**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**APPEAL NO. 21 OF 2018**

**ANGELINA KALAMBA MWASI.....1ST APPELLANT**

**JULIUS MWASI TUMUNA .....2ND APPELLANT**

**LONADA TABU MUNA MWASI ..... 3RD APPELLANT**

**MARIA MAGHUWA MWASI ..... 4TH APPELLANT**

**REHEMA MABHONDO MWASI..... 5TH APPELLANT**

**MARIAMU MWASI.....6TH APPELLANT**

**VERSUS**

**MBARUK AYUB ALI MBARUK..... RESPONDENT**

**AND**

**APPEAL NO. 30 OF 2018**

**MICHAEL MURIITHI MUTHII.....APPELLANT**

**VERSUS**

**MBARUK AYUB ALI MBARUK.....RESPONDENT**

***(Being appeals from the judgment of Honourable L. T Lewa, Senior Resident Magistrate,***

***delivered on 19 February 2018 in the suit Mombasa CMCC No. 121 of 2013)***

1. This judgment is in respect of two appeals which were consolidated. The appellants in the case Mombasa ELCA No. 21 of 2018 are Angelina Kalamba Mwasi, Julius Mwasi Tumuna, Lonada Tabu Muna Mwasi, Maria Maghuwa Mwasi, Rehema Mabhondo Mwasi and Mariamu Wali Mwasi (whom for ease of reference I will refer to as the 1st -6th appellants). The appellant in Mombasa ELCA No. 30 of 2018 is Michael Muriithi Muthii and for ease of reference, I will refer to him as the 7th appellant. The respondent in both appeals is Mbaruk Ayub Ali Mbaruk. Both appeals arise from the decision of Honourable L.T Lewa, Resident Magistrate, Mombasa, in the suit Mombasa RMCC No. 121 of 2012. I will give a brief history of the case so as to put matters into context.

2. The suit was commenced by way of a plaint with the plaintiff being Mbaruk Ayub Ali Mbaruk (the respondent). He sued the 1st – 6th appellants as the 1st to 6th defendants, and the 7th appellant as the 7th defendant. In the plaint, the 7th appellant was only described as "Mr. Mureithi." In his plaint, the respondent pleaded that on 19 October 2011, he entered into an agreement with the 1st – 6th appellants, through which the 1st – 6th appellants agreed to sell their house without land on the Plot No. 211/II/MN. The respondent pleaded that he paid the purchase price and the transfer was executed. He averred that he also cleared the ground rent of Kshs. 28,200/= to the land owner. It was pleaded that the 7th appellant was a developer, who unlawfully started developing the suit land on 18 January 2013 with the assistance of the 1st – 6th appellants. The respondent in his suit sought orders to have the appellants permanently restrained from the suit land, vacant possession, and costs of the suit.

3. Appearance was entered for the 1st – 6th appellants through M/s Koech & Associates Advocates. A defence and counterclaim was filed on their behalf. In their defence, they admitted having entered into a sale agreement with the respondent for the sale of the suit property in the sum of Kshs. 1,400,000/= and that the respondent was to pay the full purchase price on signing of the agreement. They pleaded that the respondent paid Kshs. 450,000/= leaving unpaid the sum of Kshs. 950,000/=. They pleaded that subsequently, the respondent offered to pay Kshs. 500,000/=, and in respect of the remaining Kshs. 450,000/=, he offered to build a house in another location for them. He took them to Manyani where a house was under construction. It was pleaded that out of the sum of Kshs. 500,000/= the respondent only paid Kshs. 170,000/= and left a sum of Kshs. 330,000/= unpaid. In respect of the house, the 1st appellants pleaded that it turned out that the house had in fact been sold to a third party. In the counterclaim, the 1st appellants pleaded that by offering to pay the sum of Kshs. 500,000/= and build a house for them, the respondent made a counter-offer which extinguished the original contract and restored the parties back to their original position. It was pleaded that the respondent acted in bad faith, inter alia in not presenting them with a hard copy of the sale agreement, and promising to build for them a house when he knew that he had already sold it to a third party. They pleaded *non est factum* and that they communicated to the respondent that they have rescinded their agreement. They averred that the respondent was now unlawfully collecting rent in the sum of Kshs. 10,000/= every month from January 2012. In the counterclaim they sought orders for a declaration that the respondent made a counter-offer which extinguished the original agreement; refund of the rent collected by the respondent; and costs.

4. The 7th appellant, entered appearance "under protest" through the law firm of M/s Muturi Gakuo & Kibara Advocates. In the appearance, it was indicated that his full name is Michael Muriithi Muthii. In his statement of defence, he pleaded that he has been wrongly sued as Mr. Mureithi and one of the Managing Directors of Kiburu Enterprises Limited. He pleaded that he is non-suited. He pleaded that he is a stranger to the allegations in the plaint. He denied the same and put the respondent to strict proof.

5. The respondent testified as PW-1. He stated inter alia that the 1st appellants were his neighbours and that he heard that they were selling their house. He met the 2nd appellant (Julius Mwasi Tumuna or simply Julius) who asked for fare to bring all his family members from Taita. He gave out Kshs. 3,000/= as fare. Subsequently, the 1st – 5th appellants came to his office and offered to sell the house to him at Kshs 1,400,000/=. The following day, the 1st – 5th defendants, himself, and two other persons, namely Ibrahim Kambi and Salim Mohamed, proceeded to an advocate's office where a sale agreement was prepared and read to the vendors. It was then signed by the 1st – 5th defendants. He stated that the 6th appellant was not present and that her part was signed by the 1st appellant. He produced the sale agreement dated 19 October 2011 as an exhibit and also a piece of paper which he said was a document that reflected how the money was to be apportioned or distributed to the vendors. He testified that he intended to pay them all the money on this day of the agreement but the vendors asked that he pays them in bits as they were concerned about security. He claimed to have paid them later and he had some acknowledgment receipts. He went to the owner of the land and paid him ground rent and transfer fees. He then gave notice to the tenants that he is now the new owner and asked them to vacate. In 2013, he was surprised when he was informed that the 7th appellant was digging a foundation on the land. He reported the matter to the police station but it could not be resolved there. He asserted that there was no other agreement. He further testified that out of his own good will, he volunteered to build another house for the 1st – 6th appellants though it was not in the agreement. It was his way of saying "thanks". Under cross-examination, he affirmed that he did not pay all the money on the day of the agreement. He testified that Julius told him to keep for him his share of the money (Kshs. 450,000/=) as he did not have an account and he was apprehensive about its security. The others also told him the same, even those who had come from Taita. He admitted that it was within his knowledge that the vendors were illiterate. He also affirmed that the 6th appellant did not sign the agreement and that it was signed on her behalf by the 1st appellant who it was said was her mother. He stated that he finished paying the money after one year. He testified that on 26 February 2012 he paid Kshs. 20,000/= to the 5th appellant; Kshs. 50,000/= to the 4th appellant on 8 May 2012; and Kshs. 20,000/= to the 3rd appellant on 12 September 2012. There was, what he stated to be, the last acknowledgment, signed by the 3rd , 4th and 1st appellant, but which was not dated and did not indicate the amount paid. He is not the one who prepared the document, which he stated was prepared by his employee. He testified that it was not him who gave out the money but that this was done by his secretary. He however asserted that he paid all the money.

6. PW-2 was one Julius Mwasi Tumuna (Julius), the 2nd appellant. He stated that despite being named as 2nd defendant, he was going to testify in support of the respondent. He testified that save for the 7th appellant, the others are his mother and siblings. He testified that they had an agreement to sell the suit land to the respondent at Kshs. 1.4 million. After signing the agreement, he took his share of the money, which was Kshs. 450,000/=. He was not aware that the respondent was to build a house as he was not privy to that. He refuted having again sold the land to another person. Cross-examined, he testified that at the time the sale agreement was prepared, they were all present save for the 6th appellant (Mariamu). He stated that no money was exchanged at the advocate's office. On that day, he was given Kshs. 50,000/= in town, and not in the advocate's office, and he was paid the rest of his share of Kshs. 450,000/= in instalments. He then went and bought a plot and built a house. He could not recall the exact time that he was paid the instalments. He mentioned that he bought a plot in Junda, in Mishomoroni, but he could not remember when the plot was purchased. He did not know if his siblings were paid their share.

7. PW-3 was Ibrahim Katana Charo (also referred to as Kambi) a village elder of where the suit land is located. He was present when the sale agreement was executed. He stated that the vendors had a proposal on how the money was to be shared among them. He testified that Julius was given his share of Kshs. 450,000/=. He stated that the respondent was to build a house for the 1st – 6th appellants, and he started doing so, but a rift emerged when the house got to the roofing stage. Cross-examined, he affirmed that save for Julius, the rest agreed not to collect money, in lieu of the respondent building for them a house.

8. PW-4 was one Swaleh Ali. He used to live in the disputed house as a tenant of the 1st – 6th appellants. He moved out when he was served with a notice after the house was purchased by the respondent.

9. PW-4 was one Murshid Mohamed Soud. He testified that he is the owner of the land where the disputed house is located, together with three other persons, one of whom is deceased. He however did not avail a copy of the title deed. He testified that the respondent paid ground rent to him totalling Kshs. 28,200/= and he was also paid transfer fees of Kshs. 45,000/=. The respondent then took over the house. Cross-examined, he stated that he did not confirm if the whole purchase price was paid because his role was only to give consent.

10. With the above evidence, the respondent closed his case.

11. DW-1 was Lonada Tabu Muna Mwasi the 3rd appellant, who stated that she would testify on behalf of all the other defendants. She acknowledged that they sold the disputed house to the respondent for the sum of Kshs. 1.4 million. She stated that the agreement was that their brother (presumably Julius) was to get Kshs. 450,000/= on the same day and the balance of Kshs. 950,000/= was to be paid the following day. These were however never paid and she stated that what they have been paid so far is only Kshs. 170,000/=. She stated that on the day of the agreement, the respondent paid them Kshs. 100,000/=; on 8 May 2012, Kshs. 50,000/=; and on 12 September Kshs. 20,000/=. She had an acknowledgment note which she produced as an exhibit. She stated that they are still in possession of the house despite notice to tenants having been issued. She testified that their mother called the respondent about the non-payment and he promised to pay Kshs. 10,000/= every month which he never did. He also promised to build a house costed at Kshs. 450,000/=. She produced photographs of the house but stated that the house was never completed. When confronted, the respondent mentioned that it has a case in court. Due to the non-payment, they saw an advocate who wrote a demand letter on 1 November 2012. Cross-examined, she stated that Kshs. 950,000/= was to be given to them as their share apart from the sum of Kshs. 450,000/= that was to be given to Julius. Out of this money, they were to be given Kshs. 500,000/= and in lieu of the sum of Kshs. 450,000/= a house would be built for them. She asserted that they only got money in the sum of Kshs. 170,000/= leaving unapid a sum of Kshs. 330,000/= and the house. They ran into distress as their mother was unwell and they had no source of income since the tenants in the house had been evicted. It is then that they approached the 7th appellant who promised to help and they agreed to re-sell the house to him. She was cross-examined on the ownership of the land which she claimed belonged to them as well. She denied that they went to PW-4 for consent. She testified that their agreement with the 7th appellant was for cash of Kshs. 700,000/= and a house to be built for them. She explained that they sold the house because of differences with Julius, who insisted on getting his inheritance. They decided to sell, so that he can get his share and they also have a roof over their head to live with their mother.

12. After DW-1 had testified, and before the 7th appellant could testify, counsel for the respondent orally applied to amend the name of the 7th appellant to read Michael Muriithi Muthii T/A Kiburu Enterprises Limited. There was no objection and the application was allowed.

13. The 7th appellant testified as DW-2. He testified that on 1 November 2012, the 1st – 6th appellants approached him to sell the disputed house. They informed him of the previous agreement with the respondent but told him that he had failed to meet his side of the bargain and that they had rescinded the agreement. They showed him a copy of the rescission letter. On 14 January 2013, his company (Kiburu Enterprises Limited) entered into an agreement with the 1st – 6th appellants, to purchase the house. The consideration was Kshs. 700,000/= and a house to be built for the vendors. He completed his part of the bargain and took possession. He then commenced construction of a wall, and when it was almost complete, he was served with an order of injunction. Cross-examined, he stated that the 2nd defendant/appellant did not sign the agreement.

14. With the above evidence, the defendants closed their case.

15. Counsel were allowed an opportunity to make written submission and judgment was delivered on 19 February 2018. In the judgment, the learned trial Magistrate held that the sale agreement between the 1st – 6th appellants and the respondent, at clause 2, provided that the sum of Kshs. 1,400,000/= is acknowledged on the signing of the agreement, and because of that, the 1st – 6th appellants could not claim that the full consideration was not paid. She was of the view that the respondent's case was consistent with his pleadings despite arguments to the contrary by counsel for the appellants. On the issue of the construction of a house as being part of the consideration, the learned trial Magistrate held that there was no such clause in the sale agreement. She thought that although PW-3 mentioned that the respondent was to build a house, this was hearsay, as it was not in the agreement. She held that the issue was a mere allegation without basis. She thus allowed the case of the respondent and dismissed the counterclaim of the 1st – 6th appellants.

16. Aggrieved by the above judgment, the 1st – 6th appellants and the 7th appellant filed their separate memoranda of appeal. I need not set down all the grounds of the appeal, suffice to state that the appellants are of opinion that the learned trial Magistrate erred in upholding the sale to the respondent as the consideration was not settled (including the building of a house); that the learned trial Magistrate erred in not finding that the agreement had been rescinded; that there was serious departure by the respondent from his pleadings; that the learned Magistrate's findings went against the tide of the evidence; and that adverse findings were made against Kiburu Enterprises Limited despite the company not being a party to the proceedings.

17. I invited counsel to file written submissions which they did and also gave them an opportunity to highlight the same. I have taken note of the submissions made by counsel. I hold the following view of the matter.

18. I will start by observing that it is the respondent who brought suit as plaintiff and claimed that he had a sale agreement with the 1st – 6th appellants which had been executed and in effect it was him who was entitled to ownership of the house in dispute. In my view, the respondent would be entitled to succeed if he satisfied the following :-

(i) That he had a valid and binding sale agreement with the 1st – 6th respondents.

(ii) That the 1st – 6th respondents had capacity to sell and he had capacity to purchase.

(iii) That the consideration in the sale agreement was fully paid as noted in the sale agreement unless there was proof of waiver or an amendment of the terms which were fully settled.

19. It is common ground that there was a sale agreement executed on 19 October 2011 through which the respondent intended to purchase the disputed house. The vendors noted in that agreement are six persons, namely Angelina Kalamba Mwasi (Angelina), Julius Mwasi Tumuna, Lonada Tabu Mwasi, Maria Maghuwa Mwasi, Rehema Mabhondo Mwasi, and Mariamu Wali Mwasi (Mariamu). It appears that the vendors jointly or in common owned the disputed house. Now, you would expect that because there are 6 vendors, then you will have all the six vendors execute the agreement so that they can collectively be bound by it. However only five of the six vendors signed the agreement. The respondent himself affirmed that Mariamu was not present when the agreement was drawn and she did not execute the sale agreement. Instead, the person who signed (actually placed a thumb print) against Mariamu's name was Angelina. It never came out clearly

why Mariamu was not present when the sale agreement was being signed, and it was never said why Angelina signed for Mariamu. She could only sign for Mariamu if she had her written authority but none was displayed. I regret that this is not the sort of document that can be considered to be a binding agreement. An agreement will only bind the executors thereof, and since Mariamu never executed the agreement, certainly she cannot be bound by it. If it is the case that she had a share in the disputed land, whether jointly or in common, it cannot be said that the respondent then acquired the disputed house through the sale agreement. Clearly, he could only do so if all the parties entitled to the house executed the agreement, and this is not the scenario in our case. I do not therefore see how the agreement can be said to be enforceable against all parties, or indeed even some of the parties. My own view of the matter is because Mariamu never signed the agreement, that agreement is null and void and cannot be enforceable. By that finding alone, the respondent cannot be said to have acquired any interest in the disputed house.

20. But let us assume that I am wrong on the above and that the agreement is enforceable against all parties. In such case, the respondent would only acquire interest in the disputed house if he paid the consideration that was agreed, in the manner set out in the agreement, or in any other manner subsequently agreed by the parties. The sale agreement provides at Clause 2, that the consideration is Kshs. 1,400,000/= and that this money is to be paid on execution of the agreement, and further, that its receipt is acknowledged through the act of signing the agreement. We all now know that the sum of Kshs. 1,400,000/= was never paid on execution of the sale agreement despite the sale agreement stating as much. This was an express clause in the sale agreement and it therefore needed to be complied with as drawn. If there was no payment of the sum of Kshs. 1, 400,000/= on execution of the sale agreement, then it would mean that there was a breach of the terms of the sale agreement on the part of the respondent. It was claimed by the respondent that he had the sum of Kshs. 1,400,000/= ready to pay, but that the 1st – 6th appellants, opted not to receive it due to security reasons. Well, if this was the case, what needed to be done was to modify, or redraw, the sale agreement, to reflect the change in circumstances, and to now set down what the respondent needed to do in going about settling the consideration.

21. In deciding the point whether consideration was paid as provided for in the sale agreement, the learned trial Magistrate stated that going by Clause 2 of the agreement, the vendors could not claim that full consideration was not paid, for reason that, the said clause provided that full consideration had been paid. With respect, we cannot run away from the fact that the consideration was not paid as noted in the sale agreement. We cannot close our eyes and ears to the fact that this money was not paid on the date of the sale agreement. We cannot pretend that Kshs. 1,400,00/= was paid on the day of execution of the agreement, when we know for a fact that it was never paid. If we do so, we will be committing a great injustice, and asserting that a set of facts exists, when we are very much aware, that such facts do not exist. The issue of payment of the Kshs. 1,400,000/= was not even a contested matter that the court had to decide one way or the other. It was common ground, and it was not disputed, even by the respondent himself, that he never paid the sum of Kshs. 1, 400,000/= on the date of the sale agreement.

22. It was wrong, in my view, for the learned trial Magistrate to hold that consideration was paid, solely due to the manner in which Clause 2 of the sale agreement was drawn, when the undisputed facts revealed otherwise. That being the case, the respondent was clearly in breach of Clause 2 of the agreement. It follows that the respondent could only succeed, if he demonstrated that there was a subsequent agreement which overturned or modified the agreement of 19 October 2011, or that there was a waiver or other variation of the sale agreement, which he fully complied with. I have no evidence of any subsequent written agreement varying the agreement of 19 October 2011. It will not help the respondent to say that he paid in bits the whole of the sum of Kshs. 1,400,000/=, if the vendors did not agree to be so paid in bits, for that would be a unilateral variation of the sale agreement.

23. Despite the above, I choose to look into whether I have sufficient evidence to show that the respondent actually paid the sum of Kshs. 1,400,000/-

24. It is not disputed that Julius received Kshs. 450,000/= though this was paid in instalments that took close to a year. For the other appellants, what is not disputed is payment of Kshs. 170,000/=. The 1st – 6th appellants did posit that they were ready not to receive all the money in cash, and would have been comfortable if out of the balance of Kshs. 950,000/=, they were given cash of Kshs. 500,000/= and a house worth Kshs. 450,000/= built for them. This is of course denied by the respondent. However, my analysis of the evidence, points me to the conclusion that this was the subsequent verbal understanding of the parties, and if the respondent had adhered to the same, the 1st – 6th appellants would have had no issue. I say so, because I do not see how the respondent would have been charitable enough to load himself with an additional burden of building a house if it was not his obligation to do so. To me, it does not add up. My conclusion is that he could only vest upon himself such a burden if it was his duty to do so. It is common ground that no house was ever given to the 1st – 6th appellants. Of the cash payments, out of Kshs. 950,000/=, what can be said to be concrete and undisputed is payment of Kshs. 170,000/=. The respondent indeed cannot point at any evidence of payment of this cash of Kshs. 950,000/=. There is a purported acknowledgement which the respondent asserted as being one exhibiting proof that all money was paid. I have looked at that acknowledgement. It is not dated. Secondly, it is not signed by all the vendors. Neither does it indicate any amount of money being paid. I regret that I cannot take that to be sufficient proof of payment of Kshs. 950,000/=.

25. I am not persuaded that the learned Magistrate properly evaluated the evidence. She wished away, too casually, the issue of the obligation placed upon the respondent to build a house worth Kshs. 450,000/=. PW-3 a witness called by the respondent himself, stated that the respondent needed to build a house in lieu of cash. This was not hearsay. This was evidence from a person who stated that he was involved in all steps of the sale agreement, and was talking of matters within his knowledge. This was buttressed by the fact that the respondent himself stated that he was building a house for the 1st – 6th appellants. A red flag ought to have been raised, questioning why the respondent was keen to build a house, if it was not part of the deal. It certainly, as I have mentioned earlier, not have been because the respondent was a magnanimous man. It could only have been tied to an obligation under the sale agreement, for the respondent and the 1st -6th appellant had no other relationship, other than the fact that one party was vendor and the other party was purchaser. In the ordinary course of life, these are persons only bound by terms of a contract, and not by other filial relationships, that may make one go out of his way to assist another.

26. My findings, after a re-assessment of the evidence, is that all the respondent paid, was Kshs. 450,000/= to Julius, and Kshs. 170,000/= to the other vendors. He did not abide by the terms of the sale agreement which required him to pay the sum of Kshs. 1,450,000/= on execution of the agreement. If we are to assume that the sale agreement was modified, then he needed to pay a further Kshs. 330,000/= and build a house worth Kshs. 450,000/= which he never did. Whichever way you look at it, the respondent did not perform his part of the bargain, whether you base it on the terms of the sale agreement, or what one would consider to be a subsequent variation of it.

27. Not having performed his part, the 1st – 6th appellants were fully entitled to rescind and proceed to sell the house to a third party. The only remedy that the respondent would have is the remedy of a refund for what he had paid.

28. There was heavy weather made by counsel for the 7th appellant on the fact that Kiburu Enterprises Limited was not sued in the matter yet the 7th appellant is a separate entity from this company. Following my above findings, it is clearly not necessary for me to go deeply into this issue. I have already held that the vendors were entitled to rescind the sale agreement. If the company wished to have declarations made in its favour, all it needed to do was apply to be enjoined to the suit, which they certainly were aware of, because the 7 th respondent was its director. I will thus just leave it that the respondent is not entitled to the disputed house and that all he deserves is a refund.

29. From the evidence, the 2nd appellant received Kshs. 450,000/=. I will make an order that he refunds the respondent this sum of money. I cannot make any order against the 6th appellant for she was not part of the sale agreement and I have no evidence that she received any money. I can only order the 1st, 3rd, 4th and 5th appellants, to refund to the respondent the sum of Kshs. 170,000/= . There was ground rent paid of Kshs. 28, 200/=. This falls jointly and or severally against the 1st – 6th appellants refundable to the respondent. Let these parties make a refund of this money to the respondent and that money will attract interest from today at court rates until payment in full.

30. I will now turn to the counterclaim by the 1st – 6th respondents. They claimed rent that the respondent continued to collect from the tenants in the house. From the sale agreement, the transfer of rights was to occur upon completion of the sale. No sale was ever completed by the respondent. He therefore did not have the right of possession at any one time. There was pleading that what was lost was Kshs. 10,000/= monthly. However, this needed to be backed up by evidence. Unfortunately no proof was provided that what was lost was Kshs. 10,000/= monthly. I am therefore unable to make any award for loss or rent. There is therefore nothing proved in the counterclaim. I will order its dismissal but make no order as to costs of the counterclaim.

31. The respondent was not entitled to any of the orders that he sought in his plaint. His suit at the Magistrate's court ought to have been dismissed for the reasons that I have given above. I will substitute the judgment of the learned trial Magistrate with an order that the respondent's suit is dismissed save for the order of refund as directed above. I make specific that the respondent is not entitled to the disputed house, and given that position, the respondent must immediately vacate the disputed premises. On costs, the respondent will pay the costs of the suit before the Magistrate's Court and he will also pay the costs of this appeal. As I have mentioned, there will be no orders as to costs on the counterclaim.

**Judgment accordingly.**

**DATED THIS 6TH DAY OF MAY 2020**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA.**