



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kinyua v Njogu (Civil Appeal E007 of 2022)  
[2024] KEHC 2836 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2836 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E007 OF 2022  
RM MWONGO, J  
MARCH 12, 2024**

**BETWEEN**

**MARGARET WANJIRU KINYUA ..... APPELLANT**

**AND**

**ALBERT KARIGUA NJOGU ..... RESPONDENT**

*(Being an appeal against the judgement and decree of Hon. A. Lorot  
delivered on 23rd January 2022 in Wang'uru Civil Case No 132 of 2016)*

**JUDGMENT**

1. The brief facts of the case in the trial court are that on or about the 30/5/2013 the defendant as the vendor entered into a land sale agreement with the plaintiff/appellant as the purchaser. In the agreement, the defendant sold the plaintiff land parcel number Mwea/Miuu/L.R 13963/1319 measuring 3.0 acres at a consideration of Kshs 215,000. The plaintiff paid the defendant the total consideration for the said land in instalments. The plaintiff did not visit the said land.
2. According to the plaintiff, on diverse dates between February 2014 to March, 2016, during planting seasons, the plaintiff gave the defendant a total sum of Kshs. 799,457. The amount was meant to buy farm inputs and seeds for the farming enterprise on the land to be undertaken by the defendant on behalf of the plaintiff.
3. Later the plaintiff came to discover that the defendant had defrauded her as there was neither the land as stated, nor was there any farming enterprise. The purchaser then visited the land only to find strangers on it who indicated that the true owner was someone different. On being discovered, the defendant offered to refund the plaintiff the entire sums paid to him and on or about the 2/12/2015 the defendant paid to the plaintiff a sum of Ksh.60,000. The plaintiff sued.



4. In their response, the respondent denied the claims. He admitted having paid back to the plaintiff Kshs 60,000 as a refund and another 260,000 which was inclusive of a friendly loan advanced to him by the plaintiff.
5. At the close of the hearing, the trial court dismissed the plaintiff/appellant's suit for want of proof; and awarded costs to the defendant /respondent.
6. Dissatisfied, the appellant appeals the on the following grounds:
  - i. The Learned Trial Magistrate erred in law and facts in not allowing the Appellant's suit dated the 27<sup>th</sup> September, 2016. A miscarriage of justice was thereby occasioned.
  - ii. The learned Trial Magistrate erred in law and facts in not finding that the Appellant's suit was proved on a balance of probabilities.
  - iii. The Learned Trial Magistrate erred in law and facts in finding that the plaintiff did not prove her case yet there was documentary proof on record.
  - iv. The Learned Trial Magistrate erred in law and facts in failing to fully evaluate the Appellant's evidence and failed to consider submissions.

#### Appellant's Submissions

The Learned Trial Magistrate erred in Law and Facts in not allowing the Appellant's suit

7. In his judgement at page 151 of the Record of Appeal, the Trial Court found as a fact that the only undisputed Agreement was the one dated 7<sup>th</sup> June, 2013 which was for the sale of the of the suit property at Kshs 215,000/= but did not award this uncontested sum.
8. It is the Appellant's further submission that no evidence was offered by the Respondent to prove that he refunded the Appellant any sum of money because the burden of him to prove that fact by producing acceptable evidence. He did not discharge that burden.
9. It is the plaintiff's/Appellant's submission that since the defence wishes the court to believe that he was paid and refunded the consideration to the plaintiff/Appellant, the burden of proof lies on him to proof the existence of that fact by producing acceptable documentary evidence.

#### Special damages

10. On special damages, the appellant submitted that it is trite law that they must be pleaded and specifically proved. The Appellant prayed for Kshs 954,457/= She produced a sale agreement/ acknowledgement dated 5th October,2013, for a sum of Ksh 215,0000/= acknowledgement dated 7<sup>th</sup> June, 2013 and 13<sup>th</sup> June, 2013 for a sum of Ksh 50,000 and Ksh 50,000 respectively.
11. The appellant also produced bundles of M-pesa statements showing the various amounts sent to the Defendant via his mobile phone number 0727349962. These ranged from 7<sup>th</sup> June, 2013 to 29<sup>th</sup> January, 2016 all totalling to Ksh 699,457/=. These confirmed that the entire consideration amount for the purchase of land parcel Title No L.R No. Mwea/Miuu / L.R 13963/1319 of Ksh 215,000/= was settled and a further sum of Kshs 799,457 which sum was meant to buy firm inputs and seeds for the farming enterprise on the land to be undertaken by the Defendant/ Respondent on behalf of the Plaintiff/Appellant as per the agreement signed on 12<sup>th</sup> October, 2013.

#### Respondent's submissions

Whether the Appellant proved her claim against the Respondent on a balance of probability



12. The Appellant moved the Trial Court seeking that the Respondent be ordered to transfer to the Appellant land parcel number Mwea/Miuu/L.R 13963/3919 or alternatively, that the Respondent be ordered to pay the Appellant a sum of Kshs 954,457/= being refund on consideration plus the other sums paid out to the Respondent.
13. The claim was based on the grounds that the Appellant purchased the subject property from the Respondent on 30<sup>th</sup> May, 2013 at a consideration of Kshs 215,000/=; and that the parties further agreed that the Respondent would manage the subject property on her behalf whereby the Appellant allegedly paid Kshs. 799,457/= to the Respondent for that purpose.
14. The appellant contends that she later discovered that the Respondent did not own the subject property which, according to the Appellant, was a gross misrepresentation of facts and blatant fraud.
15. The respondent cited Court of Appeal case in Nairobi Civil Appeal No.132 of 2005 [ 2015] Kinyanjui Kamau vs George Kamau Njoroge where it was observed that any allegations of fraud must be pleaded and strictly proved, and that the burden of proving fraud was on a higher standard than that of balance of probabilities which is required for ordinary civil cases.
16. From the Appellant's witness statement dated 27<sup>th</sup> September, 2016 she admitted that she was physically shown land parcel number Mwea/Miuu/L, R 13963/3919 by the Respondent. Further, she produced an allotment letter (pg 16 of the record) which demonstrates that the subject property was legally allocated to the Respondent. The Appellant testified that she had discovered the 'real' owner of the subject property but did not tender any evidence from the County Government of Kirinyaga to that effect.
17. The Appellant claims that she supported three planting seasons of maize crop but got nothing in return. First, the Appellant did not produce evidence to show the purchases she made for the packaging materials sent to the Respondent and second, the claim that the appellant continued financing the three planting seasons without receiving the proceeds is preposterous. The Appellant did not produce receipts or acknowledgements in support of her claim of Kshs 799,457/= thus the Learned Magistrate was right in dismissing the claim for want of proof.
18. The Respondent admitted that the parties entered into an agreement on 30<sup>th</sup> May, 2013 for sale of the subject property but as the agreement was frustrated, he refunded Kshs 215,000/= being the purchase price and another Kshs 45,000/= being a friendly loan advanced to him by the Appellant making a total of Kshs 260.000/= The Respondent adduced evidence to that effect.

### **Issues for Determination**

19. The issues that arises for determination are:
  - a. Is whether the appellant proved her claim against the respondent on a balance of probability
  - b. Whether or not the appeal should be allowed.

### **Analysis and Determination**

20. As required in an appeal on first instance, I have re-evaluated the entire evidence on record to enable me to reach my own conclusions noting that I did not have the benefit of hearing the witnesses and seeing their demeanour.



21. Briefly, the appellant appealed the judgement of the trial court dated 23<sup>rd</sup> December, 2021 which dismissed the plaintiff/ appellant's suit for want of proof and awarded costs to the defendant/ respondent.
22. The appellant's claim in the lower court was as follows:
  - a. That the defendant be ordered to transfer to the plaintiff land Parcel number Mwea/Miuu/L.R 13963/1319.
  - b. Alternatively, that the defendant be ordered to pay to the plaintiff a sum of kshs 954, 457 being refund on consideration plus the sum paid out of the defendant by the plaintiff.
23. The Respondent /defendant denied the claims through a statement of defence dated 6<sup>th</sup> October, 2017. However, he admitted that there was an agreement made on the 7<sup>th</sup> June, 2013 and admitted having paid to the plaintiff kshs 60,000 as refund of the consideration on the 2<sup>nd</sup> December, 2015.
24. PW1 was Margaret Wanjiru Kinyua, the appellant/plaintiff in the lower court. She testified that she entered into a land sale agreement with the defendant for land Parcel Number Mwea/Miuu/L.R 13963/1319 at a consideration of Kshs 215,000.
25. She further testified that on diverse dates between the period from February 2014 to March,2016 she gave the defendant a total sum of Ksh.799,457 which sum was meant to buy farm inputs and seeds for the farming enterprise on the land to be undertaken by the defendant on her behalf.
26. She produced the sale agreement and the Mpesa statements to prove her claim together with the letter of allotment for the land. Further, she told the court that she came to discover that the defendant had defrauded her as there was neither the land as stated nor was there any farming enterprise being undertaken upon the land.
27. Upon discovery as above the defendant offered to refund to the plaintiff the entire sums paid to him, and on or about the 2/12/2015 the defendant paid to the plaintiff a sum of ksh.60,000. He failed to pay the balance.
28. PW2- Allan Mbugua- he testified that he witnessed the signing of the agreement for the suit property. He adopted his written statement dated 27<sup>th</sup> September, 2016. He confirmed that the defendant received Kshs 50,000. On cross-examination, he stated that he witnessed the plaintiff paying Kshs 100,000 to the defendant. He confirmed that the defendant owned the land.
29. DW1 Albert Karigua Njogu adopted his written statement dated 9<sup>th</sup> October, 2017. He testified that he entered into the land sale agreement with the plaintiff for Kshs 215,000. Later, he decided to refund the money to the plaintiff as she complained that there was no shamba. He denied ever cultivating the land on behalf of the plaintiff. He said that he paid Kshs 60,000 through the bank. The other money was paid in cash.
30. DW2 Simon Njogu Ngunjiri testified that he gave the defendant Kshs 200,000 to settle his debt with the plaintiff. He did not know how the debt was accrued. He stated that he was friends with DW1.

**Whether the appellant proved her claim against the respondent on a balance of probability**

31. The appellant's claim was based on the grounds that she purchased the subject property from the Respondent on 30<sup>th</sup> May, 2013 at a consideration of Kshs 215,000/= . Further, that the parties agreed that the Respondent would manage the subject property on her behalf whereby the Appellant allegedly paid Kshs 799,457/=to the Respondent for that purpose.



32. The Respondent admitted the claim that there was an agreement for purchase of the land. He testified in court that he refunded the amount of kshs 215,000 to the appellant.
33. The appellant in her plaint pleaded that she came to discover that the defendant had at all through defrauded her as there was neither the land as stated nor was there any farming enterprise.
34. The Court of Appeal case in Nairobi Civil Appeal No.132 of 2005 [ 2015] Kinyanjui Kamau vs George Kamau Njoroje was relied on. There, the court observed as follows:

“It is trite law that any allegations of fraud must be pleaded and strictly proved See Ndolo vs Ndolo (2008)1 KLR wherein the Court stated that:

“We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases. In cases where fraud is alleged: it is not enough to simply infer fraud from the facts.”

#### **Ownership of the suit land**

35. The appellant claimed that she received an allotment letter of non-existent land. She proceeded to pay the agreed sum for the land to the respondent. Further, she sent the respondent more money to cultivate the land. She became suspicious after the third planting season. In February 2016, she visited the land and found out that it owned by another person. She did not name the person.
36. Accordingly, she said, she reported the matter to the CID. No evidence of investigations conducted or their outcome was adduced in court. Nevertheless, she concluded that the Respondent had defrauded her.
37. The burden of proof is provided for in Section 109 of the *Evidence Act* Cap 80 Laws of Kenya. The provision states that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
38. On his part, the respondent testified that he did not show the land to the appellant, although the land is available. Further, he said they were friends, and that the appellant had been his girlfriend.
39. He admitted that in February 2014 and March 2015 the appellant sent him money through M-Pesa, though it was a loan, and not for purchase of land.
40. The trial court held that the appellant’s case was based on innuendo. She did not call any police officer to testify. She did not call the alleged real owner of the suit land. She visited the suit land only once in three years. Further, the appellant’s claim of Kshs 799,457 was not supported at all by any receipts or acknowledgment.
41. The trial court held that the bundle of mpesa statements that she produced could not be admitted as evidence in Court as the appellant is not the author of the said documents. This is in consonance with



Section 35 of the Evidence Act which requires that for any documentary evidence to be admissible in Court, the same must be produced by the maker of the said document.

42. Section 35 of the Evidence Act provides:

“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say

(a) if the maker of the statement either–

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.”

43. In the case of *Moses Ogutu Mugema v Republic* [2019] eKLR Aburiri J held:

“It was expected that Safaricom Security or Liaison Officer would be called to produce the said exhibits. The investigating officer did not lay a basis upon which the makers of data could not be present in court to produce the documents, as required by law.”

44. Similarly, in this case, the appellant did not avail any officer from Safaricom to produce and verify the statements on her behalf. As such the statements remain contested and unhelpful as evidence.

45. My evaluation of all the evidence in the trial court leads me to the same conclusion as the trial court: namely, that the plaintiff/appellant did not tender material sufficient to prove her case. I so find.

46. Accordingly, the appeal fails and is hereby dismissed with costs to the respondent.

47. Orders accordingly.

**DATED AT KERUGOYA THIS 12<sup>TH</sup> DAY OF MARCH, 2024**

.....  
**R. MWONGO**



## **JUDGE**

### **Delivered in the presence of:**

No representation - Magara for Applicant

Kimata - holding brief for Ombachi for Respondent

Court Assistant, Murage

