



**Muguongo v Marete (Environment and Land Appeal E023 of 2022)  
[2023] KEELC 20814 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20814 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E023 OF 2022  
CK YANO, J  
OCTOBER 19, 2023**

**BETWEEN**

**ERASTUS NKONGE MUGUONGO ..... APPELLANT**

**AND**

**BONIFACE RIUNGU MARETE ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The appellant is the plaintiff in a suit filed in the Principal Magistrate's Court at Nkubu ELC case No. 17 of 2020. In his plaint dated January 18, 2020, the appellant claimed for judgment against the respondent for an order of specific performance directing him to transfer 0.5 acres out of suit parcel of land L.R No. Abogeta/U-Chure/2198 to the appellant, and in the alternative, to refund the sum of Kshs. 800,000/= paid as purchase price, general damages for breach of contract, liquidated damages plus costs and interest.
2. The appellant pleaded that on or about December 7, 2017 they entered into an agreement for sale of 0.5 acres out of the respondent's land LR. NO. Abogeta/U-Chure/2198 for a consideration of Kshs. 800,000/=. That at the time of the purchase the suit land was charged to Unison Savings and Credit Co-operative Society Limited for a sum of Kshs. 1,200,000/=.
3. According to the appellant, it was a term of the agreement that the respondent was to deliver vacant possession of the sold land to the appellant on or before January 1, 2018 and effect transfer of the purchased portion after the clearance of the charge with Unison Savings and Credit Co-operative Society Limited which transfer was to be effected on/or before January 30, 2019. The appellant pleaded that in breach of the terms of the said agreement the respondent failed and/or refused to clear the outstanding loan and effect transfer to the appellant, hence the filing of suit. The appellant enumerated particulars of breach and fraud on the part of the respondent.



4. By his amended defence and counter claim dated July 19, 2021, the respondent admitted that the land was charged to Unison Savings and Credit Co-operative Society Limited for a sum of Kshs. 1,200,000/= and the parties consented under the said agreement that the purchase price of Kshs. 800,000/= was to be paid in two installments, that is Kshs. 200,000/= during the execution of the agreement and Kshs. 600,000/= on or before November 9, 2017. The respondent pleaded that the appellant breached his duties by neglecting to pay the balance of Kshs. 600,000/= as agreed. That the vacant possession and transfer of the said portion was dependent on clearing of the loan due to the chargee and sub-division of the suit land. The respondent further pleaded that the sub division and Land Control Board expenses was to be shared equally by both parties.
5. The respondent stated that he did not clear the loan on time and as contemplated by the parties since the appellant failed to pay the balance of the purchase price of Kshs. 600,000/= which was to facilitate the loan repayment. He denied the particulars of breach and fraud and also denied receiving the said sum of Kshs. 800,000 and prayed for the dismissal of the appellant's suit with costs.
6. In the counter-claim the respondent reiterated his averments in the defence and added that since it was the appellant who breached the sale agreement, he ought to pay him Kshs. 1,600,000/= as liquidated damages. He stated that it was due to the said breach that the respondent could not get the completion documents from the chargee and that despite several reminders and pleas, the appellant neglected his obligation and failed to pay Kshs. 600,000/=.
7. The respondent pleaded that on 30<sup>th</sup> March 2020, he was forced to sell his motor vehicle in order to repay the loan and protect the suit land from being disposed off by Unison Savings and Credit Co-operative Society Limited in exercise of its statutory power of sale. The respondent pleaded that due to the breach by the appellant he suffered immeasurable loss and pain and so he prayed for an order for specific performance compelling the appellant to pay the outstanding balance of the purchase price of Kshs. 600,000/= an order compelling the appellant to pay liquidated damages for breach of the agreement, an order declaring that due to the breach by the appellant, the respondent had a right to retain and keep the deposit of Kshs. 200,000/=:, general damages for breach of agreement as well as costs and interests.
8. In his defence to the counter-claim, the appellant denied that he was in breach of the sale agreement since he had Kshs. 600,000/= to the respondent. That the obligation to clear the balance of the loan amount was solely on the respondent and that the only issue left for discussion was the transfer of the half an acre. He further particularized the breach on the part of the respondent.
9. At the hearing, the appellant testified as P.w 2 and called one witness, Duncan Gichunge Muthuri, the advocate who drafted the said agreement. The respondent also testified and called two witnesses.
10. In a judgment dated April 28, 2022, the learned trial magistrate concluded that the appellant had not paid the balance of the purchase of Kshs. 600,000/= on November 9, 2017 as stipulated in the sale agreement or at all, and that the respondent was therefore entitled to repudiate the sale agreement. The trial court further sated that in any event, the sale would have been rendered void for want of consent of the Land Control Board. The trial court further concluded that the sum of Kshs. 800,000/= could not be refunded as it had not been proved that the appellant ever paid the said amount. The learned trial magistrate further held that since the appellant is the one who was in breach of the sale agreement between him and the respondent, they were bound by the terms of the said agreement, and one condition was that whoever was in breach of the said agreement was liable to pay the innocent party Kshs. 1,600,000/= as liquidated damages. The trial court held that the appellant was the one in breach of the agreement and therefore was liable to pay the respondent the sum of Kshs. 1,600,000/=. Consequently, the learned trial magistrate found that the appellant had failed to prove his case on



- a balance of probabilities and dismissed it with costs. On the same breadth, the trial court found that the respondent had proved his counterclaim and granted him the prayers sought in the counterclaim.
11. Being aggrieved by the decision of the trial magistrate, the appellant filed this appeal and set out six grounds in the memorandum of appeal in the following terms-;
1. The learned trial magistrate erred in law and in fact in that she failed to appreciate that the appellant had sufficiently proved that he paid the consideration's final balance of Kshs. 600,000/= to the respondent and as a result thereof the trial court arrived at a wrongful decision.
  2. The learned trial magistrate erred in law and in fact in that she failed to appreciate that the respondent's counterclaim was an afterthought, unproven, false and/or fraudulent hence the same ought not to have been allowed and as such she arrived at a wrongful decision.
  3. The learned trial magistrate erred in law and in fact in that she failed to find and hold that the appellant had proved his case to the required standards and as such she arrived at a wrongful decision.
  4. The judgment of the learned trial magistrate is against the weight of the evidence tendered.
  5. The judgment of the learned trial magistrate is bad in law.
  6. The learned trial magistrate erred in law and in fact by allowing the counter claim yet the same was not proved.
12. The appellant prays for orders that the judgment and decree delivered by Hon. J.Irura in Nkubu PMC ELC NO. 17 of 2022 be set aside and his suit be allowed as prayed in the plaint as well as costs.
13. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated August 15, 2023 and filed in court on September 1, 2023 through the firm of Ngunjiri Michael & Co. advocates while the respondent filed his dated September 29, 2023 and filed in court on October 2, 2023 through the firm of Mithega & Kariuki Advocates.

### **Appellant's Submissions**

14. Learned counsel for the appellant gave a brief background of the matter and a summary of the parties case at the trial court and identified the following issues for determination-;
- a. Whether the appellant proved he paid the total consideration in compliance with the agreement
  - b. Whether the respondent breached the terms of the contract.
  - c. Whether the appellant proved his case on a balance of probability.
  - d. Whether the respondent proved his counter claim on a balance of probability
  - e. Whether this appeal should be allowed.
  - f. Who should bear the costs of this appeal.
15. With respect to the first issue, learned counsel for the appellant pointed out that the suit before the trial court by the appellant was one seeking to enforce a contract and alleged breach of contract on the part of the respondent. That the land sale agreement dated November 7, 2017 was a contract made before an advocate who testified in court confirming the payment of all the purchase price. It was submitted



- that it is trite law that a court of law cannot re-write a contract between parties and that the courts are only called upon to interpret the terms of the contract, adding that the parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.
16. Counsel for the appellant invited the court to look at the sale agreement under “recitals” which indicated that the respondent was selling to the appellant a portion measuring ½ acre of his land LR ABOGETA/U-CHURE/2198 at a consideration of Kshs. 800,000/=. That it was mutually agreed that a deposit of Kshs. 200,000/= was to be paid at the execution and the respondent as vendor acknowledged receipt of the same under clause 2(1) of the contract. Counsel for the appellant contend that there was no separate acknowledgment of receipt that was signed between the parties to evidence the payment of the deposit and which amount was admitted by the respondent to have been paid. It was submitted that the trial court erred in law and fact while questioning the independence of a profession, especially an advocate who is an officer of the court and disregarding his testimony especially to the fact that he witnessed the exchange of the balance of the purchase price. It was submitted that on a balance of probabilities, the appellant through direct evidence and documentary evidence proved that he had paid the balance of the purchase price amounting to Kshs. 600,000/= to the respondent.
  17. On whether the respondent breached the terms of the contract, it was submitted that the respondent neither delivered vacant possession on 1<sup>st</sup> January, 2018 nor subdivided the said land and did not make loan repayment and therefore was in breach of the contract. Learned counsel for the appellant cited the provisions of section 3(3) of the [Law of Contract Act](#) and submitted that the contract in question met the conditions contained under the said section and urged the court to enforce the agreement and find that the appellant is entitled to specific performance despite the failure by the respondent to attend Land Control Board to sub divide and transfer the 0.5 acres and order the parties to attend the Board forthwith to facilitate the transfer. Counsel for the appellant relied on the case of [Samuel Chege Gitau & another v Joseph Gicheru Muthiora](#) [2021] eKLR.
  18. It is the appellant’s submission that the counter-claim was an afterthought and that the orders of specific performance issued by the trial court are perverse and only meant to enrich the respondent who remains non-committal to perform the contract. Learned counsel for the appellant relied on the case of [Sisto Wambugu v Kamau Njuguna](#) [1983] eKLR and [Lucy Njeri Njoroge v Kalyabe Njoroge](#) [2015] eKLR.
  19. The appellant contended that the trial court fell into error by ordering him to pay liquidated damages in addition to general damages. That if the court was convinced that there was breach on the appellant’s part it should have assessed the amount of damages payable and not leave it hanging. The appellant relied on the case of [Christopher Kiprotich v Daniel Gathua & 5 others](#) [1976] eKLR. It was further submitted that the award under general damages could not be made arising out of an alleged breach of agreement and the appellant relied on the Court of Appeal case of [Kenya Tourism Board v Sundowner Lodges Limited](#) [2017] eKLR.

### **Respondent’s Submissions**

20. Learned counsel for the respondent also gave a brief background of the case and contended that the respondent having been granted leave to amend his defence, the earlier one ceased to form part of the court record. The respondent however clarified that even before the amendment, he had denied receiving the total purchase price of Kshs. 800,000/= from the appellant as had been agreed.
21. The respondent submitted that during the hearing, it transpired that the appellant who testified as P.W 2 called one Mr. Duncan Gichunge Muthuri Advocate who testified as P.W 1 and it transpired that the



two had an advocate-client relationship of many years and the sale agreement in question was drawn and executed at the office of P.w 1.

22. It is the respondent's contention that the payment of Ksh. 200,000/= was noted and acknowledged on the sale agreement drawn at P.W 1's office and the same was duly witnessed by P.W 1 as well as two other witnesses who, according to the proceedings, are the appellant's son and wife. That the appellant did not produce any evidence to prove payment of Kshs. 600,000/= as there was no acknowledgment receipt executed by the parties. That such payment cannot be proved merely by a verbal allegation and/or insistence of one having seen. The respondent maintained that the appellant did not pay the said sum of Kshs. 600,000/= as alleged or at all, and submitted that the same was not proved to the required standard.
23. It is the respondent's submission that the appellant failed to honour specific terms of the sale agreement dated 7<sup>th</sup> November 2017 and that the trial court applied the law correctly in finding the appellant to be in breach of the said agreement and in dismissing his suit. It was further submitted that the respondent proved his case in the counter-claim on a balance of probability as required by the law and therefore the trial court correctly applied the law in allowing the counter-claim.

### Determination

24. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities relied on by the advocates for the parties to buttress their rival submissions. This being a first appeal, I am reminded that this court has the duty and obligation to reconsider the evidence, evaluate it and draw its own conclusion, bearing in mind that this court has neither seen nor heard the witness and therefore will make due allowance in this respect. See *Abok Odera t/a AJ Odera & associates v Joan Patrick Macharia & Co. Advocates* [2013]eKLR, *Mwana Sokoni v Kenya Bus Service Ltd* (1985) 931 and *Ephantus Mwangi & another v Duncan Mwangi Wambugu* (1982 – 88) 1 KAR 278.
25. The main issue for determination is whether or not the appellant paid the balance of the purchase price of Kshs. 600,000/= and depending on this, which of the parties breached the agreement in question and whether or not the learned trial magistrate was justified in arriving at the decision she made.
26. From the evidence, it is not in dispute that a sale agreement dated 7<sup>th</sup> November, 2017 was entered between the appellant and the respondent. It is also not in dispute that an amount of Kshs. 200,000/= was paid by the appellant to the respondent as deposit for the purchase of the suit property. What was in dispute was whether there had been payment of the balance of the purchase price of Kshs. 600,000/= and if not, whether as a result of the nonpayment, the sale agreement was frustrated, thereby discharging the respondent from the obligation under the agreement.
27. With regard to whether the balance of Kshs. 600,000/= was paid, the respondent was categorical that following the initial payment, no further amounts were paid. However, the appellant insisted that he paid the said amount of Kshs. 600,000/= on November 9, 2017. The appellant's evidence was that on November 9, 2017, he withdrew a sum of Kshs. 600,000 from his Yetu Sacco Ltd account and both parties appeared in the offices of Mr. Gichunge advocate (P.w 1) where he paid the said amount in the presence of the said advocate, adding that the respondent acknowledged receipt thereof, but refused to give vacant possession of the land sold, failed to clear an outstanding loan with Unison Sacco, and failed to transfer the property sold. However, the respondent on his part maintained that the appellant failed to pay the balance of the purchase price and this made the respondent to fail to clear the said outstanding loan and caused him to sell his vehicle to clear the said loan to save his land from being auctioned. The learned trial magistrate found that whereas the appellant had withdrawn the said amount from his account, he failed to prove that the respondent received the same at the advocate's



office. The trial court noted that this was a significant amount of the purchase price and one would expect that there either be a written document evidencing the same at the time it was paid, or a follow up letter to indicate payment of the said sum. The trial court concluded that the said balance was not paid as stipulated in the agreement for sale or at all and thus the respondent was entitled to repudiate the sale agreement.

28. With the greatest respect to the learned magistrate, I think that the above reasoning and conclusion was quite flawed. I am not persuaded that the evidence adduced at the trial support the finding that the appellant did not pay the balance of the purchase price and therefore in breach of the agreement. The opposite is in fact the case as demonstrated hereinbelow.
29. To start with, the agreement provided that the balance of the purchase price was to be paid on or before 9<sup>th</sup> November, 2017. Both the appellant and the respondent produced the said agreement as an exhibit. I have perused the two copies of agreement that were produced by the appellant and the respondent. Under Clause 2 (i) and (ii), there is an acknowledgement in form of a signature by the respondent made against both the payment of Kshs.200,000/- and the one of Kshs. 600,000/=. Indeed, this acknowledgment is found in both the agreement that was produced by the appellant and the one that was produced by the respondent as an exhibit. The question then that arises is, why would the respondent append his signature on the part of the deposit of Kshs. 200,000/= and also the part for the balance of Kshs. 600,000/= if it is true that he had not received the latter payment? My answer to this would be that the respondent was acknowledging payments of the two amounts of Kshs. 200,000/= and Kshs. 600,000/= and nothing else.
30. In addition to the said acknowledgment, in my considered view there was sufficient evidence adduced by the appellant to support the said payment of Kshs. 600,000/=. For example, the appellant produced documentary evidence to confirm that he withdrew Kshs. 600,000/= on November 9, 2017 from his account at Yetu Sacco Meru Branch. The appellant testified that he paid the said sum of Kshs. 600,000/= to the respondent at Gichunge advocate's office. Mr. Gichunge himself testified as P.W 1 and stated categorically that the payment of Kshs. 600,000/= was paid in his office and in his presence. P.w 1 went further to explain the reason as to why it was not advisable to draw another acknowledgment. That it was because the parties could not incur further advocate's fees. The same advocate also witnessed the payment of the initial deposit of Kshs. 200,000/.
31. It is instructive to also note that in his initial defence dated 18<sup>th</sup> March 2020, the respondent stated at paragraph 7 that "...immediately after the parties entered into an agreement for sale of the suit land, he was unable to secure the title documents from Unison Savings and Credit Co-operative Society owing to reasons beyond his control a fact which is well within the plaintiff's knowledge and that as such the agreement between the parties stands frustrated." Of importance to note from the said defence is the fact that the respondent never raised the issue of non payment of the outstanding balance of Kshs. 600,000/=. It was only in his amended defence and counter-claim dated 19<sup>th</sup> July, 2021 that the respondent denied having been paid the balance of the purchase price. In my view, and as rightly submitted by the appellant, the counter claim was just but an afterthought. It is my humble view that if the trial magistrate properly evaluated the evidence on record, she would have found that the appellant is the one who had proved his case on a balance of probability and not the respondent. In this case, I am not persuaded that the respondent had proved his counter-claim as found by the trial court. On the contrary, it is the appellant who, on a balance of probability, proved that he paid the balance of the purchase price. There was sufficient evidence that show that the appellant withdrew the balance of the purchase price of Kshs. 600,000/= from his account, went to the advocates office and in whose presence the respondent was paid and the respondent acknowledged receipt by appending his signature on clause 2(ii) of the agreement for sale. The said advocate testified as P.W 1 and confirmed as much



in his testimony. The learned trial magistrate did not give any reason why she thought Mr. Gichunge Advocate (P.w 1) was not a credible witness in this case particularly on having witnessed payment of Kshs. 600,000/=. For the reasons stated, I find that this appeal has merit and I would allow it. I would set aside the judgment and decree of the subordinate court. The only issue to determine is which orders the appellant would be entitled to.

32. In his plaint, the appellant sought for an order of specific performance and in the alternative, a refund of the consideration of Kshs. 800,000/=. From the evidence on record, and in particular the sale agreement entered into between the appellant and the respondent, it is apparent that the subject of the said agreement was a property that was subject to the *Land Control Act*. There is no evidence to show that consent was applied for and obtained before the expiry of six months as set out in Section 6 of the said Act. A contract of land to which the *Land Control Act* applies becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal for the refusal, if any, has been dismissed. In the absence of any evidence to show that there was an application for and consent of the Land Control Board was granted, it is my finding that the agreement dated November 7, 2017 between the appellant and the respondent is void and the only remedy that the appellant is entitled to is an order for the refund of the purchase price of Kshs. 800,000/=. This was the alternative prayer sought by the appellant and which he should have been granted.
33. The upshot is that the appeal is allowed, the orders of the learned trial magistrate dated April 28, 2022 dismissing the appellant's suit and allowing the respondent's counter-claim are set aside. The respondent's counter claim is dismissed with costs. The appellant's suit is allowed and granted an order of refund of Kshs. 800,000/= as against the respondent.
34. The respondent is to pay the appellant the costs of this appeal and the proceedings in the magistrate's court.
35. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

**IN THE PRESENCE OF**

Court Assistant V.Kiragu/Lena M

Njindo for appellant

**C.K YANO**

**JUDGE**

