



**Momanyi v Wahome (Environment and Land Appeal E020 of 2024)
[2025] KEELC 6834 (KLR) (8 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6834 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E020 OF 2024**

M SILA, J

OCTOBER 8, 2025

BETWEEN

JAMES KIRE MOMANYI APPELLANT

AND

CHRISTINE NYAKERARIO WAHOME RESPONDENT

*(Being an appeal against the judgment of Hon. P.K Mutai, Principal Magistrate,
delivered on 6 May 2024 in the suit Kisii CMCC/ELC No. 298 of 2018)*

JUDGMENT

1. Through a plaint filed on 23 January 2017 before this court, the appellant sued the respondent claiming that vide an agreement dated 8 August 2011, the respondent sold to him a portion of land measuring 70 x 100 feet out of the land parcel Nyaribari Chache/B/B/Boburia/2120 for a consideration of Kshs. 270,000/= , which he paid in full, and that he took possession. He pleaded further that despite the purchase, on 5 January 2017, the respondent came to the ground, cut down some trees, and deposited building materials, thus denying him access to the land. In the plaint, he asked for orders of permanent injunction, refund of Kshs. 270,000/= being the amount paid as the purchase price, general damages and mesne profits, costs and interest.
2. The respondent filed defence through the law firm of M/s S.N Nyachae & Company Advocates. She inter alia pleaded that it was the appellant who was the defaulting party in the sale agreement, though in the same breadth she also pleaded that she is not the registered owner of the land parcel Nyaribari Chache/B/B/Boburia/2120, and thus the appellant was not entitled to the order of permanent injunction.
3. Perhaps given the value of the subject matter, the case was transferred to the Magistrates' Court at Kisii for disposal and hearing commenced thereafter.



4. The appellant testified as PW-1 on 9 May 2022. His evidence was that on the day that the sale agreement was drawn, he paid a deposit of Kshs. 76,000/= ; that he subsequently paid Kshs.184,000/= on 8 August 2012 which was acknowledged in writing, and later the respondent requested him to pay on her behalf insurance premiums on a motor-vehicle which he paid in the sum of Kshs. 10,085/= on 25 November 2011. In total he stated that he paid Kshs. 270,085/= . He produced the sale agreement, the acknowledgement note and the receipt for the insurance premium of Kshs. 10,085/=. After the appellant had testified, the matter was adjourned to 27 June 2022 on which day an application for adjournment was made by the respondent but declined by court. Upon the adjournment being refused, counsel for the respondent did not participate in the proceedings. On that day, two other witnesses, Francisca Ratemo, wife of the appellant, and Aloyce Nyaanga, testified as PW-2 and PW-3 respectively, by adopting their witness statements. The evidence of PW-2 was that they paid the monies as pronounced in the evidence of the appellant. She stated that she signed as a witness to the payment of the second instalment of Kshs. 184,000/= and that Kshs. 10,085/= was paid on behalf of the respondent's insurance cover. The evidence of PW-3 was that he witnessed the sale agreement and witnessed the payment of the deposit of Kshs. 76,000/=. He however did not witness payment of the subsequent instalments.
5. The court then proceeded to give directions on a hearing date for defence. Subsequently however, the respondent filed an application to have the appellant's case reopened. In a ruling delivered on 19 July 2023, the court allowed the same and directed PW-2 and PW-3 to appear for cross-examination. The witnesses did appear for cross-examination on 15 November 2023 but on that day, Mr. Orangi, who appeared for the respondent, stated that the respondent had deposited Kshs. 200,000/= with his erstwhile counsel, Mr. Nyachae, allegedly to refund the appellant. He thus stated that he would not cross-examine PW-2 and PW-3. Thereafter, the respondent filed an application to join Mr. Nyachae as Third Party but I see no record of that application ever being prosecuted or being allowed. Instead, the matter proceeded for defence hearing on 12 February 2024 when the respondent testified as the sole defence witness.
6. She admitted the sale agreement and admitted receiving the deposit of Kshs. 76,000/= . She testified that later the appellant gave her Kshs. 70,000/= ; then Kshs. 40,000/= and finally Kshs. 12,000/=, i.e Kshs. 198,000/= in total. These payments were however not reduced into writing. In cross-examination, she inter alia conceded that the appellant paid insurance cover for her son and that it was to be included as part of the purchase price. She however denied acknowledging receipt of Kshs. 184,000/= and claimed that her signature in the said acknowledgment document was forged. She also alleged that the signature of her son, which was in the acknowledgment as a witness, was also forged. She stated that she wished to refund the appellant what she had received (i.e Kshs. 198,000/= according to her) and that is why she deposited the money with Mr. Nyachae Advocate.
7. With that evidence, the respondent closed her case.
8. I need to mention that part of the evidence produced at the hearing was an extract of the register of the suit land which showed that it was on 7 January 1971 registered in name of one Saringi Kenyaga as first proprietor then transferred to one Sabina Kemuma Kenyaga on 29 August 2011 as the second proprietor. On the same day, the title was closed on subdivision into the parcels No. 9688 – 9689. The title had never been held by the respondent at any one time.



9. In his judgment, the trial Magistrate first held that the respondent had no capacity to sell the suit land given that it was not registered in her name at the time of sale. On payment of the money, he held as follows :

“The defendant admitted having received in total Kshs. 198,000/=. I find no clear evidence that whole purchase price was ever paid. In that connection and based on admission, I direct the defendant to refund the plaintiff Kshs. 198,000/= being amount admittedly received. Since the whole process was tainted with irregularities, it would attract interest from the date of this judgment. Each party will bear own costs.”

10. Aggrieved, the appellant has preferred this appeal on the following grounds :

1. That the Magistrate erred in not awarding costs to the appellant.
2. That the Magistrate erred in shifting the burden of proof to the appellant.
3. That the Magistrate erred when he misapplied the cardinal principal in liquidated claims.
4. That the Magistrate erred when he did not take into account the evidence given in court and arrived at a wrong decision.

11. The appellant seeks orders that the judgment be set aside and be substituted with an order that the appellant proved his case on a balance of probabilities with costs to him. He also wants the costs of the appeal to be provided for.

12. I directed the appeal to be argued through written submissions, but I have only seen the submissions of Mr. Anyona, learned counsel for the appellant. The respondent’s counsel did not also appear at the formal hearing of the appeal. I have considered the submissions filed and I hold the following view.

13. At the outset, there can be no contention that the appellant could not succeed in his quest to have an order of permanent injunction given that the respondent had no capacity to sell. Having nothing to sell, the appellant could not have been in a position to claim ownership of the land and having no ownership, he could not get the order of permanent injunction. Indeed, I observe that in his submissions, Mr. Anyona did not invite court to make this order of permanent injunction in favour of the appellant.

14. The real issue for determination before court was what amount of money the appellant needed to be refunded. Mr. Anyona submitted that the evidence and exhibits produced demonstrate that the respondent was paid Kshs. 270,085/=.

15. I have to agree with the appellant.

16. There was no dispute from the respondent regarding receipt of the deposit of Kshs. 76,000/=. The respondent did not also dispute that the appellant paid insurance for her son which was to be considered as part of the purchase price. The insurance receipt was produced and it is in the sum of Kshs. 10,085/=. The only money that the respondent disputed was receipt of Kshs. 184,000/=. However, proof of payment of this sum was actually exhibited by the appellant, for he produced the acknowledgment of the said monies which was in writing. That acknowledgment was drawn by the same advocate who drew the sale agreement and is dated 13 August 2012. There is a signature against the name of the appellant and against the name of the respondent, as purchaser and vendor respectively, and there is reference to the sale agreement of 8 August 2011. That acknowledgment shows that it is witnessed by three persons, i.e Joseph Njoru Wahome, Ruth Njoki Wahome, and Francisca Nyatichi and it is also signed by the Advocate. It turns out that Joseph Njoru Wahome and



Ruth Njoki Wahome are son and daughter of the respondent whereas Francisca is wife of the appellant. Francisca testified that this money was paid in her presence and she witnessed the acknowledgment. It will be recalled that the respondent opted not to exercise her right to cross-examine Francisca who testified as PW-2. Neither did the respondent call Joseph Njoru Wahome or Ruth Njoki Wahome, to testify that they never witnessed that acknowledgment, despite them being her children. Her claims that their signatures were forged could not be taken at face value.

17. I do not see any issue with this acknowledgment and I do not see any reason why the trial Magistrate did not consider it as proof that the sum of Kshs. 184,000/= was duly paid as shown by the instrument. I see no basis for the trial Magistrate believing what the respondent said by word of mouth, i.e that she was paid sums of Kshs. 70,000/= and Kshs. 40,000/= in the market without there being evidence of the same, yet discount the written acknowledgment of Kshs. 184,000/= , which was witnessed, and where one of the attesting witnesses testified to affirm its authenticity but the respondent chose not to cross-examine that witness.
18. I am persuaded that in those circumstances, the appellant proved payment of the sum of Kshs. 270,085/= but of course his claim can only be limited to what was in the agreement which was Kshs. 270,000/=. I am prepared to enter judgment in favour of the appellant for refund of this sum of Kshs. 270,000/=. I therefore set aside the judgment of the trial court which only awarded the appellant Kshs. 198,000/= and in place substitute it with judgment in favour of the appellant for the sum of Kshs. 270,000/= being refund of the purchase price paid on the sale agreement.
19. The other issue that I have a problem with in the judgment is the issue of interest. The trial Magistrate gave interest from the date of the judgment. There was no basis for this. This was a liquidated claim that was specific in nature, and generally, interest for such awards is granted from the date of filing of suit. This is demonstrated in Section 26 (1) of the *Civil Procedure Act*, which provides as follows :

26. Interests

- (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit (emphasis mine).

20. There was no reason to grant interest from the date of the judgment and not the date of filing suit. Granting interest from the date of judgment would mean that the appellant suffered for the duration of time that the court took to determine his case. The delay in determining the case could not be attributed to him and in fact I have seen that it was the respondent (as defendant) who consistently applied for adjournments or made attempts to delay the hearing of the case. The appellant ought not to have been made to suffer loss for those delays. For that reason I order interest to be payable on the sum of Kshs. 270,000/= at the current prevailing court rates from the date of filing suit, i.e 23 January 2017 until payment in full.
21. There is also challenge in this appeal regarding the order of costs. The general rule outlined in Section 27 of the *Civil Procedure Act* is that costs follow the event. That law is drawn as follows :

27. Costs

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be



in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

22. Again, there was no reason to depart from the general principle enunciated above, that costs follow the event. In our case, the appellant sued to get a refund of the money that he paid against the sale agreement that was null and void. He succeeded in his quest. There was therefore no reason to deny him costs. The respondent could as well have directly paid him what she did not dispute, or admit it in her defence, but she did not. She made the appellant toil and incur expenses to assert his claim. Given those circumstances, the appellant was fully entitled to the full costs of the suit albeit at the scale of the Magistrates' Court. I therefore proceed to set aside the order of the trial Magistrate that each party bears his own costs and substitute it with an order that the case of the appellant is allowed with costs. The said costs to attract interest at court rates again from the time that the case was filed until payment in full.

23. The last issue is the costs of this appeal. They will follow the event. I award costs of this appeal to the appellant. The said costs to attract interest at court rates from the date of this judgment until settlement in full.

24. Judgment accordingly.

DATED AND DELIVERED THIS 8 DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in presence of:

Mr. Marube h/b for Mr. Anyona for the appellant

N/A on part of M/s C. Cheruiyot & Co for the respondent

Court Assistant – Michael Oyuko

