



**Zip Code Construction Limited v Kimani (Environment and Land Appeal
E001 of 2024) [2025] KEELC 3580 (KLR) (5 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3580 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E001 OF 2024**

MN GICHERU, J

MAY 5, 2025

BETWEEN

ZIP CODE CONSTRUCTION LIMITED APPELLANT

AND

GEORGE NDUNGU KIMANI RESPONDENT

(Being an Appeal from the Judgment of the Learned Magistrate S.K. Nyaga (Ms.) Senior Resident Magistrate delivered on 11th March, 2024 in Kenol MCELC No. 017 of 2023)

JUDGMENT

1. This appeal arises from the judgment and decree of the learned Senior Resident Magistrate in case No. MCLE E017 of 2023 at Kenol Magistrate’s Court. In the judgment dated 11-3-2024, the Court dismissed the Appellant’s suit on the ground that the Appellant had not proved its case on a balance of probabilities primarily because there was failure by the Respondent’s advocates to comply with Section 33 of the Land Registration Act 2012 pertaining to the replacement of a lost or misplaced title deed.
2. Dissatisfied with the decision of the lower Court, the Appellant through counsel on record, filed a memorandum of appeal dated 2-4-2024 seeking the following orders.
 - a. This appeal be allowed.
 - b. The Judgment delivered by the learned trial magistrate on 11-3-2024 be set aside in its entirety.
 - c. That judgment be entered for the Appellant as prayed for in the plaint dated 20-7-2023 and filed on 24-7-2023.
 1. The appeal is based on eleven (11) grounds which challenge the decision of the lower court. The said grounds are as follows. That the learned trial magistrate erred in law and fact in or by-



- i. holding that the respondent (seller) performed his part of the contract for sale and purchase of Title No. Makuyu/Makuyu/Block 1/XXX8, suit land, within Makuyu area, Murang'a county,
- ii. interpreting Section 33 of the *Land Registration Act* by assuming that the Appellant, as the buyer had a role in the application for replacement of the lost/misplaced title deed,
- iii. failing to appreciate the reasons given by the Land Registrar Murang'a when she rejected the Appellant's formal application for registration,
- iv. failing to appreciate the contents of the sale agreement dated 9-9-2021 and in particular clause 6(b)(1) which listed the original title deed to the sale property as one of the completion documents,
- v. failing to appreciate the contents of the sale agreement of 9-9-2021 and in particular clause 9 (d) (iii) permitted the Appellant (buyer) to sue the Respondent (seller) for specific performance in case of default or failure to complete the sale transaction,
- vi. failing to appreciate the fact that if indeed the Respondent(seller) had performed his part of the contract by handing over the original title deed to the Appellant, the Appellant would not have been aggrieved and the filing of the suit at the trial court would not have been necessary,
- vii. failing to appreciate the fact that even after issuing the Respondent with a demand letter on 13-6-2022, which was well over one(1) year before filing the suit, the said demand letter went unheeded,
- viii. failing to appreciate the fact that despite ordering that the Respondents be served with summons to appear in the suit by way of a newspaper advertisement, the Respondent still did not answer to the grievances put forth against him by the Appellant.
- ix. failing to take into account the sworn evidence of the Plaintiff's sole witness who stated that after completion of the purchase price, he could not trace the respondent (seller),
- x. failing to take into account the sworn evidence of the Plaintiff's sole witness who stated that the respondent (seller) did not hand over to him the original title deed to the suit land and
- xi. the judgment dated 11-3-2024 was thus manifestly flawed as the learned Magistrate failed to dispense justice bearing in mind the circumstances of the case.

4. The facts of the Appellant's case are as follows. Alexander Ndumia Ndungu is the sole director of the Plaintiff company. Two, the Plaintiff and the Defendant entered into a sale agreement for the sale of the suit land for Kshs. 6,350,000/=. Three, the Plaintiff complied with all the terms of the agreement. Four, the Defendant also complied with all the terms of the sale agreement except furnishing the Plaintiff with the original copy of the title deed. Five, when the Plaintiff complained to the Defendant's advocate, he said that the Plaintiff's advocate should proceed with the registration process and if any problem arose, the Defendant would deal with it. Six, when the Plaintiff presented the registration



documents, they were rejected by the Murang'a land registry with the following comments, "Attach the original title deed." Seven, this failure by the Respondent to avail the original title deed is the genesis of this suit.

5. In the plaint dated 20-7-2023 the Applicant sought the following reliefs against the Defendant.
 - a. A declaration that the Plaintiff is entitled to completion of the sale and purchase of the suit land being Makuyu/Makuyu/Block 1/1XX8.
 - b. A declaration that the Plaintiff is entitled to have the transfer of the suit land registered in its favour.
 - c. An order of permanent injunction restraining the Defendant, his agents, servants, employees and anyone acting on their behalf from selling and/or interfering with the Plaintiffs' possession of the suit land.
 - d. An order for specific performance compelling the Defendant to complete the sale of the suit land acquired by the Plaintiff for valuable consideration by handing over the original title deed to the suit land to the Plaintiff.
 - e. That in default with complying with (d) above, the interested party, being the Land Registrar, Murang'a County be and is hereby directed to register the suit property in favour of the Plaintiff, the absence of the original title deed notwithstanding to give full effect and tenor to prayers (a) and (b) above.
 - f. Costs of the suit.
 - g. Any other relief that the Court may deem fit and just to grant.

The case proceed exparte because the Defendant did not file a defence or even enter appearance. The Attorney General likewise did not enter appearance and/or file a defence.

6. The Appellant's counsel filed written submissions dated 14-11-2024 in which he identified two issues for determination as follows.
 - a. Whether the learned trial magistrate erred in law and in holding that the Respondent had performed his part of the contract.
 - b. Whether the Appellant is justified in seeking an order for specific performance of the contract.
7. I have carefully considered the appeal in its entirety including the entire record, the eleven grounds of appeal, the written submissions, the issues for determination and the case law cited in the submissions. I make the following findings on the grounds and the issues.
8. On the 1st issue, I find that the trial magistrate erred in holding that the Respondent performed his part of the sale agreement. It is not in dispute that the only hitch with the sale agreement is the absence of the original title deed. Had the original title deed been availed by the Respondent, there would have been no suit at all. Clause 6 (b) (i) of the sale agreement dated 9-9-2021 provides as follows.

"On or before the completion date, the vendor shall procure and hand over to the purchaser's advocates the following documents.

- i. Original title deed in respect of the property being sold..."

The evidence by the Plaintiff's witness that the purported original title deed was rejected by the land registry is not controverted by any evidence from the Respondent or anyone else. It is also corroborated



by the remarks by the land registry on the application for registration dated 25/11/2021 made on 1/12/2021, “Attach the original title deed.” The trial magistrate had no basis for finding that the Respondent had complied with the sale agreement when there is credible evidence that he did not avail the original title deed.

9. I find, in regard to the second ground, that the trial magistrate had nothing to do with the application for the replacement of the lost/misplaced title deed for the suit land. That was solely an issue between the Appellant, the Respondent and the land registry.
10. For the third ground, I find no error in the trial magistrate’s interpretation of Section 33 of the Land Registration Act. The said provision does not give a court any power regarding replacement of a lost or destroyed certificate or register. That power is exclusively vested in the land registrar. This finding covers the fourth ground of appeal.
11. I find that the learned trial magistrate erred in failing to allow the prayer for specific performance which was provided for in clause 9(d) (1) of the sale agreement dated 9-9-2021. The fact that the suit by the Appellant was not contested by the Respondent means that this particular prayer was proved on a balance of probabilities. I therefore find ground 5 of the appeal proved. This finding covers grounds 6 and 7.
12. As for ordering service of summons to enter appearance and pleadings through substituted service, I find that the Appellant chose the easy option. It had all the necessary particulars of the Respondent to effect better service of the summons and pleadings. These particulars include the postal address, the home area including the sub location as per the national identity card and his advocates contacts. It was therefore casual of the Appellant’s director to state in the affidavit of 1-9-2025 at paragraph 4 as follows.

“That despite spirited attempts to effect service of summons to enter appearance and plaint upon the Defendant in person or through his last known telephone number, such efforts have been futile.”

The affidavit of the process server Simon M. Velela dated 30-8-2023 reveals even more. He depones vide paragraph 3 of the affidavit.

“That on 27/7/2023 I proceed to serve George Ndungu Kimani physically within Makuyu area which was his last known residence but my efforts were futile. He was also unreachable through his phone No. 0784336795 and the said number was not registered on WhatsApp.”

The documents being served included the plaint dated 20-7-2023, the summons to enter appearance dated 24-7-23 and the Pre Trial Conference notice dated 27-7-2023. This is according to paragraph 2 of Affidavit of service dated 30-8-2023.

13. It was highly irregular of the Appellant to serve the Respondent with the plaint, the pretrial conference notice and the summons to enter appearance on the same date. The summons gave the Respondent 15 days to enter appearance while Order 7 rule 1 Civil Procedure Rules gave him 14 days after entering appearance, to file his defence. It was only after the close of pleadings that the Respondent could be served with a pretrial conference notice.

Secondly, the process server does not state where in Makuyu he was to serve the Respondent, who was to introduce him to the Respondent and why he did not call the Respondent while in Nairobi before embarking on the journey to Makuyu only to find him unreachable.

Thirdly, the process server and the Appellant do not state why the Respondent was being served at Makuyu instead of Githunguri which is his known address according to the sale agreement. Had



the trial magistrate critically considered the application to serve the Respondent through substituted service, he should have dismissed it.

14. Order 5 rule 6 of the Civil Procedure Rules provides as follows.

“Service of summons shall be by delivering or tendering a duplicate thereof signed by the judge, or such officer as he appoints in his behalf and sealed with the seal of the Court.”

The key words are delivering tendering.

Substituted service as per Order 5 rule 17 of the Civil Procedure Rules only applies when the Defendant cannot be found physically and his home cannot be traced. In this case, I find that no serious effort was made to trace the Respondent. This finding covers the 9th ground of appeal as well.

15. Despite the very flawed service, I will readily agree with the Appellant in ground ten that even before the suit was filed, the Respondent had refused to hand over the original title to the Appellant and the filling of the suit may have been necessary on this ground.

16. Finally on the 11th ground, I find that the judgment was flawed in failing to allow prayers, (a), (b), (c) and (d) in the plaint dated 20-7-2023. Most of the prayers against the Respondent ought to have been allowed. However, when it comes to the interested party, I find that prayer (e) cannot be allowed for the reasons given in paragraph (10) above. There is one more reason why this prayer cannot be allowed. Section 13A (1) of the Government Proceedings Act provides as follows.

“No proceedings against the Government shall be or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.”

The Appellant, in the suit in the lower court did not include any notice of intention to sue the Government properly served upon the Attorney General as required by Sections 13 and 13A of the Government Proceedings Act and Order rule 2 (d) of the Civil Procedure Rules which provides as follows.

2. “All suits filed under rule (1) including suits against the government, except small claims, shall be accompanied by-

(d) copies of documents to be relied on at the trial including a demand letter before action.”

17. For the above stated reasons, I find merit in the appeal but only partly and I allow it in terms of prayers (a), (b), (c) and (d) of the plaint dated 20-7-2023. Prayers (e) and (f) are disallowed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 5TH DAY OF MAY, 2025.

M.N. GICHERU

JUDGE.

