



REPUBLIC OF KENYA



**Adan v Kiraithe (Environment and Land Appeal E016 of 2023)
[2025] KEELC 3072 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3072 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E016 OF 2023**

LN MBUGUA, J

APRIL 2, 2025

BETWEEN

HUSSEIN ADAN APPELLANT

AND

JACKSON KIRAITHE RESPONDENT

*(Being an appeal from the judgment of Hon. Ben Mararo (SPM) delivered
on 7th day of November, 2023 in Nanyuki ELC Case No. E015 of 2021)*

JUDGMENT

1. The appellant herein was the plaintiff before the Magistrates court where he filed a suit vide a plaint dated 4.1.2021 contending that he had entered into an agreement with the defendant for the sale of a portion of land measuring 120 by 120 feet which was to be excised from defendants parcel 699 in Nkando Farmers Co-operative society now registered as title No. Timau/Timau Block 7/699. The plaintiff contended that he paid the full purchase price, but the defendant breached the sale agreement of which the transfer was not executed.
2. The plaintiff therefore prayed for judgment to be entered in his favour in the following orders;
 - a) An order of specific performance.
 - b) An order directing and compelling the defendant to surrender all the original ownership documents for the suit property to the plaintiff and to sign and execute all the relevant transfer instruments in respect of that parcel of land known as Timau/Timau Block 7/699 in favour of the plaintiff and in the alternative he be ordered to pay the plaintiff the market value of the suit property plus developments (Valuation to be completed on institution of the suit).



- c) A permanent injunction to restrain the defendant, either by himself, his agents, servants, employees or anyone claiming through him from interfering with the ownership, use and or possession by the plaintiff of the said suit property.
 - d) Costs of this suit and interest.
 - e) Any other or further relief that this court may deem fit and just to grant.
3. The defendant (the current respondent) opposed the suit through a statement of defence dated 8.4.2021 denying the allegations made against him and contended that the suit was res judicata to the case Nanyuki CMCC No. 29 of 2015.
 4. In the judgment delivered on 7.11.2023 the plaintiff's suit was dismissed with costs to the defendant.
 5. Aggrieved by the said decision, the appellant lodged this appeal vide a memorandum of appeal dated 15.11.2023 where he raised the following five grounds.
 - i. The Learned Magistrate misdirected himself in failing to make a finding against the plaintiff.
 - ii. The Learned Magistrate erred in fact and in law by failing to appreciate the evidence tendered with regard to ownership of the plaintiff's plot measuring $\frac{1}{4}$ of an acre which was translated to 100 feet by 100 feet which was to be excised from plot No. 699 Nkando Farmers Block 7/699.
 - iii. The Learned Trial Magistrate misdirected himself in totally disregarding the evidence by way of agreement for sale dated 28th day of June, 2001.
 - iv. The Learned Trial Magistrate misdirected himself in relying on the pleadings drafted by the then Counsel on record for the Appellant whom despite proper instructions still drafted misleading pleadings by stating that the subject agreement of sale was executed on 28th day of August 2001 while having an agreement for sale dated 28th day of June, 2001 in possession.
 - v. The Learned Trial Magistrate erred by failing to appreciate that the plaintiff had proved its case on a balance of probabilities which was uncontroverted by the defendant.
 6. The appellant therefor prays for the following orders;
 - a. The judgment dismissing the plaintiff's suit and all consequential orders in Nanyuki ELC Case No. E015 of 2021 be set aside and substituted with one allowing the plaintiff's suit and allowing the appellant's appeal.
 - b. Alternatively, an order for retrial of Nanyuki ELC Case No. E015 of 2021 with the plaintiff allowed to amend his plaint dated 4th day of January, 2021 to exclude misleading statements that were captured by the then advocate on record.
 - c. The respondent be ordered to pay costs for the appeal
 7. On 7.10.2024 the court gave directions for the appeal to be heard by way of written submissions. The submissions of the appellant are dated 23.10.2024 where he argues that the gravamen of the dispute before the trial court was the failure by the respondent to effect the excision of and transfer a $\frac{1}{4}$ acre parcel of land from plot Timau/Timau Block 7/699. He contends that he fully paid the purchase price and the said averment was not contested. He therefore contends that he is entitled to the order of specific performance. He relied on the cases of Reliable Electrical Engineers Ltd v Mantrac Kenya Limited [2006] eKLR amongst other decisions.



8. The submissions of the respondent are dated 14/2/2025 where it was argued that the trial court had analysed the pleadings and evidence tendered and had found that the appellant's testimony was in variance with his pleadings, thus the trial court did not misdirect itself in its determination of the case. Further, it was submitted that the appellant did not meet the essential ingredients for the issuance of the orders of specific performance.
9. To this end, the respondent relied on the cases of Independent and Electoral & Boundaries Commission and another v Stephen Mutingda Mule & 3 Others [2014] eKLR, Okoth v Nyaberi & Another (C.A No. 248 of 2018) [2024] KECA 427 (KLR) 26.4.2024, amongst other cases.

Determination

10. The duty of the 1st appellate court was explained in the case of Selle and Another v Associated Motor Boat Company Ltd & Others [1968] Ea 123, where it was observed thus:-

“An appeal to this Court from a trial by the High 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 this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”
11. Before the trial court, the appellant Hussein Adan Dera testified as Pw1 and he relied on his witness statement dated 4.1.2021 as his evidence. He contended that on 27.6.2021 him and his wife met the defendant who stated that he had a quarter acre of land to sell where the price was Kshs. 25,000. That they met the following day of 28.6.2021 and made an agreement before advocate Mwangi Kariuki. Pw1 then commenced construction and stayed on that land for 23 years. However the land was not surveyed and he didn't get a title.
12. In support of his case, Pw1 produced documents including a search dated 27.1.2021, a letter dated 16.9.2020 and a caution dated 1.11.2021 as his exhibits.
13. In cross-examination, Pw1 stated that what he bought was a ¼ acre of land measuring 100 by 100 feet and not measuring 120 by 120 feet within parcel 699. He further stated that they had a case where he was ordered to pay damages as his cows had caused destruction on defendant's land. He paid a sum of Kshs. 20,699 although he was to pay 30,500. He contends that he did not go to the Land Control Board.
14. In re-examination, the plaintiff admitted that he had been sued for trespass by the defendant.
15. Dw1 was the current respondent. He adopted his witness statement dated 8.4.2021 as his evidence. He also produced documents in his list dated 8.4.2021 as exhibits.
16. He admits that he is the registered owner of parcel 699, from which he sold a portion thereof measuring 60 by 80 feet on 28.6.2002. That the defendant later started encroaching on his land, so Dw1 filed the suit CMCC No. 29 OF 2015 where he was to be paid damages for crops destroyed, that he had also sought for an injunction preventing the plaintiff from interfering with that land and for his eviction adding that the plaintiff did not oppose that case.



17. On cross-examination, Dw1 reiterated that he had indeed sold about a quarter of the land measuring 60 by 80 feet to the plaintiff.
18. I have weighed the evidence tendered before the trial court vis a vis the judgment delivered. It is quite apparent that the basis upon which the claim of the plaintiff was dismissed was on account of the dates of the agreement. That in his pleading, the plaintiff had mentioned the date of the agreement as 28.8.2001 while in his testimony, he mentioned the date of 28.6.2001. Further that in his pleadings, he was mentioning 120 by 120 feet while in his testimony, he talked of 100 by 100 feet. With that the trial court came to a conclusion that the evidence of the plaintiff did not support his pleadings, hence his case was dismissed.
19. However, a holistic approach of the dispute reveals that the issue of the agreement was not a subject of contest. To this end, the respondent had stated as follows in his witness statement ;
- “I sold a portion of my parcel of land on 28.6.2002 at Ksh 25 000. The portion was measuring 60 feet by 80 feet”.
20. In cross examination, the respondent had stated that;
- “I know the plaintiff. I sold him land and I showed him. It was 60 by 80, about a quarter not 60 by 80”.
21. It is pertinent to note that the portion which was being sold was to be hived off from respondents land, and the actual measurements had not been taken. I therefore find that in dismissing the claim of the plaintiff, the net effect was an unjust enrichment on the part of the defendant who had actually admitted to the claim. See Stephen Karanja Kibuku v Safaricom Limited [2018] KEHC 1367 (KLR).
22. On the issue of the existence of another case, I note that the judgment of the trial court did not analyse the issue. Nevertheless, I find that the decree availed by the respondent relates to the claim of trespass upon parcel 699, the land of the respondent. The issue of the sale transaction was not deliberated upon in that other case.
23. The provisions of Section 78 of the Civil Procedure Act stipulate that;
- “(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
- (a) To determine a case finally;
- (b) To remand a case;
- (c) To frame issues and refer them for trial;
- (d) To take additional evidence or to require the evidence to be taken;
- (e) To order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein”.
24. To this end, I make a determination that the plaintiffs claim before the trial court is hereby allowed; such that the respondent is directed to transfer a ¼ acre of land from his parcel Timau/Timau Block 7/699 to the appellant, in the alternative, the respondent to pay to the appellant the market value of



a quarter acre of land plus the developments made thereon. The respondent is condemned to pay the costs of the suit in this appeal and before the trial court.

DATED DELIVERED AT NANYUKI THIS 2ND DAY OF APRIL 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

