



**Kamau v Mugunu & another (Environment and Land Appeal  
6 of 2018) [2022] KEELC 4738 (KLR) (23 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 4738 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 6 OF 2018**

**BM EBOSO, J  
AUGUST 23, 2022**

**BETWEEN**

**HENRY NJOROGE KAMAU ..... APPELLANT**

**AND**

**SALOME WACHEKE MUGUNU ..... 1<sup>ST</sup> RESPONDENT**

**GABRIEL NJENGA NG'ANG'A ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment of Hon. C. C Oluoch (Mrs) (SPM) delivered at  
Kiambu Chief Magistrate Court on 4/3/2015 in Kiambu CMC Civil Case No 313 of 2010)*

**JUDGMENT**

**Background**

1. This appeal arose from the Judgment rendered on 4/3/2015 by Hon CC Oluoch (Mrs) SPM in Kiambu CMC Civil Case Number 313 of 2010. The dispute in the said suit revolved around the question of ownership of Land Reference Number 85/22, measuring approximately  $\frac{3}{4}$  of an acre [hereinafter referred to as “the suit property”]. Salome Wacheke Mugunu [the 1st respondent in this appeal] was the plaintiff in the said suit. Gabriel Njenga Ng’ang’a [the 2nd respondent in this appeal] was the 1st defendant in the said suit. Henry Njoroge Kamau [the appellant in this appeal] was the 2nd defendant in the suit. I will outline a brief background to the appeal before I dispose the issues that fall for determination in the appeal.
2. Vide a plaint dated 1/12/2010, the 1st respondent sought the following reliefs against the 2nd respondent and the appellant: (i) a permanent injunction restraining the two together with their agents against entering, leasing, trespassing on or in any way dealing with the suit property; (ii) an order directing the appellant to transfer the suit property to the 1st respondent; and (iii) Costs of the suit.



3. The 1st respondent's case was that, through a sale agreement dated 6/6/2005, entered into between her and the 2nd respondent, the 2nd respondent agreed to sell to her a piece of land measuring  $\frac{1}{2}$  of an acre, that was to be parceled out of Land Reference Number 85/4 at an agreed purchase price of Kshs 220,000. At that time, Land Reference Number 85/4 was still registered in the name of the 2nd respondent's deceased father, the late Ng'ang'a Njoroge [hereinafter referred to as "the deceased"]. The 2nd respondent was a beneficiary of part of the land under the Succession Cause relating to the deceased's estate. The 1st respondent paid the 2nd respondent a down-payment of Kshs 80,000, leaving a balance of Kshs 140,000 which was to be paid on or before 31/12/2005. Parties expressly agreed that the 1st respondent was to take possession of the land immediately.
4. The 1st respondent further contended that through a supplementary sale agreement dated 29/11/2005, the parties varied/amended the agreement dated 6/6/2005 by increasing the acreage from  $\frac{1}{2}$  of an acre to  $\frac{3}{4}$  of an acre. Similarly, the agreed purchase price was varied from Kshs 220,000 to Kshs 330,000. The 2nd respondent acknowledged receipt of a further payment of Kshs 80,000, making a total down-payment of Kshs 160,000 and leaving Kshs 170,000 as balance of the purchase price which was to be paid on or before 30/4/2006.
5. The 1st respondent added that on 13/4/2006, she paid the 2nd respondent a further sum of Kshs 51,000, leaving a balance of Kshs 119,000 and it was agreed that the said balance was to be paid to the 2nd respondent after the 2nd respondent had obtained consent to transfer the land and after the land had been registered in the name of the 1st respondent.
6. The 1st respondent further contended that on 15/5/2007, she paid the 2nd respondent a further sum of Kshs 40,000 and it was agreed that the agreed balance of Kshs 62,000 would be paid after the 2nd respondent obtained the consent to transfer the land and after the land had been registered in the name of the 1st respondent. She contended that she made a further payment of Kshs 32,000 to the 2nd respondent, leaving an agreed balance of Kshs 30,000 which was to be paid after the parties attended the land control board and after the transfer documents had been executed in the name of the 1st respondent.
7. The 1st respondent added that in 2009, she learnt from one of the persons who had similarly purchased land from the 2nd respondent that the 2nd respondent had purported to sell the suit property to the appellant. Consequently, she moved to the Kiambu Chief Magistrate Court seeking the above reliefs.
8. The 2nd respondent filed a statement of defence dated 27/1/2011 in which he contended that the 1st respondent was one of the six buyers to whom he sold land and that the 1st respondent breached the sale agreement by failing to make payment for: (i) land sale agreement; and (ii) deed plan process. It was the 2nd respondent's case that once the 1st respondent breached the contract, he [the 2nd respondent] had no alternative but to refund the money paid to him by the 1st respondent as per the terms and conditions of the sale agreement. He urged the court to dismiss the 1st respondent's suit.
9. The appellant filed a defence dated 27/1/2011 in which he averred that conveyance of the suit property into his name was transacted legally and in tandem with the directions given to the administrators of the deceased's estate by the 2nd respondent. He added that on 6/1/2010, the 1st respondent agreed to meet certain terms which were to be met to facilitate transfer of the suit property by him to the 1st respondent but the 1st respondent failed to meet those terms. He urged the court to dismiss the suit.
10. The 1st respondent filed a reply to defence in which she reiterated the averments made in the plaint.
11. Trial proceeded before Hon C C Oluoch, SPM. The 1st respondent testified and called four other witnesses. The 2nd respondent and the appellant too testified. They led evidence by four other defence witnesses. Thereafter, parties filed their written submissions. In her subsequent Judgment



dated 4/3/2015, the trial magistrate found in favour of the 1st respondent. She stated in her disposal orders that the appellant was at liberty to seek from the 2nd respondent a refund of the money paid to him.

## **Appeal**

12. Aggrieved by the Judgment and Decree of the trial court, the appellant brought this appeal vide a memorandum of appeal dated 26/3/2015. She contended that the trial court erred in:
  - i. failing to find that the 1st respondent did not pay the full purchase price of the land that she was claiming.
  - ii. failing to find that the 2nd respondent was entitled to treat the 1st respondent as having repudiated the agreement between herself and the 2nd respondent;
  - iii. failing to find that due to the 1st respondent's repudiation of the contract between her and the 2nd respondent, the 2nd respondent was entitled to rescind the contract.
  - iv. failing to find that the appellant was also entitled to treat the 1st respondent as having repudiated the agreement between her and the appellant.
  - v. failing to find that due to the 1st respondent's repudiation of the agreement between her and the appellant, the appellant was entitled to rescind the said contract.
  - vi. failing to find that the 1st respondent led the 2nd respondent and the appellant to believe that she was no longer interested in the purchase of the suit property and she was therefore estopped from claiming otherwise.
  - vii. failing to find that the 2nd respondent and the appellant having acted on the above belief, the 2nd respondent sold the suit property to the appellant and from the proceeds of the sale, the 2nd respondent availed a refund of the purchase price to the 1st respondent.
  - viii. granting the prayer for specific performance in favour of the 1st respondent yet she had not fulfilled her part of the bargain in the agreement between her and the 2nd respondent.
  - ix. granting the prayer for specific performance in favour of the 1st respondent yet she had not fulfilled her part of the bargain in the agreement between her and the appellant.
13. The appellant urged the court to set aside the Judgment of the trial court and substitute it with an order dismissing Kiambu CMC Civil Case No. 313 of 2010 with costs. He further prayed for costs of the appeal.

## **Appellant's Submissions**

14. The appellant filed written submissions dated 28/12/2021 through the firm of Brenda & Brenda Advocates. Counsel for the appellant identified the following as the four key issues that fell for determination in the appeal: (i) Whether the 1st respondent was in breach of the contract; (ii) Whether the doctrine of estoppel applied; (iii) Whether the 1st respondent was entitled to the remedy of specific performance; and (iv) Who should bear costs of the appeal.
15. On whether the 1st respondent was in breach of the contract, counsel submitted that there was evidence that the 1st respondent did not pay the full purchase price. Counsel argued that the agreement stipulated that the agreed purchase price was to be paid on or before 30/4/2006 but the 1st respondent did not comply with that term of the agreement. Counsel argued that the 1st respondent's failure to complete paying the purchase price by 30/4/2006 was an outright breach of the contract. Counsel



added that although the 2nd respondent was ready and willing to complete the sale to the 1st respondent, it was not possible because the sale agreement “had expired by effluxion of time on 30th April 2006”. Counsel contended that this fact was communicated to the 1st respondent through letters dated 10/8/2010 and 13/10/2010. Counsel added that having discharged all his obligations under the contract, the 2nd respondent was entitled to rescind the contract and thereafter pass a good title to a third party.

16. Counsel added that under the subsequent dispute resolution arrangements, the 1st respondent was required to refund the appellant Kshs 600,000 but she never made the refund, thereby breaching the terms of the agreement between them. It was the position of counsel for the appellant that the 1st respondent was not entitled to any relief.
17. On whether the doctrine of estoppel applied to the case, counsel submitted in the affirmative and contended that the 1st respondent’s conduct showed that she was “uncooperative, oppressive, high handed, outrageous, insolent and/or vindictive.” Counsel added that by failing to pay the required amount and by lodging a caveat on the suit property, the 1st respondent was estopped by her conduct from “claiming otherwise”.
18. On whether the 1st respondent was entitled to the remedy of specific performance, counsel for the appellant submitted that the 1st respondent had not fulfilled her part of the bargain and was therefore not entitled to the remedy. Counsel contended that the remedy of specific performance was not available to a party in breach of an agreement. Counsel urged the court to allow the appeal and condemn the respondents to bear costs of the appeal.

### **1st Respondent’s Submissions**

19. The 1st respondent filed written submissions dated 14/2/2022 through M/s Kirubi Mwangi Ben & Co Advocates. Counsel submitted that it was clear from the trial court’s record that the 2nd respondent sold to the 1st respondent the suit property and that the 1st respondent paid the agreed purchase price, leaving an agreed balance of Kshs 30,000 which was to be paid upon the parties attending the land control board and executing the transfer documents. Counsel argued that having received the purchase price, the 2nd respondent failed to transfer the suit property to the 1st respondent and instead caused it to be registered in the name of the appellant. It was the position of counsel for the 1st respondent that the 2nd respondent’s action constituted a breach of the sale agreement and deprived the 1st respondent of her proprietary interest in the suit property.
20. Counsel for the 1st respondent argued that it was a term of the sale agreement that the 2nd respondent would obtain consent from the land control board for the purpose of transferring the suit property to the 1st respondent. Counsel added that balance of the purchase price [Kshs 30,000] was to be paid to the 2nd respondent upon obtention of the consent of the land control board. Counsel argued that the 2nd respondent having put the 1st respondent in vacant possession of the suit property, the 1st respondent acquired the rights of a purchaser in possession. Relying on the Court of Appeal decision in *Macharia Mwangi & 87 others v Davidson Mwangi* [2014] eKLR, counsel submitted that the 1st respondent’s rights in the land were protected under Section 30 of the repealed Registered *Land Act* [sic].
21. Lastly, counsel submitted that the 2nd respondent led the 1st respondent to believe that the suit property would be transferred into her name only for him to transfer the land to the appellant. Counsel contended that the appellant was a neighbour of the 1st respondent and was aware that the 1st respondent was in possession of the land and had developed it. Counsel urged the court to dismiss the appeal.



22. The 2nd respondent did not file written submissions. On 23/2/2022, he informed the court that he was not opposing the appeal.

### **Analysis and Determination**

23. I have considered the record of the trial court, the grounds set out in the memorandum of appeal, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence on the key questions that fall for determination in the appeal. The appellant framed nine (9) grounds of appeal in the memorandum of appeal dated 26/3/2015. In his subsequent written submissions, he condensed the nine (9) grounds of appeal into the following four thematic issues: (i) Whether the 1st respondent was in breach of the contract; (ii) Whether the doctrine of estoppel applies; (iii) Whether the 1st respondent was entitled to the remedy of specific performance; and (iv) Who shall bear cost of the appeal. This being an appeal by the appellant, I will sequentially dispose the four issues as framed by the appellant.
24. Before I dispose the four issues, it is important for the court to remind itself about the principle that governs the jurisdiction that it is invited to exercise. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of Susan Munyi v Kesbar Shiani (2013)eKLR as follows:-
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
25. The above principle was similarly outlined in Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.”
26. The first issue identified by the appellant is whether the 1st respondent was in breach of the contract. There was common ground that the 1st respondent and the 2nd respondent entered into a land sale agreement dated 6/6/2005. There was also common ground that some of the key terms of the above contract were amended/varied through a supplementary land sale agreement dated 29/11/2005. The supplementary agreement varied the acreage from ½ of an acre to ¾ of an acre. Further, it varied the purchase price from Kshs 220,000 to Kshs 330,000. Thirdly, it varied the completion period.
27. The 2nd respondent's defence in the trial court was that the 1st respondent failed to make payments relating to what he described in paragraphs 2 and 3 of his defence as “(a) Land Sale Agreement” and “(b) Deed Plan Process”.
28. I have carefully examined both the original agreement and the supplementary agreement. I have also examined all the subsequent memoranda that were executed by the two respondents in this appeal in furtherance of the agreement. Under Clause (L) of the original agreement, the two respondents in this appeal incorporated the 1989 Edition of the Law Society of Kenya Conditions of Sale into the agreement. Secondly, under Clause (c) of the original agreement, the 2nd respondent acknowledged



receipt of Kshs 80,000 as part-payment of the purchase price. Further, under Clause (e), the 1st respondent was authorized by the 2nd respondent to take immediate possession of the suit property. Under Clause (g), the 2nd respondent undertook to execute documents and obtain consent and other documents to facilitate the transfer and registration of the suit property in the name of the 1st respondent.

29. Did the 1st respondent discharge his obligations under the contract? The obligations of the 1st respondent were two-fold: (i) to pay the agreed purchase price in the agreed manner; and to pay the survey fees. The evidence tendered before the trial court shows that on 6/6/2005, the 1st respondent paid to the 2nd respondent a sum of Kshs 80,000. At that point in time, the parties to the agreement agreed that the balance of the purchase price [Kshs 140,000] was to be paid on or before 31/12/2005. On 29/11/2005, parties to the agreement signed the supplementary agreement and the 2nd respondent acknowledged receipt of a further sum of Kshs 80,000 making a total down-payment of Kshs 160,000. It was agreed in writing in the supplementary agreement that the balance of the purchase price which had been varied from Kshs 220,000 to Kshs 330,000 was to be paid on or before 30/4/2006. Come 13/4/2006, the 2nd respondent signed an acknowledgement confirming receipt of a further payment of Kshs 51,000 and agreed that the balance of the purchase price [Kshs 119,000] was to be paid to him after he obtained consent of the land control board and after registration of the land in the name of the 1st respondent.
30. On 14/5/2007, the 2nd respondent signed yet another memorandum through which he acknowledged receipt of a further sum of Kshs 40,000 and agreed that the balance of the purchase price [Kshs 62,000] was to be paid to him upon him obtaining the consent of the land control board and upon registration of the suit property in the name of the 1st respondent.
31. On 1/7/2008, the 2nd respondent signed yet another memorandum through which he acknowledged receipt of Kshs 32,000 from the 1st respondent. In the same memorandum, he agreed and confirmed that the agreed balance of purchase price [Kshs 30,000] was to be paid to him after the parties to the sale contract had attended the land control board and after the parties executed transfer documents conveying the land into the name of the 1st respondent.
32. On 30/12/2009, the 2nd respondent signed a memorandum confirming receipt of Kshs 42,500 from the 1st defendant. He further confirmed that Kshs 30,000 was balance of the purchase price and Kshs 12,500 was balance of survey fees. The above agreements and memoranda were placed before the trial court as evidence.
33. Given the above evidence, the contention by the appellant and the 2nd respondent that the 1st respondent breached the agreement between her and the 2nd respondent is untenable. The 2nd respondent was to provide documents to facilitate conveyance of the land into the name of the 1st respondent. There was no evidence that he provided the documents to the 1st respondent. There was similarly no evidence that he issued any notice to the 1st respondent requiring the 1st respondent to remedy any specific breach. There was no evidence of any notice of intended rescission in the event that any specific breach had not been remedied. What the 2nd respondent and the appellant did was to enter into an illegal arrangement and cause the suit property to be conveyed to the appellant. The 2nd respondent had already sold the land to the 1st respondent. He had no land to sell to the appellant. The appellant was a neighbour of the 1st respondent and knew that the 1st respondent was in possession of the suit property as a purchaser.
34. The appellant faulted the 1st respondent for lodging a caveat on the suit property. He contended that it was for this reason that he decided to return to the District Officer the sum of Kshs 69,000 which the 1st respondent had given to him to facilitate conveyance of the suit property from the appellant's name



into her name. Given the circumstances under which the land had been conveyed to the appellant, the 1st respondent as a purchaser in possession of the land was, in my view entitled to protect his interest in the land by lodging the caveat.

35. The totality of the foregoing is that I do not find any breach on part of the 1st respondent.
36. The second issue is whether the doctrine of estoppel applied against the 1st respondent. The appellant contended that the trial magistrate erred in failing to find that the 1st respondent led the appellant and the 2nd respondent to believe that she was no longer interested in the purchase of the land and therefore she was estopped from “claiming otherwise”. The appellant contended that by failing to pay the “required monies” and by lodging a caveat on the title, the 1st respondent was estopped by her conduct from “claiming otherwise.”
37. The general common law doctrine of estoppel was enacted as part of Kenya’s statute law under Section 120 of the *Evidence Act*. It provides thus:-
- “When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. “
38. I have examined the evidence that was placed before the trial court. No evidence of any of the above essential elements of the doctrine of estoppel was placed before the trial court. The 1st respondent had at all times asserted her rights as purchaser and possessor of the suit property. Her decision to place a caveat on the title can not be reasonably interpreted as an act intended to mislead the appellant or the 2nd respondent into believing that she was no longer pursuing her rights over the suit property. To the contrary, it was an act intended to demonstrate the 1st respondent’s resolve to protect her interest as purchaser of the suit property. It is therefore my finding that the doctrine of estoppel cannot be applied against the 1st respondent in this appeal.
39. The third issue is whether the 1st respondent was entitled to the remedy of specific performance. The appellant faulted the trial court for granting the 1st respondent the remedy of specific performance yet the 1st respondent had not fulfilled her part of the bargain. I have analyzed the 1st respondent’s obligations under the agreement between her and the 1st respondent. The appellant complied with the agreement in full. It is the 2nd respondent who failed to give the 1st respondent completion documents. Further, it is the 2nd respondent who colluded with the appellant and caused the suit property to be registered in the name of the appellant.
40. This court is alive to the principle upon which jurisdiction to grant the equitable remedy of specific performance is exercised. Maraga J [as he then was] summarized the principle in *Reliable Electronic Engineers v Mantrac Kenya Limited* [2006] eKLR as follows:
- “The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect, damages are considered to be an adequate alternative where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are inadequate, specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”



41. In the present appeal, the 1st respondent purchased the suit property and was given possession. As at the date of the impugned Judgement, the 1st respondent had been in possession of the suit property for approximately ten (10) years. She contended that she had developed the suit property. She had paid purchase price in full as evidenced by the memorandum dated 30/12/2009. The appellant knew that the 1st respondent had purchased the suit property and was in possession. Denying the 1st respondent the remedy of specific performance would, in essence, have amounted to uprooting her from the suit property after ten (10) years of quiet possession. In my view, given the above circumstances, the equitable remedy of specific performance was appropriate. That is my finding on the third issue.
42. Lastly, on costs, the dispute leading to this appeal was largely authored by the 2nd respondent. He will, in the circumstances, bear costs of this appeal.

### **Disposal Orders**

43. The result is that this appeal has no merit. It is hereby rejected for lack of merit. The 2nd respondent, Gabriel Njenga Ng'ang'a, as the principal author of the dispute leading to this appeal, shall bear costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF AUGUST 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Odhiambo for the Appellant

Court Assistant: Ms Osodo

