



**Nyaga v Muriithi (Environment and Land Appeal 10 of 2021)
[2023] KEELC 18919 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 18919 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 10 OF 2021
A KANIARU, J
MARCH 14, 2023**

BETWEEN

TARCIANA WEGANDU NYAGA APPELLANT

AND

HILARY HUMPHREY MBOGO MURIITHI RESPONDENT

*(Being an appeal against the Judgement of Runyenjes SPM Hon.
J.W. Gichimu dated 18.6.2021 in ELC Civil Suit No. 68 of 2018)*

JUDGMENT

1. This appeal arose from the judgement of the lower court at Runyenjes (JW Gichimu, SPM) delivered on June 18, 2021 in ELC Civil Suit No 68 of 2018. The appellant – Tarciana Wegandu Nyaga – was the defendant then while the respondent – Hilary Humphrey Mbogo – was the plaintiff. The respondent had impleaded the appellant in the lower court for failure, refusal, and/or neglect to honour a land sale agreement. The appellant had filed a defence in which she not only denied the respondents claim but also made counter accusations against the respondent. The lower court heard the matter and found for the respondent. That is what provoked this appeal.
2. A memorandum of appeal was first filed on July 15, 2021. That memorandum was later amended and filed on February 22, 2022. The substance of the memorandum of appeal is as follows:
 1. The learned trial magistrate erred in law and fact in not considering that the respondent breached the agreement by no paying the whole consideration as agreed.
 2. The learned trial magistrate erred in law and fact in not finding that the respondent had entered into the land since January 2016 and has since then been utilizing the same, though his entry was illegal and unauthorized by the appellant.



3. That the learned trial magistrate erred in law and fact in allowing general damages yet it is the respondent who himself had breached the parties agreement by not paying the total consideration.
4. The learned trial magistrate erred in law and fact in failing to find that the appellant was not served to appear at the hearings of the matter which fact the record of the case manifests.
5. That the learned trial magistrate erred in law and fact by not considering the aspects hereof highlighted, hence the case was a mistrial, being contrary to fairness, equity, and contractual obligations of the parties.

The appellant made three (3) prayers as follows:

- a. The appeal be allowed in favour of appellant.
 - b. The decree of the learned trial magistrate dated June 15, 2021 be set aside in so far as damages, interests and costs are concerned.
 - c. A declaration that the respondent is not entitled to any damages.
3. The appeal was canvassed through written submissions. The appellant filed two sets of submissions. The first one was filed on June 15, 2022 and after the respondent filed his submissions, the appellant filed yet another set on February 7, 2023. The first set of submissions start on a somewhat confusing note by stating that the grounds of appeal are eight (8) while in actual fact, the amended memorandum of appeal has only five (5) grounds. It was then submitted, interalia, that it is the respondent who breached the agreements by failing to pay the full purchase price as agreed. It was stated that there is still a balance of 100,000/- owing from the respondent.
 4. Further, the lower court was blamed for ordering the appellant to pay damages yet it is the respondent who was in breach of the agreement. Other issues raised against the respondent include: that the case was heard *ex parte* thus affording the respondent opportunity to conceal pertinent facts; that such *ex parte* hearing was against 'the principles of equity and fairness.'; and that the case should have been heard here in Embu and not Runyenjes as Runyenjes was outside the territorial jurisdiction of the matter. The counsel on record for the respondent was also said to be conflicted as he was still the one who had signed the further agreement, which made him a potential witness in the case.
 5. The second set of submissions emphasized that the appellant was not served to appear for hearing of the matter. The appellant seemed to disown also her counsel on record who was also said to have participated in witnessing the sale agreement, and was therefore also a possible witness.
 6. The respondent's submissions were filed on October 27, 2022. An overview of the lower court case was given. It was then submitted, interalia, that the respondent honoured his part of the agreement and had paid upto 750,000/- of the purchase price. He was willing to pay the balance of 100,000/- and also pay for transfer of the land but the appellant breached the agreement. The respondent on her part was supposed to pay survey fees, subdivide the land, and obtain consent for Land Control Board to transfer the land but she didn't do any of this. The period of six (6) months within which consent of Land Control Board should be obtain was said to have expired without the appellant getting the consent. The respondent was therefore said to have become entitled to a refund of the purchase price.
 7. As for damages, the parties were said to have agreed that a payment of 75% of the purchase price would be paid by any party who breached the agreement. The lower court was therefore said to be right in awarding damages to the respondent.



8. The appellant was said to have been represented by a counsel called Momanyi, and Momanyi was served with a hearing date. The case was also said to have properly proceeded *ex parte* as there had been service. Further, it was the respondent's view that the appellant should have first opted to apply to the lower court to have the judgment set aside instead of filing an appeal. Also alleged is that the appellant should have first sought leave of the court to file the appeal in person as she had a counsel in the lower court who, presumably, should also have represented her in the appeal. The case of *Standard Chartered Bank Ltd Vs Intercom Services Ltd & others: Civil Appeal No 37 of 2003, Nairobi [2004] eKLR* was cited to reinforce the respondent's position on damages.
9. I have considered the appeal as filed, the rival submissions, and the lower court record including the judgement. This is a first appeal and as the first appellate court, the task ahead is as spelt out in *Selle Vs Associated Motor Boat C [1968] EA 123* where the court observed:

' An appeal to this court from a trial by the High court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge 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 based on the demeanor of a witness is inconsistent with the evidence in the case generally.'
10. A proper understanding of the dispute between the parties herein requires an appreciation of the substance of the sale agreement entered into between them. The agreement is dated February 1, 2016. From it, the size of the land being sold, the purchase price, the identity of the seller, the identity of the purchaser, and the obligations of each party are clearly spelt out. It is clear that the seller received Kshs 550,000/- at the time of making the agreement. The purchase price was Kshs 850,000/- and it is clear that the purchaser, remained to pay a balance of Kshs 300,000/-. Clause 1(b) of the agreement is clear that the balance was to be paid by end of July 2016 but it is clear that the payment of the balance was contingent upon demonstrable progress being made by the appellant towards making the respondent the registered owner of the land. It is clear that the appellant was supposed to make efforts to obtain consent from the area Land Control Board and also execute other documents necessary for transfer of the land to the respondent.
11. The lower court record shows that the respondent continued to honour his part of the bargain. He paid Kshs 150,000/- on April 16, 2016 and paid another 50,000/- on June 25, 2016. The appellant on her part is not shown to have done anything during this period. And contrary to her position that the respondent was supposed to pay the whole purchase price first, the agreement dated February 1, 2016 – see clause 8 – envisaged a situation where the whole purchase price may not be paid. In a scenario like that, the appellant was supposed to transfer to the respondent such portion of the land as would be good value for the money already paid.
12. Without doubt, it is clear to this court that it is the appellant who was in breach of the agreement and the lower court was right in making the findings it did.
13. The upshot, in light of the foregoing is that the appeal herein is for dismissal and I hereby dismiss it with costs to the respondent.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 14TH DAY OF MARCH, 2023.



In the presence of M/s Ndorongo for M/s Muthoni for respondent and Appellant present in person.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

