



**Gichira v Kariuki (Environment and Land Appeal 12 of 2021)
[2023] KEELC 21597 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21597 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 12 OF 2021
JM MUTUNGI, J
NOVEMBER 16, 2023**

BETWEEN

PETER MWANGI GICHIRA APPELLANT

AND

JANE DEBORAH KARIUKI RESPONDENT

*(An Appeal arising from the Judgment of Honourable Magistrate.
M. Kivuti (MS) delivered on 9th July 2021 in Civil Suit ELC No.
26 of 2019 in the Senior Principal Magistrate's Court at Baricho)*

JUDGMENT

1. This appeal arises from the Judgment of Hon. M. Kivuti delivered on 9th July 2021 in Baricho SPMC ELC No 26 of 2019.
2. The background of the matter is that the Appellant who was the Defendant in the suit before the Lower Court entered into a sale agreement dated 9th May 2012 with Bernard Kariuki Macaari (deceased) for the sale of a portion of land measuring 0.05Ha out of LR No Mwerua/Kagio/222 for the consideration of Kshs 300,000/- and paid Kenya Shillings Two Hundred and Fifty Thousand (Kshs 250, 000/-) as deposit leaving a balance of Fifty Thousand (Kshs 50,000/-) which was to be paid upon transfer.
3. Bernard Kariuki Macaari died on 5th August 2013 without transfer of the portion of the land the subject of the sale being effected to the Appellant. Letters of Administration to the deceased estate issued and confirmed on 27th November 2018. The Respondent together with Gladys Muthoni Kariuki were appointed administrators of the estate of the deceased.
4. On 11th December 2013, the Appellant lodged a caution against land title No Mwerua/Kagio/5499 which was a subdivision from Title No Mwerua/Kagio/222 and also cited the Respondent to take out Letters of Administration to the deceased estate vide Succession Cause No 441 of 2014.



5. The Respondent in response filed her affidavit to illustrate why letters of administration should not be issued to the Appellant by stating that the Appellant was not a family member and disputed ever knowing about the sale of the suit land and also stated that the consent of the Land Control Board had not been sought and as such the sale agreement was null and void and the only remedy that was available for the Appellant was the refund of the purchase price. The citation was later withdrawn by the appellant.
6. The Respondent made a refund of the deposit of Kshs 250,000/- paid by the Appellant through the Appellant's Advocates office and made a demand that the Appellant withdraws the caution that he had lodged against the title of the suit property. The Appellant refused and/or neglected to have the caution withdrawn asserting that he would only accede to the withdrawal of the caution if the Respondent in addition to the refund agreed to pay damages for breach of contract and the costs his Advocates incurred in filing the citation in Kerugoya PM Succession Cause No 141 of 2016. As no agreement could be reached by the parties, the Respondent filed Baricho ELC No 26 of 2019 where the Respondent sought orders for the withdrawal of the caution. In response the Appellant filed a defence and Counterclaim where he prayed for specific performance of the agreement and/or in the alternative damages for breach of contract together with interest and costs of the suit.
7. The Learned Trial Magistrate in her determination held that the Appellant's Counterclaim was statute barred; that the relief of specific performance of the agreement of sale would not be available as refund of the consideration had been made to the Appellant; that the claim for general damages was not available as refund of the deposit paid towards the purchase had been made; and finally that the caution registered against the title by the Appellant ought to be lifted. In consequence therefore the Learned Trial Magistrate held that the Respondent had proved her case against the Appellant and entered Judgment in favour of the Respondent (Plaintiff) as follows:-
 - i. The Defendant is hereby ordered to withdraw the LR No Mwema/Kagio/5499 within 30 days from the date of the Judgment.
 - ii. In default of compliance with Order(i) above, the Land Registrar Kirinyaga County to vacate the caution.
8. The Plaintiff(Respondent) was awarded the costs of the suit.
9. The Appellant was dissatisfied and aggrieved by the Learned Trial Magistrate's decision and has appealed to this Court against the Judgment on four grounds set out in the Memorandum of Appeal as follows:-
 - i. That the Learned Magistrate erred in law and fact by finding and holding that the Defendant's Counter Claim is statute barred.
 - ii. That the Learned Magistrate erred in Law and fact by finding and holding that the Defendant's claim for specific performance fails.
 - iii. That the Learned Magistrate erred in law and fact by finding that the Defendant was refunded the purchase price and holding that the Defendant's claim for damages for breach of contract is not sustainable and equally fails.
 - iv. That the Learned Magistrate erred in law and fact by ordering that the caution lodged against LR No Mwerua/Kagio/599 be withdrawn within 30 days.
10. The Appellant sought that the Judgment and any consequential orders be set aside and that the costs of the appeal be awarded to the Appellant.



11. In order to determine whether or not the decision of the subordinate Court was justified or not justified, it is necessary that this Court reconsiders and re-evaluates the evidence that was adduced before the Subordinate Court. This being a first appeal, the Court is under a duty to relook and re-evaluate the evidence afresh and it is not necessarily bound by any findings of fact that the Court below may have made. The Court can reach its own conclusions if upon evaluation of the evidence, the Court is satisfied the Lower Court applied the wrong principles in reaching the decision that it did and/or if any finding was not supported by the evidence. This principle was aptly established in the Court of Appeal Case of *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 where the Court stated as follows:-

“--- this Court is not bound necessarily to accept the findings of fact of 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 the 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 ----“

12. Briefly the evidence before the Lower Court was that the Respondent who was the Plaintiff instituted the suit against the Appellant who was the Defendant seeking the withdrawal of a caution that the Appellant had registered against LR No Mwerua/Kagio/5499. In her evidence the Respondent stated that the land belonged to her having been awarded the same pursuant to Succession Cause No 118 of 2017. She stated the Appellant had claimed to have bought the land from her late husband a fact she claimed she was unaware of. The Respondent testified that she refunded the sum of Kshs 250,000/- that the Appellant had paid her husband through the Appellant's Advocate A. N. Chomba. The Respondent relied on the documents (“PEX 1-6”) which she had filed in support of her case before the Subordinate Court.
13. Upon being cross-examined the Respondent affirmed her husband had subdivided the original land parcel No Mwerua/Kagio/222 in 2013 and that one of the resultant subdivisions being land parcel No Mwerua/Kagio/5499 was given to her by the Succession Court. She stated that as per the agreement exhibited by the Appellant, the sale related to land parcel Mwerua/Kagio/222 and not 5499. She denied she was party to the agreement.
14. The Appellant testified as DW2 and he adopted his recorded witness statement dated 18/3/2020 as his evidence in chief. Briefly, it was his evidence that he entered into a sale agreement dated 9/5/2012 with the Respondent's husband. The Appellant paid a deposit of Kshs 250,000/- leaving a balance of Kshs 50,000/- which was to be paid upon transfer. The Appellant testified that the vendor fell sick soon after the agreement was entered into and that he died before the process of transfer was completed. The Appellant explained that he cited the Respondent for her to obtain Letters of Administration to complete the process and/or refund the money that he had paid to her late husband. He stated that his Advocate advised him to withdraw the citation and lodge a caveat.
15. The Appellant further testified he learnt later that succession proceedings had been concluded and the purchase deposit he had paid had been refunded to his Advocate. He stated he had been unaware of the refund and that he had not consented to the refund being made. Under Cross-examination the Appellant affirmed the parcel of land subject of the sale agreement was parcel Mwerua/Kagio/222 and not parcel 5499. He confirmed the Respondent was not privy to the sale agreement. He stated that the sum of Kshs 250,000/- was received by his Advocate A. N. Chomba Advocate and that the Advocate had not paid the money to him.



16. DWI Pius Chege who testified in support of the Appellant's case affirmed he was a witness to the sale agreement between the Appellant and the Respondent's husband. He stated that the agreement related to land parcel Mwerua/Kagio/222. He stated though the deceased wife, Tabitha was present she never signed the agreement. He was not aware whether any consent of the Land Control Board was sought for the transaction.
17. The Appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 6/6/2023 while those of the Respondent were filed on 11/7/2023.
18. Having reviewed the pleadings, the Appeal record and the evidence adduced before the Lower Court and further having considered the submissions made by the parties the issues that arise for determination in this appeal are:-
- i. Whether the Appellants Counter Claim was statute barred as the Learned Trial Magistrate held.
 - ii. Whether in the circumstances and having regard to the evidence, the relief of specific performance of the sale agreement entered between the Appellant and the Respondent's late husband was available to the Appellant?
 - iii. Whether the Appellant was entitled to general damages for breach of contract?
 - iv. Whether the order for withdrawal of the caution lodged by the Appellant over title LR No Mwerua/Kagio/5499 was justified?
19. The sale agreement between the Appellant and the Respondent's husband and upon which the Counterclaim was founded was entered into on 9th May 2012. Under Clause 9 of the Counterclaim the Appellant pleaded as follows:-
9. By Sale Agreement dated the 9th day of May 2009, the Defendant purchased from Bernard Kariuki Macaari(deceased) all that piece of land situated at Kagio in Kirinyaga County referred to as Mwerua/Kagio/5499 after paying the agreed purchase price of Kenya Shillings Two Hundred and Fifty Thousand (250,000/=). However, the said Bernard Kariuki Macaari passed on before the transfer could be effected.
- Prayer(a) of the Appellant's Counterclaim was as follows:-
- a. An order of specific performance of the said sale agreement dated 9th May, 2012 with all the necessary and consequential orders and directions.
20. The Learned Trial Magistrate inter alia in holding the Counterclaim was not proved held that the Counterclaim was statute barred on account of the provisions of Section 4(1)(a) of the Limitation of Actions Act, Cap 22 Laws of Kenya as the action was not brought within a period of 6 years from the date of the contract. Section 4(I)(a) of the Limitation of Actions Act provides:-
- 4
- (1) The following actions may not be brought after the end of six years from the date on which the action accrued.
 - a. Actions founded on contract;
21. The Appellant had up to six years from 9th May 2012 to enforce the contract of sale. He filed his defence and Counterclaim in the Lower Court on 8th November 2019. This was well outside the period of



- 6 years within which he ought to have instituted the action to enforce the contract of sale. Without doubt, the Appellants Counterclaim was instituted outside the limitation period and was therefore statutorily barred. The Learned Trial Magistrate cannot be faulted for holding and finding that the Counterclaim was barred by statute.
22. It follows therefore that an order for specific performance would not have been available as the contract against which it was pegged could not be enforced as the action was commenced after the period of Limitation had expired.
 23. The Appellant although the Learned Trial Magistrate did not base her decision on the failure to obtain the consent of the Land Control Board for the transaction as required under Section 6(1)(a) of the *Land Control Act* Cap 302 Laws of Kenya, the Appellant urged the Court to rely on the Court of Appeal decision in the Case of *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR and hold that the doctrine of constructive trust as espoused in that case was applicable in the circumstances of the present appeal.
 24. With respect I do not think the circumstances that were in the Willy Kimutai Kitilit Case(supra) were similar to the circumstances in the instant appeal. In the Willy Kimutai Case, the purchaser had paid the purchase price in full and was in possession, whereas in the present Appeal there was still a balance of purchase price that had not been paid and there was no evidence that the Appellant had taken possession. In those circumstances the doctrine of constructive trust would be inapplicable. The appellant's counterclaim sought for specific performance of the Sale Agreement dated 9th May 2012. Clause 2 of the said Sale Agreement stated that the vendor shall sell and the purchaser shall buy 0.05 Ha in LR No Mwerua/Kagio/222. Clause 7 of the sale agreement also allowed the purchaser vacant possession upon signing of the agreement. The Appellant did not take possession of the portion he was acquiring.
 25. In essence, the appellant sought from the lower court for an order of specific performance of the sale agreement dated 9th May 2012 in which the deceased agreed to sell to him a 0.05 HA portion of land to be excised out of a larger parcel of land registered as LR Mwerua/Kagio/222. The Appellant could not properly seek specific performance of land parcel Mwerua/Kagio/5499 as that was not the property identified in the sale agreement.
 26. The rationale for the provision in Section 42 of the *Land Registration Act* is ease to appreciate. It was untended to forestall instances as in the instant appeal where parties enter sale agreements for portions of unsubdivided land. Section 42 of the Act provides as follows:-

“No part of the land comprised in a register shall be transferred unless the proprietor has first subdivided the land and duly registered each new subdivision.”
 27. I agree with the findings of the learned magistrate that no evidence was produced by the appellant to demonstrate that LR Mwerua/Kagio/5499 was the portion of land referred to in the sale agreement. No evidence was led by the appellant that he was in possession of the suit land, and so he cannot with certainty claim that LR Mwerua/Kagio/5499 fell within the portion he was to purchase.
 28. Besides the Respondent adduced credible evidence that she refunded the sum of Kshs 250,000/- that the Appellant's had paid towards the purchase price through the Appellants Advocate M/s A. N. Chomba & Co. Advocates. There was no dispute that A. N. Chomba Advocate represented the Appellant in the sale transaction and hence was a duly authorised agent of the Appellant.
 29. The Appellant's Advocate acknowledged the refund of Kshs 250,000/- by issuing a receipt for the same. The argument by the Appellant that he had not authorised and/or consented to the refund being



made cannot hold as his Advocates were acting as his agents. The Learned Trial Magistrate properly held, the estate of the deceased had made refund of the deposit paid towards the purchase price and that disentitled the Appellant to a claim for specific performance of the contract of sale of the land.

30. There was no basis for the claim of general damages for breach of contract as no breach was proved. The Learned Trial Magistrate properly rejected the claim for general damages as the transaction stood rescinded once the refund was made and accepted.
31. Having reviewed and evaluated the evidence presented before the subordinate Court. I am satisfied the Learned Trial Magistrate properly appraised the matter and reached the right decision. I find no basis to fault the determination she arrived at. The Appeal is devoid of merit and the same is dismissed with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 16TH DAY OF NOVEMBER 2023.

J. M. MUTUNGI

ELC - JUDGE

