



**Ndwgwa & another v Delta Connections Limited (Environment and Land Appeal E014 of 2023) [2024] KEELC 13567 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13567 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E014 OF 2023  
SM KIBUNJA, J  
DECEMBER 4, 2024**

**BETWEEN**

**DAVID MUCHEMI NDEGWA ..... 1<sup>ST</sup> APPELLANT**

**JULIANA WAMAITHA NJERU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DELTA CONNECTIONS LIMITED ..... RESPONDENT**

*(Appeal against the Judgment of Hon. D.W Mburu SPM delivered on 3rd February 2023 in Mombasa CM ELC No. E383 of 2020)*

**JUDGMENT**

1. This appeal was instituted vide the memorandum of appeal dated 1<sup>st</sup> March 2023 raising three (3) grounds that:
  - a. The learned magistrate erred in fact and law by finding that the plaintiff's suit was premature.
  - b. The learned magistrate erred in fact and law by failing to find that the respondent was in breach of the agreement for sale by failing to complete the transaction within the stipulated 90-day period.
  - c. The learned magistrate erred in law by ignoring the parol evidence rule.
2. The appellant therefore seeks for;
  - a. The appeal be allowed.
  - b. The judgement of the learned magistrate delivered on 3<sup>rd</sup> February 2023 be set aside.
  - c. Judgement be entered for the appellants as prayed for in the plaint dated 23<sup>rd</sup> November 2020.



d. Costs of the appeal be awarded to the appellants.

The appellants also filed the Record of Appeal dated 7<sup>th</sup> March 2023.

3. The court gave directions on filing and exchanging submissions on the 30<sup>th</sup> May 2024. The learned counsel for the appellants and respondent filed their submissions dated the 15<sup>th</sup> October 2024 and 18<sup>th</sup> October 2024 respectively, which the court has considered.
4. The issues for determinations by the court in this appeal are as follows:
  - a. Whether the suit was premature as filed.
  - b. Whether there was breach of the parties' contract.
  - c. Whether the trial court considered extraneous facts.
  - d. Who pays the costs?
5. The court has carefully considered the grounds on the memorandum of appeal, the record of appeal, submissions by the learned counsel, superior courts decisions cited thereon and come to the following findings:
  - a. The lower court case, CM ELC No. E383 of 2020; David Muchemi Ndegwa and Juliana Wamaitha Njeru versus Delta Connections Limited was instituted vide a plaint dated 23<sup>rd</sup> November 2020 by the appellants against the respondent, seeking for:
    - i. Refund of the purchase price together with interest at 15% per annum from the date of receipt of funds.
    - ii. Costs of the suit.

It was the appellants' case that on 18<sup>th</sup> February 2013 they entered into an agreement of sale with the respondent for the sale of two Plots No. 12 and 13, within the larger parcel of land known as Subdivision No. 463/III/MN. The appellants maintained that they paid the full purchase price of Kshs 4,200,000/= but the respondent has never transferred the plots to them, despite assuring them that they were in the process of finalizing obtaining title to the larger parcel of land from which the plots were to be subdivided. The appellants claimed that they later learnt vide a notice in the standard newspaper on 14<sup>th</sup> July 2020 that there was ELC No. 71 of 2020 in respect of Subdivision No. 463/II/MN. Upon perusing the said file, they learnt that 463/III/MN had been transferred to another party. The appellants made several attempts to get in contact with the respondent over a refund of purchase price but the respondent has been avoiding them. They therefore filed the suit.
  - b. The respondent filed a statement of defence dated 12<sup>th</sup> February 2021, among others averring that it had purchased Subdivision No. 463/III/MN from Mohamed Ali Motha for Kshs 454,000,000/-. That it instituted ELC No. 71 of 2020 seeking specific performance of the contract against the said Mohamed Ali Motha. The respondent denied being in breach of the agreement of sale, and claimed they would facilitate the transfer of the plots to the plaintiffs. They claimed that the appellants are not entitled to a refund since the transaction is ongoing and further denied owing them Kshs 4,200,000/=. The respondent prayed for the suit to be dismissed with costs.
  - c. The role of this court as a first appellate court is to re-evaluate and reconsider the evidence on record, bearing in mind it did not see or hear the witnesses testify first-hand. This was the



position in taken in the case of Kenblest Kenya Limited versus Musyoka Kitema [2020] eKLR where the court held,

As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis but bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand. This is captured by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to: ‘..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.’ This was buttressed by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR where it was held that:

“We have also, as we are duty bound to do, as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui V Republic, (1984) KLR 729 and Susan Munyi V Keshar ShianI, Civil Appeal No. 38 of 2002 (unreported).”

- d. The record confirms that the trial court delivered its judgement on 3<sup>rd</sup> February 2023. In that judgement, the learned trial magistrate held that it was stated in the agreement of sale that the two plots that the appellants purchased were to be excised from Subdivision No. 463/II1/MN measuring 51.3 acres. The court found that there was nothing in the agreement to suggest that the defendant was not the registered owner of the suit property at the date of the agreement or that the defendant was awaiting any transfer in its favour from a third party. The learned trial magistrate further held that the appellants, as purchasers had a duty to perform due diligence before paying the full purchase price. The trial court was of the view that the agreement of sale set the completion period at 90 days, and did not make it conditional upon transfer from a third party in favour of the defendants. The court was of the view that, since the agreement of sale was silent on the issue, it would not have been unusual for the appellants to assume that the parent title was registered in favour of the respondent. The court found that the appellants were aware of the underlying circumstances, even if they were not included in the agreement, and that was the reason why they did not raise any issue even after the defendant failed to complete the transfer within the expected time. The trial court was of the view that the appellants were well aware of the process being undertaken by the respondent since they took seven years from the date of the contract to seek legal redress. The trial learned magistrate found that the suit was premature since there is a pending ELC No. 71 of 2020, and struck out the suit with no costs. The learned magistrate clarified that the appellants were free to file a fresh suit against the respondent if they fail to complete the transfer even after the conclusion of ELC No. 71 of 2020.
- e. It is not disputed that the appellants, as purchasers, entered into an agreement of sale with the respondent, as vendor, on 18<sup>th</sup> February 2013. The agreement of sale was for Plots No. 12 and 13, which were to be excised from Parcel No. L.R MN/III/463 measuring 51.3 acres, and the purchase price was Kshs 4,200,000/= . The purchase price was paid to the vendor’s advocate, the firm of Omondi Waweru & Company Advocates. On 18<sup>th</sup> February 2013 the appellants paid Kshs 200,000/= as the deposit and on 3<sup>rd</sup> April 2013 paid Kshs 4,000,000/= as the final purchase price.
- f. It is not clear who was the registered owner of Plot No. MN/II/463 at the time of the sale agreement as no certificate of title or an official search of the suit property has been produced. However, the respondent claimed it bought Plot No. MN/III1/463 for Kshs.454 million from Mohamed Ali Motha, who later sold the suit property to a third party. As a result,



the defendant instituted Mombasa ELC No. 71 of 2020; Delta Connections Limited versus Mohamed Ali Motha and 5 others, where it sought inter alia to be declared as the lawful purchaser of the suit property. From the evidence on record, and the existence of Mombasa ELC No. 71 of 2020, it is evident that at the time the plaintiff entered into the agreements of sale, the respondent, vendor, was not the registered owner of Plot No. MN/1II/463. The respondent did not therefore, have any legal proprietary interest in the suit property, and could not transfer or convey any valid or lawful interest in the suit property to the appellants. The respondent did not therefore, have any capacity to enter into and execute any agreement of sale in relation to any portion of Plot No. MN/1II/463.

- g. In the case of P & T Housing Co-operative Society Ltd versus Divisional Integrated Development & Another [2017] eKLR, it was held that,

What comes out in all this evidence is that, the agreement entered into between the parties was void, ab initio and could not be effected for the simple reason that the defendant had no capacity to deal in that land. Completion cannot be affected on such a contract as the defendant was not the vendor. The plaintiff was aware that the land was registered in the name of Josephat Musyoka Nganga; but the defendant described himself as the vendor and that the owner had sold the land to him. That was total mis-representation in the circumstances.

My assessment of the evidence is that the contract or agreement was not capable of execution because the defendant was not the owner and did not obtain the Land Control Board Consent. There is no doubt that the defendant received the money from the plaintiff, and considering the background of the transaction that payment was in respect of a parcel of land that the defendant could not deal in.”

The respondent had claimed to be able to transfer the plots to the appellants, while being fully aware that it was not in a position to do so. Of course, the appellants ought to have conducted due diligence on the title of the suit property, before entering into the sale agreement and or making the payment of the purchase price, which could have revealed to them that the respondent did not have any legal title over the suit property.

- h. In the lower court suit, the appellants prayed for refund of the purchase price, with interest at 15% from date of payment and costs. They have demonstrated that they paid the purchase price to the vendor’s advocate, the firm of Omondi Waweru & Company Advocates. On 18<sup>th</sup> February 2013 the appellants paid Kshs 200,000/= and were issued receipt number 122085 as the deposit, and on 3<sup>rd</sup> April 2013 they paid Kshs 4,000,000/= and were issued with receipt number 122257 as the purchase price.
- i. Moses Waweru, the respondent’s director and proprietor of the firm of Omondi Waweru & Company Advocates, confirmed on cross-examination that the respondent received the full purchase price, but they had not completed the transfer to the appellants. He claimed that he informed the appellants of the circumstances surrounding the completion, and maintained that he would complete the transfer once the ELC No. 71 of 2020 was completed. He denied that the respondent had breached the contract and stated that the completion of the agreement was subject to the subdivision process, which was halted by the registered owner selling the suit property to a third party. He maintained that the suit herein was premature and that the appellants should wait for the outcome of Mombasa ELC 71 of 2020. Moses Waweru admitted to being the advocate who prepared the sale agreements between the appellants and the respondent, while being a director of the respondent. He also received the purchase price as the proprietor of Omondi Waweru & Company advocates, which in itself amount to conflict



of interest. He was also well aware that the respondent was not the registered owner of the suit property. That may be why in the agreement of sale, it was conveniently not stated whether the vendor is the registered owner of the suit property, and also the title document has not been listed as one of the completion documents. The respondent was well aware when entering into the sale agreement with the appellants and receiving the purchase price that it had no title in the suit property that could be passed to the appellants.

- j. It is also evident to the court that the said agreement was unenforceable as the same was not properly executed, since there is no common seal of the respondent affixed therein as required by Section 37 of the *Companies Act* that provides that:
- 1) A document is executed by a company
    - a. by the affixing of its common seal (if any) and witnessed by a director; or
    - b. in accordance with subsection (2).
  - (2) A document is validly executed by a company if it is signed on behalf of the company-
    - (a) by two authorised signatories; or
    - (b) by a director of the company in the presence of a witness who attests the signature.
- k. With the foregoing conclusions, the court need to determine the merit of the appellants prayer for judgement to be entered in their favour for refund of the purchase price of Kshs.4,200,000, interest and costs as it prayed in its suit filed through the plaint before the lower court. Indeed, the appellants have demonstrated that they paid the whole purchase price to the respondent, and the respondent has admitted to receiving the cash. In his cross-examination, DW1 however claimed that the suit was premature and that once ELC No. 71 of 2020 is concluded, he will be able to transfer the plots to the appellants. The learned trial magistrate agreed with the respondent, and found that the appellants' suit was premature in view of the pending suit ELC No. 71 of 2020 and struck out the suit. The learned trial magistrate noted that the appellants were at liberty to institute a fresh suit against the respondent if they failed to complete the transfer even after the conclusion of ELC No. 71 of 2020. The court has taken the liberty of perusing ELC No. 71 of 2020 and noted it was heard and concluded vide a consent order dated 13<sup>th</sup> May 2024, where judgment was entered in favour of the plaintiff (respondent herein) for the sum of Kshs.100million in the full and final settlement. The consent judgement did not declare the respondent as the owner of the suit property, therefore it is unlikely to complete the transfer of the two plots to the appellants herein.
- l. Had the learned trial magistrate been writing and delivering his judgement after the settlement in ELC No. 71 of 2020 had been recorded, this court has no doubt the appellants suit would not have been declared premature and struck out. Instead, an appropriate order would have been entered in favour of the appellants in terms of their prayers with the full realization that the respondent is without capacity to transfer the two plots to them as it does not own them. Since the respondent has been awarded Kshs.100 million, in ELC NO. 71 of 2020, it is only fair and just for it to refund the purchase price to the appellants. I also find that the appellants are entitled to interest as prayed in their plaint and costs.
- m. Based on the foregoing analysis I find that the appellants' appeal has merit and is allowed in the following terms:



- a. That the appeal filed through the memorandum of appeal dated 1<sup>st</sup> March 2023, is allowed.
- b. That the judgement delivered by Hon. D. W. Mburu, SPM, on 3<sup>rd</sup> February 2023 in Mombasa CMELC NO. E383 of 2020 is hereby set aside in its entirety.
- c. That judgement is hereby entered for the appellants and against the respondent as prayed in their plaint dated 23<sup>rd</sup> November 2020 filed in the trial court. For avoidance of doubts, the respondent is to refund to the appellants Kshs.200,000/= that was paid on 18<sup>th</sup> February 2013 and Kshs.4,000,000 that was paid on 3<sup>rd</sup> April 2013 totaling Kshs.4,200,000.
- d. The appellants are awarded interest at the court's rate from 23<sup>rd</sup> November 2020 when the suit was filed at the magistrate's court until payment is made in full.
- e. The appellants are also awarded costs of this appeal and the trial court.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 4<sup>TH</sup> DAY OF DECEMBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Appellants : Mr. Origi

Respondent : Mr. Waweru

Leakey – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

