Odera v Dande (Civil Appeal E073 of 2024)
[2026] KEHC 3063 (KLR) (9 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3063 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E073 OF 2024

DKN MAGARE, J

MARCH 9, 2026

BETWEEN

THOMAS MBOYA ODERA ..... APPELLANT

AND

DOREEN ACHOLA DANDE ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. M. Okuche (SPM) given on 22.10.2024 in Migori CMCC No. E032 of 2024. The court found the respondent had proved her case on a balance of probabilities. The court ordered the respondent to be paid a sum of Ksh. 1,200,000/= together with 15% on the sum of Ksh.1,200,000/= and interest at court rates.

2. The appellant was aggrieved and filed 7 grounds of appeal that are prolix. They raised only the fact that the respondent had not proved her case to the required standards. The appeal proceeded by written submissions.

3. The Respondent filed suit on 3.03.2024, claiming that on 31.1.2023, she entered an agreement of sale with the appellant for the sale of land for a sum of Ksh. 2,400,000/=, whereby a sum of Ksh. 1,800,000/= was paid. It was discovered that the appellant was not the actual registered owner of the land. The appellant refunded a sum of Ksh. 600,000/= in February 2023. There was a refund agreement for Ksh 1,200,000/= which lapsed on 16.4.2023, but the appellant failed to pay.

4. The Respondent then claimed a sum of Ksh. 1,200,000/= being the balance, and a sum of Ksh. 270,000/= as a penalty, totaling to a sum of Ksh. 1,470,000/=.

5. The appellant filed a defence and denied the contents of the plaint. He denied having given the respondent the original title deeds, and, as such, she could not have presented them. The respondent averred that it is she who is the innocent party.

Evidence

6. The respondent testified when she testified along the same lines as the plaintiff. She produced 5 exhibits. On cross-examination by the appellant, the respondent stated that she searched and found that the appellant was not the owner. She stated that the appellant realized his documents were fake, which is why the refund was issued. On reexamination, she stated that there was no addendum to the refund agreement.

7. The appellant testified and relied on the witness statement dated 13.05.2024. The statement is not in the physical file or the record. He stated that he had the refund agreement, under which he was to refund Ksh 1,200,000/=.

8. The appellant filed submissions which, unfortunately, he annexed documents to. Evidence must be produced formally in court, not by annexures to submissions.

9. The court found that the agreement was not varied. Judgment was entered as aforesaid resulting in this appeal. The appellant filed supplementary grounds of appeal. They are as follows:

    a. The trial magistrate erred in law and in fact by admitting the respondent's evidence that the appellant served the respondent with certificates of official searches, which bore the names of the Appellant at the time of signing the Sale of Land Agreement dated 31.1.2023. The said certificates of official searches were not produced in court as evidence and which said evidence was false, unproved and unsubstantiated.

    b. The trial magistrate erred in law and in fact by failing to adduce from the evidence on record that it was the respondent who breached both the agreement dated 31.1.2023 and 16.4.2024 sighting very slim and unsubstantiated allegations.

    c. The trial magistrate erred in law and in fact by failing to adduce from the evidence on record that the appellant and respondent had other oral agreements between themselves which were not reduced into writing.

    d. The trial magistrate erred in law and in fact by failing to adduce from the evidence on record that the parties mutual agreements and oral agreements specifically adduced through letter dated 14.4.2023 and refused to admit the letter dated 14.4.2023 as evidence.

    e. The trial magistrate erred in law and in fact by failing to admit and consider some of the appellant's evidence and documents which were filed in the CTS and placed in the court file.

    f. The trial magistrate erred in law and in fact by failing to give the appellant a proper chance to defend himself during the trial.

    g. That the trial did not meet the threshold of a fair hearing and a right to be heard was a sham.

    h. The trial magistrate erred in law and in fact by failing to record the questions that were posed by the Appellant during cross examination to the Respondent.

10. The grounds have no basis in law. There is no basis for the recording of the statement. On the other hand, there is nothing on record showing a questionnaire on evidence given but not recorded.

11. Parties filed submissions. The submissions were that the trial was a mistrial and a sham. The court admitted evidence not produced in court and did not record testimony. The court is said not to have considered other oral agreements amending the written agreement. Reliance was placed on the case of CMC Holdings Ltd v James Mumo Nzioki [2004] KECA 143 (KLR). It is indicated that a right to

a fair hearing cannot be taken away under Article 50 of *the Constitution*. However, in reality, the case does not deal with any of the issues raised. There is further reliance on Order 45 rule 2 of the Civil Procedure Rules and the case of Nyamogo and Nyamogo Advocates v Kogo [2001] 1 EA 173. He sought for the matter to be sent for retiral. Reliance was based on the case of MHD v MSO & another [2025] KEHC 11615 (KLR).

Duty of the first Appellate Court

12. 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 trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

13. In the case of Mbogo and Another vs. Shah [1968] EA 93 where 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 is 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."

14. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges 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 trial 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."

15. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial 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.

16. In the case of Peters vs Sunday Post Limited [1958] EA 424, 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..."

17. I do not find any basis to deal with the question of whether a mistrial happened. The evidence on record shows the questions raised in the pleadings. They are only sub-issues:

    i. Proof of breach of contract, and

    ii. Reliefs

18. The court below was dealing with a pure question of refund. The main complaint of the respondent was that the land was not registered in the appellant's name. However, this is not a question of breach but capacity. However, this was the same status before the agreement was written. Consequently,

a priori questions of capacity cannot be said to be breached. Secondly, the agreement was for Ksh 2,400,000/=. The respondent paid only Ksh. 1,800,000/=. It cannot thus be true that the appellant breached the agreement.

19. It is evident from the record that the parties subsequently agreed to a refund arrangement. However, that agreement was never registered. Be that as it may, the cause of action pleaded in the plaint is premised on an alleged breach of the main agreement. No such breach was demonstrated. The respondent, in fact, relied on and acted upon the agreement without establishing any violation thereof.

20. Parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> .....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.
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> In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when 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 whereof the learned author posited that: -
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> 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....
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> 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.

21. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...

22. Therefore, the refund agreement cannot be a basis for refund. Only the amount found due and refundable was Ksh.1,200,000/=. An order to refund interest is untenable in the absence of a breach. Failure to refund in time is not a breach. The amount now becomes money had and received. The court will not award interest before the suit was filed. Consequently, an award of 15% over the sum of Ksh. 2,000,000/= is baseless. In the absence of evidence of a breach and of the registration of both agreements, the only remedy available is money had and received.

23. The appeal is allowed to the extent that a sum of 15% of Kshs. 1,200,000/= is set aside. The rest of the orders remain the same.

24. This leaves the issue of costs, which 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.

25. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

26. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR), 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, prior-to, during, and subsequent-to the actual process of litigation

22. 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. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

27. The appellant involved issues that were unnecessary. He has not paid the undisputed amounts. He is not entitled to costs. Therefore, each party will bear their own costs.

Determination

28. In the upshot, I make the following orders:

a. The appeal is allowed partly.

i. The judgment and decree of the lower court is set aside. In lieu thereof, I make the following orders:

ii. Judgment is entered for a sum of Ksh. 1,200,000/=.

iii. The respondent to have costs in the lower court.

iv. Interest from the date of filing, that is 28.03.2024, at court rates.

b. Each party shall bear their own costs in this appeal.

c. For avoidance of doubt, the order for payment of further 15% of Ksh. 1,200,000/= is set aside.

d. Stay of execution for 30 days.

e. Right of appeal 14 days.

f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 9TH DAY OF MARCH, 2026. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Appellant present

Court Assistant – M. Nderitu