



**Sichei v Tuti Holdings Limited Co (Environment and Land Appeal  
9 of 2019) [2022] KEELC 15081 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15081 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL 9 OF 2019  
EC CHERONO, J  
NOVEMBER 24, 2022**

**BETWEEN**

**ELIUD MICHAEL SICHEI ..... APPELLANT**

**AND**

**TUTI HOLDINGS LIMITED CO ..... RESPONDENT**

*(An appeal from judgment and Decree of the Senior Resident  
Magistrate Hon. C. M Wattimah Issued on 3rd April 2019)*

**JUDGMENT**

1 The Appellant Eliud Michael Sichei who was the defendant in the former suit being SPM ELC No 1 of 2018 (SIRISIA) had been sued by the Respondent who was also the plaintiff for the sum of KSHS 1,500,000/= being the refund for monies paid for the purchase of a portion of land parcel No E Bukusu/S.Nalondo/370 plus interest and costs thereon. The Appellant filed a defence denying the plaintiff/respondent's claim. After the case was heard and determined, the trial court found in favour of the plaintiff/respondent against the defendant/appellant. Being aggrieved, the defendant/appellant filed the present appeal citing the following grounds;

1. The learned Magistrate erred in law and in fact to completely appreciate the claim before it hence arriving at an erroneous decision.
2. The learned Magistrate rendered a decision in the said judgment per in curium as it is trite law that such judgment for refund can only be arrived at upon the Respondent specifically pleading particulars of breach of contract, fraud, mistake, frustration, illegality, duress, undue influence or misrepresentation; proceed to adduce evidence in support of such particulars and sought for an order of rescission.
3. The learned Magistrate erred in law and fact to appreciate that the suit property herein E Bukusu/S Nalondo/320 Measuring approximately 27 acres as per the register held at the



Ministry of lands office Bungoma, which 27 acres is currently registered in the names of the respondent hence a claim for refund will amount to unjust and unfair enrichment by the Respondent consequently arriving at an erroneous decision.

4. The learned Magistrate erred in law and in fact in failing to appreciate that the Appellant herein sold 20 acres out of 27 acres to a third party, Mr Daniel Shikuku Eshitemi, but the whole 27 acres was transferred him and subsequently to Mr Swaleh Ahmed Mohammed later transferred to the respondent herein, therefore the said Mr Daniel Shikuku Eshitemi, Mr Swaleh Ahmed Mohammed, and the Respondent herein have always held the 7 acres of land parcel E Bukusu/S Nalondo/370 in trust of the appellant hence arriving at an erroneous decision.
  5. The learned Magistrate erred in law and in fact in failing to find that it is the Respondent herein who approached the Appellant with an offer to purchase 2 acres of the 7 acres which was being held in trust by Swalleh Ahmed Mohammed hence arriving at an erroneous decision.
  6. The learned Magistrate erred in law and in fact in failing to find that any patent defect to the interest of the 2 acres offered by the Respondent herein to be bought could be discoverable by inspection and ordinary vigilance on the part of the Respondent before entering into any contract in issue; and no particulars of any such patent defect was specifically pleaded and proved hence arriving at an erroneous decision.
  7. The learned Magistrate erred in law and in fact in failing to find that the failure to specifically plead and prove any defect on the land parcel No E Bukusu/S Nalondo/370; a claim refund cannot be sustained hence arriving at an erroneous decision.
  8. The learned Magistrate erred in law and in fact in finding that the land parcel No E.Bukusu/S.Nalondo/370 was shrouded in mystery, yet particulars of such mystery was never disclosed hence arriving at an erroneous decision.
  9. The learned Magistrate erred in law and in fact in ordering the refund of the purchase price, due an alleged inability to occupy the land in issue yet the Respondent's witness admitted that the said Respondent is already in occupation hence arriving at an erroneous decision.
  10. The learned Magistrate erred in law and in fact in making a finding on occupation without such evidence in form of a survey report being adduced hence arriving at an erroneous decision.
  11. The learned Magistrate erred in law and in fact in failing to uphold the law and the principles governing contracts to the effect that the court is not rewrite contracts between parties but only seek to interpret them with a view of either enforcing or rescinding them hence arriving at an erroneous decision.
  12. The learned Magistrate erred in law and in fact in giving a decision which was contrary to the law and facts placed before her.
- 2 The Respondent who was the plaintiff in the former suit called one witness namely Callistus Mabonga Wafula who is the managing Director of the plaintiff company and stated on oath that they had bought land from the defendant vide a Land Sale Agreement dated 30/9/2017. He further stated that the defendant/appellant sold them 2 acres from land parcel No E Bukusu/S Nalondo/370 at KSHS 1,500,000/= and that the defendant/appellant was paid in full. The witness further stated that despite paying the full purchase price, the defendant/appellant failed and/or refused to give them vacant possession of the land which was being occupied by other people.
- 3 The witness also stated that they gave up on pursuing the parcel of land and now seek the refund of the purchase price. He produced a Land Sale Agreement dated 26/9/2017, a copy of certificate of



incorporation, an acknowledgment receipt and an Agreement dated 30/9/2017 as P-Exhibits 1, 2, 3 & 4 respectively.

- 4 The defendant also had his day in court where he gave sworn testimony and asked the court to adopt his witness statement dated 18/9/2018. On cross-examination, the defendant confirmed that he entered into a land Sale Agreement with the plaintiff for two acres out of LR No E.Bukusu/S.Nalondo/370 and was paid the sum of KSHS 1,500,000/=. However, he admitted that the Title deed was not in his name. He also stated that he was not aware about the requirements to seek and obtain consent to transfer land within six (6) months under the land control Act, cap 302 Laws of Kenya.

### Legal Analysis And Decision

- 5 I have considered the extract of the record of appeal and the applicable law. As a first appeal court, my duty is to re-evaluate, re analyse and re-consider the extract of the trial court and come up with my own conclusion. However, this power must be exercised cautiously as the court did not hear the witness(s). That is the position in numerous decisions by the superior courts. In the case of *peters v Sunday post Ltd* (1958) EA 424, the court held;

“ While an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”

- 6 Similarly, in the case of *Abok james Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* (2013) Eklr , the court observed as follows;

“ This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-asses 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.”

- 7 The dispute between the Respondent who was the plaintiff and the appellant who was also the defendant in the former suit (SRRCC No 1 OF 2018, Sirisia) was a portion of 2 acres from land parcel No E Bukusu/S Nalondo/370. The plaintiff through its manager, one Callistus Mabonga Wafula testified on oath and produced four documents as exhibits which include a Land Sale Agreement dated 30/9/2017 and an acknowledgment letter dated 30/9/2017.

- 8 It is not in dispute that the disputants entered into a land sale Agreement on 30/9/2017 and that the appellant was paid the full purchase price of KSHS 1,500,000/= which he also acknowledged receipt. From the Land Sale Agreement dated 30/9/2017 also produced as an exhibit, the suit property land parcel No E.Bukusu/S.Nalondo/370 was registered in the name of a third party namely Swaleh Ahmed Mohamed. The Land Sale Agreement also indicates that the vendor who is the appellant herein had a share of 2 acres from the suit property. Though the land sale agreement stipulates that the said portion of 2 acres was sold free from any encumbrances, that was not correct as the land was registered in the name of a third party and could only have taken the efforts of the appellant and the third party to subdivide the land and have it transferred to himself before transferring to the respondent. The land sale agreement between the respondent and the appellant dated 30/9/2017 in my view was not enforceable in law. The appellant did not even adduce evidence of any efforts he attempted to have the alleged two acres transferred to his name or directly to the respondent. He did not also seek extension of time within which he could have the alleged two acres transferred to himself and thereafter to the respondent.



- 9 There is no iota of evidence showing that appellant approached or even wrote to Swaleh Aham Mohamed, the registered owner to subdivide the suit land and transfer him the two acres. When the appellant entered into the land sale agreement on 30/9/2017, the property which was the subject of the sale was a hoax and non-existent. I find that the trial Magistrate properly analysed and evaluated the evidence by the parties in her decision. I therefore have no reason to disturb the impugned judgment.
- 10 The upshot of my finding is that this appeal is devoid of merit and the same is hereby dismissed with costs.
- 11 It is so ordered.

**READ, DELIVERED and SIGNED in the open court at BUNGOMA this 24<sup>th</sup> November, 2022**

**HON. E.C CHERONO**

**ELC JUDGE**

**In the presence of;**

1. Mr. Sichangi for the Respondent.
2. Appellant/Advocate - absent

