



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki v Njogu (Environment and Land Appeal E022 of 2023)
[2025] KEELC 1087 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1087 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E022 OF 2023**

JM MUTUNGI, J

MARCH 6, 2025

BETWEEN

JUDAH GATERI KARIUKI APPELLANT

AND

CATHERINE WAMBURA NJOGU RESPONDENT

*(Being an Appeal against a Judgment of Hon. G. W. Kirugumi Principal
Magistrate in Kerugoya ELC Case No. 87 of 2018 delivered on 6th September 2023)*

JUDGMENT

1. This Appeal is against the Judgment of Hon. G. W. Kirugumi (PM) delivered on 6th September 2023 in Kerugoya CM ELC No. 87 of 2018. In the suit the Respondent, who was the Plaintiff, had sued the Appellant, who was the Defendant, seeking an order for the specific performance of the sale agreement dated 24th February 2014 and/or payment of Kshs 537,500/- being refund of purchase price plus interest at 50% on account of damages. The Respondent further prayed for costs and interest at Court rates.
2. The Learned Trial Magistrate in her Judgment held there was a valid contract that the Appellant breached and further disallowed the Appellant's plea that the suit was time barred. The Learned Trial Magistrate thus awarded the Respondent Kshs 535,500/- being refund plus interest of 50% as per the agreement. The Respondent was also awarded the costs of the suit.
3. The Appellant being dissatisfied and aggrieved by the said Judgment has Appealed to this Court and has set out 9 grounds of Appeal in the Memorandum of Appeal dated 2nd October 2023 as follows:-
 1. The Trial Magistrate erred in law and in fact in finding that the agreement dated 24th February 2014 was valid and its contents entirely or at all enforceable.



2. The Trial Magistrate erred in law and in fact in finding that the Appellant/Defendant was in breach of the terms of the agreement dated 24th February 2024.
 3. The Trial Magistrate erred in law and in fact in allowing interest of the cost of the case to run from the date of filing of suit as cost accrue only after being awarded by Court.
 4. The Trial Magistrate erred in law and in fact in enforcing the contents of the agreement dated 14th October 1993.
 5. The Trial Magistrate erred in law and in fact in failing to enforce the provisions of the *Law of Succession Act* and the Limitation of Action Act.
 6. The Trial Magistrate erred in law and in fact in finding that the Respondent/Plaintiff had established her case as laid out in her further Amended Plaint dated 27th October 2022 on a balance of probabilities.
 7. The Trial Magistrate erred in law and in fact in his application of the law and its principles to the facts and evidence before him.
 8. The Trial Magistrate erred in law and in fact in finding that the Plaintiff deserved a refund of the sum of Kshs Shillings 535,500/-, 50% interest of the said sum plus costs of the case.
 9. The Trial Magistrate erred in law and in fact in coming up with different evidence in his Judgment from what was pleaded by the Respondent all at the prejudice of the Appellant.
4. The Appellant consequently prayed that the Appeal be allowed and the Judgment of the Lower Court be set aside and that the Appellant be granted the costs of the Appeal.
 5. The brief facts in this matter are that the Respondent and the Appellant entered into an agreement dated 24th February 2014 for the purchase of land parcel Ngariama/Rungeto/569 for the agreed consideration of Kshs 337,500/-. The Respondent under the agreement was also to pay Kshs 780,000/- for the coffee trees that were on the land. The Appellant acknowledge that the sum of Kshs 337,500/- had been paid on before the date of signing the agreement. The Respondent's father now deceased had previously entered a sale agreement to purchase the same parcel of land and had paid to the Appellant the sum of Kshs 337,500/-. Following the death of her father, the Respondent and the Appellant agreed to proceed with the transaction but now with the Respondent as purchaser in place of her deceased father. The Appellant acknowledged the amount paid by the Respondent's deceased father and it was deemed as part of the purchase price. Though under the agreement dated 24th February 2014, the Respondent was to pay Kshs 780,000/- for the coffee trees no time frame for payment was provided.
 6. The agreement provided that the Appellant, as the vendor was to take all the steps necessary to effect the transfer of the land parcel to the Respondent. The agreement further provided that:-
Any party in breach of this transaction shall be required to pay to the aggrieved party 50% interest of the money the innocent party will have expended being agreed liquidated damages.”
 7. The Respondent contended that the Appellant breached the agreement and had despite demand refused to refund the sum of Kshs 537,500/- paid to him together with the interest at 50%.
 8. The Appellant in her statement of defence averred that the sum of Kshs 337,500/- that had been paid by the Respondent's late father was not recoverable as it was time barred by virtue of Section 4(1) of the *Limitation of Actions Act* Cap 22 Laws of Kenya. The Appellant further averred the transaction could not be completed because the Respondent did not pay the balance as agreed and was further frustrated because a caution was lodged against the title by one Wilfred Wawira Gateri.



9. The Respondent and the Appellant testified as the sole witnesses before the Trial Court. In her evidence, the Respondent in addition to the sum of Kshs 337,500/- which her late father had paid to the Appellant and which was acknowledged in the agreement, stated that she had paid to the Appellant a further Kshs 200,000/- making a total of Kshs 537,500/-. The Respondent exhibited documents to support the additional payments. According to the Respondent it was the Appellant who was in breach of the agreement and hence was supposed to make refund to her of the total amount she had paid plus 50% interest being the agreed liquidated damages.
10. Reuben Nyaga Gateri testified on behalf of his father Juda Gateri Kariuki pursuant to a Power of Attorney donated to him and registered on 15th March 2023. The witness denied his father had entered into any agreement to sell any land. His evidence was to the effect that the Respondent had leased the land but not bought the land. He claimed the sum of Kshs 337,500/- paid to his father was lease fees. He denied any knowledge of the sale agreement dated 24th February 2014 but admitted his father did receive an additional Kshs 135,000/- from the Respondent which the Respondent was never refunded as she refused to accept refund.
11. The Learned Trial Magistrate after analysing and evaluating the evidence came to the conclusion that there was a valid contract between the Respondent and the Appellant as per the agreement dated 14th February 2014. The Learned Trial Magistrate held that the claim relating to Kshs 337,500/- was not time barred as the Appellant acknowledged the amount in the sale agreement as having been paid to him. The Learned Trial Magistrate further held it was the Appellant who breached the agreement as he failed to secure the consent of the Land Control Board for the transaction to be completed. The Learned Trial Magistrate finally held the Respondent had proved she had paid a further Kshs 200,000/- to the Appellant in addition to the sum of Kshs 337,500/- that he had been paid.
12. Consequently, the Trial Magistrate ordered that the sum of Kshs 535,500/- (should have been Kshs 537,500/-) be refunded to the Respondent plus 50% Interest as per the contract dated 24th February 2014. The Respondent was awarded the costs of the suit.
13. These holdings and findings by the Learned Trial Magistrate provoked the instant appeal. The Appeal was canvassed by the parties by way of Written Submissions. The Appellant filed his submissions dated 14th October 2024 while the Respondent filed her submissions dated 22nd October 2024.
14. The Appellant submitted that the Learned Trial Magistrate erred in her application of the law and evidence presented. In particular the Appellant faulted the Learned Trial Magistrate for allegedly adopting and assimilating the contents of the agreement made between the Appellant and the Respondent's deceased Father in 1993, into the agreement made between the Appellant and the Respondent in 2014. The Appellant argued the sum of Kshs 337,500/- paid by the Respondent's deceased father under the 1993 agreement could not be "inherited" by the Respondent as it formed part of the assets of the deceased estate which could only be dealt with under succession proceedings. At any rate the Appellant argued no action could be founded on the agreement entered into in 1993 as any such action would be statute barred under the provisions of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
15. The Appellant contended that even if the agreement of 2014 was held to be valid, the Learned Trial Magistrate erred to award the Respondent Kshs 537,500/- as the Respondent had not obtained Grant of Letters of Administration to her late father's estate to be awarded Kshs 337,500/- that her late father had paid. Further the Appellant argued the Respondent had only paid a further Kshs 135,000/- pursuant to the 2014 agreement and that would be the only amount she would have been entitled to. The Appellant contended the Respondent was not entitled to be awarded the penal interest of 50%



as she did not pay the additional sum of Kshs 780,000/- under the 2014 agreement and was therefore in breach of the same. The Appellant thus contended the Trial Court erred in holding the Appellant breached the agreement dated 24th February 2024.

16. On her part the Respondent submitted that she entered into the agreement dated 24th February 2014 with the Appellant as a representative of their family who had been utilising land parcel Ngariama/Rungeto/569 from 1993. She stated under the agreement her and her siblings were in addition to Kshs 337,500/- to add Kshs 780,000/- being the value of the coffee stems on the land. She submitted she led documentary evidence before the Lower Court that proved she paid a further Kshs 200,000/- pursuant to the agreement dated 24th February 2014.
17. The Respondent in responding to the Appellant's assertion that the Respondent's claim as regards the sum of Kshs 337,500/- was time barred stated that the claim before the Court was founded on the agreement dated 24th February 2014 and hence the cause of action arose from the date of the agreement and the limitation period would only expire at the end of 6 years from the date of accrual of the cause of action. At any rate the Respondent argued even if the sum of Kshs 337,500/- was paid much earlier, and the Appellant acknowledged the amount vide the agreement, that renewed the effective date of the accrual of the cause of action.
18. In response to the Appellant's submission that the Respondent was not entitled to claim the sum of Kshs 337,500/- paid by her deceased father, the Respondent contended that pursuant to her further Amended Plaint dated 27th October 2022 she pleaded that she brought the suit in her personal capacity and as the Legal Representative of the estate of Cyrus Murage Njine. The Respondent hence submitted that in 2014 when the Appellant acknowledged receipt of Kshs 337,500/- it did not matter whether it was from the Respondent and/or her deceased father.
19. The Respondent finally submitted that the penal interest was properly awarded by the Trial Court as it was the Appellant who breached the agreement.
20. I have considered the record of Appeal, reviewed the evidence adduced before the Lower Court and considered the submissions made on behalf of the parties. The issues that stand out for determination in this Appeal are as follows:-
 - i. Whether the agreement dated 24th February 2014 between the Appellant and the Respondent was valid?
 - ii. Whether the claim relating to the refund of Kshs 337,500/- paid pursuant to an agreement of 1993 but acknowledged by the Appellant in the agreement dated 24th February 2014 was statute barred under the *Limitation of Actions Act*?
 - iii. Whether the Appellant was in breach of the Agreement dated 24th February 2014 and therefore liable to pay penal interest on any money paid to him under the agreement?
 - iv. Whether the order for payment of interest on costs from date of filing the suit was justified?
21. The Court is conscious that this being a first Appeal, it has a duty and indeed an obligation to consider and re evaluate the evidence adduced by the parties in the Lower Court to satisfy itself whether the decision reached by the Trial Court was justified. In doing so the Court is not necessarily bound by the findings of fact by Trial Court. It can make its own conclusions and findings based on the evidence presented. The Court however must be cautious that it never saw the witnesses when they testified and should therefore give allowance in that regard. See the Case of *Selle & Another –vs- East Africa Motor Boat & Others* (1968) EA 123 where the principle was enunciated.



Whether the Agreement dated 24th February 2014 was valid?

22. Both the Appellant and the Respondent acknowledge and admit the agreement. The agreement was duly executed by the Appellant and the Respondent, was attested by A. P. Kariithi Advocate and witnessed by one Dickson Njiine Mugo. The agreement without doubt complied with the provisions of Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya which provides as follows:-

- 3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless:-
- a. The contract upon which the suit is founded –
 - i. Is in writing
 - ii. Is signed by all the parties thereto; and
 - b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

23. The Learned Trial Magistrate therefore rightly held there was valid agreement as between the Appellant and the Respondent. The issue therefore was whether there was any breach of that agreement, and if so, by whom.

Was the claim for Kshs 337,500/- statute barred?

24. From the preamble of the agreement, the Appellant was described as “the vendor”. The Respondent (being the representative of the family of the late CYRUS MURAGE NJINE who was the original buyer but died before the transaction was over and the family members wish to continue with the transaction) was described as ‘the purchaser’. It is clear the Appellant was entering the agreement in her individual capacity and as a representative of the family of the late Cyrus Murage Njine and not as the Legal Representative of the deceased. The vendor as per the agreement was obliged to deal with the Appellant individually.

Under Clause (1) of the agreement the agreed purchase price of the parcel of land was Kshs 337,500/-. Clause (2) of the agreement provided for purchase price as follows:-

2. The purchase price shall be paid as follows:-
- (a) Kshs 337,500/- has been paid on or before he signing of this agreement and the VENDOR acknowledges receipt of the same.
 - (b) Kshs 780,000/- being the value of coffee stems standing thereon shall be paid in the account of the vendor at Equity Bank Embu Branch.

25. The Appellant was selling the suit land to the Respondent in her individual capacity and it was not her concern how the Respondent was to deal with the land once the transaction was completed. The Appellant acknowledged receipt of the sum of Kshs 337,500/- towards the purchase. In my view it would not matter when the money was paid or by whom as long as she acknowledged it was part of the purchase price for the land she had contracted to sell to the Respondent. By acknowledging receipt as per the agreement, the Appellant became indebted to the Respondent in the said sum of Kshs 337,500/- if for any reason the contract of sale was not performed. The submission that this sum of Ksh 337,500/- was not recoverable on account of limitation is farfetched. Once the Appellant acknowledged the amount, limitation could not arise as time would start to run afresh from the date of the acknowledgment of payment. The Learned Trial Magistrate therefore properly and rightly held that the statute of limitation was not applicable in the circumstances of the case.



Whether the Appellant breached the agreement dated 24th February 2014?

26. It is common ground that the sale agreement dated 24th February 2014 was never completed ostensibly because the Appellant's family objected to the sale and lodged a caution against the title. In a sense the contract of sale was frustrated and was incapable of being performed owing to intervening factors. No consent of the Land Control Board was granted for the transaction which rendered the agreement, null and void on expiry of six(6) months from the date of the agreement. The money paid towards the purchase price under the provisions of the Land Control Act, Cap 302 Laws of Kenya becomes recoverable as a Civil debt, in the event the consent for the sale transaction is not given. Section 7 of the Land Control Act provides as follows:-
7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recovered as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22.
26. The agreement dated 24th February 2014 did not provide a completion date but the transaction having related to agricultural land, the parties were obligated to fulfil their obligations under the agreement within the period of six(6) months within which the requisite Land Control consent should have been obtained for the transaction to remain valid. The Respondent was required to pay an additional Kshs 780,000/- being the value of the coffee stems on the land. She did not pay this amount but adduced evidence that proved payment of the additional sum of Kshs 200,000/-. The Respondent equally did not perform her obligation under the agreement. There is no evidence that she tendered the balance of Kshs 580,000/- to the Appellant in fulfilment of her obligation under the agreement.
27. In order for the Respondent to plead breach of the agreement on the part of the Appellant she had to demonstrate that on her part she honoured her obligations under the agreement. The agreement was frustrated and blame cannot be laid on any one particular party. All the Respondent was entitled to in the circumstances was to have the agreement rescinded and to have the money acknowledged by the Appellant and the additional monies paid refunded to her.
29. The Learned Trial Magistrate therefore erred in holding the Appellant breached the sale agreement dated 24th February 2014 and consequently ordering the Appellant to pay the penal interest of 50% interest on the money. The Learned Trial Magistrate provided no justification to order the payment of interest on the costs from the date of filing suit. It would be understandable if the order related to the decretal sum. Costs can only be awarded at the time of pronouncement of a Ruling or Judgment and hence interest ought to run from that time. I agree with the observations of Joel Ngugi, J (as he then was) in the Case of Jane Wanjiku Wambu –vs- Anthony Kigamba Hato & 3 Others (2018) eKLR where he stated:-
39. -----, in our jurisdiction, the normal rule is that interest on costs begins running from the date of the Judgment or order containing the entitlement to costs. Interest on costs cannot begin at an earlier date before the Court pronounces entitlement to costs. Indeed, there is some ambivalence whether, where interest on costs are awarded the cost should start running on the day the Judgment is pronounced (known as the “incipitur” rule) or from the date when costs are assessed (known as the “allocator” rule). Suffice it to say that interest on costs should not be allocated from a date earlier than when Judgment is delivered.”
30. In the final analysis having carefully considered and reviewed the record of Appeal and the evidence, I find that the Appeal partially succeeds.



31. The Judgment of the Lower Court be and is hereby varied as follows:-

- a. The Appellant is ordered to refund to the Respondent Kshs 537,500/- with interest at Court rates from the date of Judgment in the Lower Court.
- b. The Appellant shall bear the costs before this Court and the Court below.
- c. Interest on costs shall be at Court rates from the date of assessment.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 6TH DAY OF MARCH 2025.

J. M. MUTUNGI

ELC - JUDGE

