

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC LAND APPEAL NO. E004 OF 2023

SAMUEL NGWONO

ALURU..... APPELLANT

VERSUS

MICHAEL MUIRURI KARIUKI.....

RESPONDENT

(Being an Appeal against the Ruling and Order of Hon. L.L. Gicheha delivered on 23rd February 2023 in Kajiado ELC Case No. 249 of 2016)

JUDGEMENT.

1. In her **Ruling dated on 23rd February 2023 in Kajiado Case No. 249 of 2016**, Hon. Gicheha held:

“... The position as it is now, judgement having been entered, the Court is *functus officio*. I find the prayers sought cannot be granted and the application is dismissed with costs...”

2. Aggrieved, the Appellant filed a **Memorandum of Appeal dated 5th July 2023** seeking the setting aside of that

Ruling and the application dated 2nd November 2022 be allowed on grounds that:

- 1. The Learned trial Magistrate erred in law and in fact by failing to enforce the trial Court's judgement rendered and delivered on 21st May 2020.***
- 2. The Learned trial Magistrate erred in law and in fact by failing to adopt the valuation report despite the trial Court finding that the current value of the land was the only available remedy to the Appellant.***
- 3. The Learned trial Magistrate erred in law and in fact by misrepresenting and misapprehending the judgement rendered in favour of the Appellant wherein the trial court ordered compensation at current valuation of the land.***
- 4. The Learned trial Magistrate erred in law and in fact by failing to appreciate that the Court had jurisdiction to determine all questions relating to execution of the judgement and***

Decree within the meaning of Section 34 of the Civil Procedure Act.

5. The Learned trial Magistrate erred in law and in fact by misapprehending the final judgement and thus exposed the Appellant to suffer wrongs without a remedy.

6. The Learned trial Magistrate erred in law by relying on extraneous factors hence arriving at a wrong decision.

3. This Appeal was canvassed by way of written submissions. However, at the time of writing this decision, only the Appellant had filed their submissions.

Submissions of the Appellant

4. Counsel submitted that this dispute was on breach of contract stemming from a sale agreement for property L.R. No. 26607 in Kajiado County. The Appellant, filed a suit against the Respondent in April 2016, seeking several orders, including a declaration of breach of contract, specific performance, and damages. The trial court, in its judgment, noted that the original ownership documents were not shown and the status of the property was

unknown and went on to order for specific performance but provided an alternative remedy of refund of the purchase price at the current market value if specific performance was not possible.

5. To enforce this alternative order, the Appellant, filed an application dated 2nd November 2022, to have the valuation report indicating the market value of the property adopted as the court's judgment. The trial court dismissed this application, stating that the original judgment was not clear on the award of the refund at the prevailing market value.
6. Aggrieved by this decision, the Appellant filed the current appeal, challenging the trial court's failure to enforce its own judgment and arguing that the court misinterpreted the original order. Counsel submitted that a person should not suffer a wrong without remedy citing the Court of Appeal in **Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri 2014 (eKLR)**. It was also submitted that the trial court erred in failing to execute the decree as per **Section 34 of the Civil Procedure Act** which provides that questions relating to the execution, discharge if satisfaction of a decree shall be

determined by the court executing the decree and not by a separate suit. Since the decree question was unresolved, then the trial court erred in concluding that it was *functus officio* citing **South Nyanza Sugar Co. Ltd vs Alfred sagwa Mdeizi t/ Pave Auctioneers (2010) eKLR**. As such, this Court had the power to determine this case with finality as per **Section 78 Civil procedure Act**.

7. It was also submitted that the Appellant made payment for the suit property in 2009 and the property was yet to be transferred to him. It was therefore imperative that the Appellant be granted restorative order of refund of the purchase price at the prevailing market price together with costs of the Appeal and at the trial Court.

Analysis and Determination

8. I have considered the Grounds of Appeal, Record of Appeal, the rival submissions and the legal authorities cited. I find that the issues for determination are:

- i. Whether the Learned Magistrate misapprehended the Judgement dated 21st May 2020 by failing to adopt the valuation report; is Appeal is merited;***

ii. Whether the Appellant should obtain the reliefs sought.

iii. What orders should issue.

iv. Who should bear costs of the Appeal?

9. This being a first Appeal, the Court must conduct a fresh and independent evaluation of the entire evidence adduced before the trial court while bearing in mind that it did not hear or observe the witnesses. See **Ndatho & 7 others v Nkabu & another [2025] KECA 944 (KLR)**.

It is now well-settled law that the first appellate court must re-evaluate the evidence in the trial court, both on points of law and facts, and come up with its own findings and conclusions...

10. Through the **Plaint** dated **21st April 2016** filed at the lower court, it was the Appellant's case is that sometime on 3rd July 2009, the Respondent offered to sell an 1/8 of an acre which was to be excised from his parcel LR No. 26607 for a consideration of Kshs. 500,000. Sale agreements dated 3rd July 2009, 2nd September 2009, 29th September 2009 and 15th January 2010 were executed to this effect and the entire purchase price was paid by 15th

January 2010. At the end of 2009, the Respondent showed the Appellant beacons for his 1/8th of an acre and granted him possession. The Appellant took possession, fenced the property and dug a pit latrine awaiting completion documents from the Respondent for transfer and registration as the owner of the suit property. However, the respondent failed to avail the completion documents.

11. On 31st July 2014, the Appellant filed a complaint with the Kajiado Land Disputes Tribunal. On 26th August 2014, the Respondent admitted to have received Kshs. 500,000 from the Appellant and promised to refund the amount together with interest but failed to do so. It is the Appellant's case that in February 2016, the Respondent trespassed on the suit property, destroyed the fence and demolished the pit latrine. The Appellant thus claimed that the Respondent had breached his contractual obligations and sought the following orders at the trial Court:

- i. An order that the Respondent was in breach of the sale agreement.**
- ii. An order of permanent injunction restraining the Respondent from selling,**

charging or in any way interfering with the suit property.

iii. An order of specific performance compelling the Respondent to hand over all documents to transfer the suit property to the Appellant.

iv. General damages for breach of contract.

v. Costs of the suit.

vi. Interest on iv and v above.

vii. Any other relief.

12. The Respondent in his statement of defence dated 20th June 2016 denied the Appellant's claim and sought for dismissal of the suit with costs.

13. In the **Judgement dated 21st May 2020**, the Learned Trial Magistrate Hon. Shitubi found that there was a valid sale agreement between the parties and the Appellant had fulfilled his obligations but the Respondent had not advanced reasons why he had failed to abide by the terms. The Appellant was therefore entitled to the reliefs sought. The court held:

“... To stop the Plaintiff from experiencing more hardship, I order specific performance.

However, if it turns out that this is not possible for some reason or other since we do not know the status, then as an alternative the Plaintiff is entitled to refund of the purchase price... The value of such plot today is the only remedy that can substitute specific performance. For the reason, if in the alternative refund of the purchase price is made, then the price must be the current value of that land, based on current valuation. The Plaintiff is also awarded costs of the suit.”

14. Consequently, in an **Application dated 3rd June 2022** the Appellant moved the trial Court for adoption of the valuation report dated 4th April 2022 and judgement be entered against the Respondent for Kshs. 4,015,000 together with costs.

15. This application was heard and determined by the **Ruling dated 8th September 2022**, Hon. Gicheha held:

“... It is not clear that there was an order for compensation to the Plaintiff. Further, if they were to be compensated, the compensation would have been the value as at 21st May 2020

when the judgement was entered and not on 4th April 2022. I therefore note the application cannot be granted and the same is dismissed with costs.”

16. The Appellant then filed another **Application dated 2nd November 2023** seeking adoption of the valuation report dated 26th September 2022 and judgement be entered against the Respondent for Kshs. 2,015,000 together with costs.

17. Upon considering this application, Hon. Gicheha delivered another **Ruling dated 23rd February 2023**, which is the subject of this Appeal. In her Ruling, she held:

“... As stated earlier in my ruling, the judgement issued by Hon. Shitubi is not clear as to whether she did award the damages sought herein or it was an opinion as she was giving in her judgement.

From her judgement she states that the general damages for breach of contract are a special damage and it must be set out.

It is therefore not clear whether the intention was for the matter to be referred for an

assessment and then the assessment be adopted.

If this Court was to grant the application it would be delivering judgement twice as judgement was entered. If the learned Magistrate had wanted the Court to adopt the value of the property as per the valuation report she would have made an order that the property be valued so that she can adopt the award and enter judgement. And in doing this, the Defendant would have been given an opportunity to avail a valuation report for consideration of the Court. The position as it is now, judgement having been entered, the Court is *functus officio*. I find the prayers sought cannot be granted and the application is dismissed with costs.

18. The Appellant's case is that the learned Magistrate erred by failing to adopt the valuation report. She also misapprehended the Judgement that the trial Court did not order for compensation.

19. While the learned Hon. Gicheha held that the orders issued by Hon. Shitubi were unclear, this Court takes cognisance that Hon. Shitubi in her judgement ordered for **specific performance** and **in the alternative** for refund of the purchase price at the market value at the time of the judgement.

20. I have considered the orders granted in the Judgement dated 21st May 2020. The same are very clear that, if it was not possible for the plaintiff to get the suit property then he was to be refunded the purchase price based on the market value as at 21st May 2020.

21. **Section 34 of the Civil Procedure Act** provides that;

“(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding

under this section as a suit, or a suit as a proceeding, and may if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation.- For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.”

22. The Appellant submitted a valuation Report dated 26th September 2022 which valued the property at Kshs.2, 015,000/=.

In the case of **Macharia Mwangi Maina & 87 Others Vs. Davidson Mwangi Kagiri (2014) eKLR** the Court of Appeal held as follows;

“Article 159 (2) (a) of constitution requires justice to be administered to all, irrespective of status; Article 159 (2) (g) of Constitution stipulates that justice shall be administered without undue regard to procedural

technicalities. This court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.”

I am guided by the above authority in finding that the Learned Trial Magistrate ought to have allowed the Appellants’ application in the interest of justice.

23. I also find that the Learned Trial Magistrate erred in holding that the Court was *functus officio*. The Decree is yet to be satisfied. Court orders are not made in vain.

In the case of **South Nyanza Sugar Co. Ltd Vs. Alfared Sagwa Mdeizi t/a Pave Auctioneers (2010) eKLR** the court held as follows;

“Section 34 of the Civil Procedure Act strictly bars the filing of separate proceedings to

determine issues that emanate or arise from execution of decrees in a suit. Without obvious regard to these mandatory provisions of the law, the learned magistrate held that the appellant, if he sought to recover any monies from any of the parties to the application had to bring or initiate independent proceedings. In the face of the clear provisions of Section 34 of the Civil Procedure Act, this conclusion was clearly erroneous.”

24. It is for the above reasons that I find that the Learned Trial Magistrate erred in failing to adopt the Valuation Report dated 26th September 2022.

25. In conclusion I find merit in this Appeal and the same is allowed.

26. In essence the **Ruling** and **Order** issued on **23rd February 2023** is hereby set aside and substituted with an order allowing the **Application** dated **2nd November 2022** as prayed. The costs by this Appeal shall be borne by the Respondent.

Dated, Signed and Delivered virtually at Kajiado this 15th day of October 2025.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Muasya for Mr. Musyoki for the Appellant.

N/A for the Respondent.

Court Assistant - Peter.

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