



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyange v Nyagah (Environment and Land Appeal E028 of 2024)  
[2025] KEELC 5915 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5915 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E028 OF 2024**

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

**BETWEEN**

**IRERI M NYANGE ..... APPELLANT**

**AND**

**FREDRICK MWANIKI NYAGAH ..... RESPONDENT**

*(Appeal arises from the judgment of Hon J.A Otieno, Senior Resident Magistrate (SRM) delivered on 12/6/2024 in Embu CM ELC Case No. 72 of 2019)*

**JUDGMENT**

1. This appeal arises from the judgment of Hon J.A Otieno, Senior Resident Magistrate (SRM) delivered on 12/6/2024 in Embu CM ELC Case No. 72 of 2019 Fredrick Mwaniki N. Nyaga v Ileri M. Nyange, which the Respondent instituted seeking general damages for breach of contract, liquidated damages for breach of contract and an order for specific performance directing the Appellant to transfer a portion of 0.20 hectares (ha) out of the land known as Gaturi/Nembure/9682. An alternative prayer was made for refund of the purchase price of Kshs. 512,900/= together with interest from 15/11/2016 until payment in full. The Respondent also sought costs and interests of the suit and any other relief the court deemed fit to grant.
2. The Respondent's case was that that he entered into an agreement with the Appellant for the sale of 0.20 ha out of Gaturi/Nembure/9682 vide which he was to make a down payment and pay the balance of the purchase price after obtaining the consent of the Land Control Board (LCB) and upon the Appellant effecting the relevant transfer documents. He claimed to have paid the sum of Kshs. 512,900/= which the Appellant continued to hold despite not transferring the land to him. He asserted that the Appellant was in breach of contract and set out particulars of breach of the agreement by the Appellant.



3. The Appellant filed a defence and counterclaim and averred that the only amount he received as part payment of the purchase price was Kshs. 359,600/= and not Kshs. 512,900/= as alleged by the Respondent. He averred that the Respondent forcefully occupied the suit land for over three years and began cultivating and harvesting his coffee, Napier grass and bananas which prompted his family to object to the sale. It was his position that the Respondent was only entitled to a refund of Kshs. 359,600/=.
4. His counterclaim was that in 2016 the Respondent trespassed and constructed a cowshed on the suit land without authority which curtailed his use of the land as its proprietor. He sought to have the Respondent's suit dismissed with costs and for the Respondent. Further, he sought to have the Respondent demolish the cowshed in default of which he would be allowed to demolish it at the Respondent's cost. He pleaded for the Officer Commanding Runyenjes Police Station to provide security during the demolition. Additionally, he sought to have the land registrar Embu remove the caution registered against the suit land as well as costs of the suit.
5. During the hearing, the Respondent adopted his written witness statement and stated that on 21/4/2016, his cousin Ileri N. Nyange approached him and requested for his help in repaying a loan to the Agricultural Finance Corporation (AFC) to avoid the auction of his land. In return, Ileri agreed to sell him ½ acre out of Gaturi/Nembure/9682 at Kshs. 450,000/= and an additional Kshs 30,000/= for plantation including trees, coffee and bananas on the suit land.
6. The Respondent claimed that he began repaying the loan on 23/5/2016 and cleared it by 1/7/2018. Thereafter, he paid Kshs. 200,000/= for the land which the Appellant used to buy a motorcycle for his son, and a further sum of Kshs 30,000/= for the produce and plants on the farm. That he also gave the Appellant and his son more funds including Kshs. 80,000/= for a hospital bill for his son and Kshs 47,000/= for other needs, and that he also paid for the LCB consent in December 2018 thereby clearing the balance of the agreed purchase price. The Respondent contended that after completing payments, the Appellant told him that he would only give him a ¼ acre instead of ½ acre. He did not object but instead registered a caution against the land and reported the matter to the Assistant Chief. He maintained that he had fulfilled his part of the agreement which he sought to enforce.
7. To support his case, he tendered in evidence copies of the map of the suit land, receipts from AFC, the sale agreement dated 15/11/2016, valuation report, demand letter dated 5/2/2019 and a bundle of correspondence.
8. The Appellant testified and adopted his witness statement in which he stated that in 2016, he decided to sell the suit land so that he could help his son settle an outstanding loan. That his son brought the Respondent as a potential purchaser of the land and they agreed on the purchase price of Kshs. 450,000/=. That the Respondent made the first payment of Kshs. 159,600/= to the bank to settle the loan and later paid Kshs. 200,000/= in cash to the Appellant's son leaving a balance of Kshs. 90,400/=. He averred that the Respondent did not give him more money and before he could transfer the land to him, the Respondent started using the land without paying the balance and built a cowshed on the land which crossed over to the Appellant's land. The Appellant explained that he failed to transfer the suit land to the Respondent because the Respondent occupied the land forcefully and started committing acts of waste on the land. He admitted that the Respondent had removed the caution placed against the land. The Appellant produced a copy of the search done on parcel no. 9682.
9. On conclusion of the hearing, the trial court delivered a judgment on 12/6/2024 vide which it found that the Respondent neither tendered evidence of the existence of a cowshed on the suit land nor that it had encroached onto his land. The trial court found that since the Respondent had admitted that the caution against the land had been removed, the reliefs sought in the counterclaim fell short.



The court further observed that having established that the sum of Kshs. 359,600/= was admitted by the Appellant, the burden to prove the disputed amount of Kshs. 153,000/= was on the Respondent which burden the Respondent failed to discharge.

10. On the prayer for general damages, the trial court found that these were awarded under exceptional circumstances and that the Respondent did not prove the existence of such circumstances and therefore that relief was unmerited. The trial court awarded the Respondent 30% of Kshs. 450,000/= amounting to Kshs. 135,000/= based on paragraph 3 of the sale agreement as liquidated damages for breach of contract. The relief for specific performance was found not be reasonable in the circumstances and was declined. The court entered judgment in favour of the Respondent in the sum of Kshs. 359,600/= and Kshs. 135,000/= being liquidated damages for breach of contract as well as costs and interest at court rates. This is what led to the appeal before this court.
11. The Appellant filed a memorandum of appeal and set out five grounds of appeal. He faulted the trial court for holding that he did not prove that the cowshed was built on his land yet the Respondent filed a valuation report seeking the construction costs. He faulted the trial court for awarding liquidated damages and costs to the Respondent while it was contended that the Respondent breached the sale agreement dated 15/11/2016. The trial court was faulted for making orders in favour of the Respondent who did not prove his case on a balance of probabilities. The court was faulted for not making orders in respect of the Appellant's counterclaim and for generally disregarding the Appellant's defence. The court was urged to set aside the judgment of the trial court and allow the appeal. The Appellant prayed for costs of the appeal and for the suit before the trial court.
12. The appeal was canvassed through written submissions. The court directed parties to file and exchange written submissions which it has considered. The Appellant submitted that the Respondent took possession of the land without completing the sale or a formal transfer in breach of their agreement and therefore he should not have benefited from an award on liquidated damages. He urged that the award of liquidated damages was not supported by the agreement. He questioned why the counterclaim was dismissed yet the Respondent admitted in his testimony and it could also be seen in the valuation report that he built a cowshed on the suit land.
13. The Appellant argued that the trial court did not consider the fact that the Respondent prematurely entered and used the land contrary to the agreement which did not authorise taking of possession before completion which amounted to a breach of contract. Additionally, that the trial court erred in failing to direct the Respondent to vacate the suit land despite making an order for a refund of the purchase price.
14. The Respondent submitted that the standard timeline for completion of an agreement for sale is generally 90 days unless parties agreed otherwise. He averred that in breach of the sale agreement, the Appellant failed to apply for LCB consent to transfer or prepare documents in readiness to complete the sale transaction as section 8 of the Law Society Conditions for sale 2015 provides. He submitted that the Appellant did not disprove his claim that he breached the contract while urging that he proved that there existed a sale agreement which was not completed for over three years for no apparent reason. He urged the court to dismiss the appeal.
15. 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 15/11/2016 for the sale of 0.2 ha out of the suit land. The purchase price was agreed at Kshs. 450,000/=. The Appellant admitted that he was paid the sum of Kshs 359,600/= pursuant to the agreement. The Appellant argued that the Respondent took possession of the suit land prematurely and that that was not provided in the agreement and that the Respondent therefore breached the sale agreement. The



- Respondent argued that the completion period for a land transaction is 90 days. The failure by the Appellant to transfer the suit land to the Respondent despite receiving more than half of the purchase price three years later amounted to a breach of contract.
16. The Appellant contended that the Respondent was in breach of the terms of the agreement. The court has looked at the sale agreement, which was not very elegantly drafted and left out terms that would govern the performance of the agreement. Contrary to the Appellant's assertion, the completion date was not specified in the agreement. The agreement merely stated that it was subject to the LCB consent being obtained and if this were refused, the agreement would be deemed to be cancelled and there would be no other claim save for the consideration. It would seem that the Appellant did not take any steps to obtain the LCB consent yet clause 2 provided that the balance of Kshs, 129,000/= would be paid after the consent of the LCB. It is not in contention that the Respondent paid Kshs 359,600/= towards the purchase of the land.
  17. The contract provided at clause 3 that should any party fail to perform his part of the agreement, he would pay the other 30% of the agreed purchase price as liquidated damages. That was the agreement which the parties wrote and agreed to be bound by. The trial court cannot be faulted for awarding liquidated damages for it was an express term in the parties' agreement. The agreement was silent on the taking of possession of the land being sold by the purchaser. It cannot therefore be said that the Respondent breached the contract by taking possession of the land.
  18. in the counterclaim, the Appellant sought to have the Respondent demolish the cowshed constructed on the suit land and which was said to have encroached onto the Appellant's land. The trial court found that the Appellant did not tender evidence of the existence of a cowshed on the suit land or that it had encroached onto the Appellant's land. The court notes from the valuation report produced by the Respondent that he sought compensation for a cowshed as part of the developments made on the suit land. The court agrees with the Appellant that that was sufficient evidence to prove the existence of a cowshed on the suit land. The trial court erred in finding that the existence of the cowshed was not proved. The second limb of the counterclaim was in relation to the removal of the caution. The Appellant admitted during trial that the Respondent had removed the caution on the suit land, that prayer was overtaken by events as the trial court noted.
  19. The trial court ordered that the Respondent be refunded the purchase price paid as well as the liquidated damages which effectively terminated the agreement. This was in line with clause 3 of the agreement which stipulated how the liquidated damages were to be calculated. The Appellant failed to prove that the Respondent breached the terms of the sale agreement. He also failed to prove that he fulfilled his end of the bargain and met his obligations towards the successful completion of the agreement.
  20. The appeal succeeds in part. The Respondent will demolish the cowshed he constructed on the suit land within 30 days of the date of this judgment in default of which the Appellant will be at liberty to demolish it and seek a refund from the Respondent of the cost of the demolition. Each party will bear its costs for the appeal.

**DELIVERED VIRTUALLY AT EMBU THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**K. BOR**

**JUDGE**

In the presence of:

Ms. W. Kamochu holding brief for Ms. M. Ndeke for the Appellant



Mr. K. Kariuki holding brief for Mr. K. Guantai for the Respondent

Diana Kemboi- Court Assistant

