



REPUBLIC OF KENYA



**Kiura v Reuben (Environment and Land Appeal 4 of 2024)
[2025] KEELC 5866 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5866 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 4 OF 2024**

**AK BOR, J
JULY 31, 2025**

BETWEEN

CECILY NJOKI KIURA APPELLANT

AND

NDWIGA NYAGAH REUBEN RESPONDENT

(An Appeal arising from the judgment of Hon J.W Gichimu Principal Magistrate, delivered on 1/2/2024 in Runyenjes PM ELC Case Co. E034 of 2022)

JUDGMENT

1. This appeal arises from the judgment of Hon J.W Gichimu Principal Magistrate, delivered on 1/2/2024 in Runyenjes PM ELC Case Co. E034 of 2022 *Ndwiga Nyagah Reuben v Cecily Njoki Kiura*, which the Respondent instituted vide a plaint seeking to have the Appellant transfer to him 0.05 hectares (ha) out of the land known as Kagaari/Kigaa/11204 within 60 days of the date of judgment, failing which the Executive Officer was to sign the relevant transfer documents and the Land Registrar was to dispense with the requirement for the original title deed for the land.
2. In the alternative, he sought to have the Appellant pay him Kshs. 215,000/= being half of the purchase price equivalent to the 0.05ha which the Appellant did not transfer to him and a further sum of Kshs. 129,000/= being the agreed liquidated damages making a total of Kshs. 344,000/= together with interest at court rates from the date of the agreement. He also sought costs of the suit with interest at court rates from the date of judgment and any other relief the court deemed fit to grant.
3. The Respondent's case was that he entered into an agreement dated 14/6/2016 with the Appellant for the sale of 0.10 ha out of the land known as Kagaari/Kigaa/8533 at the agreed consideration of Kshs. 430,000/=. That the Appellant excised a portion of the land which was given reference no. Kagaari/Kigaa/10594, which she transferred to the Respondent and a title deed was issued to him on 27/5/2019. He averred that Kagaari/Kigaa/10594 measures 0.05 ha, which is half of what the parties



had agreed upon and as such the Respondent perpetrated fraud on him. He stated that he did not check the acreage on the title deed and only discovered the fraud by the Appellant in October 2021 when he attempted to get a loan facility using the title deed as security and the title was taken to the bank for valuation.

4. The Respondent set out particulars of fraud against the Appellant as transferring to him land that was smaller than what he had bought, and retaining the extra Kshs. 215,000/= despite the Appellant being aware that the land she transferred was half of what the Respondent had paid for. He averred that the Appellant breached the express term of the agreement when she transferred to him land which was half of what was contracted.
5. The Appellant filed a defence and counterclaim in which she averred that after entering into the agreement, parties mutually agreed that the size of the land she was selling had become too small and therefore they would reduce the size previously agreed of 0.10 ha to 0.05ha for the same price. She denied the allegations of fraud and breach of contract pleaded by the Respondent and averred that all the changes to the sale agreement were made by mutual consent following which the parties went to the Land Control Board (LCB), obtained consent, documents were executed and the Respondent processed his title deed.
6. After excising the Respondent's portion, she remained with Kagaari/Kigaa/11204 which demonstrated the mutual agreement because both parties were involved in the subdivision of the land. In the counterclaim, the Appellant averred that the Respondent had illegally placed a caution against Kagaari/Kigaa/11204 and sought an order for the caution to be vacated and costs.
7. The matter went to trial where parties tendered their evidence. The Respondent testified that the parties neither agreed to reduce the acreage of the land sold nor did the Appellant refund the purchase price for the remaining acreage. On cross examination, the Respondent testified that the suit land was surveyed by the Appellant and her surveyor and not him and that he did not see the mutation forms.
8. He admitted that the parties attended the LCB and that the Board gave consent for the transfer of a 1/8 acre and that he signed the transfer form for the 1/8 acre. He processed the title deed at the lands office for 1/8 acre. On re-examination, he stated that the parties did not enter into another agreement to rescind the previous agreement. The Respondent called his wife, Zipporah Wanja Ndwiga, who corroborated his testimony. The Respondent relied on the sale agreement dated 14/6/2016 and copies of the title deed for Kagaari/Kigaa/10594, official search for land parcel Kagaari/Kigaa/11204, and the demand letter dated 9/11/2021.
9. The Appellant testified that the parties had agreed on the sale of ¼ acre of land. However, that there was a disagreement within her family and she was asked to give her grandson a portion of land. She stated that she called the Respondent and informed him that she wanted to reduce the portion she was selling to him to 1/8 acre. That if he did not want 1/8 acre, she had no choice but to refund the entire purchase price and the Respondent agreed to that new arrangement. She admitted that the parties did not write another contract to rescind the first agreement. On cross examination, she stated that she was summoned before the Directorate of Criminal Investigations in 2021 regarding the issue of this land. She called the surveyor to subdivide the land.
10. The trial court delivered its judgment and took the view that the parties agreed to reduce the acreage of the land because the Appellant was unable to transfer the whole portion of 0.10 ha in order to accommodate her grandson. The trial court's findings were based on the facts that the Respondent attended the LCB where consent was issued for the transfer of a portion of land measuring 0.05 ha and not 0.10 ha; the Respondent signed the transfer form for 0.05 ha instead of the agreed 0.10 ha; the title



deed issued to the Respondent was for 0.50 ha and not 0.10 ha; and, the title deed was issued to the Respondent on 29/10/2019 but he came to court in 2022.

11. The trial court concluded that the Respondent was aware that the portion of land which was transferred to him had been reduced, and based on those findings, the court did not order specific performance of the sale agreement. The court was of the view that the Appellant could not transfer half of the agreed portion and retain the entire purchase price and so she had to refund the purchase price for the portion that she did not transfer to the Respondent.
12. The court found that the Appellant breached clause 1(b) of the sale agreement when she failed to transfer 0.10 ha and instead transferred 0.05 ha and that the Respondent was therefore entitled to liquidated damages for breach of contract being $\frac{3}{4}$ of the purchase price. The court was satisfied that the caution registered against the suit land by the Respondent should be removed because he was getting a refund of the money and directed that the caution be removed failing which the Land Registrar would remove it. The Learned Magistrate entered judgment for the Respondent in the sum of Kshs. 344,000/= comprising a refund of half the purchase price of Kshs. 215,000/= and liquidated damages of Kshs. 129,000=.
13. Aggrieved by that decision, the Appellant raised three main grounds of appeal which were not elegantly drafted but can be summed up as follows: that the trial court failed to consider its own findings; that the evidence tendered left no doubt that the parties agreed to reduce the acreage because the Appellant was unable to transfer the whole agreed portion; the findings of the court defeated any fraud on the part of the Appellant; that the Learned Magistrate erred in failing to find that parties had agreed to vary the terms of the agreement for the reasons given in the judgment; and, the trial court was faulted for finding that the Appellant breached the agreement after finding that the parties agreed to vary the agreement in very clear terms.
14. The court was invited to set aside, review or reverse the judgment of the trial court and allow the counterclaim. The court directed parties to file and exchange written submissions which it has considered.
15. The Appellant submitted that the trial court erred in finding that the Appellant should refund half of the purchase price yet the court found that it was clear the parties agreed to reduce the acreage. She submitted that the judgment against her for breach of contract should be set aside since from the evidence and record of the court, it was clear that the agreement was varied by consent of the parties. She submitted that the findings of the trial court defeated any fraud on her part since the Respondent agreed to the variation of the size of land and went ahead to sign the transfer forms and documents that clearly indicated the varied size of land to be 0.05 ha. She urged the court to allow the appeal.
16. The Respondent submitted that no evidence was tendered in court to confirm that the parties entered into another agreement for the sale of 0.05 ha of the suit land as opposed to the agreed 0.10 ha. He relied on *Kukal Properties v Tafazzal Maloo & 3 others* (1993) eKLR and *Housing Finance Company of Kenya Ltd v Gilbert Kibe Njuguna*, and *Gimalu Estates Ltd & 4 others v International Finance Corporation & another* (2006) eKLR where it was generally held that parties to a contract can effect a variation of the contract by modifying or altering its terms by mutual agreement. He submitted that he trusted the Appellant who was his neighbor until when he desired to use the title deed as a security. He maintained that he was entitled to a refund of the portion of land that was not transferred to him plus 30% penalty for breach, plus costs and interest of the suit. He urged the court to find that the Appellant had breached the agreement and dismiss the appeal with costs.
17. The issue for determination is whether the trial court erred in arriving at its findings and whether the appeal has merit. It is not in dispute that the parties entered into an agreement dated 14/6/2016 for the



sale of 0.10 hectares of land by the Appellant to the Respondent for a consideration of Kshs. 430,000/= . It is also not in contention that only 0.05 hectares was transferred to the Respondent, and that there was no subsequent written agreement executed between the parties to vary the original acreage or purchase price.

18. In *Prudential Assurance Co. v Sukhwender Singh Jutney and Another* cited in *Weru v Nderitu* (Civil Appeal E024 of 2022) [2023] KEHC 20678 (KLR) (21 July 2023) (Judgment) the court held that once parties have reduced their agreement into writing, no extrinsic evidence, oral or written may be admitted to contradict, vary, or add to the terms of the written agreement.
19. The trial court found that the Respondent attended the LCB, signed the transfer forms and received a title deed for 0.05 hectares. The Learned Magistrate erred in treating those actions as evidence of a variation of the written contract. The Appellant was bound by the terms of the original agreement in the absence of any written variation of that agreement.
20. The Appellant's failure to transfer the agreed 0.10 ha to the Respondent amounted to a breach of contract. Clause 1(b) of the sale agreement provided that should any party fail to perform its part of the agreement, they would pay to the other 30% of the agreed purchase price as liquidated damages together with any other money incurred in furtherance of the agreement.
21. The trial court did not err in finding that the Appellant had breached her part of the agreement and for awarding the liquidated damages of Kshs. 129,000/= being 30% of the agreed purchase price. Given that the Appellant only conveyed a portion of the land initially agreed upon, the trial court concluded, rightly so, that the Respondent was entitled to a refund corresponding to the untransferred portion. The trial court directed that the caution placed against Kagaari/Kigaa/11204 was to be removed, a finding which this court sees no reason to interfere with.
22. This court finds no merit in the appeal and dismisses it with costs to the Respondent.

DELIVERED VIRTUALLY AT EMBU THIS 31ST DAY OF JULY 2025.

K. BOR

JUDGE

In the presence of:

Mr. Njiru Mbogo for the Appellant

Mr. Ndwiga Nyaga Reuben- the Respondent

Diana Kemboi- Court Assistant

