



**Mwai v Kabuga & another (Environment and Land Appeal
E004 of 2023) [2025] KEELC 1430 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1430 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E004 OF 2023**

**JM MUTUNGI, J
MARCH 20, 2025**

BETWEEN

DAVID NGUYO MWAI APPELLANT

AND

JOSEPH NJUGUNA KABUGA 1ST RESPONDENT

SIMON NJUGUNA MWEA 2ND RESPONDENT

*(An appeal arising from the Judgment and Decree of Honourable S.M Nyaga delivered on
26.1.2023 in the Senior Principal Magistrate's Court in ELC Case No. 14 of 2021 at Baricho)*

JUDGMENT

1. This Appeal arises from the Judgment delivered on 26th January 2023 by Hon. S.M. Nyaga (SRM) in Baricho PMC ELC 14 of 2021. In his Judgment, the Learned Magistrate declared that the 1st Respondent is the legal owner of the land parcel Kiine/Gacharo/2787 (the suit land). He ordered the Appellant to vacate the suit land and to surrender any developments on it. Alternatively, he directed the Appellant and the 2nd Respondent to jointly and severally refund Kshs. 1,750,000, along with costs and interests from the time of the breach of the Memorandum of understanding dated 26th August 2019. Additionally, the Trial Magistrate dismissed the Appellant's Counterclaim with no order as to costs.
2. Aggrieved and dissatisfied with the Court's decision, the Appellant, who was the 1st Defendant in the Court below, appealed to this Court and filed a Memorandum of Appeal and Record of Appeal dated 10th February 2023 and 27th October 2023, respectively. The Appellant's Memorandum of Appeal set out 7 grounds of Appeal as follows: -
 1. That the Honourable Learned Magistrate erred in law and in fact by failing to apportion the liability when he failed to direct the 2nd Respondent to refund the 1st Respondent the remaining portion.



2. That the Honourable Learned Magistrate erred in law and in fact by ordering the Appellant to jointly and severally refund the 1st Respondent.
 3. That the Honourable Learned Magistrate erred in law and in fact by disregarding the Counterclaim and failing to analyze evidence thereof.
 4. That the Honourable Learned Magistrate erred in law and in fact by failure to appreciate the fact that the Memorandum of Understanding dated 26th August 2021 in respect of land parcel no. Kiine/Gacharo/2787 exclusively covered the Appellant's part of refunding the 1st Respondent and did not cover the 2nd Respondent.
 5. That the Honourable Learned Magistrate erred in law and in fact by failing to consider the fact that the Memorandum of Understanding dated 26th August 2019 was arrived at through coercion and/or under duress as the Appellant was in lawful custody of the police.
 6. That the Honourable Learned Magistrate erred in law and in fact by holding that breach had arisen yet the Memorandum of Understanding dated 26th August 2019 did not have the completion date.
 7. That the Honourable Learned Magistrate erred in law and in fact by going out of his way assessing cost and damages contrary to Clause 1 of the Memorandum of Understanding dated 26th August 2019 yet the court had framed only one issue of interpretation as the only issue for determination.
3. The Appellant prayed for the following orders:
1. This Appeal be allowed.
 2. The Judgment delivered on 26th January 2023 by the Honourable magistrate be set aside and do apportionment of liability as per the Memorandum of Understanding dated 26th August 2019 and each party to refund what it received and in the alternative, the Court do order the 2nd Respondent to pay the 1st Respondent the monies received.
 3. A declaration that the Appellant does not owe the first Respondent and Counterclaim dated 19th August 2021 as per prayer (b) and (c) be allowed.
 4. Any other alternative relief that this court may deem fit to grant.
4. The 1st Respondent who was the Plaintiff filed the suit in the Lower Court, claiming that the Appellant and the 2nd Respondent had defrauded him of his money by falsely presenting themselves as the legal owners of land parcel Makuyu/Kimorori/Block III (Kagaa)/635. The 1st Respondent testified that after he paid the purchase price and took possession of the land, he discovered that the Appellant and the 2nd Respondent were not the actual owners of the land they sold to him. The 1st Respondent reported the matter to the police. Following the report and their arrest, the Appellant and the 2nd Respondent agreed to settle the issue out of Court, and they pledged title of the land as security. The 1st Respondent stated that the land was originally owned by Samuel Maina, who was holding it as collateral for a loan of Two Hundred Thousand Kenya Shillings (Kshs 200,000/-). The 1st Respondent stated that he agreed to pay this amount in order to have the title released and transferred to himself to stand as security.
5. He testified that the Memorandum of Understanding required both the Appellant and the 2nd Respondent to repay the money owed to the 1st Respondent by 10th October 2019, which they failed



- to do. As a result, the 1st Respondent claimed to have become the legal owner of the suit land. While he acknowledged receiving a sum of One Million Four Hundred and Fifty Thousand Kenya Shillings (Kshs 1,450,000/-) from the Appellant, he insisted that he was still owed Three Million and Five Hundred Thousand Kenya Shillings (Kshs 3,500,000/-) by both the Appellant and 2nd Respondent.
6. During Cross-examination, the 1st Respondent confirmed that he had been in communication with the Appellant and reiterated that he received the One Million Four Hundred and Fifty Thousand Kenya Shillings (Kshs. 1,450,000/-) from the Appellant just two days before filing his claim in the Lower Court. He testified that, in addition to the Two Hundred Thousand Kenya Shillings (Kshs. 200,000/-) paid to Samuel Maina, he spent a further Two Hundred Thousand Kenya Shillings (Kshs 200,000/-) on building materials for the suit land; though he conceded he had no documents filed in Court to substantiate this claim. The 1st Respondent stated that he paid money to both the Appellant's and the 2nd Respondent's account. He maintained that using the suit land as security was intended to secure payment of the entire amount owed and not an individual obligation. He affirmed that he had not attempted to recover any amount from the 2nd Defendant.
 7. The Appellant testified as DW1 and it was his evidence that he freely signed the Memorandum of Understanding dated 26th August 2019, even though he was in police custody at the time. He affirmed that he had made a commitment to pay his portion in full on or before 10th October 2019, but he failed to do so owing to financial challenges. Nonetheless, he stated that he paid a sum of One Million Four Hundred and Fifty Thousand Kenyan Shillings (Kshs. 1,450,000/-) to the 1st Respondent on 22nd March 2021. He affirmed that he had a permanent home on the suit land and he resided thereon with his family.
 8. DW2, Samuel Maina Ngugi, in his evidence confirmed that the land was registered in his name and that he had been the proprietor from 2017 to 2019. He indicated that he held the land as a lien against a debt of One Million Two Hundred Thousand Kenya Shillings (Kshs 1,200,000/-) owed by the Appellant. He affirmed that he did not have a claim over the suit land.
 9. After analyzing and evaluating the evidence, the Trial Court delivered the impugned Judgment which has provoked the instant Appeal. The holding by the Learned Trial Magistrate was that the Appellant and the 2nd Respondent had vide the Memorandum of Understanding agreed to use land parcel Kiine/ Gacharo/2787 as security for the refund to the 1st Respondent of the full purchase price paid damages and costs. The Trial Court held that the total amount owed to the 1st Respondent on account of the purchase price, damages and costs was Kshs 3,200,000/- out of which the Appellant had paid by way of refund Kshs 1,450,000/- leaving a balance of Kshs 1,750,000/- which the Trial Magistrate ordered the Appellant and the 2nd Respondent could in the alternative refund to the 1st Respondent though the Court made no mention of what would happen to the land held in the name of the 1st Respondent.

Submissions of the Parties

10. The Appellant filed his written submissions dated 31st May 2024 and raised one key issue for consideration: whether the Honorable Learned Magistrate erred in the Law by holding the Appellant liable for the actions of the 2nd Respondent. Counsel for the Appellant submitted the 1st Respondent had admitted receiving a sum of one Kshs 1,450,000/- from the Appellant which was the amount the Appellant was liable to pay under the MOU. Counsel contended that the Appellant had used the title of the suit land as security for the refund of the amount that he had received from the 1st Respondent and consequently submitted unfairly from the Appellant as the 1st Respondent should not be permitted to benefit he received Kshs. 1,450,000 from the Appellant and keeping possession of the land would be subjecting the Appellant to double jeopardy. The Appellant argued that such a



situation would constitute unjust enrichment for the 1st Respondent. It was the Appellant's position that having fulfilled his obligations, the Lower Court should have allocated the remaining balance to the 2nd Respondent, who not only chose not to participate in the trial but also never reimbursed the money received from the 1st Respondent. The Appellant placed reliance on the cases of *Robinson v. Harman* (1848) 1 EXCH 850 and *Mafatlal Industries Limited v. Union of India* (1997) 5 SCC 536 to support his arguments.

11. The 1st Respondent filed his written submissions on 23rd October 2024. Counsel for the 1st Respondent submitted on three issues. Firstly on whether the Appellant bore liability for the 2nd Respondent and it was his argument that the spirit of the Memorandum of Understanding was that the security, though it belonged solely to the Appellant, was meant to cover both the Appellant and the 2nd Respondent jointly. He referred paragraph 10 of the Memorandum of Understanding, which provided as follows:-

“ And Whereas the 1st parties with their intention to revoke the agreement dated 5th February 2019 and refund the purchase price along with costs and damages, they have voluntarily and/or without any coercion whatsoever agreed and they are desirous and willing to have the said title deed Kiine/Gacharo/2787, currently registered in the name of SAMUEL MAINA NGUGI (ID 9267653) transferred to JOSEPH NJUGUNA KABUGA (ID No. 20315964), as security for the said purchase price, together with costs and damages, until the same is paid in full of the agreement dated 5th February 2019.

12. The 1st Respondent's Counsel also made reference to paragraph 11 of the Memorandum of Understanding, which provided as follows:

“ And, whereas the 1st parties undertake to pay the 3rd party the above purchase price with costs and damages on or before the 10th of October 2019, the same shall be shared equally between the two.”

13. Counsel argued that the clauses clearly indicated that title No. Kiine/Gacharo/2787 was to serve as security for both until the total purchase price and any damages and costs were fully paid. He emphasized that there was no agreement stating that this security would cover only the Appellant's financial obligations. Counsel further referred to clause 3 of the MOU which stated that upon the 1st parties fully repaying the refund within the stipulated period, the 3rd party would execute all necessary documents and transfer the title deed of the suit land to the Appellant. He expressed his view that the 1st parties were in breach of this clause and continued to be in breach, meaning that the clause became overtaken by events. He submitted that the recourse available would be as stipulated by clause 7 of the Memorandum of Understanding, which states:

“ That in the event that the 3rd parties do not meet the terms of this memorandum of understanding, the said agreement is and shall remain valid, and the purchaser shall use it for any legal action.”

14. The 1st Respondent further argued that the term "1st parties" was clearly defined on the agreement's first page to mean both the Appellant and the 2nd Respondent. Counsel submitted that, as a consequence, the Appellant bore the burden of the 2nd Respondent when he willfully offered his title as security for the purchase price. The second issue that Counsel addressed was whether the Memorandum of Understanding was signed under coercion and it was his position that the Memorandum of Understanding was freely entered into without any coercion or undue influence. The 1st Respondent's Counsel cited the following cases to support his submission that parties are bound by the terms of



contracts they freely enter into: *Hussamudin Gulambusein Pothiwalla, Administrator, Trustee, and Executor of the Estate of Gulambusein Ebrahim Pothiwalla versus Kidogo Basi Housing Cooperative Society Limited and 31 others, Civil Appeal No. 330 of 2003*; Housing Finance Co. of Kenya Limited versus Gilbert Kibe Njuguna, Nairobi HCCC No. 1601 of 1999; and County Government of Migori v. Hope Self Help Group (2020) eKLR. In these cases, the Courts maintained that as long as the parties to a contract had a meeting of minds, they were bound by the terms of their contract. The Courts held that they would not deviate from these terms unless the terms were so unfavorable that equity would intervene to relieve a party from an unfair bargain in limited, special circumstances.

15. As regards the third issue, Counsel submitted that, based on the evidence presented, it was evident that the 1st Respondent was entitled to the suit land. This was because the Appellant had failed to pay the outstanding amount, even after being given the opportunity to do so.

Analysis and Determination

16. I have reviewed the evidence, the Record of Appeal, and the parties' submissions. The key issues that arise for determination are:

1. Whether the Appellant used his title as security for the entire debt owed to the first Respondent, arising from the annulment of the agreement dated 5th February 2019.
 2. whether the Trial Magistrates erred in failing to hold that the Appellant by making a refund of Kshs 1,450,000/- had discharged his liability under the MOU.
 3. Whether the Learned Trial Magistrate in holding the 1st Respondent was the legal owner of land parcel Kiine/Gacharo/2787 and failing to acknowledge that a sum of Kshs 1,450,000/- had been refunded to the 1st Respondent by the Appellant was inequitable and constituted unjust enrichment to the 1st Respondent.
17. This Court, being a Court of Appeal of first instance, must re-evaluate the evidence presented before the Trial Court in keeping with the principle in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 to ascertain whether the decision reached by the Trial Court was justified on the basis of the evidence adduced. In the case, the Court of Appeal stated 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 retrial and the principles upon which this Court acts in such an appeal are well settled. 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.”

18. Undoubtedly, the relationship between the parties involved stemmed from a fraudulent transaction that went awry. The Appellant and the 2nd Respondent sold land parcel Makuyu/Kimorori/Block 111 (Kagaa) 635 through the sale agreement dated 5th February 2019, which belonged to someone else, to the 1st Respondent without proper authorization. Upon discovery of the fraud, the 1st Respondent reported the matter to the police, who apprehended the Appellant and the 2nd Respondent. Their apprehension led to the creation of the Memorandum of Understanding dated 26th August 2019.
19. The Memorandum was signed by four parties: the Appellant and the 2nd Respondent (referred to as the "1st parties"), the 1st Respondent (the "3rd party"), and Samuel Maina Ngugi (the "2nd party"). Samuel Maina Ngugi was included as a necessary party because he was the registered owner of the subject land at the time the Memorandum was signed, and he was owed a sum of Kshs 200,000/- by the Appellant.



20. The MOU in the penultimate paragraph in the preambular part provided:-
- “And Whereas the 1st parties with their intention to revoke the agreement dated 5th February 2019, and refund the (purchase price) together with costs and damages, they have voluntarily, without any coercion, whatsoever agreed to transfer the title deed Kiine/Gacharo/2787, currently registered in the name of Samuel Maina Ngugi, to Joseph Njuguna Kabuga as security for the purchase price and the associated costs and damages until these amounts are fully paid in accordance with the agreement dated 5th February 2019.”
21. Clause 2 of the Memorandum of Understanding provided as follows: “The 3rd party at the, execution date of this Memorandum of Understanding shall clear the said friendly loan of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-) owed to Samuel Maina Ngugi through money deposit in his Equity Bank account (the said 3rd party acknowledges receipt of this) for him to release, execute all the requisite documents to effect the transfer in favor of Joseph Njuguna Kabuga immediately.”
22. Further the parties in the last preambular paragraph of the MOU provided as follows:-
- “AND WHEREAS the 1st parties undertake to pay the 3rd party the above purchase price together with costs and damages on/or before 10th day of October 2019 and the same shall be shared equally between the two”.
23. I have carefully reviewed and considered the Memorandum of Understanding dated 26th August 2019. It is evident the MOU was entered into to address and resolve issues that had arisen regarding an agreement for sale dated 5th February 2019 entered into between the Appellant and 2nd Respondent on the one part and the 1st Respondent on the other part. As disclosed by the evidence, that agreement was fraudulent on the part of the Appellant and 2nd Respondent and they had received a sum of Kshs 2,500,000/- from the 1st Respondent when the land they purported to sell to him was not theirs. The intent of the MOU was to secure the refund of the purchase price and damages to the 1st Respondent.
24. The land parcel Kiine/Gacharo/2787 was owned by the Appellant but he had pledged the same to one Samuel Maina Ngugi to secure a loan and as at the time the MOU was being entered into the land had been transferred to the said Samuel Maina Ngugi and a balance of Kshs 200,000/- was due to him by the Appellant. The 1st Respondent as per the MOU agreed to settle the balance of the loan due to Samuel Maina by the Appellant so that the title could become security for the monies owed to him by the Appellant and the 2nd Respondent on the fraudulent sale.
25. As per the last preambular paragraph in the MOU it is evident that even though the title of the land was to be taken by the 1st Respondent as security for the entire amount, the Appellant and the 2nd Respondent were to share the amount owed to the 1st Respondent equally.
26. The 1st Respondent admitted the Appellant paid to his account a sum of Kshs 1,450,000/-. The Memorandum of Understanding provided that the Appellant and the 2nd Respondent were to share the liability to him equally and not jointly and severally. The intention of the parties was that the liability to the 1st Respondent by the Appellant and 2nd Respondent was to be shared equally. That was the agreement and understanding of the parties, and the Court shall not re-write the contract between the parties. Parties ordinarily should be bound by the terms of the contracts they voluntarily and freely enter into. In this case the Appellant and the 2nd Respondent agreed the liability by them to the 1st Respondent would be shared between the equally. The liability to 1st Respondent as per the Lower Court Judgment was Kshs 3,200,000/- and with the payment of Kshs 1,450,000/- paid by the



Appellant, the balance that remained was Kshs 1,750,000/-. Had the Appellant paid Kshs 1,600,000/- he would have fully discharged his liability.

27. There is concern that even though the Trial Magistrate decreed the suit land to the 1st Respondent and ordered the Appellant to give vacant possession, the Learned Trial Magistrate Court said nothing concerning the sum of Kshs 1,450,000/- paid by the Appellant to the 1st Respondent. The order by the Trial Magistrate would unfortunately have resulted with the 1st Respondent having both the land and the money. That would constitute unjust enrichment on the part of the 1st Respondent. That was clearly a misdirection on the part of the Learned Trial Magistrate.
28. In the result it is my determination that the Appeal has merit and partly succeeds. I consequently allow the Appeal on the following terms:-
1. That the Judgment by the Learned Trial Magistrate dated 26th January 2023 is set aside and substituted with an order entering Judgment for the 1st Respondent in the alternative prayer (b) of the Plaint as follows:-
 - a. As against the Appellant, the Appellant to pay Kshs 150,000/- together with interest at Court rates from 26th January 2023 until payment in full.
 - b. As against the 2nd Respondent, the 2nd Respondent to pay Kshs 1,600,000/- together with interest at Court rates from 26th January 2023 until payment in full.
 2. The 1st Respondent upon the Appellant honouring 1(a) above to retransfer land parcel No. Kiine/Gacharo/2787 unconditionally to the Appellant DAVID NGUYO MWAI and in the event the 1st Respondent fails to execute any necessary documents to effectuate the order, the Deputy Registrar of the Court is hereby authorized to execute the same.
 3. Each party to bear their own costs of the Appeal.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20TH DAY OF MARCH 2025.

J. M. MUTUNGI

ELC - JUDGE

