



**Mwangi v Ng'ang'a (Sued as the administrator of the Estate
of Adam Nyaga Mwangi) (Environment and Land Appeal
E019 of 2023) [2025] KEELC 3152 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3152 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E019 OF 2023**

JA MOGENI, J

APRIL 3, 2025

BETWEEN

JULIA WANJIKU MWANGI APPELLANT

AND

**LUCY WAITHIRA NG'ANG'A (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF ADAM NYAGA MWANGI) RESPONDENT**

JUDGMENT

1. The Plaintiff/Respondent herein sued the Respondent/Appellant seeking specific performance for the sale agreement dated 27/08/2008 and damages for breach of contract. In the alternative on a without prejudice basis he sought for excision of 1 acre of land from Title No. Mituburi/Nanga Block 1/184 and registration of the same in the name of the Plaintiff and refund of the balance. In the alternative a refund to the Plaintiff of the consideration already paid together with interest at commercial rates from 30/03/2009 until payment in full.
2. In her Defence, the Respondent/Appellant denied the averments made by the Plaintiff/Respondent but admitted to entering into into a written agreement while being the registered owner of suit property Mituburi/Nanga Block 1/184 and states that the Respondent/Plaintiff had upto March 2009 to remit balance of the purchase price for the 1st sale agreement dated 27/08/2008. She also admits entering into a second sale agreement dated 5/05/2012 where she was to transfer one acre out of the suit property to the Plaintiff.
3. She also filed a counter-claim where she sought to have the Plaintiff/Respondent declared a trespasser, to have the Plaintiff compensate her for the stones excavated and trees felled totaling to Kesh 150,000 and 50,000 respectively, damages and costs and interest for the suit and interest until payment in full.



4. The trial Court in its Judgment found that it would be unfair for the Defendant to keep the Kesh 450,000 paid by the Plaintiff for the 1st agreement and also the land. Although the Court noted that it was the Plaintiff who frustrated the implementation of the 1st agreement. The Court then directed that the Defendant excise 1 acre out of MITUBIRI/NANGA BLOCK/1/184 and transfer to the Plaintiff within 90 days from the date of the Judgment which was 23/02/2023. At the same time the Court directed the Defendant to refund to the Plaintiff Kesh 194,000 as stated in the 2nd agreement dated 5/05/2012 within 90 days from the date of the Judgment stated above.
5. Both parties the Plaintiff and the Defendant were directed to pay for the cost of the suit and counter-claim respectively. It was observed that they had both contributed to the dispute reaching Court.
6. Aggrieved by the said decision, the Appellant filed a Memorandum of Appeal dated 15/03/2023 raising 5 Grounds of Appeal that are stated as hereunder:
 1. That the Learned Trial Magistrate erred in law and in fact by making a Judgment that is unsupported and negated by the finding of the said Court.
 2. That the Learned Trial Magistrate erred in law and fact in condemning the Appellant to uphold non-existent clauses in the two agreements that had been breached by the Respondent and therefore re-writing the contracts as between the parties.
 3. That the Learned Trial Magistrate erred in law and fact by rewarding the Respondent herein despite having found in her analysis that the Defendant was solely to blame for breach of both contracts and of unbecoming conduct in the transaction.
 4. That the Learned Trial Magistrate erred in law and in fact in finding that there was no trespass as claimed by the Appellant herein in her counterclaim and thereby dismissing her entire claim in the counter-claim and not awarding the Appellant a Judgment commensurate to her claim.
 5. That the Learned Trial Magistrate erred in law and in fact by failing to consider the material circumstances of the case therefore arriving at the wrong decision and making a Judgment devoid of justice in favour of the Appellant.
7. The Appellant prays that the appeal be allowed, the proceedings, Judgment and all consequential orders issued on the 23rd February, 2023 by the Honorable Trial Magistrate M.W. Kurumbu be set aside and be substituted with orders dismissing the Respondent's claim and allow the Appellant's claim in the Counter-claim.
8. On 13/2/2024 the appeal was admitted for hearing and this Court gave directions that the same be canvassed by way of written submissions. The Respondent filed its submissions on 28/10/2024.
9. Ground 1 and 3 are similar and so I will deal with them together, on whether the Learned Trial Magistrate erred in law and in fact by making a Judgment that is unsupported and negated by the finding of the said Court, the Appellant submitted that despite the Respondent committing to pay the balance of Kesh 350,000 having paid the initial Kesh 450,000 for the 1st agreement. The Court found that it is the Respondent who was in breach of this agreement since he was allowed to take possession of the suit property but did not pay the balance within the agreed 90 days. This led to the Appellant entering into a second agreement dated 5/05/2012 where he agreed to give one acre off the suit property and an acre having been costed at Kesh 266,000 the Appellant was to refund the balance of Kesh 194,000 to the Respondent,
10. The Appellant failed to refund nor give off the one acre and give to the Respondent because according to her testimony the Plaintiff wrote to her a demand letter asking for the balance of Kesh 194,000



and so she rescinded the agreement. Thus the Appellant in calling off the agreement contended that the Respondent in both the Court found that he had breached the two contracts. It is therefore the contention of the Appellant that the Learned Magistrate erred in finding for the Plaintiff.

11. On whether the Learned Magistrate erred in finding in favour of the Respondent despite finding he was in breach, the Appellant submitted that the Court's finding in its Judgment was that the Respondent was in breach and that despite finding so, the Appellant contends that what the Court found and what was awarded are two different things. That the trial Court rewarded the Respondent for his wrong doing.
12. On whether the Learned Trial Magistrate erred in law and fact in condemning the Appellant to uphold non-existent clauses in the two agreements that had been breached by the Respondent and therefore re-writing the contracts as between the parties the Appellant submitted that despite both agreements not providing for what should happen in the case of default by either party. That the trial Magistrate went ahead and ordered for enforcement which is that there should be excision of 1 acre and a refund. The Appellant contends in her submissions that the Court went ahead to amend the terms of the agreement of sale in favour of the Respondent.
13. The Appellant thus submitted that parties to a contract are bound by the terms thereof and that it is not the business of the Court to rewrite contracts. That the Court ought to have been bound by the terms of the contract and that the trial Court erred. Therefore the Appellant submits that since the Court rewrote the terms of the contract and that this ground should also succeed.
14. It is the submission of the Appellant that she has proved grounds 4 & 5 and that the Respondent is trespasser since his presence was no longer welcome on the suit property and that there is no sale agreement any more the Appellant having rescinded both. She referred to the definition of a trespass as provided under Section 3 of the *Trespass Act* Cap 294.
15. The Appellant therefore urged that the appeal be allowed with costs.
16. The Appellant relied on the following cases, Belle Maison Ltd. -vs- Yaya Towers Ltd, (Nairobi HCCC No. 2225 of 1992), South Nyanza Sugar Co. Ltd v Leonard O. Arera [2020] eKLR and DIM Agencies Limited v Kenya Airports Authority [2021] eKLR.
17. The Respondent filed his submissions dated 28/10/2024 and argued that the Learned Magistrate issued the correct orders based on the facts and evidence on record. That the Learned Magistrate made her decision having meticulously analyzed the evidence presented by both parties. That the Court found the Appellant's evidence insufficient to establish a breach on the part of the Respondent. The evidence and findings laid out in the Court's detailed reasoning supported the Judgment. The Trial Magistrate exercised due judicial diligence by extensively reviewing and undertaking a comprehensive review of the facts presented, evaluating the credibility of witnesses, the consistency of their testimonies, and the documentary evidence submitted.
18. He submitted that it is a well-established principle that the trial Court, having had the advantage of hearing and observing the witnesses firsthand, is best placed to make findings of fact. The appellate Court should, therefore, exercise caution before interfering with such findings unless there is a clear indication of error.
19. On whether the Learned Magistrate rewrote the contracts the Respondent submitted that the Court correctly interpreted the terms of the agreements in line with the legal principles and based on the precise language and the intention of the parties. That the Court considered the context of the evidence presented during trial and also carefully considered the written agreements.



20. He submitted on the principle of *pacta sunt servanda* which he stated underpins Contract Law and held each party to their agreed-upon terms. Thus it is his submissions that the Learned Magistrate upheld non-existent clauses is unfounded.
21. On the third ground the Respondent submits that the relief awarded by the trial Magistrate is justified and proportionate to the breach committed by the Appellant. Since according to the Respondent the Court correctly applied the principles of the Contract Law ensuring that the Respondent was compensated for losses incurred due to the Appellant's breach.
22. On the fourth ground the Respondent submitted that the Appellant's counter-claim for trespass was dismissed because the evidence did not support the claim for trespass.
23. On the fifth and last ground the Respondent submits that the Appellant has not demonstrated any specific instance of misdirection by the trial Magistrate and that her Judgment does not in any way indicate any oversight or failure to consider key evidence. He thus submits that the appeal lacks merit and should be dismissed.
24. He relied on the cases of *Ephantus Mwangi & Another v. Duncan Mwangi Wambugu* [J982-88] 1 KAR 278, Court of Appeal decision in *National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another* [2002] 2EA 503, *Muthaiga Road Trust Company Ltd vs Five Continents Stationers Ltd* [2003], *Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua* [2015] eKLR, and *Mbogo & Another vs Shah* [1968] EA 93.
25. This being a first appeal, this Court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the Learned Trial Magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this Court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.

Determination

26. I have considered the Grounds of Appeal and the parties' respective submissions. The issues that arise for determination are whether the Learned Magistrate erred in her Judgment based on the Appellant's Grounds of Appeal and by granting the orders.
27. The circumstances in which this Court can interfere with the Trial Magistrate's exercise of discretion are well circumscribed in the Court of Appeal case of *Mbogo and Another v Shah* [1968] EA 93 where the Court held that it can interfere with the discretion if it's satisfied that the trial Court misdirected itself arriving at a wrong decision resulting to an injustice. In such circumstances it is the duty of this Court to revisit the evidence on record, evaluate it and reach its own conclusion on the dispute.
28. It is common ground that the Appellant and the Respondent entered into two sale agreements dated 27/08/2008 and 05/05/2012, pursuant to which the Appellant sold to the Respondent the parcel of land known as MITUBIRI/NANGA BLOCK 1/184 (the suit property) at a consideration of Kshs 800,000. The Respondent paid a total of Kshs 450,000, leaving a balance of Kshs 350,000.
29. A reading of the agreement reveals that payment of the purchase price was to be completed within 90 days and that the Respondent was at liberty to take possession immediately upon execution of the sale agreement which he did and erected and started to use the suit property. It is not in dispute that the Respondent did not pay the balance of Kesh 350,000 as was expected and the two parties entered into



a new agreement where the Appellant agreed to excise one (1) acre from the suit property which was costed at Kesh 266,000 and give to the Respondent and also refund the balance of Kesh 194,000 from the money paid. Fully aware of that background, including that she had received a total of Kshs 450,000 which is over ½ of the purchase price of the initial contract the Appellant declined to excise the one acre as per the 2nd sale agreement and she filed a Counter-claim seeking to have the Respondent declared a trespasser, to be compensated for the stones excavated and trees felled totaling to Kesh 150,000 and 50,000 respectively, damages and costs and interest for the suit and interest until payment in full. She did not include in her prayers what was to happen to the amount she had received.

30. The Learned Magistrate observed as follows in the Judgment:

“ At the same time it would be unjust for the Defendant to keep both the land and the money. The parties had mutually agreed that the Defendant would excise 1 acre out of the suit land and transfer it to the Plaintiff and refund the balance to the Plaintiff. I will therefore enforce the agreement dated 5/05/2012”

31. The Appellant has contended that the Learned Magistrate granted orders which were not sought by the Respondent and that he reviewed the terms of the sale agreement. Whereas it is correct to state that it is not the business of the Court to rewrite the terms of a contract, it must be remembered that the Court has a duty to render substantive justice in terms of the provisions of Article 159 (2) (d) of *the Constitution*. The duty to do justice is not upon the Court alone. Parties who approach the Court should be ready and willing to do justice. Perhaps in realization of that, the Respondent chose to include in his Plaint a prayer for any further or other relief as the Court deemed just. The Learned Magistrate seized that opportunity since it would be totally unjust to dismiss the Plaintiff's claim when he took possession and developed the suit property pursuant to the terms of the agreement and paid over ½ of the purchase price.

32. This Court is alive to the doctrine of unjust enrichment. The Appellant would clearly be enriching herself unjustly by retaining the land and the money paid to her by the Respondent. Broadly founded upon the aim of equity to do justice between parties, the doctrine of unjust enrichment and the remedy of restitution to counter unjust benefit proceed upon the realization that to allow a Defendant to retain such a benefit would result in his/her being unjustly enriched at the Plaintiff's expense, and this, subject to certain defined limits, will not be tolerated by the law, and owing to the importance and aim of this doctrine in every advanced and civilized system of justice. This was the emphatic language of Madan, JA (as he then was) in the case of Chase International Investment Corporation and Another –v- Laxman Keshra and Others (1978) KLR 143 at page 154 where it was firmly and unequivocally laid down that in Kenya, a claim may properly be founded for restitution where it would be unjust to allow a party to retain the benefits of an unjust enrichment. The learned Judge stated inter alia:

“Woe unto the day when it is lost sight in Kenya, which would also be contrary to the spirit of Section 3(c) of the *Judicature Act*. I trust that in future, in appropriate cases, there will be less smothering of just equitable rights on the basis of technical objections and artificial distinctions oblivious to justice and substance.”

33. And on the authorities approved by Madan and Wambuzi, JJA (as they then were) in the case of Chase International Investment Corporation (supra), the basic elements presupposed by the doctrine of unjust enrichment are (1) that the Defendant has been enriched by the receipt of a benefit, (2) that he has been so enriched at the expense of the Plaintiff to allow the Defendant to retain the benefit in the circumstances of the case. These subordinate principles of the general principle of unjust



enrichment are interrelated. They clearly show the nature of restitutionary claims, and how people incur restitutionary obligations.

34. In other words, the idea of unjust benefit is intended to prevent a person from retaining money or some benefit derived from another which it is against conscience that he should keep it, and he should, in justice, restore it to the Plaintiff. The gist is that a Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to make restitution. Lord Goff of Chievely and Professor Gareth Jones state in their monumental treatise, *The Law of Restitution*, 5th Edition (1998) at PP 11-12:

“Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment.”

35. In the case of *Willy Kimutai Kitilit –vs- Michael Kibet* [2018] eKLR, the Court of Appeal held *inter alia*, that:

“The doctrine of equity are part of our laws although Section 3 of the *Judicature Act* subordinates common law and the doctrine of equity to *the constitution* and written law in that order. Section 3(3) of the *Law of Contract Act* and Section 38(2) of the *Land Act* as amended clearly stipulate that the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust. The equity of proprietary estoppe is omitted but as the decision in *Yaxley –vs- Gotts* [2000] ch. 162 (*Yaxley’s case*) on which the Court in *Macharia Mwangi Maina* decision relied, amongst others, shows that the doctrine of constructive trust and proprietary estoppe overlaps and both are concerned with equity’s intervention to provide relief against unconscionable conduct.”

36. In the above case, the Court of Appeal further stated:

“There is another stronger reason for applying the doctrine of constructive trust and proprietary estoppe to the *Land Control Act*. By Article 10(2) (b) of *the Constitution* of Kenya, equity is one of the national values (emphasis supplied) which builds the Courts in interpreting any law (Article 10(1)(b). Further, by Article 159(2)(e), the Courts in exercising judicial authority are required to protect and promote the purpose and principles of *the constitution...*”

37. The upshot of the foregoing is that the Learned Magistrate did not err in granting the orders. That being the case, this appeal is without merit, and I therefore dismiss it. Considering the circumstances of the dispute, I make no order as to costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 3RD DAY OF APRIL, 2025
VIA MICROSOFT TEAMS.**

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MOGENI J

JUDGE

Judgement read in virtual Court in the presence of:

Ms. Waigwa for the Appellant



Mr. Atebe holding brief for Mr. Oudo for the Respondent

Melita - Court Assistant.

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MOGENI J

JUDGE

