



**Kata v Kimote & 2 others (Environment and Land Appeal E009 of 2021)
[2023] KEELC 21731 (KLR) (7 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21731 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E009 OF 2021
TW MURIGI, J
NOVEMBER 7, 2023**

BETWEEN

FRANCIS MATHEKA KATA APPELLANT

AND

BETTY KAMENE KIMOTE 1ST RESPONDENT

**FRANCISCA YULA MUTUKU ALIAS FRANCISCA YULA
KING'OO 2ND RESPONDENT**

COUNTY LAND REGISTRAR MAKUENI 3RD RESPONDENT

JUDGMENT

1. By a Memorandum of Appeal dated 12th September, 2021, the Appellant herein appealed against the Judgment of Hon. J. N. Mwaniki delivered on the 8th September, 2021 in Makueni Civil Case No. 41 of 2014 and set out thirty-four grounds of appeal.

Background

2. The Appellant had sued the Respondents vide a Complaint dated 6th August, 2019 and further amended on 26/02/2015 seeking the following orders:-
 1. A Declaration order that the action of excising and/or taking over three (3) acres from the Plaintiff's ten (10) acres sold to him by the 1st Defendant, the purported sub-division and transfer of the said three (3) acres to the second Defendant is illegal, unlawful, null and void and that the Plaintiff is entitled to ten (10) acres.
 2. An order of permanent injunction to restrain the Defendants, their servants and/or agents from entering, trespassing, using by cultivating or others and interfering with the Plaintiff's



use and possession of his ten (10) acres of that land parcel known as Makueni/Unoa/97 sold to him by the 1st Defendant.

3. Damages of Kshs. 217,825/=.
 4. Costs and interest of the suit.
 5. A declaration that the Plaintiff is the lawful owner of title No. Makueni/Unoa/3135 transferred to the 2nd Defendant by the 1st Defendant.
 6. An order that the title deed over title number Makueni/Unoa/3135 issued in the name of Fransica Yula Mutuku (the 2nd Defendant) be cancelled forthwith by the land Registrar Makueni (the 3rd Defendant).
 7. That the Plaintiff Francis Matheka Kata be issued with a title deed in respect of land title number Makueni/Unoa/3135 forthwith.
 8. An order compelling the 1st Defendant to transfer to the Plaintiff parcel number Makueni/Unoa/3135 measuring 7 acres and in default the executive officer do sign all documents to effect the said transfer.
 9. Any other or further relief the court may deem fit to grant.
3. The 1st Defendant filed a Statement of Defence dated 7th May, 2014 and an amended Statement of Defence dated 20th July, 2015 in which she denied the Plaintiff's claim. She urged the court to dismiss the Plaintiff's suit with costs. The 2nd Defendant filed a Statement of Defence and Counter Claim dated 7th May, 2014. She also filed an amended statement of defence dated 20th July, 2019 and a further amended statement of defence dated 18th September, 2019 in which she denied the Plaintiff's claim. In her counterclaim, the 2nd Defendant sought the following orders:-
- a. A declaration that the 2nd Defendant is the rightful owner of 3 acre plot situated within the Plaintiff's 10 acre portion of land Parcel No. Makueni/Unoa/79.
 - b. An order of permanent injunction restraining the Plaintiff, his servants, agents and/or anyone claiming under him from entering into, cultivating, trespassing or interfering with the Defendant's 3acre plot situated within the Plaintiff's 10 acre portion of Land Parcel No. Makueni/Unoa/79.
 - c. An order compelling the Plaintiff to transfer to the 2nd Defendant her 3 acre plot out of his portion of Land Parcel No. Makueni/Unoa/79.
 - d. Costs of the suit.
 - e. Any further relief that the Court may deem fit to grant.
4. In the proceedings before the lower Court, the Appellant was the Plaintiff while the Respondents were the Defendants. During the trial, both the Plaintiff and the 2nd Defendant testified and called one witness each in support of their respective cases. In his judgment, delivered on 9th September 2021, the Learned Trial Magistrate found that the Plaintiff had failed to prove his case on a balance of probabilities and dismissed the suit with costs to the Defendants.
5. The Appellant being dissatisfied with the judgment filed this Appeal vide the Memorandum of Appeal dated 14th September, 2021 on the following grounds:-



1. That the Learned Magistrate erred in law and in fact in disregarding the fact that the 1st Respondent admitted that she received the whole purchase price of Kshs. 1,078, 930/= from the Appellant for the 10 acres and the 1st Respondent had no issue transferring to the Appellant Makueni/Unoa/3136 measuring 7 acres which is part of the Appellant's parcel (10 acres).
2. That the Learned Magistrate erred in law and in fact in failing to address himself to the fact that prayer (h) of the further amended Plaint dated 5th August 2019 was admitted in trial and submissions by the 1st Respondent ought to have been allowed.
3. That the Learned Magistrate erred in law and in fact in failing to address himself and appreciate the fact that the 1st Respondent had admitted to transfer to the Appellant parcel number Makueni/Unoa/3136 measuring 7 acres and in default the executive officer to sign all documents to effect the said transfer.
4. That the Learned Magistrate erred in law and in fact by attempting to indirectly deny the Appellant his undisputed 7 acres sold to him by the 1st Defendant hence failing to determine the issues between the Appellant and the 1st Respondent despite finding that it is not in dispute that the Appellant bought 10 acres of land from the 1st Defendant.
5. That the Learned Magistrate erred in law and in fact in failing to address himself to the fact that the 1st Respondent had an obligation as agreed in the contract between her and the Appellant that the Appellant was entitled to his 10 acres and since prayer (h) of the further amended plaint was not objected then the Appellant was entitled to his additional 3 acres.
6. That the Learned Magistrate erred in law and in fact by failing to address himself to the fact that the 1st Respondent having sold to the Appellant 10 acres had no authority to transfer 3 acres of the Appellant's portion to the 2nd Defendant and the title transferred to the 2nd Respondent as Makueni/Unoa/3135 measuring (3 acres) was fraudulently and illegally obtained and ought to have been cancelled.
7. That the Learned Trial Magistrate erred in law and in fact in failing to address himself and appreciate the fact that the 1st Respondent having sold 10 acres to the Appellant had no title to the 3 acres which she could transfer to the 2nd Defendant.
8. That the Learned Trial Magistrate erred in law and in fact by failing to find that there was no contract between the 1st and 2nd Defendant over sale of 3 acres by the 1st Respondent and the 1st Respondent had no title to pass in respect of the Appellant's parcel.
9. That the Learned Magistrate erred in law and in fact in disregarding the fact that there was no privity of contract between the 1st and 2nd Respondents and any purported contract between the Appellant and the 2nd Respondent was not binding to the 1st Respondent. That the 1st Respondent was not entitled to transfer the Plaintiff's 3 acres to the 2nd Respondent and parcel Makueni/Unoa/3135 measuring 3 acres should be returned to the Appellant.
10. That the Learned Magistrate erred in law and in fact in having found that by the time the transfer was carried out of parcel number Makueni/Unoa/3135 the court had by consent of parties issued an injunction order restraining the transfer of the 3 acres in dispute until the suit was determined and erred in failing to find that the transfer done in contravention of the court order was null and void and title Makueni/Unoa/3135 ought to be cancelled and registered in the Appellant's name.



11. That the Learned Magistrate erred in law and in fact in rubber stamping an illegality by finding that it could not cancel title Makueni/Unoa/3135 on the ground that the transfer was done when there was a court order barring the same.
12. That the Learned Magistrate erred in law and in fact in finding that it is absurd to order cancellation of the title Makueni/Unoa/3135 only to have it issued again and that interest of justice demands what has been done to remain as it would still have been done despite finding that the Defendant's portion was transferred to her during the pendency of this case while there existed an order barring the parties from transferring or interfering with the land in question.
13. That the Learned Magistrate erred in law and in fact in failing to address himself and appreciate the fact that parties are bound by pleadings and although the 2nd Defendant had filed a statement of defence and counterclaim dated 7th May 2014, the 2nd Defendant amended the defence and filed a further amended defence pursuant to a court order and leave granted on 31st July, 2019 hence abandoning the counterclaim and the court ought not to have allowed the 2nd Defendant's counterclaim.
14. That the Learned Magistrate erred in law and in fact in disregarding the fact that the only pleading by the Defendant on record was the further amended defence filed on 18th September, 2019 and the 2nd Defendant was bound by that pleading.
15. That the Learned Magistrate erred in law and in fact in failing to address himself to the fact that the 2nd Respondent's defence and counterclaim dated 7th May, 2014 was superseded and replaced with the further amended defence filed on 18th September 2019 and the valid defence for the Defendants was the further amended defence dated 18th September, 2019 and not the defence and counterclaim dated 7th May, 2014 and hence the 2nd Defendant was not entitled to the prayers granted by the court purportedly prayed by the counterclaim already abandoned/superseded.
16. That the Learned Magistrate erred in law and in fact in finding that the 2nd Respondent's counterclaim had merit and made a declaration that the 2nd Respondent is the rightful owner of a 3 acre plot situated within the Plaintiff's 10 acre portion of land in Makueni/Unoa/79 despite the fact that Makueni/Unoa/79 does not exist and without sufficient evidence by the Respondent.
17. That the Learned Magistrate erred in law and in fact in failing to assess the overwhelming evidence, submissions and pleadings presented by and for the Appellant.
18. That the Learned Magistrate erred in law and in fact in finding in favour of the 2nd Respondent without satisfying himself that the 2nd Respondent had discharged her evidentiary burden to the required standards.
19. That the Learned Magistrate erred in law in failing to direct himself to the fact that ordering the declaration that the 2nd Respondent is entitled to the 3 acres in title Makueni/Unoa/3135 would amount to deprivation of property contrary to the Appellant's constitutional rights.
20. That the Learned Magistrate erred in fact and in law in failing to grant a temporary stay of execution of his judgment order pending the appeal in disregard of the grave consequences it presented against the Appellant and his family/home.



21. That the Learned Magistrate erred in law and in fact in failing to find that there was no contract and/or valid agreement between the Appellant and the 2nd Defendant in respect of 3 acres of the Appellant's land purchased from the 1st Defendant.
22. That the Learned Magistrate erred in law and in fact in failing to find that the arrangement between the 2nd Defendant and the Appellant was for the Appellant to purchase 3 acres on behalf of the 2nd Defendant from the 1st Defendant if she was willing and the Appellant was an agent of the 2nd Defendant and since the deal did not materialize the 2nd Defendant was only entitled to her money deposited with the Plaintiff which the Appellant is willing to refund to the 2nd Defendant.
23. That the Learned Magistrate erred in law and in fact in failing to find that there was no sale agreement between the Appellant and the 2nd Respondent and the purported sale was null and void as there was no consent of the relevant Land Control Board obtained by the Appellant.
24. That the Learned Magistrate erred in law and in fact in failing to find that title number Makueni/Unoa/3135 was obtained fraudulently, unlawfully and should be cancelled and the same transferred to the Appellant.
25. That the Learned Magistrate erred in law and in fact in finding that the Appellant signed the documents in regard to the alleged transaction is not in dispute despite finding that the same were signed under duress at Makueni Police Station.
26. That the Learned Magistrate erred in law and fact in finding that the Plaintiff never stated or proved the particulars of the circumstances under which he signed the documents over a span of time as would lead the court to say it was under duress despite the Appellant giving evidence that the purported documents were signed by duress.
27. That the Learned Magistrate erred in law and in fact in finding that the Appellant voluntarily sold the land to the 2nd Respondent 3 out of the 10 acres sold by the 1st Respondent in the absence of sufficient evidence by the 2nd Respondent.
28. That the Learned Magistrate erred in law and in fact in finding that the Respondent paid the Appellant the agreed purchase price for 3 acres being Kshs 350,000/= and not to scout for land without stating the reasons or basis for his finding and in the absence of sufficient evidence by the 2nd Respondent.
29. That the Learned Magistrate erred in law and fact in issuing an order of an injunction in the absence of evidence by the 2nd Defendant.
30. That the decision of the said Magistrate was against the weight of the evidence adduced.
31. That the Learned Magistrate erred in law and fact in failing to make a finding that there was evidence that title deed Makueni/Unoa/3135 was issued fraudulently and through misrepresentation.
32. That the Learned Magistrate erred in law and fact in failing to find that the Appellant secured land on behalf of the 2nd Respondent only for the seller to change his mind and for the 2nd Respondent to refuse to take back her money alleging that she purchased 3 acres from the Appellant.



33. That the Learned Magistrate erred in law and in fact in failing to find that the documents presented by the 2nd Respondent in evidence were signed by the Appellant while at the police station and under duress.
6. The Appellant's prayers are that:-
 1. The Appeal be allowed.
 2. The judgment and orders of the Subordinate Court be reversed and the Appellant suit before the subordinate court be allowed as prayed and the 2nd Defendant's counterclaim be dismissed.
 3. The costs of this appeal be awarded to the Appellant.
 4. Any further or other relief as justice of the case may require to be granted in the circumstances.
7. The Appeal was canvassed by way of written submissions which were duly filed by both parties herein.

The appellant's submissions

8. The Appellant submissions were filed on 21st February, 2023.
9. In regards to grounds 1, 2, 3 and 4 of the Memorandum of Appeal, Counsel contended that the Appellant proved before the trial court that on 8th November, 2006 he entered into a sale agreement with the 1st Respondent for the same 10 acres to be excised from Parcel No. Makueni/Unoa/79. Counsel added that the 1st Respondent admitted that she received the whole purchase price of Kshs. 1,078,930/= from the Appellant and that she had no issue with transferring Parcel No. Makueni/Unoa/3136 to the Appellant.
10. Counsel argued that prayer (h) of the further amended plaint ought to have been allowed due to admission but the trial court erred by not considering or determining the issue concerning the 7 acres belonging to the Appellant. To buttress this point, counsel relied on the case of *Coffee Board of Kenya Vs Thika Coffee Mills Limited & 2 Others* [2014] eKLR.
11. On grounds 5, 6, 7, 8 and 9 of the Memorandum of Appeal, Counsel contended that the 1st Respondent had a clean title to pass to the Appellant and that the 1st Respondent had no right to transfer the Appellant's land to the 2nd Respondent. To buttress this point, counsel relied on the case of *Ngere Tea Factory Company Ltd vs Alice Wambui Ndome* [2018] eKLR.
12. Counsel further submitted that the 2nd Respondent acquired the title deed for Parcel No. Makueni/Unoa/3135 illegally, unprocedurally and through a corrupt scheme. It was submitted that there was no contract of sale between the 1st Respondent and the 2nd Respondent and therefore, the 1st Respondent had no right to transfer the Appellant's 3 acres to the 2nd Defendant.
13. On grounds 9, 10, 11, 12 and 13 of the Memorandum of Appeal, Counsel contended that the 2nd Respondent unlawfully acquired the Appellant's 3 acres of the suit property and hence, the said transfer by the 1st Respondent was null and void.
14. On grounds 14, 15, 16 and 17 of the Memorandum of Appeal, Counsel contended that if there had been any claim by the 2nd Respondent against the Appellant, she ought to have filed and proved a counterclaim. Counsel submitted that parties are bound by their pleadings and that the 2nd Respondent was bound by her amended defence filed on 18/09/2019 which did not have a counterclaim. To buttress this point, counsel relied on the case of *Dakianga Distributors Ltd v Kenya Seed Company Limited* [2015] eKLR.



15. On grounds 22, 23 and 24 of the Memorandum of Appeal, Counsel contended that the Appellant was an agent of the 2nd Respondent and that the Appellant was willing to refund the money deposited with him by the 2nd Respondent having not found land for her to purchase. Counsel also urged the Court to find that the documents presented by the 2nd Respondent as a sale agreement were signed under duress and they were inadmissible as evidence.
16. On grounds 25, 30, 31 and 32, Counsel submitted that the decision of the trial court was against the weight of the evidence that was adduced by the Appellant. On grounds 18, 19 and 20, Counsel argued that the 2nd Respondent did not discharge her onus of proof on the allegations that were made on the purchase of the Appellants land. That the burden of proof was not discharged as per the required standards. Counsel relied on the case of *Abmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR in support of this submission.
17. In sum, Counsel for the Appellant urged the Court to set aside the judgment of the lower Court and to allow the appeal with costs.

The 1st and 2nd Respondents' Submissions

18. The 1st and 2nd submissions were filed on 23/02/2023.
19. Counsel contended that the crux of the appeal herein is the sale agreement between the Appellant and the 2nd Respondent dated 10/7/2011. Counsel argued that the conditions of a valid contract were fulfilled and that oral and documentary evidence was presented to that effect. Counsel maintained that the sale agreement was duly executed by the vendor and the purchaser and that it was also properly attested by witnesses.
20. Counsel contended that the Appellant did not dispute that he received the purchase price in the sum of Kshs. 350,000/=. Counsel further contended that court cannot rewrite contracts for parties and neither can they imply terms that were not part of the contract. Counsel relied on the case of *Alton Homes Limited & Another vs David Nathan Chelogoi & 2 Others* [2018] eKLR in urging the Court to dismiss the appeal herein with costs.

Analysis and Determination

21. I have considered the entire material on the record of appeal and the respective written submissions by the parties. Although the Appellant raised thirty-four (34) grounds of appeal, the Court is of the opinion that the Appeal may conclusively be determined on the following three (3) grounds: -
 - a. Whether there was a valid sale agreement between the Appellant and the 2nd Respondent.
 - b. Whether the Learned Trial Magistrate analysed/evaluated the evidence on record.
 - c. Whether the Appeal is merited.
22. This being a first Appeal, this Court has a duty to evaluate, assess and analyse the evidence on record and make its own decision.
23. The principles which guide a first Appellate Court were discussed in the case of *Selle & Another vs Associated Motor Boat Company and Others* (1968) 1 EA 123 where the Court of Appeal set out the duty of Appellate Courts as follows;

“An appeal to this court from a trial court 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 itself and drive 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 this respect. In particular, this court is not bound necessarily to follow the trial judge finding 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

24. In the trial of the suit before the lower Court, the Appellant testified as PW1 and called one witness in support of his case.
25. PW1 testified that he entered into an agreement for the sale of ten acres out of land Parcel No Makueni/Unoa/79 with the 1st Respondent herein. He testified that the purchase price was Kshs 70,000/= per acre. He went on to state that he paid the entire purchase price being Kshs 1,078,930/=. He produced the sale agreement dated 16/09/2012 in support of his evidence. It was his testimony that the 1st Respondent admitted in her defence that she had sold to him 10 acres from land parcel No. 79 and confirmed that she had received the purchase price in full.
26. That upon payment of the purchase price, the 1st Respondent excised his portion of 10 acres from land parcel No Makueni/Unoa/79. He went on to state that on 28/11/2013 the 1st Respondent fraudulently excised three acres from his portion and transferred the same to the 2nd Respondent on the grounds that he had sold the same which he denied. It was his testimony that the 2nd Respondent had given him Kshs 350,000/= to scout for land for her to purchase. That initially the owner of the neighbouring land wanted to sell his land but later on changed his mind. He testified that the 2nd Respondent refused to accept back her money after he failed to secure land for to purchase and started claiming a portion of his land. That thereafter the 2nd Respondent lodged a complaint against him at Makueni police station and that upon presenting himself, he was placed in cells and forced to sign the sale agreement and documents confirming that he had no objection to his land being subdivided.
27. PW2 an Extension Officer with the County Government of Makueni testified that he prepared a report on the crops that had been damaged on the Appellant’s land.
28. The 1st Respondent testified as the sole witness in respect of her case. She informed the court that she sold ten acres to the Appellant out of land parcel No. Makueni/Unoa/79 and confirmed that she had received the entire purchase price. She informed the court that she later discovered that the Appellant had sold three acres from his portion to the 2nd Respondent after she complained to her that the Appellant was preventing her from using her portion of 3 acres. She testified that the Appellant acknowledged to her that he had sold 3 acres to the 2nd Respondent and that he had no objection to the transfer of the same.
29. It was her testimony that the Appellant informed the Commissioner that he had no objection to 3 acres being transferred from his portion to the 2nd Respondent. It was her testimony that she was granted consent to subdivide the land on 31st October, 2013 after the Appellant failed to appear before the Land Control Board on 2 different occasions despite being notified to attend.
30. The 2nd Respondent testified as DW2 and called one witness in support of her case. She testified that on 10th July 2011, she entered into a sale agreement with the Appellant to purchase 3 acres for Kshs 350,000/= which she paid in full and immediately took possession thereof.



31. She informed the court that she visited the land in the company of Stella Kikuvi, and the Appellant gave her a chance to choose the site from where the three acres would be excised. It was her testimony that the agreement for sale was made by Stella Kikuvi.
32. That sometime in the year 2013 she complained to the Commissioner that the Appellant had cleared her land and planted fruit trees thereon. That upon being summoned by the Commissioner, the Appellant admitted in the presence of 1st Respondent that he had sold 3 acres from his portion to the 2nd Respondent and agreed to have the same excised from his portion of land. It was her testimony that 1st Respondent was granted consent to subdivide her land after the Appellant failed to appear before the Land Control Board.
33. DW3 testified that she made and witnessed the sale agreement between the Appellant and the 2nd Respondent and confirmed that they visited the land.

Whether There was a Valid Sale Agreement Between the Appellant and the 2nd Respondent.

34. It is not in dispute that the Appellant entered into a sale agreement with the 1st Respondent for the purchase of 10 acres out of land parcel No. Makueni/Unoa/ 79. It is also not in dispute that the 1st Respondent received from the Appellant the purchase price in full.
35. The Appellant testified that the 2nd Respondent gave him Kshs 350,000/= to scout for land for her to purchase. That after he failed to secure the land, the 2nd Respondent refused to take back her money and started demanding for a portion of his land. He denied having sold 3 acres to the 2nd Respondent and insisted that he was acting as an agent on her behalf.
36. On the other hand, the 2nd Respondent testified that the Appellant sold to her three acres out of his 10 acre portion in land parcel No.79. In this regard she produced the agreement dated 10/07/2011 and a hand written agreement of even date.
37. The *Black's Law Dictionary* defines a contract as follows:-

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

38. Section 3(3) of the *Law of Contract* stipulates as follows:-

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless: -

a. The contract upon which the suit is founded:-

i. is in writing;

ii. is signed by all the parties thereto; and

b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”



39. The hand written sale agreement dated 10th July, 2011 shows that the agreement between the Appellant and the 2nd Respondent was for the sale of 3 acres. The terms of the agreement were as follows:-
- i. Two acres @ 100,000/= 200000
 - ii. One acre @ 150, 000= 150000
40. The agreement was signed and witnessed by Boniface Munyao and Stella ndunge Kikuvi. The agreement was formalised and recorded in the sale of land agreement form which was also signed and witnessed by the parties therein. According to the agreement, the Appellant was selling 3 acres out of land parcel No. 79 Unoa for Kshs 350,000/=. The agreement was executed by the parties and attested by their witnesses. The Appellant confirmed having received Kshs. 350,000/=from the 2nd Respondent. However, he denied having sold 3 acres from his portion to the 2nd Respondent.
41. The Appellant alleged that the 2nd Respondent lodged a complaint against him at the Makueni Police Station and that subsequently, he was placed in cells and forced to sign the land sale agreement and documents indicating that he has no objection to the subdivision.
42. On her part, the 2nd Respondent testified that the sale agreement between herself and the Appellant was drawn by Stella Kuvuvi. Her evidence was corroborated by Stella Kivuvi who confirmed that she was the one who drew the sale agreement between the Appellant and the 2nd Respondent.
43. The Appellant did not tender any evidence to prove that he was placed in cells at Makueni Police Station. He did not adduce any evidence to demonstrate that the sale agreement was executed at Makueni Police Station or that he executed the same under duress. Moreover, the Appellant did not demonstrate the consequences of not signing the agreement. It is clear that the sale agreement was not executed under duress as alleged by the Appellant. From the evidence tendered by the 2nd Respondent and (DW3), it is crystal clear that the Appellant voluntarily executed the sale agreement dated 10th July, 2011.
44. In his evidence before the trial court, the Appellant testified that the 2nd Respondent gave him Kshs. 350,000/= to scout for land for her to purchase. He alleged that the owner of the land which he had identified for purchase changed his mind on selling the same.
45. The Appellant contradicted his testimony in ground No. 23 of his memorandum of appeal where he stated in part as follows;
- “.....was for the Appellant to purchase 3 acres on behalf of the 2nd Defendant from the 1st Defendant if she was willing and the Appellant was just an agent of the 2nd Defendant and since the deal did not materialize the 2nd Defendant was only entitled to her money deposited with the plaintiff which the Appellant is willing to refund to the 2nd Defendant.”
46. From the above ground of appeal it is clear that he was purchasing the 3 acres from the 1st Respondent and not from the owner of the neighbouring land as alleged. From the evidence on record, it is crystal clear that the Appellant received Kshs 350,000/- from the 2nd Respondent being the purchase price for three acres from his 10 acre portion and not as an agent as alleged. This court finds and holds that the sale agreement between the Appellant and the 2nd Respondent is valid and binding on the parties.

Whether the Court Analyzed the Evidence on Record

47. The Appellant faulted the Court for holding that the 2nd Respondent is the owner of the 3 acre plot. The Appellant averred that the 1st Respondent transferred the three acres from his portion to the 2nd



Respondent without his consent or approval. He alleged that he was not invited to attend the Land Control Board. He alleged that land parcel No. Makueni/Unoa/3135 comprised of three acres was fraudulently transferred to the 2nd Respondent and insisted that the 1st Respondent should be ordered to transfer back the land to him.

48. In her pleadings, statement and evidence, the 1st Respondent testified that the Appellant did not raise any objection to the subdivision of the suit property. It was her testimony that she was present when the Appellant informed the District Commissioner that he had no objection to the transfer of three acres from his portion to the 2nd Respondent. That on this basis, she applied and was granted consent by Makueni Land Control Board and proceeded to subdivide her land into four 4 portions in favour of the Appellant, one Simon, the 2nd Respondent and herself.
49. The abstract of title shows that upon subdivision, Land Parcel No. Makueni/Unoa/79 gave rise to Land Parcel Nos. 3134, 3135, 3136 and 3137.
50. The Appellant did not deny that they attended the District Commissioner where he agreed that 3 acres should be excised from his portion and transferred to the 2nd Respondent.
51. From the evidence on record it is clear that due process was followed in subdividing and registering the new parcels of land. Indeed, the Learned Trial Magistrate was correct in finding that the Appellant had voluntarily sold three acres from his portion to the 2nd Respondent. The Appellant did not tender any evidence to demonstrate that Land Parcel No. Makueni/Unoa/3135 was fraudulently transferred to the 2nd Respondent.
52. Having found that the Appellant voluntarily sold 3 acres from his portion to the 2nd Respondent, this court finds and holds that he is not entitled to the same.

Whether the Appeal is Merited

53. The Appellant averred that the trial Magistrate erred in law and in fact by attempting to deny him the undisputed 7 acres sold to him by the 1st Respondent.
54. It is not in dispute that the Appellant purchased 10 acres from the 1st Respondent. The 1st Respondent confirmed as much in her pleadings as well as in her evidence. She testified that she subdivided her land into 4 portions after she obtained consent from the Land Control Board.
55. The 1st Respondent testified that she retained land parcel No. Makueni/Unoa/3136 in her name and has no objection in transferring the same to the Appellant. From the foregoing, I find that the Learned Trial Magistrate failed to evaluate the evidence on whether the Appellant is entitled to 7 acres comprised in land Parcel No. Makueni/Unoa/3136.
56. Having found that there was a sale agreement between the 1st Respondent and the Appellant for the sale of 10 acres, and having found that the Appellant sold 3 acres out of his 10 acre portion, it is the finding of this court that the Appellant is entitled to the remaining 7 acres comprised in land parcel No. Makueni/Unoa/3136.
57. In the end, the Appeal partially succeeds in the following terms:-
 1. The 1st Respondent is directed to transfer to the Appellant land parcel No. Makueni/Unoa/3136 to the Appellant within 30 days from the date hereof in default the executive officer to sign all the documents to effect the transfer.
 2. Each party to bear its own costs.



RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF NOVEMBER, 2023.

.....

HON. T. MURIGI

JUDGE

In the presence of:-

Court assistant - Mr. Kwemboi.

Ms Kyalo for the Respondents.

