



**Oyuga v Oluoch (Environment and Land Appeal 19 of 2020)
[2023] KEELC 17348 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17348 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 19 OF 2020
SO OKONG'O, J
MAY 11, 2023**

BETWEEN

PAMELA ANYANGO OYUGA APPELLANT

AND

DICKSON ONJIRO OLUOCH RESPONDENT

*(Being an Appeal from the whole judgment and decree of Hon. S. TEMU, SPM
delivered on 26th November 2020 in Nyando SPMC ELC No. 48 of 2019)*

JUDGMENT

Background:

1. This appeal is challenging the judgment and decree of Hon. S. Temu SPM made on 26th November 2020 in Nyando SPMC ELC No. 48 of 2019 (hereinafter referred to as “the lower court”). The Appellant had brought a suit in the lower court against the Respondent on 22nd November 2019 seeking the following reliefs;
 - a. An order of specific performance of the sale agreement dated 26th January 2007 requiring the Respondent to transfer the right, title and interest in all that property known as a portion of Title No. Kisumu/Wawidhi A1/5890 measuring 0.40 of a hectare (approximately 1 acre) (hereinafter referred to as “the suit property”) to the Appellant and in default the court executive officer to execute the necessary transfer forms, Land Control Board forms and any other relevant forms as will ensure that the Appellant was the absolute proprietor of the suit property.
 - b. A permanent injunction to issue restraining the Respondent whether by himself, servants, agents and or otherwise from disposing of or in any way interfering with the Appellant’s right to the suit property.



- c. In the alternative the Respondent refunds the Appellant the purchase price for the suit property at the current market rate plus interest at 14% per annum from 26th January 2007 until payment in full.
 - d. Any other remedy that the court may deem just in the circumstances.
 - e. Costs of the suit together with interest thereon at court rates from the date of filing suit until payment in full.
2. The Appellant averred that she entered into a sale agreement with the Respondent for the purchase of the suit property on 26th January 2007 at a consideration of Kshs. 130,000/-. The Appellant averred that upon making the final payment of the purchase price, the Respondent was under a corresponding obligation to issue the Appellant with the completion documents to enable the Appellant to transfer the suit property to her name. The Appellant averred that the Respondent had failed and/or ignored to issue the Appellant with the completion documents despite incessant pleas and reminders from the Appellant.
3. The Appellant contended that she complied with the provisions of the said sale agreement but the Respondent did not complete the same. The Appellant averred that the Respondent irrevocably guaranteed to the Appellant that he will deliver a good title to the suit property. The Appellant averred that the Respondent was liable to the Appellant for the market value of the suit property together with all the developments thereon.
4. The Appellant averred that the Respondent was planning to sell the suit property to someone else. The Appellant averred that the sale agreement was binding upon both parties, having been executed by the parties willingly. The Appellant averred that the Respondent's conduct was inequitable and fraudulent.
5. The Respondent entered appearance and filed a statement of defence on 4th February 2020. The Respondent admitted that he was the registered proprietor of the suit property and that he entered into a sale agreement with the Appellant in respect thereof. The Respondent denied that the Appellant fulfilled her part of the agreement and that he failed to issue the Appellant with the completion documents upon full payment of the purchase price.
6. The Respondent averred that the said agreement was not concluded because of nonpayment of the full purchase price by the Appellant and lack of consent of the relevant Land Control Board to subdivide the larger parcel of land and transfer the portion thereof to the Appellant. The Respondent averred that pursuant to the provisions of sections 6 and 8 (1) of the [Land Control Act](#), Chapter 302 Laws of Kenya, the said agreement became void for all purposes for want of the Land Control Board's consent.
7. The Respondent denied that he had irrevocably guaranteed to the Appellant that he would deliver a good title to the suit property and that he was liable to the Appellant for the market value of the suit property and the developments thereon. The Respondent also denied that he was planning to sell the suit property to a third party. The Respondent averred further that the transaction between the Appellant and the Respondent having been voided as aforesaid, the Respondent had a meeting with the Appellant at which the Appellant expressed a desire to have a refund of the purchase price that he had paid to the Respondent for the suit property. The Respondent averred that after the meeting, he refunded the Appellant the full purchase price in the sum of Kshs. 130,000/- through a banker's cheque number 344878. The Respondent averred that the said refund was made in compliance with section 7 of the [Land Control Act](#), Chapter 302 Laws of Kenya.



8. The Respondent averred that the obligations he owed to the Appellant were subordinate to the provisions of the Laws of Kenya, particularly the *Land Control Act*. The Respondent averred that the contractual relationship that he had with the Appellant was terminated in the manner stated above and that the Appellant was not entitled to any of the reliefs that she had sought in the lower court. The Respondent averred that the Appellant's suit was fatally defective, bad in law, incompetent and misconceived as it offended the provisions of section 4 (1) (a) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The Respondent averred that the Appellant's action was for a breach of contract that ought to have been filed within 6 years of the date of the breach, which was 6 months from the date of execution of the said sale agreement.
9. The Appellant filed a reply to defence in which she reiterated the contents of the plaint and denied all the allegations made by the Respondent in the defence save where the same consisted merely of admissions.
10. The lower court heard the matter and rendered a judgment in favour of the Appellant on 26th November 2020. The lower court entered judgment for the Appellant against the Respondent for a refund of Kshs. 130,000/= being the purchase price paid by the Appellant with interest at court rates with effect from 13th March 2019 until payment in full. The Appellant was also awarded the costs of the suit.

The appeal:

11. The Appellant was aggrieved by the said judgment of the lower court and lodged this appeal against the same. In her Memorandum of Appeal dated 18th December 2020 the Appellant challenged the lower court judgment on the following grounds;
 1. That the Learned Trial Magistrate erred in law and in fact when he failed to order specific performance despite finding that there was a sale of land agreement between the Appellant and the Respondent.
 2. That the Learned Trial Magistrate erred in law and in fact in writing a judgment that was at variance with the pleadings and the weight of evidence when he ordered a refund of the purchase price of Kshs. 130,000/= without interest from the time the same became due and owing as the refund should have reflected the market price of the land and not the purchase price.
 3. That the Learned Trial Magistrate erred by ignoring the law of constructive trust as established by precedents.
 4. That the Learned Trial Magistrate erred in law and in principle in relying solely on the provisions of section 6 and 8 (1) of the *Land Control Act* and ignoring the principle of equity as established by precedent.
12. The Appellant prayed for the following orders;
 - a. That the Appeal be allowed and the orders made by the Learned Trial Magistrate on 26th November 2020 be set aside.
 - b. That an injunction does issue restraining the Respondent whether by himself, his servants and/ or otherwise from disposing of or in any way interfering with the Appellant's rights to the suit property until the appeal is heard and determined.



- c. That the Respondent be ordered to transfer the suit property to the Appellant for value and if he fails to do so, the Executive Officer should sign all the transfer documents.
- d. That in the alternative, the Respondent be ordered to refund the purchase price with accruing interest from the date of the sale agreement until payment in full and that the refund should reflect the current market value of the suit property.
- e. That the Appellant be awarded the costs of the appeal and in the lower court.

The appeal was heard by way of written submissions.

The Appellant's submissions:

13. The Appellant filed her submissions on 11th January 2023. The Appellant submitted that this being a first appeal, the duty of this court as a first appellate court set out under section 78 of the *Civil Procedure Act* was spelt out in *Sielle v. Associated Motor Boat Company Limited* [1968] E.A 123 and restated in *Abok James Odera t/a A.J Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR as follows:

This being a first appeal, we are reminded of our primary roles as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the trial judge are to stand or not and give reasons either way.”

The Appellant framed three issues for determination by the court namely;

Whether an order of specific performance ought to have been issued:

14. The Appellant submitted that specific performance is an equitable remedy that lies within the court's discretion to award whenever the common law remedy is insufficient, either because damages would be inadequate or because the damages could not possibly be established. The Appellant submitted that she did not demand a refund of the purchase price from the Respondent. The Appellant submitted that she was entitled to an order of specific performance. The Appellant submitted that the award made in her favour by the lower court was inadequate to the extent that the court ordered a refund of the purchase price only without interest. The Appellant submitted that the Respondent did not have title to the suit property when he entered into the sale agreement with the Appellant. The Appellant submitted that once the Respondent obtained a title in 2017, the Respondent had an obligation to subdivide the suit property and to transfer the sold portion to the Appellant. The Appellant submitted that the most appropriate remedy in the circumstances is specific performance.

Whether the Appellant was entitled to a refund of the purchase price together with interest from 26th January 2007 until payment.

15. The Appellant cited Order 22 Rule 78 of the Civil Procedure Rules and submitted that the same gives the court the discretion to order that interest be paid or not when a sale of immovable property is set aside. In support of this submission, the Appellant relied on *Mehuba Gelan Keul & 2 Others v. Abdulkadir Shariff Abdirahim & 4 Others* [2015] eKLR. The Appellant submitted that the rationale for the payment of interest is that the purchaser has been deprived of the money paid to the vendor for the period it was held by the vendor. The Appellant submitted that although the Respondent entered an agreement with the Appellant on 26th January 2007 the Respondent did not acquire a title for the suit property until 29th August 2017. The Appellant submitted that the lower court should have made a finding that the Respondent did not have a good title when he sold the suit property to



the Appellant. The Appellant submitted that she waited for over 10 years without realising the fruits of her investment. The Appellant submitted that the conduct of the Respondent was dishonest. The Appellant submitted that since the Respondent had no title to the suit property, there was no way either party could have applied for the consent of the Land Control Board for the transaction. The Appellant submitted that the agreement between the parties became operational or was revived when the Respondent acquired a title for the suit property. The Appellant submitted that she should not have been denied interest on her investment from the date of the sale agreement.

Whether the trial court should have considered the principles of equity and trust:

16. The Appellant submitted that where trust is not express, the court can infer the same. The Appellant submitted that trusts that are inferred are constructive and resultant trusts. In support of this submission, the Appellant relied on *Charles Kangayia v. Alfred Musavi & Another* [2020] eKLR. The Appellant submitted that the Respondent held the suit property in trust for her between 2007 and 2017. The Appellant submitted that she had taken possession of the suit property and was only waiting for the property to be transferred to her. The Appellant reiterated that the Respondent had no title to the suit property and as such they could not apply for consent of the Land Control Board. The Appellant cited *Charles Kangayia v. Alfred Musavi & Another* (supra) and submitted that a party who has led another to incur expenses or to prejudice his position on the belief that an agreement is valid cannot be allowed to turn around and claim that the agreement is unenforceable. The Appellant submitted that she trusted the Respondent to cause the suit property to be transferred to her the moment he had a good title to the property. The Appellant submitted that it was as a result of the Respondent's breach of the agreement for sale that she was forced to seek the court's intervention. The Appellant urged the court to allow the appeal with costs.

The Respondent's submissions:

17. The Respondent filed his submissions on 26th January 2023. The Respondent submitted on each ground of appeal starting with the first ground. On the first ground of appeal, the Respondent submitted that it was common ground before the lower court that he was the registered owner of the suit property. The Respondent submitted that it was the Appellant who breached the sale agreement dated 26th January 2007 by her failure to pay the purchase price as agreed. The Respondent submitted that the Appellant had not paid the full price. The Respondent submitted that the money allegedly paid by the Appellant to the Respondent's sons was not received by the Respondent. The Respondent submitted that due to the Appellant's breach of the sale agreement, he rescinded the agreement and refunded the purchase price to the Appellant.
18. The Respondent submitted further that the suit property was agricultural land and as such the sale of the same required Land Control Board Consent as provided under section 6 of the *Land Control Act*. The Respondent submitted that failure by the parties to obtain the consent of the Land Control Board within 6 months voided the sale agreement. The Respondent submitted that it was not the sole responsibility of the Respondent to apply for the Land Control Board's consent. In support of this submission, the Respondent cited *Ezekiel Kisorio Tanui v. Jacinta Ekai Nasaka* [2014] eKLR.
19. The Respondent submitted that the Appellant had now come up with a new argument in this appeal to the effect that the agreement could not be completed because the Respondent had no title to the suit property and that the parties had to wait until the Appellant got title to complete the agreement. The Respondent submitted that a registered owner of land does not need to hold a physical title deed in respect thereof to deal with the land. The Respondent submitted that since the agreement was void for all intents and purposes, the lower court could not order specific performance. The Respondent submitted that the only remedy that was available to the Appellant was a refund of the purchase price



- as provided under section 7 of the *Land Control Act*. The Respondent reiterated that the lower court suit was statute barred under the provisions of the *Limitation of Actions Act*.
20. The Respondent submitted that the equitable doctrine of constructive trust could not be employed to circumvent the clear provisions of the *Land Control Act*. In support of this submission, the Respondent cited *David Sironga Ole Tukai v. Francis Arap Muge & Another* [2014] eKLR.
 21. On the second ground of appeal, the Respondent submitted that the Appellant admitted that she received a banker's cheque from the Respondent but claimed to have returned the same to the Respondent. The Respondent submitted that the Appellant did not tender evidence in proof of the alleged return of the said banker's cheque. The Respondent submitted that he was sure that the cheque had been paid. The Respondent submitted that the burden was on the Appellant who claimed not to have banked the cheque to either bring the cheque to court to demonstrate that it was never cashed or to prove that she returned the cheque to the Respondent. The Respondent submitted that the Appellant did not discharge this burden.
 22. The Respondent submitted further that the lower court ordered though wrongly that the Respondent once again refund the purchase price to the Appellant. The Respondent submitted that the Appellant's advocates rejected the refund cheque. The Respondent submitted that the Appellant having refused to receive the refund cannot claim interest on the same. The Respondent submitted that the interest should run from the date of judgment to when the amount is paid. In support of this submission, the Respondent cited section 26 of the *Civil Procedure Act* and *Jane Wanjiku Wambui v. Anthony Kigamba Hato & 3 Others* [2018] eKLR.
 23. On the third ground of appeal, the Respondent cited *William Kipsoi Sigei v. Kipkoech Arusei & Another* [2019] eKLR in which the doctrines of constructive trust and equitable estoppel were applied in favour of a purchaser who had paid the full purchase price and had been in possession of a parcel of agricultural land for 14 years but failed to obtain the consent of the Land Control Board.
 24. The Respondent submitted that the Appellant neither paid the full purchase price nor took possession of the suit property and as such constructive trust could not be imposed by the court in his favour. The Respondent submitted that during the hearing, the Appellant admitted on cross-examination that she had not fully paid the purchase price and that she had made some payments to the Respondent's son. The Respondent submitted that the Appellant also admitted that she had sold the land to one, Willis and that she never lived on the land. The Respondent submitted that the facts of the case did not qualify the Appellant to rely on the doctrine of constructive trust and equitable estoppel. The Respondent urged the court to dismiss the Appeal with costs.

Analysis and determination:

25. I have considered the judgment of the lower court, the Memorandum of Appeal and the submissions by the advocates for the parties. From the memorandum of appeal, the issues that arise for determination in this appeal are whether the lower court erred in its failure to order specific performance and to award interest on the purchase price from 26th January 2007 which was the date of the sale agreement upon ordering a refund. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, *Verani t/ a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269 and *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 on the duty of the first appellate court. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence



at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.

26. The lower court framed a number of issues for determination one of which was whether there was a valid binding agreement between the Appellant and the Respondent that could be enforced. The lower court found that the sale agreement between the Appellant and the Respondent was subject to the provisions of the *Land Control Act*, Chapter 302 Laws of Kenya. The lower court further found from the evidence on record that the consent of the Land Control Board was not obtained for the sale agreement between the Appellant and the Respondent as required under section 6 of the *Land Control Act*. From those findings, the lower court held that the sale agreement between the Appellant and the Respondent was void and as such was unenforceable. The lower court therefore declined to order specific performance.
27. I find no reason why I should disturb the lower court's findings and holding on this issue. Section 6 of the *Land Control Act* provides that where consent is not obtained for a controlled transaction, the transaction becomes void. Under section 8 of the *Land Control Act*, consent of the Land Control Board should be applied for within 6 months of the date of the transaction. In this case, it was common ground that the parties neither applied for the consent nor obtained the same. Pursuant to section 6 of the *Land Control Act*, the transaction became void as held by the lower court. The Appellant brought in the argument of constructive trust to save her from the strict requirements of section 6 of the *Land Control Act*. The doctrine of constructive trust was neither pleaded nor argued before the lower court. It was therefore not an issue on which the lower court could make a pronouncement. The lower court did not therefore err in not considering whether or not the relationship between the Appellant and the Respondent and the conduct of the parties created a constructive trust in favour of the Appellant in relation to the ownership of the suit property.
28. In *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others* [2014]Eklr, the Court of Appeal cited with approval the Malawi Supreme Court of Appeal case of *Malawi Railways Ltd. v. Nyasulu* [1998]MWSC 3 where the judges quoted an article by Sir Jack Jacob entitled "The present Importance of Pleadings" published in 1960 *Current Legal problems*, at P.174 where the author stated as follows:

"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 or 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 of the 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.”

29. In *Mwangi Mbothu & 9 others v Gachira Waitimu & 9 Others* [1986] eKLR, the court stated that:

The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied.”

30. Trust must be pleaded and evidence led on the basis of which a trust can be implied. As I have stated earlier, the Appellant never pleaded trust. Evidence was also not led from which the court could imply trust even if it was pleaded. In her submissions in the lower court, the Appellant never submitted on the issue of trust or equitable estoppel. All these issues have been raised on appeal. This court cannot determine the appeal on issues that were not raised before the lower court and in respect of which the lower court did not make a determination. For the foregoing reasons, I am in agreement with the lower court that the sale transaction between the Appellant and the Respondent was void and as such unenforceable.

31. On the issue of interest on the refund of the purchase price, the lower court held that the Respondent’s admission that he had refunded the purchase price in the sum of Kshs. 130,000/- to the Appellant by a banker’s cheque on 13th March 2019 constituted an admission that he had received the said amount from the Appellant which admission also revived the Appellant’s claim that was time barred. The court held further that the Appellant having maintained that she did not bank the cheque, the burden was on the Respondent to show that the cheque was banked and paid. The court held further that since the sale transaction became void for lack of consent, the Respondent was under an obligation to refund the purchase price that was paid by the Appellant. The court held that since the Appellant’s claim was revived on 13th March 2019, the interest would accrue on the purchase price from that date. The court therefore entered judgment for the Appellant for Kshs. 130,000/- together with interest from 13th March 2019. The Appellant has contended that the refund should have reflected the then-market value of the suit property and not the purchase price for the property. The Appellant submitted that the interest should have been awarded from the date of the sale agreement on 26th January 2007 until payment in full.

32. On the issue of the refund reflecting the market value of the land, I see no merit in the argument. A refund could only be of the actual amount that the Appellant paid together with interest that was at the discretion of the court. If the Appellant wanted the market value of the land, she should have claimed the same in her plaint and proved the same at the trial. I wonder how the court could have arrived at the market value of the suit property without evidence having been led in respect thereof. On the claim of interest from 26th January 2007, I am in agreement with the lower court that the Appellant’s claim for a refund was time-barred. The sale agreement between the Appellant and the Respondent became void on 26th July 2007 after the expiry of 6 months from the date of the agreement for lack of Land Control Board consent. It was from that date that the Appellant’s cause of action for the recovery of the purchase price that she had paid accrued. The claim being for the recovery of money following the termination of a contract, the same should have been brought latest by July 2013. The Appellant’s suit was filed on 22nd November 2019 several years after the expiry of the limitation period. The lower court was right when it found that the Appellant’s claim was revived on 13th March 2019 through the Respondent’s admission of the debt and expression of willingness to pay the same. Section 26 of the *Civil Procedure Act* gives the court the discretion on the issue of interest. The court can award interest prior to the date of filing suit, from the date of filing suit and after the date of the decree. In this case,



the court after taking all factors into account including the fact that the cause of action was revived on 13th March 2019, awarded interest from that date which was a date prior to the filing of suit. I am not persuaded by the Appellant that the lower court exercised its discretion wrongly. A claim of interest from 26th January 2007 was time barred and the court was right in rejecting the same. In any event, the Appellant did not pay the entire purchase price of Kshs. 130,000/- on 26th January 2007. I wonder how she could earn interest on the entire sum from that date. In *Jane Wanjiku Wambui v. Anthony Kigamba Hato & 3 others* [2018] eKLR that was cited by the Respondent, the court stated that:

"First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See *New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd* [1988] KLR 380."

33. For the foregoing reasons, I find no reason to differ from the holding by the lower court on this issue. The interest shall accrue from 13th March 2019 and in the event that the principal amount due herein together with interest from 13th March 2019 had been tendered to the Appellant following the judgment delivered by the lower court on 26th November 2020 and the same was rejected as claimed by the Respondent, no further interest will be due to the Appellant on the principal amount from the date of such rejection.

Conclusion:

34. I find no merit in the appeal before the court. The same is dismissed with costs to the Respondent.

DELIVERED AND DATED AT KISUMU ON THIS 11TH DAY OF MAY 2023

S. OKONG'O

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Akinyi for the Appellant

Mr. Kouko for the Respondent

Ms. J. Omondi-Court Assistant

