



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Murangi v Mwangi (Civil Appeal E066 of 2022)  
[2024] KEHC 5553 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5553 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E066 OF 2022  
LM NJUGUNA, J  
MAY 8, 2024**

**BETWEEN**

**MARY RITA MURANGI ..... APPELLANT**

**AND**

**MARGARET MUTHONI MWANGI ..... RESPONDENT**

*(Appeal arising from the decision of Hon. J. Ndeng'eri SRM in Chief Magistrate's Court at Embu Civil Case No. 94 of 2019 delivered on 25 th November, 2021)*

**JUDGMENT**

1. The appeal herein has been filed vide memorandum of appeal dated 30<sup>th</sup> December 2022 wherein the appellant, being dissatisfied with the above cited decision, now seeks orders that:
  - a. The appeal be allowed;
  - b. The honourable court do proceed and set aside the award of;
    - i. Kshs.500,000/= damages
    - ii. Award of costs.
  - c. The honourable court be pleased to order a re-trial of the suit in CMCC No. 94 of 2019 and allow admission into evidence of the appellant's defense; and
  - d. Costs of the subordinate court and this appeal be awarded to the appellant herein.
2. This appeal is premised on the grounds that:
  - a. The learned trial magistrate erred in law and fact in awarding the plaintiff Kshs.500,000/= as damages for breach of contract considering that the same was not supported by the evidence on record;



- b. The trial court erred in law and fact in failing to allow the appellant a chance to be heard thus leading to a miscarriage of justice;
  - c. The learned trial magistrate erred in law and fact in failing to consider that the facts testified in the case did not amount to proof on a balance of probability that the defendant had breached the said contract;
  - d. The trial court erred in law and fact in making an award of Kshs.500,00/= as the same was not based on evidence and it was erroneous; and
  - e. The learned trial magistrate's judgment on quantum was wholly not supported in law by evidence tendered in court by the parties.
3. Through a plaint dated 29<sup>th</sup> May 2019, the plaintiff/respondent herein filed a suit seeking judgment against the defendant/appellant herein for a refund of Kshs.500,000/= plus 50% being liquidated damages for breach of agreement, costs of the suit and interest. It was the plaintiff/respondent's case that on 05<sup>th</sup> June 2017, she entered into an agreement with defendant/appellant for purchase of parcel number Gaturi/Githimu/1593 for Kshs.800,000/=. That the plaintiff/respondent proceeded to pay a deposit of Kshs.200,000/= for this transaction. She further stated that on 08<sup>th</sup> November 2018, the plaintiff/respondent entered into another agreement to purchase the defendant/appellant's land parcel number Rwika/Plot No. 19 at Kshs.500,000/=. That she paid Kshs.300,000/= as down payment for this transaction. That the defendant/appellant became elusive and refused to transfer the title to her but she transferred them to third parties.
  4. The defendant/appellant filed a statement of defense in which she denied the averments made in the plaint.
  5. During the hearing, PW1 was the respondent who stated that the appellant had agreed to sell to her parcel number Gaturi/Githimu/1593 for Kshs.800,000/=. That she paid Kshs.200,000/= and left a balance of Kshs.600,000/=. That later, she changed her mind and did not want to buy the plot anymore because it was on a slope and it wouldn't have been feasible for building a house. That when she told the appellant her reservations about the purchase, the appellant offered to sell to her parcel number Rwika/Plot No. 19 for Kshs.500,000/= and she paid Kshs.300,000/= as deposit. That after a while, the appellant did not reach out to transfer the land to her, forcing her (PW1) to demand for the title. That the appellant told her that she is no longer interested in selling the property to her. That upon conducting searches on the properties, she realized that they were not in the appellant's names.
  6. The appellant did not tender her evidence in court because on the scheduled hearing date, there was no appearance and the court noted that the appellant was duly served with the hearing notice and there was an affidavit of service on record. The trial magistrate proceeded to determine the matter, entering judgment against the appellant and awarded the respondent damages of Kshs.500,000/=.
  7. The appeal herein was canvassed by way of written submissions.
  8. The appellant submitted that the trial magistrate erred in awarding damages for breach of the 2 agreements yet she herself wrote in her judgment that the respondent failed to prove breach of contract. She urged the court to focus on this error and find that there was no basis for awarding damages since the determination of the trial court was not based on evidence. That the suit should have been dismissed since the evidence was found to be lacking. That even though the trial magistrate stated that the appellant had been served with a hearing notice and an affidavit of service was on record, the same was not on record and the appellant was denied a chance to defend the suit. That all along, the appellant was willing to refund the respondent Kshs.300,000/= for the consideration paid on the 2



sale agreements but no consent was reached and the matter proceeded to hearing where the respondent failed to demonstrate breach of contract.

9. On her part, the respondent submitted that the appeal herein is incompetent, having been filed out of time without the leave of court. That the appeal is contemptuous and it defied the provisions of Section 79G of the *Civil Procedure Act*. She relied on the case of *Gerald M'limbine v. Joseph Kangangi* (2009) eKLR where the court reiterated the importance of a party seeking leave before lodging an appeal out of time. That the court granted leave to appeal out of time on condition that the appellant deposits the decretal sum in court within 14 days of the ruling failing which the appeal shall stand dismissed. That the period given ended and that the appeal herein stands dismissed regardless of whatever other steps were taken by the appellant after the 14 days period allowed.
10. She placed reliance on the cases of *Republic v. Ahmad Abolfathi Mohamed & Another* (2018) eKLR and *Shimmers Plaza Limited & National bank of Kenya Limited* (2015) eKLR where the courts held that disobedience of court orders must be firmly dealt with. As to whether the court should issue an order for retrial, she submitted that before the hearing date, the appellant failed to attend court even when the date was taken by consent. That the hearing notice was duly served to her and an affidavit of service was on record but she failed to attend court on the said date.
11. She submitted that the appellant has approached the court with unclean hands through this appeal which is an abuse of the court process and an academic exercise. That the appellant was given an opportunity to be heard but she squandered the same and so there is no need to roll back the wheels of justice in a manner that would serve an injustice to another party. That the damages were correctly awarded based on the available evidence and she relied on the cases of *Simon Thuo Mwangi v. Unga Feeds Limited* (2015) eKLR and *Esther Wamaiitha Njibia & 2 Others v. Safaricom Ltd* (2014) eKLR. She urged the court to guard judicial time by dismissing the appeal.
12. The issues for determination are as follows:
  - a. Whether the appellant was denied a right to be heard; and
  - b. Whether the trial court erred in awarding damages based on the reasoning it gave.
13. In her analysis of the issues, the trial magistrate dwelt on failure by the respondent to conduct due diligence before purchase as a prerequisite for land acquisition. However, the issue before the court was commercial in nature and should not have been tied up on a subject that would have ordinarily be a preserve of the Environment and Land Court. Being an appeal before this court, the determinable issues are only those touching on the commercial aspects of the transaction. In determining the said issues, this court, being a first appellate court, is required to revisit the evidence adduced at the trial and re-evaluate it (see the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123)
14. The matter was scheduled for hearing on 09<sup>th</sup> September 2021 but on that day, none of the parties attended court. The court ordered that hearing be rescheduled to 21<sup>st</sup> October 2021 and that a hearing notice to issue in that regard. A hearing notice indeed was issued and the same was dated 09<sup>th</sup> September 2021 and it was served upon the appellant. According to the affidavit of service dated 18<sup>th</sup> October 2021, the appellant was served at her office at Jubilee Pamoja House by appending the hearing notice on the door of the office, being sufficient service. On the hearing date, the appellant did not attend court and the trial magistrate noted that she was duly served and an affidavit of service was on record. She proceeded to take the evidence of the respondent and allowed her 14 days to file her submissions before writing her judgment.



15. From the foregoing, and from perusing the trial court record, the appellant was duly served with the hearing notice but she failed to attend court. The appellant, indeed, had a right to be heard in court. This right was to be exercised in compliance with the laid down rules of procedure and without abusing the court process or wasting judicial time. The orders of the court that a hearing notice should issue were complied with by the respondent who effected sufficient service upon the appellant by pinning the hearing notice on her door, in accordance with Order 5 Rule 14 of the Civil Procedure Rules.
16. An affidavit of service deposed by one Charles Mutiso Muli stated the circumstances under which the service was effected as required under Order 5 Rule 15 of the *Civil Procedure Rules*. Therefore, the appellant's right to be heard was not infringed as she was notified of the hearing date. It then follows that if the appellant failed to attend the hearing and give her evidence, the prayer that the matter be re-tried is untenable.
17. The second issue is whether the trial magistrate erred in awarding damages of Kshs.500,000/=. From the facts, the respondent intended to buy parcel number Gatari/Kithimu/1593 from the appellant for KShs.800,000/= and she paid a deposit of KShs.200,000/=. A sale agreement dated 05<sup>th</sup> June 2017 was prepared and it indicated that the appellant acknowledged receipt of the deposit paid. The default clause in the first agreement stated that the defaulting party would forfeit 50% of the purchase price as liquidated damages.
18. It was the respondent's case that the parcel of land she intended to purchase was not feasible for building her home and so she entered into a second agreement dated 08<sup>th</sup> November 2018 to purchase parcel number Rwika/Plot No. 19 from the appellant for Kshs.500,000/=. In the second agreement, the appellant acknowledged receipt of Kshs.300,000/=. The default clause in the second agreement stated that the defaulting party would forfeit 10% of the purchase price as liquidated damages. The respondent narrated in her testimony that her efforts to have the appellant transfer the properties to her were futile and that the appellant became unavailable, but at the same time, the searches of both properties revealed that she was not their legal owner. That when the respondent visited her at her home, the appellant told her that she was no longer interested in selling the second plot.
19. From the testimony of PW1, the respondent, she changed her mind about the first property and took the second property which was being offered by the appellant. According to her, a total of Kshs.500,000/= changed hands but there was no property transfer because the properties were not in the appellant's name. The respondent only sought her refund of the deposits paid plus interest and not specific performance. Each of the sale agreements is indeed a contract through which the appellant made an offer which was accepted by the respondent, on the basis of which she paid money for the properties (consideration). The sale agreements even included default clauses on consequences of non-performance, which was loss or interest on the purchase price depending on the defaulting party.
20. The respondent stated that although she had paid Kshs.200,000/= deposit for the first property, she changed her mind about purchasing it and went on to pay another Kshs.300,000/= for the second property. The appellant acknowledged receipt of both amounts through the sale agreements. I reiterate the fact that the 2 properties were not registered in the names of the respondent. The applicant produced official searches to prove as much. The issue of ownership raised also speaks to the fact that the respondent did not have capacity to sell the properties in the first place. In my view, there was indeed breach of the agreements since the respondents received money on properties that she did not have legal ownership to dispose of.
21. This means that the default clauses in the agreements are to be interpreted in favour of the appellant. Subject to the default clauses in both agreements, the deposits paid by the respondent should be



refunded. In the first agreement, the interest is 50% of the purchase price. In the case of the second sale agreement, the default clause stipulates interest of 10%.

22. At this point, it is important to mention that the amounts herein are already quantified and therefore there will be no general damages awarded in a case of breach of contract. (see the cases of *Kenya Tourism Board v. Sundowner Lodges Limited* [2017] eKLR and *Dharamshi v. Karsan* [1974] EA 41)
23. Given my discussion hereinabove, and considering the pleadings, arguments herein and caselaw, I find that the appeal partially succeeds with orders as follows:
  - a. The appellant to pay the respondent Kshs.430,000/= made up as follows:
    - i. Deposit of Kshs.200,000/= paid for L.R. Gaturi/Githimu/1593 plus 50 % of the purchase price as special damages for breach of the first agreement to make a total of Kshs.300,000/=; and
    - ii. Kshs.300,000/= plus 10% of the purchase price for Rwika/Plot No. 19, as special damages making a total of Kshs.330,000/=
  - b. Interests on special damages;
  - c. The awarded special damages shall attract interest from the date of filing the plaint until payment in full; and
  - d. Each party shall bear its own costs of the appeal.
24. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 08<sup>TH</sup> DAY OF MAY, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the Appellant

..... for the Respondent

