



**Wahome (As Legal Representative of the Late Watson Wahome Njuru) v Muruti & another
(As Legal Representative of the Estate of the Late Joseph Muturi Kurutu) (Environment
and Land Appeal 18 of 2023) [2024] KEELC 7072 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7072 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 18 OF 2023**

**YM ANGIMA, J
OCTOBER 17, 2024**

BETWEEN

**FRANCIS NJURU WAHOME APPELLANT
AS LEGAL REPRESENTATIVE OF THE LATE WATSON WAHOME NJURU**

AND

**SIMON NJOROGE MURUTI 1ST RESPONDENT
ISAAC MBUTHIA MUTURI 2ND RESPONDENT
AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JOSEPH
MUTURI KURUTU**

*(Being an appeal against the judgment and decree of Hon. Charles
Obulutsa (CM) dated 10.02.2022 in Nyabururu CM ELC No. 13 of 2019)*

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. Charles Obulutsa (CM) delivered on 10.02.2022 in Nyahururu CM ELC No. 13 of 2019 – Watson Wahome Njuru -vs- Joseph Muturi Kirutu. By the said judgment, the trial court dismissed the Appellant’s suit in it’s entirety and partly allowed the Respondent’s counterclaim. The record further shows that the Respondent also filed a cross-appeal against the failure by the trial court to award him all the reliefs sought in the counterclaim.

B. Background

2. The record shows that vide a plaint dated 03.03.1995 the Appellant’s late father Watson Wahome Njuru (the deceased) sued the Respondent seeking the following reliefs:



- a. An order for specific performance of the sale transaction.
 - b. Alternatively and without prejudice to (a) above an order for the refund of Kshs.633,824/75 with interest at the rate of 39% p.a.
 - c. General damages for breach of contract in addition to specific performance.
 - d. Costs of this suit and interest thereon.
 - e. Any other or further relief which this Honourable court may deem fit to grant.
3. The deceased pleaded that by a sale agreement dated 01.02.1994 the Respondent agreed to sell to him Title Nos. Nyandarua/PESI/168 and 169 (the suit properties) at an agreed consideration of Kshs.1,000,000/= . He pleaded that he paid a sum of Kshs.633,824/75 to the Respondent on account of the transaction whereas the balance was to be paid on completion. The deceased further pleaded that despite the consent of the Land Control Board having been obtained on 30.08.1994 the Respondent had failed to complete the sale despite him being ready, able and willing to perform his part of the agreement.
4. The material on record shows that the Respondent filed a defence and counterclaim dated 28.04.1995. By his defence, he denied liability for the claim by the deceased. He pleaded that vide a sale agreement dated 01.10.1993 he agreed to sell the suit properties to the deceased at an agreed price of Kshs.1,000,000/= which was to be paid as follows:
- a. Kshs.439,627/50 to the Co-operative Bank of Kenya, Nyahururu Branch.
 - b. Kshs.560,372/50 to the firm of Waruhiu & Muite Advocates by 31.12.1993.
5. The Respondent pleaded that in breach of the terms of the said agreement the deceased had failed to pay the purchase price in full as agreed or at all hence he was not obligated to complete the sale. He further pleaded that the consent of the Land Control Board which was purportedly obtained on 30.08.1994 was null and void since it was obtained outside the statutory period of 6 months from the date of the agreement. It was thus the Respondent's contention that the deceased was not entitled to specific performance or any of the reliefs sought in the suit.
6. By his counterclaim, the Respondent reiterated the contents of his defence and asserted that the deceased was the one in breach of the sale agreement by failing to pay the purchase price as per the terms of the agreement. He further pleaded that the consent of the Land Control Board obtained by the deceased was null and void sine it was contrary to the express provisions of the Land Control Act.
7. It was the Respondent's contention that sometime in 1994 the deceased illegally invaded and occupied the suit properties and that he had persisted in such occupation up to the time of filing the counterclaim. As a result, the Respondent sought the following reliefs in his counterclaim:
- a. Rescission of the sale agreement.
 - b. General damages for breach of contract.
 - c. General damages for trespass.
 - d. Mesne profits.
 - e. Costs of the suit.
 - f. Interest.



8. The deceased filed a reply to counterclaim dated 09.11.1996. By his reply to counter-claim he joined issue with the Respondent's defence and reiterated the contents of his plaint. He denied the allegation that he was in breach of the sale agreement and put the Respondent to strict proof thereof. He also denied that the consent of the Land Control Board was null and void. He further denied that the Respondent was entitled to the reliefs sought in the counterclaim. As a consequence, he prayed for dismissal of both the defence and counterclaim and for entry of judgment in his favour as prayed in the plaint.

C. Trial of the Action

9. The record shows that upon a full hearing of the suit, the trial court found that the deceased was the one in breach of the sale agreement for the sale of the suit properties by failing to pay the purchase price as per the terms of the sale agreement. The trial court further found that the Respondent had partly proved his counterclaim. As a result, the trial court dismissed the suit in its entirety and allowed the Respondent's counterclaim to the extent of allowing rescission of the sale agreement and forfeiture of the deposit of the purchase price. The court, however, declined to award the Respondent general damages and mesne profits on the basis that the same had not been adequately proved.

D. Grounds of Appeal

10. Being aggrieved by the said judgment the Appellant filed a memorandum of appeal dated 09.03.2022 raising the following 5 grounds:
 - a. That the learned trial magistrate erred in law and fac in ordering the entire deposit amount paid by the plaintiff to be forfeited to the defendant.
 - b. That the learned trial magistrate erred in law and fac in not upholding the validity of the sale agreement dated 01.02.1994 yet it had been signed by both parties.
 - c. That the learned trial magistrate erred in law and fac in holding that the money transfer was done way after the completion date of 31.12.1993 yet the completion date was 30.05.1994.
 - d. That the learned trial magistrate erred in law and fac in finding the plaintiff was not ready, willing and able to comply with his part of the agreement yet there was evidence of money transfer and parties had agreed to charge the suit properties in order to secure a sum geared to pay the full purchase price.
 - e. That the learned trial magistrate erred in law and fac in failing to find the termination letter was invalid.
11. As a result, the Appellant sought the following reliefs in the appeal:
 - a. That the appeal be allowed.
 - b. That the judgment of the trial court be set aside and the Appellant's suit allowed as prayed in the plaint.
 - c. Any other or further relief the court may deem fit to grant.
 - d. That the Appellant be awarded costs of the appeal.
12. Pursuant to leave sought belatedly and granted on 22.04.2024 the Respondent filed a notice of cross-appeal dated 19.07.224 raising the following grounds:



- a. The trial magistrate erred in law and in fact by failing to make an order for the respondent in the cross-appeal to deliver possession of the suit properties to the appellants, failing which the cross-appellants would be free to evict him
 - b. The trial magistrate erred in law and in fact when he failed to award the cross-appellants mesne profits. The learned trial magistrate ought to have considered that the respondent's family has been in unlawful occupation of the suit properties since sometimes in the year 1991 (approximately 33 years), to the detriment and prejudice of the appellants.
 - c. The trial magistrate erred in law and in fact by ignoring the tabulation of mesne profits prepared by Gachanga and Associates.
 - d. The trial magistrate erred in law and in fact when he denied the appellants' claim for mesne profits simply because the specific amount claimed was not pleaded even though Order 21, rule 13(b) and (c) of the Civil Procedure Rules, 2010 gave the honourable court the power to direct an inquiry as to rent or mesne profits from the institution of the suit.
 - e. The trial magistrate erred in law and in fact when found and held that the respondent was in occupation of the suit property with the appellants' consent yet the respondent was issued with a notice to terminate the transaction dated 27.09.1994 and a notice to vacate the land dated 06.02.2014.
13. As a result, the Respondent sought the following reliefs in his cross-appeal:
- a. The appellant in the main appeal together with his employees, agents or any other persons currently occupying the suit properties at the appellant's instance be and are hereby ordered to deliver possession of the suit properties Title Nos. Nyandarua/Pesi/168 and Nyandarua/Pesi/160 (the suit properties) to the respondents in the main appeal within 30 days of the judgment and decree herein.
 - b. In default of compliance with Order (a) above, the respondents in the main appeal shall be at liberty to evict the appellant in the main appeal together with his employees, agents or any other persons currently occupying the suit properties at the appellant's instance without any further reference to this honourable court and the OCS Ndaragwa Police Station or the in-charge Pesi Police Post or any other police officer(s) shall provide assistance and security and ensure the maintenance of peace and order during the evidence of the appellant in the main appeal from the suit properties Title Nos. Nyandarua/Pesi/168 and Nyandarua/Pesi/169.
 - c. The appellant in the main appeal be ordered to indemnify the respondents in the main appeal for all the costs incurred during the eviction exercise.
 - d. An order directing an inquiry as to rent or mesne profits to the respondents in the main appeal from the institution of the lower court suit in the year 1995, pursuant to Order 21, rule 13(b) and (c) of the Civil Procedure Rules, 2010.
 - e. The costs of this appeal, the cross-appeal and the entire magistrate's court suit be awarded to the respondents in the main appeal.

E. Directions on Submissions

14. When the appeal was listed for directions it was directed that both the appeal and cross-appeal shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Respondent's



submissions were filed on 15.10.2024 whereas the Appellant's submissions were not on record by the time of preparation of the judgment.

F. Issues for Determination

15. The court has considered the Appellant's appeal as well as the Respondent's cross-appeal. The court is of the opinion that the grounds raised by the parties may be summarized as follows:
 - a. Whether the trial court erred in fact and law in dismissing the Appellant's suit.
 - b. Whether the trial court erred in fact and law in disallowing part of the Respondent's counter-claim.
 - c. Whether the Appellant is entitled to the reliefs sought in the appeal.
 - d. Whether the Respondent is entitled to the reliefs sought in the cross-appeal.
 - e. Who shall bear costs of the appeal and the cross-appeal.

A. Applicable legal principles

16. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at page 126 as follows:

“...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 allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

17. Similarly, in the case of *Peters –vs- Sunday Post Ltd* [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

18. In the same case, Sir Kenneth O' Connor quoted Viscount Simon, L.C in *Watt –vs- Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an



appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

19. In the case of *Kapsiran Clan -vs- Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:
 - a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

a. Whether the trial court erred in fact and law in dismissing the Appellant’s suit

20. The court has considered the material and submissions on this issue. The Appellant contended that the trial court erred in finding and holding that the deceased was the one who breached the sale agreement by failing to fully pay the purchase price in accordance with the terms of the sale agreement. It was further contended that the completion date had been mutually extended by the parties to 30.05.1994 vide another sale agreement dated 01.02.1994.
21. The Appellant further contended that the trial court erred in failing to rely upon the sale agreement dated 01.02.1994 which was duly executed by the contracting parties. The court has noted from the material on record that both sale agreements essentially provided for the same mode of payment of the purchase price, that is, payment of Kshs.439,627.50 to the Co-Operative Bank, Nyahururu Branch and Kshs.560,372.50 to the law firm of Waruhiu and Muite Advocates. The only material distinction between the two agreements is the completion date. Whereas the agreement dated 01.10.1993 provided for payment to be done by 31.12.1993 the one dated 01.02.1994 had the date cancelled by hand and replaced with “the completion date”.
22. The trial court duly considered the issue of alteration of the date of payment and came to the conclusion that the alteration on the date of payment was not countersigned by the contracting parties. The trial court further found that, in any event, there was no evidence of payment of the full purchase price by the deceased even after the completion date. The only evidence which was presented by the



Appellant was a cheque payment of Kshs.100,000/= and a credit transfer of Kshs.209,345.65 totaling Kshs.309,345.65.

23. The court finds no fault with the trial court's finding on who was in breach of the sale agreement. There was absolutely no evidence on record to demonstrate the payment of the purchase price in two tranches as per the terms of the sale agreement either on or before the completion date. There was no credible evidence to demonstrate that the contracting parties had mutually extended the completion period to 30.05.1994 or any other date. The court is thus of the opinion that the trial court was right in holding that the deceased was the one in breach of the sale agreement and in dismissing his suit.

b. Whether the trial court erred in fact and law in disallowing part of the Respondent's counterclaim

24. The court has considered the material and submissions on record. It is apparent that the Respondent only obtained 3 out of the 7 prayers sought in the counterclaim. The Respondent was granted an order for rescission of the sale agreement; forfeiture of the deposit paid; and costs of the suit and counterclaim. However, he was not awarded general damages for breach of contract, general damages for trespass and mesne profits. In their notice of cross-appeal, the Respondent contended that since the Appellant's claim for specific performance was disallowed, then the trial court ought to have granted him an order for vacant possession of the suit properties.
25. In declining to award the Respondent damages for trespass to land, the trial court held that the claim for trespass was not tenable because the deceased purchaser was in possession with the consent of the vendor. The trial court was thus of the view that trespass implied lack of consent on the part of the land owner.
26. Black's Law Dictionary, 10th Edition defines trespass as "an unlawful act committed against the person or property of another; esp., wrongful entry on another's real property." It also defines a trespasser as "someone who commits a trespass; one who intentionally and without consent or privilege enters another's property." The court is thus of the opinion that for an entry to constitute trespass it must have been without the consent of the owner and without any lawful justification or excuse. The material on record shows that entry by the deceased was pursuant to a sale agreement hence it was lawful.
27. The court finds no fault with the trial court's finding on the issue of trespass. The purchaser's occupation could not be termed as unlawful interference with the property rights of the vendor because the latter must have taken possession pursuant to a sale agreement which, although initially valid, was never completed. The purchaser could not thus be termed as a trespasser in the legal sense before adjudication of the dispute which was submitted to judicial determination.
28. The court has considered the submissions and material on record on the claim for mesne profits by the Respondent. The Respondent faulted the trial court for failing to award him the mesne profits of Kshs.4,446,097/= sought. In the alternative, he faulted the trial court for failing to order an inquiry as to rent or mesne profits under the provisions of Order 21 rule 13 of the Civil Procedure Rules, 2010. In disallowing the claim the trial court held as follows:

"Based on the above, the court is satisfied that the claim for mesne profits is not substantiated. The defendant was under obligation to specifically plead the claim and strictly prove it. It is not known if any development has been made thereon and what is the benefit he has achieved from the same."



29. The trial court relied upon the case of Peter Mwangi Mbuthia & Another -vs- Samow Edin Osman [2014] eKLR whereby the Court of Appeal held as follows on proof of mesne profits:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed was arrived at. Absent that, the learned Judge erred in awarding an amount that was neither substantiated nor established.”

30. So, what was the evidence of mesne profits before the trial court? It is evident that the vendor produced a tabulation sheet by Gachanga & Associates showing that the cumulative mesne profits was Kshs.4,446,097/= between 1992 and 2014. No basis was laid for the figures of the monthly rent claimed in the sheet and it was not demonstrated that the figures reflected reasonable market rates. Moreover, the claim for mesne profits was not pleaded with particularity in the counterclaim itself. As a result, the court finds no fault with the trial court for finding that the claim for mesne profits was not pleaded with particularity and strictly proved to the required standard.

31. The court has considered the Respondent’s claim for general damages for breach of contract. As a general rule, a breach of contract would invariably result into some financial or economic loss. Such loss would normally be quantifiable hence it ought to be quantified and claimed as such. It would be a rare case where general damages would be awarded for breach of contract. See Dharamshi -vs- Karsan [1974] EA 41 and Securicor Courior (K) Ltd -vs- Benson David Onyango & Another [2008] eKLR. Be that as it may, the court has noted that in the circumstances of this case the vendor sought forfeiture of the deposit paid by the purchaser and the remedy was granted. As a result, the court is of the view that the forfeited deposit shall constitute adequate compensation to the vendor for the purchaser’s breach.

32. The court has considered the Respondent’s prayer for vacant possession of the suit property. The court has noted that although the trial court disallowed the purchaser’s claim for specific performance and allowed the vendor’s counterclaim for rescission of the sale agreement, it did not order restitution of the suit properties to the vendor. The court is of the opinion that restitution in integrum goes hand in hand with an order for rescission of a contract. There is no indication that the suit properties are no longer available for restitution to the vendor.

33. The court is further of the opinion that it would not be necessary for the Respondent to file another action for recovery of the suit properties when the relevant sale agreement has already been rescinded. It would run contrary to the overriding objective of the *Civil Procedure Act*, (Cap.21) to require separate or further proceedings to be undertaken for recovery of the suit properties.

34. Section 78 of the *Civil Procedure Act* (Cap.21) on the powers of an appellate court stipulates as follows:

“(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power:-

- a. to determine a case finally;
- b. to remand a case;
- c. to frame issues and refer them for trial;
- d. to take additional evidence or to require the evidence to be taken;
- e. to order a new trial.



- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

35. On the other hand, Order 42 rule 32 of the Civil Procedure Rules provides as follows on determination of appeals:

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents although such Respondents may not have filed any appeal or cross-appeal.”

36. The court is thus satisfied that on the basis of the material on record, it is just and expedient to make an order for the Appellant to hand vacant possession of the suit properties to the Respondent in line with the overriding objective captured in Section 1A of the Civil Procedure Act which calls for just, expeditious, proportionate and affordable resolution of disputes.

c. Whether the Appellant is entitled to the reliefs sought in the appeal

37. The court has found that the trial court did not err either in law or fact in holding that the purchaser was in breach of the sale agreement for the sale of the suit properties. It would, therefore, follow that the Appellant is not entitled to the reliefs sought in the appeal or any one of them.

d. Whether the Respondent is entitled to the reliefs sought in the cross-appeal

38. The court has found that the trial court did not err in law or fact in declining to award the Respondent general damages for trespass, general damages for breach of contract, and mesne profits. However, the court is of the view that there was an omission on the part of the trial court in failing to order restitution of the suit properties upon rescission of the sale agreement. In that regard, the court is inclined to vary the decree of the trial court on the counterclaim to include an order for vacant possession of the suit properties within a specified period in default of which the Appellant shall be evicted.

e. Who shall bear costs of the appeal

39. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule on costs of the appeal. As a result, the Respondent shall be awarded costs of the appeal. On costs of the cross-appeal, it is evident that it has not substantially succeeded since the Respondent was successful only in one aspect. The court has further noted that the cross-appeal was filed belatedly about 2 years after the filing of the appeal. As such, the court is not inclined to award the Respondent costs of the cross-appeal.

I. Conclusion and Disposal Orders

40. The upshot of the foregoing is that the court finds no merit in the Appellant’s appeal. However, the Respondent’s cross-appeal succeeds only to the limited extent as specified hereunder. As a consequence, the court makes the following orders for disposal of both the appeal and the cross-appeal:



- a. The Appellant's appeal be and is hereby dismissed with costs to the Respondent.
- b. The Respondent's cross-appeal is hereby determined in the following terms only:
 - i. The Appellant as personal representative of the deceased purchaser shall hand vacant possession of Title Nos. Nyandarua/PESI/168 & 169 to the Respondent within 30 days from the date hereof in default of which he and anyone claiming through the purchaser shall be evicted therefrom.
 - ii. The rest of the prayers in the counterclaim are declined.
 - iii. There shall be no orders as to costs on the cross-appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM THIS 17TH DAY OF OCTOBER, 2024.

In the presence of:

Mr. Were holding brief for Mr. Mwangi for the Appellant

Mr. Otieno for the Respondent C/A - Carol

.....

Y. M. ANGIMA

JUDGE

