REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO.E039 OF 2025

NICHOLAS ODERA SUMBA.......**APPELLANT**

VERSUS

FREDRICK OMONDI MALA.....1ST RESPONDENT

LAND REGISTRAR, MR.YEGON, SIAYA.....2ND RESPONDENT

(An appeal from the Judgment and/or decree of Hon .J.P Mkala (RM) delivered on 26th May 2025 in Siaya SCCC No.E073 2025)

BETWEEN

FREDRICK OMONDI MALA.....CLAIMANT/APPLICANT

VERSUS

NICHOLAS ODERA SUMBA.....1ST RESPONDENT

LAND REGISTRAR, MR.YEGON, SIAYA.....2ND RESPONDENT

JUDGMENT

1. The Appeal arises from the Small Claims Court at Siaya where **Hon. J.P Mkala** granted the 1st Respondent Kshs 40,000/ plus assessed costs of Kshs 5000/ as well as interest at court rates. The 1st Respondent as the Claimant had lodged his claim vide the Statement of Claim where he sought for the sum of Kshs 40,000/ from the Appellant being in respect of services rendered plus costs of the suit.

2. In his evidence, CW1, the 1st Respondent stated that the Appellant who is a friend gave him survey work to perform for him. He stated that by that time he was done with his PhD and that he was moving towards survey. He stated that the Appellant sent a few documents through Easy Coach and asked him to pick from one John. He stated that he picked the

documents from the said John who gave him phone numbers of the proprietors and paid him a deposit of Kshs. 10,000. He stated that the work was for Kshs. 100,000. According to CW1, the work entailed survey and sub-division of two parcels into five portions. He stated that he concluded the task and met the Appellant at the Registrar's office where he did the application for consent to the Land Control Board. That the Appellant gave him Kshs. 33,000 and that the balance was to be paid. He stated that Yegon gave out the letters without the consent from the Land Control Board. That he asked to be paid Kshs. 67,000.00. On being cross-examined, he stated that he did the survey work for the Appellant, though he did not have evidence that he was a surveyor. He stated that the agreement was through WhatsApp messages. That he did not issue an invoice but that he gave the Appellant a receipt. He stated that he did not remember the name in the title. He stated that he was given the work by the Appellant. He stated that he paid for the consent. He stated that the Appellant was to appear during transfer.

3. In response, the Appellant filed a response dated 7th May 2025. He contended that he did not owe the 1st Respondent any money. According to the Appellant, the claim should be struck out as it does not disclose any reasonable cause of action since the services alleged to have been offered and/or rendered have not been particularized and/or disclosed neither is there evidence of the existence of a contract of engagement

between the Claimant and the 1st Respondent and Appellant in respect to the said services. The Appellant contended that the Claimant's prayer to the trial Court to help track the Appellant's communication, is vague, ridiculous averment that is not understandable. According to the Appellant, the suit should be struck out or failure to disclose a reasonable cause of action and for being frivolous, vexatious and an abuse of the court process. The Appellant prayed that the Claim be dismissed with costs.

4. RW1, the Appellant, an advocate stated that he knew the 1st Respondent but that he had never had a meeting with him. He stated that he owed nothing to the 1st Respondent. He denied owing the 1st Respondent Kshs. 40,000. He denied that any services were offered to him by the 1st Respondent. On being cross-examined, he denied sending any documents to the 1st Respondent or that any survey was done for his benefit. He stated that he did not know how the 1st Respondent got the Land Control Board Consent. He stated that he knew that the 1st Respondent was surveyor.

5. In his judgment, the learned trial Magistrate found the 1st Respondent had proved his claim on a balance of probability. The learned trial Magistrate held that the Appellant failed to explain why Kshs. 31,702 was sent to the 1st Respondent as per the M-Pesa statement. It was noted that the amount was sent a few days before the consents for transfer were issued.

According to the learned trial Magistrate, the Appellant conceded during the trial hearing that some of the portions of the land subject of the said consent were transferred to him. It was held that the Appellant could not give satisfactory explanation how the 1st Respondent came into possession of the transfer forms, application for consent and the LCB Consent. According to the learned trial Magistrate, the 1st Respondent may be suffering from some mental illness once in a while but that his recollection of events was more believable than the Appellant's averments. The claim against the 2nd Respondent was dismissed for lack of evidence and cause of action against him. In the end, the learned trial Magistrate awarded the 1st Respondent Kshs. 40,000, disbursement costs Kshs. 5,000, and interest at court rates from the date of the judgment until payment in full.

6. Dissatisfied with the decision, the Appellant appealed in this Court contending in the Memorandum of Appeal dated 13th June 2025:

1. That the learned trial magistrate erred in law and in fact by awarding the 1st Respondent Kshs. 40,000.00 out of the alleged survey services rendered to the Appellant yet the 1st Respondent by himself admitted not being a surveyor and indeed did not provide any evidence to prove he is a surveyor licensed to provide the services

which formed his cause of action in the Statement of Claim Court.

2. **That the learned trial magistrate erred in law and fact by awarding the 1st Respondent Kshs. 40,000 arising out of alleged survey services rendered to the Appellant, in full breach of the provisions of Section 9(e) of the Survey Act, Cap. 299 which bestows the survey board of Kenya with the jurisdiction, duty and power to hear all disputes between surveyors and their clients in respect to all matters relating to professional fees charged for services rendered by surveyors.**

3. **That the learned trial magistrate erred in law and fact by holding that the 1st Respondent had proved his case on a balance of probability yet not a single exhibit was produced by the 1st Respondent in court in support of his averments neither was any document(s) in form of exhibit(s) served on the Appellant by the 1st Respondent. The only document(s) found to have been uploaded by the 1st Respondent in the CTS were uploaded as part of the Appellant's documents and the Appellant did not therefore have the benefit of even seeing them during the hearing of the matter. He only came across the said documents much after the hearing had taken**

place though the document(s) were nevertheless totally irrelevant to the cause of action in the matter

4. **That the learned trial magistrate erred in law and fact by granting an award of Kshs. 40,000 to the 1st Respondent on alleged survey services rendered to the Appellant yet there wasn't any evidence supplied by the 1st Respondent to even remotely confirm that such survey work was carried out. There was no evidence supplied by the 1st Respondent on the purported subdivision of the parcel of land mentioned in the matter save for documents relating to land transfer and land control board consent that happened to be in his possession and which were in any case registered in the name of a 3rd Party, a Mr. Isaac Obuyu and not the Appellant.**

5. **That the learned trial magistrate erred in law and fact by entering judgment in favour of the 1st Respondent as against the Appellant even when the 1st Respondent did not prove his case on a balance of probability taking into account the conflicting evidence adduced in court vis a vis the conflicting averments in his pleadings filed in court. The 1st Respondent averred that the**

services he rendered were for Kshs. 100,000.00 out of which the Appellant paid him Kshs. 33,000 leaving a balance of Kshs. 67,000 a representation that is totally in contrast with the pleadings in the claim filed in court which is for payment of Kshs. 40,000 for which the 1st Respondent alleges the Appellant had paid him half of the amount and still owed him Kshs. 40,000 meaning the services rendered were for Kshs. 80,000.In his evidence in court, the 1st Respondent says the alleged survey services rendered was for Kshs. 100,000 for which he was paid Kshs. 10,000 as deposit and another Kshs. 33,000 therefore leaving the balance outstanding as Kshs. 67,000. The 1st Respondent therefore had several conflicting versions on the amount in claim for the services rendered, what he had been paid and what he was yet to be paid.

6. **The Learned Trial Magistrate erred in law and fact by his finding in the judgment that the 1st Respondent had proved his case on a balance of probability when the 1st Respondent did not, at the very least produce any evidence in form of a contractual engagement between him and the Appellant. The 1st Respondent's averment that he had a contract with the Appellant by way of**

Whats APP messages which evidence he alleges to have produced in court was non-existent as the same does not form part of any record of an exhibit produced in court. The production of such evidence by the 1st Respondent, if at all had to nevertheless conform and/or comply with the provisions of Section 106A and 106B of the Evidence Act on electronic production of documents.

7. The learned trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant by stating that the Appellant did not explain why he had sent a total of Kshs. 31,702 on Mpesa to the 1st Respondent, yet both Appellant and the 1st Respondent clearly stated that they are well known to each other and there would therefore be nothing strange about such Mpesa transaction between them as the 1st Respondent even admitted in court to having previously been assisted by the Appellant in his other endeavors. How the Learned Trial Magistrate would use such unrelated Mpesa transactions to find that the 1st Respondent had proved his case on a balance of probability even when there was no connection between the said Mpesa transactions with the subject matter in dispute is not understandable.

8. The learned trial Magistrate erred in law and fact by turning around the subject matter in dispute as if the burden of proof lay on the Appellant and not the 1st Respondent as expected when he states in his judgment that the Appellant could not give satisfactory answers as to how the 1st Respondent came into possession of the transfer forms and land control board consent forms , in respect to a parcel of land which is in any case was registered in the name of a 3rd party, a Mr. Isaac Obuyu and not the Appellant. The Appellant in his answer in evidence in cross-examination was categorical and clear that he could not know how the 1st Respondent came across the land control board consent and transfer forms. It is not understandable how the Learned Trial Magistrate could enter judgment in favour of the 1st Respondent as against the Appellant simply because the 1st Respondent had in his possession land control board consent and transfer forms which were nevertheless in the name of a 3rd Party, Isaac Obuyu yet the claim for the services purportedly rendered and the amount claimed for such services were not proved.

9. The learned trial Magistrate erred in law and fact by not appreciating the fact that the suit filed by

the 1st Respondent was in itself ambiguous, as the 1st Respondent sought even the tracking of the communications of the Appellant, a weird claim that the court seemed to have acknowledged by admitting that the 1st Respondent could have been suffering from mental illness.

10. **The learned trial Magistrate erred in law and fact by finding the 1st Respondent to have proved his case on a balance of probability yet he at the same time affirmed in his judgment that the 1st Respondent was suffering from mental illness which therefore meant he could not have had legal capacity and/or *locus standi* to even institute a suit in court.**

11. **The learned trial Magistrate erred in law and fact by holding in the judgment that the Appellant admitted and conceded that some of the parcels of land subject of the consent referred to by the 1st Respondent in the matter were transferred to him yet there was completely no such admission and/or concession by the Appellant during his evidence in court.**

12. **The learned trial Magistrate erred in law and fact by assessing the 1st Respondent's disbursements**

at Kshs. 5,000 without proof of court payments and/or receipts of the same and/or justification for such assessment.

13. **The learned trial Magistrate erred in law and fact by finding in his judgment that the Mpesa payments to the 1st Respondent having been made a few days before the land transfer was issued in the 1st Respondent's documents, (which in any case is not true) then that in itself was proof that the Appellant owed the 1st Respondent the amount in claim yet there was no proof that there existed any contract between the Appellant and the 1st Respondent and there was also no proof that even if such a contract existed, the amount in claim was owing to the 1st Respondent and remained unpaid and was therefore outstanding.**

14. **The learned trial Magistrate erred in law and fact by delivering an erroneous judgment, thereby misinterpreting and misconstruing the facts of the matter and the legal principles applicable on the burden of proof in civil proceedings.**

7. The Appellants pray that the judgment be set aside, and the 1st Respondent's Statement of Claim be dismissed with costs to the Appellant.

8. The appeal has been disposed of by way of written submissions.

9. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. See ***Selle vs. Associated Motor Boat Co. [1968] EA 123); Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR.***

10. In **Ephantus Mwangi and Another vs Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278**, the Court of Appeal held that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."**

11. I have considered the appeal in light of the evidence on record and written submissions filed on behalf of the parties herein. The issue for determination is whether the 1st Respondent proved his case on a balance of probability, and if proved, whether entitled to the reliefs sought in the Statement of Claim.

12. The *legal burden of proof* was on the 1st Respondent to prove his claim on a balance of probabilities. It was therefore incumbent upon the 1st Respondent to prove his assertions pleaded in the Statement of Claim. Section 107(1) of the *Evidence Act*, Cap 80 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.**

13. However, the burden may shift to the Defendant (Appellant) to disprove the alleged claim. This is the *evidential burden of proof,* which is well captured under Sections 109 and 112 of the Evidence Act. See **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**. The two concepts are well illustrated by the Court of Appeal in the case of **Mbuthia Macharia v Annah Mutua & Another [2017] eKLR**, that:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes an 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.” See **Supreme Court in Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR,**

14. The *standard of proof* is well captured in the case of **Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, where the Court held that:

Denning J. in Miller v 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 the tribunal can say, we think it is more probable than not, the burden

is discharged, but if the probabilities are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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 lose, because the requisite standard will not have been attained."

15. **Kimaru J.** (as he then was) in **William Kabogo Gitau vs George Thuo & 2 others (2010) 1 KLR 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 opposite party is said to have established his case on a balance of probabilities. He has established that it is

probable than not that the allegation that he made has occurred."

16. In his judgment, the learned trial Magistrate stated that he had gone through the Mpesa Statement which established that the Appellant herein had sent the 1st Respondent a total of Kshs. 31,702. In finding the basis to connect the Appellant with the 1st Respondent's claim, the learned trial Magistrate held that the Appellant failed to explain how and why the money had been sent to the 1st Respondent. According to the learned trial Magistrate, the money had been sent a few days before the consent for transfer were issued. Another finding that I find not in tandem with the trial court proceedings is where the learned trial Magistrate states that the Appellant conceded during the hearing that some of the portions of the land subject of the said consent were transferred to him. I have keenly gone through the Appellant's evidence, and have found no such evidence was tendered by the Appellant. The Appellant all through denied any dealings with the 1st Respondent and owing any money to the 1st Respondent.

17. According to the learned trial Magistrate, the Appellant could not satisfactorily explain how the 1st Respondent came into possession of the transfer forms, application for consent and LCB Consent. It is not in dispute that in cross-examination, the Appellant stated that he could not tell how the 1st Respondent got the LCB Consent. In his evidence, the 1st Respondent

stated that one John from whom he collected documents gave him Kshs. 10,000. He stated that he did the application for consent to the Land Control Board and was given Kshs. 3,000 and the balance was to be paid. However, in his evidence the Appellant denied sending the documents to the 1st Respondent. The Appellant submits that the documents in possession of the 1st Respondent do not bear his name but a 3rd Party's name, one Mr. Isaac Obuyu Ragot. It will be noted that the said John who gave him the documents was not called in court in support of the 1st Respondent's case.

18. It is a generally accepted legal principle that mental illness or incapacity must be proved through expert medical evidence. In the case of **John Patrick Machira V Patrick Kahiaru Muturi Civil Case No 113 of 1999** it was held;-

> **"Questioning one's mental health is a serious thing. He who questions another's mental well-being must demonstrate the basis of the question. Everybody is presumed to be of sound mind unless and until the contrary is shown on credible evidence. That is why there are stringent provisions in the Mental Health Act (Cap 248) setting out a laborious process by which a conclusion is to be reached concerning a person's state of mind. That**

process has not been embarked upon in the instant case, and no medical evidence has been furnished to the court to support any allegation putting the mental health of the defendant in doubt and to rebut the initial presumption of sanity…"

19. The learned trial Magistrate stated that the 1st Respondent may be suffering from mental illness once in a while but his recollection of the events was more believable than the Appellant's. I find nothing is on record either in the trial court proceedings or medical reports to show that 1st Respondent had lucid moments. As per the trial Court proceedings, there is no evidence to show that he had any difficulties in testifying brought about by the alleged mental illness. The finding by the learned trial Magistrate seems to have been made out of sympathy. In **E.P Communications Limited v East Africa Courier Services Limited [2019] eKLR,** the court held that while a party may have supplied goods, "courts of law act on hard evidence not sympathy or speculation". In **Beatrice Kahai Adagala v The Postal Corporation of Kenya [2015] eKLR,** the Court of Appeal noted that "much as we sympathize with the appellant... we cannot help her as the law ties our hands".
20. To a more convincing ground that this appeal has merit, is in respect of the reliefs granted to the 1st Respondent by the learned trial Magistrate. The 1st Respondent was awarded a

compensation of Kshs. 40,000 and a disbursement fee assessed at Kshs. 5,000. It is not dispute that in the Statement of Claim the 1st Respondent sought Kshs. 40,000, costs to be assessed by Court and any other appropriate reliefs. The learned trial Magistrate went through the Mpesa statement where he saw Kshs. 31,702 sent to the 1st Respondent by the Appellant. The Appellant contends that the e- Certificate of Electronic Evidence was not produced in Court as a confirmation of the transaction. In his evidence, the 1st Respondent did not mention Kshs. 31,702 but only said he was paid a deposit of Kshs. 10,000 and an additional Kshs. 33,000. He did not state the nature of payment for the amounts. The basis of awarding Kshs. 40,000 is not clear as it is an amount that seems to have been plucked from the air. It is trite that parties are bound by their pleadings. The Court itself is bound by the pleadings as filed by the parties and evidence on record.

21. In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, **Malawi Supreme Court of Appeal**, the learned judges cited with approval an article by Sir Jack Jacob entitled "*The Present Importance of Pleadings" published in [1960] Current Legal Problems*, at p. 174 where the learned author posited that:

> **"As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of**

pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for

the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.

22. The 1st Respondent pleaded Kshs. 40,000 but in his evidence he prayed for Kshs. 67,000. The 1st Respondent's claim was in the form of special damages which must be specifically pleaded and strictly proved. In **Okulu Gondi v South Nyanza Sugar Company Limited (2018) eKLR,** court held that *"special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity."* I find the 1st Respondent failed to prove the claim to the standard required in proving special damages. The learned trial Magistrate award of Kshs. 40,000.00 is not backed by any facts and the law. The award was erroneous as it was not proved by the 1st Respondent on a balance of probability.

23. Assessment of costs is a discretionary power of the Court. See Section 27 of the Civil Procedure Act. The Court of Appeal in **Supermarine Handling Services Ltd vs Kenya Revenue Authority [2010] eKLR**, the Court said: "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. The successful party is entitled to costs of the suit. The

Appellant contends that there was no basis of awarding Kshs. 5,000 to the 1st Respondent. According to the learned trial Magistrate, he assessed the disbursement at Kshs. 5,000. Having found the trial Court judgment was erroneous, it follows therefore that the 1st Respondent is not entitled to the costs. Accordingly, the trial Court's finding must be interfered with.

24. In the result, it is my finding that the Appellant's appeal has merit. The same is allowed is allowed. The trial court's judgement dated 26th May 2025 is hereby set aside and substituted with an order dismissing the 1st Respondent's claim with costs to the Appellant. As the cause of action against the 2nd Respondent had already been dismissed by the trial Court, then there will be no order regarding the said 2nd Respondent. The Appellant is awarded the costs of the appeal.

Dated and delivered at Siaya, this 20th day of February 2026

D. K. Kemei

Judge

In the presence of:

Mr Sumba……for Appellant

Fredrick Omondi Mala……. 1st Respondent

N/A……for 2nd Respondent

M/s Maureen…… Court Assistant