



**NNO & another v Ong’ayo (Environment and Land Appeal E007 of 2022) [2025] KEELC 6835 (KLR) (7 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6835 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E007 OF 2022**

**M SILA, J**

**OCTOBER 7, 2025**

**BETWEEN**

**NNO ..... 1<sup>ST</sup> APPELLANT**

**LBM ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOSHUA MOSAGE ONG’AYO ..... RESPONDENT**

*(Being an appeal against the judgment of Hon. S.K Onjoro, Principal Magistrate, delivered on 25 February 2022 in the suit Kisii CMCC/ELC No.11 of 2020)*

**JUDGMENT**

1. The suit from which this appeal emanates was commenced by the respondent through a plaint filed on 31 January 2020. He pleaded that on 24 January 2014 he together with the 2<sup>nd</sup> appellant, LBM, (sued in the plaint as 2<sup>nd</sup> defendant) purchased from the 1<sup>st</sup> appellant, NNO, (sued in the plaint as the 1<sup>st</sup> defendant) the land parcel Bassi/Bosingi/xxx. He averred that the final payment was made on 7 September 2015. He pleaded that despite the purchase the 1<sup>st</sup> appellant had refused to transfer the land. What he wished in the plaint is for the 1<sup>st</sup> appellant to be ordered to transfer the land into the joint names of himself and the 2<sup>nd</sup> appellant, or in the alternative, the property be transferred solely into his name and he refunds the 2<sup>nd</sup> appellant half the purchase price. He also asked for orders to have the appellants restrained by a permanent injunction, general damages, and costs of the suit. From the sale agreement, I see that the property being purchased was developed with two shops, three lodging rooms, and a toilet.
2. The appellants filed a joint statement of defence through the same counsel. The 2<sup>nd</sup> appellant pleaded that she is the one who solely paid the purchase price through loans that she took using a check-off system with her employer, the Kenya Police Service. She pleaded that the suit property was not purchased jointly. She contended that the respondent has taken occupation and has dispossessed her.



- The 1<sup>st</sup> appellant on his part pleaded that he could not effect transfer to the name of the respondent because it was the 2<sup>nd</sup> appellant who approached him to buy the suit land and that it was her who paid the whole purchase price.
3. The respondent filed a reply to defence, more or less contending that the purchase price was paid jointly by himself and the 2<sup>nd</sup> respondent.
  4. PW-1 was the respondent. He testified that he is a nurse. He testified that the 2<sup>nd</sup> appellant is his wife and that they bought the suit land together. He averred that they agreed to purchase the suit property as matrimonial property. He testified that he was financially sound at the time that the land was purchased and he produced his bank and mpesa statements to demonstrate this. He testified that he filed a caution as the appellants were colluding to have the suit property transferred only to the 2<sup>nd</sup> appellant. He stated that he was staying on the land with his mother who is aged. Cross-examined, he stated that they have a child with the 2<sup>nd</sup> appellant, but they no longer live together, as the 2<sup>nd</sup> appellant informed him that she got married to somebody else. He asserted that he contributed Kshs. 300,000/= of the purchase price. He averred that on 24 January 2014 (the day of the sale agreement) he contributed Kshs. 200,000/=. He added that on various dates he gave the 2<sup>nd</sup> appellant some monies. Specifically, he testified that he gave her Kshs. 20,000/= on 3 March 2015, and Kshs. 80,000/= between 15-19 March 2015. He acknowledged being a student at the time (at KMTC) but denied that the 2<sup>nd</sup> appellant was paying his fees.
  5. PW-2 was Job Ombiro Omeino a brother of the respondent. He described the 2<sup>nd</sup> appellant as wife to the respondent. He stated that he was aware that the two entered into a sale agreement and that each was to pay half the purchase price. He stated that on 5 March 2015 his brother asked him to sell some of his things to raise Kshs. 20,000/=. He sold some trees and three goats and handed over the Kshs. 20,000/=. He stated that he was present when this Kshs. 20,000/= was paid to the seller (1<sup>st</sup> appellant) and the 2<sup>nd</sup> appellant recorded the same in her own handwriting. Cross-examined, he stated that save for this Kshs. 20,000/= he did not know how the other monies were paid.
  6. PW-3 was Charles Mayaka Gera who testified that the respondent is his brother in law. He stated that he witnessed the sale agreement of 24 January 2020. He did not know how the balance was paid. He nevertheless claimed in cross-examination that each gave Kshs. 200,000/= to the vendor.
  7. PW-4 was Sereti Albert Ongwae an Advocate of the High Court of Kenya. He testified that he is the one who wrote the sale agreement of 24 January 2014. According to him the purchasers were buying the land jointly as husband and wife. Kshs. 400,000/= was paid on the date of the sale agreement. On the balance, he testified that they told him that they had paid Kshs. 20,000/= and they paid Kshs. 180,000/= in his office on the day the acknowledgment was written (i.e 7 September 2015). Cross-examined, he denied that the addition of the respondent as a purchaser was an afterthought. He however did not know the source of the money.
  8. With the above evidence, the respondent closed his case.
  9. DW-1 was the 1<sup>st</sup> appellant. He relied on a witness statement that he had recorded. In it, he acknowledged selling the suit land. He averred that he was paid the purchase price by the 2<sup>nd</sup> appellant. He claimed that the respondent hijacked the writing of the agreement as he said that he was husband of the 2<sup>nd</sup> appellant. He added that the 2<sup>nd</sup> appellant respected him as they were cohabiting as husband and wife but they later separated. He stated that he was willing to transfer the suit land to the 2<sup>nd</sup> appellant and described the respondent as ‘an idler, riding on the 2<sup>nd</sup> appellant’s back to get what he has not sweated for.’ He contended that all money was received from the 2<sup>nd</sup> appellant and that at no time did the respondent pay him a single cent. He claimed that the respondent was a total stranger to him



- and has never transacted with him over the suit land, He added that the respondent was a student at KMTC-Nyeri at the time the sale agreements were drawn, while the 2<sup>nd</sup> appellant worked as a police officer and that it is common sense that it was the 2<sup>nd</sup> appellant who had means to purchase and pay for the land. He wondered how a student at KMTC could raise half the purchase price.
10. Cross-examined, he testified that prior to and at the time of the sale agreement, he knew the 2<sup>nd</sup> appellant and respondent as husband and wife. They brought to him Kshs. 400,000/= at the time of the sale agreement. He was not privy as to how the money was raised. He stated that it was the 2<sup>nd</sup> appellant who paid him the instalment of Kshs. 20,000/= and confirmed that this receipt was witnessed by PW-2. He handed over the property to the 2<sup>nd</sup> appellant, and the respondent and his mother. At some point he had written a demand letter to both the 2<sup>nd</sup> appellant and respondent asking them to pay the balance.
  11. Re-examined, he stated that he knew that the money came from the 2<sup>nd</sup> appellant's Cooperative Bank account but did not know if the respondent contributed to it. He stated that all the time he was dealing with the 2<sup>nd</sup> appellant.
  12. DW-2 was the 2<sup>nd</sup> appellant. She stated that the respondent was her husband from 2011 to 2017 and they got one child together. Regarding purchase of the property, she testified that she took loans to purchase it. She asserted that the respondent did not contribute anything as he was a student at KMTC. She stated that she took a loan with Cooperative Bank Kisii, and paid through check-off from her salary. She produced a withdrawal slip to show that she withdrew Kshs. 394,710/= and topped up with cash of Kshs. 6,000/= so as to raise the deposit of Kshs. 400,000/=. She stated that she took a further loan of Kshs. 180,000/= from Cooperative Bank on 7 September 2015 and added a further Kshs. 20,000/= from her salary to pay the balance of Kshs. 200,000/=. She claimed that the respondent was previously not qualified prior to him joining KMTC and never worked before that.
  13. Cross-examined, she stated that she was the one providing while he was a student at KMTC. She testified that since they were husband and wife, they agreed to have both their names in the sale agreement.
  14. DW-3 was MO a cousin of the 1<sup>st</sup> appellant. His evidence was that on 24 January 2014, he witnessed the 2<sup>nd</sup> appellant going to the bank in company of the 1<sup>st</sup> appellant to withdraw Kshs. 400,000/=. He added that the balance was paid in instalments of Kshs. 20,000/= and Kshs. 180,000/= and these were paid by the 2<sup>nd</sup> appellant.
  15. With that evidence the appellants closed their case.
  16. Counsel filed their final submissions before the trial court pronounced its judgment.
  17. In the judgment, the trial court held that though the 2<sup>nd</sup> appellant had produced documents that she had obtained a loan facility, there was no direct evidence that the said loan is what was used to pay the deposit and the entire purchase price. He held that the respondent had also availed witnesses to demonstrate that he paid part of the purchase price. That being the case, he held that he can only resort to the sale agreement and acknowledgement of the purchase price which bear the signature of both respondent and 2<sup>nd</sup> appellant, and which attests that the property was bought jointly. He thus allowed the respondents case and ordered the property transferred to both parties. On costs, each party was to bear their own costs.
  18. Aggrieved, the appellants have preferred this appeal on the following grounds :



1. The trial Magistrate erred in law in making orders for the enforcement of the agreement which involved agricultural land and which had not received the mandatory consent of the Land Control Board.
  2. The trial Magistrate erred in law in making orders for the enforcement of the agreement which was null and void for all purposes.
  3. The trial Magistrate erred in finding that the respondent and the appellants (sic) were joint purchasers when there was evidence or sufficient evidence on record to the contrary.
  4. The trial Magistrate misdirected himself in deciding the case against the weight and uncontroverted evidence by the appellants who actually purchased the land in issue.
19. The appellants seek that the appeal be allowed and the respondent's case be dismissed.
20. The appeal was argued through written submissions and I have taken note of the submissions filed by Mr. Soire, learned counsel for the appellants, and Mr. Ombati, learned counsel for the respondent.
21. In his submissions, Mr. Soire urged that the sale agreement is void for all purposes for want of consent of the Land Control Board and relied on Section 6 (1) of the *Land Control Act*, Cap 302, Laws of Kenya. He submitted that no evidence was tendered to show that the consent was applied for and obtained as required. He submitted that if the court finds that no consent was issued then no order for specific performance can be made. He further submitted that the weight of evidence showed that it was the 2<sup>nd</sup> appellant who contributed the purchase price and not the respondent who was then a student.
22. On his part, Mr. Ombati submitted that the issue of consent of the Land Control Board was a new issue which was never raised in the defence or even in the evidence of the parties. He referred me to the case of Jane Njeri Nderi vs Peter Njuguna Nderi, ELC at Thika, Case No. 28 of 2020. He further relied on the case of George Achiyuga Aliaza vs Zephania Kisa Paul where the Court of Appeal waived the requirement for consent of the Land Control Board. On the issue of purchase, he submitted that the 2<sup>nd</sup> appellant and respondent executed the sale agreement as joint purchasers.
23. I have considered the foregoing.
24. I am of the opinion that the issue of the consent of the Land Control Board is a new issue now being brought up on appeal. It was never raised in the pleadings of the parties and was never canvassed in the evidence. No party had opportunity to say whether or not the consent of the Land Control Board was required, applied for, or given. No party mentioned that he/she had any issue regarding the issuance, or lack of issuance, of the consent of the Land Control Board. No party asked that the sale agreement be declared null and void for want of the consent of the Land Control Board. One cannot at the appellate stage ask the court to resolve an issue that was never there before the trial court and the trial court never directed its mind to it. In essence, the question of the Land Control Board was not in dispute and the appellants cannot now say that the trial court erred in not voiding the sale agreement for want of consent of the Land Control Board. How can a court be at error in not deciding a matter that the court was never called upon to decide? There is really no point of saying any more on this point. There is no substance in grounds 1 and 2 of the Memorandum of Appeal.
25. In arguing grounds 3 and 4 of the Memorandum of Appeal, the appellants' main contention is that the purchase price was paid solely by the 2<sup>nd</sup> appellant. In my opinion, it is immaterial that the purchase price was paid wholly by the 2<sup>nd</sup> appellant, or whether it was partly paid by the appellant and partly by the respondent, or even wholly by the respondent. The main prayer in the suit was for an order of specific performance of the sale agreement to have the 1<sup>st</sup> appellant transfer the suit land in both names



of the 2<sup>nd</sup> appellant and respondent. Here, we need to look at the obligations of a seller. Once the seller is paid, he has the duty to transfer the land to the purchasers or in accordance with the directions of the purchasers. The purchasers in our case were both 2<sup>nd</sup> appellant and the respondent.

26. In the sale agreement, the 1<sup>st</sup> appellant (as vendor) agreed and undertook to execute each and every document to convey the land to the purchasers. Whether or not the suit land was bought by money from the 2<sup>nd</sup> appellant or money from the respondent ought never to have been a concern of the 1<sup>st</sup> appellant. He needed to abide by his duty which was to transfer the suit land to the two purchasers in accordance with the sale agreement. He could not create his own terms which were not in the sale agreement to try and transfer the land only to the 2<sup>nd</sup> appellant.
27. In fact, I am even shocked at the manner in which he conducted himself in these proceedings. His interest ended when he was paid the purchase price. He had no business poking his nose into the relationship of the 2<sup>nd</sup> appellant and the respondent. He could not try to side with the 2<sup>nd</sup> appellant to the detriment of the respondent. Why would it bother him that he was being called to transfer the land to both 2<sup>nd</sup> appellant and the respondent? Why would he even bother to appeal the judgment of the trial court? What is hurting him by the order that he transfers the land to both the 2<sup>nd</sup> appellant and the respondent? I am completely baffled. He stands to gain nothing or lose nothing whether he transfers the land solely to the 2<sup>nd</sup> appellant, solely to the respondent, or jointly to both 2<sup>nd</sup> appellant and respondent. His interest was the purchase price and he was fully paid.
28. The issue of who contributed what, and to what extent, ought never to have been an issue before court as there was no counterclaim by the 2<sup>nd</sup> appellant to demand that the suit land be transferred solely into her name. Neither was this a suit by the 2<sup>nd</sup> appellant against the respondent for division of matrimonial property. If there were such pleadings, then the court may have had to delve into the issue of contribution of the parties, but as I am saying, there were never any pleadings to this effect, and it is because of this that the question of contribution of the parties to the purchase price was completely irrelevant. What was relevant was the duty of the seller to transfer land to the purchasers and nothing more.
29. The 1<sup>st</sup> appellant did not say that he was not paid. He did not contest the sale agreement. He did not ask that he be excused from it. He never asked that the sale agreement be voided. That being the case, I cannot fault the court for making the order that he specifically performs the agreement in accordance with the sale agreement. It is the same holding that I make herein. I direct the 1<sup>st</sup> appellant to perform his part of the sale agreement and execute all requisite documents in order to have the suit land transferred into the joint names of the 2<sup>nd</sup> appellant and the respondent. He must ensure that he has done so within the next 30 days. In default, the Court Administrator to proceed and do so on behalf of the 1<sup>st</sup> appellant.
30. From the foregoing it will be seen that I see no substance in this appeal and it is hereby dismissed.
31. The last issue is costs. I recognize that the 2<sup>nd</sup> appellant and the respondent are, or were, husband and wife. Their romance seems to have gone sour. It is not uncommon in such instances to find some lingering bitterness which makes the erstwhile lovers lose reason and now claw at the other for truly love hurts. I will not add salt to injury by burdening one party with costs as between the 2<sup>nd</sup> appellant and the respondent. I therefore make no orders on costs as between them. However, the 1<sup>st</sup> appellant had a duty to perform his part of the bargain. His refusal to do so is what made the respondent come to court so as to enforce that sale agreement. I have already explained myself that the 1<sup>st</sup> appellant had no reason not to transfer the suit land in accordance with his duties under the sale agreement. I have also wondered what has bothered him so much by the court's order so that he feels that he must appeal yet



he was paid the purchase price. For those reasons, I will order the 1<sup>st</sup> appellant to pay to the respondent the costs of the suit before the lower court and the costs of this appeal.

32. Judgment accordingly.

**DATED AND DELIVERED THIS 7 DAY OF OCTOBER 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in presence of :

Mr. Soire for the appellants

Mr. Ombati for the respondent

Court Assistant – Michael Oyuko

