



REPUBLIC OF KENYA



KENYA LAW
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**Macharia v Karogo (Civil Appeal 37 of 2017)
[2025] KEHC 10493 (KLR) (16 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 37 OF 2017**

TW OUYA, J

JULY 16, 2025

BETWEEN

STEPHEN MAINA MACHARIA APPELLANT

AND

JORAM MUCHUGI KAROGO RESPONDENT

*(Being an appeal from the judgement and decree by Hon. J.W Onchuru, in Murang'a
Chief Magistrate Court Civil Case No. 292 of 2011 delivered on 24th of July, 2017)*

JUDGMENT

1. By a Memorandum of Appeal dated 23rd August, 2017, the appellant herein, Stephen Maina Macharia, appealed against the judgement and decree of the lower court, in which the said court entered judgement in favour of the respondent in the sum of Kshs. 321,000 together with costs of the suit plus interest.
2. As per the plaint dated the 21st of October, 2011, the respondent instituted a suit at the Lower Court against the appellant for the sum of Kshs. 421,000 on grounds that on or about the 2nd of June, 2011, the parties entered into an agreement, where the appellant agreed to repay a debt of Kshs. 421,000 originally owed by Elizabeth Wambura Maina, the appellant's wife.
3. It was a term of the agreement that the appellant was to pay an initial deposit of Kshs. 20,000 on 26th June, 2011, and thereafter a sum of Kshs. 10,000 per month commencing from 30th July, 2011, until payment in full. The respondent alleged that the appellant failed to honour the terms of their agreement, and he filed the suit at the trial court to recover the said amount.
4. By a Statement of Defence dated 18th November, 2011, the appellant, who was the defendant at the Lower Court, denied that he owed the respondent a sum of Kshs. 421,000. He stated that the agreement between them cannot be enforced as it is founded on a mistaken and falsified amount,



- making the agreement defective. The appellant alleged that on 25th August, 2011, he sent the respondent Kshs. 10,000 vide a banker's cheque no. 029155, despite the discrepancies of the amount owed to the appellant, which amount he has always openly protested to the respondent and his advocate.
5. After considering all the evidence adduced before the court, the learned trial magistrate found that the appellant was in debt to the appellant for the sum of Kshs. 321,000. The appellant disputes that he owes the appellant the said amount, hence the present appeal.
 6. In his Memorandum of Appeal, the appellant advanced a total of seven [7] grounds of appeal, in which he principally complained that the learned trial magistrate failed to take into consideration his evidence and statements on record. That the trial court failed to consider that he had paid the respondent a sum of Kshs. 455,000 as part of the debt, despite having produced documents to prove the said payments. That the learned trial magistrate had failed to consider that at the time of filing the suit, the balance due was Kshs. 121,000 only and that the learned trial magistrate failed to consider that the agreement made by the parties on 2nd June, 2011, contained errors in calculations.
 7. The appellant also faulted the learned trial magistrate for failing to consider that the respondent's suit was premature, having been filed at a time when he was paying the debt in monthly instalments as provided in their agreement and for awarding the respondent costs of the suit plus interest from the date of the said suit.
 8. The appeal was canvassed by way of written submissions following the directions by this court on 11th July, 2024. The appellant's submissions dated 30th May, 2024, was filed on his behalf by his learned counsel, L.M Mbuthia & Associates Advocates while submissions by the respondent dated 15th January, 2025, was filed on his behalf by his learned counsel C.W Waititu & Company Advocates.
 9. In his written submissions, the appellant mainly reiterated and expounded on the grounds contained in his Memorandum of Appeal. The respondent on the other hand submitted that the appellant cannot claim that he had made payments of Kshs. 455,000 towards payment of the loan whereas he had acknowledged owing him Kshs. 421,000 at the time of executing the agreement in 2011.
 10. It was the respondent's submissions that the appellant executed the agreement dated 2nd June, 2011 without any vitiating factors and it can therefore be presumed that he assented to the terms of the agreement.
 11. The respondent further submitted that the appellant did not adduce any documentary evidence to support his claim that he had paid him Kshs. 455,000 towards satisfaction of the loaned amount. As such, the respondent contends that this court should uphold the decision of the trial court that he had proved his case on a balance of probabilities.
 12. This being a first appeal, this court is duty bound to re-analyse, re-consider and re-evaluate the evidence on record and to draw its own independent conclusion on whether the findings of the trial court should stand; although it should bear in mind that it neither heard nor saw the witnesses and to make due allowance in that respect.
 13. This principle was reiterated in the court of appeal case of *Selle v Associated Motor Boat Co.* [1968] EA 123; as follows: "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally."

14. Guided by the principle in the aforementioned duty, I have duly considered the grounds of appeal and the rival written submissions made on behalf of the parties. Having done so, I find that the main issue for determination is whether the instant appeal is merited.
15. In this case, it is not disputed that as per the agreement dated 21st December 2007, the respondent advanced to the appellant's wife, Elizabeth Wambura Maina, a loan amount of Kshs. 576,000 which loan, the appellant agreed to pay in the stead of his wife.
16. It is also not disputed that the appellant had paid the respondent a sum of Kshs. 255,000 as part payment towards the satisfaction of the said loan. What is however disputed, is whether the appellant made additional payments of Kshs. 200,000 on top of the Kshs, 255,000 he had initially paid, towards the said loan.
17. The appellant in this appeal, claims to have paid the respondent a sum of Kshs. 455,000 and the balance due and owing to the respondent is Kshs. 121,000. The respondent on the other hand alleges that the appellant only paid him a sum of Kshs. 255,000 and what is remaining to be paid, is a sum of Kshs. 321,000, as declared by the trial court. He stated that the appellant executed the agreement dated 2nd June, 2011, and he cannot therefore turn around and state that he does not owe the balance stated therein.
18. On my part, I have gone through the records of the trial court, and I have noted that the appellant in his defence at the trial court, indicated that he did not owe the respondent the sum of Kshs. 421,000 as alleged. He stated that he had made an additional payment of Kshs. 200,000 on top of the undisputed amount of Kshs. 255,000 that he had initially paid to the respondent in satisfaction of the loan. It is therefore his contention that the amount that remained unpaid was Kshs.121, 000.
19. To prove that he had made an additional payment of Kshs. 200,000 on top of the undisputed amount of Kshs. 255,000, the appellant adduced a hand-written agreement dated 13th June, 2009, that was executed by himself and the respondent, showing that he had paid the appellant Kshs. 100,000. The appellant also attached a payment slip from Equity Bank dated 4th April, 2009, to show that he had paid a further amount of Kshs. 100,000 to the respondent.
20. The respondent in his testimony before court indicated that the appellant had only paid him Kshs. 255,000 towards satisfaction of the loan. He stated that the appellant first paid him Kshs. 100,000, which he deposited in his Equity bank account. Although he did not indicate when this payment was made. The respondent alleges that the appellant later paid him a lump sum of Kshs. 155,000. He however did not indicate when the appellant paid him this amount or which mode of payment he used, whether it was a cash payment or the said amount was deposited in his bank account.
21. While being cross examined by the appellant's counsel at the trial court, the respondent denied that the appellant had paid him any money in his house. He however later acknowledged that the signature in the agreement dated 13th June, 2009, which the appellant claimed they executed after he paid him Kshs 100,000 in his home, was his. During his re-exam, the respondent changed his statement and acknowledged that on the 13th of June 2009, he was paid by the appellant a sum of Kshs. 100,000.
22. I have also noted that the respondent did not at all adduce any form of evidence to controvert or challenge the evidence adduced by the appellant that he had made an additional payment of Kshs.



- 200,000 towards the satisfaction of the loan. While the respondent had an opportunity to cross-examine the appellant and rebut the evidence that he had adduced to prove the said additional payments, the respondent did not make mention of them.
23. Whereas the respondent acknowledged in his evidence before the trial court that he had received Kshs. 100,000, as per the agreement dated 13th June, 2009, which the appellant claimed he paid him in his house, and whereas the respondent did not adduce evidence to prove that the Kshs. 100,000 paid to him on the 13th of June, 2009, was part of the Kshs. 255,000, it can be presumed that this amount was a separate and additional amount to the Kshs. 255,000 that the appellant had initially paid him.
 24. Furthermore, the respondent did not make mention of the additional payment of Kshs. 100,000 that the appellant deposited to his Equity bank account on the 4th of April, 2009.
 25. The respondent needed to have adduced evidence to controvert and challenge the appellants claims that the payments of Kshs. 200,000 made by him on the 4th April and 13th June, 2009, respectively were not additional payments as alleged by the appellant, which he failed to do.
 26. It is therefore evident that the learned trial magistrate was in error when she held that the appellant did not adduce any evidence to prove the additional payments of Kshs. 200,000 he claimed to have paid the respondent.
 27. I have also noted that the learned trial magistrate did not, in his judgement, make any mention of the agreement dated 13th June, 2009 and the bank slip from equity bank dated 4th April, 2009, adduced by the respondent as proof of additional payment, which was an error on his part. The Magistrate should have interrogated the said documents and record the reasons he felt the documents were not sufficient to prove of that the appellant had made additional payments of Kshs. 200,000.
 28. The learned trial magistrate did not also make mention of the fact that the respondent had in his evidence before the trial court, acknowledged receiving Kshs. 100,000 from the appellant as per the agreement dated 13th June, 2009. Had the learned trial magistrate properly interrogated the evidence before the court, I am of the view that he would have arrived at a different conclusion.
 29. Considering that the respondent did not demonstrate to this court how and when the appellant paid the Kshs. 255,000, it cannot be left to this court to decipher whether the amount of Kshs. 200,000 paid by the appellant was part of the Kshs. 255,000 that he had initially paid. The respondent in effect, failed to adduced evidence to controvert the appellant's assertions that these payments were in addition to the Kshs. 255,000 the appellant had initially paid him.
 30. I also noted that the respondent stated that the appellant signed the agreement dated 2nd June 2011, showing that he owned him Kshs. 421,000, and he cannot therefore deny that he owes the said amount.
 31. I am however of the view that this argument is neither here nor there as the fact that the appellant signed the said agreement does not preclude the respondent from proving by way of evidence that the appellant owes him the amount of money stated in the said agreement.
 32. Furthermore, the appellant in his letter dated 15th November, 2011, addressed to the respondent's counsel disputed the amount contained in the agreement. The appellant further stated in his evidence before the trial court that he signed the agreement under very difficult circumstances.
 33. Having stated that, I am of the view that the appellant has proved on a balance of probabilities that he paid an additional amount of Kshs. 200,000, other than the undisputed amount of Kshs. 255,000. The appellant has proved that he has paid the respondent a total amount of Kshs. 455,000 towards the



principal loan amount of Kshs. 576,000. The balance that therefore remains to be paid by the appellant is Kshs. 121,000.

34. Flowing from the foregoing, I am of the considered view that the present appeal has merit and should be allowed. The trial court's judgement should be set aside and judgement should be entered in favour of the respondent as against the appellant for the sum of Kshs. 121,000 plus interest.
35. As regards cost, I am of the view that each party should bear their own costs both at the trial court and in this appeal.
36. Final Orders
 - i. Appeal succeeds. Judgement of the trial court for kshs. 321,000 is hereby set aside and substituted with kshs. 121,000 as against the appellant plus interest from the date of filing suit.
 - ii. Each party to bear their costs of this appeal and at the trial court.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH JULY 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....Kinuthia Nyambura

For Respondent.....Wairegi HB Ms Waititu for the Respondent.

Court Assistant.....Brian

