



**Apiyo v Omwa (Environment and Land Appeal E016 of 2023)
[2025] KEELC 6440 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6440 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E016 OF 2023
E ASATI, J
SEPTEMBER 25, 2025**

BETWEEN

JOSHUA OBUDHO APIYO APPELLANT

AND

GEORGE OTIENO OMWA RESPONDENT

(Being an appeal from the decision and judgement of the learned Principal Magistrate at Kisumu (the Honourable M. C Nyigei) dated 28th August 2023) in the original KISUMU CM ELC CASE NO 423 OF 2018 (Formerly KISUMU HCC NO 106 OF 2010)

JUDGMENT

Background

1. A brief background to the appeal herein is that vide a plaint dated 10th August, 2010, the Respondent sued the Appellant in the High Court of Kenya at Kisumu in Kisumu HCC No.106 of 2010 in which the Respondent claimed that he had purchased a portion of land known as Kisumu/Korando/1288 from the Appellant at a consideration of Kshs.17,500 which the Appellant became unwilling to transfer to him. The Respondent therefore sought a declaration that he was the absolute owner of land parcel No. Kisumu/Korando/1288, an order directing the Appellant to sign the transfer documents in respect of the suit land in the alternative the court to sign the documents. The Respondent also sought for cost of the suit.
2. The record shows that the suit was later transferred to Environment and Land Court and registered as Kisumu ELC Case No.724 of 2015.
3. The plaint was also amended and replaced with the amended plaint dated 13th December, 2016 in which the relief sought by the Respondent was for specific performance of the agreement dated 17th August, 1991, a refund of Kshs.783,000/- being the current market value of the land, special damages and costs.



4. In response, the Appellant filed a Statement of Defence which was later amended and replaced with the Amended Statement of Defence dated 18th November, 2018 vide which the Applicant averred that even if there was ever any agreement dated 5th April, 2015 the same was illegal and null and void by reason of the fact that the same was made under threats, duress, intimidation and coercion from the Respondent who was aware that the dispute was already in court and subjudice and that the Appellant did not consult his family.
5. The Appellant further averred that there was no valid and enforceable agreement between the parties herein.
6. That if there was any agreement for sale of any portion of the suit land, the same because illegal and null and void for non-compliance with the Law of Contract Act Cap 23 and Section 6(1) of the Land Control Act Cap 302 and that the Respondent's suit was barred by the statute of limitation and was bad in law. That the amended plaint was bad in law as it was not accompanied with a Verifying Affidavit.
7. The suit was later vide a court order made on 19th September, 2018 transferred to the Chief Magistrate's Court at Kisumu as Kisumu CMC ELC Case No 423 of 2028 for hearing and determination.
8. The record shows that the suit was subsequently heard before the trial court and judgement delivered on 28th August, 2023 that the Respondent had proved his case on a balance of probabilities. The court ordered the Appellant to make good the claim and pay the balance of Kshs.783,000/-, costs of the suit and interest at court rates.
9. The claims for specific performance, general and special damages were declined.

The appeal

10. Aggrieved by the judgement, the Appellant preferred the present appeal vide the Memorandum of Appeal dated 21st September, 2023 on the grounds that:-
 1. having found that the agreement dated 5th April, 2015 was drawn while the case was pending in the lower court but in the absence of the advocates on record for the parties the learned Magistrate gravely erred in law in failing to hold that the same amounted to overreaching and was oppressive and unconscionable and therefore unenforceable.
 2. the learned Magistrate gravely erred in law in rejecting the Appellant's case that he was in a disadvantaged position due to illiteracy merely because the agreement dated 5th April, 2015 was drawn at the Appellant's home.
 3. the learned Magistrate gravely erred in law and in fact to find and hold that there was no consensus ad litem on whether the Appellant had agreed to refund Kshs.800,000/- or only Kshs.17,500/- in light of the fact that the person who drew the agreement dated 5th April, 2015 was not called to corroborate what was agreed and that further in the light of the Appellant's advanced age and illiteracy, which were not disputed.
 4. the learned Magistrate erred in law in failing to properly analyze the evidence presented in the lower court and in particular in failing to consider at all the Appellant's evidence as contained in his witness statement dated and filed on 28th January, 2020, to the effect that what he had agreed to refund was only Kshs.17,500/-.
 5. the learned Magistrate erred in law in failing to consider and make any findings on the Appellant's written submissions in the lower court.



6. The decision was against the weight of the evidence.
11. The Appellant seeks in this appeal, for an order that the appeal be allowed, that the honourable court be pleased to set aside and/or vary the order of the Principal Magistrate dated the 28th day of August, 2023 requiring the Appellant to refund Kshs.783,000/- and pay costs to the Respondent and for further orders that the Respondent's suit in the lower court be dismissed and further that the costs of this appeal as well as the costs in the lower court be awarded to the Appellant.

Submissions

12. Pursuant to directions given on 20th November, 2024, the appeal was heard by way of written submissions. On behalf of the Appellant, written submissions dated 15th January, 2025 were filed by Moses J.A. Orengo Advocate for the Appellant.
13. No submissions were filed on behalf or by the Respondent. The record shows that on 20th February, 2025. Counsel for the Respondent requested for and was granted 21 days more to file written submission but no such submissions were filed.

Analysis and determination

14. As this is a first appeal, the court has a duty to re-examine and analyze the evidence placed before the trial court to arrive at independent findings. see *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123.
15. The first grounds of appeal is that the trial court gravely erred in failing to hold that the sale agreement entered into on 5th April, 2015 while the case was pending amounted to overreaching and unconscionable and therefore unenforceable.
16. It was submitted on behalf of the Appellant that the award of the sum of Kshs.783,000/- to the Respondent amounted to an award of general damages which was based on an agreement the contents of which amounted to overreaching and was oppressive and unconscionable and therefore unenforceable. That prayers (b) of the Respondent's amended plaint was for a refund of Kshs.783,000/- being the current market value of the land parcel.
17. That the emphasis was on the word refund which meant to pay back or return what was received from the Respondent. That it should not be taken to mean compensation for the value of the land which is a form of general damages.
18. The record shows that the Appellant had claimed in paragraph 5B of the amended plaint that by an agreement dated 5th April, 2015 between the parties it was agreed inter alia that:-
 - a. The Defendant (Appellant herein) would refund Kshs.800,000/- being the current market value after breach of their agreement for sale of Kisumu/Korando/1288 dated 17th August, 1991.
 - b. The Defendant (Appellant herein) gave the Plaintiff Kshs.17,000/- being part payment of the total amount and it was agreed that the balance of Kshs.783,000/- would be paid on 30th June, 2015.
18. He pleaded further that despite demand being made and notice of intention to sue having been given, the Defendant (Appellant herein) had refused and neglected to refund the monies claimed.



19. The Appellant vide paragraph 7B of the Amended Statement of Defence denied that there was any agreement dated 5th April, 2015 between him and the Respondent in which he agreed to refund Kshs.800,000/- to the Respondent as claimed by the Respondent.
20. Further in paragraph 7D, 7E, 10 and 11 of the Amended Statement of Defence the Appellant had averred in the alternative that even if there was any such agreement the same was unconscionable hence unenforceable as the same was made under threats, duress and coercion, was invalid was not compliant with the law and was barred by statute of limitation hence bad in law.
21. The evidence placed before the trial court by the Respondent in respect of the agreement dated 5th April, 2015 was as contained in his witness statement adopted as his evidence- in-chief.
22. He had stated in the said witness statement that on 5th April, 2015, he entered into another agreement with the Defendant (Appellant herein). That the Defendant agreed to pay him Kshs.800,000/- the current market value on account of purchase of L.R. Kisumu/Korando/1288. That the Defendant paid Kshs.17,000/- leaving a balance of Kshs.783,000.
23. PW2 also stated that after serious negotiation, another agreement was drawn which he signed as a witness after they had agreed and settled at Kshs.800,000/-.
24. The Appellant adopted the content of his witness statement as his evidence. He had stated in the witness statement that he had in the year 1991 agreed to sell a portion of the suit land to the Respondent at Kshs.7000/- which was the actual money paid to him and his brother one Ezekiel Ndong Obiero in small instalments in a period of over 3 months out of which he only received Kshs.3000/- and the rest paid to his brother.
25. That he offered to refund Kshs.17,500/- to the Respondent when the transaction failed.
26. The Appellant denied that he entered into any subsequent agreement dated 5th April, 2015 to refund a sum of Kshs.800,000/- to the Plaintiff (Respondent). That the agreement dated 5th April, 2015 is illegal, null and void by reason of the same being presented to him on false and fraudulent misrepresentation that he was only signing for Kshs.17,500/-. That having paid Kshs.17,000/- of the admitted sum of Kshs.17,500/=, the balance would be only Kshs.500/-
27. Taking this evidence into account, the trial court found that the parties having entered into another agreement on 5th April, 2015, all the initial agreements are rescinded. That what was left for determination by the court were the terms of the agreement dated 5th April, 2015.
28. The court further declined to believe that the appellant was in a disadvantaged position due to illiteracy when he had an advocate on record, the agreement was drawn at his own home and that the parties are cousins. That all their agreements were in Dholuo language and that the parties had witnesses. That it is trite law that parties to a contract are bound by the terms of the contract. That the parties are duty bound to honour the contract.
29. It was the Respondent's case that the purchase price under the land sale agreement dated 17th August, 1991 was Kshs.17,500/-.
30. It was common ground that the Appellant had paid to the Respondent Kshs.17,000/- by way of refund. According to the Appellant, the balance outstanding on account of the refund was only Kshs.500/- while according to the Respondent, the balance is Kshs.783,000/- which the trial court awarded. The basis of the Respondent's claim is the agreement dated 5th April, 2015. The agreement written in dholuo language and its translation into English language were produced as exhibits P.4 and 5 respectively copies of which are on page 82 and 85 of the record of appeal.



31. Although the Appellant admitted in his testimony that the parties subsequently agreed to a refund of the purchase price, he maintained that the amount of the refund was to be Kshs.17,500. He denied agreeing to refund market value of the land at Kshs.800,000/-. He stated in his evidence in chief;
32. I later entered into an agreement to refund the money. It was Kshs.17,500/ This was plus interest. This was a long time ago. My wife was present during the 2nd agreement. My sons had gone to church. I lost the documents that the Plaintiff gave me to sign. I never went to school. I saw it was written 17,500.”
33. On being questioned by the court, the record shows that the Appellant still maintained that the 2nd agreement was for Kshs.17,500/-.
34. There is no evidence as to how the sum of Kshs.800,000/- was arrived at. The fact that the Appellant was illiterate was not denied by the Respondent. The Appellant challenges the agreement on the grounds that the same was unconscionable.
35. The appellant had relied on the case of Nairobi H.C. Misc Civil Application No.435 of 2013 (Equity Bank Limited -vs- Light Limited [2014]eKLR in his submissions before trial court, where the arbitrators found that there was no consensus ad idem and that this resulted in an unconscionable burden being placed on the other party.
36. Counsel for the Appellant had submitted before the trial court that it was clear that it was the Respondent who had inserted the sum of Kshs.800,000/- thereby placing on unconscionable burden on the Appellant.
37. Counsel had also relied on the case of Nairobi Civil Appeal No.282 of 2004 (Margaret Njeri Muiruri -vs- Bank of Baroda (Kenya) Limited [2014]eKLR where the Court of Appeal after holding that a court law cannot re-write a contract between the parties stated that;
38. Nevertheless, court have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair oppressive due to a procedural abuse during formation of the contract or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable agreement is one that is extremely unfair.
39. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case (see Blacks’ Law Dictionary, 9th Edition, Gardener Ed).
40. Counsel submitted that in the agreement dated 5th April, 2015 the Defendant (Appellant herein) was in a weak, vulnerable and disadvantaged position. Relying on the case of Margaret Njeri Muiriri (Supra) Counsel submitted that the circumstances prevailing placed the Appellant in a state of special disability. That these circumstances included illiteracy and lack of education on the part of the appellant.
41. I have considered the submissions made on behalf of the Appellant herein. The question to raised by ground number 1 of the appeal is whether the agreement dated 5th April 2015 was unconscionable.
42. In Euromec International Limited -vs- Shandong Taikai Power Engineering Company Limited [2021]KEHC 93 eKLR the doctrine of unconscionability was discussed. The court held that;

"unconscionability was meant to protect those who were vulnerable in the contracting process from loss or improvidence to that party in the bargain that was made. Although other doctrines could provide relief from specific types of oppressive contractual terms, unconscionability allowed courts to fill in gaps between the existing islands of intervention



so that the clause that was quite penalty clause or not quite exception clause would disappear.

43. And in CIS -vs- Directors Crawford International School & 3 Others [2020] eKLR, the court relying on the case of Margaret Njeri Muiruri -vs- Bank of Baroda (Kenya)Limited [2014]eKLR held that courts have authority to infuse fairness in unconscionable contracts.
44. In the present case, the Appellant denies agreeing to refund Kshs.800,000. It was the burden of the Respondent under the provisions of Section 107 to 109 of the *Evidence Act* to prove that indeed the Appellant agreed to pay Kshs.800,000/-. This burden has not been discharged.
45. Although the Respondent stated that the amount was the current market value of the sold property, there was no evidence as to how the amount was arrived at, there was no valuation of any kind.
46. The Appellant claim that he was illiterate was not denied.
47. I find that the agreement dated 5th April, 2015 was unconscionable and therefore unenforceable for 2 reasons. Firstly, there is no evidence that the amount of Kshs.800,000/- was agreed on or how it was arrived at. Secondly, the said amount taking into account all the facts of the case (namely; that the sale price was Kshs 17,500 according to the respondent while according to the appellant it was Kshs 7000, that the respondent had already been refunded Kshs 17,500/-, the sale agreement was not subjected to the requirements of the *Land Control Act* and that as at the time the agreement dated 5th April 2015 was allegedly entered into, the case was pending in court) was oppressive and unfair to the Appellant who was in a disadvantaged position by reason of illiteracy.
48. I find that the trial court erred by failing to hold that the agreement dated 5th April, 2025 was oppressive and unconscionable and therefore unenforceable.
49. The rest of the grounds of appeal are closely related to ground number 1 already discussed and determined herein as they all challenge the trial court's findings and decision on the agreement dated 5th April 2015. I find that grounds 2 to 6 have been sufficiently covered in the analysis of the evidence, submissions made before the trial court and the submissions made in the appeal in respect of the first ground of appeal.
50. In the result, this court finds that the appeal has merit and that there is reason to interfere with the findings and decision of the Honourable trial court.
51. The appeal is therefore hereby allowed. The judgement of the trial court dated 28th August, 2023 requiring the Appellant to refund Kshs.783,000/- and pay costs of the suit is hereby set aside.
55. Each party to bear own costs of the suit. The costs of the appeal are awarded to the Appellant.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 25TH DAY OF SEPTEMBER, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

No appearance for the Appellant.



Okello E for the Respondent.

