



Mbugua (Suing on His Behalf and as Administrator of the Estate of the Late George Mbugua Mungai) v Kabue & 2 others (Environment and Land Appeal E017 of 2024) [2025] KEELC 4007 (KLR) (26 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4007 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E017 OF 2024**

MN GICHERU, J

MAY 26, 2025

BETWEEN

MICHAEL MUNGAI MBUGUA (SUING ON HIS BEHALF AND AS ADMINISTRATOR OF THE ESTATE OF THE LATE GEORGE MBUGUA MUNGAI) APPELLANT

AND

STEPHEN WAMWEA KABUE 1ST RESPONDENT

DISTRICT LAND REGISTRAR MURANG'A 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

(An Appeal from the Judgment of Honourable Peter Ndwiga Maina dated and delivered on the 28th day of March, 2024 at Murang'a Chief Magistrate's Court MC.ELC/22/2019)

JUDGMENT

1. In a judgment dated 28-3-2024 in Murang'a CMC ELC No. 22 of 2019, the learned Chief Magistrate ordered as follows.
 - (1) That Kshs. 2 Million (being the entire purchase price for L.R. No. Loc.5/Kagunduini/2492 and 2495) be refunded to the Plaintiffs by the 1st Defendant plus interest thereof at court rates from the date of the agreement for sale, to wit, 6th February 2019.
 - (2) That the Plaintiffs and 2nd Defendant shall get the costs of the suit plus interest at court rates from the date of this judgment.
2. Dissatisfied with the judgment of the Court, the Appellant, through counsel on record, filed a memorandum of appeal dated 24-4-2024 seeking to aside the judgment on the following four grounds.



The learned trial magistrate erred in law and in fact by-

- i. finding that there was no evidence of breach of contract and failing to consider the overwhelming evidence on record and the Defendant's admission on his pleadings,
 - ii. failing to grant the Plaintiff an order compelling the 1st Defendant herein to execute the transfer instrument in favour of the Plaintiff within 30 days of judgment,
 - iii. failing to grant the Plaintiff an order compelling the 1st Defendant to supply the Plaintiff with all the completion documents pursuant to an agreement for sale dated 6th February 2019 within 30 days of judgment and
 - iv. failing to award the Plaintiff general damages for breach of contract.
3. The Appellant seeks the following orders.
- a. The judgment of the lower Court in CM's Murang'a case No. 22 of 2019 be set aside.
 - b. The Court grants an order compelling the 1st Respondent to supply the Appellant with all the completion documents pursuant to the sale agreement of 6-2-2019.
 - c. The Court to compel the 1st Respondent to execute the transfer instrument within 30 days of judgment.
 - d. In default of the 1st Respondent complying with prayer (b) above, the Court grants an order to the Executive Officer, CM's Court at Murang'a to execute a transfer instrument transferring the suit land Loc.5/Kagunduini/2492 and 2495.
 - e. An order compelling the 1st Respondent to give the Appellant vacant possession of the suit land.
 - f. An order compelling the 2nd Respondent to register the suit land to the Appellant.
 - g. A permanent injunction be issued restraining the Respondents jointly and severally through their agents, servants and/or employees and whoever and whatsoever from dealing with the properties in any manner that is adverse to the Appellant's interest.
 - h. General damages for breach of contract.
 - i. Interest in general damages for breach of contract.
 - j. Costs of this appeal.

4 The facts of the case according to the Plaintiffs are as follows.

One, on 6-2-2019 they entered into a sale agreement with the 1st Defendant for the purchase of L.R. Loc.5/Kagunduini/2492 and 2495. The purchase price was Kshs. 2 Million. Two, the Plaintiffs paid the purchase price of Kshs. 2 Million to the 1st Defendant as per the agreement. Kshs 1,781,000/= was paid to Unaitas Sacco and Kshs 219,000/= to the Defendant as per the agreement between the parties. The 1st Defendant had a loan with the Sacco. The payments were made between 5-1-2019 and 16-2-2019. Three, the 1st Defendant refused to transfer the suit land to the Plaintiffs as agreed. This default on the part of the 1st Defendant made the filing of this suit necessary.

5. The 1st Defendant, in his written statement of defence avers as follows. Firstly, he denies the Plaintiff's claim generally. Secondly, there was an agreement between him and Unaitas to pay less than the amount demanded. He would be given a discount. He made this revelation to the Plaintiffs but they went ahead



and paid the entire amount demanded. This made the Defendant not to benefit from the discount from Unaitas Sacco. Thirdly, the 1st Defendant's family opposed the sale making it difficult for him transfer the suit land to the Plaintiffs. Fourthly, there was an arrangement between the parties whereby the Plaintiffs were to compensate the 1st Defendant with an extra Kshs.1 Million for the coffee bushes on the suit land.

6. The 3rd Defendant also denied the Plaintiffs' claim in the written statement of defence dated 26th January 2023.

They did not file witness statements in the suit. At the trial, it is only the 2nd Plaintiff who testified.

7. In the judgment dated 28-3-24, the learned trial magistrate made two significant findings that gave rise to this appeal. The first of these two findings is that the sale agreement was void ab initio and the second one was that general damages are not awardable under a void contract.

8. Counsel for the Appellant filed written submissions dated 9-12-2024 in which two issues for determination are identified as follows.

- a. Whether there was a breach of contract by the 1st Respondent.
- b. Whether there is sufficient cause to grant the order compelling the 1st Respondent to issue the Appellant with completion documents.

9. I have carefully considered the appeal in its entirety including the record, the submissions and the issues raised therein.

This being a first appeal, this court must reconsider the evidence in trial court, evaluate it itself and draw its own conclusions 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 necessary to follow the trial court's findings of fact if it appears..."

See *Selle and Another vs Associated Motor Boat Co. Ltd* (1968) E A 121.

10. On the 1st issue, I find that there was indeed breach of the sale agreement by the 1st Respondent. The Plaintiffs performed their part of the agreement by paying the entire purchase price as agreed.

Clause 4.1 of the sale agreement dated 6-2-2019 did not specify the amount to be paid to Unaitas Sacco. It simply provided at Clause 4.1 (C) (1)

"The purchasers shall pay the outstanding amount at UNAITAS Sacco to procure release of security documents."

It was wrong of the trial Court to find the sale agreement void merely because Unaitas Sacco had not discharged the suit land by the time of filing the suit in the lower Court. This issue was not raised in the defence and proved by way of evidence by the 1st Respondent. It was the duty of the 1st Respondent to plead and prove that the sale agreement was void. The written statement of defence filed by the 1st Defendant and dated 25-8-2022 has not mentioned the word "void" even once let alone plead it. For a contract to be void, it must be declared illegal by statute or by common law or one of the parties is incapacitated by law from making such a contract. In this case, there was no evidence of any of the above circumstances to warrant the sale agreement being void. It is my finding too that the 1st Respondent was in breach of the contract.



11. The trial magistrate erred in finding that the Plaintiffs who were the innocent parties in this case were not entitled to damages. The innocent party was entitled to damages and these damages were liquidated by the parties themselves vide clause 16.2 (a) of the sale agreement dated 6-2-2019 as follows.

“If the wilful default is on the part of the vendor, the purchasers shall be entitled, without prejudice to any other remedies lawfully accruing to them, to damages equivalent to 10% of the purchase price as the agreed liquidated damages..”

The authorities referred to at pages 11 and 12 of the judgment of the trial magistrate especially the case of Kenya Tourist Development Corporation vs. Sundowner Lodge Limited [2018] eKRL did not hold that general damages are not recoverable in cases of alleged breach of contract. Rather the holding was that general damages are not recoverable if liquidated damages are also recoverable. In this case, the Appellants (Plaintiffs) were entitled to the liquidated damages in clause 16.2. (a) of the sale agreement. There is no duplication of damages as the recovery is only on one head but not two heads.

The Plaintiffs were entitled to the refund of the purchase price and the damages in clause 16.2(a) which proceeds to provide,

“The vendor shall further refund all the monies paid as payment of the purchase price and the agreed liquidated damages after the expiry of a ten (10) days completion notice being given to the vendor by the purchaser or their advocates.”

These two are the bare minimums that the parties agreed upon. It was not proper for the trial court to deny the Plaintiffs these two.

12. On the final issue of specific performance of the sale agreement, I find that the learned trial magistrate was right in denying the Plaintiffs the order of specific performance. It was not available to them in the absence of proof that the suit land is rare and unique. This remedy being equitable in nature is discretionary and will only be granted when the Plaintiff can convince the Court that damages are not adequate in the circumstances. The award will be given were it can be shown that it is the object(land) rather than its value that the Plaintiff desires. See Gathuthi Hotel Vs Fazal Ilahi [1957] E.A 17 and Patel Vs. Dhana Singh [1962] EA 32.

Other considerations in ordering for specific performance are that the Plaintiff must approach the court with clean hands. See the case of Bir Singh vs Paramar [1971] EA 2009. On this score the Plaintiffs come clear.

Thirdly, the equitable remedy will not be available where the Plaintiff has unreasonably delayed his filing of the suit. In this regard, the Plaintiffs win.

Finally, the court will reject the Plaintiff's claim if it will cause hardship to the Defendant. In this case, the 1st Defendant says that his family members were opposed to the sale of the suit land. On this point, the Plaintiffs lose.

In any case, under clause 1.1.5 of the sale agreement, there is a rider in the following words,

“Subject however to the entries in the Register relating to the land and to such of the overriding interests set out in Section 28 of the Land Registration...”

The sale was therefore not absolute and the overriding interests could be those enjoyed by the 1st Defendants family members.



Had the parties intended that there be specific performance of the sale agreement, they would have put it in the sale agreement. Failure to put it in the sale agreement means that it was never intended to happen.

From the above, it is clear that the Plaintiffs have failed to prove that they are entitled to any of the prayers in (b), (c), (d), (e), (f) and (g) of the memorandum of appearance dated 24-4-2024.

13. In the final analysis, the only extra relief that the Plaintiffs obtain from this appeal is the 10% liquidated damages mutually agreed between the parties at the time of signing the sale agreement on 6th February 2019.
14. In conclusion and for the reasons already given, I uphold the decision of the learned trial magistrate and order as follows.
 - a. The 1st Defendant to refund the purchase of Kshs. 2 Million to the Plaintiffs.
 - b. The 1st Defendant to pay interest to the Plaintiffs on the Kshs. 2 Million with effect from 6-2-2019 to the date of full refund at court rates.
 - c. The 1st Defendant to pay the Plaintiffs liquidated damages of 10% together with interest thereon at court rates from 6-2-2019 to the date of full refund.
 - d. The 1st Defendant to pay the costs of this appeal and the lower court suit to the Plaintiffs and other Defendants together with interest thereon at Court rates from the date of judgment in the lower court.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26TH MAY, 2025.

M. N. GICHERU

JUDGE

Delivered online in the presence of:-

Court Assistant – Mwangi Njonjo

Appellant's Counsel - Miss Lanoi

1st Respondent's Counsel - Absent

2nd and 3rd Respondents' Counsel – Miss Njuguna

