Mwalim National Sacco Society Limited v Murithi & 2 others (Civil Appeal E244 of 2023) [2026] KEHC 349 (KLR) (Civ) (23 January 2026) (Judgment)

Neutral citation: [2026] KEHC 349 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E244 OF 2023

FR OLEL, J

JANUARY 23, 2026

BETWEEN

MWALIM NATIONAL SACCO SOCIETY LIMITED ..... APPELLANT

AND

LINUS LABANSON MURITHI ..... 1ST RESPONDENT

PETER OMONDI OKAL ..... 2ND RESPONDENT

JOSEPH MUSEE KULA ..... 3RD RESPONDENT

(BEING AN APPEAL FROM THE AWARD OF THE CO-OPERATIVE SOCIETIES TRIBUNAL IN NAIROBI COOPERATIVE TRIBUNAL CAUSE NO 141 OF 2017 DELIVERED ON 2nd MARCH, 2023)

JUDGMENT

A. Introduction

1. The Appeal has an interesting background. Initially, the tribunal did take evidence of the dispute arising herein and on 08.01.2018 delivered its initial judgment, where they held that:

    a. The Appellant had failed to provide proper records to show the exact date of default and thus made it impossible to calculate what amount was due if any from the 1st and 2nd respondent as guarantors of the 3rd respondent.

    b. The 1st and 2nd respondents had failed to lay any basis for award of general damages, nor were the particulars of negligence pleaded nor proved.

c. Once the accounts were reconciled the tribunal would decide whether there was overpayment by the 1st and 2nd respondents and the Appellant was granted 45 days to provide the proper records sought.

2. After the said judgment had been delivered, the Appellant did not file the requisite accounts records as directed and in September 2019, the 1st and 2nd respondent herein filed a review application seeking to have the judgment dated 08.01.2018 to be set aside and that the tribunal be pleased to issue the full and final judgement as prayed for in the statement of claim. This Application was heard on merit and dismissed as lacking in merit vide the ruling dated 09.04.2020.

3. Further due to the intransigence of the Appellant in failing to file the requisite accounts documents they had been directed directed to file, the infatigable 1st and 2nd respondent again filed their second Application dated 15.10.2021 seeking that the tribunal be pleased to issue a full and final judgment as prayed for in the statement of claim and again vide its ruling dated 14.10.2021 though the tribunal dismissed the said Application, they redirected the Appellant to file the statement of accounts within 21 days in full compliance with the earlier judgment issued on 08.01.20218.

4. In compliance with the order to file accounts, the Appellant finally did so and filed the same on 14.12.2022 the very day the matter came up to confirm compliance and subsequently on 02.03.2023 the tribunal did issue a 2nd judgment, where they held that the Appellant being the custodian of the records had not been transparent in providing accounts which would have helped the tribunal in determining how much was payable by the guarantor's after the shares and deposits of the 3rd respondent had been attached and thus could not make the guarantors easy targets for recovering amounts owned by the 3rd respondent who was the principal debtor.

5. The tribunal thus determined that it was only just and prudent to allow the 1st and 2nd respondent's claim in the sum of Kshs.687,000/= as prayed for in the statement of claim.

6. Being aggrieved by the said judgment, the Appellant did file their Memorandum of Appeal raising four (4) broad grounds of Appeal namely that.

   a. That the learned tribunal erred in law and in fact in awarding the 1st and 2nd respondents the sum of Kenya shillings Six hundred and Eighty-Seven Thousand, Six hundred shillings (Kshs.687,600/=) only plus costs and Interest.

   b. That the learned Tribunal erred in law and in fact in finding and holding that the 1st and 2nd Respondents were entitled to the awarded sum when indeed the Tribunal agreed that both the 1st and 2nd Respondents were guarantors towards a loan facility advanced to the 3rd Respondent in the judgment as delivered on 8th January 2018.

   c. That the learned Tribunal erred in law and fact in finding and holding that the 1st and 2nd respondent were entitled to any amount from the Appellant even after finding in its judgment delivered on 08.01.2018 that indeed the 3rd Respondent had defaulted in repaying the loan facility advanced to him.

   d. That the learned Tribunal erred in law and fact in ordering for and admitting evidence post the trial and judgment delivered without affording the parties an opportunity to explain and/or challenge such evidence contrary to the rules of natural justice, fair trial and the principles of finality in judicial decisions.

7. The Appellant thus urged this court to set aside the impugned judgment dated 2nd March 2023 and proceed to dismiss the 1st and 2nd respondents claim against them.

B. Background Facts

The statement of claim

8. The 1st and 2nd respondent did file their statement of claim before the tribunal stating that, at all material times, they were paid up members of the Appellant Sacco and in the period between 2009 and 2010, they had guaranteed the 3rd respondent to the tune of Kshs.1,762,308.50/=. In August 2012 the 3rd respondent abruptly resigned from his employment and after a period of 18 months, in January/ February 2014, the Appellant wrote to inform them that the 3rd Respondent had defaulted in paying his loan and that they would proceed to attach their salary to recover the outstanding amount due.

9. It was the 1st and 2nd Respondents' contention that the loans disbursed to the 3rd respondent were fraudulent and that the Appellant had illegally inflated the 3rd respondents loan balance to unjustly enrich themselves at their expense and they also pointed to a collusion between the Appellant and the 3rd respondent, where they had deliberately failed to attach is shares to their loss and damage. The 1st and 2nd respondent thus sought for refund of the sums already deducted totaling to Kshs.687,600/= plus cost and interest of this suit.

The Appellants Statement of Defence

10. The Appellant filed their statement of defence dated 5th May 2017, where they denied in toto all the 1st and 2nd respondents averments as made in the statement of claim and put them to strict proof thereof. They clarified that the 3rd respondent was not their employee and thus had no knowledge of his resignation from his workplace and subsequent clearance from the said employer. They thus had no way of attaching his terminal benefits. Furthermore, it was not true that they had not attached the 3rd Respondents shares held at the sacco, as the same had been attached and credit given for the same in the loan statement issued.

11. It was the Appellants further contention that when the 3rd Respondent started to default in settling his loan balance and after reconciliation of his accounts they proceeded to inform both his guarantors, of the default and thereafter proceeded to attached a portion of their salary to settle the outstanding loan due from the 3rd respondent. In view of the aforegoing the allegations of fraud and/ or malafides as alleged were not proved and they urged the court to ignore the same.

12. Finally, it was the Appellants' contention that the amounts reflected on the 3rd respondents' payslips only reflected the principal amount and pro rata interests but did not indicate the accrued interests due on default in repaying the outstanding loan. It was hypocritical for the 1st and 2nd respondents to willingly sign the guarantee forms for the loan but then turn around to question the loan disbursements so guaranteed. The respondents thus could not run away from their obligation which they had properly been called upon to pay and thus had no cause of Action as against the Appellant.

13. The Appellant thus prayed that the said claim be dismissed with costs. The 3rd respondent in this Appeal though served did not file any response to the statement of claim and neither did he participate in the trial.

Evidence

14. The 1st respondent testified on his own behalf and on behalf of the 2nd respondent and stated that they were dissatisfied by the process of how the Appellant processed and recovered the loans due from them. According to the Sacco policy, one could only get a loan equivalent to 3 times his savings and as at the time they were guaranteeing the 3rd respondent he had shares worth Kshs.152,650/= which means he

was only entitled to get a loan of Kshs.457,950/=. Instead, the 3RD Respondent was given a loan of Kshs.1,762,308.50/= which was unprocedural and was against the Sacco credit policy.

15. It was their further evidence that where a member of the Sacco defaulted on his loan, the first recourse of action was to surcharge his shares first before resorting to enforcing the guarantees for the balance of the loan due, which in the current instant was not done. Also, the 3rd respondent had been an employee of the said Sacco and immediately he stopped working at Sacco, the Appellant ought to have informed them but in this instance had waited for 18 months before informing them, which inaction was prejudicial to them as the default interest had increase astronomically.

16. Finally, it was their contention that by the time he resigned from the Sacco, the 3rd respondent had over Ksh.400,000/= in savings which the Appellant had willfully failed to attach. The Appellant had also forged the loan amounts as the 3rd respondent's pay slip revealed that the 1st loan was Ksh.392,000/= but later when demand was issued the said loan was indicated as Kshs.539,321/=. Similarly for the 2nd loan on the 3rd respondents pay slip indicated that the loan was Kshs.631,615/= yet in their demand the Appellant had claimed that the said loan was Kshs.711,080.50/=.

17. The discrepancies pointed out in processing the loans advanced and failure to attach the 3rd respondents shares and savings pointed to a collusion between the Appellant and the said 3rd respondent and thus the entire decisions and process to surge them was unlawful, tainted with illegalities and thus prayed to be refunded the sums deducted under the guarantee totaling to Ksh.687,600/= plus costs and Interest thereon.

18. Under cross examination, he confirmed that they both did sign the guarantee forms and acknowledged that the loans are recoverable with interest accrued.

19. The Appellant witness Mr. Francis Kamau stated that he worked as a credit officer at the said Sacco. In 2009, the 3rd respondent did apply for the 1st loan (Vision loan) amounting to Kshs.441,000/= repayable within 72 months and after assessment and approval by the credit committee the same was granted. Further in 2010 the 3rd respondent again took out a 2nd loan, known as Super loan amounting to Ksh.737,000/= which was repayable within 60 months and after undergoing a similar verification process the same was approved.

20. It was to be noted that the loans were not based on the 3rd respondent saving but was assessed on his ability to repay the same. This was based on a policy circular dated 13.02.2009 which authorized the Sacco to trade and give loans to its members, as long as it did not exceed 2/3 of the members' salary. Further both the 1st and 2nd Respondent had willingly guaranteed the 3rd respondent and had not been forced to do so. Finally, it was their contention that the 3rd respondent was not their employee as alleged and worked for the Immigration department and thus could not have known of his work status until he later defaulted in settling the loan owed.

21. After following due procedure, they had opted to enforce the guarantees earlier issued and thus could not be faulted for the action taken.

22. Under cross examination the Appellant witness insisted that the ability to pay the loan was the central consideration before a loan was approved and that was essentially determined by the person's pay slip. Secondly, he was shown various pay slips of the 3rd respondent indicating different amounts in terms of shares and in response, he pointed out that the said pay slips were misleading as the correct loan figures were those he had presented in the documents supplied to court. The inconsistencies in the pay slip was also an issue beyond them as the said pay slip was issued by the Immigration department and not the Sacco and thus had no control over the figures stated therein.

23. The Appellant thus urged the tribunal to dismiss the said suit.

24. The tribunal after considering the evidence lead and submissions tendered did hold that the Appellant had not been transparent in the manner they calculated the unpaid loan and interest due on the 3rd respondents loan and thus were directed file further documentation which would enable the court to determine what was due and as from which date. After further hearing the tribunal issued a 2nd judgment directing the Appellant to refund a total of Kshs.687,600/= to the 1st and 2nd respondent being the amount unlawfully deducted from them.

C. Submission

Appellants Submissions

25. The Appellant relied on their submissions dated 8th May 2025, where they stated that at the heart of the Appeal lies a fundamental question of lawful procedure, contractual obligation and accountability. It was not in dispute that the 1st and 2nd respondent had guaranteed the 3rd respondent, who eventually defaulted on his loan repayments and that the learned tribunal had so held in their 1st judgment dated 08.01.2018 wherein it was further ascertained that the said 1st and 2nd respondents had no basis to claim general damages for breach of contract.

26. About four (4) years after delivery of the judgment dated 08.01.2018, the respondents had again moved court vide their Application dated 15.10.2021 seeking to enforce the said judgment and the tribunal surprisingly and without provocation or prayer from either party did direct that they do comply with the orders issued on 08.01.2018 within 21 days and proceeded to fix the matter for mention to confirm compliance. Eventually on 02.03.2023 the tribunal did deliver a 2nd judgment in the said suit, where they directed the Appellant to refund to both the 1st and 2nd respondents the sums deducted on account of the enforced guarantee totaling to Kshs.687,600/=.

27. It was the Appellant contention that the 1st judgment dated 08.01.2018 had conclusively determined the rights and obligations of the parties herein and thus there was no statutory mechanism, which allowed for a 2nd judgment within the same matter, which procedure was unknown in law.

28. The tribunal did err in law and fact by awarding the 1st and 2nd respondent the sum of Kshs.687,600/= based on their misunderstanding of the legal framework of how guarantees worked under the commercial law framework. It could also not be ignored that both the respondents had willingly accepted the risks associated with loan defaults and the tribunal having found that the principal debtor had defaulted from paying his loan, the burden shifted on the guarantors to carry the said liability.

29. They further submitted that the learned tribunal had correctly held in their first judgment dated 08.01.2018 that the guarantors were co-obligators in the loan agreement and thus could not depart from the said finding to again hold that the Appellant had not been transparent in its dealings with the said respondent and thus liable to refund the sums already deducted. Reliance was placed in the case of Ebony Development Co Ltd vs Standard Chartered Bank Ltd (2008) eKLR, Nairobi HCCC No 573 of 2011 (Talewa Road Contactors Limited & Another Vs Jamii Bora Charitable trust Registered trustees & Another & Fidelity Commercial Bank Ltd Vrs Kenya Garage Vehicle Industries Ltd 2017 EKLR where it was held that the obligation of the guarantor was clear and it became liable upon default by the principal debtor....".

30. Having presented evidence confirming compliance with the law by issuing the guarantors with a demand, they were free to enforce the said guarantee without any inhibition as the guarantors obligation to pay was triggered the moment the borrower was in default and was not contingent on the

notice being issued. Reliance was placed in the case of Supreme Court of Nigeria; Fortune International Bank Plc Vs Pegasus Trading Office (Gmbh) & Others (2004) & Africa Insurance Development Corporation Vs Nigeria Liquefied Natural Gas ltd (2000) 4NWLR (Pt 653) 494 at 505-506, where the said issue was canvassed.

31. On the second issue, the Appellant submitted that it was the corner stone of the legal system that once a judgment had been delivered the court became fuctus offico. To thus allow further or new evidence post judgment would contravene the established principles of fair hearing and undermined judicial process. Reliance was placed in the case of Kenya Airports Authority Vrs Mitu Bell Welfare Society & 2 others (2016) Eklr, Telkom Kenya Limited Vs John Ochanda (Suing on his own behalf and on behalf of 996 former Employees of Telkom Kenya Ltd), (2014) EKLR & Kenya Agricultural and livestock Research organization Vs Kenya Scientific Research International Technical and Institutional Workers Union, Where it was held that once the final judgment was made it was wrong to re-open the suit through post judgment filings which would be irregular and should not be entertained.

32. Finally the Appellant relied on the principal invoked in the maxim of "Qui prior est tempore, potior est jure" (He who is earlier in time is stronger in right or "first in time, is stronger in law's"), which basically meant that in a case of equal equites, precedence should be upheld given that it embodied the fundamental principle that in the case of equal equites, precedence should be given to the first in time. Therefore, it followed that the judgment of 08.01.2018 must be upheld and the 2nd judgment dated 02.03.2023 be discarded.

33. The Applicant thus urged the court to find that the impugned decision rendered by the tribunal represents miscarriage of justice and was a departure from established legal principles and thus urged the court to uphold the Appeal and proceed to allow the same.

The 1st and 2nd Respondent's written Submissions.

34. The 1st and 2nd respondent filed their submissions in response to the Appellants submissions and included what they referred to as the cross Appeal, which raised six (6) grounds of Appeal; simplified down to the fact that the Appellant had failed to provide any documentation to justify their basis of deducting a total of Kshs 687,000/= from their accounts and thus the tribunal had made the right decision in directing that the same be refunded.

35. In addition to the aforestated abnormality the Appellants had defended their claim before the tribunal through the loans officer, contrary to Section 28(3),(b) of the Cooperative *Societies Act*, which mandated that it was only a committee member who could prosecute and/or defend suits by or against a society. The Appellant act to defend the suit through the loans officer was thus a nullity and the suit should have been treated as undefended.

36. Further it was the 1st and 2nd Respondents contention that the Appellant did not Appeal against the original judgment entered against them on 08.01.2018, which re opened the primary suit and provided a window for the Appellant to supply further supporting documentation, which would enable the tribunal to tabulate what was genuinely due to. The Appellant had failed to do so and was merely abusing the court process and thus prayed that this Appeal be dismissed. Reliance was placed in CTC No 251 of 2021 Stephen Atemba & 4 0thers Vs Trans-National Times Sacco Society Ltd & Another, where it was held that, "guarantors cannot be deemed to carry a burden because of the 1st respondent non-vigilance or indolent actions."

D. Analysis And Determination

37. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel. It is trite law, that the appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

38. A first appellate court is also the final court of fact, and litigants are entitled to full, fair, independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Ouseph AIR 1969 Kerala 316

39. This Appeal turns on the following questions

    a. Whether there is a valid Cross Appeal.

    b. Whether the 2nd Judgment delivered on 02.03.2023 is valid.

    c. Whether the learned Tribunal erred in law in finding and holding that the 1st and 2nd respondents were entitled to any refund from the Appellant.

    d. Who should bear the costs of this suit.

Whether there is Valid cross Appeal on record.

40. The 1st and 2nd respondent counsel filed what he termed as a cross Appeal dated 21st May 2025 and urged the court to uphold the judgment dated 02.03.2023 directing the Appellant to refund a sum of Ksh 687,000/= being sums illegally deducted from them by the Appellant. They also prayed to be awarded costs and interest of the suit.

41. Section 79G of the *Civil Procedure Act* provides that;

> " Every Appeal from the Subordinate court to the high court shall be filed within a period of thirty (30) days from the date of the decree or order Appealed against excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant a copy of the decree or order."

42. The cross Appeal has been filed after a period of slightly over two (2) years, without leave of this court and is thus a nullity Abinito.

Whether the 2nd Judgment delivered on 02.03.2023 is valid

43. As clearly explained in the pleadings filed, the primary suit between the parties herein was heard and determine on merit on 08.01.2018, except on the issue of accounts, where the Appellant was directed to file further documentation in support of their case to enable the court determine what exactly was due from the 1st and 2nd respondent as guarantors of the 3rd respondent.

44. To enforce this aspect of the decree which called for accounts to be taken, the 1st and 2nd respondent filed two (2) Notice of motion Applications dated 24.09.2019 and on 15.10.2021,both which were dismissed but in the latter Application the trial court directed that the Appellant to comply with the earlier orders issued of filing the accounts documents within 21 days in full compliance with the decree dated 08.01.2018.

45. The Appellant filed the said documents and vide the judgment appealed against dated 02.03.2023 the tribunal held that the Appellant had failed to account for the loan amount due, when the said burden fell on them. They were thus ordered to refund the 1st and 2nd respondent the sums earlier deducted from them totaling to Kshs.687,600/=.

46. It is trite law that in one suit, there cannot be two judgments as is the case herein and that definitely is an error in law which cannot be allowed to stand. The Court of Appeal in the case of Kenya Airports Authority Vs Mitu-Bell Welfare Society & 2 others (2016) EKLR did hold that the concept of partial judgment or interim judgment after hearing the parties was unknown to the Kenya law. It was stated therein that;

> " The legal question is can there be outstanding issues to be dealt with by a court after it has delivered a judgment?
>
> 71. We have stated that a judgment brings to an end the jurisdiction of the court that delivers the same. In our considered view, the concept of partial judgement or interim judgment after hearing of the parties is unknown to the Kenyan law,
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> .....However a court cannot deliver judgment and invite further pleadings to be filed or reserve contested matters for its consideration and determination.
>
> 72. In the instance case, the trial court erred in delivering a judgment and then reserving outstanding matters to be dealt with by the court. Save as authorized by law, upon delivery of judgment a court becomes functus offico. It is not surprising that the 1st respondent in its written submissions observed that the trial court adopted an unconventional approach. The error in law committed by the trial court is aptly demonstrated by posing the question what would happen if contestation and dispute arise from the affidavits and reports filed in court? Would the trial court after judgment re-litigate the issues arising from the affidavit and reports? Which pleadings would form the basis of the re-litigation?

47. This issue was further emphasized in Telkom Kenya Limited Vs John Ochanda (Suing on his own behalf and on behalf of 996 former Telkom Employee of Telkom Kenya Limited),(2014)Eklr, Where the court of Appeal held that;

> " It is unthinkable that the surprise should be sprung long after judgment has been entered as the learned judges directions seemed to invite. Much as the learned judge believed himself to be acting in the interest of justice, we take the view that the very act of re-opeing the suit through affidavits had the effect of defeating the law and the interest of justice. We respectfully reject the notion that Article 159(2),(d) o *the Constitution* and the overriding objectives of the *Civil Procedure Act* and Rules could be invoked to justify a departure from well used procedure for perfecting declaratory judgments by inviting parties to compute entitlements and the filing of affidavits as happened in this case. We reiterate that it would be a serious abdication of the judicial function were the same to be delegated to the parties who

come to the courts for that very determination. Such delegation is a nullity for all purposes and the challenge to the learned judge's ruling on that score is well founded and is upheld."

48. No doubt the tribunal had acting in good faith to call for proper financial records from the Appellant to calculate the exact liability of both respondents, but they overstepped their mandate by inviting further pleadings after judgment had been delivered on 08.01.2018 as they were already fuctus officio. Having held so, there is no need to proceed to determine the other issues arising herein.

E. Disposition

49. This Appeal therefore has merit and the same is Allowed with no orders as to costs as the pleadings reveal that the Appellant has not been transparent in its dealing with the 1st and 2nd Respondent.

50. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MARSABIT THIS 23RD DAY OF JANUARY, 2026.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 23RD DAY OF JANUARY, 2026.

In the presence of: -

.....Appellant

..... Respondent

.....Court Assistant