



**Nthenge v Kiswili (Environment and Land Appeal E002 of 2021)  
[2023] KEELC 21468 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21468 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL E002 OF 2021  
TW MURIGI, J  
OCTOBER 25, 2023**

**BETWEEN**

**SLYVESTER NTHENGE ..... APPELLANT**

**AND**

**JOHNSTONE KIAMBA KISWILI ..... RESPONDENT**

*(By a Memorandum of Appeal dated 14th June, 2019, and further amended on 2nd February 2023, the Appellant appealed against the Judgment of Hon, J.O. Magori delivered on the 12th January 2021, in Makindu Civil Case No. 162 of 2014)*

**JUDGMENT**

1. By a Memorandum of Appeal dated 14<sup>th</sup> June, 2019, and further amended on 2<sup>nd</sup> February 2023, the Appellant appealed against the Judgment of Hon, J.O. Magori delivered on the 12<sup>th</sup> January 2021, in Makindu Civil Case No. 162 of 2014 and set out Nineteen Grounds of Appeal.

**Background**

2. The Respondent had sued the Appellant by way of a Complaint dated 6<sup>th</sup> May, 2014 seeking the following orders:-
  1. An order of a permanent injunction.
  2. General damages for trespass.
  3. Interest on (2) above.
  4. Costs and interest of the suit.
3. The Defendant/Appellant filed a Statement of Defence dated 20<sup>th</sup> May, 2014. He denied the Plaintiff's claim and sought for the following orders:-



1. A declaration that the contract for sale of 2 acres of land between him and the Plaintiff is null and void.
2. An order of eviction against the Plaintiff.
3. That the suit be dismissed with costs.
4. In the proceedings before the lower Court, the Appellant herein was the Defendant while the Respondent was the Plaintiff.
5. After the trial, the Learned Trial Magistrate delivered his judgment on 12<sup>th</sup> January, 2021. In his judgment, the Learned Trial Magistrate found that the Plaintiff had proved his case on a balance of probabilities and entered judgment against the Defendant in the following terms:-
  - i. A permanent injunction is issued against the Defendant as prayed.
  - ii. The Defendant to accept the balance of Kshs 40,000/= which was unpaid by the Plaintiff and the same be paid within 30 days.
  - iii. The prayer for general damages for trespass is disallowed.
  - iv. The Plaintiff is awarded costs of this suit and interest at court rates.
6. The Appellant being dissatisfied with the judgment filed this Appeal vide the Memorandum of Appeal dated 14<sup>th</sup> June, 2019 on the following grounds: -
  - a. That the Honourable Magistrate erred in law and in fact in failing to consider that the key/crucial elements of a contract of a sale (sale agreement) were missing and which invalidated the sale agreement in question between the Appellant and the Respondent
  - b. That the Honourable learned trial Magistrate erred in law and in fact in finding that the issue of validity of the sale agreement cannot arise.
  - c. That the learned trial Magistrate erred in law and in fact in failing to find that the Respondent breached the terms of the sale agreement by failing to pay the full purchase price as soon as is practically possible as provided under the sale agreement hence entitling the Appellant to repudiate it.
  - d. That the learned trial Magistrate erred in law and in fact by holding that the Appellant did not file any counterclaim for the sale to be declared null and void and for the Respondent to be evicted from the subject land.
  - e. That the Honourable learned trial Magistrate despite finding that the Appellant is not the registered owner of the land in question erred in law and in fact in failing to find that therefore the Appellant could not pass any good title to the Respondent and the sale was void ab initio.
  - f. That the learned trial Magistrate erred in law and in fact in finding that the Appellant despite being the owner of the subject land trespassed thereon and that his re-entry thereupon was unprocedural.
  - g. That the learned trial Magistrate erred in law and in fact in finding that the sale was valid despite lack of the requisite and mandatory land control Board Consent.
  - h. That the trial court erred in law and in fact in finding that the Respondent was ready and willingly to pay the balance of the purchase price and that it is the Appellant who did not give the



Respondent a chance to make payment and also erred in finding that the Appellant frustrated the payment of the balance of the purchase price.

- i. That the Honourable learned trial Magistrate erred in law in finding that the Respondent had proved grounds for granting a permanent injunction against the Appellant.
  - j. That the Honourable learned trial Magistrate erred in law and in fact in failing to consider and dismissing material evidence placed in the court record by the Appellant.
  - k. That the learned trial Magistrate erred in law and in fact by taking into account irrelevant consideration and introducing extraneous factors in his judgment and order therefore arriving at the wrong conclusion.
  - l. That the learned trial Magistrate erred in law and in fact by holding and ordering the Appellant accepts Kshs 40,000/= from the Respondent instead of the current market value of the 4/10(four tenths) portion of the subject land claimed by the Appellant.
  - m. That the Honourable trial Magistrate misdirected himself and erred in law and in fact in failing to find that the material evidence on record overwhelmingly favoured a finding against the Respondent, dismissal of the Respondent's suit and allowing the Appellant's Defence and counter claim.
  - n. That the learned trial Magistrate further erred in law and in fact by failing to appreciate, consider and take into account the pleadings on record as filed by both parties and particularly the Appellant's Defence and counterclaim and also the Appellant's written submissions and thereby arriving at the wrong decision.
  - o. That the Honourable learned trial Magistrate erred in law by making wrong/erroneous findings and conclusions and rendering a decision unsupported by law and evidence on record so as to amount to an erroneous judgment and order in the circumstances of the case.
  - p. That the Honourable learned trial Magistrate erred by making a decision that was erroneous without proper basis and against the weight of the evidence in the court record.
7. The Appellant prays are that:-
1. The Appeal herein be allowed.
  2. That the whole judgment and orders arising from the Senior Magistrate's Court at Makindu and delivered in Makindu SPMCC No. 162 of 2014, Johnstone Kiamba Kiswili vs Sylvester Nthenge against the Appellant be set aside; save for the finding on dismissal of the respondent's claim for general damages for trespass which should be upheld.
  3. That the Respondent's suit against the Appellant in the lower court i.e Makindu SPMCC No. 162 of 2014, Johnstone Kiamba Kiswili Vs Sylvester Nthenge be dismissed in its entirety and the Appellant's Defence and counterclaim filed in the lower court be allowed with costs to the Appellant/Defendant.
  4. That the Honourable Court be pleased to order that the Respondent cedes possession and ownership of 4/10(four tenths) of the subject land Plot No. 120 at Kiunduanu Makueni County to the Appellant being the portion which the Respondent never paid consideration for and order that the Makueni County Surveyor oversees the sub-division.
  5. That in the alternative, the Honourable Court be pleased to order that the Respondent compensates the Appellant by paying to the Appellant the current market value/purchase



price of the 4/10(four tenths) of the subject land being Plot No 120 Kiunduanu Makueni County which the Respondent failed to pay consideration for.

6. That the Court be pleased to order the respective parties to file their respective current market valuation reports or there be an independent court mandated current market valuation report of the subject land being Plot No. 120 Kiunduanu Makueni County to assist the court in arriving at a just determination.
7. That the Appellant to have the costs both of the lower court and of this Appeal.
8. The parties were directed to canvas the Appeal by way of written submissions. As at the time of writing this judgment the Respondent had not filed his written submissions.

### **The Appellant's Submissions**

9. The Appellant submissions were filed on 10<sup>th</sup> March, 2023.
10. On his behalf, Counsel submitted that the learned trial Magistrate did not evaluate the evidence before arriving at its decision since it was evident that the Respondent did not pay the full purchase price for the suit property.
11. Counsel submitted that the learned trial Magistrate acknowledged that the Plaintiff did not pay Kshs 10000/= to the Appellant. Counsel further submitted that the sale agreement stipulated that the outstanding balance of Kshs 40000/= was to be paid as fast as is practically possible. Counsel submitted that according to the Law Society of Kenya conditions on sale of land 1989, payment should be made within 90 days after execution of the agreement for sale if no time frame is provided for completion of payment.
12. That to attempt to pay the balance of the purchase price after 14 years from the sale is unacceptable. Counsel contended that the Respondent should pay the balance of the purchase price at the current market price.
13. Counsel contended that the learned trial Magistrate erred in failing to consider the proposal adopted by the council of elders that the Respondent should keep what he had paid for and surrender what he had not paid for.
14. Counsel submitted that the learned trial Magistrate erred in law and in fact in failing to find that the Defendant had filed and pleaded a counterclaim against the Plaintiff/Respondent/ It was submitted that failure to find as much amounted to a blatant miscarriage of justice. Counsel contended that the Defendant's/Appellant's grounds of opposition dated 19/05/2014 and the replying affidavit sworn on even date clearly shows that the Defendant had raised a counterclaim.
15. Counsel contended that the Plaintiff did not file a reply to the defence and counter claim. That the trial court also ignored the demand letters issued to the Appellant.
16. Counsel submitted that the trial court erred by failing to nullify the sale between the parties herein Counsel further submitted that the sale agreement dated 20/03/2008 was defective, null and void for the reason that:-
  1. It does not specify the land parcel number.
  2. The same was not drawn by an advocate or a person licensed to prepare a sale agreement under the law society conditions.
  3. It does not specify whether the land is titled or not.



4. The legal owner did not sign the agreement.
5. The signatures by the parties are not attested by a witness.
6. It is altered in pen without counter signing and it was never registered.
17. It was submitted that the learned trial Magistrate erred in law and in fact in finding that there was a contract for sale of land between the Appellant and the Respondent.
18. Counsel further submitted that the entire transaction was void for lack of consent from the Land Control Board. Counsel submitted that the Plaintiff/Respondent did not obtain consent from the Land Control Board within six months of the execution of the sale agreement. Counsel asserted that the learned trial Magistrate erred in law and in fact in finding that it was the Appellant/Defendant who was to obtain consent from the Land Control Board. Counsel contended that consent is issued in the name of the purchaser and not of the vendor.
19. Finally, Counsel submitted that the trial Magistrate erred in law in finding that the Respondent had proved the grounds required for the grant of a permanent injunction. It was submitted that the Respondent did not satisfy the conditions for the grant of an injunction because he did not prove ownership over the suit property. Counsel submitted that the suit property is registered in the name of David Mutisya hence the Appellant does not have title to pass to the Respondent..

### **Analysis And Determination**

20. I have considered the entire material on the record of appeal and the submissions by the Appellant. Although the Appellant raised nineteen (19) grounds of appeal in the Memorandum of Appeal, the Court is of the opinion that the Appeal may conclusively be determined on the following three (3) grounds: -
  - a. Whether there was a valid sale agreement between the Appellant and the Respondent.
  - b. Whether the learned trial Magistrate analysed the evidence on record before arriving at his decision.
  - c. Who should bear the costs of the Appeal.
21. This being a first Appeal, this Court has a duty to evaluate, assess and analyse the evidence on record and make its own decision.
22. The principles which guide a first Appellate Court were discussed in the case of *Selle & Another Vs Associated Motor Boat Company and Others* (1968) 1 EA 123 where the Court of Appeal set out the duty of Appellate Courts as follows;

“An appeal to this court from a trial court by the High Court is by way of a 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 itself and drive 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. In particular, this court is not bound necessarily to follow the trial judge finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanour of a witness is inconsistent with the evidence in the case generally.”



### **Whether There Was A Valid Sale Agreement Between The Parties Herein**

23. The Appellant is challenging the judgment of the learned trial Magistrate on the grounds that the sale agreement between him and the Respondent was void abinitio.
24. At the trial the Plaintiff/Respondent testified as PW1 and called a total of 4 witnesses in support of his case.
25. He testified that he purchased two acres comprised in Plot No. 120 Kiunduani Area. It was his testimony that the purchase price was Kshs 50,000/= per acre That paid Kshs 60,000/= upon the execution of the sale agreement and took possession of the suit property, constructed his home and fenced it off. It was his testimony that later on, his wife paid Kshs 10,000/= to the Appellant He testified that the Defendant hindered him from paying the outstanding balance of Kshs 30,000/= which he has always been ready to pay.
26. The Defendant/Appellant testified as DW1 and called one witness in support of his case. It was his testimony that he sold two acres to the Plaintiff for Kshs. Kshs 100,000/=. The Appellant contended that the sale agreement does not meet the requirements of a valid contract for sale of land.
27. It is not in dispute that the parties herein entered into a sale agreement for the sale of 2 acres.
28. According to the sale agreement dated 20<sup>th</sup> March 2008, the subject land is the one next to Ngwiwa Lake and borders David Mutisya's land. The terms of the agreement were as follows:-
  1. The sale price per acre is Kshs. 50,000/=.
  2. The buyer has paid the seller Kshs. 60,000/= deposit (say Sixty Thousand Only).
  3. The balance of Kshs 40,000/= (say Kshs. 40,000/= will be paid as fast as is practically possible.

The Appellant submitted that the sale agreement was null and void abinitio for the following reasons;-

1. The signatures by the parties are not attested by a witness.
2. The agreement does not specify the subject matter or land parcel number or mode payment.
3. The completion date is not indicated.
4. The agreement was not drawn by an Advocate or a person licensed to prepare a sale agreement under the Law Society conditions.
5. The legal owner has not signed the agreement.

For those reasons, the Appellant contended that the learned trial Magistrate erred in law and in fact in failing to consider the crucial elements in a contract of sale. The Appellant faults the court for finding that a valid agreement existed between him and the Respondent herein. The Appellant maintains that the sale agreement is defective and as such, it should be set aside.



29. The Learned Trial Magistrate in his judgment stated as follows in part:-

“The issue of the validity of the agreement cannot arise as the Defendant acknowledges having entered into the said agreement. The Defendant cannot therefore turn back and say that the agreement was null and void abinitio at this stage.”

30. The Black’s Law Dictionary defines a contract as follows:-

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

31. Section 3(3) of the Law of Contract stipulates as follows:-

- “(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) The contract upon which the suit is founded—
    - (i) is in writing;
    - (ii) is signed by all the 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:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

32. The sale agreement in question is in writing and is signed by the parties therein. The agreement was not attested by witnesses as provided by the law. Of importance to note is that the Plaintiff/Respondent took possession of the suit land upon payment of Kshs. 60,000/=. Although the sale agreement does not indicate the plot number, it specifies the location of the land that was the subject of the agreement. Moreover, there is nothing to show that the Appellant ever objected to the occupation and possession thereof by the Respondent.

33. The Appellant submitted that the agreement was not drawn by an Advocate or person licensed to draw the same. Section 3(3) of the Law of contract provides that the agreement must be in writing. The law does not provide that a sale agreement must be drawn by an Advocate or a person licensed to draw the same. The law only requires that the agreement for sale of land must be in writing.

34. The Appellant alleged that the agreement was void abinitio because he did not have a title to pass to the Respondent. Counsel submitted that the Appellant cannot pass title to the Respondent because he is the registered owner of the suit property. He submitted that the Appellant was a purchaser and had sold 2 acres from his interest. The record shows that the Appellant purchased the suit property from one David Mutisya and later sold 2 acres to the Respondent. Having purchased the suit property from one David Mutisya, this court finds and holds that the Appellant is the beneficial owner of the same. As the beneficial owner he can dispose of his property to whomsoever he wishes. His two witnesses confirmed that he sold 2 acres to the Respondent. He cannot therefore turn around state that the agreement is void because he is not the registered owner.

35. The Appellant alleged that the Respondent breached the terms and conditions of the sale agreement by failing to pay the balance of the purchase price as soon as is practically possible. The Appellant testified



that the Respondent breached the agreement by failing to pay the balance of Kshs 40,000/=. It was his testimony that the Council of elders resolved the dispute and decided that the Plaintiff should get 60% of the portion of the suit property while the 40% should revert back to him. He denied receiving Kshs 10,000/= from the Respondent's wife. The Appellant was of the view that the Appellant should pay the outstanding balance at the current market price.

36. The Plaintiff/Respondent on the other hand testified that the Defendant frustrated his efforts to pay the outstanding balance of the purchase price which he has always been willing to pay. He testified that his wife had paid Kshs 10,000/= but there was not prove of the same.
37. Clause 3 of the sale agreement stipulated that the balance of Kshs 40,000/= was to be paid as fast as is practically possible. It is a principle of law that parties to an agreement are bound by the terms and conditions thereof. It is not the business of the court to rewrite such contracts. In the case of National Bank of Kenya Ltd vs Pipe Plastics Sam kolit (K) Ltd (2002) EA 503(2011) eKLR the court of Appeal held that:-

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.

38. In the case of Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd(2017)Eklr the court of appeal stated that:-
39. “We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between the parties. They are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.
40. Turning to this case, the balance of the purchase price was to be paid as soon as is practically possible. The agreement did not specify the time frame within which the outstanding balance was to be paid. The sale agreement does not contain any default clause and the consequences thereof. The Appellant therefore cannot demand that the Respondent pays the balance at the current market price. The Appellant has not specified the particulars of the breach of the agreement. The Appellant has not proved breach on the part of the Respondent.
41. The Appellant submitted that the sale agreement is void for want of consent from the Land Control Board.
42. He faulted the court for holding that the Appellant ought to have obtained the consent or he should have obtained the consent from the person who sold the land to him. ....

#### **Whether The Learned Trial Magistrate Analysed The Evidence Before Arriving At The Decision**

43. The Appellant contended that the learned trial Magistrate erred in law and fact in failing to take into account the pleadings filed by both parties and particularly his defence and counterclaim. He asserted that the trial Magistrate erred in holding that he did not file any counterclaim to have the sale agreement declared as null and void. The Appellant contended that he had raised a counterclaim in his replying affidavit and submission.
44. Order 7 Rule 1 of the Civil Procedure Rules provides for counterclaim as follows:-

“The defence and counter-claim filed under Rules 1 and 2 shall be accompanied by:-

- a. an affidavit under Order 4 Rule 1(2) where there is a counter-claim.”



45. A counterclaim is a cross suit. The Defendant is actually the Plaintiff in a counterclaim, and is therefore required to file a verifying affidavit to accompany the counterclaim. A counterclaim cannot therefore be raised in submissions or a replying affidavit
46. I have carefully perused the entire record and I note that apart from the defence dated..... the Defendant did not file a counterclaim as alleged.
47. As correctly stated by the trial court, the Appellant ought to have filed a counterclaim to declare the sale as null and void.
48. In the end I find that the learned trial Magistrate properly analyzed and evaluated the evidence presented before him in arriving at his decision.
49. On costs, I hereby direct that each party bears its own costs.

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**HON. T. MURIGI**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 25<sup>TH</sup> DAY OF OCTOBER, 2023.**

**IN THE PRESENCE OF:-**

Court assistant - Mr. Kwemboi.

Atonga for the Appellant.

