

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ELC APPEAL NUMBER E026 OF 2024

SAMUEL KAGOIYO NJERU.....
APPELLANT

VERSUS

**BERNARD NYAMU MBURIA (*Sued through his guardian
Lucy Wambui Gituku*)**

.....**RESPONDENT**
(Being an appeal from the judgment of Hon. Cheruto C. Kipkorir- Principal Magistrate delivered on 24th April 2024 in Chief Magistrate's Court at Kerugoya M.E.L.C Case No. 129 of 2019).

JUDGMENT

1. This Appeal is against the Judgment of Hon. Cheruto C. Kipkorir (PM) delivered on 24th April 2024 in Kerugoya CMELC No. 129 of 2019. The Trial Court in the Judgment found that although the Appellant had purchased **Mutira/Kiaga/49** from the Respondent, he failed to pay the full consideration. The Trial Court held that the failure to fulfill this essential term of the agreement rendered the contract void for want of consideration, and consequently ordered cancellation of the Appellant's title, restoration of

Kiara Mburia, the Respondent, as proprietor, and refund of the Kshs. 480,000/-. Costs were awarded to the Respondent.

2. Aggrieved and dissatisfied with the decision, the Appellant lodged this Appeal through a Memorandum of Appeal dated 22nd May 2024, setting out seven grounds of Appeal. The Appellant by the grounds contained in the Memorandum of Appeal, inter alia faults the Learned Magistrate for declaring the contract between the Appellant and the Respondent void despite insufficient proof of the Respondent's case; granting reliefs that were never pleaded for by the parties; holding that the Appellant's title was not valid despite evidence of part performance, and effectively rewriting the parties' contract. The Appellant further faulted the Learned Magistrate for failing to dismiss the Respondent's suit when the allegations of fraud by the Respondent and unsoundness of mind of the Respondent were not proved.

3. The background of this matter is that by a plaint dated 21st December 2005, the Respondent averred that he was

the registered proprietor of land parcel Mutira/Kiaga/49 until 2001 when, under the guise of assisting him to obtain a new generation identity card, the Appellant fraudulently and unlawfully caused himself to be registered as proprietor of the land. The Respondent sought a declaration that the contract entered into with the Appellant was null and void for want of consideration and for lack of capacity on his part to transact; a declaration that the Appellant's registration as owner was fraudulent; cancellation of the Appellant's title and restoration of the Respondent as the proprietor; and, an order directing the Land Registrar, Kirinyaga, to recall the title issued in the Appellant's name for cancellation.

4. The Appellant filed a Statement of Defence and denied the allegations in the plaint, specifically he denied there was any sale agreement with Kiara Mburia. He instead averred that he entered into an agreement with Bernard Nyamu Mburia in the presence of witnesses who could attest that Bernard was of sound mind at the time of the transaction.

He asserted the Plaintiff was frivolous, vexatious, and an abuse of the court process.

5. The case was heard on 14th February 2024 and the Respondent called Lucy Wambui (PW1) who testified that Bernard Nyamu, with whom she lived, suffered from a mental illness and had been in that condition since she married his brother in 1972. She stated that although three acres of the six-acre parcel were sold in 2001 at Kshs. 120,000/- per acre, she was not present when the sale agreement was executed. She stated that Bernard was of unsound mind at the time of the transaction, did not know who received the purchase price or whether Land Control Board consent was obtained, and insisted that the land, being ancestral, should remain in Bernard's name.

6. The Appellant (DW1) testified that he lawfully bought the suit land from Bernard in 2001 for Kshs. 720,000/-, paid Kshs. 480,000/- in cash, with the balance to be met by him transferring land parcel Mwerua/Kabiriri/1557 to Bernard. He stated that Bernard was of sound mind, that they

obtained Land Control Board consent, and that the land was transferred to him on 23rd May 2001. He admitted he never transferred Mwerua/Kabiriri/1557, attributing this to a caution placed on the land and his absence because of studies. The Appellant maintained that all procedural legal requirements were complied with before the suit property was transferred to him. He asserted that Kiara Mburia and Bernard Nyamu was one and the same person and further stated that a restriction had prevented him from using the land, and that Bernard continued to reside on the land until 2023.

7. The Appeal was canvassed by way of Written Submissions and the Appellant filed his written submissions dated 20th February 2025. The Appellant faulted the Trial Court for holding that the contract between the parties was void for want of consideration. The Appellant argued that the sale agreement was valid and enforceable, having been sanctioned by the Land Control Board. He contended that fraud had not been proved, and therefore his title was protected under the **Land Registration Act**. He argued

that he had been unable to transfer land parcel Mwerua/Kabiriri/1557 in satisfaction of the consideration because the Respondent placed a caution on the land and because he later travelled for further studies. He submitted that the contract did not specify timelines for the transfer, and the court therefore erred in attributing laches to him. He urged that the Respondent's suit ought to have been dismissed.

8. The Respondent filed his submissions dated 14th May 2024. He submitted that the transaction through which the Appellant acquired Mutira/Kiaga/49 was invalid both for want of capacity and want of consideration. The Respondent argued that Bernard was of unsound mind and therefore incapable of entering into a valid contract, a fact consistently affirmed by PW1 and not controverted by the Appellant. Further, the Appellant failed to produce any evidence of consent from the Land Control Board or the transfer instruments, and the green card itself was silent on the documents relied on, rendering the transfer fraudulent. As concerns payment of the consideration, the

Respondent contended that although the Appellant paid part of the purchase price, he never transferred land parcel Mwerua/Kabiriri/1557 which formed part of the consideration and there was breach on the part of the Appellant. On those grounds, the Respondent maintained that the Trial Court rightly declared the contract void and ordered cancellation of the Appellant's title, and he urged that the Appeal be dismissed with costs.

9. This Court, being an Appellate Court of first instance, is obligated to consider and re-evaluate the evidence and material that was before the Learned Trial Magistrate at the time she rendered the impugned Judgment, to satisfy itself whether or not the decision of the Learned Trial Magistrate was justified. This was in keeping with the principle established by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat & Others (1968) EA 123.**

10. This Court's role as an Appellate Court of first instance, is to revisit the evidence on record, evaluate it,

and reach its own conclusions in the matter. See the case of **Selle & Another v. Associated Motor Boat Co. Ltd (1968) EA 123**). However, the Court will not ordinarily interfere with the findings of fact made by the Trial Court unless those findings were based on no evidence, on a misapprehension of the evidence, or if it is demonstrated that the Court acted on incorrect principles in reaching its conclusions. See **Mwanasokoni v. Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v. Kiruga & Another (1988) KLR 348**).

11. In my view, the following issues arise for determination in this Appeal:

1) Whether the Respondent had the capacity to enter into a valid contract of sale with respect to Mutira/Kiaga/49.

2) Whether the sale agreement dated 25th April 2001 and the subsequent transfer were valid, and in particular whether full consideration was paid.

3) Whether the trial court erred in granting relief not specifically pleaded by the parties.

4) Whether the Trial Court re-wrote the contract between the parties contrary to its terms.

Whether the Respondent had the capacity to enter into a valid contract of sale with respect to Mutira/Kiaga/49.

12. The Trial Court directly addressed the question of the Respondent's mental capacity and found that it had not been proved. In Paragraph 9 of the impugned Judgment, the learned magistrate observed that **"in spite of the foregoing, no evidence was led to show that mental illness was indeed congenital. No evidence was led to show that at the time the contract was entered in 2001, he suffered the mental illness that is pleaded. The reports are dated after the agreement was executed...** She further held that **"As this is the basis of the fraud pleaded, the particulars were not well proved."**

13. On that basis, the plea of incapacity was dismissed. This finding was not challenged by way of a cross-appeal. It

is trite that an Appellate Court only determines matters properly placed before it, and a respondent who seeks to upset a finding adverse to him must file a cross-appeal or at least a notice of grounds for affirming the decision on different grounds. In the absence of such a step, the Court cannot reopen or revisit the trial court's conclusion on capacity.

14. Accordingly, the issue of the Respondent's mental capacity is not for determination in this Appeal.

Whether the sale agreement dated 25th April 2001 and the subsequent transfer were valid, and in particular whether full consideration was paid.

15. It was common ground that the Appellant and the Respondent entered into a written sale agreement for the transfer of Mutira/Kiaga/49. The agreed purchase price was Kshs. 720,000/-, of which Kshs. 480,000/- was paid in cash. The balance of Kshs. 240,000/- was to be met by transferring land parcel Mwerua/Kabiriri/1557 to the Respondent. The Appellant admitted that the transfer of

this parcel of land was never effected, attributing the failure to a caution registered against the land and to his absence while pursuing studies.

16. The Trial Court held that consideration, being an essential element of a valid contract, was not fully satisfied, and that the Appellant could only have discharged his obligation by simultaneously transferring land parcel Mwerua/Kabiriri/1557 to the Respondent. The Learned Magistrate held that for the total consideration under the agreement not to have been satisfied by the Appellant for 23 years, the delay was inordinate and the Appellant was guilty of laches, and that rendered the agreement voidable. The Learned Magistrates in the premises went ahead to hold the contract to be void.

17. The Court notes that while the sale agreement met the formal requirements of **Section 3(3) of the Law of Contract Act**, its validity depended on performance of its material terms.

18. The Court in the case of **Maritim v Ngeno**
[2024] KEHC 13169 (KLR) (29 October 2024)

(Judgment) observed that:

“The essential components of a contract as was observed by Harris JA in Garvey v Richards {2011} JMCA 16 ought to ordinarily reflect the following principles:

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships, and consideration. For a contract to be valid and enforceable, an essential term governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence.”

19. The Appellant’s explanation for failing to transfer Mwerua/Kabiriri/1557 in a timeous manner to the

Respondent when it was part of the same transaction, where he as purchasing the Respondents land parcel Mutira/Kiaga/49 puts to question what his intentions were. The explanation that a restriction was registered against the land that prevented him from effecting the transfer to the Respondent cannot sell because he got his title registered in May, 2001 while the restriction was placed on his land in 2007. As the Court of Appeal held in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**, a proprietor whose root of title is under challenge must go beyond producing a title and demonstrate the legality of the process through which it was acquired. The Appellant did not demonstrate that he acquired title to land parcel Mutira/Kiaga/49 procedurally. There is no valid explanation as to why the Appellant did not transfer land parcel Mwerua/Kabiriri/1557 in 2001 when he obtained transfer of the land he was purchasing.

20. The Appellant admitted that as part of the consideration for the purchase of land parcel Mutira/Kiaga/49 he was to transfer land parcel

Mwerua/Kabiriri/1557 to the Respondent to meet the balance of the purchase price of Kshs 240,000/-. The agreement entered into between the Appellant and the Respondent specifically provided that the Appellant would as part of the consideration for his purchase of land parcel Mutira/Kiaga/49 from the Respondent, transfer to the Respondent land parcel Mwerua/Kabiriri/1557. While the evidence on record indicates that the Appellant had land Mutira/Kiaga/49 transferred to his name and was issued a title on 23rd May 2001, there was no evidence tendered to demonstrate that he contemporaneously with the transfer to himself caused land parcel Mwerua/Kabiriri/1557 to be transferred to the Respondent. The explanation the Appellant gave for the failure to transfer land parcel Mwerua/Kabiriri/1557 to the Respondent was that a caution/restriction was registered against the title though the evidence on record showed the restriction was not registered as at 18th May, 2006 when a certificate of official search (exhibited by the Respondent) was issued.

21. It is evident that the Appellant in having land parcel Mutira/Kiaga/49 transferred and registered in his name on 23rd May 2001 had not met and/or satisfied the consideration for the contract. Where in a situation such as in the instant matter a fundamental term of the contract is not fulfilled, the contract becomes voidable at the instance of either of the parties and the parties revert to the position they were at before the contract.

22. The Appellant in the present matter was quick to process the transfer in his favour without satisfying a fundamental term of the contract; of ensuring the consideration of the contract was met. As at the time he processed the transfer of the Respondent's land to himself, he was fully aware that he had not satisfied the consideration he was supposed to make before the contract could get completed. He had not met and/or complied with his part of the bargain and that he acquired title to land parcel Mutira/Kiaga/49, he did so irregularly, and it cannot be ruled out that he was taking advantage of the Respondent, who the evidence indicates may have

been undergoing through some mental challenge though he had not been certified to have been unsound mind. The transaction in my view was voidable at the instance of the Respondent. The Learned Trial Magistrate therefore properly held the contract was void.

23. The Appellant argued that in ordering for the refund of Kshs 480,000/- paid by the Appellant as part of the consideration the Learned Magistrate went outside the scope of the pleadings as no party had made such a plea. Generally, parties are bound by their own pleadings and the Court also ought not to grant a remedy not prayed for (See **IEBC & Another -vs-Stephen Mutinda Mule & 3 Others (2014) eKLR**). The Court however where issues in controversy have been canvassed and from the evidence certain facts have been established, the Court with a view of doing justice to the parties may issue consequential orders that are intended to obviate what would constitute an unjust result.

24. In the instant matter the Court having found the contract to have become void for want of consideration, it would be unjust and unconscionable to cancel the contract and say or do nothing about the part payment paid as consideration pursuant to the voided contract. In the premises the order for the refund of Kshs 480,000/- paid to the Respondent as part of the consideration towards purchase price was a consequential order following the order of cancellation of the contract and the title registered in favour of the Appellant. It was necessary for the Learned Magistrate to make the order for refund to forestall a situation where the Respondent ended being unjustly enriched by being allowed to keep the consideration paid to him and the land that was reverted to him following the order to cancel the title in the name of the Appellant. The Learned Magistrate was not rewriting the contract between the parties as argued by the Appellant but rather was giving effect to the same.

25. On the whole and upon evaluation of the evidence, I cannot fault the Learned Magistrate on the decision that

she reached on analyzing and evaluating the evidence that was before her. I find no merit in the Appeal and I dismiss the same with costs to the Respondent.

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

J. M. MUTUNGI
ELC - JUDGE