



REPUBLIC OF KENYA



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**Wangechi v Ngatia (Civil Appeal E063 of 2024)
[2026] KEHC 689 (KLR) (28 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 689 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E063 OF 2024
DKN MAGARE, J
JANUARY 28, 2026**

BETWEEN

MARTHA MUTHONI WANGECHI APPELLANT

AND

LYDIA NJOKI NGATIA RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. E.N. Angima, Senior Resident Magistrate, dated 9.9.2024, arising from Nyeri CMCC No. E002 of 2021. The appellant was the defendant in the lower court.
2. The court entered judgment for a sum of Ksh. 330,000/= together with costs against the appellant.
3. The Memorandum of Appeal dated 8.10.2024 raised the following Grounds:
 1. The learned magistrate erred in law and fact in failing to find that the court had no power to rewrite a contract dated 24.7.2018 by enforcing the performance of outside the completion period on 28.2.2019 without any addendum of supplementary agreement and by incorporating a different contract of lending and borrowing dated 24.7.2018 thus leading to a different cause of action not enforceable in the suit.
 2. The learned magistrate erred in law and fact in finding that the Respondent had expressed inability to pay Ksh. 400,000/= as at 28.2.2024, and hence the Appellant could be said to have defaulted on the land sale agreement, while the Respondent had not expressed his willingness to complete the transaction as at the completion date.
 3. The learned magistrate erred in law and fact in finding that the Respondent, having voluntarily withdrawn the case against the 2nd Defendant, could not be implied that the consented to taking liability on behalf of the Respondent, and the Appellant could only be liable to half of



the amount of Ksh. 180,000/=, being Ksh. 90,000/= paid within contractual periods as the land was jointly owned and compliance was not possible on the part of the Appellant alone, thereby severing the doctrine of joint and several liability.

4. The learned magistrate erred in law and fact in failing to uphold the Appellant's counterclaim and wrongly held that there was mutual consent to extend the terms of the contract, as there was payment of Ksh. 150,000, but which referred to the contract of lending and borrowing.
 5. The learned magistrate erred in law and fact in failing to consider the Appellant's submissions, and that the respondent failed to prove the case on the balance of probabilities, and the burden could not be shifted to the appellant, and failure to give evidence was not fatal to the appellant's case.
 6. The learned magistrate erred in law and fact in failing to consider the Appellant's submissions and entire defence and written submissions on the legal analysis but took irrelevant factors and for evidence in reaching /rendering the decision.
4. The Plaintiff dated 15.12.2020 claimed a sum of Ksh. 440,000/= plus costs and interest. This was a result of money received in respect of an aborted land sale. They prayed for 20% interest, being a sum of Ksh. 110,000/=.
 5. The appellant, as a first respondent, filed a defence and counterclaim. They stated that clause (k) of the contract constituted a separate agreement for borrowing and lending. They posited that the refund would be half of the purchase price. They stated that the lending and acknowledgment were not enforceable.
 6. It was averred that on 24.7.2018, the Plaintiff and the Defendants entered into a sale agreement where the Defendants sold and the Plaintiff bought a portion of 1/8 acres to be excised from LR No. Aguthi/Gatitu/5311. It was pleaded that the purchase price was Ksh. 550,000/= and a sum of Ksh. 150,000/= was paid upon execution of the agreement.
 7. Further, it was agreed that a sum of Ksh. 400,000/= would be paid upon completion, and for the avoidance of doubt, the completion date was on 28.2.2019.
 8. Before the completion, the 1st Defendant approached the Plaintiff for the advancement of money and Ksh. 30,000/= was advanced on 29.8.2018 towards the purchase price. Further Ksh. 150,000/= was advanced on 15.4.2019 towards the purchase price making a total of Ksh. 330,000/= but refused to transfer the property.
 9. It was also averred that it was the agreement of the parties that a penalty of Ksh. 110,000/= was payable by the defaulting party being 20% penalty hence the claim of Ksh. 440,000/=.
 10. The Respondent entered an appearance and filed a Defence and counterclaim dated 4.4.2023 denying the averments in the Plaintiff. The Respondent claimed a declaration that the contract dated 15.4.2019 was not enforceable as against the Respondent and was extinguished on 28.9.2019.
 11. It was contended that the agreement of dated 15.4.2019 was in contravention of clause (k) of the agreement dated 24.7.2018 and was outside the completion date of 28.2.2019.
 12. The 1st Defendant averred that he was only entitled to a refund of half of the purchase price paid of Ksh. 180,000/= within the contract period being Ksh. 90,000/= less 20% default penalty as the Plaintiff failed to pay Ksh. 400,000/= as at 20.02.2018.



13. The Trial Court heard the parties and proceeded to render Judgement allowing the claim. The court held that the defendant had proved a claim of Ksh. 330,000/= but dismissed the claim for penalty. Aggrieved by the finding of the lower Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.

Evidence

14. During the hearing, PW1 was the Respondent. She relied on his witness statement and produced the documents listed. It was her stated case that the Appellant admitted receiving Ksh. 330,000/= from her. That Ksh. 110,000/= claimed was for the penalty as the Appellant breached the agreement. On cross-examination, it was stated that she paid Ksh. 330,000/= as per the land sale agreement and not as money lending.
15. On his part, the Appellant did not call any witness.

Submissions.

16. The Appellant contended in her submissions that the Respondent failed to satisfy the burden of proving that the Appellant was in breach of contract. In this regard, it was submitted that the lower court wrote a contract for the parties contrary to the law. Reliance was placed inter alia on National Bank of Kenya Limited v Pipe Plastic Samkolit K Limited (2002) 2 EA 503.
17. The Appellant maintained that the Respondent only paid Ksh. 180,000/= and fell in breach of the contract. The Appellant submitted that the burden of proof was on the Respondent and it never shifted.
18. The Respondent filed submissions dated 30.10.2025 by which it was submitted that the Respondent proved her case on a balance of probabilities and the Appellant did not rebut the evidence. Reliance was placed on D.T Dobie & Company (K) Ltd -V- Wanyonyi Wafula Chebukati [2014] eKLR.

Analysis

19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.
20. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

21. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the court in their usual gusto, held as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow



the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

22. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

23. This court's jurisdiction to review the evidence should be exercised with caution. In the cases of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

24. Bearing in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court must reconsider the evidence, evaluate it itself, and draw its own conclusions.

25. The Appellant urged the court to find that the lower court erred in allowing the suit. This court is entitled to reevaluate, by way of retrial, the pleadings and evidence at the lower court. In breach-of-contract cases, a party alleging a breach must prove. It is not enough to throw allegations into the court without proof. Further, with regard to the parties to a contract, there must be a succinct explanation of why a debt shown to have passed hands is not due. In the case of *Raghibir Singh Chatte v National Bank of Kenya Limited* [1996] KECA 99 (KLR) the Court of Appeal Akiwumi, J. A, stated thus:

The words of Jessel M.R. on this issue are the following:

When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given."

26. The court in the above case continued as follows:

In the subsequent appeal to this court, it was held that a mere denial is not a sufficient defence in the type of action that had been brought against the defendant. In the judgment of this court delivered by Platt, J. A. as he then was, it is clearly stated as follows:

"First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

Thus in *Maguga General Stores* this court authoritatively enunciated the principle that in an action for a debt or liquidated demand a mere denial or general traverse will not do for all purposes. Applying the same principle a defence in an action of that type that is a mere



general traverse cannot be and is not a sufficient defence and also discloses no reasonable defence for the purposes of 06 r 13(1)(a).

27. The burden was with the Respondent to prove his case against the Respondent. On this subject, Section 107-109 of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

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.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

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

28. A party that invokes the aid of the law and asserts the affirmative of an issue has the burden to prove the matters in issue. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is, however, the evidential burden that is placed upon any party, the burden of proving any particular fact which he desires the court to believe in its existence, which is captured in Sections 109 and 112 of the Act.

29. It follows that the burden of proof is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. In *Nyakwana v Ongaro* [2015] KEHC 8440 (KLR), D.S. Majanja, held as follows:

As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person... The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

30. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] 1 KLE 526 stated that:

In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.



31. Courts have established that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 held that;

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

32. The preponderance of probabilities is degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. Furthermore, in *Palace Investment Ltd – vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not.

This burden on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained.”

33. With the above guide, in the instant Appeal, the Plaintiff dated 15.12.2020 claimed a sum of Ksh. 440,000/= plus costs and interest. It was not enough for the Appellant to assert breach of contract on the part of the Respondent without laying a basis. The court is, however, alive to the fact that whether or not the Appellant proved her case, the Respondent, as Plaintiff, had the burden to prove in the first instance the allegations that she paid Ksh. 150,000/= upon execution of the agreement, Ksh. 30,000/= was advanced on 29.8.2018 towards the purchase price, and further Ksh. 150,000/= paid on 15.4.2019 towards the purchase price, making a total of Ksh. 330,000/= which the Appellant was entitled to refund since the sale of the land did not go through.

34. On reevaluation, the Plaintiff’s case, to the extent that she paid Ksh. 330,000/= to the Appellant was proved. The Appellant signed the agreement dated 27.7.2018, acknowledging under clause (a) that she had received Ksh. 150,000/= by signing. There was also an acknowledgement dated 29.8.2018 for Ksh. 30,000/=. Further, there was also an undisputed acknowledgement dated 15.4.2019. The same acknowledged that Ksh. 150,000/= was paid upon its execution.

35. This amount was agreed therein to be applied towards the purchase price and I find no basis upon which the Appellant alleged that it was paid as a loan and not towards the purchase price. This constituted a total of Ksh. 330,000/= which the Respondent was entitled to as refund and which was proved. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. In *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177, where he that:

[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them



at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.

In *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell)*, Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the

36. The allegations by the Appellant as to the Plaintiff breaching the agreement were, however, mere assertions since the Respondent’s case as to breach on the part of the Appellant was not controverted. What then is the effect of failure by the Respondent to tender evidence in rebuttal? In the case of *Leo Investment Limited v Mau West Limited & another* [2019] eKLR Justice C Kariuki, J, stated as doth: -

“But what are the effect of failure by the appellant to tender evidence in rebuttal? The court in *Shaneebal Limited vs County Government of Machakos* [2018] eKLR (supra) addressed this issue in paragraphs 24 to 29 and while citing other case laws it held that where no defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the plaintiff’s case unchallenged.

39. That where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”

37. In any event, the court was dealing with a commercial issue of the refund of the payable amounts under a contract for the sale of land that did not materialize, and not the transfer of the suit premises. The amount sought to be refunded ought to have clearly arisen from the sale agreement and proved to have exchanged hands from the Respondent as buyer to the Appellant as seller of the impugned property. The amount that was exchanged was Ksh. 330,000/= and, which I hold that the Appellant, as seller, received. There was no appeal on the penalties, and the court will not address this issue.

38. Further, the question of dismissal of the counterclaim is neither here nor there in the absence of evidence supporting the counterclaim. The same is therefore for dismissal. The appeal herein, therefore, lacks merit and is accordingly dismissed.

39. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.



40. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

41. In the circumstances of this case, an award of costs of Kshs. 75,000/- to the Respondent is just and proper.

Determination

42. In the upshot, I make the following orders: -

- a. The Appeal lacks merit and is dismissed in limine.
- b. The Respondent shall have the costs of the Appeal assessed at Ksh. 75,000/=.
- c. 30 days stay of execution.
- d. File is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28TH DAY OF JANUARY, 2026.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Wabande Gacheru for the Appellant

Mr. Kimunya for the Respondent

Court Assistant- Michael

