Kwinga v Kimuyu & another (Environment and Land Appeal 27 of 2017) [2025] KEELC 4946 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEELC 4946 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND APPEAL 27 OF 2017

EO OBAGA, J

JULY 3, 2025

BETWEEN

ISAIAH KASYULA KWINGA ..... APPELLANT

AND

ROSARIA KAVULI KIMUYU ..... 1ST RESPONDENT

TOM MUTHOKA BERNARD ..... 2ND RESPONDENT

(Being an appeal against the judgment and decree of the Hon. J. Karanja, PM delivered on 15th October, 2013 in Makueni PMCC No. 173 of 2009)

JUDGMENT

1. The Appellant appeals from the judgment of Hon. J. Karanja (PM) delivered on 15th October, 2013 in Makueni PMCC No. 173 of 2009.

2. In the trial court, the Appellant was the Plaintiff whereas the Respondents were the Defendants. The suit was dismissed against the 2nd Respondent with no orders as to costs whereas judgment was entered against the 1st Respondent in the following terms: -

    i. General damages for breach of contract;

    ii. Refund of the sum paid with interest;General damages are awarded in the sum of Kshs.30,000/=The sum paid as per the agreement Exhibit 1 is Kshs.68,400/= which is to be refunded with interest at court rates.The Plaintiff shall also have costs of the suit and interest.

3. Dissatisfied with the above outcome, the Appellant filed the Amended Memorandum of Appeal herein dated 17th September, 2019 on the basis of the following grounds: -

    i. The learned trial magistrate erred in law and fact by declining to allow the prayers by the Appellant when none of them had been opposed.

ii. The learned trial magistrate erred in law and fact by showing open bias against the Appellant case by disregarding and/or confusing Exhibits (1) and (2).

iii. The learned trial magistrate erred in fact and law by failing to appreciate the fact that the Appellant had permanent houses within the suit property and that his livelihood entirely depended on the same thereby exposing the Appellant to an eviction and demolition of his residential houses.

iv. The learned trial magistrate erred in law and fact by failing to find that there was a valid agreement between the Appellant and the 1st Respondent and failing to grant compelling orders to the Respondents to transfer 6 acres of land to the Appellant was misdirection.

v. The learned magistrate erred in law and fact in disregarding the Appellant's unchallenged evidence that he first acquired 6 acres and these had no issue at all apart from the 1st Respondent being ordered to effect transfer.

vi. The learned magistrate failed to appreciate that what was in issue was 1 acre as the 6 acres had no dispute between the parties and had been acquired by mutual consent

vii. The learned magistrate erred in law and fact in failing to appreciate that the dispute arose after an agreement for additional one acre for Kshs.40,000/= and that it is this one acre which was sold to the 2nd Respondent.

viii. The learned court was wrong in its contradictory reasoning – finding that the purchase price was Kshs.40,000/=, 24,000/= paid with a balance of Kshs.16,000/= while at the same time showing that the Appellant had paid Kshs.68,400/= which it ordered be refunded.

ix. The learned magistrate erred in law and fact in holding that there was no link between the land in the sale agreement and Plot No. 1279 Utithi Settlement Scheme yet the issues had been set out in the Plaint and the Respondents did not adduce evidence to the contrary. Indeed during the hearing of the injunction application, the 1st Respondent had testified that he had sold the land to the Appellant but the land was not subdivided.

x. The learned magistrate erred in law and fact in failing to appreciate that the Appellant acquired the 1st portion in 1997 and continued expanding as time went on and that it was the height of injustice to be ordered to be refunded a few coins in 2013 having heavily developed the land over the years.

xi. The learned magistrate erred in law and fact in failing to appreciate that the Appellant had been in possession of the land for over 16 years and had massively invested in it hence orders amounting to eviction could not be issued as none had been sought by any party.

xii. The learned magistrate erred in law and fact in failing to appreciate that as between the Appellant and the 2nd Respondent, the Appellant was the first in buying and taking possession hence had a good title over the 2nd Respondent.

xiii. The learned magistrate erred and misdirected itself in law and fact in making orders which have the effect of dispossessing the Appellant of his land and evicting him yet the Respondent had not sought such orders indeed did not participate in the matter.

xiv. The learned magistrate erred in law and fact in finding that the Respondents could not be injuncted despite the fact that the 1st Respondent was in breach.

xv. The learned magistrate erred in law and fact in holding that the Appellant had proved his case but gave orders which make him a loser.

xvi. The learned magistrate erred in law and fact in interrogating the Appellant's evidence as if the same had been challenged by any party. Indeed the matter was conducted by way of formal proof.

xvii. The learned magistrate erred in law and fact in granting orders in favour of the Respondent who had not counterclaimed nor did they participate in the hearing.

4. The Appellant prays that following orders do issue in his favour: -

a. This Appeal be allowed.

b. The decision of the trial magistrate be set aside and/or reversed and replaced with an order allowing the suit as sought in the Plaint.

c. The costs in this Appeal be borne by the Respondents.

5. Parties agreed to dispose of the appeal by way of written submissions.

6. The Appellant filed his submissions which are dated 24th April, 2024.

7. On his behalf, Counsel submitted that key findings by the lower court are based on no evidence or on a misapprehension of the evidence. Counsel contended that the lower court was at error in law and fact when it termed Peter Kimuyu a stranger. That from the translated annexures, Peter Kimuyu received various amounts from 26th March, 2002 up to 25th February, 2008 for the purchase of various sizes of land acreage. Counsel added that on 25th February, 2008, Peter Kimuyu curved off 2 acres 4 metres he had sold to the appellant and that this was done in the presence of the Respondent, her late husband Barnabas Kimuyu Ndwii and sons Lucas and Leonard.

8. Counsel further contended that the court was in grave error in holding that there was no description of the land that was the subject of the agreement or that there was no link between the said land in the agreement and the Plot No. 1279 Utithi Settlement Scheme. It was his submission that the subject land was never an issue.

9. Counsel submitted that vide the replying affidavit sworn by Barnabas Kimuyu Ndwii on 2nd October, 2009, the Respondent's late husband admitted to having received Kshs.24,000/= leaving a balance of Kshs.16,000/= for the one acre that was sold. Counsel added that Barnabas Kimuyu Ndwii further admitted to selling the same land to the 2nd Respondent.

10. Counsel further submitted that the lower court fell into error on the amount of money that was paid by the Appellant. It was contended that the lower court noted payments of Kshs.68,400/= which it ordered to be refunded yet in its analysis the court stated that the Appellant had paid Kshs.24,000/= leaving a balance of Kshs.16,000/=. Counsel insisted that as long as the lower court addressed its mind to the Kshs.40,000/=, the court was dealing with one acre and ignoring the six acres acquired earlier altogether.

11. Counsel contended that the lower court was wrong in failing to issue an injunction against the 1st Respondent and/or making an order for transfer of 6 acres to the Appellant. He added that from March 1997 to February 2008, there were no issues over any portion acquired from either Barnabas or Peter and the court was at error for making adverse orders against the Appellant. Counsel contended that the 6 acres purchased earlier were clear.

12. Counsel argued that the problem arose after 30/03/2008 in relation to the last one acre which would subsequently be sold to the 2nd Respondent. It was his submission that the court erred in lumping together all the parcels acquired in different times and proceeding to impugne the transaction when they were not in dispute.

13. Counsel submitted that having proved his case to the standards required, the court erred in issuing orders which made the Appellant a loser. It was Counsel's contention that the orders given by the court mean that the Appellant has to vacate the land. That since none of the Respondents participated in the suit, they could not get orders in their favour.

14. Counsel submitted that the total of six acres purchased over time starting from 1997 were not in dispute and that the lower court failed to comprehend that the Appellant had been expanding and had massively developed the said land, hence orders amounting to eviction could not issue. Counsel urged the Court to allow the appeal as sought.

15. The Respondents filed their submissions dated 11th May, 2024.

16. On their behalf, Counsel contended that the agreement did not define the parcel of land in question by way of parcel number. Additionally, it was contended that no evidence was tendered to show that the Appellant was on the suit land for whatever period of time. Counsel submitted that the trial court had the discretion to disallow the prayers sought even when the suit was not opposed. Counsel submitted that the judgment of the lower court was based upon sound legal principles and therefore should not be disturbed by this court.

17. To buttress the Respondents' submissions, Counsel relied on the case of United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] EA.

18. This being a first appeal, the court is bound by the duty of the first appellate court as clearly set out in the case of Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123 where the Court of Appeal held as follows: -

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, 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 necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)"

19. The seventeen grounds supporting the memorandum of appeal can be summed up as follows: -

    i. Whether the learned trial magistrate erred in law and fact by failing to find that there was a valid sale agreement between the Appellant and the 1st Respondent;

    ii. Whether the learned trial magistrate erred in law and fact by failing to order six acres of land be transferred by the 1st Respondent to the Appellant;

    iii. Whether the learned trial magistrate erred in law and fact by failing to issue orders of injunction against the Respondents.

20. At the hearing of his suit before the trial court, the Appellant was bound prove all the above issues within the required standard of a civil claim, which is on a balance of probabilities. In asserting his legal right to six (6) acres of the suit property, Section 107(1) of the *Evidence Act* attaches the burden of proof on the Plaintiff in the following terms: -

    i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

21. The dictum of the Court in William Kabogo Gitau v George Thuo & 2 others [2010] eKLR elaborates on what is proof on a balance of probabilities. The Court observed as follows: -

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case is more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%, as opposed to 49% of the opposing party, is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

22. Again, it is not enough for the Appellant to claim that his suit was undefended and so all the prayers sought therein must be allowed. The Appellant must demonstrate the extent of his entitlement to the orders sought even during a formal proof hearing. The Court of Appeal affirmed this position in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR as follows: -

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

23. At the hearing of his case, the Appellant produced several sale agreements for different acreages of land purchased from the 1st Defendant and her family. Starting with the sale agreement dated 29/03/1997 at page 38 of the Record of Appeal, it is stated that the Appellant purchased two acres of land from Barnabas Ndwii for Kshs.32,000/=. The agreement states that the purchase price was cleared.

24. Another agreement was executed dated 17th January, 2005 between the Appellant and Barnabas Ndwii for an extra one acre of land. On 23rd December, 2007, the Appellant cleared the balance of the purchase price.

25. The Appellant again entered into a sale agreement dated 26th December, 2003 with Peter Kimuyu, who is the 1st Defendant's son for the purchase of one acre of land within the suit property. The agreement states that the full purchase price of Kshs.20,000/= was paid.

26. Again, on 22nd December, 2004, the Appellant entered into a sale agreement with Peter Kimuyu for the purchase of an extra half acre of land. On 27th February, 2005, the agreement indicates that the full purchase price of Kshs.10,000/= was paid. Another agreement dated 20/07/2005 was executed

between Peter Kimuyu and the Appellant for an extra 4 metres of land for every acre of land sold to him. The agreement states as follows: -

> " Today 31/04/2006 Isaiah has given me Kshs.2,800/= for metres I added on top of the acres I had sold to him. The metres are 23 + 4M per acre."

27. The agreement went on further to state that on 25/02/2008, Peter Kimuyu received the full purchase price and proceeded to mark the Appellant's boundaries. Among the attesting witnesses were the late Barnabas Ndwii and his wife, the 1st Defendant.

28. In the case of William Muthee Muthami v Bank of Baroda [2014] eKLR, the Court aptly observed as follows: -

> " In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

29. It is not in doubt that the Appellant clearly demonstrated that he executed several sale agreements for a cumulative total of six acres between the years 1997 up to 2008. His evidence of being in possessions thereof was again not controverted. The above sale agreements are valid having been properly executed and the full purchase prices having been paid in accordance with Section 3 (3) of the *Law of Contract Act*.

30. Section 116 of the *Evidence Act* further provides as follows: -

> " When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.'

No evidence was adduced to disprove either the above contracts or the Appellant's possession of six acres of the suit property.

31. The trial magistrate in his judgment stated that he did not understand who Peter Kimuyu was in the transaction. The translated version of the agreement produced as exhibit 1(b) clearly showed that Peter Kimuyu was son of the 1st Defendant Barnabas Kimuyu Ndwii who was the original 1st Defendant in the suit before the lower court. He received payments with consent of his father. When Peter Kimuyu was showing the Appellant his two acres and four metres on 25th February, 2008, among the witnesses present was his father and his mother who is the 1st Respondent in this appeal.

32. On the part of the payments made to Barnabas Kimuyu Ndwii, the evidence shows that he purchased his third acre on 25th February, 2008 at Kshs.40,000/=. He paid Kshs.4,000/= deposit on the same day leaving a balance of Kshs.16,000/=. When he took the balance of Kshs.16,000/= to the Barnabas Kimuyu Ndwii, he declined to receive it saying that he was going to receive it later when he needed it. The reason for this was that he had sold 1½ acres to the 2nd Respondent.

33. The evidence adduced shows that the Appellant purchased six acres save that there was a balance of Kshs.16,000/= for the sixth acre which he was ready and willing to pay but Barnabas Kimuyu Ndwii was not willing to receive it. What the Appellant was seeking was specific performance of the contract. As at 1st March, 1998, the Appellant had cleared paying Kshs.32,000/= for the first two acres he purchased. The payment was made to Barnabas Kimuyu Ndwii. As at 28th August, 2004 the Appellant had cleared paying Kshs.20,000/= for his third care. The payment was made to Peter Kimuyu, who is

son of Barnabas Kimuyu Ndwii. As at 23rd December, 2007, the Appellant had completed paying for his fourth acre by paying a total of Kshs.30,400/= to Barnabas Kimuyu Ndwii. As at 27th February, 2005 the Appellant had purchased ½ an acre which payment of Kshs.10,000/= was paid to Peter Kimuyu. Between 26th June, 2005 and 25th February, 2008, the Appellant purchased various meters from Peter Kimuyu which made the cumulative acres purchased to be 2 acres and four metres. This made a total of 5 acres and four metres. As at 30th March, 2008, the Appellant had paid Kshs.24,000/= out of the Kshs.40,000/= for his sixth acre leaving a balance of Kshs.16,000/=. This is the amount he was ready and willing to clear but Barnabas Kimuyu Ndwii declined to receive.

34. The uncontroverted evidence is that the Appellant purchased six acres but Barnabas Kimuyu Ndwii declined to receive the balance of Kshs.16,000/=. I therefore find that the Appellant is entitled to transfer of six acres into his name upon payment of the balance of Kshs.16,000/=.

35. The trial magistrate was therefore wrong in granting general damages of Kshs.30,000/= and ordering a refund of Kshs.68,400/= when the evidence showed that he had paid much more than what the court ordered as a refund. I therefore allow the appeal, set aside the judgment delivered on 15th October, 2023 and replace with the following judgment:

    a. A declaration that the Appellant is the owner of six acres comprised in plot No. 1279 Utithi Settlement Scheme.

    b. An order of specific performance ordering the 1st Respondent to transfer to the Appellant six acres out of plot No. 1279, Utithi Settlement Scheme upon the Appellant paying the balance of Kshs.16,000/=.

    c. A permanent injunction against the Respondents restraining them from interfering with in any manner with the Appellant's six acres comprised in plot No. 1279, Utithi settlement scheme.

    d. Costs of the suit in the lower court and this appeal to be paid by the 1st Respondent.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 3RD DAY OF JULY, 2025.

In the presence of:

Mr. Ngala for Appellant.

Court assistant – Steve Musyoki