush paragraph 81 cited by the Respondent counsel where it was held that

“it is common cause and trite law that not all agreements need be in writing. An agreement will be duly formed and binding where there is consideration in present and accepted having been offered. An agreement need not be in any special form or in writing unless statute expressly provides for it”
23. Lord Mac Berger in *Thorner -V- Major* (2009) UKHL 18 (2009) 1 WLR 776 stated this of an oral contract;

“the interpretation of an oral contract is a matter of fact (I suggest inference from primary fact), rather than one of law, on which parties' subjective understanding of what they were agreeing is admissible”.
24. In *Ali Abed Mohammed -V- Kenya shell co. Limited* (2017) eKLR, the court held that “a contract can be inferred from the circumstances and it need not be in writing.”
25. In *HCA 638/2019 (2023) KCLA 230 A.G. -V- Kabuito Contractors Limited*. the Court of Appeal listed the Requirements to be met in order to form an oral contract as follows;-
 1. The terms of the contract must be valid and legally enforceable;
 2. It must contain the necessary elements found in all contracts (offer acceptance, consideration and mutuality or meeting of the minds) and
 3. The oral agreement must not violate the law.
 4. Capacity of the parties
26. The Court of Appeal agreed that an oral agreement will exist if it can satisfy the requirements of a valid agreement such as offer, acceptance, consideration and capacity to contract; that one must prove the terms of the agreement and the existence of the verbal agreement. In the instant case, this court is satisfied from the evidence on record that, the parties agreed that survey be done and the Respondent was to make payment on behalf of the parties and the consideration is therefore that the respondent meets the costs of survey and he would seek a refund from the beneficiaries.
27. This court agrees with the lower court and finds that the Respondent proved on a balance of probability that the appellant is indebted to the Respondent for the claimed sum of 63,400/= being survey fees. The Respondent's evidence was more believable. The appeal lacks merit and is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON 18TH DAY OF JUNE, 2025

HON. R. WENDOH



JUDGE.

Judgement read virtually in open court in the presence of

Mr. Wanyonyi for Respondent - present

Mr. Kaosa for Appellant - absent

Juma/Hellen-Court Assistants

