Kimaru v Wamugunda & 3 others (Environment and Land Appeal E010 of 2023) [2025] KEELC 6290 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6290 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND APPEAL E010 OF 2023

JM MUTUNGI, J

SEPTEMBER 25, 2025

BETWEEN

CHARLES MURIUKI KIMARU .... APPELLANT

AND

MWAI WAMUGUNDA .... 1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER .... 2ND RESPONDENT

LAND REGISTRAR, KIRINYAGA COUNTY .... 3RD RESPONDENT

HON ATTORNEY GENERAL .... 4TH RESPONDENT

(Being an appeal from the judgment of Hon. Stephen Nyaga- Principal Magistrate at Baricho Principal Magistrate's Court in ELC Case No. E005 of 2020 delivered on 16th February 2023)

JUDGMENT

1. This Appeal arises from the judgment of Hon. Stephen Nyaga (PM) delivered on 16th February 2023 in Baricho ELC Case No. E005 of 2020. The 1st Respondent's suit, who was the Plaintiff before the Lower Court, was dismissed on 8th December 2022 for non-attendance, and the Appellant's Counterclaim who was the 1st Defendant in the Lower Court, was heard on the same date. The learned trial Magistrate upon hearing the Counter claim ordered that the 1st Respondent refunds the Appellant the sum of Kshs 160,000/- that he had paid together with interest at 30% p.a or alternatively he transfers ¼ Acre portion of land parcel Mwerua/Baricho/1023. The Appellant was also awarded the costs of the suit.

2. Aggrieved by the decision of the Trial Court, the Appellant lodged the present Appeal through a Memorandum of Appeal dated 3rd March 2023, setting out six grounds, namely:

1. That the Learned Magistrate erred in law and fact by failing to issue interest from the date of breach of agreement to date having been what was agreed by the parties in the agreement in case of breach.
2. That the Learned Magistrate erred in law and fact in completely disregarding the evidence put forth by the Appellant.
3. That the Learned Magistrate erred in law and fact by failing to appreciate that the current market value of land then and now had changed and therefore it was not possible to refund just the amount of money paid during the sale agreement and just mere interest without considering the years that have passed after the breach by the 1st Respondent.
4. That the Learned Magistrate erred in law and fact by failing to allow the counterclaim as it is despite the fact that the Respondents did not oppose the claim and they all failed to show up in Court.
5. That the Learned Magistrate erred in law and fact in failing to fairly evaluate the evidence tendered by the parties.
6. That the Learned Magistrate erred in law and fact by issuing an ambiguous judgment that neither party had prayed for.

3. The 1st Respondent commenced the proceedings in the Lower Court by plaint dated 21st September 2020, seeking removal of a restriction placed on the suit land by the Appellant. In response, the Appellant filed a statement of defence and counterclaim dated 26th February 2021, pleading breach of contract by the 1st Respondent. He sought transfer of ¼ acre of the suit property, or in the alternative a refund of Kshs. 1,500,000/- together with costs and interest. The matter came up for hearing on 8th December 2022, when the Appellant adopted his witness statement and list of documents as his evidence and closed his case. It was on this basis that the learned magistrate proceeded to render the Judgment now impugned.
4. The Court on 16th October 2024 directed that the Appeal be canvassed by way of written submissions.
5. In submissions dated 14th February 2025, the Appellant argued that the trial Court erred in awarding a refund of only Kshs. 160,000/- without regard to the rise in market value of land. He maintained that if the transfer of ¼ acre could not be effected, then the refund should be pegged at Kshs. 1,500,000/- being the current value, or alternatively, the Kshs. 160,000/- paid should attract contractual interest of 30% per annum from the date of breach until full payment. He further contended that the Respondents, having failed to defend the Counterclaim, left the trial Court with no basis to deny him the relief sought.
6. The 1st Respondent, in submissions dated 13th May 2025, opposed the appeal. He argued that under Order 12 Rule 3(3) of the Civil Procedure Rules, a Defendant with a Counterclaim bears the burden of proof even where the main suit was dismissed. He submitted that the Appellant merely adopted his witness statement and produced documents, but tendered no credible evidence to support refund at current market value. According to him, the trial Court substantially granted the Counterclaim by ordering refund of Kshs. 160,000/- with costs and Interest at the contractual rate. He urged dismissal of the Appeal with costs, relying on the decision in Nancy Wanjiku Mukoma v Bernard Njoroge Ngugi (2022) eKLR.
7. I have considered the Record of Appeal, the Judgment appealed from, and the rival submissions of the parties. This being a first Appeal, the duty of this Court is to re-evaluate the evidence afresh and draw

its own conclusions on the evidence with a view of determining whether the decision reached by the trial Court was justified having regard to the evidence adduced. This principle was established by the Court of Appeal in the case of Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, where the Court held:

> "This Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial... this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

8. From the record and submissions, two issues arise for determination:

    1. Whether the trial Court erred in failing to allow the counterclaim as prayed.
    2. Whether the trial Court erred in limiting the refund to Kshs. 160,000/- instead of pegging it to the current market value.

    Whether the Trial Court erred in failing to allow the Counterclaim as prayed.

9. The Appellant's Counterclaim sought transfer of ¼ acre out of land parcel Mwerua/Baricho/1023, or in the alternative, a refund pegged at the current market value of Kshs. 1,500,000/- together with costs and interest. The trial court found that the Appellant had paid Kshs. 160,000/- under the sale agreement of 31st May 2012, and directed that the 1st Respondent either transfers ¼ acre out of parcel Mwerua/Baricho/1023 or refund that sum, with interest at 30% per annum and costs.

10. On Appeal, the Appellant challenges that finding on two limbs. First, he argued that since the Counterclaim was unopposed, the trial Court ought to have allowed it as prayed, without modification. Second, he contended that even on the refund of Kshs. 160,000/-, the trial Court failed to apply the interest clause in the agreement as drafted by the parties, which entitled him to interest at 30% per annum from the date of default until payment in full.

11. On the first limb, the law is settled that even where a claim is undefended, the claimant bears the burden of proving it on a balance of probabilities. Order 12 Rule 3(3) of the Civil Procedure Rules provides that where the Plaintiff's suit is dismissed for non-attendance, a defendant who has filed a Counterclaim may proceed "so far as the burden of proof lies upon him." The *Evidence Act*, Cap 80 at Sections 107–109, similarly requires that he who alleges must prove. This is because the legal burden lies on the party who would fail if no evidence at all were given.

12. The Appellant's evidence established payment of Kshs. 160,000/- under the sale agreement of 31st May 2012. Beyond that amount, there was no proof of additional payments or of the alleged current market value. The trial Court was therefore correct in confining its Judgment to the sum actually proved.

13. On the second limb, the refund clause in the agreement provided in material part as follows:

> "In default on the part of the vendor, the vendor shall reimburse to the purchaser consideration and costs plus interest at the rate of 30% per annum, while in default on the part of the purchaser, only the consideration amount paid shall be refunded."

14. This clause created a specific contractual right to interest at 30% per annum upon default by the vendor. Clause 4 of the agreement further provided that the balance of Kshs. 80,000/- was to be paid "upon completion of this transaction." However, the agreement did not define "completion" or incorporate the Law Society Conditions of Sale. In such circumstances, the law implies that completion must occur within a reasonable time.

15. The Appellants Counterclaim was undoubtedly predicated on the sale agreement dated 31st May 2012 which both the Appellant and the 1st Respondent exhibited in their respective bundles of documents. Impliedly and having regard to clause 5 of the agreement, the transaction was subject to the provisions of the *Land Control Act*, Cap 302 Laws of Kenya.

Clause 5 of the agreement of sale provided as follows:-

5. That expenses pertaining to Land Control Board for subdivision, survey fee, physical Planning shall be paid by the vendor while expenses pertaining to Land Control for transfer, stamp duty and title shall be paid by the purchaser.

16. There was no evidence adduced to the effect that the consent of the Land Control Board was sought or obtained. In consequence, the transaction having been subject to the *Land Control Act*, became void for all purposes as no consent of the Land Board was obtained under Section 6(1) (a) and 8(1) of the Act.

Section 6(1)(a) provides as follows:-

6(1) Each of the following transactions, that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) ------------;

(c) -----------

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

Section 8(1) provides as follows:-

8(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

17. Where a controlled transaction becomes void under Section 6(1) of the *Land Control Act*, any money paid as consideration is recoverable as a debt under the provisions of Section 7 of the Act.

Section 7 of the Act provides:-

7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22.

18. In the circumstances of the instant matter the completion period would not have been beyond six months being the period within which the parties were under the provisions of the *Land Control Act* required to apply for the consent of the Land Control Board. Be it as it may be, the transaction, became void under the provisions of Section 6(1) of the *Land Control Act* as no consent was obtained within the prescribed time. Consequently, only the consideration paid under the voided agreement was recoverable as a debt. The option of specific performance was unavailable. The Learned Trial Magistrate therefore could not properly make an order requiring the 1st Respondent to transfer the ¼ Acre portion of land, the subject of the voided contract. The Learned Magistrate was however perfectly in order to order refund of Kshs 160,000/- which was proved to have been paid by the Appellant to

the 1st Respondent. The parties had agreed a penalty interest of 30% p.a for default and such interest would not be continuing but would be applicable once at the time of determination.

19. The claim by the Appellant to refund the purchase price paid pegged on the current market valuation of ¼ Acre portion of land in the face of Section 7 of the *Land Control Act* is unjustifiable and there can be no basis. It would be synonymous to making an order of specific performance through the back door. The transaction which was a controlled one failed to get completed and the law provides the available remedies in such instance. The Appellant would not have been entitled to such a remedy and the trial Magistrate rightly did not grant the same.

20. For clarity therefore, though the Appeal lacks merit and is for dismissal, the Court clarifies that in additional to a refund of Kshs 160,000/- the Appellant would be paid 30% interest on the amount amounting to Kshs 48,000/- altogether Kshs 208,000/- which would accrue interest at Court rates from the date of Judgment in the Lower Court until payment in full.

21. Subject to the clarification that I have adverted to herein above, the Appeal is without any merit and is dismissed. I order that the parties bear their own costs of the Appeal.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 25TH DAY OF SEPTEMBER 2025.

J. M. MUTUNGI

ELC JUDGE