



**Mbogo & another v Njue (Environment and Land Appeal E050 of 2024)
[2025] KEELC 6000 (KLR) (11 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6000 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E050 OF 2024
AK BOR, J
SEPTEMBER 11, 2025**

BETWEEN

KELLEN MUTHONI MBOGO 1ST APPELLANT

ESTHER KAGENDO NJUE 2ND APPELLANT

AND

JANE WAMBETI NJUE RESPONDENT

JUDGMENT

1. This appeal was lodged against the judgment of Hon F. N Kyambia, Chief Magistrate, delivered on 3/10/2024 in Embu ELC Case No. 138 of 2018. The Respondent, Jane Wambeti Njue filed an amended plaint seeking to have the Appellants jointly refund her Kshs. 6,978,000/= comprising the purchase price paid of Kshs. 2,670,000/=, liquidated damages of Kshs. 300,000/= and interest on Kshs. 2,670,000/= at the rate of 30% per annum from 27/8/2015 to the date of filing suit at Kshs. 801,000/= per year for five years amounting to Kshs. 4,005,000/=. She also sought costs for all the developments on the parcel of land known as Ngandori/Ngovio/2417 plus costs of the suit.
2. The Respondent's case was that on 27/8/2015, she entered into an agreement with the 1st Appellant for the sale of 1 ¼ acre out of Ngandori/Ngovio/2417 measuring approximately two acres for the sum of Kshs. 1,700,000/=. She claimed that she also entered into another agreement with the Appellants where they sold to her a further ¼ acre out of Ngandori/Ngovio/2417 for Kshs. 470,000/=. She averred that she paid the full purchase price. She averred that the 2nd Appellant had authorized her mother, the 1st Appellant to sell her entitlement of the land on her behalf.
3. The Respondent averred that the Appellants further sold to her a plot at Kibugu market in Embu West Sub-County at a consideration of Kshs. 600,000/= and that she paid Kshs. 500,000/= towards the consideration leaving a balance of Kshs. 100,000/=. It was her case that she paid to the Appellants the sum of Kshs. 2,670,000/= in total. She averred that the 1st Appellant subdivided Ngandori/



- Ngovio/2417 into parcel numbers 5615 to 5618 and transferred parcel no. 5616 to the 2nd Appellant, parcel number 5617 to Boniface Njagi Mbuti while parcels 5615 and 5618 remained in the 1st Appellant's name.
4. She asserted that the Appellants breached the agreement and failed to perform their part of the agreement, She set out the particulars of breach against the Appellants. The Respondent averred that with the consent of the Appellants, she took possession of the suit land on the date of the agreement and had extensively developed the land.
 5. The Appellants filed a defence and denied the Respondent's claim. The 1st Appellant denied receiving the full purchase price of Kshs. 1,700,000/= and averred that she only received Kshs. 1,500,000/= since the agreement was subject to approval by her children. She stated that land parcel Ngandori/ Ngovio/5617 is registered in the name of Boniface Mbogo Mbutii who was not a party to the suit; parcel number 5616 is registered in the name of the 2nd Appellant who was not a party to the sale agreement and that only land parcel numbers 5615 and 5618 were in her name.
 6. She averred that the agreement fell through because the Respondent had cautioned the land. She also averred that she offered to refund the purchase price and the liquidated damages stated in the agreement to the Respondent when they disagreed, but the Respondent declined and started threatening her and her children. According to them, it was the Respondent who breached the agreement. She urged the court to dismiss the suit with costs.
 7. The trial court's record shows that by a ruling delivered on 20/12/2022 a partial judgment was entered against the 1st Appellant for the admitted sum of Kshs. 1,500,000/= and the suit was to proceed for hearing on the balance of amounts.
 8. The matter was set down for hearing on 20/2/2024. The Respondent adopted her written statement and stated that the 1st Appellant sold her four parcels of land but did not transfer them to her despite having paid her the sum of Kshs. 2,670,000/=. That the agreement stipulated that in the event of breach of the agreement, the 1st Appellant was to pay her 30% interest of Kshs. 300,000/=. She stated that in total she was claiming the sum of Kshs. 6,900,000/=. That since the Appellants had paid her Kshs. 1,500,000/=:, she was claiming the balance.
 9. The Respondent produced copies of the agreement dated 27/8/2015, acknowledgements dated 5/10/2015 for the sum of Kshs. 300,000/= and an undated acknowledgement for the sum of Kshs. 800,000/=:, the green card for parcel no. 2471, official searches for parcel numbers 5615 to 5618 and the letter dated 3/7/2017.
 10. On cross-examination, the Respondent testified that she was buying four parcels of land. One parcel measuring $\frac{3}{4}$ acres was to be hived out of parcel number 5618; $\frac{1}{2}$ acre was to be hived from parcel no. 5617 and $\frac{1}{4}$ acre from 5617, which were subdivisions of land parcel 2417. She admitted that the 1st Appellant had refunded her the sum of Kshs. 1,500,000/=: . She maintained that the 2nd Appellant was present when she made payments. She stated that she used the suit land from 2016 to 2023 and denied that she was the one that breached the sale agreement.
 11. The 1st Appellant relied on her written statement and stated that parcel no. 2417 belonged to her and that she inherited it from her late husband with her children. She admitted that she received the sum of Kshs. 1,500,000/= for the sale of $1 \frac{1}{4}$ acres of the land to the Respondent. She denied receiving any money for a plot or that the Respondent paid her the sum of Kshs. 470,000/= and denied that she breached the sale agreement. She stated that she took the Respondent to the Land Control Board with the intention of transferring 1 acre of the suit land to her. The Respondent placed a caution on the



- land and when she confronted her about it, she started quarrelling her. She stated that her children were not involved in the sale of the land.
12. On cross-examination, the 1st Appellant stated that she was selling the Respondent a total of 1 ¼ acres but later changed to one acre. She stated that she refunded the Respondent Kshs. 1,500,000/=. She admitted that the agreement provided for a remedy of 30% interest in the event of breach. However, she stated that it was the Respondent who breached the agreement by placing caution against the parcels of land. She stated that she could not refund the Respondent the money because she had sued her.
 13. The trial court found that the Respondent and the 1st Appellant entered into an agreement dated 27/8/2015 for the sale of 1 ¼ acres to be excised from Ngandori/Ngovio/2417 at the consideration of Kshs. 1,700,000/=, out of which the Respondent paid Kshs. 1,500,000/=. The court observed that the terms of the agreement provided that in the event of default, the 1st Appellant would refund the purchase price with interest at 30% per annum plus an additional Kshs. 300,000/=.
 14. The court held that any alleged subsequent transactions for the sale of an additional ¼ acre and a plot in Kibugu Market were not in writing as required by section 3(1) of the *Law of Contract Act*, and further, that the Respondent failed to prove payment of Kshs. 470,000/= for the ¼ acre and Kshs. 500,000/= for the plot in Kibugu respectively. Those claims were therefore dismissed.
 15. On the issue of breach of the terms of contract, the court found that the agreement was solely between the Respondent and the 1st Appellant and that the allegation that the 2nd Appellant had authorized the sale was not substantiated. The trial court noted that the suit land was subject to succession and the 1st Appellant could only have dealt with her share. The court found that despite the Respondent placing a caution on the suit land, it was incumbent upon the 1st Appellant to perform her part of the agreement which she did not and therefore she was the one in breach.
 16. The trial court concluded that since the Respondent had already been refunded the sum of Kshs. 1,500,000/=: the 1st Appellant was to pay interest on Kshs. 1,500,000/= at 30% per annum from the date of the agreement to the date of filing suit, together with Kshs. 300,000/= damages as stipulated in the agreement. These sums were to attract interest at court rates from the date of judgment. The Respondent's claim for developments on the land failed for want of evidence. Each party was to bear their own costs of the suit.
 17. The 1st Appellant raised seven grounds of appeal in the memorandum of appeal. She faulted the trial court for finding that she was in breach of the agreement dated 27/8/2015 and failing to find that it was the Respondent who breached the agreement by lodging a caution against her land and that of her children. She faulted the court for failing to find that it was the Respondent who made it difficult to perform the agreement by placing cautions on the land. In addition, she faulted the court for condemning her to pay the Respondent interest on the purchase price at 30% per annum from the date of the agreement without considering that she had refunded the purchase price through the mediation agreement of 17/5/2023.
 18. She further faulted the court for condemning her to pay Kshs. 300,000/= as damages to the Respondent as per the agreement yet it was the Respondent that breached the agreement. She faulted the court for failing to consider that the agreement was vitiated by the Respondent's claim for her land and that of her children, which according to her frustrated the performance of the agreement. She faulted the court for disregarding her evidence and urged this court to allow the appeal and set aside the judgment of the trial court.
 19. The court directed parties to file and exchange written submissions, which it has considered. The Appellant submitted that it was not in dispute that parties entered into an agreement dated 27/8/2015



for the sale of 1¼ acres out of Ngandori/Ngovio/2417. She submitted that clause (b) of the agreement required the Respondent to pay the balance of the purchase price of Kshs. 1,400,000/= on or before 30/9/2015, but by the time of filing suit, she had not paid the entire amount and that there was a balance of Kshs. 200,000/=. She submitted that the Respondent nevertheless took possession of the 1 ¼ acre piece of land on 1/1/2016, and the Appellant proceeded with subdivision of the land for purposes of transfer. She submitted that, the Respondent placed cautions on the resultant parcels claiming 1½ acres instead of the 1¼ acres in the agreement, which in her opinion demonstrated dishonesty.

20. It was contended that by failing to pay the balance of the purchase price by 30/9/2015 and demanding more land than she had bought, the Respondent breached the agreement. On the issue of interest and damages, it was submitted that the parties had gone for mediation following which the 1st Appellant refunded Kshs. 1,500,000/= to the Respondent. The Appellant argued that the trial court erred in condemning her to pay the interest and damages yet it was the Respondent who breached and frustrated the performance of the contract. It was argued that the award of 30% interest and Kshs. 300,000/= damages resulted in unjust enrichment of the Respondent who had been in occupation of the Appellant's land since 2016. The court was urged to allow the appeal.
21. In her submissions, the Respondent gave a background to the suit and urged the court to uphold the trial court's judgment.
22. The court has considered the appeal and the rival submissions. The issues for determination in this appeal are whether the trial court erred in finding that the 1st Appellant breached the terms of the agreement dated 27/8/2015; whether the trial court erred in awarding the Respondent interest at 30% per annum on the purchase price of Kshs. 1,500,000/= and Kshs. 300,000/= as liquidated damages; and lastly, who should pay the costs.
23. It is not in dispute that the Respondent and the 1st Appellant executed a sale agreement on 27/8/2015 for the sale of 1¼ acres out of Ngandori/Ngovio/2417 at a consideration of Kshs. 1,700,000/=. It is equally undisputed that the Respondent paid Kshs. 1,500,000/= pursuant to that agreement. Clauses 5 and 6 of the sale agreement stipulated that in the event of breach, the vendor would refund the purchase price with interest at 30% per annum together with Kshs. 300,000/= as liquidated damages.
24. The Respondent claimed that, in furtherance of the agreement dated 27/8/2015, the 1st Appellant sold to her an additional ¼ acre for which she paid Kshs. 470,000/=: together with another plot at Kibugu Market for which she paid Kshs. 500,000/=. The trial court correctly found that the subsequent transactions did not comply with section 3(1) of the Contract Act and were therefore unenforceable. There is no reason to interfere with those findings and the finding that the Respondent did not prove the claim for compensation for the developments on the suit land.
25. The 1st Appellant contended that the Respondent breached the agreement by registering cautions against the resultant subdivisions of land parcel 2417, which she claimed belonged to her and her children and that the Respondent's act rendered the performance of the agreement impossible. She further argued that the Respondent was in default and failed to pay the balance of the purchase price of Kshs. 200,000/= by 30/9/2015 as stipulated in the agreement and that she started demanding more land than was agreed making it impossible to perform her part of the bargain in the agreement.
26. The Respondent maintained that she paid the full purchase price and that it was the 1st Appellant who breached the agreement when she failed to transfer the suit land to her. The issue therefore is who between the 1st Appellant and the Respondent breached the agreement. A caution by its very nature



is intended to preserve an interest in land but did not bar the 1st Appellant from transferring the land to the Respondent.

27. It would appear from clause (b) of the agreement that the transfer of the suit land should have been done on or before 30/9/2015 when the Respondent was to pay the balance of the purchase price. The cautions were registered in 2017. The 1st Appellant cannot argue that the cautions barred her from transferring the suit land to the Respondent for they were lodged after the date she was required to complete the transaction. The 1st Appellant's argument during the trial rested on the existence of the cautions.
28. This court agrees with the trial court that it was the 1st Appellant who breached the terms of the sale agreement. Having substantially performed her obligations by paying a substantial amount of the agreed purchase price, the Respondent was entitled to expect performance from the Appellant. It would be inequitable to demand full compliance from the Respondent yet the 1st Appellant was not keen to perform her obligations under the agreement.
29. The sale agreement dated 27/8/2015 expressly stipulated at clause 6 that the vendor would be liable to pay interest at the rate of 30% per annum on any portion of the purchase price, which she might be compelled to refund to the purchaser. In addition, she was to pay Kshs. 300,000/= in case of breach of the agreement. The Respondent is entitled to interest on the sum of Kshs. 1,500,000/=.
30. It is not the place of the court to rewrite the contract for the parties. Since the agreement provided the consequences of breach, the trial court was correct in awarding the Respondent both interest and liquidated damages.
31. The appeal fails. The Respondent shall have the costs of the appeal.

DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF SEPTEMBER 2025.

K. BOR

JUDGE

In the presence of: -

Ms. Mutegi Emies for the Appellant

Ms. Pamela Kimathi for the Respondent

