



REPUBLIC OF KENYA



**Kamau & 2 others v Kiptanui & another (Civil Appeal
44 of 2022) [2024] KEHC 8163 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 44 OF 2022**

AC MRIMA, J

JULY 5, 2024

BETWEEN

ESTHER GATHONI KAMAU 1ST APPELLANT

SAMWEL KARANJA MWAURA 2ND APPELLANT

EVANS KAMAU MWAURA 3RD APPELLANT

AND

MOSES KIPTANUI 1ST RESPONDENT

DANIEL SUTER TANUI 2ND RESPONDENT

*(Being an appeal from the Judgment and decree of S. K. Mutai (SPM) in Kitale
Chief Magistrate Civil Case No. 282 of 2021 delivered on 12th September 2022)*

JUDGMENT

Background

1. The Appeal subject of this judgment has its roots in the transaction in Suwerwa Plot No. 003174Trans-Nzoia measuring 27.6 acres (hereinafter referred to as ‘the suit property’).
2. In a synopsis, pursuant to the Sale Agreements dated 25th February 2014 and 15th January 2015, Esther Gathoni Kamau, Samuel Karanja Mwaura and Evans Kamau Mwaura, the 1st, 2nd and 3rd Appellants herein respectively, being Administrators and beneficiaries of the Estate of Evans Kamau Mwaura in Kitale High Court Succession Cause No. 260 of 2006 sold to Moses Kiptanui and Daniel Tanui, the Respondents herein, the suit land at a consideration of Kshs. 9,384,000/-.
3. It was alleged that at the time of execution of the Agreements, the Respondents had paid the Appellants Kshs. 2,908,050/- and that the balance of Kshs. 7,100,400/- was to be deposited to the Appellants’



Advocate Fixed Deposit Account pending the successful registration and transfer of the suit land in the names of the Respondents.

4. Before completion, a dispute arose in the Succession Cause, and upon determination, it was held that the Appellants herein, then being the Administrators, had no capacity to sell the suit property on the basis that they were not the legal owners.
5. In the ensuing circumstances, the Appellants' Advocate gave a professional undertaking that in the event the Appellants were found not to be the legal owners, he would release to the Respondents all the consideration with accrued interests.
6. It later turned out that the Appellants were not the owners of the suit land. Despite being requested to effect the undertaking, the Appellants' Advocate refused make the refund. However, upon being sued in Kitale Civil Suit No. 13 of 2019 (OS) the Advocate made good payment. The Court ordered that the remaining amount that had been paid directly to the Appellants herein be refunded or if not, they be sued in a separate suit.
7. The foregoing claim yielded the suit at the trial Court being Kitale Chief Magistrate Civil Case No. 282 of 2021 wherein the Respondents sued for a refund.
8. Upon considering the evidence, the trial Magistrate was of the finding that the Respondents herein were entitled to a refund of Kshs. 2,908,050/-. Judgment to that end was accordingly entered.

The Appeal

9. The Appellants, dissatisfied with the findings of the Trial Court, lodged the instant appeal. It was their position that they received from the Respondents Kshs. 1,570,000/- as opposed to 2,908,050/-.
10. Through the Memorandum of Appeal dated 14th December 2022, they cited the following grounds of Appeal;
 1. That the learned trial magistrate erred in law and in fact by finding that the Respondent had established their case on a balance of probability while the Appellants evidence on record was unsatisfactory (sic).
 2. That the trial magistrate erred in law and in fact in failing to properly analyse the evidence by the Appellants.
 3. That the trial magistrate erred in law and in fact in failing to pay due regard that there was duplicity of documents produced by the respondents during trial and proceeded to admit the same into evidence.
 4. That the trial magistrate erred in law in shifting the burden of proof upon the appellants and in fact in failing to acknowledge that there was no proof that the Appellants acknowledged the principal sum of Kshs. 2,908,050/- claimed by the respondents.
 5. That the trial Magistrate erred in law and in fact in failing to acknowledge that there was an error in Sale agreement produced by the Respondents which had disparity on the acreage and consideration for sale of the parcel of land.
 6. That the learned trial magistrate erred in law and in fact in not finding that the evidence raised by the Appellants was weighty and meritorious as against the Respondent's evidence.
 7. That the learned trial Magistrate erred in law and in fact in failing to have any regard to the principle of substantive justice when dealing with the suit.



The Submissions

11. The Appellants, through Counsel, filed written submissions dated 18th May 2023. It was their case that the agreement in respect of the suit land, approximately 27 acres was for a consideration of Kshs. 8,640,000/- each acre going for Kshs. 320,000/-.
12. They submitted that the total amount they received from the Respondents was Kshs.1,570,000/- which according to them did not form part of the consideration for the property. It was their case that the amount was expended towards obtaining title deeds and other miscellaneous expenses.
13. It was submitted that as per the contract, it was 27 acres and it is not clear if the sale agreement dated 15th January 2015 quoting 27.6 acres at consideration of Kshs. 340,000/- was meant to supplement the first agreement entered on 25th February 2014.
14. It was also submitted that if the subsequent contract was meant to supplement the first one, then a supplementary agreement would have been made.
15. As regards the effect of duplicity of documents, the Appellant submitted that during trial, the 1st Respondent adduced evidence to the fact that for every payment effected, an acknowledgment was prepared and both parties executed it. To that end, they submitted that the payments that was received by Jackson Chege Mwaura were without the knowledge and or consent of the parties who are representatives of the other family members.
16. In conclusion, the Appellants urged the Court that the trial Court erred in failing to acknowledge that there was an error in the sale agreements produced by the Respondents which had disparity on the acreage and consideration for sale of the parcel of land.

The Respondents' case

17. The Respondents urged their case through written submissions dated 10th July 2023. It was their submission that the Appellants were out to hide in an excuse that the contract was fraudulent in order not to be bound by it when in fact it was only was the Succession Court that voided the contract.
18. It was their case that upon being voided, the contracting parties ought to have been restored to the position they were before the contract. The decision in Mahupaper International Ltd & Another -vs- Kenya Commercial Bank Ltd & 2 Others (2003) eKLR was referred to where the requirements that entitle parties to restitution were set out.
19. The Respondents argued that the trial Court did not rewrite the contract afresh between the parties. It was their case that the Appellants did not discharge the burden of disproving the position that there existed a contract which the trial court rightly construed.
20. The Respondents urged this Court to dismiss the appeal with costs.

Analysis:

21. From the parties' pleadings and submissions, there is only one issue for determination in this appeal. It is whether the trial Court misdirected itself in making the finding that the Respondents were owed Kshs. 2,908,050/-.



22. The mandate of a Court exercising its first appellate jurisdiction is settled. As was aptly spelt out by the Court of Appeal in *Susan Munyi v Keshar Shiani* [2013] eKLR, the role of the first appellate Court is to re-look and re-analyse the evidence presented before the trial Court afresh. The Court observed;
- ... As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.
23. Further, in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR the Court set out the role of the first appellate Court in the following terms;
- ... This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.
24. That said, the Court now turns to the issue as to whether the trial Court misdirected itself in making the finding that the Respondents were owed Kshs. 2,908,050/-.
25. As a preliminary observation, the contest as to whether the cost per acre was Kshs. 320,000/- or Kshs. 340,000/- in this Court's view is not relevant for purposes of this appeal. The real contest revolves around proof of the amount of money paid by the Respondents to the Appellants herein.
26. At the trial Court, therefore, the Respondents had the legal burden of demonstrating by way of evidence that indeed they paid Kshs. 2, 908,050/- to the Respondents as opposed to the sum of Kshs. 1,570,000/- which was readily agreed by the Appellants.
27. Upon discharge of the legal and evidentiary burdens by the Respondents, the Appellants herein, based on their statement of defence had the evidentiary burden of disproving the Respondents' case. They had the obligation of showing that the total amount of money received was no more than Kshs. 1,570,000/-.
28. The Court of Appeal discussed the dynamics of legal and evidentiary burden of proof in Civil Appeal No 297 of 2015, *Mbuthia Macharia -vs- Annah Mutua Ndwiga & Another* as follows;
13. ...the Judge alluded to the provisions of section 107 of the *Evidence Act*, which deals with the burden of proof in any case and aptly stated that it lies with the party who desires any court to give judgment as to any legal right or liability, is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading Text Book;- The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:
- The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for



whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues. (emphasis added)

15.
- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence" In this case, the incidence of both the legal and evidential burden was with the appellant. It was upon the appellant to prove that he did not affix his signature on the transfer of the suit premises in favour of the 1st respondent. The appellant did not adduce any such evidence nor did he call any witness. On the other hand, the 1st respondent discharged her evidential burden by placing before court an affidavit by the appellant in which he had sworn on 24th April, 2004; that he bequeathed to the 1st respondent the suit premises and a transfer dated 3rd September 2008 in favour of the 1st respondent which displaced his claim that the 1st respondent had stolen the title as the said transfer was effected after a new title was issued.
29. Before the trial Court, the 1st Respondent herein testified as PW1. It was his evidence that the land he bought from the Administrators was 27.6 acres at a consideration of Kshs. 9,384,000/=.
30. It was his further evidence that he entered into an agreement on 25th February 2014 and paid the Kshs. 50,000/- and gave them a banker's cheque of Kshs. 1,000,000/-. He produced the acknowledgment receipts.
31. He produced the Funds Transfer Document for the said Kshs. 1,000,000/- from Kenya Commercial Bank Limited as PExh. 2.
32. He testified further that the 2nd Respondent herein deposited into the Respondent's account Kshs. 150,000/- produced as PExh. 4 and there was a further deposit by his brother's wife by way of M-Pesa of Kshs. 50,000/-. He marked the M-Pesa statement for Identification as MFI-5.
33. The 1st Respondent further produced payment acknowledgement of Kshs. 200,000/- deposited to the Appellants' Equity Bank Account on 14th December 2015 as PExh 6.
34. It was his case that there was no acknowledgement of M-Pesa transfer of 11th December 2019 as it was to facilitate succession case.
35. In defence, Evans Mwaura, the 3rd Appellant herein, testified as DW1. It was his case that they sold the suit land, a portion of 27 acres to the 1st Respondent for Kshs. 320,000/ per acre. It was his evidence that they received 1,570,000/- from the Respondents.
36. They denied knowledge of money paid to Jackson Mwaura and stated that he did not know Evans Kimaiyo and neither could he recall money sent by Daniel Suter. It was his case that they were ready to pay Kshs. 1,500,000/=.
37. This Court will now refer to the documentary evidence of payment and pit it against the oral evidence of the witnesses.
38. On 25th February 2014 Esther Gathoni Kamau, Jackson Chege Maura, Samuel Karanja Mwaura, Evans Kamau Mwaura and James Waweru Mwaura acknowledged receipt of Kshs. 50,000/-. This was produced as PExh.1.



39. On 11th December 2014, the 2nd Respondent herein transferred Kshs. 150,000/- to Jackson Chege Mwaura.
40. On the same date (11th December 2014), Eunice Kimaiyo, of Telephone Number 7237218** sent Kshs. 50,200/- to Jackson Mwaura Chege. The M-Pesa transaction was produced as PExh.5.
41. Subsequently, on 5th March 2014, Easter Gathoni Kamau, Jackson Chege Mwaura, Samuel Karanja Mwaura, Evans, Kamau Mwaura, James Waweru Mwaura, Geoffrey Maigwa Mwaura, Johnson Ndungu Mwaura and Muchiri Mwaura acknowledged receipt of Kshs. 1,000,000/- from Daniel Tanui c/o The 1st Respondent herein. The monies were paid to Equity Bank Nyahururu, Account No. 01601953727*.
42. The Bank Application Form for Funds Transfer for the above transaction was produced as PEx.2.
43. On 14th February 2015, Esther Gathoni Kamau, Samuel Karanja Mwaura and Evans Kamau Mwaura acknowledged receipt of Kshs. 200,000/-. It was deposited in Equity Bank Account No. 0300191695* in Ol Kalou.
44. For orderly appreciation of the monies that changed hands as acknowledged by the Appellants herein, the list hereunder will suffice;
 - i. Acknowledgment dated 25th February 2014 of Kshs. 50,000/-.
 - ii. Acknowledgment dated 5th March 2014 of Kshs. 1,000,000/-.
 - iii. Acknowledgment dated 15th October 2015 of Kshs. 220,000/-.
 - iv. Acknowledgement dated 14th December 2015 of Kshs. 200,000/-.
 - v. Acknowledgment dated 31st November 2018 of Kshs. 100,000/-.
45. There is also 'Funds Transfer' of Kshs. 150,000/- by the 2nd Respondent herein to Jackson Chege Mwaura.
46. The Court will turn to the M-Pesa transactions all received by Jackson Chege Mwaura. They are as follows;
 - i. Transaction dated 22nd April 2015 of Kshs. 48,000/-
 - ii. Transaction dated 31st July 2015 of Kshs. 50,000/-
 - iii. Transaction dated 18th August 2015 of Kshs. 10,000/-
 - iv. Transaction dated 3rd September 2015 of Kshs. 5,000/-
 - v. Transaction dated 16th September 2015 of Kshs. 10,000/-
 - vi. Transaction dated 12th October 2015 of Kshs. 10,000/-
 - vii. Transaction dated 4th April 2015 of Kshs. 5,000/-
47. Cumulatively, the amount variously received by the Respondents is Kshs. 1,858,000/-. From this Court's computation, a deduction of Kshs. 288,000/- being the money received by Jackson Mwaura, results to Kshs 1,570,000/- which is amount of money the Appellants do not contest.
48. It, therefore, can be deduced that what is in contest is the amount received by the 4th Appellant. The Appellants contended that the said sum of Kshs. 288,000/- was not received in respect of the suit property.



49. For clarity, the amount contested is the KCB Funds Transfer dated 11th December 2014 of Kshs. 150,000/- effected by the 2nd Respondent upon Jackson Mwaura and all the M-Pesa transactions as captured in paragraph 45 herein above.
50. There is no doubt, from the various payment acknowledgments produced in Court that, the Appellants, differently constituted, including Jackson Mwaura, received funds in respect of the suit property.
51. Surprisingly, the said Jackson Chege Mwaura, who was the 4th Defendant in the trial Court, was dropped out as an Appellant in the instant appeal. There was no explanation from the Appellants as to why he was not part of the appeal.
52. Be that as it may, the claim that Jackson Mwaura did not receive money in respect of the suit property ought to have been raised by the Appellants right from the trial Court and evidence to that end adduced. That, did not happen.
53. That said, this Court finds that from the evidence, the money, cumulatively received by the Appellants is Kshs. 1,858,000/-. The pleaded amount of Kshs. 2,908,050/- was not proved at the trial Court.
54. The trial Court's finding that the amount paid to the Appellants was Kshs. 2,908,050/- was without evidence. There appears to have been an error of duplicity in summation of the Appellants' 'Payment Acknowledgment' dated 5th March 2014 of Kshs 1,000,000/- and the Funds Transfer of a similar amount of the same date.
55. The above is further affirmed through the Plaintiffs' List of Documents dated 5th July, 2021 filed in the civil suit. In the said list, there is an Acknowledgment of payment for Kshs. 1,000,050/= dated 5th March 2014. There is also a Bank Funds Transfer Form for Kshs. 1,000,000/= again dated 5th March 2014. These two documents related to the same transaction. However, the trial Court considered the same as separate payments and that is where the issue of conflict arose. If the two items are rightly considered as one, then the total amount due shall be Kshs. 1,858,000/- and not Kshs. 2,908,050/= as decreed in the impugned judgment.
56. In the end, the appeal must partly succeed.

Disposition:

57. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
58. In the end, the following final orders hereby issue: -
 - a. The appeal partly succeeds.
 - b. The finding by the trial Court that the Respondents were owed Kshs. 2,980,050/- was without evidence and is hereby set aside. It is hereby substituted with amount of Kshs. 1,858,000/-.
 - c. For clarity, the Appellants herein shall refund the Respondents the sum of Kshs. 1,858,000/-.
 - d. Since the appeal has partly succeeded, each party to bear its own costs.



59. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 5TH DAY OF JULY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Miss. Mwaniki, Counsel for the Appellant.

Miss Ngeiywo for Mr. Songole, Counsel for the Respondent.

Chemosop/Duke – Court Assistants.

