



**Munungi v Mbogo & another (Environment and Land Appeal
72B of 2022) [2024] KEELC 1366 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1366 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 72B OF 2022**

**BM EBOSO, J
MARCH 1, 2024**

BETWEEN

STEPHEN WARACHI MUNUNGI APPELLANT

AND

JAMES KAROBIA MBOGO 1ST RESPONDENT

MOSES MUNUNGI WARACHI 2ND RESPONDENT

*(Being an Appeal against the Judgment of Hon P. Gichochi Chief Magistrate, delivered
on 26/02/2019 in Kiambu Chief Magistrate Court Civil Case No. 60 of 2015)*

JUDGMENT

Introduction

1. This appeal challenges the Judgment rendered by the Hon. P. Gichohi, Chief Magistrate [as she then was] on 26/2/2019 in Kiambu CMC Civil Case No 60 of 2015. The appeal was initially filed in the High Court at Kiambu as Kiambu HCCA No 112 of 2019. The appeal was subsequently transferred to Thika ELC in August 2022 through a ruling rendered by Kasango J on 5/8/2022.
2. The 1st respondent was the plaintiff in the trial court while the 2nd respondent and the appellant were the 1st and 2nd defendants respectively. The 2nd respondent filed a defence in which he admitted the 1st respondent's claim. The triable issues in the trial court were therefore between the appellant and the 1st respondent. The key issue that fell for determination in the suit in the trial court was the question as to whether the equitable remedy of specific performance was available to the 1st respondent as against the appellant in relation to land parcel number Ndumberi/ Riabai/4704. The said land was at all material times registered in the name of the appellant. Before I dispose the issues that fall for determination in the appeal, I will outline a brief background to the appeal, setting out a summary of the parties' respective cases in the trial court.



Background

3. The appellant and the 2nd respondent are father and son. Through a plaint dated 18/3/2015, the 1st respondent sued the duo in the lower court. The case of the 1st respondent was that, on 13/4/2012, the 2nd respondent agreed to sell to him land parcel number Ndumberi/Riabai/4704 at a consideration of Kshs 500,000. He added that the said land had been “bequeathed” to the 2nd respondent by the appellant. In furtherance of the agreement, he paid the agreed purchase price to the 2nd respondent. He contended that it was an implied term of the sale agreement that the appellant “was under obligation to transfer the land to him upon receipt of the consideration of the purchase price payable to the 1st defendant [the 2nd respondent]”. It was the case of the 1st respondent that, after he paid the full purchase price to the 2nd respondent, the appellant and the 2nd respondent failed/neglected and/or refused to transfer the suit land to him.
4. The 1st respondent sought the following verbatim reliefs against the appellant and the 2nd respondent:
 - a. An order directing the defendants to transfer to the plaintiff land parcel Ndumberi/Riabai/4704 and to sign all necessary documents to facilitate the transfer.
 - b. Costs of suit and interest thereon.
 - c. Any other and better relief in addition or in the alternative to the above that this Honorable Court may deem fit to grant in the circumstances.
5. The 2nd respondent filed his statement of defence dated 26/5/2015 in which he admitted having entered into the sale agreement and having received purchase price in full from the 1st respondent. He added that the agreement was frustrated by the appellant who failed to transfer the suit property to the 1st respondent. He contended that it was agreed between him and the appellant that he would sell the suit property to the 1st respondent.
6. The appellant filed a statement of defence and counterclaim dated 1/11/2017 in which he denied having bequeathed the suit property to the 2nd respondent or giving him the authority to transact on his behalf. He contended that the 1st respondent trespassed on the suit property pursuant to an unlawful agreement between him and the 2nd respondent. He further contended that the 1st respondent unlawfully placed a caution against the title to the suit property. He urged the court to dismiss the 1st respondent’s suit, remove the caution placed against the title, and issue eviction orders against the 1st respondent.
7. Upon conclusion of trial and upon receiving submissions from the parties, the Chief Magistrate Court delivered the impugned Judgment in which it dismissed the appellant’s defence and counterclaim and decreed the appellant to refund the 1st respondent the sum of Kshs 500,000 together with interest at court rate. The trial court also directed the appellant to pay the 1st respondent costs of the suit.

Appeal

8. Aggrieved by the Judgment of the trial court, the appellant brought this appeal. He advanced the following eleven verbatim grounds of appeal:
 1. That the learned trial magistrate framing of issues for determination completely overlooked the pleadings by the second defendant.
 2. The learned trial magistrate erred in law and facts in holding that the appellant was personally liable to the first respondent for frustrating the transaction.



3. That the learned magistrate erred in law and facts in holding that the appellant signed the transfer documents to the 2nd respondent.
 4. The learned trial magistrate erred in law and fact in dismissing the defence and counterclaim by the Appellant, in view of the finding that the agreement the subject matter of the suit, was not enforceable by specific performance.
 5. The learned trial magistrate erred in law and facts in holding that the appellant was privy to the contract.
 6. The learned trial magistrate erred in law and fact in granting reliefs of liquidated damages, with backdated interest rates, that were not specifically pleaded or prayed for.
 7. The award of costs of the suit against the appellant was, in the circumstances of the case, unjustified, unwarranted, and plainly wrong.
 8. The decision of the trial magistrate was a travesty of justice that violated cardinal principles for a fair trial.
 9. The evaluation of the evidence by the learned trial magistrate failed to uphold impartiality and shifted the burden of proof against the appellant.
 10. The learned trial magistrate erred in law in failing to appreciate and hold that the 1st respondent was in large measure culpable and responsible for his predicament in entering into the contract.
 11. The learned trial magistrate erred in law and fact in failing to hold that the second respondent was the appropriate party for a refund order and on costs and not the appellant.
9. The appellant urged the court to set aside the Judgment of the trial court in such terms as the Court may deem necessary. He urged the Court to make an order on the costs of the appeal and grant any other order that the court may deem fit and just.

Appellant's Submissions

10. The appeal was canvassed through written submissions dated 30/3/2023, filed by M/s Njoroge Baiya & Co Advocates. On ground 1, counsel submitted that Order 15 rules 1 and 2 of the [Civil Procedure Rules](#) required the court to look at the material propositions affirmed or denied by the parties and frame issues out of that. Counsel argued that the trial court failed to adhere to the above procedure and ended up framing incomprehensible issues that leaned entirely on the case of the 1st respondent.
11. On grounds 2, 3, 5 and 10, counsel faulted the trial court for finding that the appellant bequeathed the suit property to the 2nd respondent without any evidence supporting the finding. Counsel further faulted the trial court's finding to the effect that the appellant had signed the transfer documents to convey the suit property to the 2nd respondent. Counsel argued that the sale agreements presented to the trial court as evidence were null and void given that they did not meet the criteria on attestation as required under Section 3 of the [Law of Contract Act](#). Counsel relied on the cases of [Willy Kimutai Katilit v Michael Kibet](#) [2018] eKLR and [Hon. Mwai Kibaki & Another v Mathingira Wholesales Company Limited & others](#) [2018] eKLR.
12. On ground 4, counsel submitted that once the trial court made a finding that the remedy of specific performance would not be tenable, then the 1st respondent's claim to possession and ownership of the suit property became untenable. Counsel added that the trial court's dismissal of the appellant's defence and counterclaim resulted in the 1st respondent remaining in possession of the suit property,



contrary to its holding that the remedy of specific performance was untenable. Counsel faulted the trial court for failing to uphold the law through its finding which resulted in the 1st respondent remaining in possession of the suit property. Counsel added that the appellant was not at fault and was not responsible for any wrongful act that warranted liability on his part.

13. On ground 6, counsel submitted that the trial court granted reliefs that were neither pleaded in the plaint nor sought by the 1st respondent. Counsel added that parties were bound by their pleadings and that evidence led outside the pleadings ought to be disregarded. Counsel relied on the decision in the case of *Dakianga Distributors (k) Ltd v Kenya Seed Company Ltd* [2015] eKLR.
14. On ground 7, counsel submitted that the main relief in the suit in the trial court did not succeed hence it was unfair and without basis for the trial court to award costs against the appellant.
15. On ground 11, counsel argued that liability for refund of the purchase price paid by the 1st respondent rested with the 2nd respondent, given that the two respondents testified that the purchase price was paid to the 2nd respondent. Counsel added that there was no basis for entering Judgment against the appellant in light of the evidence presented. Counsel abandoned the other grounds of appeal. He urged the Court to allow the appeal as prayed.
16. Despite being granted adjournments on 9/5/2023 and 31/10/2023 to enable him file and serve written submissions, the 1st respondent did not bother to file and serve written submissions. Indeed on 1/3/2024.

Analysis and Determination

17. I have read and considered the entire original record of the trial court; the record filed in this appeal; the grounds of appeal; and the submissions tendered in this appeal. I have also considered the legal frameworks and jurisprudence relevant to the issues that fall for determination in the appeal. As observed in the introductory part of this Judgment, the 2nd respondent filed a defence through which he admitted the 1st respondent's claim. Consequently, there were no triable issues as between the two respondents. The triable issues that emerged for determination by the trial court were between the appellant and the 1st respondent.
18. Taking into account the grounds of appeal, the submissions tendered, and the above background, the following are the key issues that fall for determination in this appeal: (i) Whether the trial court erred in holding the appellant personally liable to refund the 1st respondent the sum of Kshs 500,000 together with interest; (ii) Whether the trial court erred in rejecting the appellant's defence and in dismissing the appellant's counterclaim; (iii) Whether the trial court erred in condemning the appellant to pay costs of the suit; (iv) What order should be made in relation to costs of this appeal. I will make brief sequential analysis and pronouncements on the four issues.
19. Was the appellant personally liable to refund to the 1st respondent the purchase price of Kshs 500,000 together with interest from the dates when the monies were paid? Through the plaint dated 18/3/2015, the 1st respondent sought to enforce a specific sale agreement dated 13/4/2012. He produced the said sale agreement. A perusal of the said sale agreement dated 13/4/2012 reveals that it was never signed by the appellant. Further, there was no attestation in relation to the appellant in terms of Section 3 of the *Law of Contract Act*. It therefore follows that by dint of the provisions of Section 3 of the *Law of Contract Act*, a plea for an order of specific performance of the agreement dated 13/4/2012 against the appellant was untenable.
20. It does also emerge from the plaint and from the evidence that was tendered before the trial court that the purchase price of Kshs 500,000 was paid to and received by the 2nd respondent in furtherance of



the agreement dated 13/4/2012. There was no evidence to suggest that the appellant sold the suit land to the 1st respondent on 13/4/2012. There was, similarly, no evidence suggesting that the appellant received purchase price from the 1st respondent in furtherance of the sale agreement dated 13/4/2012. The person who purported to sell the suit land to the 1st respondent was the 2nd respondent. The person who received purchase price from the 1st respondent in furtherance of the sale agreement was the 2nd respondent. The trial court having found that the equitable remedy of specific performance was unavailable to the 1st respondent in the circumstances of the case, the party liable to refund the purchase price relating to the aborted sale was the party who received the purchase price. That party is the 2nd respondent.

21. Taking into account the decision of the two respondents to ignore the mandatory requirements of Section 3 of the *Law of Contract Act*, the trial court had no basis for finding that the appellant had frustrated the transaction. The appellant had no obligation to further the unenforceable agreement dated 13/4/2012 entered into by the two respondents. For the above reasons, it is the finding of this court that the trial court erred in holding the appellant personally liable to refund to the 1st respondent the purchase price of Kshs 500,000 together with interest.
22. Did the trial court err in rejecting the appellant's defence and in dismissing the appellant's counterclaim? The appellant was the registered proprietor of the suitland. He denied being privy to the agreement dated 13/4/2012. He successfully contested the 1st respondent's claim for an order of specific performance. Indeed, in its finding, the trial court held that the equitable remedy of specific performance was not available to the 1st respondent against the appellant.
23. In his counterclaim, the appellant sought: (i) an order dismissing the 1st respondent's suit with costs; (ii) an order vacating the caution lodged by the 1st respondent against title number Ndumberi/Riabori/4704; and (iii) an order decreeing eviction of the 1st respondent from the suit land. The court having found that the equitable remedy of specific performance was not available to the 1st respondent, it followed that the caution which the 1st respondent had lodged against the title had to be vacated. It also logically followed that the 1st respondent had no right to continue occupying the appellant's land. It was therefore an error for the trial court to dismiss the appellant's counterclaim in its entirety. By rejecting both the 1st respondent's plea for an order of specific performance and the above reliefs that were sought by the appellant, the trial court created a state of confusion. The trial court failed to uphold the rule of law as correctly pointed out by counsel for the appellant. In the absence of an order of specific performance, the appellant was entitled to removal of the caution and vacant possession of his land. For the above reasons, I agree with the appellant that the trial court made an error in rejecting his defence and in dismissing his counterclaim.
24. Was the appellant properly liable to bear costs of the suit in the trial court? From the totality of the evidence that was placed before the trial court, it was clear that the two respondents were the authors of the unfortunate situation in which the 1st respondent found himself in. They had the opportunity to first let the land be registered in the name of the 2nd respondent before entering into the sale agreement. The duo elected to enter into a contract that did not comply with the mandatory requirements of Section 3 of the *Law of Contract Act*. Further, the 2nd respondent went ahead to pay full purchase price without bothering to first procure the consent of the Land Control Board. In the absence of a binding and actionable contract between the appellant and the 1st respondent, there was no basis for condemning the appellant to pay costs of the suit. The proper order to make in the circumstances of the case was an order that parties should bear their respective costs of the primary suit and the counterclaim.
25. On costs of this appeal, it is clear that the errors giving rise to the appeal were made by the trial court. In the circumstances, parties will bear their respective costs of the appeal.



Disposal Orders

26. For the above reasons, this appeal is allowed in the following terms:

- a. The Judgment of the trial court rendered on 26/2/2019 in Kiambu CMCC Civil Case No 60 of 2015 together with the resultant decree are set aside and are substituted with the following orders:
 - (i) Moses Munungi Warachi (the 1st defendant) is hereby decreed to refund to James Karobia Mbogo (the plaintiff) the sum of Kshs 500,000 with interest at court rate from the date of the Judgment of the Environment and Land Court in Thika ELC Appeal No 72B of 2022.
 - (ii) The caution lodged by the plaintiff against the land register relating to parcel number Ndumberi/Riabai/4704 is hereby removed forthwith.
 - (iii) The plaintiff shall vacate land parcel number Ndumberi/Riabai/4704 within 30 days and in default, eviction shall ensue.
 - (iv) Parties shall bear their respective costs in Kiambu CMCC Case No 60 of 2015.
- (b) Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 1ST DAY OF MARCH 2024.

B M EBOSO

JUDGE

In the presence of: -

Njoroge Banya (muted) for the Appellant

Ms Kanini for the 1st Defendant

Court Assistant: Hinga

