



**Karimi v Kareche (Environment and Land Appeal E018 of 2022)
[2023] KEELC 16198 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16198 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E018 OF 2022**

JM MUTUNGI, J

MARCH 9, 2023

BETWEEN

MERCY WANJA KARIMI APPELLANT

AND

JAMES G. KARECHE RESPONDENT

*((Arising from the Judgment delivered on 20th August, 2015 by
Hon. J. Kasam – SRM in Kerugoya CMCC No. 286 of 2014))*

JUDGMENT

1. The present appeal is against the judgment of Hon J. Kasam – SRM delivered on August 20, 2015 in Kerugoya CMCC No 286 of 2014. The appeal basically related to the issues of costs and the award of interest at 40% on the sum of Kshs 220,000/- until payment in full which amount the appellant had agreed to refund to the respondent and made a consent to that effect which was recorded and adopted by the court. The parties canvassed the issues relating to Interest and costs by way of submissions and no viva voce evidence was adduced. The suit before the lower court was premised on the sale agreement dated March 26, 2008 entered into between the appellant and the respondent.
2. By the agreement, the appellant agreed to sell the respondent land parcel Mutira/Kaguyu/3728 then registered in the name of John Karimi Wangamba (deceased) who was the appellant’s husband for the total consideration of Kshs 220,000/- which the respondent paid in full upon execution of the agreement. The appellant under the agreement undertook to expeditiously process succession proceedings and to have the respondent named as a beneficiary in regard to the suit property at the confirmation of the grant. The appellant granted the respondent possession and use of the suit property including of any development thereon. Under clause 4 of the sale agreement, the appellant agreed that if she defaulted on the agreement she would refund the amount paid towards the purchase price together with interest of 40% and in case it was the respondent who defaulted on the sale agreement he would be refunded the purchase price less 40% interest.



3. The learned trial magistrate upon evaluation of the evidence held that the appellant, held herself as per the sale agreement as being able to facilitate the completion of the agreement in favour of the respondent which she failed to do. The learned trial magistrate held that the appellant in approaching the court to seek for the forceful eviction of the respondent from the suit property did not come to court with clean hands as she was the one who had failed to fulfil her part of the bargain as far as the agreement was concerned. The learned trial magistrate took the view that a party ought not to be allowed to benefit from their own wrong doing. The learned trial magistrate accordingly went ahead to enter judgment in favour of the respondent for the sum of Kshs 200,000/- together with interest at 40% p.a until payment in full and awarded the respondent the costs of the suit and the counter claim.
4. The appellant being dissatisfied by the judgment has appealed to this court and *vide* an amended memorandum of appeal dated November 19, 2018 set out two grounds of appeal as hereunder:
 1. The learned trial magistrate erred in law and fact in failing to appreciate the terms of the agreement voluntarily entered into, and that the plaintiff/appellant was wishing to refund the purchase price paid.
 2. The learned trial magistrate erred in law, in failing to make a finding that the contract of sale between the appellant and the respondent was incapable of being enforced as the sale property belonged to a deceased person, which fact was well known to both parties herein.
5. The appellant consequently prayed that the appeal be allowed, that the rate of interest as directed by the learned trial magistrate be set aside and substituted with an order that the respondent was not entitled to any interest, and, that the costs of the suit and the counter claim be paid by the respondent to the appellant.
6. The parties canvassed the appeal by way of written submissions. On the part of the appellant it was submitted that the agreement of sale entered into between the parties was not capable of being enforced, firstly, because it related to property of a deceased person and the agreement was clearly entered into in contravention of section 45 and 82 of the [Law of Succession Act](#) cap 160 of the Laws of Kenya. Secondly, the appellant argued that the land fell within the purview of the [Land Control Act](#), cap 302 Laws of Kenya and that as per the requirement of section 6 and 7 of the [Land Control Act](#) no consent for the transaction was obtained within a period of 6 months from the date of the agreement for sale which rendered the transaction void for all purposes. The appellant in support of her submissions placed reliance on the case of [Susan Wakuthie Kibaga & another v Elizabeth Njoki Murage](#)(2017) eKLR where the court (OlaO, J) held that a contract that was made in contravention of section 45 and 82 of the [Law of Succession Act](#) and equally where the contract was subject to the [Land Control Act](#) and no consent was obtained under section 7 of the Act within the requisite period such contract was unenforceable. The appellant argued that in as much as parties can enter into agreements and the courts will not re-write contracts freely entered into by parties, the courts will equally not enforce obligations arising out of an illegal agreement.
7. The appellant contended that to the extent that the learned trial magistrate ordered the appellant to pay interest at 40% per annum that the agreement provided to be payable by any defaulting party, he was in effect enforcing obligations arising from an illegal contract which the court could not lawfully do. The appellant thus urged the court to allow the appeal and find that the respondent was not entitled to any interest.
8. The respondent in his submissions supported the findings of the learned trial magistrate and urged the court to uphold the award of interest at 40%. The respondent argued that the parties had freely entered into the agreement and that the appellant had acknowledged the property the subject of



the sale belonged to her deceased husband but undertook to have the appropriate succession process undertaken to facilitate the transfer of the land to the respondent. The respondent submitted that at the time the transaction was entered into, the appellant was clearly aware that she lacked the capacity to complete the transaction without succession proceedings being taken out and a grant issued which would have facilitated the transaction to proceed to completion. The respondent submitted appellant failed to do what she was obligated to do under the agreement and for that default she was obligated to refund the purchase price paid with 40% interest. In essence the 40% interest was to be the agreed liquidated damage. In support of his submissions the respondent relied on the cases of *Anne Murambi v John Munyao Nyamu & Another* (2018) eKLR, *Gragan (K) Limited v General Motors (K) Limited & another* (2016) eKLR and *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another* (2002) E.A 503. In the *National Bank case* (supra) the court held:-

“A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause”.

The Respondent urged the Court to dismiss the Appeal.

9. I have evaluated the record of appeal and the submissions by counsel on behalf of the parties, cognisant of my role as a first appellate court, which is to re-evaluate the evidence and arrive at my own independent conclusions. See *Selle v Associated Motor Boat Company Ltd* 1968 EA 123.
10. As the parties had consented to the order of refund being made, the twin issues that call for determination in this appeal are whether the learned trial magistrate erred in making an order for payment of interest of 40% until payment in full of the amount ordered to be refunded and whether the respondent should have been awarded the costs of the suit and the counter claim.
11. Significantly the appellant in entering the sale agreement dated March 26, 2008 acknowledged and disclosed that the property that she wished to sell was registered in the name of her husband who was deceased and that she was in the process of instituting a succession cause. Clause 2 of the agreement stated as follows:
 12. The seller shall expeditiously prosecute the succession cause and the purchaser shall be indicated as a beneficiary in the confirmation of grant.
 12. The parties to the agreement were agreed that the transaction was conditioned upon the succession process being completed, a process that the appellant agreed to superintend. The agreement in my view was not subject to the *Land Control Act*, cap 302 Laws of Kenya but was predicated on the process of succession being undertaken. The provisions of the *Land Control Act* therefore had no application to the sale transaction. The *Land Control Act* would have no application where transfer is by virtue of transmission pursuant to the provisions of the *Law of Succession Act*, cap 160 Laws of Kenya.
13. In the present matter the appellant agreed that she would prosecute the succession cause where the respondent would be included as a beneficiary by reason of having purchased the suit property. The appellant agreed in the event she was not able to fulfil the obligations on her part she would make a refund of the purchase amount paid and on top of that pay what amounted to penal interest on the amount agreed at 40%. With respect, the learned trial magistrate appeared to have construed the default clause as meaning that the interest of 40% would have been paid annually until payment in full. That in my view was a misconception and my understanding of the agreement is that upon default, interest of 40% would be charged and added to the amount paid as purchase price in the event the appellant



was the one who was in default and a refund needed to be made. In case it was the respondent who would have defaulted, he would receive a refund less 40% interest on the purchase price paid.

14. The respondent in as far as the agreement of sale was concerned, had fully performed his obligation under the agreement by paying the purchase price of Kshs 220,000/- in full. The appellant acknowledged she had not fulfilled her obligation under the agreement fully and that explains why she agreed and made an offer to refund the purchase price of Kshs 220,000/- to the respondent but declined the payment of interest arguing the agreement had been frustrated by third parties including her minor children who had now become of age. The appellant additionally argued the agreement was illegal by reason of noncompliance with section 45 and 82 of the Law of Succession Act and section 6 and 7 of the Land Control Act. I have explained that the Land Control Act had no application to the agreement entered into by the parties as it was subjected to the succession process under the Law of Succession Act. I do not consider that the agreement was illegal by virtue of section 45 and 82 of the Law of Succession Act because, the appellant specifically undertook she would ensure there was compliance with the Act to facilitate completion of the transaction. That she was unable to do, and in my view she cannot run away from the obligation that she freely and voluntarily entered into.
15. It is from the judgment- not clear as to why the learned trial magistrate entered judgment for Kshs 200,000/- when from the proceedings the consent entered by the parties was for the refund of Kshs 220,000/- which was the amount paid and acknowledged in the agreement. The refund ought to have been of Kshs 220,000/- as per the consent of the parties to which a sum of Kshs 88,000/- representing 40% of the amount paid ought to have been added as clearly the respondent was entitled to this amount following default on the part of the appellant on her obligations under the agreement. There was in my view no basis to have interest accrue at the rate of 40% p.a until payment was made in full of the purchase price. Likewise having regard to the circumstances of the matter this was a proper case where the parties ought to have been required to bear their own respective costs considering the admission made by the appellant and the condition to which the sale was subjected. Nonetheless, the appellant created a legitimate expectation on the respondent that she would have been able to satisfy the condition and for that reason the appellant has to shoulder the liability arising from her inability to deliver on her promise.
16. In the premises, I find no merit in the appeal and dismiss the same. The judgment by the learned trial magistrate is upheld on the following amended terms:-
 - a. Judgment is entered in favour of the respondent in the sum of Kshs 220,000/-.
 - b. Sum of Kshs 88,000/- is awarded to the respondent being 40% interest on the purchase price on account of default.
 - c. Interest to be paid at 12% p.a on (a) &(b) above from August 20, 2015 until payment is made in full.
 - d. Parties to bear their own costs of the court below and of the appeal.

JUDGMENT DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 9TH DAY OF MARCH, 2023.

JOHN M. MUTUNGI

ELC -JUDGE

