REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT KERUGOYA

ELC APPEAL NO EO37 OF 2024

PETER NDAMBIRI NDEGWA.....APPELLANT

VERSUS

ESTHER WANGUI..... RESPONDENT

(Being an Appeal against the Judgment of Hon. Cheruto C. Kipkorir(PM), in Kerugoya MC ELC NO. E069 OF 2022 delivered on 24th July, 2024).

JUDGMENT

1. This present Appeal is against the Judgment of Hon. Cheruto C. Kipkorir (PM) in Kerugoya MCELC No. E069 of 2022 delivered on 24th July, 2024. The Learned Trial Magistrate in the suit found in favour of the Respondent who was the Plaintiff and against the Appellant who was the Defendant.

2. The background to the matter is that the Respondent filed the suit by way of Plaint dated 24th May 2022 before the Lower Court where she averred she was the registered owner of LR No. Ngiriama/Rungeto/561, and that on or

about 20th April 2006 she entered into a sale agreement for the purchase of the parcel of land with the Appellant for the consideration of Kshs 730,000/-. That the Appellant paid Kshs 200,000/- by way of deposit and was to pay the balance of Kshs 530,000/- by the month of May, 2006. The Respondent stated that on that basis she allowed the Appellant to enter into possession of the land. The Appellant was further to pay for the developments effected on the land upon assessment.

3. The Respondent averred that the Appellant never honoured the agreement but on 19th May 2022, unjustifiably placed a caution against the title of the suit land. The Respondent thus in the suit prayed for orders for the removal of the caution and a permanent injunction restraining the Appellant, his agents, servants or anyone claiming through him from entering or utilizing the suit; and the costs of the suit.

4. The Appellant filed a defence dated 14th June 2022 where he averred that the alleged agreement dated 20th April

2006 became void after the expiry of six months from the date of the agreement and hence he claimed he had become entitled to ownership of the land by operation of the law through adverse possession and/or constructive trust. The Appellant averred that he placed a caution to preserve the land and to protect his interest in the land. The Appellant stated that he had separately filed Gichugu MCELC No. E020 of 2022 (originating summons) against the Respondent which suit was subsequently ordered transferred and consolidated with the instant suit before the Kerugoya Chief Magistrates and to be deemed as the Counterclaim to the Respondent's suit. By the Originating summons the Appellant sought to be declared as having acquired ownership of the suit land by reason of having been in exclusive occupation of the land for a period of over 12 years from 21st April 2006. In the alternative he pleaded that he was entitled to the suit land by reason of constructive trust and/or promissory estoppel.

5. The Respondent and the Appellant testified and were the sole witnesses in respect of their cases. After analyzing

and evaluating the evidence by the parties the Learned Magistrate made a finding that the Appellant did not prove that he paid the full purchase price of Kshs 730,000/-. She further held the possession was by permission as it was given pending payment by the Appellant of the balance of the purchase price which was not paid. On that account, the Learned Magistrate held the possession was not adverse and consequently dismissed the Counterclaim.

6. Having dismissed the Counterclaim, the Learned Magistrate found and held the caution was not lawfully lodged and ordered its removal; ordered a permanent injunction to issue and further ordered the Respondent to refund the sum of Kshs 200,000/- that she had admitted was paid to her. The parties were ordered to bear their own costs of the suit and the Counterclaim.

7. Aggrieved and dissatisfied with the Judgment the Appellant has appealed to this Court and has set out 7 grounds of Appeal in his Memorandum of Appeal as follows:-

1. **The Learned Trial Magistrate after correctly making a finding that the Respondent signed the acknowledgment slip dated 24th July 2006 for Kshs 230,000/-, failed to give effect to the clear wording of the said document, as to the intention of the parties.**

2. **The Learned Trial Magistrate erred in law and in fact in making a finding that there was no proof of payment of the purchase price in full, yet the payment of Kshs 230,000/-, on 24th July 2006 was the final settlement of the purchase price for land parcel number Rungeto/Ngariama/561.**

3. **The Learned Trial Magistrate, while appreciating that the Respondent received Kshs 200,000/- on the date of the agreement and a further sum of Kshs 230,000/- was acknowledged later, yet made final orders for refund of Kshs 200,000/- only to the Appellant and with no interest.**

4. **The Learned Trial Magistrate erred in law and in fact in making a finding that the Appellant had no good reasons to lodge a caution yet there was a sale agreement and money paid as purchase price.**

5. **The Learned Trial Magistrate erred in law and in fact in failing to appreciate the principles applicable for a claim of adverse possession based on a sale agreement.**

6. **The Learned Trial Magistrate erred in law and in fact in making a finding that the Respondent regulated how the sit land was to be utilized yet the Respondent conceded that the Appellant has been in exclusive and uninterrupted occupation for a period of over 16 years and the sale agreement expressly provided that the Appellant was to take occupation and make developments as he deems fit.**
7. **The Judgment of the Learned Trial Magistrate was against the pleadings, the evidence and applicable legal principles.**

8. The Appellant consequently prays that the Appeal be allowed; and the Judgment be set aside and be substituted with an order dismissing the Respondents suit with costs.

9. The Appeal was canvassed by the parties by way of written submissions. The Appellant filed his submissions dated 13th March 2025 while those of the Respondent were dated 8th May 2025. I am conscious that this is a first Appeal and that the Court on a first Appeal is required and indeed obligated to reevaluate and consider the evidence adduced before the Lower Court to satisfy itself whether or not the Judgment reached by the trial Court was justified. The Court is not bound by the findings made by the trial Court and may reach its own findings or conclusions on evaluation and consideration of the evidence but must bear in mind that it had no opportunity of seeing the witness testify. See the case of **Selle & Another –vs- Associated Motor Boat Co. Ltd & Another (1968) EA.**

10. The undisputed facts in this matter are that the Appellant and the Respondent entered into an agreement of sale of land on 20th April 2006 whereby the Respondent agreed to sell to the Appellant land parcel No. Rungeto/Ngariama/561 for the consideration of Kshs

730,000/-. A sum of Kshs 200,000/- towards the purchase was paid to the Respondent. The balance of Kshs 530,000/- was to be paid within the month of May, 2006 upon transfer of the property. The Appellant was under the agreement allowed to take possession and to utilise the land howsoever he wanted. The Respondent testified that the Appellant did not pay her the balance of Kshs 530,000/- though he remained in possession of the land. The Appellant in his evidence insisted he paid the Respondent the full purchase price. To support that assertion, the Appellant pointed to an alleged acknowledgment for the sum of Kshs 230,000/- dated 24th July 2006 which he stated was signed by the Respondent in full settlement. The Respondent denied receiving the sum of the said Kshs 230,000/- or that she signed such an acknowledgment. There lies the problem. The balance that remained to be paid was Kshs 530,000/- and was to be payable against transfer? Is it possible that the Appellant would have agreed to pay the full purchase price and yet not pursue the transfer of the land from the Respondent from 2006 to 2022 when he lodged a caution?

It is improbable. Additionally the alleged instalment of Kshs 230,000/- being the balance was paid by a cheque No. 0000006 and this begs the question whether the cheque was infact paid and/or honoured by the Bank. It would have been easy to demonstrate payment by producing a copy of the presented cheque to the Bank and a Bank statement of the Appellant's Bank account to demonstrate the cheque was indeed paid to the Respondent. Additionally, the payment of Kshs 300,000/- is not demonstrated and it is unclear how or when it was paid, if at all. From the evidence, the Appellant was meticulous in documenting his transactions yet apparently he omitted documenting what was rather significant towards the purchase of the suit land; payment of Kshs 300,000/- towards the purchase price.

11. The Respondent in the Replying Affidavit to the Originating Summons sworn on 17th June 2022 denied receiving the sum of Kshs 230,000/- as indicated in the acknowledgment dated 24th July 2006. She further denied executing the acknowledgment. Under **Section 107,108**

and 109 of the evidence Act, Cap 80 Laws of Kenya the burden of proving payment of the purchase price lay on the Appellant as it was him who was asserting full payment of the purchase price and wanted the Court to accept that fact as proved.

Section 107,108 and 109 of the Evidence Act provide as follows:-

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its

existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

12. In the instant matter, the burden to prove payment of the purchase price lay on the Appellant. He did not discharge that burden and the Learned Magistrate properly found and held that the Appellant had failed to prove that he paid the full purchase price.

13. Having found that the Appellant did not prove full payment of the purchase price, and it not being disputed that the entry into possession was pursuant to the permission granted by the Respondent under the agreement dated 20th April 2006, the Appellant's possession was permissive and not adverse. In the case of **Mbira –vs- Gachuhi (2002) 1 EALR 137** the Court of Appeal underscored the fact that where possession is by consent, adverse possession cannot arise. The Court inter alia stated:-

“---a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non permissive or non-consensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption----.”

14. In the case of **Mtana Lewa –vs- Kahingi Ngala Mwagandi (2015) eKLR** the Court of Appeal as per Asike Makhandia, JA explained adverse possession thus;-

> **“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period in Kenya is 12 years. The process springs into action essentially by default or in action of the owner. The essential pre requisites being that the possession of the**

adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

15. In the case of **Sisto Wambugu –vs- Kamau Njuguna (1983) KECA 69(KLR)** the Court of Appeal held that where a person enters onto land pursuant to a sale transaction and has not paid the full purchase price, such possession does not become adverse until the last instalment of the purchase price was paid and that time for adverse possession would start to run from the date of the last instalment payment. In the case the Court held:-

"Where a claimant pleads the right to land under an agreement, and it the alternative seeks an order on subsequent adverse possession, the rule is, the claimant's possession is deemed to have become adverse to that of the owner after payment of the last

instalment of the purchase price. The Claimant will succeed under adverse possession upon occupation for at least Twelve years after such payment."

16. The Court of Appeal in the case of **Peter Mbiri Michuki – vs- Samuel Mugo Michuki (2014) eKLR** was emphatic that where entry onto land was pursuant to a sale agreement, adverse possession could only ensue upon payment of the full purchase price. The Court inter alia stated:-

"Our reading of the record shows that the Plaintiff entered into the suit property pursuant to a sale agreement in 1964 as a bonafide purchaser for value. The entry in 1964 was with permission of the Applicant qua vendor. In the case of Public Trustee –vs- Wandaru (1984) KLR 314 at 319, Madan JA stated that adverse possession should be calculated from the date of the payment of the

purchase price to the full span of Twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the and purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run."

17. I have considered both the Appellant's and the Respondent's submissions. The Appellant's submissions quite clearly are predicated on the premise that the Appellant had paid the full purchase price of the suit land. On my evaluation and analysis of the evidence, I have come to the conclusion that the Appellant did not prove full payment of the purchase price. The Appellant therefore could not obtain specific performance of the contract of sale as he had not performed his part of the bargain. I have reviewed and considered the authorities cited and relied on by the Appellant in his submissions notably, **Macharia mwangi Maina & 87 others –vs-**

Davidson Mwangi Kagiri (2014) eKLR; **Willy Kimutai Kitilit –vs- Michael Kibet (2018) eKLR** and **Kiplagat Kotut –vs- Rose Jebor Kipngok (2019) eKLR**; and it is my view that the principles espoused in those cases are inapplicable in the circumstances of the instant case. In all those cases the total purchase price had been paid and the purchasers were in possession. The facts are distinguishable from the facts in the instant case.

18. It is my determination therefore, that the doctrine of adverse possession and constructive trust were not applicable in the circumstances of the instant case. The Learned Magistrate properly appraised and evaluated the evidence and reached the correct decision. The Learned Magistrate rightly ordered the refund of Kshs 200,000/- that was proved to have been paid by the Appellant to the Respondent. There was no basis to award interest from the date of payment, the Appellant having been the one who failed to honour the terms of the agreement.

19. I find no basis upon which I could fault the Learned Magistrate and I accordingly uphold her decision. The Appeal is without merit and is ordered dismissed. Considering the circumstances of this matter I consider it appropriate that the parties should bear their own costs of the Appeal and of the Court below. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 12TH DAY OF NOVEMBER 2025.

J. M. MUTUNGI

ELC - JUDGE