



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELC APPEAL NO. 32 OF 2020

PAMELA AWUOR OCHIENG1st
APPELLANT

ROMANUS ODHIAMBO OTIENO2nd
APPELLANT

-VERSUS-

ELISHA ODARI
.....**RESPONDENT**

JUDGEMENT

A. Background of the Appeal

1. This is an appeal from the judgment and decree of **Hon. M. Obiero, Principal Magistrate**, delivered on **25th August 2020** in **Migori Chief Magistrate's Court, Environment and Land Case No. 4 of 2019**. The suit was originally filed at the **Environment and Land Court at Kisii as ELC No. 346 of 2014** before being transferred to the ELC at Migori and subsequently to the Chief Magistrate's Court at Migori for hearing and final disposal pursuant to jurisdictional directions on pecuniary limits.
2. The dispute traces its origin to a **sale agreement dated 2nd November 2010** between the present appellants, **Pamela Awuor**

Ochieng and **Romanus Odhiambo Otieno**, as purchasers, and the respondent, **Elisha Odari** as vendor. Under that agreement, the respondent agreed to sell to the appellants a parcel of land known as **Land Reference No. SUNA WEST/WASIMBETE/1257**, measuring approximately **3.40 hectares**, at an agreed consideration of **Kenya Shillings Three Hundred and Sixty Thousand (Kshs. 360,000)**. The purchase price was paid in full **Kshs. 340,000** by cheque and **Kshs. 20,000** in cash and the purchasers were granted possession immediately after execution.

3. The respondent, however, later declined and/or failed to execute the requisite transfer instruments, prompting the appellants to institute proceedings in the lower court seeking, inter alia, (i) an order of permanent injunction restraining the respondent from interfering with their quiet possession of the suit property, (ii) an order of **specific performance** compelling him to transfer the land, and (iii) costs of the suit.
4. The **original plaint**, filed on **4th September 2014**, inadvertently described the suit property as **LR SUNA EAST/WASWETA 1/1257** instead of **SUNA WEST/WASIMBETE/1257**. Upon discovering the error, the appellants filed an **amended plaint dated 4th December 2014** correcting the land reference number. The amended plaint, together with all subsequent witness statements, documents, and testimony, consistently referred to the correct parcel, that is, **SUNA WEST/WASIMBETE/1257**. The respondent filed a statement of defence denying liability and asserting that the **Kshs. 360,000** was a **loan**, not a purchase price.

5. During trial, the appellants called four witnesses, including both purchasers and the attesting witnesses to the sale agreement, who confirmed the transaction and the payment of the purchase price. The respondent, testifying as DW1, admitted receiving the money but claimed it was advanced as a loan for school fees. Under cross-examination he conceded that the identity-card number appearing in the agreement was his.
6. After evaluating the evidence, the learned magistrate identified five issues for determination, namely: (i) whether the Kshs. 360,000 which the Defendant received was from the plaintiffs was a loan or purchaser price of the sale of land, (ii) whether the Defendant had capacity to sell any part of the suit land, (iii) whether the agreement of 2nd November 2010 was valid, (iv) whether the defendant breached the said agreement, and (v) whether the plaintiffs were entitled to the reliefs sought in the plaint.
7. In his judgment, the learned trial magistrate found in favour of the plaintiffs on the first four issues. He held that the **Kshs. 360,000** was indeed the purchase price for the land; that the respondent was the person who had executed the agreement and possessed capacity to sell; that the written agreement complied with the statutory requirements under section 3(3) of the Law of Contract Act; and that the respondent had breached the agreement by refusing to complete the transfer despite full payment.
8. Nonetheless, the learned magistrate **dismissed the entire suit**, holding that although the plaintiffs had proved the sale and breach, they had sought reliefs in respect of a different parcel **LR SUNA**

EAST/WASWETA 1/1257 whereas the evidence related to **LR SUNA WEST/WASIMBETE/1257**. On that basis he declined to grant specific performance or an injunction, reasoning that “parties are bound by their pleadings.” Costs were awarded to the respondent.

9. The appellants, being dissatisfied with the dismissal, filed the present appeal to this Court challenging that finding and seeking a reversal of the decision.

B. Appeal to this Court

10. The appellants filed a **Memorandum of Appeal dated 2nd September 2020** containing six (6) grounds, which, distilled, revolve around one central complaint namely, that the learned trial magistrate **erred in law and fact by disregarding the amended plaint and proceeding to determine the suit on the basis of the original plaint**, thereby addressing an issue that was never in controversy between the parties and reaching an erroneous conclusion.

11. The appellants accordingly prayed that: -

a) The Appeal herein be allowed;

b) The Judgement of the Lower court delivered on the 25th day of August 2020 be set aside and the same be substituted with an order allowing the Appellants Appeal with costs

- c) The Respondent to pay cost in the lower court and this particular Appeal

C. Submissions by the Parties

12. The appeal was canvassed through **written submissions**, the appellants having filed their main submissions dated **6th July 2022** through the firm of **M/s Kwanga Mboya & Company Advocates**, while the respondent filed his submissions dated **12th December 2022** through **M/s Nelson Jura & Company Advocates**. Thereafter, pursuant to leave of this Court granted on **27th November 2023**, the appellants filed **supplementary submissions dated 6th December 2023** to clarify certain procedural aspects touching on the amendment of the plaint in the lower court and to address issues raised by the respondent in opposition to the appeal.
13. In their primary submissions, the **appellants** reiterated that the learned trial magistrate erred both in law and fact by disregarding the **amended plaint** dated **4th December 2014**, which was properly on record. Counsel emphasized that the entire trial, including witness statements, exhibits, and submissions, was conducted on the basis of the amended pleadings referring to **LR SUNA WEST/WASIMBETE/1257**. The trial court, having found that the sale was valid and the respondent had breached the contract, ought to have granted the prayers for specific performance and injunction instead of dismissing the suit on the ground of a corrected typographical error.

14. The appellants further submitted that even if there had been any irregularity in the timing of the amendment, such was cured by **the order of Hon. Okong'o, J.**, made on **26th November 2014** in the former **Kisii ELC No. 346 of 2014**, before the matter was transferred to Migori. To support that position, counsel relied on the **supplementary record of appeal dated 13th October 2023**, which contains the relevant extract of the court proceedings before **Hon. Okong'o, J.** showing that **leave to amend** had in fact been duly granted.
15. At **paragraph 2 of the appellants' supplementary submissions dated 6th December 2023**, counsel expressly pointed to page 3 of the supplementary record of appeal, citing the proceedings of **26th November 2014** where the learned Judge recorded as follows: ***"The application dated 4/9/2014 is adjourned to a date to be taken at the registry. The Plaintiff is granted leave to amend the Plaintiff and the application dated 4/9/2014 within 21 days from the date hereof. The Plaintiff shall pay to the Defendant travelling expenses assessed at Kshs. 4,000/= before the next hearing date."***
16. It is therefore the appellants' submission that the amendment of the plaint was not irregular or without leave as alleged by the respondent. On the contrary, the record demonstrates that the High Court sitting at Kisii had **expressly granted leave to amend** both the plaint and the contemporaneous interlocutory application within twenty-one days. The amendment of 4th December 2014 was consequently effected **pursuant to a valid court order**, and the trial court's later finding to the contrary was **factually and legally**

erroneous.

17. The appellants also argued that the respondent had full knowledge of the amendment and participated in the proceedings without raising any objection at any stage before the trial court, thereby **waiving any technical objection**. Counsel cited **Order 8 Rule 5 of the Civil Procedure Rules** and **Article 159(2)(d)** of the Constitution, urging that courts are enjoined to administer justice without undue regard to procedural technicalities, particularly where no prejudice is demonstrated.
18. On the merits, the appellants reiterated that the evidence on record proved: A valid contract for the sale of **LR SUNA WEST/WASIMBETE/1257**, duly executed and witnessed in compliance with section 3(3) of the **Law of Contract Act**; Payment of the full purchase price; Breach of contract by the respondent's refusal to transfer the land; and their continuous possession of the property since 2010.
19. On that basis, they urged the Court to set aside the dismissal and substitute it with judgment for **specific performance**, a **permanent injunction**, and **costs** in both courts.
20. The **respondent**, on the other hand, submitted that the appeal was misconceived and devoid of merit. Counsel contended that the purported amended plaint was **filed out of time and without leave**, contrary to **Order 8 Rule 1(1)** of the Civil Procedure Rules, and was **never served** upon the respondent. The learned magistrate, counsel argued, was therefore correct to disregard it and to rely on the **original plaint** which remained the only proper

pleading on record.

21. The respondent further submitted that **parties are bound by their pleadings** and cannot amend them through oral evidence or submissions. He relied on the decision in **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR**, citing the **Malawi Supreme Court case of Malawi Railways Ltd v Nyasulu [1998] MWSC 3**, for the principle that a court cannot determine issues not raised in the pleadings. Counsel argued that by leading evidence on a parcel different from that pleaded, the appellants sought to change their case through evidence, which is impermissible.
22. The respondent further submitted that even if the appellants' counsel had made an error in drafting the initial plaint, such negligence or oversight **cannot be excused** at the expense of the respondent. He relied on the case of **Odoyo Osodo v Rael Obara Ojuok & 4 Others [2017] eKLR**, where the court held that lack of diligence and casualness on the part of counsel cannot be equated to a genuine mistake or error deserving indulgence. According to him, the trial court properly applied the principle that *equity aids the vigilant and not the indolent*.
23. The respondent accordingly urged this Court to **uphold the judgment** of the lower court, arguing that the appellants had not demonstrated any error in principle or law that would warrant appellate interference. He prayed that the appeal be **dismissed with costs**.

D. Issues for Determination

24. Having considered the record of appeal, the memorandum of appeal, the supplementary record and submissions by both parties, the Court is of the view that this appeal turns on **two central issues only**:

- a) Whether the learned trial magistrate **erred in law and fact** by disregarding the **amended plaint** and proceeding to determine the case on the basis of the **original plaint**, thereby holding that the appellants' claim related to a different parcel of land.
- b) If the answer to Issue (1) is in the affirmative, whether on the evidence and the applicable law the appellants **proved their case on the merits** and were therefore entitled to the remedies of **specific performance, injunction, and costs**.

E. Analysis and Determination

Issue 1: Whether the learned trial magistrate erred in law and fact by disregarding the amended plaint and proceeding on the basis of the original plaint

25. As a first appeal, I am enjoined to revisit the evidence that was before the lower court afresh, analyse it, evaluate it and arrive at my own independent conclusion, but always bearing in mind that the trial magistrate had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that – **see *Selle v Associated Motor Boat Company Ltd [1968] EA 123***.

26. The fulcrum of this issue is twofold: (i) **the procedural status** of the amended plaint dated **4th December 2014**; and (ii) **the practical conduct of the trial** namely, what controversy the parties actually joined and litigated.

a) Status of the amended plaint

27. The respondent urged that the amended plaint was filed after close of pleadings, without leave and without service, hence a nullity. The appellants countered that leave to amend had been **expressly granted** by the ELC at Kisii on **26th November 2014** (Hon. Okong'o, J.) prior to the amendment, and produced the **supplementary record of appeal (13th October 2023)** and **supplementary submissions (6th December 2023)** pointing to the proceedings of that date. The extract records as follows: *"The application dated 4/9/2014 is adjourned to a date to be taken at the registry. **The Plaintiff is granted leave to amend the Plaint and the application dated 4/9/2014 within 21 days** from the date hereof. The Plaintiff shall pay to the Defendant travelling expenses assessed at Kshs. 4,000/= before the next hearing date."*

28. On the face of that record, which was placed before this Court without rebuttal by a contrary certified note, I am satisfied that **leave was duly granted** by the ELC at Kisii to amend both the plaint and the contemporaneous application within twenty-one days. The amendment dated **4th December 2014** fell **within** that leave window. Any argument premised on absence of leave therefore **fails on the facts**.

29. Even assuming for argument that there remained a **residual irregularity** (for example, as to service), the law affords robust **curative powers**. **Order 8 rule 5** of the Civil Procedure Rules empowers the court, at any stage and even **suo motu**, to order any document to be amended “for the purpose of determining the real question in controversy.” Those powers are buttressed by **sections 1A and 1B** of the Civil Procedure Act (overriding objective) and **Article 159(2)(d)** of the Constitution (undue technicalities). Appellate courts routinely deploy **section 78(1)** of the Civil Procedure Act to make orders necessary for the final determination, including regularizing pleadings where no prejudice is shown.

30. The respondent did not demonstrate **prejudice** traceable to the amendment. He neither sought to strike out the amended plaint at the trial nor requested an adjournment or additional time. On the contrary, he **joined issue** at every turn on the basis that the property in dispute was **SUNA WEST/WASIMBETE/1257**, cross-examined on that footing, and tendered his defence on the same footing. The defence that the KShs. 360,000/= was a **loan** (not a purchase price) was litigated squarely with reference to the **2/11/2010** agreement over the WEST/WASIMBETE parcel. In these circumstances, any procedural complaint was in substance **waived**; and in any event, it cannot be permitted to defeat adjudication of the **real controversy**.

b) **What controversy was actually tried**

31. The trial court expressly found that: (i) the consideration of **KShs. 360,000/=** was paid **as purchase price**; (ii) the **written**

agreement of 2nd November 2010 met **section 3(3) of the Law of Contract Act**; (iii) the respondent had **capacity** and indeed executed the agreement (ID number matched, attestation proved); and (iv) the respondent **breached** the agreement by refusing to transfer. Those findings were grounded on evidence that consistently identified the property as **LR SUNA WEST/WASIMBETE/1257 (3.40 Ha)**.

32. Having tried and determined the substance in the appellants' favour, the trial court nonetheless dismissed the suit because the **original plaint** contained a misdescription (**SUNA EAST/WASWETA 1/1257**). That approach **elevated form over substance** and ignored the **amended plaint** and the case as actually litigated. While it is correct that parties are bound by their pleadings (***IEBC & Another v Mule & 3 Others [2014] eKLR***), it is equally settled that where parties **consciously lead evidence** on an unpleaded matter and **leave the court to determine it**, the court may, in a proper case, treat the pleadings as **constructively amended** and decide the real issue see ***Odd Jobs v Mubia [1970] EA 476***. Here, there was both a **formal amendment** (pursuant to leave) and a **trial by conduct** on the WEST/WASIMBETE parcel.

33. The respondent's reliance on "strict compliance" cases addressing attempts to **smuggle** new claims through submissions is therefore **distinguishable**. This is not a case where the plaintiffs sprang a new case at address; it is a case where, before transfer to the subordinate court, the High Court granted **leave to amend**, the plaintiffs **amended**, and **all parties** then tried the suit on the

amended description.

34. The absence of **prejudice**, the court's **curative jurisdiction**, and the **interests of substantive justice** compel the conclusion that the learned magistrate **misdirected himself** by declining relief on the basis of the original misdescription. The correct approach was either (i) to proceed on the **amended plaint** already on record; or at the very least (ii) to invoke Order 8 rule 5 to rectify the misdescription so as to grant the relief that the evidence merited.
35. I therefore **answer Issue 1 in the affirmative**: the learned trial magistrate erred in law and fact by disregarding the amended plaint and by determining the suit on the footing of the original misdescription, notwithstanding that the real controversy tried concerned **LR SUNA WEST/WASIMBETE/1257 (3.40 Ha)** and that leave to amend had been granted on **26th November 2014**.

Issue 2: Whether, upon proper consideration of the evidence and the applicable law, the appellants proved their case on the merits and are entitled to the remedies of specific performance, injunction, and costs

36. Having found that the learned trial magistrate erred in disregarding the amended plaint, this Court must now turn to the substantive merits of the dispute. The record of the lower court, which I have reviewed in its entirety, leaves little room for doubt that the appellants established their case to the required standard of proof on a balance of probabilities. Indeed, the trial magistrate himself made express findings in their favour on every material issue save for the technical question of land description which, as already held,

ought not to have been decisive.

37. The evidence before the trial court was clear and consistent. The appellants testified that on **2nd November 2010** they entered into a written sale agreement with the respondent for the purchase of the parcel of land known as **LR SUNA WEST/WASIMBETE/1257**, measuring approximately **3.40 hectares**, at an agreed price of **Kshs. 360,000**. They paid the full purchase price Kshs. 340,000 by cheque and Kshs. 20,000 in cash and the respondent acknowledged receipt. The agreement was duly executed by both parties and attested in accordance with **section 3(3) of the Law of Contract Act**, which requires contracts for disposition of an interest in land to be in writing, signed, and witnessed. The document produced as Exhibit 1 in the lower court fully satisfied those statutory requirements.
38. The respondent's attempt to recast the transaction as a **loan arrangement** was unsupported by any documentary evidence. His own testimony was internally inconsistent. He admitted that the identity card number appearing on the sale agreement was his, that he received the sum of **Kshs. 360,000**, and that the payment was made by the appellants. Yet he produced no acknowledgment, promissory note, or written instrument indicative of a loan. His explanation therefore lacked credibility. The trial court, having observed his demeanour, rightly rejected the allegation of a loan as an afterthought. This Court sees no reason to interfere with that factual finding.
39. The respondent further contended that he lacked **capacity to sell** the land. That argument too collapses under scrutiny. The evidence

showed that he was the registered proprietor of **LR SUNA WEST/WASIMBETE/1257** at the time of the transaction. The sale agreement bore his correct identity-card number and signature, and the attesting witness, PW4 Meshack Asembo, confirmed witnessing the execution. Even in the related criminal proceedings referenced in the record (Criminal Case No. 631 of 2014), the respondent was convicted for acts arising from interference with the very parcel he had sold to the appellants. These facts collectively establish beyond doubt that the respondent was indeed the vendor and that he had full capacity to contract.

40. The next question is whether there was **breach**. On the evidence, the appellants fully performed their part of the bargain by paying the purchase price and taking possession. The respondent, on the other hand, refused to execute the necessary transfer documents despite repeated demands and despite admitting receipt of the consideration. The breach was therefore clear and deliberate. The respondent's refusal deprived the appellants of their proprietary interest in the land they had paid for and occupied since 2010. Such conduct offends both law and equity.

41. The appellants, having proved existence of a valid contract, performance of their obligations, and breach by the respondent, were entitled to the equitable remedy of **specific performance**. The suit property is a unique and identifiable parcel of land; damages would not provide adequate redress. Equity presumes that what has been agreed to be done should be specifically enforced where consideration has passed and performance is possible. No evidence was presented to show that transfer of the property had

become impossible, illegal, or inequitable. There are no third-party rights or encumbrances to defeat the contract. In those circumstances, a decree of specific performance is the most just and appropriate relief.

42. In addition to specific performance, the appellants sought a **permanent injunction** to protect their possession and to restrain further interference by the respondent. They testified, without contradiction, that after purchasing the land they took possession and began utilizing it but that the respondent later trespassed upon it, destroyed their fence, and disrupted their occupation. The respondent did not deny those acts. Having established ownership and possession, the appellants are entitled to protection from further interference. A permanent injunction is therefore warranted to secure their quiet enjoyment of the land.

43. On the question of **costs**, the general principle under **section 27 of the Civil Procedure Act** is that costs follow the event unless the court for good reason orders otherwise. The appellants were successful on all substantive issues before the trial court, and their case was dismissed only on a procedural misstep concerning land description an error this Court has found to have been cured by the amendment properly allowed by Hon. Okong'o, J. To deny them costs would be to perpetuate the very injustice that this appeal seeks to correct. I therefore see no reason to depart from the ordinary rule. The appellants are entitled to recover costs both in the lower court and in this appeal.

44. In the result, I find that the appellants **proved their case on the merits** before the trial court and that the learned magistrate erred by denying them substantive relief on a purely technical ground. The evidence established a valid sale agreement, full performance by the appellants, breach by the respondent, and a continuing right to specific performance and injunctive protection. The equitable balance of justice tilts entirely in favour of the appellants.

45. Accordingly, this Court finds and holds that the appellants are entitled to judgment in their favour as prayed in the amended plaint.

F. Disposition and Orders

46. In conclusion, and upon a thorough re-evaluation of the evidence, pleadings, and applicable law, I am satisfied that this appeal is **meritorious**. The learned trial magistrate fell into error by disregarding the amended plaint and by dismissing a claim that had been proved on the merits.

47. Consequently, I **allow the appeal, set aside** the judgment and decree of the **Chief Magistrate's Court at Migori (Hon. M. Obiero, PM)** delivered on **25th August 2020** in **ELC Case No. 4 of 2019**, and in its place, I hereby **enter judgment for the appellants** in terms of the prayers sought in the **amended plaint dated 4th December 2014**, namely:

- a) A declaration that the appellants lawfully purchased and are entitled to be registered as proprietors of **LR SUNA WEST/WASIMBETE/1257**, measuring approximately **3.40**

hectares;

- b) An order of **specific performance** compelling the respondent to execute all necessary transfer documents to effect transfer of the said parcel to the appellants within **Thirty (30) days**, failing which the **Deputy Registrar of this Court** shall execute the same on his behalf;
- c) A **permanent injunction** restraining the respondent, his agents, servants, or any person acting under his authority from entering, interfering with, or dealing with the suit property in any manner adverse to the appellants' ownership and possession; and
- d) **Costs** of the suit in the lower court and of this appeal to the appellants.

It is so ordered.

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **31st** day of **October, 2025**.

MOHAMMED N. KULLOW
JUDGE

Judgment delivered in the presence of: -

.....for the Appellant

.....for the Respondent

Philomena W...... Court Assistant

Original File Copy