



**Muse v Harambee (Civil Appeal E108 of 2023)  
[2024] KEHC 13115 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13115 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E108 OF 2023**

**S MBUNGI, J  
OCTOBER 25, 2024**

**BETWEEN**

**OBADIAH MATHIAS MUSE ..... APPELLANT**

**AND**

**CHARLES HARAMBEE ..... RESPONDENT**

*(Being an appeal from the judgment of the Small Claims Court at Kakamega delivered  
by Hon.S.Wayodi on 30/06/2023, in Kakamega SCCCOMM NO 203 OF 2023)*

**JUDGMENT**

**Introduction**

1. This appeal arises from the judgement of Hon. S. Wayodi -RM delivered on 30<sup>th</sup> June 2023 in Kakamega SCCCOMM No 203 of 2023 which compelled the appellant to pay the respondent Kshs.120,000/-with interest at court rate and the cost of the suit.
2. The appellant herein being dissatisfied with the judgment of Hon.S Wayodi delivered on 30/06/2023 filed the appeal herein on the following grounds:
  - i. The learned magistrate erred in finding that the respondent had proven his case on a balance of probabilities despite overwhelming evidence to the contrary and without pointing out falsities in the respondents case.
  - ii. That the learned magistrate erred when she found that the respondent lent the appellant money as a debt on an understanding of repayment.
  - iii. The learned magistrate erred when she failed to appreciate the appellants evidence on the nature of engagement and arrangement under which the respondent paid the appellant the subject amount of money for services rendered.



- iv. The learned magistrate erred by failing to appreciate the evidence presented to her from Kakamega criminal case no ..of 2018 involving the appellant in which the statement of the respondent contradicts his narration of alleged facts in Kakamega SCCCOMM No 203 of 2023.
  - v. The learned magistrate failed to apply herself to the hearing of the case by being inquisitive especially where both parties were unrepresented by legal counsel, thereby applying her judgment to unclarified state of affairs and facts.
3. The court directed parties to file their written submissions.Both parties complied.

### **Submissions**

4. The appellant isolated the following issues in its submissions dated the 15<sup>th</sup> March 2024 for determination:
  - a. Whether the respondent proved his case on a balance of probabilities;
  - b. Whether the Kshs.120,000/- subject to the claim was a loan facility and should be repaid;
  - c. Who should pay costs.
    - a. Whether the respondent proved his case on a balance of probabilities;
5. The appellant submitted that the claim was for Kshs.120,000/- which the respondent claimed to have given the appellant as a loan which he was to repay.the respondent however denied receiving the money as a loan.
6. The appellant further stated that the money was payment for survey and succession services over a piece of land that the respondent had purchased.he also stated that it took him over a month before he was issued with the death certificate and the chief's later from the respondent for him to commence the process.
7. Additionally, the appellant submitted that it was agreed that the appellant would hand over the transaction to an advocate identified by the appellant for succession bit and the respondent would negotiate and pay the advocates fees separately.
8. He further stated that he undertook his duties as agreed until a stage where succession was necessary and informed the respondent that he had done his bit. The respondent's duties apart from the actual surveyor-related tasks included obtaining the death certificate of the deceased seller, a letter from the area chief confirming the estate and survivors and the national IDs of the proposed administrators. These documents were to be handed over to his advocates who would undertake the bit of obtaining the grant of letters of administration, however the respondent refused to pay the advocate claiming that the respondent should pay from the Kshs.120,000/-
9. The appellant also submitted that he filed with the trial court the respondents statement recorded with the police for the purposes of instituting criminal proceedings.the facts as stated in the statement are different from and contradict what the respondent stated in his statement of claim and his testimony at the lower court.
10. The appellant averred that the lower court in its judgment agreed with the respondent despite the blatant evidence that the appellant had not adduced an ounce of evidence to prove that he had indeed extended aloan to the Appellant and that the appellant had not repaid the same.



11. The appellant also submitted that the court refused to acknowledge the absence of any written agreement of lending between the parties and the presence of evidence disapproving lending.

**b. Whether the kshs.120,000/- subject of the claim was a loan facility and should be repaid.**

12. The appellant submitted that he had adequately demonstrated that the amount expended to him was not a loan to be repaid and that the amount was to be used for survey and related tasks .

13. He further submitted that succession proceedings can only be instituted by an advocate and not a surveyor and it can only be after the process is completed that the final stages of the tasks of the appellant being application for transfers and obtaining of title deeds could be finalized.

14. In his submission the appellant stated that the respondent expecting him to ensure the entire process including succession is financially catered for from Kshs.120,000/- could be unreasonable and it is for that reason that the appellant at the time of receiving the kshs.120,000/- agreed with the respondent that he would separately cater for succession proceedings financially.

15. The appellant submitted that the appeal succeeds and the judgment of Hon.S. Wayodi delivered on 30<sup>th</sup> May,2024 in Kakamega SCCCOMM No 203 of 2023 be set aside and quashed and that the costs be paid to the appellant.

**Respondent's Submissions**

16. The respondent isolated only one issue in his submissions dated the 23<sup>rd</sup> February 2024 for determination;

a. Whether the appellant received monies from him for surveyor services and conveyancing which he did not deliver;

17. The respondent submitted that he adduced and produced evidence to show that he gave the appellant money for services which he never rendered to him and judgment was entered in his favor.

18. The respondent also relied on Section 109 of the Evidence Act which states;

‘The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it’s provided by any law that the proof of that shall lie on any particular person.’

19. The respondent also submitted that the trial magistrate was right in deciding in his favor hence court should dismiss this appeal.

**Analysis and Determination**

20. I have considered the appeal in the light of the evidence on record and submission on behalf of both parties.

21. It is trite law that ‘whoever alleges must prove’. Section 107 of the Evidence Act, Chapter 80 Laws of Kenya states as follows:

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



22. The respondent alleged that he had loaned the appellant Kshs.120,000/- and in support of his case he produced a copy of a cheque dated 28<sup>th</sup> August 2018. On the other hand the appellant denied receiving the loan from the respondent and alleged that the said amount was to be used for succession process which task he did complete, however he has not produced any document to show completion of the survey and related tasks.
23. The duty to prove that Appellant carried out survey and related tasks lay squarely with the appellant. He has failed to discharge his evidential burden of proof.
24. The court of appeal in the case *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR discussed the burden of proof and stated thus:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.
25. The Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case...”
26. On the issue of the criminal case the appellant never sighted the number of the case neither availed the proceedings to the trial magistrate, neither was it part of the record of appeal. Nevertheless, the degree of proof in civil cases is on a balance of probabilities wherein criminal cases is beyond reasonable doubt, thus an acquittal in a criminal case does not necessarily mean the accused has no civil liability.
27. Our legal system is adversarial but not inquisitorial, the trial magistrate had no obligation to inquire anything from the parties.
28. From the foregoing, this court is satisfied that the Appeal is thus without merit the same is dismissed with costs to the Respondent.
29. Right of appeal 30 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**S.N MBUNGI**

**JUDGE**

**In the presence of :**

Khavagali for the appellant

Parties - absent

Court Assistant – Elizabeth Ang’onga

