



Kimamo v Karagoini Redeemed Church (Sued through representatives Pastor Solomon N Macharia & Samuel Maina Githatu) (Environment and Land Appeal 44 of 2023) [2023] KEELC 21645 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21645 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 44 OF 2023
YM ANGIMA, J
NOVEMBER 16, 2023
FORMERLY NYAHURURU ELCA NO. E010 OF 2023**

BETWEEN

GRACE MUTHONI KIMAMO APPELLANT

AND

**KARAGOINI REDEEMED CHURCH RESPONDENT
SUED THROUGH REPRESENTATIVES PASTOR SOLOMON N MACHARIA &
SAMUEL MAINA GITHATU**

(An appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 31.01.2023 in Nyahururu CM ELC No. E037 of 2021)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 31.01.2023 in Nyahururu CM ELC No. E037 of 2021 – Grace Muthoni -vs- Karagoini Redeemed Gospel Church (Sued through their representatives Pastor Solomon N. Macharia and Samuel Maina Githatu). By the said judgment, the trial court dismissed the Appellant’s suit and allowed the Respondent’s counterclaim. The Respondent was also awarded costs of both the suit and counterclaim.

B. Background

2. The record shows that vide a plaint dated 26.04.2021 the Appellant sued the Respondent before the trial court seeking the following reliefs:



- a. That the sale agreement entered into and signed by the Plaintiff and the Defendant through its official representatives on the 11.01.2017 be and is hereby rescinded and nullified.
 - b. Special damages at Kshs. 30,000/= which amount is equivalent to thirty percent (30%) of the total purchase price for breach of contract as per the agreement dated 11.01.2017.
 - c. That the Defendant be ordered to remove the illegal structures erected on the Plaintiff's parcel of land and a permanent order of injunction do issue restraining the Defendant through its official representatives, members, agents, servants and/or anyone acting on its behalf from entering, remaining and/or trespassing thereon.
 - d. General damages of breach of contract.
 - e. Costs of this suit plus interest.
 - f. Any other or further reliefs that this honourable court may deem fit and just to grant.
3. The Appellant pleaded that she was at all material times the rightful owner of Title No. Nyandarua/ Karagoini/498 (the suit property) which she had acquired through Nyahururu SPMC Succession Cause No. 103 of 2013 (the Succession Cause). She pleaded that vide a sale agreement dated 11.01.2017 she sold a portion of 1/8 of an acre to the Respondent at an agreed consideration of Kshs. 100,000/= which amount was paid in full.
 4. The Appellant further pleaded that the parties engaged the services of a government surveyor who pointed out the boundaries of the portion of land the subject of the sale and the Respondent was satisfied with its location and extent whereupon it took possession and erected some temporary structures thereon for its purposes. It was the Appellant's case that later on the Respondent started threatening, insulting and intimidating her claiming that the portion of land she had sold to it fell short of 1/8 of an acre.
 5. The Appellant further pleaded that she reported the said threats, insults and acts of intimidation to the locational chief, the District Officer and the police service but the issue was not resolved in consequence whereof she had to relocate from the suit property as she feared for her life. As a result, it was contended that it had become difficult to complete the sale agreement dated 11.01.2017 due to the Respondent's aforesaid conduct which constituted breach of contract. It was the Appellant's case that she no longer intended to complete the sale and she was ready to refund the purchase price less 30% liquidated damages for breach of contract.
 6. The Respondent filed a defence and counterclaim dated 30.05.2021 and amended on 03.12.2021 in which it denied liability for the Appellant's claim. It admitted the existence of the sale agreement dated 11.01.2017 but stated the parties had engaged a private surveyor who pointed out the tentative ground area for 1/8 of an acre pending formal sub-division and excision.
 7. The Respondent pleaded that it had variously pursued the Appellant for formal sub-division and transfer of the sold portion of land but the Appellant had failed to do the needful. It denied the allegations of threats, insults and intimidation made by the Appellant and put her to strict proof thereof. It denied ever frustrating completion of the sale agreement or of being in breach thereof. It was contended that it was the Appellant who was in breach by failing to excise the sold portion of land and transferring the same to the Respondent.
 8. By its counterclaim, the Respondent reiterated the contents of the defence and contended that the sale agreement dated 11.01.2017 was valid and capable of performance. It pleaded that it was the Appellant



who was in default by failing to undertake a formal sub-division and excision of the 1/8 acre and failing to transfer the same as per the terms of the sale agreement.

9. The Respondent pleaded that having taken possession of the sold portion of land and having constructed a place of worship and other facilities for worshippers over the years the Appellant was holding the 1/8 of acre the subject of the sale in trust for the church. As a result, the Respondent sought the following reliefs in the counterclaim:
 - a. A declaration of the existence of a constructive trust in favour of the Defendants as against the Plaintiff for a portion measuring 1/8th acre in L.R. Nyandarua/Karagoini/498.
 - b. An order for specific performance compelling the Plaintiff to formally cause to be excised a portion of 1/8 acre out of L.R. Nyandarua/Karagoini/498 through the service of a County Surveyor Nyandarua County.
 - c. An order for specific performance compelling the Plaintiff to execute all the necessary documents that would facilitate the excision and transfer of a portion of 1/8 acre out of L.R. Nyandarua/Karagoini/498, and in default, the Court Administrator/Executive Officer do execute all such documents on behalf of the Plaintiff.
 - d. The costs of the suit plus interest at court rates.
 - e. Any other relief that the court may deem fit and just to grant.
10. The Appellant filed a reply to defence and defence to counterclaim dated 05.10.2021. By her reply to defence, she joined issue upon the Respondent's defence and reiterated the contents of the plaint. She denied being in breach of the sale agreement dated 11.01.2017 and put the Respondent to strict proof thereof. By her defence to counterclaim, the Appellant denied all the allegations contained in the counterclaim. She pleaded that although the sale agreement between the parties was enforceable and capable of performance, the Respondent was the one in breach thereof hence not entitled to the reliefs sought in the counterclaim. The Appellant also filed a defence to the amended counterclaim dated 11.01.2022 in which it denied all the allegations contained in the amended counterclaim. In particular, she denied that any constructive trust had arisen in favour of the Respondent.

C. Trial Court's Decision

11. The record shows that upon a full hearing of the suit, the trial court found that the Appellant had failed to prove her claim on a balance of probabilities against the Respondent and proceeded to dismiss it with costs. On the counterclaim, the trial court found and held that the Respondent had demonstrated that it was the Appellant who was in breach of the sale agreement by failing to obtain the necessary completion documents. Accordingly, the trial court allowed the Respondent's counterclaim with costs.

D. Grounds of Appeal

12. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 28.02.2023 raising the following four (4) grounds of appeal:
 - a. That the learned magistrate erred in law and fact in finding that the Appellant was in breach of the agreement dated 11.01.2017 and in ordering that the Appellant does pay Kshs. 30,000/= for breach of the said agreement.
 - b. That the learned magistrate erred in law and fact in finding that the Appellant had failed to prove her case on a balance of probabilities thus dismissing her suit with costs.



- c. That the learned magistrate erred in law and fact in failing to rescind the contract between the Appellant and the Respondent and giving an order of specific performance against the Appellant despite the Appellant proving her case on a balance of probabilities.
 - d. That the learned magistrate erred in law and in fact in upholding the Respondents' counterclaim despite the Appellant proving that the Respondent was in breach of the contract and had frustrated completion of the contract.
13. As a result, the Appellant sought the following reliefs in the appeal:
- a. The appeal be allowed.
 - b. That the judgment of the trial court dated 31.01.2023 be set aside.
 - c. That judgment be entered for the Appellant as prayed in her plaint dated 26.04.2021 together with costs of the suit.
 - d. That the Appellant be awarded costs of the appeal.

E. Directions on Submissions

14. When the appeal was listed for directions, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on 30.08.2023 whereas the Respondent's were filed on 13.09.2023.

F. Issues for Determination

15. Although the Appellants raised 4 grounds in her memorandum of appeal, the court is of the opinion that those grounds may be summarized as follows:
- a. Whether the trial court erred in law and fact in dismissing the Appellant's suit.
 - b. Whether the trial court erred in law and fact in allowing the Respondent's counterclaim.
 - c. Who shall bear costs of the appeal.

G. Applicable legal principles

16. As a first appellate court, this court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

“...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 that respect. In particular, this court is not bound necessarily to follow the trial judge's findings 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 demeanor of a witness is inconsistent with the evidence in the case generally.”



17. Similarly, in the case of *Peters –vs- Sunday Post Ltd* [1958] EA 424 Sir Kenneth O’ Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

18. In the same case, Sir Kenneth O’Connor quoted *Viscount Simon, L.C in Watt –vs- Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

19. In the case of *Kapsiran Clan -vs- Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:

- a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.



H. Analysis and Determination

a. Whether the trial court erred in law and fact in dismissing the Appellant's suit

20. The court has considered the material and submissions on record on this issue. The trial court dismissed the Appellant's claim primarily on the basis that she was the one in breach of the terms of the sale agreement dated 11.01.2017. In its judgment, the trial court held, inter alia, that:

“It has not been disputed that to date, the Plaintiff has not obtained the necessary land control board consent to their transaction and executed the necessary documents for transfer of the portion the Defendant purchased despite having stated in clause 6 of the said agreement that time was of essence. From the above, it is evident and proved on a balance of probabilities that it is the Plaintiff who has breached their agreement. Therefore, the remedy of rescission is not available to the Plaintiff to cover up for her own breach. It is my finding that the Plaintiff has failed to prove her case on a balance of probabilities as against the Defendant and her suit is thus dismissed with costs.”

21. In her plaint dated 26.04.2021 the Appellant advanced two reasons why she considered that the Respondent was in breach of the sale agreement dated 11.01.2017. First, it was her contention that the Respondent had alleged that the subject matter of the sale fell short of 1/8 of an acre. Second, that the Respondent had issued threats and insults against her and also intimidated her. The court has noted, however, that the particulars of the alleged threats, insults and intimidation were not specified in the plaint.
22. The court finds no legal or logical justification for holding that the Respondent's complaint on the alleged shortfall on acreage would constitute breach of contract. There was no covenant by the Respondent in the sale agreement that it shall not seek to verify whether the area pointed out by the surveyor actually amounted to 1/8 of an acre. There was no allegation that the Respondent had refused to sign the application form for consent of the Land Control Board or refused to sign the transfer forms. The Respondent's complaint could not, therefore, be construed to mean a breach of contract or repudiation of the agreement.
23. Apart from the Appellant's allegation of threats and insults in the pleadings and her witness statement, the Appellant did not call any other witness to corroborate the nature and extent of the alleged threats and insults. The material on record shows that the Appellant and one of the church officials or preachers (DW1) had some differences resulting from alleged gossip. When the Appellant confronted the preacher demanding to know the source of the information the latter refused to disclose the informer. The court really finds no evidence of any threat to the health or life of the Appellant by the Respondent or its officials to warrant a repudiation of the sale agreement.
24. Even if the church officials may have spoken ill of the Appellant as alleged, that would not be sufficient ground to warrant a repudiation of the sale agreement for land. It would only justify the Appellant in becoming angry or annoyed. The allegation that the church officials may have wanted the Appellant to lose all her properties and assets and become destitute through spiritual intervention, even if true, could not justify the repudiation of the sale agreement dated 11.01.2017. The court finds no evidence of threats of violence or death which would have justified a repudiation of the sale agreement on the part of the Appellant.
25. The court has noted that although the Appellant obtained a certificate of confirmation in the Succession Cause in 2014 she never took steps to transfer the suit property into her name within a



reasonable period or at all. It would appear that even by the time of the hearing of the suit before the trial court she had not implemented the certificate of confirmation of grant. It would thus appear that she would not have been in a position to undertake a formal excision of the property the subject of the sale. She would also not have been able to obtain the consent of the Land Control Board in those circumstances. The court agrees with the findings and holding of the trial court that the Appellant was the one in breach of the sale agreement and not the Respondent.

26. The court is also unable to agree with the Appellant's contention that the Respondent was in breach of the sale agreement by failing to pay survey fees. The court agrees with the Respondent's submission that this ground was an afterthought since it was never pleaded in the plaint. It was not contained in the Appellant's witness statement. It was also not contained in the Appellant's demand letter dated 01.03.2021. Moreover, the court finds no evidence on record to demonstrate that any formal sub-division and excision of the 1/8 acre was ever undertaken by the Appellant. There were no mutation forms tendered at the trial and there was no evidence of amendment of the Registry Index Map. There was also no evidence on record to demonstrate that the Respondent was ever issued with an invoice to pay the survey fee which it failed to honour.
27. In the premises, the court finds no fault with the finding and holding of the trial court that the Appellant had failed to prove her claim on a balance of probabilities since she was the one in breach of the terms of the sale agreement dated 11.01.2017. The court fully concurs with the holding of the trial court on the first issue.

b. Whether the trial court erred in law and fact in allowing the Respondent's counterclaim

28. The court has considered the material and submissions on record on this issue. The trial court found and held that it was the Appellant and not the Respondent who was in breach of the sale agreement dated 11.01.2017. The material on record shows that even though the Respondent was shown the portion of 1/8 acre the subject of the sale, there is no evidence on record to demonstrate that the Appellant ever undertook a formal sub-division and excision of the said portion of land. There was no copy of a duly registered mutation form and a copy of the amended Registry Index Map to demonstrate the excision.
29. There was also no evidence to demonstrate that the Appellant took any steps within a reasonable time to obtain the consent of the Land Control Board for purposes of sub-division and transfer of the land the subject of the sale. The court is of the opinion that the Appellant could not lawfully undertake the sub-division and transfer without first undertaking distribution of the estate of her deceased husband in accordance with the confirmed grant. The court is thus of the opinion that the Appellant was the one who defaulted in taking steps towards the completion of the sale. She was the one who defaulted in obtaining the completion documents in her capacity as the vendor.
30. There is no evidence on record to demonstrate any form of default on the part of the Respondent. The material shows that the Respondent had paid the full purchase price of Kshs. 100,000/=. It had taken possession and developed the plot. There was no indication that the Respondent had refused to sign the application forms for Land Control Board consent or transfer forms. There was no evidence to show that the Respondent had been invoiced for survey fees and failed to pay. On the contrary, there is no evidence on record to demonstrate that any mutations were ever drawn and registered in the instant case. Accordingly, the trial court was right in finding and holding that the Respondent had proved its counterclaim to the required standard.
31. The court is of the opinion that once the Appellant received the full purchase price and handed vacant possession of the 1/8 acre to the Respondent, a constructive trust arose in favour of the Respondent



in respect of that portion. It does not matter that the consent of the Land Control Board was never obtained for the sale transaction.

32. In the case of *Aliaza –vs- Saul* (Civil Appeal No. 134 of 2017 [2022] KECA 583 (KLR) (24 June, 2022) (Judgment) the Court of Appeal held, inter alia, that:

“In my view, from the time the Appellant entered the first of the two parcels of the suit land in 2002 and into the subsequent portion that he purchased in 2004, a constructive trust in his favour was created in respect of the land. Such trust, as was found by the court in the case of Macharia Mwangi Maina, became an overriding interest over the suit land. The failure on the part of the Respondent to obtain the necessary consent from the Land Control Board within the required six (6) months to enable the Appellant transfer the suit land into his name does not render the transaction void. Entry and fairness, the guiding principles in Article 10 of *the Constitution*, require that the *Land Control Act* is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the Appellant.”

33. The court is thus satisfied that the trial court was right in its determination on the second issue. The decision of the trial court is fully supported by the evidence on record. The decision cannot be faulted either in law or fact hence it ought not to be disturbed.

d. Who shall bear costs of the appeal

34. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should be deprived of costs of the appeal. Consequently, the Respondent shall be awarded costs of the appeal.

I. Conclusion and Disposal Orders

35. The upshot of the foregoing is that the court finds no merit in the Appellant’s appeal. As a consequence, the court makes the following orders for disposal of the appeal:
- a. The appeal be and is hereby dismissed.
 - b. The judgment and decree of the trial court dated 31.01.2023 in Nyahururu CM ELC No. E037/2021 is hereby affirmed.
 - c. The Respondent is hereby awarded costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 16TH DAY OF NOVEMBER, 2023.

In the presence of:

Mr. Gakeni Gicheru holding brief for Ms. Wanjiru Muriithi for the Appellant

Mr. Nderitu Komu for the Respondent

C/A - Caro

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Y. M. ANGIMA
JUDGE

