



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muli v Makenga (Civil Appeal E015 of 2022)  
[2024] KEHC 13955 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13955 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E015 OF 2022  
JK NG'ARNG'AR, J  
NOVEMBER 12, 2024**

**BETWEEN**

**BENJAMIN MULI ..... APPELLANT**

**AND**

**CHRISTINE NGINA MAKENGA ..... RESPONDENT**

*(Being an appeal against the Judgment and decree of Hon. M. N. Nabibya (PM) delivered on 20th January 2022 in Mombasa Chief Magistrate's Court Civil Suit No. 656 of 2019, Christine Ngina Makenga v Benjamin Muli)*

**JUDGMENT**

1. The background of the appeal vide Complaint dated 29<sup>th</sup> April 2019 is that in the year 2010, Respondent entered into a written land sale agreement dated 15<sup>th</sup> November 2010 with one Khalif Salim Mwavumo for the purchase for valuable consideration of a portion of the Title No. MSA/M.S/Block 1/1932. That on that same date, the Respondent went to the lands offices where she met the Appellant who was a surveyor and she explained to him that she wished to have the title deed processed in her name and the Appellant undertook to assist her. That she then made payments amounting to Kshs. 184,000 upon being requested by the Appellant as facilitation for the process. That the seller was ready and willing to transfer the parcel of land to the Respondent but the Appellant took no action which amounted to delays and frustrations.
2. The Respondent prayed for damages against the Appellant for a refund of Kshs. 184,000, an order compelling the Appellant to hand over to the Plaintiff all the documents in his possession concerning the said conveyance, costs of the suit and interests at court rates.
3. The Appellant filed a Statement of Defence dated 13<sup>th</sup> June 2019 that the Respondent engaged the Appellant in two jobs with the initial one having been successfully completed. That on the second job, the Respondent requested for assistance in subdivision of Plot No. Msa/M.S/Block 1/1932 in 2014



- and that it was agreed the Respondent would meet the costs of all the requisite charges but she was slow in releasing the funds which were paid in small instalments. That 90% of the job had been concluded with maps authenticated, new numbers issued, approved by the director of surveys but release of the same to appropriate authorities upon payment of the necessary fees. That part of the reason for the delay in completion of the work was occasioned by the said Khalif Salim Mwavuno who could not execute the requisite documents in 2015 on account of his wife's death in Mecca. The Appellant however admitted having received Kshs. 146,000 from the Respondent and not Kshs. 184,000. In the Counterclaim, the Appellant claimed for Kshs. 75,000 due and owing on account of the work done.
4. This suit was heard in the trial court and judgment delivered on 20<sup>th</sup> January 2022 where the court found that there was effort shown by the Appellant that he undertook steps towards the agreement but he did not explain the nature and extent of difficulties that made him fail to deliver on his part about 9 years thereafter. That the Appellant did not deliver according to his undertaking and therefore the claim succeeded to the tune of the amount admitted to have been received which was Kshs. 146,000, and the Counterclaim failed because there were no documents to support the claim for special damages. The Respondent's prayer for handing over of all documents was allowed and the Respondent was also granted costs and interest at court rates from the date of the judgment.
  5. Being dissatisfied, the Appellant appealed against the judgment and orders of the trial court through the Memorandum of Appeal dated 4<sup>th</sup> February 2022 on grounds that the learned trial magistrate erred in law and in fact: in finding that the Respondent was entitled to a refund of Kshs. 146,000 when there is a finding that the Appellant had proceeded with the work to where it had reached; in holding that the Appellant failed to explain the nature and extend of difficulties which caused the delay in delivering on the agreement contrary to the Defendant's evidence on record; in holding that the Appellant failed to deliver on the agreement between the parties about 9 years disregarding the Appellant's evidence and documents which proved a different period; in holding that the Appellant's agreement with the Respondent was to process the title deed whereas the agreement was for subdivision of plot No. MSA/M.S BLOCK 1/1932; in failing to consider the Appellant's evidence on record with regards to the counterclaim and therefore dismissing the same whereas there was no evidence to the same filed by the Respondent and evidence was tendered to prove the same; in holding that the only reason for delay of the process was due to the death of the Appellant's wife contrary to the Appellant's evidence on record; and in failing to consider the Appellant's evidence on completion of the work hence ordering a refund which was unjustified.
  6. The Appellant prayed that the appeal be allowed and orders do issue that the judgment and decree of the trial court dated 20<sup>th</sup> January 2022 be set aside and replaced with an order dismissing the suit and granting the orders in the counterclaim, and that the Appellant be awarded costs of the appeal herein and in the lower court.
  7. The appeal was canvassed by way of written submissions. The Appellant in his submissions dated 20<sup>th</sup> December 2023 maintained that there was no justification for refund of Kshs. 146,000 admitted as the same had been expended in the work. That there was no duration of time upon which the work ought to have been completed beside the fact that the Appellant explained the cause of the delay. That there was miscarriage of justice for refund of monies already utilized in a process that had been concluded as at the time of hearing of the suit. The Appellant submitted that the court failed to consider the Appellant's evidence on the reasons and exhibits tendered in support of the delay hence arriving at a wrong conclusion. That the Appellant filed a Counterclaim but the Respondent failed to file a defence to the same and that a basis was laid for the claim of Kshs. 75,000 with proof of work progress. That the work having been concluded, the sum ought to have been payable to the Appellant. The Appellant therefore prayed that the appeal be allowed with costs.



8. The Respondent in their submissions dated 1<sup>st</sup> February 2024 stated that though the Appellant submitted copies of some documents of which none was prepared by him, he did not call the makers of the documents to explain the status. That the Appellant did not deliver anything to the Respondent on both the subdivision of work and the title deed he was supposed to procure. That no receipts of payments were produced as proof of the use of money. That the Respondent produced a further list of documents dated 2<sup>nd</sup> July 2021 with the Survey Regulations 1994 which indicated that the Appellant ought to have charged only Kshs. 30,000 where the value of the parcel of land was Kshs. 300,000. That the Appellant not only overcharged the Respondent but failed to deliver 9 years down the line. On the counterclaim, the Respondent submitted that special damages have to be specifically pleaded and proved as was held in the case of *Zacharia Waweru Thumbi v Samuel Njoroge, Civil Appeal No. 445 of 2003*. The Respondent prayed that court upholds the decision of the subordinate court and dismisses the appeal with costs.
9. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co. (1968) E.A 123* as follows: -

“ ... Briefly put they are that this 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 ... ”
10. I have considered the Record of Appeal dated 20<sup>th</sup> December 2023 and submissions by the parties. The issues for determination are: -
  - a. Whether engagement of the Appellant’s services was for subdivision of Msa/M.S/Block 1/1932 and/or processing of the title deed
  - b. Whether the Appellant’s explanation for the delay was sufficient
  - c. Whether the Appellant furnished the court with evidence of completion of the work and a refund of Kshs. 146,000 is therefore unjustified
  - d. Whether the claim for Kshs. 75,000 in the counterclaim was sufficiently proved
  - e. Who should bear costs
11. It is not in dispute that the Respondent made payments to the Appellant to facilitate processing of the title deed of Msa/M.S/Block 1/1932 in the Respondent’s name. It is also not in dispute that the Respondent made payments to the Appellant to the tune of Kshs. 146,000. Parties are in agreement that the said processes were commenced and that Khalif Salim Mwavumo, the seller of the portion of land, was required to execute the requisite documents.
12. The issue of contention, however, was the duration for completion and the sum total of what ought to have been paid. On the one hand, the Respondent submits that frustrations and delays were occasioned by the Appellant. That the Appellant did not deliver according to his undertaking, that the Appellant delayed in delivering about 9 years later and the counterclaim failed because there were no documents to support the claim for special damages.
13. On the other hand, the Appellant maintained that the Respondent was slow in releasing the requisite funds which were paid in small instalments. That however, the reason for delay was that the seller had been bereaved and could not execute the requisite documents, that 90% of the work had been concluded and the Kshs. 75,000 claimed in the Counterclaim was due and owing on account of the work done.



14. The Appellant was a land surveyor working with the Lands Department posted to Mombasa offices at Bima Towers. It is the presumption of this court that the Respondent approached the Appellant for services offered to the public in the offices and as is the procedure, receipts ought to have been issued for any payments made.
15. 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
16. The Appellant has not furnished this court with proof of how the Kshs. 146,000 paid and the Kshs. 75,000 demanded were expended. Even though no duration of time was set upon which the work ought to have been completed, the delay of 9 years was inordinate. The reason of the seller losing his wife in Mecca is not sufficient explanation for the delay
17. I am satisfied that the trial court sufficiently applied evidence of the parties and the law in its decision. I therefore find no merit in the appeal and uphold judgment of the trial court.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2024**

.....

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of: -

Keyata Advocate for the Appellant

Makau Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

