



**Ngengi v Malonza (Originating Summons E729 of 2021)
[2025] KEHC 1090 (KLR) (Commercial and Tax) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1090 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ORIGINATING SUMMONS E729 OF 2021**

RC RUTTO, J

FEBRUARY 28, 2025

BETWEEN

JEAN MUMBI NGENGI APPLICANT

AND

PETER MWENDWA MALONZA RESPONDENT

JUDGMENT

1. This judgment determines the Originating Summons dated 6th July 2021, brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 52 Rule 4(e) of the Civil Procedure Rules. The Originating Summons is supported by the affidavit of the Applicant sworn on 6th July 2021 and Supplementary Affidavit sworn on 22nd February 2022. The facts leading to the case are that the applicant engaged the Respondent, an Advocate of the High Court of Kenya, for the sale of Flat Number MF 13J, Block 13, on L.R. No. 25980 (“the subject property”). Upon accepting instructions, the dealings culminated in the execution of a sale agreement dated 14th June 2011, for a consideration of Kshs. 5,400,000/= paid through the Advocate/Respondent who was to remit the proceeds of the sale to the Applicant. The Applicant avers that the said amount was never remitted hence she seeks the following orders: -
 - a. That the court be pleased to order Peter Mwendwa Malonza T/A Malonza & Company Advocates to unconditionally release and/or pay the Applicant Kshs 5,400,000/= being the proceeds from sale of Flat Number J, Block 13 on L.R No. 25980 situated in Madaraka estate.
 - b. That the Defendant do pay interest of 20% from 2011 to date of payment.
 - c. The costs of the suit be awarded to the Plaintiff.



2. In opposing the Originating Summons, the Respondent filed a Replying Affidavit and a Further Affidavit, sworn on 20th August 2011 and 6th October 2021, respectively. The Respondent confirmed acting for the applicant in the transaction and stated that the purchaser of the subject property paid the purchase price in instalments, which extended beyond the completion period and the funds were disbursed in accordance with the Applicant's instructions. Further, that the transactions were concluded in the year 2012 and for about 10 years no claim of any unpaid money was made.
3. After attempts to settle the issues raised herein through mediation ultimately failing, the summons was heard by way of written submissions. The Applicant's submissions are dated 25th August 2024, while the Respondent's submissions are dated 16th May 2024.

Applicant's submissions

4. The Applicant submitted that she sold the subject property for a purchase price of Kshs. 5,400,000/=. The Respondent, practicing under the name and style of Malonza & Company Advocates, acted for both parties in the transaction. The applicant further submitted that she granted the purchasers vacant possession in 2011 and that the Respondent failed to remit the purchase price to her.
5. The Applicant identified two issues for determination: whether the suit is time-barred and whether she is entitled to the reliefs sought.
6. On the first issue, the Applicant submitted that pursuant to Section 19 (1) of the Limitations of Actions Act, the suit is not time barred. Additionally, that the right to recover the land accrued when the Respondent forwarded the transfer documents for execution and she declined to sign, as she believed that the purchasers were yet to pay the full purchase price. It was her submission that the attempt to effect transfer constituted a fresh and legitimate cause of action, effectively resetting the limitation period for the claim, and therefore the doctrine of laches does not apply. The Applicant relied on the case of *Diana Katumbi Kiiro v Reuben Musyoki Muli* [2018] eKLR to assert that the cause of action arose in 2019 when the purchaser sought the transfer and not the time of sale.
7. On the second issue, the Applicant relied on Section 80 of the *Advocates Act* to stress the duty of an Advocate to a client. She submitted that the Respondent has not disputed the existence of an advocate-client relationship or refuted receiving the proceeds. Instead he has provided evidence of payments whose details are unrelated to the proceeds from the sale of the subject property. The Applicant argues that the Respondent's evidence does not reflect or relate to any transaction between her and the purchasers. Further that the documents furnished as purported evidence of the utilization of the proceeds of sale do not add up to Kshs.5,400,000/-
8. The Applicant concludes that the Respondent bears the burden of proving that the proceeds of the sale were released to her, given that she has already established that they were not. She submits that the burden shifted to the Respondent, who failed to discharge it and consequently, she submitted that the Originating Summons is merited and ought to be allowed.

Respondent's submissions

9. The Respondent set out the background as follows; that he acted for the Applicant during the acquisition of the subject property from Muthoni Murage in 2009 and its subsequent sale to Meshack Kijuba in 2011. At the time, he and the Applicant were married but have since divorced. Thereafter, the Respondent proceeded to submit on two issues: whether the reliefs sought by the Applicant should be granted and who is entitled to the costs of the suit.



10. On the first issue, the Respondent submitted that all payments were made and disbursed in accordance with the Applicant's instructions. Further, he stated that he had provided compelling documentary evidence of multiple transactions that benefited the Applicant. He contended that payments, totalling Kshs 862,000/=, were made to the Applicant's agents, Geoffrey Maithya and her manager at the time, Mr. Ndung'u, in accordance with the Applicant's specific instructions.
11. He further argued that the sale transaction took place in 2011 and that the Applicant has not provided any documentary evidence proving non-payment or any attempts to follow up on payments from him. He reiterated that he has furnished evidence demonstrating that the purchase price was disbursed as per the Applicant's instructions.
12. On the second issue, the Respondent submitted that the Applicant knowingly initiated legal proceedings against him despite having received the proceeds of the sale in 2011 and 2012. He submitted that any costs incurred by him in relation to the suit should be attributed to the Applicant's dishonesty and lack of clean hands.
13. The Respondent also pointed out that the Applicant's prolonged inaction for almost 10 years rendered her guilty of laches, thereby making the suit time-barred and raising questions about its legitimacy and timeliness. He contended that time began to run in 2012 and would have naturally lapsed in 2018. In support of this argument, he relies on the case of John Omollo Nyakango t/a H.R. Gainjee & Sons v Kenya Power & Lighting Co. Ltd [2022] eKLR, where the suit was struck out based on Section 4(1) of the *Limitation of Actions Act*.
14. Consequently, he submitted that the court should dismiss the claim with costs.

Analysis and Determination

15. I have considered the Originating Summons filed, the grounds therein, the Respondent's responses, as well as the written submissions and authorities cited by both parties. The issues for determination are:
 - a. Whether this suit is time barred.
 - b. Whether the Applicant is entitled to the amount of Kshs 5, 400, 000/=
16. On the first issue, the Applicant submits that this suit concerns the recovery of the proceeds from the sale of land, is subject to a time limit of 12 years from the date when the right to receive the money accrued, as provided under Section 19(1) of the *Limitation of Actions Act*. The Respondent, on the other hand, argues that the cause of action is based on a contract, which has a time limit of six years for a claim to be raised, as per Section 4(1) of the *Limitation of Actions Act*. The Respondent further contends that the Applicant's prolonged inaction in filing the claim renders her guilty of laches.
17. The sale transaction which is the basis of this claim is dated 14th June 2011. The question that then arises is whether the cause of action is one for a breach of contract, or an action for the recovery of the proceeds of sale.
18. The person sued in this matter is the Applicant's counsel in the transaction, not the purchaser in the sale agreement. Therefore, it cannot be said that this is a case of breach of contract where one of the parties has failed to meet its obligations. Furthermore, upon reviewing the sale agreement, it is clear that the transaction was between the Applicant and the purchasers, Llanziva Meshack Kijuba and Helemina Shikokoti. Besides, the Respondent admitted that the purchase price was fully paid by the purchasers under the agreement, with payments made in 2011 and 2012. Therefore, it is clear that the claim before this court is not one for breach of contract but for the recovery of the proceeds from the sale of land.



19. Having established the cause of action, then, when did it accrue? According to Black's Law Dictionary (10th Edition), the term "accrue" is defined as "to come into existence as an enforceable claim or right." According to the sale agreement, specifically Clause 5 on Completion, it states:

"Upon execution of this Agreement and payment of the full purchase price, the Purchaser shall be entitled to vacant possession."

20. In my view, and considering the admission of vacant possession as issued in 2011, it follows that an enforceable claim or cause of action arose in 2011, when the vacant possession was surrendered. It is at this point that the Applicant should have received the outstanding purchase price. I therefore do not agree with the Applicant's position that the cause of action only accrued in February 2019 when she failed to honor the request for transfer, on the grounds that she had not yet received the full purchase price.

21. Section 19 (1) of the Limitations of Action Act states:-

"19. Actions to recover mortgage money or proceeds of sale of land

(1) An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued."

22. Given that this claim was filed in 2021, ten years after the cause of action accrued, this matter cannot be said to be time-barred. The rationale of the statute of limitation was aptly captured in the East African Court of Justice Appeal Case No. 2 of 2012, Attorney General of Uganda & Another Vs. Omar Awadh & 6 Others [2013] eKLR where it was stated as follows;

"Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overarching rationale for statutes of limitations, such as the time limit of Article 30 (2) of the EAC Treaty, is to protect the system from the prejudice of stale claims and their salutary effect on the twin principles of legal certainty and of repose (namely: affording peace of mind, avoiding the disruption of settled expectations, and reducing uncertainty about the future)".

23. This matter, having been filed two years before it would become stale, cannot therefore be considered time-barred.

24. On the second issue, the Applicant alleges that Respondent declined to submit to her the full purchase price despite having received the same from the purchasers. In contrast, the Respondent has relied on several documents attached to his affidavit, including: a copy of an RTGS form evidencing a payment of Kshs 2,145,500/= in favor of the Applicant; a bank slip for Kshs 250,000/= in favor of the Applicant; a deposit slip for Kshs 250,000/= in favor of the Applicant's Barclays Bank account; copies of acknowledgment of payment for Kshs 200,000/= to the selling agent, Geoffrey Maithya; and a transaction receipt for Kshs 1,200,000/= in favor of the Applicant. The Respondent asserts that these transactions demonstrate payment of the purchase price to the Applicant or under her instructions. However, the Applicant denies the validity of this evidence, arguing that it does not relate to the sale agreement dated 14th June 2011.



25. It is not in dispute that the Applicant sold the subject property to the purchaser at Kshs 5, 400, 000/= . It is also not in dispute that the proceeds of the sale were received by the Respondent. What is in dispute is whether the proceeds of sale agreement of 14th June 2011 were transferred to the Applicant.
26. The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the Evidence Act. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:
- “In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”
27. It is a well-established principle that he who alleges must prove. When the Applicant filed the claim, alleging that the Respondent had failed to remit the purchase price to her, the Respondent provided evidence proving that the payment was indeed remitted to the Applicant as per her instructions. It was then incumbent upon the Applicant to disprove the payments made.
28. In her evidence the Applicant disputes the transfer of Kshs 2,142,500/=, claiming that it is unrelated to the sale. However, she does not clarify the purpose of this payment, despite the account details being undisputedly hers. Consequently, I am not convinced that this transaction was for a different sale. Regarding the cash deposit receipt for Kshs 250,000/=, the Applicant argues that it does not constitute proof of payment of the proceeds from the sale of the subject property. However, she fails to adduce evidence to demonstrate what the payment was for, noting that the receipt is in her name. Similarly, for the cash deposit voucher from Barclays Bank in the Applicant's name, she does not disclose what the payment was for, since the account details remain unchallenged.
29. Concerning the payments made to third party Geoffrey Maithya, the Applicant asserts that the funds were not for her, but fails to confirm or deny whether she knew the third party and whether she issued instructions to have the amounts remitted to him. On a balance of probability, this amount was paid to her or on her instructions.
30. As for the transaction receipt of Kshs 1,200,000, it is made out to the Respondent's firm, yet no further evidence has been provided to show that this amount was remitted to the Applicant. Therefore, it remains unclear to this court whether this deposit was indeed transferred to the Applicant.
31. I agree with the Applicant that there is no evidence of the alleged sum of Kshs 662,000 or the cheque for Kshs 300,000 that was purportedly remitted. Regarding the PMM1 to PMM11, I agree with the Applicant that no evidence has been presented to show that the monies used to settle the case between the Applicant and NIC Bank Limited were sourced from the proceeds of the sale agreement dated 14th June 2011.
32. The legal position is that the burden of proof in civil cases such as the present one rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that:-
- “We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the



parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

33. Therefore, after analysing the documentary evidence submitted before this court, I find and hold that the Respondent partially remitted the purchase price to the Applicant. However, in the absence of conclusive proof that the full amount was remitted, this court cannot make a determination that the entire purchase price was paid to the Applicant

34. Regarding the claim for interest at a rate of 20% from 2011 to the date of payment, I note that the parties did not make submissions on this issue. Nevertheless, I am guided by the provisions of Section 19(4) of the Limitation of Actions Act, which states:

“ 19. Actions to recover mortgage money or proceeds of sale of land

(4) An action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, may not be brought after the end of six years from the date on which the interest became due”

35. In light of the foregoing and the timelines stated above, the said interest is not payable.

36. In conclusion and for the reasons set out above, the suit partially succeeds as follows: -

- a. The Respondent shall pay the Plaintiff the outstanding balance of the purchase price, which remains unproven in full, amounting to Kshs 2,557,500/=, being proceeds from the sale of flat No. J, Block 13, erected on L.R No. 25980.
- b. Each party to bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 28TH DAY OF FEBRUARY 2025

RHODA RUTTO

JUDGE

For Applicant:

For Respondent:

Court Assistant:

