

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT
SIAYA

ELC APPEAL CASE NO. E007 OF 2024

GEORGE ODHIAMBO
ARTHUR.....APPELLANT

-VERSUS-

CORNELIA OKIRI AWALE.....1ST
RESPONDENT

FREDRICK MARIWA.....2ND
RESPONDENT

JUDGEMENT

Background

1. This judgement arises from the decision of Honourable Mr. J.P. Nandi (SPM) in Bondo Senior principal Magistrates' Court Environment and Land Case E014 of 2020 where judgment was delivered on the 5th day of July 2023.
2. The appellant was the defendant in the above proceedings. He was sued by the respondent herein who was the 1st plaintiff. The 1st plaintiffs case was that the appellant had entered into her land parcel Siaya/Omia Malo/4870 a subdivision of Siaya/Omia Malo/647 without her consent. The 1st plaintiff sought the appellants eviction among other orders.

3. At the same time the appellant raised a counterclaim wherein he averred that he was a bonafide purchaser of the parcel Siaya/Omia Malo/4871 which was also subdivision Siaya/Omia Malo/647. The appellant claimed for specific performance of the contract of sale by subdivision and transfer of the portion he purchased and cancellation of the Plaintiffs title which he termed to have been issued illegally. The 1st respondent indeed admitted she had sold the appellant about half of the land which was in her deceased husbands name.
4. The trial court upon hearing both parties found that the plaintiff sold property that did not belong to her but which formed part of the deceased estate contrary to the provisions of section 82(b)(ii) and 45 of the Law of Succession Act. The former forbids immoveable property to be sold before confirmation of grant while the latter is against intermeddling with any property of a deceased person. Consequently, the trial court made a finding that the plaintiff had no clean title to pass to the appellant as she had no locus to dispose the property of a deceased person.
5. With regard to the orders sought by the appellant in the counterclaim the court found the 1st and 2nd plaintiffs as the lawful registered owners of the parcels and were entitled to exclusive possession thereof.

6. Further on the plea for specific performance of the contract of sale between the 1st plaintiff and the appellant, the trial court found that having nullified the contract an order for specific performance was not available to the appellant. Additionally, the trial court found that the purchase price which was Kshs.300,000/- was recoverable as a debt. It had also emerged during the hearing that the 1st plaintiff was ready to refund the same.
7. The trial court proceeded to order a refund to the appellant the amount of Kshs.300,000/- being the purchase price and costs of the suit at 70% and interest.

Appeal

8. Aggrieved by the above the appellant appeals the decision on the following grounds; -

1) The Learned Trial Magistrate erred in fact and in law by failing to make a determination on the improvements done by the appellant and the entitlement of the appellant to compensation for improvements made on the suit land.

2) The Learned Trial Magistrate erred in fact and in law by awarding the appellant a global sum of the purchase price without interest until payment in full.

3) The Learned Trial Magistrate erred in fact and in law by awarding the respondents costs when both the appellant and the respondent had participated any alleged illegality.

9. On the basis of the above grounds the appellant prays that;-

- a) The judgement of the trial be varied to award the appellant interests until in full on the purchase price
- b) The judgement of the trial court on payment by appellant of 70% of the respondent's costs be set aside and it be substituted with an order that each party bear its costs
- c) Respondent be ordered to pay costs for this appeal.

SUBMISSIONS

10. The appeal was heard by way of written submissions both parties complied with the directions of the court. The appeal was fixed for hearing on 10/6/2025 where counsels were given an opportunity to orally highlight on their submissions.

Appellant Submissions

11. The appellants submissions are dated 11/3/2025. Three issues were identified summarized as follows;-

Whether the learned trial magistrate erred in fact and in law by failing to award costs to the successful party, the appellant herein but awarding costs and interests to the respondents.

12. It is submitted that having found the Respondents liable, there was no good reason to deny the Appellant costs of the suit. The court is invited to reconsider the facts and evidence with a view of establishing whether the decision by the trial magistrate of not awarding costs and the reasons given for the failure to award costs was justified in the circumstances of this case.
13. The court is referred to the provisions of Section 27 of the Civil Procedure Act governing orders on costs and the case of Punchlines Limited v Joseph Mugo Kibaria & 10 others [2018] eKLR, the Court of Appeal where the Court of Appeal emphasized that the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.

Whether the learned trial magistrate erred in fact and in law by awarding the appellant a global sum of the purchase price without interests or damages and failing to award compensation.

14. It is contended that a claimant for general damages for breach of contract who does not prove that he suffered a loss is all the same entitled to damages, though nominal. Reliance is placed on **Anson's Law of Contract, 28th Edition**, at page **589** and **590** and the holding of the

Court of Appeal in **Kimakia Co-operative Society vs. Green Hotel (1988) KLR242.**

15. Counsel submits that the appellant avers he has been occupying the land ever since the year 2017 and has made developments thereon which was corroborated by the 1st Respondent in the proceedings before the trial court.
16. Citing the provisions of Section 2 of the Land Act on just compensation and criteria for determining the same; **Katra Jama Issa v Attorney General & 3 others [2018] eKLR** where it was held inter alia that fair compensation requires that one is paid for the value of the land to him, not its value generally or its value to the acquiring authority. Section 107 A(1) of the Land Value (Amendment) Act 2019 is cited with regard to the Land Value Index as an applicable criteria

Respondents Submissions

17. The Respondents submissions are dated 3/06/2025. The respondent raised a preliminary point. That the appeal is incompetent for having been filed against a deceased party being the 1st respondent without substitution of legal representative or personal representative under the provisions of Order 24 of the Civil Procedure Rules. That the appeal purports to challenge findings and seek orders against a deceased person, contrary to law. Reliance is

placed in the case of **Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others [2018] KEHC 1972 (KLR) eKLR**

18. It is urged that the appeal against the 1st Respondent has abated by operation of law substitution having not been undertaken within 1 year as required and any proceedings or orders sought against the deceased 1st Respondent are therefore nullity and void ab initio. Further reliance is placed on the Court of Appeal holding in **GEETA BHARAT SHAH & 4 OTHERS v OMAR SAID MWATAYARI & ANOTHER [2009] KECA 126 (KLR)**
19. On whether the trial court was within the Law and judicial discretion by Awarding Costs and Interest to the Respondents, despite the Appellant's partial success it was submitted that the trial magistrate's decision to award costs and interest to the Respondents, notwithstanding the Appellant's partial success, aligns with the discretionary powers vested in the court under Section 27(1) of the Civil Procedure Act. That the provision grants the court the authority to determine by whom and to what extent costs shall be paid, emphasizing that costs follow the event unless the court, for good reason, decides otherwise. The case of **Supermarine Handling Services vs Kenya Revenue Authority (2005)** which enunciated that that where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the

discretion has been exercised injudiciously or on wrong principles.

20. It is posited that the trial magistrate, after evaluating the conduct of both parties and the circumstances surrounding the litigation, exercised discretion to award costs and interest to the Respondents. This perspective supports the trial magistrate's decision to award costs to the Respondents, recognizing their efforts and resources expended during the litigation. Absence of any evidence of unjudicial or capricious exercise of this discretion, there is no basis for appellate interference.
21. The court is referred to the case of **Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application no 6 of 2014 and Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & others {2014} eKLR** which held that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case. The court has noted myriad decisions cited on discretion and the point that a successful party can be denied costs if it is proved that but for his conduct the action would not have been brought.
22. It is submitted that the general principle in contract law is that damages are awarded to compensate for loss

suffered due to breach of contract. The learned magistrate was correct in awarding a refund of the purchase price without interest or additional compensation. The appellant was not entitled to interest or general damages because the basis of the award was not breach of contract or tortious conduct, but rather restitution for unjust enrichment. Further, it is clear that there was no contract between the appellant and the 1st respondent as she attempted to sell land that did not belong to her. Reference is made to the case of *Fibrosa Spolka*, **Lord Wright ([1943] AC at page 61)**.

23. It is asserted that Restitutionary claims do not carry interest unless specifically pleaded and proved. The appellant never demonstrated that there was an express or implied term providing for interest, nor did he adduce evidence to show he suffered quantifiable damage deserving compensation.
24. Further, that awarding interests is a discretionary power of the trial court and will not be interfered with except where it is shown the decision was based on a whim, was prejudicial or was capricious.

ANALYSIS AND DETERMINATION

25. I have examined and considered the full record of the trial court; the grounds of appeal; and the parties' respective

submissions together with the issues they identified. I have also considered the relevant legal frameworks and the prevailing jurisprudence on the issues falling for determination in this appeal.

26. In my view, the following are the issues that fall for determination in this appeal;

1) Whether or not the appeal against the 1st Respondent is competent

2) If the answer to the 1) above is in the negative whether appeal lies against the 2nd respondent

3) Whether the learned trial magistrate erred in fact and in law by awarding the appellant a global sum of the purchase price without interests or damages and failing to award compensation.

4) Whether the trial court was within the Law and judicial discretion by Awarding Costs and Interest to the Respondents, despite the Appellant's partial success

5) Costs of this appeal.

27. Issues No.3 and 4 are dependent upon the outcome of the first two issues.

Whether or not the appeal against the 1st Respondent is competent

28. The appeal against the 1st respondent is said to have abated and that the orders sought are null and void. My

perusal of the record of this court reveals this appeal was filed on 21/3/2024 and admitted by the court on 8/4/2024. On 7/10/24 Mr. Ochanyo informed the court that the 1st Respondent was deceased though he had no documentation in proof. Ms Nyakwena confirmed that she had acted for both the 1st and 2nd respondents in the lower court and that indeed the 1st Respondent had passed on in December 2023. That she had no instructions on her substitution. Both counsels agreed that the appeal could be canvassed by way of written submissions.

29. It is therefore not in dispute that the 1st respondent is deceased. I must therefore first establish whether the appeal against the 1st Respondent was filed before or after the death of the 1st respondent. The dates are given as December 2023 and were not contested. I have already observed that the instant appeal was filed on 21/3/2024.
30. Section 2 of the Civil Procedure Act defines a suit thus; -
'All civil proceedings commenced in any manner prescribed'.
31. An appeal is therefore a suit for purposes of section 2 above. What then are the legal implications where the death of a party and in the present case the 1st Respondent predates the filing of the suit. During the oral submissions Mr. Mwamu urged on behalf of the 2nd respondent that the judgement of the trial court ordered

the 1st Respondent (deceased) to refund Kshs.300,000/-. There was no judgement against the 2nd respondent.

32. Clearly the appeal herein has been filed against a deceased party being the 1st respondent. Can a suit be mounted against a deceased person? This question has been a subject of many judicial pronouncements where the courts have been of the same mind as follows; -

33. In **Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others (supra) Mbogholi-Msagha** cited the Indian case of C. Muttu vs. Bharath Match Works AIR 1964 Kant 293 where the court observed, **“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought *bona fide* and in ignorance of the death of such a person.”**

34. In the case **Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) v Rosaline Njeri Macharia & another**

[2016] KECA 804 (KLR) the Court of Appeal had this to state;-

28] The High Court (**Lesiit, J**) was, with respect, correct in her decision in the case of **John Gachoki Ndenge v Kiambu Dandora Farmers Company Limited & Another (Civil Suit No. 481 of 2006 [2008] eKLR** when she stated:

“...under that section {s.36(1)} of the Banking Act), it is the Deposit

Protection Fund Board which is the legal entity with corporate powers and therefore capable of suing and being sued. The Deposit Protection Fund is not a legal entity and therefore it is incapable of being sued. It was therefore materially defective and a nullity for the plaintiff to institute the suit against the Deposit Protection Fund. That defect is not curable by an amendment.”

[29] Clearly, a suit not by or against a person or a body corporate is incompetent. It is a nullity.

35. In the present case the 1st respondent would take the place of the Deposit Protection Fund. Also see the case of **Naikuni v Naikuni & 7 others; Manyuele (Applicant) [2025] KEELC 3064 (KLR)**.
36. Would the provisions of Order 24 of the Civil Procedure Rules be helpful under the circumstances? In my view no because the deceased did not die during the pendency of the appeal.
37. From the foregoing therefore it is the finding of the court that the appeal against the 1st Respondent is null and void.

If the answer to the 1) above is in the negative whether appeal lies against the 2nd respondent

38. It was submitted during plenary on behalf of the Appellant that the judgement was entered jointly and severally against both Respondents. That infact the money was deposited by the 2nd Respondent with the office of Mr. Mwamu. Indeed, this is confirmed by Mr. Mwamu. I have perused the judgement delivered on 5/07/2023. Order no. 30(c) of the same reads *'The 1st Plaintiff to refund to the Defendant the amount of the purchase price being Kshs 300,000/='*.
39. Clearly the payment was to be made by the 1st Respondent and for purposes of the judgement it can only be treated as such regardless of who deposited the money on her behalf.
40. It is the finding of this court that no appeal can lie against the 2nd Respondent with regard to the refund of Kshs.300,000/-
41. On whether the learned trial magistrate erred in fact and in law by awarding the appellant a global sum of the purchase price without interests or damages and failing to award compensation, this ground was dependent upon the findings in the issues 1 and 2. The answers to the said issues having been in the negative, there is no basis upon which this court can make a determination on this issue/ground of appeal. There is no appeal.

42. Lastly on whether the trial court was within the Law and judicial discretion by Awarding Costs and Interest to the Respondents, despite the Appellant's partial success. This issue would likewise collapse in view of the findings hereinabove.
43. The upshot of the foregoing is that the appeal is struck out in its entirety.

HON. A. E. DENA
JUDGE
6/11/2025

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Ochanyo for the applicant

Mr. Awinda h/b for Mwamo for 2nd respondent

Court assistant: Ishmael Orwa

ORIGINAL