



**Nyambok v Ojuka & another (Environment and Land Appeal E030 of 2022)
[2023] KEELC 21647 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21647 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E030 OF 2022
GMA ONGONDO, J
NOVEMBER 15, 2023**

BETWEEN

SAMWEL ODOYO NYAMBOK APPELLANT

AND

MICAH ONYANGO OJUKA 1ST RESPONDENT

JACK OTIENO OYIER 2ND RESPONDENT

*(Being an appeal of the entire Judgment of the Chief Magistrate's Court of Kenya at Homa Bay,
(Hon. T.M. Olando) delivered on the 28th Day of July 2022 in MC ELC No. E004 of 2022)*

JUDGMENT

1. The instant appeal was provoked by the judgment of Honourable Tom Mark Olando, Principal Magistrate rendered on July 28, 2022 where the learned trial magistrate held thus;

“I find the plaintiffs purchased the land and paid the full purchase price. I thus, find that the plaintiffs have provided their case on a balance of probabilities and enter judgment in favour of the plaintiffs and against the defendant as here below.

The defendants to refund to the plaintiffs Kes 650,000 as per the agreement together with interest and penalty of 50% of the purchase price. The plaintiff also gets costs of the suit and interest from the date of filing until payment in full.”

2. Being aggrieved at the judgment, the appellant, Samwel Odoyo Nyambok through the firm of Odhiambo B.F.O and Company Advocates and currently represented by Omondi Ogwel and Company Advocates, filed the appeal by way of a memorandum of appeal dated August 10, 2022 based on the grounds infra;



- a. The learned trial magistrate erred in law by purporting to give effect to an illegal contract on the sale of land that was entered into by a person who had not taken out grant of letter of administration intestate and confirmed the same as required by the law.
 - b. The learned trial magistrate erred in law in failing to find that the contract upon which the dispute was based was void ab initio and that no remedy could flow from a void contract.
 - c. The learned trial magistrate erred in law by blithely disregarding the express provision in the impugned contract which pointed to the fact that the said contract whose fruits would only crystallize upon successful filing and completing the succession process and as such by filing this dispute and harassing the appellant using the police it is the respondents who breached the central term of the same contract.
 - d. The learned trial magistrate erred in law and in fact in holding that the appellant is to pay some interest which was clearly a forgery besides the fact that the alleged maker of the document was never called to testify.
 - e. The learned trial magistrate misconducted himself by hastily setting the matter for hearing when he had already been placed on transfer and ignoring critical procedures in the trial process such a pre-trial, in which case parties in this suit never complied with order 11 of the [Civil Procedure Rules](#).
 - f. The learned trial magistrate erred in law by failing to consider detailed submissions of the appellants which could have guided him in reaching a justified decision in this matter.
 - g. The learned trial magistrate erred in fact and in law by misapprehending the entire theory that was being advanced by the appellant thereby arriving at a false and dangerous conclusion that the appellant's defence was an admission.
 - h. The learned trial magistrate erred in coming up with judgment which to a material extent does not conform to the dictates of order 21 rules 4,5 and 6 of the [Civil Procedure Rules](#).
 - i. The learned trial magistrate erred in law and in fact by failing to read and apprehend the appellant's response to the demand letter by the respondents to the extent that the appellant was willing to refund the entire sum that was paid to him by the respondents without the said respondents instituting a suit.
 - j. The learned trial magistrate erred in law in awarding cost to the Respondents who went to court after the appellant had promised to refund them the amount of money, they had paid to him.
 - k. The learned trial magistrate erred in law by failing award cost to the appellant in this matter when the suit as it was premature and unnecessary due to the doctrine of ripeness.
3. Wherefore, the appellant has sought that;
- a. This appeal be and is hereby allowed and the judgment and orders thereof set aside and replaced with an order dismissing the suit filed at the HomaBay Chief Magistrate's Court (MC ELC/E004/2022).
 - b. The cost of this appeal and the cost at the lower court to be provided.



4. The appellant's supplementary record of appeal dated February 13, 2023 contains the respondents' submissions dated July 21, 2022 filed before the trial court and the appellant's submissions dated July 21, 2022
5. On June 5, 2023, this court directed that the appeal be heard by written submissions.
6. It is cardinal to note that on the said date, Mr. Omondo Ogwel, learned counsel for the appellant told this court thus;

“.....We do not intend to file submissions as we will rely on submissions filed in the trial court.”
7. In the appellant's submissions filed before the trial court, learned counsel for the appellant urged the court to find that the suit was based on an illegal contract and that it be dismissed with cost. Counsel relied on, *inter alia*, sections 45, 79 and 82 of the Law of Succession Act chapter 160 Laws of Kenya, Republic v Titus Ngamau Musila [2018] eKLR and Njogu & Company Advocates v National Bank of Kenya Ltd [2016] eKLR, among other authorities.
8. By the submissions dated October 16, 2023, learned counsel for the respondents states that it is evident that during the hearing of previous suit and his defence, the appellant admitted selling to the respondent's land whereby he offered to refund the purchase price to them in amicable settlement. That the trial magistrate's judgement thereof was simply in line with the Appellant's admission and undertaking to that effect. That the appeal herein was not filed in court in good faith, is an afterthought and an abuse of the court process and there is no merit in it at all. That the previous judgment be upheld and the appeal herein be dismissed accordingly with costs.
9. Additionally, the court allowed counsel for the respective parties to orally highlight their submissions. So, learned counsel for the appellant referred to the appellant's submissions filed at the trial court and stated in part that the substratum of this dispute is the contract dated August 20, 2019 which is illegal and the court cannot give effect to the same in light of section 82 (b) (2) of the Law of Succession Act chapter 160 Laws of Kenya. That the succession cause thereof lies at the High Court. That the appellant filed a preliminary objection before the trial court but it was disallowed. That the appellant has refunded the purchase price paid to him hence, there was no basis of the suit.
10. In her submissions, learned counsel for the respondent relied on the respondents' submissions as noted in paragraph 8 herein. That as submitted by the appellant's counsel, the appellant undertook to refund the purchase price before the suit was lodged at the trial court. That as revealed in pages 31 and 32 of the record of appeal, the appellant reiterated that he sold the suit land to the Respondents and he has no right to keep the land in the circumstances. That the suit was justified and that the appeal be dismissed with costs
11. At the trial court, the respondents sued the appellant by way of a plaint dated January 26, 2022 for;
 - a. An order compelling the defendant to transfer the purchased portion of the suit land, Kanyada/ Kanyabala/2358 measuring (50 by 100 ft) to them failing which the Court Administrator Homa Bay Law Courts to sign transfer documents in their favour.
 - b. Refund of the purchase at the current market value together with the 50% per cent penalty as per the sale of land agreement
 - c. Cost of the suit.
12. By his statement of defence dated February 14, 2022, the appellant denied the respondents' claim and stated, *inter alia*, that the suit land is still registered in the name of Narkiso Nyambok Onyando



- (Deceased) and that Homa Bay High Court Succession Cause No. E010 of 2021 in respect of the same, was still pending in court. That as such, the appellant lacked capacity to dispose of the suit land at the time the contract was being entered into. Therefore, he prayed;
- a. That an order be and is hereby given by this court dismissing this suit since it discloses no other cause of action other than the refund of the purchase price of Kes 650,000/- which the defendant has expressly admitted to refund.
 - b. That a declaration be and is hereby issued that the contract dated August 20, 2019 is unenforceable, null and void for want of capacity of vendor to seek to dispose of the land without taking out grant of letters of administration intestate on the estate of the late Narkiso Nyambok.
 - c. That the cost of this suit be granted to the defendant.
13. In her evidence, the 1st respondent (PW1) relied on her statement and told the court, inter alia, that the sale agreement between him and the appellant (P Exhibit 1) related to the suit land registered in the name of deceased as disclosed in P Exhibit 3. That succession of the estate of the deceased, was in progress. That the appellant refused them to use the land or failed to refund the money paid as purchase price and that the appellant did not tell her anything about succession of the estate of the deceased.
14. The 2nd respondent (PW2) relied on his statement dated January 26, 2022 as part of his testimony and stated that the appellant sold him land as revealed in P Exhibit 1. That the appellant told him that they had done succession concerning the estate of the deceased and that he did not take them to the land control board in respect of the sale of the suit land. That the appellant did not refund money paid as purchase price as regards the suit land and urged the court to compel him to pay it back.
15. The appellant (DW1) relied on his statement dated 14th February 2022 as part of his evidence. In cross examination, he told the court that the appellant sold the suit land to the respondents at a consideration of 650,000/=. That succession had not been done in respect of the estate of the deceased and that the appellant has not given them land or refunded the said consideration.
16. In reaching the impugned judgment, the trial court noted P Exhibit 1 and that the appellant had received the purchase price which he was ready to refund. That the appellant’s statement of defence amounted to an admission of the respondents’ claim.
17. It is established law that an appellate court has the jurisdiction to review the evidence on record in order to determine whether the conclusion originally reached upon such evidence should stand. That however, the said jurisdiction should be exercised with caution; see *Peter v Sunday Post* (1958) EA 424 at 429.
18. On that score, the issues for determination in this appeal are condensed into whether;
- a. This appeal founded upon the alleged illegality of the sale agreement (P EXhibit 1) as grounds 1, 2 and 3 are assessed together alongside all the other grounds contained in the memorandum of appeal, is tenable.
 - b. Thus, the appellant is entitled to the orders sought in the said memorandum.
19. Notably, it is not in dispute that the appellant sold the suit land to the respondents who paid Kes 650,000/= in two instalments being purchase price thereof as revealed in P Exhibit 1 herein that the appellant neither gave the respondents the land nor refunded the purchase price to them.



20. Evidently, P Exhibit 1 was reduced into writing and the parties as well as witnesses signed it. This court is conscious of section 3 (3) of the [Law of Contract Act](#) chapter 23 Laws of Kenya and relevance of the same to P Exhibit 1.
21. At paragraph 10 of the statement of defence, the appellant stated that there was actual breach of the terms of P Exhibit 1. That it is not safe to continue with the contract. The appellant termed it an illegality which the court cannot enforce in the circumstances.
22. In Para 11 of the statement of defence, the appellant stated that he;
- “.....asked the plaintiffs (respondents) to give him six months in order to arrange and refund them the Kes 650,000/- which was paid to him, and that the plaintiff never heard from them except through the current suit.”
23. The learned trial magistrate observed that the appellant’s defence was an admission as noted by the trial court. This is revealed in the parties’ respective pleadings and evidence. Also, the appellant’s counsel submitted that the appellant was willing to refund the entire purchase price to the respondents and the court erred in awarding costs to the respondents.
24. No doubt, DW1 stated in re-examination as follows;
- “...I have the money even now. I can refund the money even now.....”
25. Moreover, it is undisputed that at the time P Exhibit 1 was entered into, the suit land was registered in the name of the deceased and that his estate had not been succeeded by the appellant. The term “Legal Representative” is given meaning in section 2 of the [Civil Procedure Act](#) chapter 21 Laws of Kenya.
26. It is borne in mind that the estate of the deceased person is vested in the legal representative; see [Trouwistik Union International and another v Jane Mbeyu and another](#) [1993] eKLR.
27. Additionally, in the case of [Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama](#) [2014] eKLR the Court of Appeal held;
- “....A litigant is clothed with *locus standi* upon obtaining a limited or full grant of letters of administration in cases of intestate succession.....”
28. It crystal clear that the original suit was defended by the appellant. Counsel for respective parties were ready for hearing of that suit on July 19, 2022. As a result, the trial court heard the suit in the spirit of article 159(2) (b) of the [Constitution of Kenya](#) , 2010. The learned trial magistrate summarized the parties’ respective pleadings, evidence, framed two issues for determination, analyzed them before arriving at the impugned judgment. Therefore, he complied with order 21 (supra).
29. In the circumstances, is P Exhibit 1 a void contract and unenforceable? Indeed, there are instances where a contract in breach of statute at it’s formation, may nevertheless be enforced; see [Shaw v Groom](#) [1970] 2 QB 504, [Nathalal Raghavji Lakhani v H.J.Vaitha 7 another](#) [1965] EA 452, [Njogu case](#) (supra) and [Safari Inns Ltd 72 others v Deutsche Investitions-Und Entwicklungsgellschaft \(“Deg”\) & others](#) [2011] eKLR.
30. In the case of [Kariuki v Kariuki](#) [1983] KLR 227, it was observed that the only remedy available to a party to a transaction which has become void under the [Land Control Act](#) Chapter 302 Laws of Kenya is that the party can recover as a debt any money or consideration paid in the course of the transaction under section of the said Act.



31. Furthermore, in the case of *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] KLR, the Court of Appeal reasoned;

“.....This is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This court is bound to deliver substantive rather than technical or procedural justice.....” (Ephasis added).

32. Article 10 (2) (b) of the [Constitution of Kenya](#), 2010 anchors the principles of equity which include;

- a. Equity treats as done that which ought to have been done (equitable conversion).
- b. Equity will not allow a wrongdoer to profit by a wrong; see also *Jeho v Vivian* [1876] Law Rep 6 Ch App.742 (restitution)
- c. He who seeks equity must do equity.
- d. Equity will not allow a statute to be used as a cloak for fraud (constructive trust)

33. In the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR, the Court of Appeal held;

“Thus, since the current Constitution has by virtue of Article 10 (2) (b) equated equity as a principle of justice to a Constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle.....”

34. In the obtaining scenario, I bear in mind the facts and circumstances of the transaction between the appellant and the respondents. So, the situation of PExhibit 1 is cured by equity as captured in article 10 (2) (b), Shaw, Nathalal, Kariuki, Macharia Maina and Kitilit cases (all supra).

35. It is therefore, the finding of this court that the judgment of the trial court is not faulty at law. I would uphold the same accordingly.

36. Wherefore, this appeal is devoid of merit and is hereby dismissed.

37. Concerning costs of this suit, I am guided by the decision in *Rai v Rai* (2014) eKLR that the basic rule on costs follow the event, is not invariable. That indeed, the ultimate factor on award or non-award of costs, is the Judicial discretion.

38. Costs of this appeal and the court below shall be borne by the appellant, by dint of the decision in Rai case (supra) and the proviso to section 27 (1) of the [Civil Procedure Act](#) cap 21 Laws of Kenya.

39. It is so ordered.

DATED, DELIVERED AT HOMA BAY THIS 15TH NOVEMBER 2023.

G. M. A ONG'ONDO

JUDGE

PRESENT

1. Mr. Omondi learned counsel for the appellant.
2. H.O Mimba learned counsel for the respondents.
3. Mutiva, court assistant.

