



REPUBLIC OF KENYA



KENYA LAW
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**Mae v Chilumo (Civil Appeal E272 of 2024)
[2025] KEHC 12309 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 12309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E272 OF 2024**

**F WANGARI, J
JULY 31, 2025**

BETWEEN

CECIL MAE APPELLANT

AND

JUSTINE CHILUMO RESPONDENT

(Being an appeal against the Judgment of Hon. V. Muthoni (Adjudicator/RM) delivered on 13th August 2024 in Mombasa SCCCOMM No. E532 of 2024, Justine Chilumo v Cecil Mae)

JUDGMENT

1. The Claimant/ Respondent filed his Statement of Claim dated 05/06/2024 seeking compensation for Kshs. 450,000/= being the total costs incurred in land purchase and development in the said land, interest and costs of the suit. It is stated that on 27/02/2022 he entered into a contract with the Respondent/Appellant for sale of a plot of land situated in Utange area for Kshs. 200,000/=.
2. That the Claimant fenced the plot, dug a pit latrine and put up a temporary structure. That the total cost incurred on the said parcel of land was Kshs. 450,000/=. It turned out that the parcel of land had been sold to other individuals who went and demolished the structures on the plot.
3. The Respondent/Appellant in his Response to Statement of Claim dated 09/07/2024 admitted having entered into a sale of land agreement with the Claimant. Sometime in year 2024, there was a person who went claiming ownership of the land. A case was filed in the Environment and Land Court, ELC 69 of 2023.
4. Both the Claimant and the Respondent agreed on a refund of Kshs. 200,000/=. The Respondent sent Kshs. 150,000/= through Mpesa but the Claimant reversed the same to the Respondent's number. The Claimant wanted to be paid the whole amount at once which was not possible. The Respondent also disputed the amount of Kshs. 450,000/= being claimed.



5. The suit was heard in the Small Claims Court and Judgment delivered on 13/08/2024. Judgment was entered on admission for Kshs. 200,000/=. A further Kshs. 149,900/= being the amount proved to have been spent on developing the land and further cash paid to the Respondent, making a total amount Kshs. 349,900/= interest from the date of filing suit until full payment. The Claimant was also awarded costs of the Claim.
6. Being dissatisfied with the Judgment, the Respondent/ Appellant filed the Memorandum of Appeal dated 11/09/2024 on grounds that;
 - a. the learned trial Magistrate/Adjudicator erred in law and fact in finding the Appellant herein liable to pay Kshs. 149,900 despite there being no sufficient evidence to corroborate the said amount;
 - b. entering Judgment against the Appellant on admission of Kshs. 200,000/= and still entering judgment for Kshs. 149,000 which was not pleaded and thus amounting to double jeopardy and violation of rules of natural justice;
 - c. finding the Appellant liable to pay the Respondent a cumulative sum of Kshs. 349,900/= against the weight of evidence on record;
 - d. failing to sufficiently consider the Appellant's position as set out in his pleadings and evidence thus reaching a manifestly erroneous finding;
 - e. failing to fully analyze, appreciate and evaluate the nature of the case and evidence before her and the issues for determination and consequently fell in error and arrive at a wrong determination;
 - f. arriving at a decision that was in the circumstances wrong.
7. The Appellant prayed that the appeal be allowed with costs.
8. The court directed that the appeal be disposed off by way of written submissions. Parties were given timelines within which to comply. As at the time of writing the Judgment herein, parties had not filed their submissions.

Analysis

9. I have considered the Record of Appeal and all the evidence on record. The issues for determination are: -
 - a. Whether the trial court was correct in its finding and the awards made therein
 - b. What orders on costs should issue
10. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle v Associated Motor Boat Co.* (1968) E.A 123 as follows: -

“... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”
11. This being an appeal from Small Claims Court, the jurisdiction of this court is limited to section 38 of the [*Small Claims Court Act*](#) which provides as follows;



- (1). A person aggrieved by the decision or an order of the court may appeal against that decision or order to the High Court on matters of law.
 - (2). An appeal from any decision or order referred to in subsection (1) shall be final.
12. An appeal on points of law only is similar to second appeals at the Court of Appeal. In the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, the duty of a second appellate court was set out as follows;
- “This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse”.
13. The Claimant claimed the refund of money arising out of a failed sale of land contract between him and the Respondent. Section 12 (1), of the *Small Claims Court Act* which is the jurisdiction clause provides as follows;
1. Subject to this Act, the rules and any other law, the court has jurisdiction to determine any civil claim relating to-
 - a. contract for sale and supply of goods or services;
 - b. a contract relating to money held and received;
 - c. liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - d. compensation for personal injuries; and
 - e. set-off and counterclaim under any contract.
14. The Appellant stated that the trial court erred in law by entering judgment on admission for Kshs 200,000/= and further awarding Kshs. 149,900/= which was not pleaded or proved. I have perused through the Statement of Claim and Specifically paragraph 3 and 4 of the claim. A total of Kshs. 450,000/= was claimed, and an explanation on how the amount came to be was given in paragraph 4. It was upon the Claimant to prove the figures as claimed.
15. I have perused the receipts produced as exhibits. The receipts are in the name of one Elizabeth. The Claimant has adduced evidence that the said Elizabeth is his wife. The wife was a witness to the agreement between the Claimant and the Respondent. The said Elizabeth was actively involved in the matter including the criminal report made against the Respondent on the offence of obtaining by false pretense. The court awarded the claim as per the receipts produced. The award shall not be interfered with.
16. I find that the Claimant had discharged the legal burden of proof that that in addition to the money paid for the plot, he incurred further expenses in developing the land. Photos attached to the report from the DCI dated 13/07/2024 refers. It was upon the Appellant to adduce evidence in rebuttal hence shifting the evidential burden of proof. On shifting of evidential burden of proof, the Supreme Court in the case of *Raila Amolo Odinga & Another vs. IEBC & 2 Others* [2017] eKLR held as follows;
- “(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the Plaintiff, however, “depending on the effectiveness



with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the Respondent to adduce evidence to prove compliance with the law...”

27. The Respondent/ Appellant on his part had mere denials that there were no developments done on the land. He did not discharge the burden of proof. From the analysis of the trial court and making a finding that the evidence of the Claimant/ Respondent had proved his claim, I find no reason to interfere with the discretion of the court in making the finding.
29. On costs, the same follows the event. However, the court retains discretion whether to award the same or not. Considering that litigation must come to an end, and the relationship that both parties had before the fallout, each party is to bear its own costs.

Determination

29. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. That the appeal is hereby dismissed.
 - b. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JULY, 2025

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HON. F. WANGARI

JUDGE

In the presence of;

N/A by the Appellant

Cheruiyot Advocate for the Respondent

Ms. Norah, Court Assistant

