



**Warui v Ndaru (Environment and Land Appeal E010 of 2023)  
[2025] KEELC 5884 (KLR) (15 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5884 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E010 OF 2023**

**AK BOR, J**

**JULY 15, 2025**

**BETWEEN**

**LUCY WANGARI WARUI ..... APPELLANT**

**AND**

**SARAPIN JORAM NDARU ..... RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment of Hon E.N Wasike [Principal Magistrate] delivered on 20/6/2023 in Siakago PM ELC Case No. 5 of 2021 Lucy Wangari Warui v Sarapin Joram Ndaru. The Appellant filed suit seeking to have the Respondent ordered to transfer the land known as Mbeti/Gachururi/1600 [the suit land] to her. She also sought to have the Respondent permanently restrained from selling the suit land to any other person and for the Respondent to bear the costs of the case.
2. The basis of her claim was that she entered into an agreement with the Respondent on 4/10/2007 pursuant to which she bought one acre out of the land at the agreed consideration of Kshs. 90,000/= out of which she paid a deposit of Kshs. 70,000/= and the balance was to be paid once the Respondent obtained the Land Control Board [LCB] consent. She averred that upon paying the deposit towards the purchase price, she took possession of the land and built a five bedroomed house and a pit latrine and started utilising the land by rearing some domestic animals and farming food crops. It was her case that she lived on the suit land without interference from the Respondent for 10 years but relocated to her parents' home once she started having some health issues.
3. The Appellant averred that she paid the Respondent the balance of Kshs. 20,000/= and an additional Kshs. 4,000/= to facilitate the processing of the title deed through her advocate but the Respondent refused to have an acknowledgement note executed for payment of the balance of the purchase price. She averred that the Respondent was required to obtain all the consents and documents necessary for the transfer of the land after receiving the deposit and she was to pay the balance once the Respondent



obtained the consents. It was her contention that the Respondent breached the agreement when he failed to obtain the LCB consent to transfer the land.

4. The Appellant averred that in 2017, there was a heavy wind that blew away her house and demolished it completely and in 2018, the Respondent trespassed onto the land and started cultivating it without her consent. That she sought the assistance of various authorities regarding the Respondent's trespass without success. She stated that through a letter dated 19/10/2017, the Respondent's advocate offered to refund her Kshs. 70,000/= but she declined. She set out the particulars of breach and trespass to land and sought to have the Respondent ordered to issue a title deed to her and general damages for the losses she had suffered due to the Respondent's alleged breach of contract.
5. The Respondent filed a defence where he averred that the Appellant took possession in 2010 and lived on the suit land until 2013. He stated that he was a stranger to the five bedroomed house which the Appellant claimed to have built on the land. He denied that he had trespassed on the suit property since he is the registered owner. He asserted that he refunded the deposit of the purchase price of Kshs. 70,000/= to the Appellant; and that she acknowledged receipt vide the acknowledgement slip dated 9/11/2017. He averred that it was the Appellant who breached the agreement by refusing to share the costs of the subdivision and obtaining the LCB consent as stated in the agreement. He urged that the Appellant was not entitled to the prayers sought.
6. The trial court in its judgment found that the Respondent did not disprove the Appellant's allegations that she took possession of the suit land in 2007 after execution of the sale agreement. The court rejected the Respondent's argument that the Appellant lived on the land for 3 years. The court observed that the parties blamed each other for the frustration of the contract but failed to adduce any evidence to show the efforts they made to ensure compliance with the terms of the agreement. The court blamed both parties for frustrating the contract.
7. The court was not persuaded that the Appellant paid the balance of the purchase price and a further Kshs. 4,000/= to facilitate issuance of a title deed and held that the Appellant did not produce evidence to substantiate that claim. The court was satisfied that the Appellant was refunded the deposit of Kshs. 70,000/= given the acknowledgement letter produced by the Respondent. The court noted that the Appellant did not controvert the contents of the letter or her signature and that she failed to challenge the validity of the letter. The trial court further held that the transaction between the parties became void for want of the relevant LCB consent and concluded that the claim lacked merit and dismissed the suit. The court directed each party to bear its costs of the suit. That is what led to the appeal before this court.
8. The Appellant filed a memorandum of appeal and faulted the Learned Magistrate for failing to consider the spirit of *the Constitution* as outlined in Article 159[2][d] of *the Constitution* of Kenya. Secondly, that the trial court failed to consider the fact that the Appellant had been in possession of the land for more than 10 years. The other ground of appeal was that the trial court failed to appreciate that it was the Respondent who frustrated the contract and that the Appellant had already discharged her obligations under the contract. Additionally, that the Learned Magistrate failed to direct that a forensic investigation be conducted on the document purported to have been signed by the Appellant acknowledging receipt of the refund of the money she had paid for the land.
9. It was also urged that the Learned Magistrate failed to consider the current jurisprudence on the issue of obtaining LCB consent on the position that the expiry of six months should not deny the aggrieved party justice. The trial court was also faulted for failing to consider the fact that it was the responsibility of the Respondent to obtain the LCB consent and that he should not be allowed to benefit from



- his own failures. The Appellant maintained that the trial court should have made a finding that the Respondent bore the bigger burden in frustrating the contract.
10. The Respondent's cross appeal raised two grounds, firstly, that the Learned Magistrate erred by failing to award him the costs of the suit after it dismissed the Appellant's suit; and secondly, that the Learned Magistrate exercised his judicial discretion injudiciously by making an order that each party bears its costs yet costs must always follow the event.
  11. He urged this court to set aside the trial magistrate's determination that each party was to bear its costs of the suit and substitute it with a finding that the costs of the suit were awarded to the Respondent.
  12. The court directed parties to file and exchange submissions which it has considered. The issue for determination is whether the appeal and the cross appeal have merit. It is not in dispute that parties entered into an agreement for the sale of one acre out of the suit land at a consideration of Kshs. 90,000/= and that the Appellant paid a deposit of Kshs. 70,000/=: and the balance was to be paid upon the Respondent obtaining the requisite LCB consent.
  13. The Respondent contended that upon the Appellant being refunded the deposit of the purchase price, the contract was rescinded. The Respondent produced an acknowledgment slip dated 9/11/2017, signed by the Appellant and witnessed by Rose Njeru Advocate, confirming receipt of the deposit of the purchase price of Kshs. 70,000/= by the Appellant. The Appellant denied receiving the amount and claimed that the acknowledgment slip was a forgery. As the trial court rightfully noted, the Appellant did not dispute her signature on the document, neither did she adduce any evidence such as that of a handwriting expert to support her claim of forgery. The burden was upon her to prove the alleged forgery, which she failed to discharge.
  14. The Respondent called Rose Njeru advocate as a witness. She testified that both parties were present at her office on 9/11/2017, and that she personally witnessed the Appellant receiving Kshs. 70,000/= from the Respondent. She further confirmed that the Appellant signed the acknowledgment slip in her presence. The trial court was satisfied with this evidence, and this court finds no reason to fault that finding. That evidence supports the conclusion that the deposit was indeed refunded, which in this court's view effectively rescinded the contract leaving no enforceable claim.
  15. The Appellant claimed that she paid the balance of Kshs. 20,000/= and an additional Kshs. 4,000/= to facilitate issuance of the title deed. However, no evidence was availed by the Appellant to prove this claim. The trial court found no proof of these payments, and this court sees no basis to interfere with that finding.
  16. On the question of costs, the general rule under Section 27 of the *Civil Procedure Act* is that costs follow the event unless the court, for good reason, orders otherwise. The trial court in directing each party to bear its own costs reasoned that from the proceedings, facts and evidence on record, it was clear that both parties contributed in frustrating the contract and the Respondent bore the bigger burden since he received a substantial amount of the purchase price and failed to ensure that the purchased portion was transferred to the Appellant. There is no reason to interfere with that finding.
  17. The appeal and the cross appeal lack merit and are dismissed. Each party will bear its costs of the appeal and the cross appeal.

**DELIVERED VIRTUALLY AT EMBU THIS 15<sup>TH</sup> DAY OF JULY 2025.**

**K. BOR  
JUDGE**



In the presence of: -

Ms. Lucy Wangari Warui, the Appellant

Mr. Kalamu Ndolo for the Respondent

Diana Kemboi- Court Assistant

