



**Bundotich v Rotich (Environment and Land Appeal E003 of 2024)
[2025] KEELC 4615 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4615 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E003 OF 2024**

**L WAITHAKA, J
JUNE 12, 2025**

BETWEEN

PATRICK BUNDOTICH APPELLANT

AND

IRENE JELAGAT ROTICH RESPONDENT

*(Being an appeal from the judgment and decree of R. Koech SPM delivered
on 25th January 2024 in Eldama Ravine ELC Case No. 27 of 2021)*

JUDGMENT

Introduction

1. The circumstances giving rise to this appeal are that the trial magistrate dismissed the appellant's suit in the lower court and allowed the respondent's defence and counterclaim.
2. The suit in the lower court to wit Eldama Ravine SPMC ELC Case No. 27 of 2021 was in respect of the parcel of land known as L.R No. Lembus/Kabunyony/ Moringwa/ 994 measuring 1.0 hectare (hereinafter referred to as the suit property). In the suit, the appellant sought the following reliefs against the respondent: -
 - a. A declaration that he (the plaintiff) is the legal/registered owner of the suit property;
 - b. A declaration that the defendant is a trespasser over the suit property;
 - c. A permanent injunction to restrain the defendant from entering into, saw milling, fencing, constructing, leasing, selling or in any way interfering with the use and occupation of the suit property;
 - d. An order of eviction against the defendant by herself, agents, servants, employees and/or any one claiming through her from residing, saw milling and in any way using the suit property;



- e. General and special damages;
 - f. Costs of the suit and interest;
 - g. Any other relief the court may deem fit to grant.
3. As can be discerned from the averments in the face of the plaint, the plaintiff's suit was premised on the grounds that the plaintiff is the registered proprietor of the suit property which he purchased from Cornelius Kipngetch Tallam (hereinafter referred to as the seller) sometime in the year 2015/2016 and that the suit property was transferred to the plaintiff on 15th January, 2020.
 4. The appellant acknowledged that the suit property had been sold to the defendant before it was sold to him but contends that the defendant had breached the terms of the contract entered into between the respondent and the seller leading to rescission of the contract by the seller.
 5. It was the plaintiff's case that the defendant/respondent was offered refund of the amount paid in respect of the rescinded contract but she refused to take it.
 6. It is the plaintiff's further case that the suit property was exchanged with another parcel of land known as Uasin Gishu/Chegeya Settlement Scheme/494 which the plaintiff/appellant bought for the seller on 6th November, 2018.
 7. The plaintiff/appellant contended that the defendant/ respondent did not have the legal right to remain on his land because the contract she had with the seller was rescinded.
 8. Terming the actions of the defendant/respondent complained of illegal, unprocedural, unconstitutional and trespass to land, the plaintiff/appellant lamented that efforts to have the defendant/respondent remove the structures she had erected on the suit property were futile.
 9. Explaining that owing to the actions of the defendant/respondent complained of he had suffered loss and damage, the plaintiff/appellant urged the court to grant him the reliefs sought.
 10. The defendant filed a statement of defence and counterclaim, dated 9th February 2022, in which she denied the allegations levelled against her.
 11. By way of counterclaim, the defendant sought judgment against the plaintiff for: -
 - a. An order for cancellation of the plaintiff's title over the suit property;
 - b. An order for subdivision of the suit property to excise a portion measuring 0.75 acres or thereabout in her favour;
 - c. An order for her registration as the owner of the portion to be excised which she had been in possession and occupation since 2010;
 - d. An order for the plaintiff to sign all necessary documents to facilitate the process failure of which the court can sign on his behalf;
 - e. An order of injunction restraining the plaintiff by himself, his servants, agents and/or employees from claiming, trespassing, selling, charging, threatening him and/or in any other way interfering with his portion of land comprised in the suit property;
 - f. Costs of the suit;
 - g. Any other relief the court may deem fit to grant.
 12. The plaintiff filed a reply to defence and defence to counterclaim reiterating his pleaded case.



13. When the case came up for hearing, parties by themselves and through their witnesses led evidence reiterating their pleaded cases.
14. Upon considering the case urged before him, the learned trial magistrate dismissed the plaintiff's suit and allowed the defendant's defence and counterclaim. In so doing, the learned trial magistrate *inter alia* stated/held: -

“It is apparent that the suit property was a subdivision from the parent title which is LR No. Lembus/ Kabunyony/Moringwo/37 which was registered in the name of Chelilis Cheptoo who is the late father of Cornelius Kipnetich Tallam who testified as P.W.2. It is not disputed that the defendant bought 0.75 acres from PW2 for a consideration of Kshs. 300,000/-. What is disputed is whether or not the defendant paid PW2 the entire sum of Kshs. 300,000/-. Both the plaintiff and PW2 contend that the defendant did not complete the transaction while the defendant insists that she paid the entire consideration.....

PW2 appeared to this court to be lying through his teeth. Even though he denies being paid the balance of the purchase price by the defendant; the defendant produced acknowledgement of receipt of the balance only signed by PW2. On the basis of the evidence on record, I do find that the defendant paid the full purchase price of Kshs.300, 000/- and there was no justification for PW2 to purport to rescind the land sale agreement he executed on 13/2/2010.

There was no justification for both the plaintiff and PW2 to secretly transfer the suit property to the plaintiff including the portion that had been lawfully purchased by the defendant. Even though the plaintiff is the registered owner of the suit property, a portion of the suit property measuring 0.75 acres rightly belongs to the defendant and ought to be transferred to the defendant as of right.

I do not find any merit in the plaintiff's suit against the defendant and I do dismiss the suit with costs to the defendant. I do find the defendant who is the plaintiff in the counterclaim has proved the counterclaim on a balance of probabilities to warrant the grant of the orders claimed in the said counterclaim...”

15. Dissatisfied with the judgment/decision of the trial court, the plaintiff (now appellant) appealed to this court on grounds that the learned trial magistrate erred by: -
 - a. Dismissing his suit with costs;
 - b. Holding that his suit was not meritorious;
 - c. Directing him to transfer a portion of his land to the respondent within 90 days;
 - d. Failing to review the evidence submitted before him and the fact that he (the plaintiff) had also bought an alternative piece of land for the seller and that he had been mandated by the seller's family members to do so;
 - e. Failing to consider the fact that the respondent was indolent and/or slept on her rights by failing to secure a title deed within reasonable time; and
 - f. Failing to find that the respondent violated the terms of the agreement/contract dated 13th February, 2010.

The appellant prays for:

- a. A declaration that he (the appellant) is the legal registered owner of the suit property;



- b. An order of permanent injunction restraining the respondent by herself, her heirs, agents, servants, employees and/or anyone claiming through her, from entering into, sawmilling, fencing, constructing, leasing, selling or in any way interfering with the use and occupation of the suit property measuring approximately 1.0 ha registered in his favour;
 - c. An order of eviction against the respondent by herself, her agents, servants, employees and/or anyone claiming through her, from the suit property;
 - d. Cost of the appeal;
 - e. Any other relief that the court may deem fit and just to grant.
16. Pursuant to directions given on 19th December 2024, the appeal was disposed off by way of written submissions.

Appellant's submissions

17. In his submissions filed on 28th March, 2025 the appellant identified five (5) issues for the court's determination. These are: -
- i. Whether the respondent breached the agreement of sale dated 13th February, 2010;
 - ii. Whether the suit property was available for purchase/exchange;
 - iii. Whether the respondent has a lawful claim of the portion of 0.75 acres acquired within the property known as LR. No. Lembus/Kabunyonyi/ Moringa/ 994;
 - iv. Whether the appellant is entitled to the prayers sought in the plaint dated 20th December 2021;
 - v. Whether the advocate who wrote the sale agreement and is representing the respondent, can amount to conflict of interest.
18. On whether the respondent breached the agreement of sale dated 13th February 2010, based on the terms of the sale agreement dated 13th February 2010 and acknowledgement notes dated 20th August, 2010 and 10th February, 2012 which show that payment of the purchase if paid in full was paid outside the time stipulated in the sale agreement, coupled with the admission by the respondent that she paid the balance of the purchase price outside the time stipulated in the sale agreement, the appellant submits that the default in payment of the purchase price in accordance with the conditions set in the sale agreement rendered the transaction void.
19. Regarding payment of the balance for purchase of the suit property, it is pointed that the seller who testified as P.W.2, testified that he never signed the acknowledgement of payment notes. Terming the acknowledgement notes forged documents owing to the signatures therein not being the same, the appellant maintains that the sale agreement executed between the seller and the respondent was breached by the respondent by failing to pay the purchase price as per the sale agreement, dated 13th February, 2010.
20. Based on the decision in the case of National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2011)e KLR, where it was held that a court of law cannot rewrite a contract between parties and that parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved and the decision in the case of William Kazungu Karisa vs. Cosmas Angora Chanzera (2006) e KLR, where the court held that the basic rule of law on contract is that parties must perform their respective obligations in accordance with the terms of the contract executed by them; based on the definition of breach of contract in Black's Law Dictionary, 9th Edition, page 213, the appellant



maintains that the respondent breached the terms of the contract executed between him and the seller (P.W.2) leading to rescission of the contract by the seller.

21. On whether the suit property was available for purchase/exchange, arguing that he was forced to intervene to save the seller P.W.2, who was being abused by the respondent and faulting the respondent for having taken long to obtain title to the portion of the suit property he had bought, claiming that the consideration received by the seller had been refunded and that he had the sanction of seller's family to buy the suit property, the appellant submits that the suit property was available for purchase/exchange.
22. On whether the respondent has a lawful claim of the portion of 0.75 acres acquired within the property known as LR. No. Lembus/Kabunyonyi/Moringa/994 and is entitled to the orders sought in the plaint, it is the appellant's case that the respondent does not have a valid and lawful claim to the portion of the suit property she claims because the suit property is currently registered in his name; that she is not entitled to the orders sought as she obtained the suit property through a process tainted with fraud, which fraud she knew of. His title is therefore, impeachable under Section 26 of the [Land Registration Act](#), 2012.

Respondent's submissions

23. In her submissions filed on 25th April 2025, the respondent framed seven (7) issues for the court's determination. These are;
 - a. Whether the portion of land sold/bought by the respondent from Cornelius Kipngetich Talam (P.W.2) was available for exchange between the appellant and P.W.2;
 - b. Whether the estate of the deceased was holding the land in trust as there existed a 'constructive trust' between the administrators of the said estate and the respondent;
 - c. Whether the contract between the respondent and P.W.2 was binding?
 - d. Whether the act of exchanging the suit property between the appellant and P.W.2 was proved in court;
 - e. Whether the trial court adjudicated the question of conflict of interest;
 - f. Whether the purported agreement or arrangement of exchange of the suit property with alternative land between the appellant and P.W.2 is binding to the respondent in the absence of express contract with a clause referring to the respondent;and
 - g. Who is entitled to costs.
24. The respondent points out that the portion of the suit property she bought from the respondent was to be created from the parcel of land known as Lembus/ Kabonyony/Moringwo/37 belonging to the estate of seller's father. It is the respondent's case that she took active possession of the suit property upon buying it and paying the purchase price of Kshs. 300,000/- and installed 3-phase electricity. According to the respondent, the seller (P.W.2) was to transfer the portion she bought upon succession of the estate of the deceased comprised in the portion of the suit property she bought.
25. As to whether the land was available for exchange between the appellant and P.W.2, based on the fact that the property was subject of the sale agreement between her and P.W.2 and that it was also subject of succession proceedings, the respondent submits that the land was not available for exchange between the appellant and P.W.2. In that regard, the respondent makes reference to the case of, In the Estate of Kamatu Kabara Succession Cause 340 of 2012, where the court held that it's trite law that a purchaser



is not a beneficiary of an estate that is subject to a succession cause if the sale agreement was done after the death of the deceased and before the confirmation of grant as it violates the terms of the Law of Succession.

26. Terming the decision of P.W.2's family endorsing the sale of a portion of the suit property to the appellant among other persons intermeddling with the estate of the deceased, the respondent reiterates his contention that the suit property was not available for sale or exchange with another parcel of land.
27. It is the respondent's case that the substratum of the appellant's claim has no nexus with the alternative land allegedly exchanged with the suit property.
28. On whether the estate of the deceased was holding the land in trust on account of a constructive trust which existed in respect thereof between the administrators of the estate and the respondent, the respondent submits that based on the fact that the family of the deceased knew that the respondent had bought a portion of the suit property from P.W.2, a fact confirmed by the family's minutes produced in evidence by the appellant, the respondent, based on the decision in the case of Paul Maina Kangethe vs. Robert Ngeno & Hezron Kimeli Cheruiyot ELC Case No.67 of 2014, submits that there existed a trust relationship between P.W.2 and the appellant that he would hold the title then transfer it to a third party, the respondent.
29. Terming the action of the appellant of transferring the suit property to himself unjust enrichment, the respondent submits that the trial court properly trained itself when it ordered transfer of the portion of the suit property bought by the respondent to the respondent.
30. On whether the contract between the respondent and P.W.2 was binding on the parties thereto, contending that there is no proof of revocation of the contract, the respondent submits that the contract is still valid.
31. As to whether exchange of the suit property between the appellant and P.W.2 was proved in court, because no written agreement of the alleged exchange was produced in court, the respondent submits that no such contract exists.
32. Concerning the appellant's argument that the respondent lost her right to the suit property because she took long to acquire title in respect thereof, hence was indolent, the respondent points out that the question of indolence was never pleaded in the course of trial and submits that this court cannot be invited to adjudicate it. Because the suit property was subject of succession proceedings, the respondent submits there was good reason for the delay in transferring the portion sold to her.
33. On whether the trial court adjudicated the question of conflict of interest, it is pointed out that the issue was raised during trial and the trial court adjudicated upon it. It is the respondent's case that no real mischief or prejudice in any colour was pleaded and that this court cannot construe perceived prejudice suffered by the appellant in the course of trial in the lower court.
34. As to whether the purported agreement or arrangement between the appellant and P.W.2 was binding on the respondent yet she was not a party to it, the respondent points out that there is no written agreement referencing her and/or proving that the suit property was exchanged with another. Based on the decision in the case of Joseph Gatia Wambugu v Muriuki Wambugu, Peter Njiru Moses & 5 others (IPs) (2019) e KLR, where the court emphasized the need to comply with the provisions of Section 3(3) of the *Law of Contract Act*, the respondent inter alia submits that it defeats logic and is out of the ambit of this court to interrogate contracts which the court had no benefit of or knowledge and not on the court's record.



35. Urging this court to limit itself to the issues raised in the parties' pleadings, the respondent submits that the contention that the trial court failed to find that the respondent violated the terms of the agreement was never raised during trial. The respondent terms that contention a guise to shield himself from the effects and consequences of the judgment.
36. On who is entitled to costs, the respondent submits that costs follow the event and terming the appeal lacking in merit, urges this court to dismiss it with costs to her.

Analysis and determination

37. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see *Selle & Another vs. Associated Motor Boat Co. Ltd* (1968) E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988) KLR 348.
38. As can be discerned from the pleadings filed in the suit hereto, it is acknowledged/admitted that the defendant in the main suit entered into a contract of sale of a portion of the suit property with the seller (P.W.2) way before the portion sold to the defendant was sold to the plaintiff by P.W.2 on the ground that the defendant had breached the contract leading to rescission of the contract by the seller, P.W.2.
39. As rightly observed by the learned trial magistrate, the only issue arising from the pleadings concerning the contract entered into between the defendant and the seller is whether the defendant paid the entire purchase price or merely paid a portion of it (Kshs. 120,000/-) as claimed by the defendant.
40. Concerning that issue, the defendant produced evidence in the form of acknowledgement of payment receipt of the purchase price signed by the seller. Whereas the seller maintained he never received the balance of the purchase price and claimed that the acknowledgement of payment receipt produced by the defendant in evidence were forged, he did not produce any evidence capable of proving that fact.
41. The trial court based on the demeanor of the seller, found the testimony of the seller to the effect that he was not paid the whole of the purchase price to be incredible. There being no evidence produced by the plaintiff/appellant that can form the basis of this court determining that the trial magistrate erred and/or misdirected himself on the issue of payment, this court has no basis of arriving at a verdict different from that reached by the learned trial magistrate on that issue.
42. I have reviewed the sale agreement executed between the respondent and the seller P.W.2, which is found on page 15 of the record of appeal. The agreement merely indicates that the balance of the purchase price of Kshs. 180,000/- would be paid on or before 3rd March, 2010. There is no indication as to what would happen if payment was not made within the time stipulated in the sale agreement. Worthy to note is that possession passed upon payment of the deposit. If parties intended that none failure to pay would lead to rescission of the contract, they would have expressly stated so and provided for what would happen to the deposit received and the possession already given. The totality of the evidence adduced in this case, which includes receipt of the balance of the purchase price way after the time stipulated in the sale agreement can only lead to conclusion that time was not of essence. In view of the foregoing, whilst there is evidence that the respondent did not pay the purchase price within the time stipulated in the sale agreement, from the conduct of the parties, in particular payment of the purchase price by the respondent after time within which it ought to have been paid had lapsed, the acceptance of the balance of the purchase by the seller, P.W.2, negates a finding that the contract was



breached thereby leading to rescission of the contract by the seller. No evidence capable of proving that fact was adduced. P.W.2's claim that he did not receive the balance of the purchase price was, on account of his demeanor, found by the trial court to be unbelievable. There is no evidence or grounds that have been placed before this court to warrant interference with that finding/ determination by the trial court.

43. On the issue of conflict of interest by the respondent's advocate, it is the considered view of this court that the issue cannot avail the appellant the reliefs sought because the appellant did not demonstrate to the court that he suffered any prejudice on account of the failure of the trial court to bar the respondent's counsel from representing the respondent on account of the alleged conflict of interest. Most importantly, the issue was not raised in the parties' pleadings. There was also no indication that the appellant desired to avail the respondent's counsel as a witness. The alleged conflict of interest, if found to exist, would only form a ground for recusal or barring the respondent's counsel from representing the respondent but would not form a ground/basis of defeating the respondent's proven rights to the suit property.
44. This being a case of two equities regarding sale of the parcel of land that resulted in the suit property by P.W.2, and the respondent being the first to acquire interest in the suit property, her right over the suit property, in the circumstances of this case, takes precedence over that of the appellant. In the circumstances, I find and hold that the learned trial magistrate did not err by dismissing the appellant's case and allowing the respondent's defence and counterclaim.
45. Consequently, I dismiss the appeal with costs to the respondent.
46. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 12TH DAY OF JUNE 2025.

L. N. WAITHAKA

JUDGE

In the presence of:-

Mr. Tarigo for the appellant

Mr. Sirma for the respondent

Court Assistant: Lilian

