



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kiarie v Muya (Environment and Land Appeal 22 of 2021)
[2024] KEELC 522 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 522 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 22 OF 2021
LA OMOLLO, J
FEBRUARY 8, 2024**

BETWEEN

SAMUEL NJOROGE KIARIE APPELLANT

AND

GEORGE IRUNGU MUYA RESPONDENT

*(Being an appeal arising from the judgement of Hon. Kennedy Bidali (CM)
delivered on 22nd September, 2021 in Naivasha CM ELC No. 82 of 2018.)*

JUDGMENT

Introduction.

1. By the Memorandum of Appeal dated 27th September, 2021, the Appellant appeals against the judgement of Hon. Kennedy Bidali delivered on 22nd September, 2021 in Naivasha CM ELC No. 82 of 2018.
2. The grounds of appeal are;
 - a. That the judgement of the honorable court dated on 22nd September, 2021 be reviewed and judgement entered in favour of the Appellant against the Respondent.
 - b. That the Respondent do bear the cost of this Appeal.
 - c. That the agreement is so clear that the consideration of Kshs. 800,000 of the suit property was to be transferred directly from the respondent bank account into my account which did not take place. (Sic)
 - d. That on 5th day of April 2017 this matter was heard before Judge D.O Ohungo in the environment and land court in Nakuru.



- e. That the Advocate of the Respondent assured the honorable court that he will avail the said CCTV footage of the banking hall on 23rd May, 2017 between 9:00 am and 11:00 am but he did not avail them. (Sic)
- f. That on 11th June, 2017 my advocate Jeremiah Kamau Wanyeki passed on through a tragic road accident.
- g. That since I had no money to hire another advocate I requested Nakuru Law Court to act in person. (Sic)
- h. That this matter was mentioned on 24th November, 2017 to confirm whether the respondent had availed the said CCTV footage but his advocate admitted before Judge D.O Ohungo that he did not find them. (Sic)
- i. That on 12th June, 2018 and 24th July, 2018 this matter was called for direction by Judge D.O Ohungo but the respondent nor his advocate did not avail before the Honorable court. (sic)
- j. That to my surprise instead of Judge D.O Ohungo directing the matter for judgement the said file of case no. 18 of 2017 was secretly taken back to Naivasha and accorded case no. 82 of 2018 where the case was ruled in a criminal court and I was criminalized to have trespassed the suit property illegally. (Sic)
- k. That from 22nd September 2021 I am supposed to vacate the suit property within 21 days together with my family.
- l. That I therefore humbly request that this matter be heard as an urgent case while maintaining the status quo of the suit property.

Factual Background.

3. The suit before the Magistrate's court was instituted by the Respondent vide a Complaint dated 25th January, 2017. He claimed that he had purchased Plot No. 347 Ngomongo from the Appellant for a consideration of kshs. 800,000/=.
4. The Respondent, in his complaint, averred that the Appellant gave him vacant possession of the suit property but on 17th August, 2016 he invaded the land and began to damage the buildings and the fixtures thereon.
5. The Respondent sought the following orders;
 - a. An order of eviction to be issued against the Defendant to remove himself, his agents, servants, employees and or persons claiming under or in trust for him from the parcel of land known as Plot No. 347 Ngomongo, Gilgil Town.
 - b. A permanent injunction to restrain the Defendant by himself, his agents, servants, employees and/or persons claiming under or in trust for him, from wasting, constructing, demolishing, or in any manner altering the current status of the suit property, being all that parcel of land known as Plot No. 347 Ngomongo Gilgil, together with the house developed and constructed thereon.
 - c. A permanent injunction to restrain the Defendant by himself, his agents, servants, employees and/or persons claiming under or in trust for him, from entering into, remaining upon, or in any other manner interfering with the Plaintiff's quiet enjoyment, use and possession of the



suit property, being all that parcel of land known as Plot No. 347 Ngomongo Gilgil, together with the house developed and constructed thereon.

- d. General exemplary and aggravated damages for trespass to land and mesne profits.
 - e. The costs of this suit.
 - f. Any other or further relief as this court may deem fit to grant.
6. The Appellant filed his Statement of Defence on 3rd July, 2019 where he denied the Respondent's claim and stated that the suit property was his matrimonial home. He also stated that he had agreed to sell to the Respondent the suit property at a consideration of Kshs. 800,000/=.
 7. He further stated that he vacated the suit property on 22nd May, 2016 and transferred it to the Respondent on 23rd May 2016. They later entered into a land sale agreement that was erroneously dated 23rd April, 2016 but the Respondent failed to pay the purchase price.
 8. He admitted to moving back to the suit property on 17th August, 2016 and sought that by 'Consent of the parties', the court issues an order that the Equity Bank Manager Gilgil Branch to avail to the court the CCTV footage of 23rd May, 2016 between 9.00 am and 11.00 am.
 9. He further stated that the CCTV footage would help in the determination of the main suit and will help in 'defining the ownership of the suit property'.
 10. The Learned Trial Magistrate delivered his judgement on 22nd September, 2021 in the following terms;

"I therefore enter judgement in favour of the plaintiff as prayed for in the plaint in prayers a), b) and c).

The defendant shall also pay general damages for Kshs. 200,000/= and Mesne profits of Kshs. 200,00/= being global sums for the defendants continued occupation for approximately 6 years.

The Orders in a) shall be executed upon the expiry of 21 days.

The Plaintiff will have costs and interest."

11. On 22nd May, 2023 the court gave directions that the appeal be heard by way of written submissions.

Issues for Determination.

12. The Appellant filed his submissions on 31st May, 2023 while the Respondent filed his submissions on 27th June, 2023.
13. The Appellant in his submissions gives a background to the dispute and states that he entered into a land sale agreement with the Respondent on 23rd April, 2016 for the sale of plot No. 347 Ngomongo Gilgil. The purchase price was agreed at kshs. 800,000/=.
14. The Appellant also submits that they agreed that he would give the Respondent vacant possession of the suit property before they entered into the land sale agreement and that he was to transfer the suit property before payment of the purchase price.
15. He further submits that he vacated the suit property and transferred it to the Respondent who failed to pay the purchase price and on account of this failure, he moved back to the property.



16. It is his submission that the Respondent then filed a suit before the Environment and Land Court at Nakuru where he claimed to have paid the Appellant kshs. 800,000/= in cash on 23rd May, 2016. The Appellant submits that he sought for the CCTV footage of the said date to determine whether the purchase price was indeed paid but none was availed.
17. The Appellant further submits that the Respondent did not adduce any evidence before the trial court to show that he paid the purchase price and adds that the suit before the lower court was not based on a sale agreement but was on trespass.
18. The Appellant submits that his advocate on record died as the matter was pending before the trial court and since he did not have money to appoint another counsel, he was not represented during the hearing.
19. The Appellant relies on the judicial decision in Solomon Ndegwa Kuria vs Peter Nditi Gitau [2019] eKLR and submits that the parties had a written contract that provided strict terms on the mode of payment and submits that the Respondent did not adhere to them. It is his submission that since there was no payment, the Appellant effectively repudiated the contract. The Appellant ends by praying that his appeal be allowed as prayed.
20. The Respondent in his submissions relies on the judicial decision of Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR and submits that the Appellant has not demonstrated any good reason why this court should interfere with the decision of the lower court.
21. The Respondent also relies on the judicial decision of Catherine Nasimiyu Khisa and Gladys Nakhumicha Khisa (Suing as the Administrators and Legal Representatives of the Estate of the Late Shadrack Khisa Naliakho-deceased) v Jacob Wangila Wanyama & another [2020] eKLR and submits that the appeal is not merited and that it is an abuse of the court process.
22. The Respondent argues that at the time they executed the agreement, the purchase price had already been paid and that the CCTV footage was not availed because the bank stated that the footage was not available due to passage of time.
23. The Respondent submits that the Appellant's failure to retain counsel did not lead to any procedural or technical deficiency in the proceedings and concludes his submissions by seeking that the Appellant's appeal be dismissed with costs.

Analysis And Determination.

24. Before delving into the issues for determination, this court notes that the Appellant's Memorandum of Appeal does not contain prayers.
25. The Appellant in his Statement of Defence sought that by 'Consent of the parties', the court issues an order that the Equity Bank Manager Gilgil Branch to avail to the court the CCTV footage of 23rd May, 2016 between 9.00 am and 11.00 am.
26. He further stated that the CCTV footage would help in the determination of the main suit and will help in 'defining the ownership of the suit property'.
27. It is therefore logical to deduce that the Appellant denies that he was paid the purchase price. This forms the basis for seeking that an order be issued compelling Equity Bank Gilgil branch to avail the CCTV footage of 23rd May, 2016 between 9:00 am and 11:00 am.



28. Essentially, the Appellant’s defence before the trial court is that he did not receive consideration for purchase the suit property and that the Respondent cannot claim any interest in it.

29. This court is guided by Section 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution of Kenya which obligates this court to administer justice without undue regard to technicalities.

30. Section 1A of the Civil Procedure Act provides as follows;

“ 1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”

31. Section 1B of the Civil Procedure Act provides as follows;

“ 1B. Duty of Court

1. For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; andSUBPARA (e)
the use of suitable technology.”

32. Section 3A of the Civil Procedure Act provides as follows;

“ 3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”



33. Article 159 (2)(d) of *the Constitution* of Kenya provides that in exercising judicial authority, the courts should be guided by certain principles that include the principle that justice shall be administered without undue regard to procedural technicalities.
34. It is on the basis of these provisions of the law that I shall proceed to make a determination in this matter. The grounds of appeal have been set out in the preceding paragraphs but I will nonetheless reproduce them as hereunder;
- a. That the judgement of the honorable court dated on 22nd September 2021 be reviewed and judgement entered in favour of the Appellant against the Respondent.
 - b. That the Respondent do bear the cost of this Appeal.
 - c. That the agreement is so clear that the consideration of Kshs. 800,000 of the suit property was to be transferred directly from the respondent bank account into my account which did not take place. (Sic)
 - d. That on 5th day of April 2017 this matter was heard before Judge D.O Ohungo in the environment and land court in Nakuru.
 - e. That the Advocate of the Respondent assured the honorable court that he will avail the said CCTV footage of the banking hall on 23rd May, 2017 between 9:00 am and 11:00 am but he did not avail them. (Sic)
 - f. That on 11th June, 2017 my advocate Jeremiah Kamau Wanyeki passed on through a tragic road accident.
 - g. That since I had no money to hire another advocate I requested Nakuru Law Court to act in person. (Sic)
 - h. That this matter was mentioned on 24th November, 2017 to confirm whether the respondent had availed the said CCTV footage but his advocate admitted before Judge D.O Ohungo that he did not find them. (Sic)
 - i. That on 12th June, 2018 and 24th July, 2018 this matter was called for direction by Judge D.O Ohungo but the respondent nor his advocate did not avail before the Honorable court. (sic)
 - j. That to my surprise instead of Judge D.O Ohungo directing the matter for judgement the said file of case no. 18 of 2017 was secretly taken back to Naivasha and accorded case no. 82 of 2018 where the case was ruled in a criminal court and I was criminalized to have trespassed the suit property illegally. (Sic)
 - k. That from 22nd September 2021 I am supposed to vacate the suit property within 21 days together with my family.
 - l. That I therefore humbly request that this matter be heard as an urgent case while maintaining the status quo of the suit property.



35. My analysis of the grounds of appeal is that they are a narrative of matters of fact preceding the institution of the suit and subsequent to the filing the suit in this court before it was transferred to the Chief Magistrate's Court at Naivasha for hearing.
36. The only issues for determination as understand by me from a reading of the grounds of appeal are as follows;
 - a. Whether the Learned Trial Magistrate erred in issuing orders of eviction, permanent injunction and payment of mesne profits against the Appellant in respect of all that parcel of land known as Plot No. 347 Ngomongo Gilgil, together with the house developed and constructed thereon.
 - b. Who should bear costs of the appeal.

A. Whether the Learned Trial Magistrate erred in issuing orders of eviction, permanent injunction and payment of mesne profits against the Appellant in respect of all that parcel of land known as Plot No. 347 Ngomongo Gilgil, together with the house developed and constructed thereon.

37. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. It was 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 allowances in this respect.”

38. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the court held as follows:

“This being a first appeal, we are reminded of our primary role as a first Appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

39. The orders issued by the Trial Magistrate were based on his assessment of facts that were undisputed and on a single issue for determination i.e. whether the Defendant (Appellant herein) was lawfully in occupation of the suit property. These are set out in page 5 of the judgement.
40. The Learned Magistrate correctly observed that the Defendant's (Appellant herein) only claim is that the purchase price was never paid. The Learned Magistrate in his judgement recounts the Appellants evidence wherein (the Appellant) he stated that after executing transfer documents, the Respondent received an urgent call and hurriedly left for Naivasha and promised to return in the afternoon but he (the Respondent) never returned and the purchase price was never paid.
41. In his judgment, the Learned magistrate further observed that the Plaintiff's case (Respondent herein) is that the purchase price was paid and he availed three eye witnesses who saw the Appellant receive the money. One of the eye witnesses is Francis Mwangi. He is the agent who introduced the Appellant and the Respondent. In his uncontroverted testimony, he stated that his agency fee was paid from the Kshs. 800,000 paid to the Appellant and that subsequent to this payment, the Appellant hired his car



and him as a driver to take him to Nairobi and that the Appellant paid him a further Kshs. 6000 for this service.

42. I have also perused the sale agreement and one of the mutually agreed terms is as follows;

“The Purchase price for the said plot is Kenya Shillings Eight Hundred Thousand Shillings Only(800,000/=)which has been transferred to the vendors account in full and he acknowledges receipt upon signing of the agreement hereof.”

43. The Appellant argues that the Learned Trial Magistrate erred in not finding that the consideration of Kshs. 800,000/= was to be transferred directly from the Respondent’s bank account to the Appellant’s bank account.

44. The Respondent on the other hand argues that the Appellant acknowledged receiving the purchase price in full according to the land sale agreement dated 23rd April, 2016. The Respondent conceded that though the money was to be paid into the Appellant’s account, he requested that it be given to him in cash.

45. The Learned Trial Magistrate at pages 5 and 6 of the judgement found that the Respondent called three witnesses to testify and that their testimonies were that they saw the Appellant receive the purchase price in cash.

46. At page 6 of the judgement, the Learned Trial Magistrate observes as follows;

“The undisputed facts are that the purchase price was not transferred to the vendors account as provided. The other undisputed facts are that the defendant signed the agreement acknowledging receipt upon signing of the agreement thereof. It is evident that the parties did not abide strictly by the terms of the agreement. The Plaintiff states that that the cash payment proposal was made by the Defendant. The agreement itself also has its errors. It is dated 23.4.2016, whereas from the evidence of the parties the date was 23.5.2016. But there is overwhelming evidence showing the Defendant was paid the purchase price in cash.”

47. The sale agreement dated 23rd April, 2016 was produced before the trial court as Exhibit P10. The Appellant herein admits to signing it.

48. It is not disputed that the sale agreement was erroneously dated 23rd April, 2016. As pointed out by the Learned Trial Magistrate in his judgement, the Respondent called three witnesses who gave evidence that they saw the Appellant receive the purchase price in cash. This evidence remains uncontroverted.

49. In my view, the issue of the CCTV footage is immaterial. The Respondent, during cross examination, stated that they had requested for it but they were informed that it was not available due to the passage of time. The Appellant who has made it an issue during appeal doesn’t state that he made the footage available and that the Learned Magistrate disregarded it. It is clear, therefore, that none of the parties availed the CCTV footage in evidence. The court had no opportunity of interrogating it and did not make any finding on it.

50. Taking all these facts into consideration, I agree with the findings of the Learned Trial Magistrate that there is overwhelming evidence that the Appellant was paid the purchase price in cash. This is based on the facts set out in page 6 of the judgment and I reproduce but paraphrase them as follows:

- a. The Appellant signed the agreement acknowledging receipt of the purchase price.
- b. The Appellant proceeded to the sub-county office to execute the transfer documents.



- c. The Appellant gave vacant possession of the suit property and stayed away from it till 17th June, 2016 which, on a balance of probability, he could not have done without having received the purchase price.
 - d. There are three eye witnesses who confirmed having seen the Appellant receive the purchase price which was paid to him in cash.
51. Consequently, the orders of eviction, permanent injunction and payment of mesne profits as issued by the Learned Magistrate were legally and factually sound.

b. Who should bear costs of the appeal?

52. Section 27 (1) of the *Civil Procedure Act* stipulates as follows;

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid: and the fact that that court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers. Provided that the costs of any action, cause or other matter shall follow the event unless the court or judge shall for good reasons otherwise order.”

Disposition.

53. The Learned Trial Magistrate correctly applied the facts to the law and made no mistake in arriving at his determination. Nothing, therefore, warrants interference with his finding.
54. In the result, I find that this Appeal lacks merit and it is hereby dismissed with costs to the Respondent.
55. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 8TH DAY OF FEBRUARY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. P.K. Njuguna for the Respondent.

No appearance for the Appellant.

Court Assistant; Mr. Muruya.

