



**Nchabira v Miiru (Environment and Land Appeal E127 of 2021)
[2023] KEELC 19867 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E127 OF 2021**

**CK YANO, J
SEPTEMBER 20, 2023**

BETWEEN

ANN NCHABIRA APPELLANT

AND

CHARLES MUGAMBI MIIRU RESPONDENT

*(Being an appeal from the judgment and decree of Honourable S. NDEGWA Senior
Principal Magistrate in Githongo ELC NO. E001 OF 2021 dated 3rd December, 2021)*

JUDGMENT

Introduction

1. This is an appeal from the judgment of the Senior Principal Magistrate's court at Githongo (Hon. S. Ndegwa Spm.) given on 3rd December, 2021 whereby the learned trial magistrate dismissed the appellant's case with costs to the respondent.
2. The appellant herein had sued the respondent herein seeking for an order of specific performance compelling the respondent to transfer a quarter of the subject land LR Abothuguchi/Kariene/5616 to the appellant and in the alternative a refund of part of payment of the purchase price plus interest from 30/9/2019, General damages for breach of contract as well as costs and interest.
3. The appellant's case was that on 30/9/2019, she entered into a sale agreement with the respondent for sale of ¼ of an acre of the suit land at a purchase price of Kshs. 1.6 million out of which she paid a down payment of Kshs. 1,390,000/= . That the respondent however breached the contract by refusing to attend Land Control Board for consent to transfer the said parcel of land to the appellant. In the plaint dated 4th December, 2020, the appellant also accused the respondent for entering into the said agreement in bad faith by failing to disclose that the said land was charged to Times U Sacco Society Ltd, for Kshs. 1,200,00/= which loan was yet to be fully settled. The appellant listed particulars of



breach of contract on the part of the respondent and particulars of loss and damage suffered by the appellant.

4. By his defence dated 23rd April 2021, the respondent admitted entering into the said agreement with the appellant, but accused the appellant for *inter alia* failing to pay the balance of the purchase price in line with the timelines specified in the sale agreement, failing to remit survey fees as envisaged in clause 3 of the said agreement and placing a caution over the subject matter on 14th December, 2020. The respondent further pleaded that they had agreed with the appellant to terminate the agreement and structure a formula on repayment of the sum of Kshs. 850,000/= already paid to the respondent by the appellant.
5. The appellant called one witness and produced the sale agreement dated 30th September, 2019, acknowledgment receipt for Kshs. 200,000/= dated 13th October, 2019, acknowledgement receipt for Kshs. 300,000 dated 29th February, 2020, acknowledgment receipt for Kshs. 300,000/= dated 30th June 2020, acknowledgement receipt for Kshs. 170, 000/= dated 15th September, 2020, official search for land parcel No. Abothuguchi/Kariene/5616 and demand letter dated 12th October, 2020 as P exhibit 1 to 8 respectively.
6. The respondent also testified, but never called any witness.
7. After considering the matter, the learned trial magistrate framed two main issues for determination, namely who amongst the appellant and the respondent was in breach of the contract and the issue of due diligence. The learned trial magistrate found that the appellant did not keep her part of the contract as far as payments were concerned. That as per the acknowledgment slips, by 30th November, 2020 when the final instalment was supposed to be paid, the appellant had paid Kshs. 1,390,000/=. The trial court posed the question;

“so, does (the) fact that the defendant (respondent) continued to receive the amounts (less) vitiate the contract?”

The learned trial magistrate held the view that without the contract being varied by both parties, the court will consider it as it is, that the appellant did not keep her part of the contract as far as payments were concerned.

8. With regard to the second issue, the trial court noted that the certificate of official search produced as P exhibit 6 was dated 15th September, 2020 and the encumbrances section read “30/5/2019 charge to Times U Sacco Society Ltd for Kshs. 1,200,000/= rights under section 82 and 83 reserved” while the agreement for sale (P exhibit 1) is dated 30/9/2019, six months after the charge was registered. The court concluded that the appellant failed to conduct due diligence.
9. The Trial court also blamed the respondent for signing acknowledgement against larger sums of money than what was actually paid on the basis of trust. The trial court further found that the respondent did not make the requisite application to the Land Control Board for consent. The trial court also found that the appellant failed to comply with clause 1(b) – (e) as far as payment in instalments were concerned and also failed to pay survey fees. Accordingly, the learned trial magistrate held that the balance of probability was in favour of the respondent and dismissed the appellant’s claim with costs.
10. The appellant being dissatisfied with that decision has preferred this appeal on the following grounds -;
 - 1) That the learned Trial Magistrate erred in law and fact in that she failed to find that the contract which was entered into between the appellant and the respondent was a controlled transaction within the meaning of Section 6 of the Land Control Act and therefore the same was subject to



the said mandatory provisions of the law and the consent of the land Control Board was not obtained as required hence the contract became null and void after 6 months.

- 2) That the learned magistrate erred in law and fact in that she failed to find that the respondent did not pay the survey fees as agreed and therefore it was erroneous for the court to find that the appellant did not pay the survey fees.
 - 3). That the learned trial magistrate erred in law and fact by failing to find that the respondent having continued to receive the consideration in bulk of the payment by instalments despite the agreed timelines time having ceased to be essence to the contract and therefore he was estopped from alleging that the instalments were paid late.
 - 4) That the learned trial magistrate erred in law and fact by finding that the respondent filed a defence and counterclaim when there was co-counterclaim(sic) on record.
 - 5) That the learned trial magistrate erred in law and fact in that she found that the agreement for sale of land which was entered into between the parties was entered six (6) months after the charge was registered which was erroneous.
 6. That the learned trial magistrate erred in law and fact and she failed to find that the balance of the purchase price remaining was a sum of Kshs. 210,000/= the appellant having paid to the respondent Kshs. 1,390,000/= and therefore the appellant was not in breach of the contract under the circumstances.
 - 7) That the learned trial magistrate erred in law and fact by finding that the appellant did not reply to the respondent's submissions when indeed the appellant replied to the same in reply to the respondent's submissions and quoted an authority which was not considered by the court.
 - 8) That the learned Trial Magistrate erred in law and fact that she failed to consider the appellant's submissions and the judicial authorities thereof and thereby arrived at the wrong decision.
 - 9) That the decision of the trial magistrate is against the weight of evidence and is bad in law.
11. The appellant seeks to have the judgment and decree of the lower court set aside and judgment be entered for her as prayed in the plaint.
 12. The appeal was canvassed by way of written submissions. The appellant filed her submissions dated 6th March 2023 through the firm of Kiogora Arithi & associates advocates while the respondent filed his submissions dated 14th June 2023 through the firm of Munene Kirimi & Co. advocates.
 13. It is the appellant's submissions that as submitted before the lower court, the mandatory consent of the Land Control Board for the transfer of land as required by Section 6 of the Land Control Act (Cap 302) was not obtained within 6 months and therefore the respondent should have refunded the received sum of Kshs. 1,390,000/=. Counsel for the appellant relied on the court of appeal case of Peter Waweru Waititu v Cyrus J. Karanja CA No. 257 of 2001.
 14. The appellant's counsel submitted that the agreement for sale of land dated 30th September, 2019 which was entered into between the appellant and the respondent stated at paragraphs 2 and 3 that the respondent was to give the appellant actual possession of the ¼ of an acre on or before 30th June 2020. That the lower court erred by finding that the respondent paid for the Land Control Board Consent when he never produced any receipt as evidence that he paid his share of survey fees.
 15. It is the appellant's submissions that although the sale agreement in question provided how the payment was to be done, the respondent accepted and continued receiving the purchase price by



instalments well beyond the agreed timelines hence time ceased to be of essence. That the respondent did not serve the appellant with a notice to the effect that he was not going to accept payment beyond the agreed time. Counsel for the appellant submitted that the respondent is estopped from blaming the appellant yet he never served the appellant with notice to alter or terminate the contract or decline to accept payments by installments. The appellant's counsel argued that the evidence on record shows that the bulk of the purchase price was paid and accepted by the respondent after the completion date had passed. That by accepting the installments after expiry of the set deadlines, time ceased to be of essence to the contract and that if the respondent wanted to make time of essence, he ought to have served notice to the appellant which he never did. Counsel for the appellant relied on the court of appeal case of *Michael Murithi Muthui v Cecelia Wanjiru Cooper & 3 others*, Civil appeal No. 159 of 2018. It is further submitted that by the doctrine of estoppel, the respondent is estopped from denying that he received a sum of Kshs. 1,390,000 as the balance remaining was Kshs. 210,000/= only. The appellant's advocate relied on the holding of the court of Appeal in the case of *Ntoitha v P.M Wamae & Company advocates* civil appeal No. 17 of 2013.

16. The appellant submitted that whereas the certificate of official search dated 18/11/2020 shows that the land had no charge, the one dated 15/9/2020 demonstrated that there was a charge in favour of Times U Sacco Society Ltd for Kshs. 1,200,000/= yet the completion date for the contract was 30/11/2020 and therefore it is clear that the respondent took the loan before the completion date of the contract and argued that the respondent's intention was to frustrate the contract. The appellant denied that she breached the contract and faulted the lower court for finding otherwise. The appellant further submitted that contrary to the trial court's findings, she responded to the respondent's submissions in which she relied on the court of Appeal case of *Michael Murithi Muthui v Cecilia Wanjiru Cooper alias Cecilia Wanja Ernest & 3 others* civil Appeal No. 159 of 2018 which the appellant argued the trial court did not consider. The appellant urged the court to allow the appeal in terms of prayers (a), (b) (ba) and (c).

Respondent's Sumissions.

17. In opposing the appeal, the respondent submitted that the judgment and decree and all consequential orders of the trial court were sound, legally anchored and tenable under the law and ought to stand. Counsel for the respondent submitted that the respondent never defaulted on what was required of him in the sale agreement between the parties herein. That the fact that the evidence is not challenged does not mean that the court will not interrogate the evidence of the appellant. That the court still had an obligation to interrogate the appellant's evidence and determine whether the same is merited to enable the court come up with logical conclusion as ex-parte evidence is not automatic prove of a case. It is the respondent's submissions that the appellant had to discharge the burden of proof and relied on the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR.
18. On whether the respondent had breached the sale agreement the parties had entered into, the respondent stated that the appellant alleged that she entered into a sale agreement with the respondent for the purchase of the suit property and that the same was reduced into writing and signed by all the parties. Counsel for the respondent cited the provisions of section 3 (3) of the *Law of Contract Act* and the definition of a breach of contract in *Black's Law Dictionary*, 9th Edition, page 213. On the issue by the appellant that the Land Control Board consent was not obtained within six (6) months, from the date of the sale agreement, the respondent argued that a cursory look at the sale agreement shows that the parties were bound by their respective timelines in respect of all what was supposed to be done by each of them and that as per the agreement, the events were chronological in nature and that if the parties decided to be bound by the clauses of the sale agreement in question, then the appellant cannot



turn around and claim that the Land Control Board consent was obtained after six (6) months. The respondent stated that he sought for consent for subdivision of the subject parcel vide an application made to the Land Control Board on 9th November, 2020 whereby consent was given vide a meeting held on 12th November, 2020. That as per clause 3 of the said sale agreement, survey fees were payable by the parties in equal shares but the appellant refused to pay thus breaching the said agreement. The respondent pointed out that the appellant filed the suit in the trial court on 8th January, 2021 claiming among others orders of specific performance. The respondent submitted that all along as demonstrated in the trial court, the appellant was well aware that consent for subdivision had been sought prior to her filing the suit and failed miserably in performing her obligations. The respondent further pointed out that he had obtained consent for subdivision and actually subdivided the subject parcel but the appellant placed a caution over the parcels on 14th December, 2020 which would not have allowed the respondent to transfer the suit property due to the encumbrances placed on it. That instead of remitting transfer fees to enable the subject parcel pass to her, the appellant failed to adhere to clauses contained in the sale agreement and thereby negating the whole essence of the said sale agreement.

19. The respondent relied on the case of *Aliaza v Said* (civil appeal 134 of 2017 (2022) KECA 583 (KLR) (24 June 2022) judgment) and submitted that he obtained consent from the Land Control Board and caused the subject parcel to be subdivided but in performance of his duties, he was thwarted by the failures by the appellant to perform his duties. Counsel for the respondent submitted that the Land Control Act was never intended to be an instrument or statute for unjust enrichment nor was it meant to exempt a mala fide vendor from his contractual obligations. That the statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. That it is not a statute aimed at aiding unconscionable conduct between the parties, and that it is in this context that the doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment and to prevent unconscionable conduct and ensure one party does not benefit at the expense of another.
20. The respondent further submitted that the contract which was entered into by the parties was not varied, adding that the appellant never kept her part of the bargain and violated all clauses of the sale agreement with abandon. Counsel for the respondent relied on the case of *National Industrial Credit Bank (K) Ltd v Aquinas Francis Wasike & another* [2015] eKLR in which the court observed that a written contract is read, understood and applied by what it expressly says, implication is out of question and that is the position here.
21. The respondent's advocates associated themselves with the judgment of the trial court and argued that the instances the trial court highlighted were crystal clear and that the appellant should not try to hide behind the concept of lack of Land Control Board Consent when she was the one frustrating its acquisition. It is submitted that he who seeks equity must do equity and that equity does not aid the indolent and that whoever seeks equity must do so with clean hands. That the appellant has failed in all the above points and the respondent urged the court not to sanitize the appellant's shortcomings which were clearly highlighted by the trial court in its judgment. It is the respondent's submissions that the current appeal is devoid of merit and should be dismissed with costs.

Analysis and Determination

22. I have considered the entire appeal as well as the submissions together with the authorities cited. I am bound to re-evaluate the evidence on record in order to come to an independent conclusion. In the case



of *Oluoch Eric Gogo v Universal corporation Limited* [2015] the court restated the duty of an appellate court as follows-;

“As a first appellate court the duty of-course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the court of Appeal case of *Selle & Another v Associated Motor Boat Co. Ltd, & another* 1968 EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore make an allowance in that respect

.... from the above decisions which echo section 78 of the *Civil Procedure Act*, it is clear that this court is not bound to follow the trial court’s finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.”

23. The evidence of the parties is to the effect that the appellant and the respondent entered into agreement for sale of ¼ of an acre out of LR No. Abothuguchi/Kariene/5616 for Kshs. 1,600,000/= evidenced by the agreement for sale dated 30th September,2019.
24. The appellant alleged that he made payment to the respondent by instalments amounting to Ksh. 1,390,000/= as consideration. The same is evidenced by the said agreement as well as various acknowledgment receipts. According to the appellant, the outstanding balance was Kshs. 210,000/=. The appellant asserts that the respondent frustrated the completion of the sale by among other things failing to give her vacant possession, failing to carry out sub-division to excise the sold portion and failing to procure the consent of the Land Control Board to subdivide and transfer the land sold.
25. The respondent in his defence inter alia, accused the appellant of failing to pay the balance of the purchase price, failing to remit survey fees and placing a caution over the subject matter. The respondent has also given different figures of what he believes as the outstanding balance. Whereas in paragraph 10 (iii) of the defence the respondent asserts that the balance is Kshs. 210,000/=. in paragraph 10 (iv), he states that the final balance is Kshs. 420,000/= and further states that the final monies owing to him is Kshs. 750,000/=.
26. It is my considered view that the issues for determination herein are-;
 - i. Whether the learned magistrate erred both in law and fact by dismissing the appellant’s case.
 - ii. Whether the appeal is merited or not.
27. That the agreement was subject to consent of the land control board is not in doubt. Both the vendor and the purchaser appreciated that they were dealing with agricultural land and that they required consent of the Land control Board. The same is noted in clause 4 and 10 in the agreement for sale dated 30th September, 2019.
28. Section 6 of the *Land Control Act* cap 302, provides as follows

“Transactions affecting agricultural land-;

1. Each of the following transactions that is to say-
 - (a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land Control area,



- (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the development and use of land (planning) regulations, 1961 9 LN 516 1961) for the time being apply,
- (c) the issue, sale, transfer mortgage or any other disposal of or dealing with any share in a private company or cooperative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

29. Section 8 of the Land control Act provides as follows-;

“8(1) an application for consent in respect of a controlled transactions shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason to do so upon such conditions, if any as it may think fit.”

- 30. In view of the above provisions, the law speaks for itself that the consent of the Land Control Board is a mandatory requirement for subdivision and sale of Agricultural land. Section 8 of the said Act provides that the application for consent of the land control Board is supposed to be made within six months of the agreement.
- 31. The agreement herein was made on 30th September, 2019. It follows that within 6 months of this period, that is by 30th March, 2020 an application needed to have been made but the same was not made. I have seen an application dated 9th November, 2020 and consent dated 12th November, 2020 attached to the respondent’s submissions dated 27th September, 2021 and filed in court on 7th October, 2021. However, I have not seen any application for extension of time that was made. The parties herein were not strangers to the requirements of the Land Control Act and indeed were aware of the requirements for consent and that is why the same was inserted in the sale agreement. The Land Control Act is indeed very strict on the issue of consent such that at Section 22 of the Act it provides for an offence for any person taking possession before the said consent is issued.
- 32. In the case of Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri (2014) eKLR and Willy Kimutai Kitibit v Michael Kibet [2018] eKLR the court of appeal opted to allow a contract of sale of land to be performed despite there not being any consent from the Land Control Board. In contrast, the court of appeal comprising a different bench in David Siranya Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR arrived at a contrary decision and asserted that consent of the land control board must be granted as required by the Land Control Act.
- 33. In my view, there is a purpose to the Land Control Act. Looking at section 9 of the said Act, the Land Control Board can allow or decline to give consent based on factors such as the economic development of the land concerned or on the maintenance or improvement of standards of good husbandry. I therefore opt to follow the decision of David Siranya Ole Tukai (*supra*)



34. It is not disputed that the sale agreement herein was frustrated and that no consent was obtained from the Land Control Board. The only remedy left for the appellant is that provided at section 7 of the Land Control Act which provides as follows-;

“7 Recovery of consideration

If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22”.

35. I have looked at the provisions of section 22 of the Land Control Act and I am of the view that the same do not come to the aid of the appellant. What the appellant is entitled to is a refund of what she paid under the contract. In the plaint dated 4th December, 2020, the appellant *inter alia* sought for an order of specific performance and in the alternative, a refund of part of the purchase price paid plus interest from 30th September, 2019. The appellant gave evidence, which was supported by relevant documents to prove payment of Kshs. 1,390,000/= . Having perused the acknowledgment receipts which were signed by all the parties, including the respondents, it is abundantly clear that the appellant paid and the respondent acknowledged receipt of the following payments – Kshs. 220,000/= at the execution of the agreement, Kshs. 200,000 on 13th October, 2019, Kshs. 200,000.0 on 13th November, 2019, Kshs. 300,000 on 29th February, 2020, Kshs. 300,000/= on 30th June 2020 and Kshs. 170,000/= on 15th September, 2020. The total amount that was paid is Kshs. 1,390,000/= . The respondent is therefore bound to refund the sum of Kshs. 1,390,000/= to the appellant.

36. In the result, I find that the learned trial magistrate erred in dismissing the appellant’s case. Since the sale agreement has been declared null and void, and the judgment of the subordinate court in Githongo SPMC ELC NO. E001 of 2021 is set aside and in its place, I enter judgment for the appellant in the sum of Kshs. 1,390, 000/= plus costs and interest at court rates from the date of filing suit. I also award the costs of this appeal to the appellant.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF SEPTEMBER, 2023

In the presence of

Court assistant – V. Kiragu/Lenah M.

Ms Mugo for appellant

Kaaria holding brief for Munene for respondent

C.K YANO

JUDGE

