



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL 798 OF 2004**

**SIMON KINYANJUI MWAI..... APPELLANT**

**VERSUS**

**PAUL MBURU MWAI ..... RESPONDENT**

**J U D G M E N T**

1. The Appellant was the plaintiff in the lower court and the Respondent was the first defendant. There was a second defendant who, due to reason that are not immediately apparent, was not included in this appeal.
2. The appeal is against the decree of the lower court passed on 31<sup>st</sup> August 2004. By that decree judgment was entered for the defendants. The plaintiff's suit for specific performance of a contract of sale of a plot in a trading centre was dismissed. The defendants had counterclaimed for rent and also for an order for the plaintiff to vacate the suit plot. The counterclaim for rent was dismissed, but that for an order to vacate the plot was allowed.
3. It is useful to understand the background of the dispute as disclosed by the proceedings before the lower court. The first defendant (Respondent in this appeal) was the mother of both the plaintiff (Appellant) and the second defendant and other sons. She owned some properties that included the suit plot (which was registered in the name of the second defendant as trustee).
4. The first defendant guaranteed a bank loan to one of her other sons using her main property, the agricultural land upon which the entire family had their homes. The loan was apparently not serviced and the land fell in danger of being sold by the bank in exercise of its statutory power of sale.
5. The first defendant then called a meeting of the entire family at which she decided to sell the suit plot and another plot in order to raise funds to pay off the bank loan and save the land. Immediate family members were given the first option to purchase.
6. The plaintiff and the defendants then entered in to a sale agreement by which he would purchase the suit plot for KShs 70,000/00. The plaintiff paid KShs 30,000/00 towards the purchase price. The balance of KShs 40,000/00 was to be paid before the end of 1986. He did not pay the balance as agreed, but at some point he paid a further KShs 10,000/00 directly to the bank. He never paid the outstanding KShs 30,000/00.
7. In the meantime the family land continued to be in danger of sale by the bank, and at another family meeting it was agreed that the plot be offered to another buyer in order to save the family land. It would appear that the plaintiff acquiesced to this arrangement so that he may be refunded his KShs 40,000/00.

**8.** Indeed the suit plot was then sold to one Francis Ndung'u for KShs 150,000/00. He paid a total of KShs 92,000/00 to the bank and the title was redeemed. The balance was to be paid upon transfer. But transfer was not immediately possible because the suit herein was then instituted.

**9.** The grounds of appeal in the memorandum are-

(i) That the trial court did not consider and appreciate the reasons why the Appellant did not pay the balance of the purchase price as agreed and erred in concluding that he was in breach of the sale agreement.

(ii) That the trial court erred in not finding that it was the Respondent who was in breach by refusing to accept the balance of the purchase price.

(iii) That the trial court erred in ordering eviction of the Appellant, a relief that had not been sought.

(iv) That the trial court did not consider the entire evidence presented.

(v) That the decision of the trial court was against the weight of evidence.

(vi) That the trial court was biased against the Appellant and considered extraneous matters, thereby arising at the wrong decision.

**10.** I have carefully read the testimonies of the many witnesses who testified for both sides, as well as the judgment of the lower court. I have also considered the submissions of the learned counsels appearing.

**11.** The Appellant was clearly unable or unwilling to pay the balance of the purchase price (KShs 30,000/00) despite the long period of time that he had to do so. Because of his default the purpose of selling to him the suit plot in the first place was defeated, and the agricultural land upon which the entire family lived was again in danger of being sold off by the bank. The Respondent and her family were then forced to look for another buyer in order to save the family land, and the suit plot was then lawfully sold to this third party, who immediately paid part of the purchase price sufficient to save the family land.

**12.** It would not be proper at all to allow this family dispute to continue to fester. By purchasing the suit plot the third party ultimately saved the family land upon which they all lived from the auctioneer's hammer. It would do violence to this third party, and indeed to the Respondent and the rest of her family, to permit the Appellant to purchase the suit plot in his own sweet time despite being grossly in breach of the sale agreement in so far as payment of the balance of the purchase price is concerned.

**13.** I cannot find in the testimonies of the many witnesses who testified on behalf of the Appellant evidence of the Respondent's refusal to accept the balance of the purchase price as alleged by him.

**14.** The Appellant may have improved upon the suit plot before or after his sale agreement by constructing additional rooms or extensions. But by the same token he has reaped the benefit of collecting rents upon part of the property, and by using the rest of it. All in all, it is time for him to vacate the plot to enable this unhappy family chapter to come to a close.

**15.** The complaint that the order that the Appellant do vacate the suit plot was granted gratuitously is without basis. The Respondent and her co-defendant specifically counterclaimed for the same as can be seen at paragraph 11 (c) of the defence and counterclaim dated 8<sup>th</sup> November 1988.

**16.** In the result I find no merit in the appeal and the same is dismissed with costs to the Respondent. It is ordered.

**17.** The delay in preparation of this judgment is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 14<sup>TH</sup> DAY OF SEPTMBER 2012.**

**H.P.G. WAWERU**  
**JUDGE**