Barasa v Ikwara (Environment and Land Appeal E001 of 2023)
[2025] KEELC 7189 (KLR) (23 October 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL E001 OF 2023

BN OLAO, J

OCTOBER 23, 2025

BETWEEN

BARNABAS OTWANI BARASA ..... APPELLANT

AND

GEORGE OLAKITAR IKWARA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of HON E. A. NYALOTI CHIEF MAGISTRATE delivered on 26th July 2023 in Busia CM ELC Case NO 6 of 2018)

JUDGMENT

1. George Olakitar Ikwara (the Respondent herein) was the Plaintiff in *Busia Chief Magistrate's Court ELC Case No 6 of 2018* wherein he impleaded Barnabas Otwani Barasa (the Appellant herein) over what he claimed to be a breach of the sale agreement dated 18th October 2016 with respect to the land parcels No South Teso/Apokor/2661 and South Teso/Apokor/2832 (the suit land). He sought an order of specific performance of the sale agreement and for the Appellant to execute all the unsigned documents to facilitate the transfer of the suit land to him and in default, the Executive Officer of this Court be authorized to do so on behalf of the Appellant. He also sought an order for costs and any other relief the Court may deem just and expedient to grant.

2. The Appellant filed a defence and counter-claim in which he pleaded inter alia, that it was the Respondent who breached the sale agreement by not paying the balance of the purchase price within the period of 4 months as agreed. That out of the purchase price of Kshs.720,000 the Respondent only paid Kshs.620,000 as deposit and although the Respondent later agreed to pay Kshs.140,000 having taken possession of the suit land and damaged some property thereon, there is still a sum of Kshs.5,000 owed to him.

3. The Appellant sought in his counter-claim the following orders.

    1. Dismissal of the Respondent's case with costs.

2. A declaration that the sale agreement between the parties dated 18th October 2016 is null and void.

3. Costs.

4. The Respondent filed a reply to the defence and counter claim. He pleaded that the Appellant had not denied receipt of the Kshs.720,000 but had refused to complete the transaction. Further, that no notice had been served demanding Kshs.100,000 as claimed in the counter-claim. That the counter-claim is scandalous and an abuse of the Court process and should be dismissed and the Respondent's claim allowed as prayed.

5. The suit was heard partly by Hon L. Ambasi Chief Magistrate who heard the Respondent's case and thereafter by Hon E. N. Nyaloti Chief Magistrate who heard the Appellant's case and subsequently delivered the impugned judgment on 26th July 2020. In that Judgment, the trial magistrate made the following disposal orders:

    1. An order of specific performance directing the Appellant to sign and execute the transfer documents and hand over the land to the Respondent with vacant possession.

    2. The Appellant has proved the counter-claim on a balance of probability.

    3. The Respondent to pay the Appellant Kshs.100,000 being the balance of the purchase price and Kshs.5,000 being the balance of the damages the Respondent owes the Appellant.

    4. The Appellant to execute the transfer documents to the Respondent within 14 days failure to which the Executive Officer/Court administrator Busia Law Court shall execute the transfer documents in favour of the Appellant.

    5. Any encumbrance on the land filed by the Appellant be removed within 14 days of this judgment.

    6. The Respondent is awarded costs.

    Aggrieved by that judgment, the Appellant moved to this Court *vide* his memorandum of appeal dated 2nd August 2023 in which he raised the following ten (10) grounds of appeal:

        1. The learned trial magistrate erred in law and in fact in allowing the Respondent's claim in the absence of material evidence supporting such a finding.

        2. The learned trial magistrate erred in law and in fact in ordering for specific performance of a contract which had been breached by the Respondent.

        3. The learned trial magistrate erred in law and in fact in allowing the Respondent's case when the Appellant had adduced sufficient evidence on a balance of probabilities to prove that the Respondent had breached the contract forming the basis of the claim.

        4. The learned trial magistrate erred in law and in fact in basing her decisions on facts that were never pleaded and/or proved during trial.

5. The learned trial magistrate erred in law and in fact in allowing a non-existent counter-claim going by the pleadings that had been tabled before Court for determination.

6. The learned trial magistrate erred in law and in fact in making a finding that the Appellant had proved his and proceeded not to grant the orders sought in the counter-claim.

7. The learned trial magistrate erred in law and in fact by awarding the Appellant the sum of Kshs.105,000 in the absence of such a prayer in the pleadings.

8. The learned trial magistrate erred in law and in fact in writing and delivering a judgment that did not comply with mandatory provisions of the law on framing of a judgment.

9. The learned trial magistrate erred in law and in fact by allowing both the Respondents claim and the Appellant's counter-claim which procedure and holding is strange and alien in law.

10. The learned trial magistrate erred in law in awarding costs to the Respondent and failing to award costs and interest to the Appellant when it had been demonstrated that it is the Respondent who had breached the contract forming the basis of the claim and when she had awarded the sum of Kshs.105,000 to the Appellant.

The Appellant therefore prayed that this appeal be allowed, the judgment of the lower Court be set aside, the counter-claim be allowed and he be allowed costs of this appeal.

6. The Court directed that the appeal be canvassed by way of written submissions. These were filed by Mr Okeyo instructed by the firm of Okeyo Ochiel And Company Advocates for the Appellant. However, although the firm of Masiga, Wainaina And Associates Advocates filed a Notice of Appointment to act alongside the firm of Ipapu And Advocates for the Respondent, they did not file any submissions on behalf of the Respondent.

7. I have considered the record of appeal and the submissions by the Appellant's counsel.

8. Before I delve into the merits or otherwise of the appeal, I notice that the typed judgment reads:

> " Dated, Signed And Delivered In Open Court At Busia Law Court This 26Th Day Of July 2020 In The Presence Of The Parties.
>
> E. A. Nyaloti
>
> Chief Magistrate
>
> Busia"

There is then the signature of the trial magistrate dated 26th July 2023 It is therefore clear whether that judgment was delivered on 26th July 2020 or 26th July 2023. That issue has not been canvassed but I will take it that the exact date of delivery was 26th July 2023 and that the date of 27th July 2020 is an error.

9. This being a first appeal, I must be guided by precedents such as *Okeno v R* 1972 EA 32 where the then East African Court of Appeal set out a first appellate Court's duty as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* 1957 EA 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions (*Shantilala M. Ruwala v R* 1957 EA 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* 1958 EA 424".

The general principle is that an appellate Court will interfere with the findings of fact by the trial Court where such findings are based on no evidence or on a misapprehension of evidence or the trial Court is shown demonstrably to have acted on wrong principles in reaching it's decision – see also *Selle & Another v Associated Motor Boat Company Ltd* 1968 EA 123 And Also *Mwanasokoni v Kenya Bus Services Ltd* 1985 KLR 931 [1985 eKLR] among others. I shall therefore be guided by the law, the above precedents and others while considering this appeal.

10. Grounds NO 1 and 4 can be considered together. Therein, the trial magistrate is faulted for allowing the Respondent's claim in the absence of material evidence and basing her decision on facts which were not pleaded. It is common ground that the parties had executed a land sale agreement dated 18th October 2016 whereby the Appellant was to sell to the Respondent the suit land at a consideration of Kshs.720,000 of which the sum of Kshs.620,000 was to be paid on a or before execution of the agreement and the sum of Kshs.100,000 being the balance was to be paid within 4 months from the date of execution of the sale agreement. Clause 3 of the agreement provided that the Kshs.620,000 would be held as stakeholders while the Appellant arranged for the extraction of the title deed to the suit land. In the course of the trial, it became obvious that both parties did not keep their bargain of the sale agreement in terms of payment of the balance price and also the production of the relevant documents to facilitate the transfer. When he was cross-examined by MR WERE on 17th November 2022, the Respondent said:

> " I was to pay the balance of Kshs.100,500 and was to be paid within 4 months. I paid after that date. Possession was upon payment of full purchase price. We have had disputes on the land that I destroyed his crops."

On his part, when the Appellant was cross-examined by MR IPAPU, he admitted that he had not availed the original title deeds for the suit land as per clause 3 of the sale agreement which reads:

> " Completion:

On or before the completion date, the vendor shall deliver to the purchaser the following documents two original title deeds in respect of land parcels No South Teso/Apokor/2832 and South Teso/Apokor/2661 by way of transfer."

In cross-examination the Appellant said:

> " I did not allege loss of title to the land, I did not lodge a claim of loss of title. I bought the land together with my spouse. I was not registered as co-proprietors. It was a family property but it was registered in my name. I never reported anywhere that I lost a title."

For reasons best known to himself, it is clear from the above that the Appellant similarly did not honour his obligation by availing the original title documents to the suit land.

11. A sale agreement is a solemn undertaking between the parties. Each is required to abide by their obligations therein. If there is need for any variations, the parties must agree. In view of the above evidence, it is clear that the trial magistrate erred both in law and in fact when she made a finding at paragraph 37 of the impugned judgment that:

> 37: "An order of specific performance by the Defendant to sign and execute the transfer documents and hand over the land to the Plaintiff with vacant possession."
>
> It was therefore an act of unjust enrichment for the Appellant to be ordered to execute transfer documents and hand over the suit land to the Respondent who, by his own admission, had not paid the balance of the purchase price in terms of their agreement. There is merits in grounds 1 and 4.

12. In grounds 2 and 3, the trial magistrate is faulted for ordering specific performance of an agreement which had been breached and which breach had been proved by the Appellant on a balance of probabilities. In his plaint dated 24th January 2018 and filed in the trial Court, the Respondent's main prayer was an order of specific performance of the land sale agreement between the parties with respect to the suit land. The remedy of specific performance is defined in *Black's Law Dictionary* as:

> " The rendering, as nearly as practicable, of a promised performance through a judgment or decree ... a Court ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate as when the sale of real estate or a rare article in involved. Specific performance is an equitable remedy that lies within the Court's discretion to award whenever the common law remedy is insufficient, either because damages would be inadequate or because the damages could not possibly be established."

In the case of *Guarden Singh Birdi & Marinder Singh Ghatora As Trustees Of Ramgharia Institute Of Mombasa v Abubakar Madhubuti* C.a. Civil Appeal No 165 Of 1996, Gicheru JA (as he then was) said at the commencement of his judgment with which Tunoi JA agreed (with SHAH J A dissenting) that:

> " When the Appellants sought the relief of specific performance of the agreement of sale of the Respondent's property ....
>
> ... they must have been prepared to demonstrate that they had performed or were ready and willing to perform all that they had not acted in contravention of the essential terms of the said agreement."

Similarly, in the case of *Mawa Family Co Ltd v Industrial & Commercial Development Corporation & Another* C.a. Civil Appeal No 76 of 2017 [2024 KECA 802 KLR], the Court had the following to say at paragraph 29:

> " By parity of reasoning we find that in the instant case the memorandum of sale expressly provided that time was of the essence. For the Appellant to seek the equitable relief of specific performance, he had a duty to demonstrate that he had performed all the terms, of the contract. In the instance case, it is on record that the Appellant had not performed all the terms of the contract. In the circumstances, we find that the Appellant is not entitled to the equitable relief of specific performance."

Given what I have already stated above, it must be obvious that the remedy of specific performance was not available to the Respondent. The trial magistrate therefore erred both in law and in fact in granting the Respondent that remedy. In the case of *Kukal Development Ltd v Tafazzal H. Maloo & 3 Others* 1993 KECA 65 KLR [c.a Civil Appeal No 155 of 1992, and which has been cited by counsel for the Appellant, Mulli JA addressed the issue of beach and specific performance as follows:

> " The Maloos were in breach of the intended agreement. They accepted the refund of 10% deposit. The purchase price was not tendered during the contractual period or thereafter. The remedy of specific performance was not available to the Maloos. Specific performance is an equitable remedy and must flow from a legal right. The Maloos, having committed breach of their agreement, specific performance could not be legally decreed."

Grounds NO 2 and 3 of the memorandum of appeal must therefore be allowed.

13. In grounds NO 5, 6, 7 and 9 the Appellant takes issue with the trial magistrate for allowing a non-existent counter-claim going by the pleadings before the Court and for findings that the Appellant had proved his counter-claim and yet proceeded not to grant the orders sought therein. The trial magistrate is similarly faulted for allowing both the Respondent's claim and the Appellant's counter-claim which procedure is strange and alien in law.

14. A counter-claim is defined in *Black's Law Dictionary* 10Th Edition as

> " A claim for relief asserted against an opposing party after an original claim has been made; ... a defendant's claim in opposition to or as a set off against the plaintiff's claim – Also termed counteraction, counter-suit, cross demand or cross-claim".

I do not think there is any law and neither has counsel cited any precedent to the effect that a Court cannot grant a Plaintiff's claim and a Defendant's counter-claim. All depends on the particular circumstances of each case. Indeed, a Court can also dismiss both the Plaintiff's claim and the Defendant's counter-claim. That would not be strange in my view. All depends on the claims and evidence adduced.

15. In this case, the Appellant's counter-claim was pleaded in paragraph 23(a), (b) and (c) of his defence as follows:

    a. "Dismissal of the Plaintiff's case with costs."

    b. "A declaration that the agreement of 18.10.16 between the parties here is null and void."

    c. "Defendant be awarded costs."

So basically, the principal order which the Appellant sought in his counter-claim was for the trial magistrate to declare "that the agreement of 18.10.16 between the parties is null and void." In paragraph 38 of the impugned judgment however, and which I have already referred to above, the trial magistrate made the following findings:

38 "I am satisfied that the Defendant has proved the counter-claim on a balance of probability."

Having made the above finding, the trial magistrate then proceeded in paragraph 40 of the impugned judgment to order the Appellant "to execute the transfer document to the Plaintiff within 14 days failure to which the Executive Officer/Court Administrator Busia Law Courts shall execute the transfer documents in favour of the Plaintiff." That was really a contradiction in terms and an error both in law and in fact. The trial magistrate could not make a finding that the sale agreement executed on 18th October 2016 was null and void, as sought in the counter-claim, yet at the same time direct that the same be executed by the Appellant in favour of the Respondent. Once something is declared as being null and void it ceased to exist in the law and is therefore incapable of execution.

16. The trial magistrate also proceeded in paragraph 39 of the impugned judgment to order the Respondent to pay the Appellant "Kshs.100,000 being the balance of the purchase price and Kshs.5,000 being the balance of the damages the Plaintiff (Respondent) owes the Defendant (Appellant)". That was also an error in law and in fact. As counsel for the Appellant has rightly pointed out in his submissions, parties are bound by their pleadings and nowhere in his defence and counter-claim did the Appellant counter-claim for the payment to him of the said sum of Kshs.105,000 which the trial magistrate awarded him gratuitously. Grounds 5, 6, 7 and 9 of the memorandum of appeal are equally well pleaded and allowed.

17. Ground NO 8 faults the trial magistrate for having erred in law and in fact by writing and delivering a judgment that did not comply with the mandatory provisions of the law in framing a judgment. Order 21 Rule 4 of the *Civil Procedure Rules* provides that:

4: "Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

I have looked at the impugned judgement. In my view, it substantially complies with the provisions of Order 21 Rule 4 of the *Civil Procedure Rules*. I see no reason to fault the trial magistrate on that. However, Order 21 Rule 3(1) of the *Civil Procedure Rules* provides that:

3(1) "A judgment pronounced by the Judge who wrote it shall be dated and signed by him in open Court at the time of pronouncing it."

Judge is defined in Section 2 of the *Civil Procedure Act* to mean "the presiding officer of a Court" and therefore that includes the trial magistrate who presided over the proceedings the subject of this appeal. As I stated earlier on in this judgment, there are two dated on which the record shows it was delivered i.e. 26th July 2020 which is typed and 26th July 2023 which is hand written. The date of 26th July 2020 must be an error because the trial commenced on 17th November 2022 when the Respondent testified and ended on 18th March 2023 when the Appellant testified and closed his case. Other than that discrepancy in the dates of judgment, I do not see any other lapse worth my intervention especially in the absence of any submissions by the Respondent on that issue suggesting prejudice.

18. It is clear to me that this appeal is well merited and is for allowing.

19. Having said so, however, it is clear from the record that the Appellant received from the Respondent the sum of Kshs.620,000 being consideration for a transaction that has obviously collapsed. Section 78(1) (a) of the *Civil Procedure Rules* provides that among the powers of an appellate Court is "to determine a case finally." If the Appellant does not refund the said Kshs.620,000, which he himself confirmed during the trial when cross-examined by MR IPAPU on 18th March 2023 that:

> "I am not a liar. I am willing to refund the Plaintiff Kshs.620,000. I have said in my defence that I am willing to refund the Plaintiff Kshs.620,000. I am willing to refund Kshs.620,000 after the determination of this case."

and should that undertaking not have been fulfilled, then the Appellant will have unjustly enriched himself. It is only fair in the circumstances that he be directed to refund the said Kshs.620,000 to the Respondent.

20. The up-shot of all the above is that having considered this appeal, I issue the following disposal orders:

1. The appeal is allowed.
2. However, the Appellant to refund to the Respondent the sum of Kshs.620,000 within 30 days from the date of this judgment if he has not already done so and in default, execution to issue.
3. The parties to bear their own costs both here and in the Court below.

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 23RD DAY OF OCTOBER 2025.

Right of Appeal.

BOAZ N. OLAO

JUDGE

23RD OCTOBER 2025