



**Osumba v Masinde (Environment and Land Appeal E030 of 2021)
[2024] KEELC 475 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 475 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E030 OF 2021
LC KOMINGOI, J
FEBRUARY 1, 2024**

BETWEEN

JOYCE NGESA OSUMBA APPELLANT

AND

CHARLES KW MASINDE RESPONDENT

*(Being an Appeal from the judgement of Hon. Kahuya I. M Principal
Magistrate in CM ELC E001 of 2021 delivered on 13th October 2021)*

JUDGMENT

1. In her Judgement dated 13th October 2021 Hon. I.M. Kahuya, Principal Magistrate stated;

“In conclusion, the Plaintiff has proven his case on a balance of probability thus I hereby allow prayers 1,2, &3 of his Plaint together with costs of the suit. The issue of General damages was not proved thus denied.”
2. Aggrieved by the said Judgement, the Appellant filed a Memorandum of Appeal dated 2nd November 2021. The Appeal seeks the setting aside of the judgement and that the Appellant’s prayers allowed on grounds that:
 1. The learned trial magistrate erred in fact by finding that the Respondent was in possession of the property Land Reference No. Kjd/Kitengela/2167 (hereinafter referred to as the suit property) contrary to the evidence adduced before the court.
 2. The learned trial magistrate erred in fact and in law by finding that the Land Control Board application dated 11th June 1991 signified a transfer of ownership of the suit property from the Appellant to the Respondent.



3. The learned trial magistrate erred in fact and in law by finding that the Appellant herein transferred ownership of the suit property to the Respondent without any evidence of any transfer instruments being produced before the honourable court.
 4. The learned trial magistrate erred in fact and in law by ignoring the prima facie evidence that the Appellant is the absolute and indefeasible owner of the suit property albeit (sic) there being no evidence or claim of fraud, illegality or misrepresentation.
 5. The learned trial magistrate erred in in fact and in law in failing to find in favour of the Appellant in view of the evidence adduced before the Hon. Court that supported the evidence of the Appellant to the effect that the Respondent never fully paid the full consideration of the suit property.
 6. The learned trial magistrate erred in law in failing to appreciate the law in that, she failed to evaluate the pleadings on record and evidence placed before her and consequently arrived at the wrong conclusions and findings.
3. The Appeal was canvassed by way of written submissions.

The Appellant's Submissions

4. Counsel highlighted the background of the dispute acknowledging existence of an intention to sell the suit property to the Respondent for Kshs. 40,000. But the Respondent only paid Kshs. 24,000. He neither completed the payment nor followed up on the transfer. While making reference to *Rufale v Umon Manufacturing Co. (Ramsboltom)* (1918) L.R 1KB 592 and *Pius Kimaiyo Langat v Coopertave Bank of Kenya Ltd* [2017] eKLR, counsel submitted that parties are bound by the terms of their contracts and failure to complete the payment repudiated the agreement. Therefore, the Respondent could not claim he purchased the property and the trial court erred in arriving at that determination.
5. Counsel also submitted that the trial court's determination that the Land Control Board consent dated 11th June 1991 inferred that there was no balance of the purchase price and that the transfer was effected was erroneous. This is because the consent implied intention to transfer but was not in any way evidence of payment of the full purchase price.
6. Counsel further submitted that the delay by the Respondent of about ten (10) years to complete the purchase price is inordinate and unreasonable. It is also submitted that the trial court misapprehended itself when it discharged parties from their agreement and proceeded to make its determination. He prays that the Appeal be allowed with costs.

The Respondent's submissions

7. Counsel for the respondent submitted that the Respondent paid the full purchase price of Kshs. 40,000 in 1991 and was entitled to an order of specific performance. Moreover, a constructive trust was created when the Appellant allowed the respondent to take possession and develop the suit property and had been in possession for over fifteen (15) years without interference. She was thus estopped from claiming the suit property. Counsel made reference to Section 28(b) of the *Land Registration Act* and the following case law on constructive trust: *William Kiptarbei Korir & 6 others v Danson Muniu Njeru* (2018) eKLR, *Mwangi & another v Mwangi* (1986) KLR 328, *Steadman v Steadman* (1976) AC 536, 540, *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR and *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (2014) eKLR.



8. Counsel further submitted that the oral agreement entered into in 1991 was enforceable because it was entered into before amendments of the [Law of Contract Act](#). Adding that there was evidence that the Respondent took possession of the suit property as was stipulated by the then Section 3(3) of the [Law of Contract Act](#). And that Section 3(7) of the [Law of Contract Act](#) made an exception for oral sale of land contracts where there is proof of part performance. Reference was made to the Court of Appeal case of [Peter Mbiri Michuki v Samuel Mugo Michuki](#) (2014) eKLR.
9. He finally submitted that, the appeal be dismissed with costs to the Respondent and the judgement of the lower court ought to be upheld.
10. I have considered the grounds of Appeal, the rival Submissions and the authorities cited. The issues which arise for determination are;
 - i. Whether the learned trial magistrate erred in finding that the application for consent from the Land Control Board dated 11th June 1991 and the consent dated 14th August 1991 signified an intention to transfer ownership of the suit property to the Respondent.
 - ii. Whether the learned trial magistrate erred in fact by finding that the Respondent was in possession of the suit property contrary to the evidence adduced before court.
 - iii. Whether the Appeal is merited.
 - iv. Who should bear costs of this Appeal?
11. This being the first appeal, the court is duty bound to relook at the evidence at the trial court and come up with its own determination as was held by the Court of Appeal in [Peter Kamau Njau v Emmanuel Charo Tinga](#) [2016] eKLR where it was stated;

“Our duty in this appeal, being a first appeal is to analyze afresh and re-evaluate the evidence presented in the trial court in order to arrive at our own independent conclusion. See *Selle v Associated Motor Boat Co.* (1968) EA 123.”
12. Similarly, the Court of Appeal on [Abok James Odera T/A A.J Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates](#) (2013) eKLR stated thus;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the evidence on record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2 EA212 where on the Court of Appeal held inter alia that;

“on a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
13. The Respondent herein filed a Plaint dated 6th January 2021 at the Chief Magistrates Court; Kajiado ELC No. E001 of 2021 seeking inter alia orders: to be declared the owner of the suit property; LR No. Kajiado/Kitengela/2167 and the same be transferred to him. His claim was that he had purchased the suit property from the Appellant in 1991, paid the full consideration, took physical possession, fenced



the land, applied for Land Control Board consent from Land Control Board on 11th June 1991 and the consent was issued on 14th August 1991. However, the Appellant disappeared with the original title and never transferred the suit property to him although the Respondent had all along been residing on the suit property. In 2009 he was informed that the Appellant intended to sell the suit property and to avert this, he placed a restriction against the title at the Land Registry. However, in 2020 the Appellant through forceful entry and trespass took possession of the suit property and has since been residing there.

14. The Appellant herein in her Statement of Defence at the trial court contested the Respondent's claim stating that he did not pay the full purchase price but only paid Kshs. 24,000. He also neglected nor follow up on the transfer process. As such the contract was invalid and the suit ought to be dismissed with costs.
15. The Learned trial magistrate ruled in favour of the Respondent and allowed his prayers save for general damages. The Appellant thus seeks to set aside this decision on grounds that the learned trial Magistrate erred in arriving at that decision.
16. The Appellant claims that this decision was erroneous because there was no evidence of possession of the suit property by the Respondent, there was no evidence of transfer instruments, the Land Control Board consent did not confer ownership and the Respondent never paid the full purchase price.
17. The impugned judgement reads in part:

“In her defence, the Defendant acknowledged the verbal sale agreement between the parties herein but that the Plaintiff only paid Kshs. 24,000 leaving a balance of Kshs. 16,000 thus explaining why the transfer was never effected. Thereafter, the Plaintiff went silent for over eighteen years prompting the Defendant to assume that he was deceased and proceeded to look for a buyer for the property...

...

In the present case, the suit was still registered in the Defendant's name many years after the oral sale agreement had been executed. According to the Defendant, the reason for this was because the Plaintiff had not completed payment of the balance of Kshs. 16,000 thus explaining why she withheld the original title deed that would have facilitated the requisite transfer of ownership. This aspect was vehemently denied with the Plaintiff maintaining that he paid up the entire consideration immediately an agreement was entered thus explaining why they applied for the land control board consent and the same issued on 14/8/1991.

...

(Page 3) It is thus my view that the oral sale agreement was still valid thus explaining why the Plaintiff took possession of the suit land in anticipation of the processing of his title deed which was never to be. If this was not the case, he would in my opinion have not become aware of the Defendant's intentions of selling the suit land to a third party. Similarly, I am of the view that there was no balance on the consideration as alleged by the Defendant otherwise she would not have transferred ownership to the Plaintiff as observed on the application to the land control board dated 11/6/1991.”

18. The Respondent produced as exhibits is the application for consent to the Land Control Board dated 11th June 1991 and consent from Land Control Board dated 14th August 1991. The letter of consent, indicates that there was consent to transfer of LR No. Kajiado/Kitengela/2167 from Joyce Ngesa



Osumba to C.K.W. Masinde for a consideration of Kshs. 40,000. Save for the unsupported Appellant's claim that the respondent did not pay the whole purchase price, no evidence was adduced to show that the purchase price was not paid in full. What is on record is upon the oral sale agreement, the Appellant gave the Respondent vacant possession and sought Consent from Land Control Board which was granted. However, transfer was not effected. The Appellant claims the reason for this was due to non-payment of the full purchase price and her assumption that the Respondent had passed away since he had never followed up on the transfer. "Despite her frantic efforts to contact the Plaintiff over a period of 10 years..." as deponed in the statement of defence.

19. It is on record that the Respondent was in possession of the suit property. The Appellant's claim that she could not trace him cannot be true.

20. In her Judgement the learned trial magistrate observed as follows;

"In the present case, the Plaintiff has satisfied this court that he not only paid the consideration but took possession of the suit land in part performance of the said oral contract entered in 1991. Furthermore, he has proved that his possession all those years has been peaceful and uninterrupted until recently when he learnt of the Defendant's intentions of selling to a third party.

In conclusion, the Plaintiff has proven his case on a balance of probability thus I hereby allow prayers 1, 2 and 3 of his Plaint together with costs of the suit. The issue of general damages was not proven thus denied."

21. I find that the learned trial magistrate did not err in declaring the Respondent as the owner of the suit property and I find no reason to interfere with her findings.

22. The upshot of the matter is that I find no merit in this Appeal and the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 1ST DAY OF FEBRUARY 2024.

L. KOMINGOI

JUDGE

In the presence of:

N/A for the Appellant.

Mr. Mammin for Mr. Mukamba for the Respondent.

Court Assistant – Mutisya.

