



REPUBLIC OF KENYA



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**Githinji & another v Ndui (Environment and Land Appeal
21B of 2023) [2025] KEELC 1191 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1191 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 21B OF 2023**

**JM MUTUNGI, J
MARCH 13, 2025**

BETWEEN

ANDREW MWAI GITHINJI 1ST APPELLANT

ERNEST N WAMBUGU 2ND APPELLANT

AND

JULIUS NJOGU NDUI RESPONDENT

(An appeal arising from the Judgment of Honourable. K.K Cheruiyot-Ag PM, delivered on 25th November 2014 in the Principle Magistrate's Court No. 301 of 2010 at Kerugoya)

JUDGMENT

1. This appeal arises from the Judgment of Hon. K.K. Cheruiyot (Ag. PM), who dismissed the Appellants' claim and ordered the Respondent to refund Kenya Shillings Sixty-Three Thousand (Kshs. 63,000)/- paid by the Appellants to the Respondent as the purchase price for the disputed land, Kabare/Njiku/609.
2. Aggrieved and dissatisfied with the Court's decision, the Appellant appealed to this Court vide a Memorandum of Appeal dated 16th December 2014 and filed a Record of Appeal dated 7th November 2022. The Memorandum of Appeal set out 5 grounds of Appeal as follows: -
 1. That the Learned Trial Magistrate erred both in fact and law by failing to appreciate the veracity and authenticity of the written agreement between the parties herein as required under the Contracts Act Cap 23 Laws of Kenya.
 2. That the Learned Trial Magistrate totally went wrong and misdirected himself in foregoing the fact that the defendant had admitted the plaintiff claim and went ahead to frame other issues not of concern and adjudicating on the same.



3. That the Learned Trial Magistrate erred both in fact and law by failing to give attention to the fact that the defendant had from the time of their agreement given vacant possession to the plaintiffs on the land in dispute and consequently there was no Counterclaim.
 4. That the Learned Trial Magistrate erred both in fact and law by omitting to appreciate the fact that the Plaintiffs' had occupied the suit land and carried on and developed thereon for a period exceeding 12 years yet to counterclaim was filed to their eviction of admission of claim on a probability.
 5. The Learned Trial Magistrate failed to take into consideration the evidence of the Respondent on cross-examination where he admitted the claim but he said the failure to transfer was due to the bad blood with the 1st Appellant/Plaintiff.
3. The Appellants prayed that the appeal be allowed and the judgment in the Principal Magistrate Court in PMCC No. 301 of 2010 be set aside with costs.

Evidence of the Parties.

4. The evidence presented in the lower court was as follows: The 1st Appellant, testified that he and the 2nd Appellant purchased half of the disputed land through a sale agreement dated 22nd September 1989, for a total consideration of Kenya Shillings Thirty Thousand (Kshs. 30,000/-). He stated that they paid the Respondent the full amount of Kshs. 30,000/- and subsequently sought subdivision approval from the Kirinyaga County Council. Consent to subdivide and transfer the half portion of the disputed land was granted.
5. The Appellant further testified that the Respondent later decided to sell the entire plot to them. He indicated that the Appellants paid the Respondent for the second half of the disputed land and received consent to transfer the entire property. However, he stated at the time for the Respondent to transfer ownership, he claimed that he had misplaced the lease, which prevented him from completing the transfer in their names. The Appellant prayed for an order compelling either the Respondent or the executive officer to execute the transfer documents.
6. During cross-examination, the 1st Appellant maintained that the agreement, dated 22nd September 1989, was specifically for the half portion of the disputed land and stated that they later entered into an oral agreement to purchase the second half portion. He stated that there was evidence of payment for the second portion, as well as proof of consent fee payments and copies of the associated minutes. The Appellant testified that the Respondent admitted that he received a sum of Kenya Shillings Sixty-Three Thousand (Kshs 63,000/-) as part of the payment; however, he reiterated that the market value of the disputed land between the years 1989 and 1995 was Ksh. 60,000/-, which they paid in full. During re-examination, the 1st Appellant explained that they did not enter into a formal agreement or seek legal advice because they were friends with the Respondent and trusted him in the transaction. Additionally, he stated that the Respondent voluntarily applied for the transfer and that no outstanding balance was owed to him. He stated that the Respondent never offered to refund the purchase price and that they filed a caution against the title when the Respondent attempted to sell the disputed land to safeguard their interest.
7. The Respondent testified that the Appellants expressed interest in buying the disputed land in 1984. He stated he offered to sell the plot for Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000/-). He testified that the Appellants accepted this offer, and they subsequently entered into an oral agreement. He stated that he received a payment of Kshs. 63,000/- from the Appellants, leaving a balance of Kshs. 87,000/-. While he acknowledged visiting the County Council Offices with the



Appellants, he disputed the claim that there was an agreement for a portion of the land and another for the whole land. He maintained the Appellants breached the agreement that they had entered into and stated he was willing to refund the amount they had paid to them.

8. During Cross-examination, he acknowledged being aware of the consent they obtained from the county and stated that he declined to execute further documents because the Appellants had not cleared the outstanding balance of the purchase price. He confirmed that he received the sum of Kshs. 63,000/- in 1989 and stated that the Appellants have occupied and utilized the disputed land since then. He also alleged that they forcefully entered the land and claimed to have reported this to the D.O.'s office, although he later abandoned that complaint. In re-examination, he reiterated that he received Kshs. 63,000/- and asserted that the remaining balance was to be paid once consent was obtained.
9. Upon reviewing the pleadings, evidence and submissions of the parties, the Trial Court delivered a Judgment dismissing the Appellants' suit. In reaching this decision, the Learned Trial Magistrate addressed two key issues: whether the plaintiffs were entitled to specific performance of the agreement for the sale of land parcel Kabare/Njiku/609 and what relief if any should be awarded.
10. Regarding the first issue, the Learned Trial Magistrate concluded that the specific performance of the oral agreement, which the Appellants sought to enforce, could not succeed. The Learned Magistrate reasoned that the Appellants' argument was based on an oral agreement, which could not be enforced as it contravened Section 3(3) of the *Law of Contract Act*, Cap 23 Laws of Kenya. In dismissing the Appellants' claim, the Learned Trial Magistrates noted that the only recourse available to the Appellants was a refund of Kshs. 63,000/- without any Interest. This decision was based on the fact that the Appellants had not specifically pleaded or claimed any interest, and their contract did not include any provision regarding interest in case of default in performance.

Submissions of the Parties.

11. The Appeal was canvassed by way of Written Submissions pursuant to the Court's directions given on 7th May, 2024.
12. The Appellants filed their written submissions dated 15th July 2024. In the submission, the Appellants addressed three key issues: Firstly, whether the Court erred in failing to recognize the validity of the agreement between the parties under the *Law of Contract Act*. Secondly, whether the Court overlooked the fact that the Respondent had granted vacant possession to the Appellants from the time of the agreement, and thirdly, whether the court neglected to consider that the Respondent had admitted to having a personal conflict with the 1st Appellant.
13. Regarding the first issue, the Appellants' argued that the Learned Trial Magistrate erred in law by finding that the oral agreement between the parties violated the provisions of Section 3 (3) of the *Law of Contract Act*. This Section before the amendment in 2002 provided as follows:

“(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessor who has performed or is willing to perform his part of a contract-



1. Has in part performance of the contract taken possession of the property or any part thereof: or
 2. Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”
14. The Appellants argued that the written and oral agreements between the parties were made before the amendment of Section 3(3) of the Law of Contract Act, which took effect on 1st June 2003. Therefore, they contended that this provision should not have applied in the circumstances of the present case. They submitted that they had produced a sale agreement dated 6th October 1989, and a letter dated 22nd September 1989, in which both parties expressed their willingness to buy and sell. Consequently, they argued that the provision under Section 3(3) of the Law of Contract Act, before the Amendment in 2003 ought to have applied and not the current Section 3(3) of the Act.
15. Regarding the second issue, the Appellants argued that from the time of the sale agreement, they had been given vacant possession of the property by the Respondent, a fact that the Respondent did not dispute. They also contended that although the Respondent claimed there was a remaining balance of the purchase price to be paid, he did not file a counterclaim or provide evidence of the existence of such a balance. Concerning the third issue, the Appellants submitted that there was evidence of a personal conflict between the Respondent and the 1st Appellant, which contributed to the Respondent’s reluctance to transfer the disputed land to the Appellants.
16. The Respondent filed his written submissions dated 28th August 2024. He contended that it was inappropriate for the Appellants to introduce a new ground of appeal, listed as issue No. 3 in their submissions, without amending the memorandum of appeal dated 16th December 2014. He argued that the Respondent’s reluctance to sign over the disputed land stemmed from the Appellants’ failure to pay the full balance of Kshs. 150,000/-, having only paid Kshs. 63,000/-. The Respondent maintained that the Appellants’ appeal lacked merit because the agreement they entered into was for the sale of half a portion of land parcel No. Kabare/Njiku/609, for which he received Kshs. 63,000/-. When the Appellants expressed interest in purchasing the entire parcel, the Respondent stated that they orally agreed on a total price of Kshs. 150,000/-. He argued Kshs. 87,000/- remained unpaid, which explained why the Respondent did not transfer the property to the Appellants. The Respondent further pointed out that since there was no stay order and the Trial Magistrate awarded him costs amounting to Kshs. 55,675/-, he then paid Kshs. 7,325/- to offset the refund of Kshs. 63,000/- that he had been ordered to repay. According to the Respondent, the decision of the Learned Trial Magistrate should not be interfered with.

Analysis And Determination

17. I have examined the evidence, the Record of Appeal, and the submissions from both parties. The issues for determination can be summarized as follows:-
1. Whether the oral agreement pertaining to the sale of the entire portion of land parcel Kabare/Njiku/609 between the parties was enforceable?
 2. Whether the purchase price of Kshs. 63,000/- paid by the Appellants was for a portion or the whole land parcel Kabare/Njiku/609?
 3. Whether the Learned Trial Magistrate erred in his application of the law to the facts the case?



18. 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.”

Whether the oral agreement pertaining to the sale of the entire portion of land parcel Kabare/Njiku/609 between the parties was enforceable;

19. There is no doubt that the parties herein entered into two agreements regarding land parcel No. Kabare/Njiku/609. The initial agreement, dated 6th October 1989 which was duly signed by the Respondent as the seller and the Appellants, related to the sale of half of the disputed land. In regard to the Agreement the Appellants produced in evidence a letter dated 22nd September 1989, which, along with the sale agreement, demonstrated a clear intention to sell and purchase half a portion of land parcel No. Kabare/Njiku/609 for the sum of Kshs. 30,000. The second agreement was an oral agreement between the parties for the sale of the remaining half of the disputed land. While the parties disagree on the amount of the purchase price to be paid by the Appellants, they all concur that an oral agreement for the sale of the entire portion was indeed made.
20. The primary contention of the Appellants in this Appeal is that the Learned Trial Magistrate ruled that this oral agreement was unenforceable because it was not in writing, as it violated Section 3(3) of the *Law of Contract Act*. This dissatisfaction is expressed in the first paragraph of the Appellants' memorandum of appeal, which states: “The Learned Trial Magistrate erred both in law and fact by failing to appreciate the veracity and authenticity of the written agreement between the parties as required under the *Law of Contract Act*, Cap 23 Laws of Kenya.”
21. The Appellants support their claim that the oral agreement was valid and enforceable by arguing that the Learned Trial Magistrate erred in his Judgment because the oral agreement between the parties was made in 1989, many years before Section 3(3) of the *Law of Contract Act* was enacted. They assert that this subsection was enacted on 1st June 2003, and therefore could not apply retroactively. Additionally, they contend that they took possession of the disputed land in 1989, which meant that the provision to Section 3(3) of the *Law of Contract Act* was in their favor.
22. Section 3(3) of the *Law of Contract Act*, Cap 23 Laws of Kenya provides as follows:-
- 3(3) “No suit shall be brought upon a contract for the disposition of an interest in land unless-
- (a) the contract on which the suit is founded –
- is in writing.
- is signed by all parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

Section 3 (7) of the *Law of Contract Act* further provides as follows:-



(7) The provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection.

23. In the case of Peter Mbiri Michuki v. Samuel Mugo Michuki [2014] eKLR, the Court considered the application of Section 3(3) of the Law of Contract Act in regard to an oral agreement for sale of land made by the parties. The Court of Appeal addressed the application of the provisions of the Law of Contract Act as follows:-

“Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of an interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1st June, 2003. The trial court found that the sale agreement between the parties was an oral agreement made in 1964 between the appellant and the plaintiff. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows:

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (i) Has in part performance of the contract taken possession of the property or any part thereof; or
- (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.

We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the Plaintiff/Respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the Learned Judge that the Plaintiff/Respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in 1991. It is our view that Section 3 (7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the Law of Contract Act applies in this case and we hold that the sale agreement between the appellant and the Plaintiff did not violate or offend the provisions of the Law of Contract Act”.



24. In the Case of Anderson Omondi Owandho (suing as the legal rep. of the Estate of Thomas Owandho Rajwai (Deceased) v Augustinos Ondiek [2017] eKLR, the court considered application of Section 3(7) of the Law of Contract Act and held as follows:-

“It is further my view that Section 3(7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. Section 3(3) of the Law of Contract Act having come into effect in 2003 does not apply to an oral contract for sale (or exchange) of land concluded before it came into effect....”

25. In the instant case the Learned Trial Magistrate agreed and found there was an oral agreement entered into between the Respondent and the Appellants. The Learned Trial Magistrate held the oral agreement having not been in writing violated the provisions of Section 3(3) of the Law of Contract Act, and was therefore null and void unenforceable. That clearly was a misdirection and a mis apprehension of the Law in view of the provision of Section 3(7) of the Law of contract Act. The oral agreement was not affected by the Amendment to Section 3(3) of the Law of Contract Act, whose effective date was from 1st June 2003.

26. As to whether the sale related to a portion of the suit property or the whole property, there is clear evidence that the initial agreement that was in writing entered into in October 1989, that the sale only related to half portion of land parcel Kabare/Njuku/609 and the consideration was Kshs 30,000/-. The content of the agreement dated 6th October 1989 was as follows:-

Agreement Between Mr. Julius Njogu Ndui & M/s Andrew Mwai Githinji & M/s Ernest Ndambiri Wambugu.

Mr. Julius Njogu Mdui ID. NO. (Particulars withheld) wish to sell half of my plot entitled Kabare/njuku/609 to the above named parties.

This is after a consideration of Kshs 30,000/- (Thirty Thousand). I have agreed totally to work hand in hand until the said plot is legally transferred to the parties.

Today the 6th day of October 1989 I have received a total sum of Kshs 10,000/- (Ten Thousand Only) from my purchaser. The rest of the amount will be paid to me after handed over to the parties.

Signature Of Plot Owner: - Signed

Purchasers – 1. Andrew Mwai Githinji – Signed – ID(Particulars withheld)

2. Ernest Ndambiri Wangugu – Signed – ID/(Particulars withheld)

Witness - 1. Daniel Karuku – Signed – (Particulars withheld)

Today The 27.10.89 I Mr. Njogu Ndui Have Received Shs 18,000/- (eighteen Thousand). This is in respect of the above.

Julius Njogu

Witnesses – 1. S. J. Muriuki – Signed

2. Daniel Karuku

3. Mwai Mbatha - Signed



27. The Kirinyaga County Council vide its letter of 17th October 1989 gave its consent for Transfer/subdivision of the suit land. The content of the letter addressed to the District Land Registrar, Kirinyaga was as follows:-

17th October, 1989

The District Land Registrar

Kirinyaga

Re:- Consent To Transfer/sub-division

Land Parcel No. Kabare/njiku/609.

The Council has no objection for sub-division and transfer of the above parcel by Mr. Julius Njogu Ndui to Andrew Mwai Githinji and Ernest Ndambiri Wambugu.

F. K. Maringu

Clerk To Council

Fem/fwk

C.c.

Julius Njogu Ndui,

Box 57,

Wang'uru

Andrew Mwai Githinji &

Ernest Ndambiri Wambugu

Box 57

Wang'uru

28. The Appellants testified that the Respondent subsequently agreed to sell the whole plot to them though the agreement was verbal. The Appellants stated they fully paid for the whole plot and the Respondent acknowledged the full payment of Kshs 60,000/- for the plot. The Respondent in his evidence admitted he agreed to sell the plot to the Appellants though according to him the consideration was Kshs 150,000/- out of which the Appellants paid Kshs 63,000/- leaving a balance of Kshs 87,000/-. The Respondent did not deny he executed the agreement dated 6th October 1989 which clearly indicated the sale was for half of the plot and the consideration was Kshs 30,000/-.
29. It is the Appellants position that they entered a further agreement orally that the Respondent would sell them the whole plot for Kshs 60,000/- which they paid and which amount the Respondent acknowledged having received. Both the Appellants and the Respondent affirm there was indeed an oral agreement for the sale of the whole plot. The only point of divergence is on the consideration that was to be paid by the Appellants. The Respondent stated the consideration was to be Kshs 150,000/-. The parties had around the same period entered into a written agreement for the sale of half portion of the same plot at the consideration of Kshs 30,000/- and there is evidence by way of acknowledgments that this amount was received by the Respondent. It does not appear reasonable and/or realistic that the Appellant could have agreed to purchase the remaining one half of the plot at a price four times the price of the half portion that they had just completed paying for and in respect of which the Council had issued consent for subdivision and transfer vide its letter of 17th October 1989. Indeed the



Respondent in regard to the initial written agreement, in his evidence stated he executed the agreement in the presence of his brother and his wife. The Council's letter of 17th October 1989 to the Land Registrar was in the following terms:-

The District Land Registrar

Kirinyaga

Re:- Consent To Transfer/sub-division

Land Parcel No. Kabare/njiku/609

The Council has no objection for sub-division and transfer of the above parcel by Mr. Julius Njogu Ndui to Andrew Mwai Githinji and Ernest Ndambiri Wambugu.

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30. The Respondent as per the evidence adduced through the signed acknowledgments of receipt of monies from the Appellants in 1992 and his application for the transfer of the plot to the Appellants clearly points to the existence of the further agreement albeit verbal that he had agreed to the sale of the whole plot. The Kirinyaga County Council vide its letter dated 12th April 1994 gave its consent to the transfer of the suit land to the Appellants. The letter was in the following terms:-

Dated 12th April 1994

The Lands Officer

Kirinyaga

Re: Consent To Transfer.

The Council has no objection in the Transfer of parcel No. Kabare/Njiku/609 to Andrew M. Githinji ID/No. (Particulars withheld) and Ernest N. Wambugu ID/No. (Particulars withheld). The parcel is registered under Julius N. Ndui.

They should report to your office for necessary action.

R. W. Miano (mrs)

For – Clerk to Council.

C.C



Ernest N. Wambugu

Andrew M. Githinji

Julius N. Ndui

31. Given that the County Council had earlier on 17th October 1989 given consent for transfer of half portion of the plot, the later Letter of Consent is consistent with the Appellants contention that there was the subsequent verbal agreement where the Respondent agreed to sell to them the whole plot instead of half of the plot. Without doubt the payments made by the Appellants to the Respondent in 1992 were pursuant to the verbal agreement . The fact that the Respondent agreed to apply to the County Council for the transfer of the whole plot was affirmation that he had been paid the full consideration. On the evidence the Learned Trial Magistrate ought to have found and held that the Appellants purchased the whole plot and had paid the full purchase price as agreed.
32. While the pleadings were far from being perfect having regard to the evidence, it is apparent that the Appellants have been in possession and occupation of the suit property from 1989. Why the Respondent had never sought to have the Appellants evicted if they breached the sale agreement is difficult to understand. When the Appellants fully paid for the suit property, the Respondent pending transfer of the property to the Appellants held the title documents in trust for the Appellants. It is also doubtful whether the Respondent by virtue of the provisions of Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya would have succeeded in an action for the recovery of the land from the Appellants even if he had pleaded a Counterclaim. I have inked the above observations to illustrate there was a deficiency in the pleadings which limited the issues that the Court would have considered.
33. Be it as it may be, upon analysis and evaluation of the evidence and the applicable law. I am satisfied that the Learned Trial Magistrate erred in his evaluation and analysis of the evidence and applicable law and thus reached the wrong decision. I find the Appeal has merit and allow the same, set aside the Judgment delivered on 25th November 2014 and in place thereof substitute a Judgment in favour of the Appellants as prayed in the Complaint dated 15th September 2010.
34. The Appellants are awarded the costs of the Appeal.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 13TH DAY OF MARCH 2025.

J. M. MUTUNGI

ELC - JUDGE

