Ngugi v Ngugi (Environment and Land Appeal E045 of 2023)
[2025] KEELC 7455 (KLR) (3 November 2025) (Judgment)

Neutral citation: [2025] KEELC 7455 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E045 OF 2023

JA MOGENI, J

NOVEMBER 3, 2025

BETWEEN

MUCHIRI NGUGI ..... APPELLANT

AND

CHARLES MBUGUA NGUGI ..... RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate's Court at Kikuyu (Honorable Jacinta Orwa (Mrs) (SPM) delivered on 12th May, 2023) In SPMCC ELC No. 37 of 2018 – Kikuyu)

JUDGMENT

1. The Appellant filed an Appeal before this Court through a Memorandum of Appeal dated 22/05/2023. The Appeal is against the decision of Hon. SPM Jacinta Orwa delivered on 12/05/2023 at Kikuyu in which the Learned Magistrate entered Judgment in favour of the Respondent against the Plaintiff's claim for specific performance.

2. The genesis of the litigation leading to the Appeal emanates from an Agreement for Sale of land where the Plaintiff purchased for valuable consideration 0.4 Ha within the remaining portion of LR No. 26693 (Original No. 20064/7) Kiambu measuring approximately 0.8 Ha or thereabout. It was the term of the Sale Agreement dated 9/11/2017 that the Plaintiff would pay a deposit of the Purchase Price to the Defendant loan account with Chase Bank to clear the existing loan arrears by the Defendant.

3. That a further deposit of the purchase price was to be paid into the Defendant Consolidated Bank Account with another deposit being in the form of transfer of the Plaintiff Motor Vehicle Registration No. KBX 106 W, Nissan and then the Plaintiff was to pay another deposit in cash to the Defendant as per the provisions of Clause 2 of the Sale Agreement.

4. On 14/2/2018 the Plaintiff and Defendant entered into another Agreement for Sale in respect to the portion for the suit property which confirmed the total deposit paid and the remaining balance to

be paid in the form of transfer of the Plaintiff's Motor Vehicle Registration No. KBX 106W Nissan March to the Defendant as per Clause 3 thereof with the completion date fixed as ninety (90) days as per Clause 4 thereof and the completion documents clearly specified as per Clause 10 (c) thereof.

5. The Appellant/Applicant states that he cleared the Defendant's loan arrears with Chase Bank Kenya Ltd and the original title was released and that he further transferred his motor vehicle to the Defendant as per the terms of the Agreement.

6. The Plaintiff contends that he fulfilled his obligations as per the terms of Clause 2 of the Agreement but that the Defendant failed to give the Plaintiff vacant possession of his purchased 0.4 Ha within the suit property as the Agreement stated.

7. The trial Court considered the claim and found that there were two valid Agreements between the parties dated 19/11/2017 and 14/02/2018. Clause C & D of the agreement dated 14/02/2018 specifically provided for rescinding of the agreement by the vendor if the Plaintiff/Appellant did not transfer the vehicle in the name of the Defendant within 90 days. During the hearing the Plaintiff admitted not having transferred the vehicle in the name of the Defendant and also that he owes the Defendant Kesh 500,000 which he stated that he could not pay before the Defendant surrendered completion documents to the Plaintiff.

8. In finding that the Plaintiff had failed to prove his case against the Defendant on a balance of probabilities the trial Court observed that it was not the business of the Court to re-write a contract for parties since the Plaintiff and the Defendant are bound by the Agreements of 19/11/2017 and 14/02/2018. That the Plaintiff failed to transfer the Motor Vehicle in the name of the Defendant within 90 days from the date of execution of the Agreement for 14/02/2018. Further that the Plaintiff failed to pay Kesh 500,000 to the Defendant thus the trial Court was hesitant to order for specific performance of the contract as was prayed for by the Plaintiff. The Court relied on the cases of County Government of Migori v Hope Self-Help Group (2020)eKLR and Kihuba Holdings Ltd. v Charo Karisa Nguilu (2021)eKLR.

9. Aggrieved by the said decision, the Appellant lodged the present Appeal faulting the trial Court's decision on the following grounds:

    1. The Learned Magistrate erred in Law and fact by holding that the Appellant had breached Agreements for Sale dated 19th November, 2017 and 14th February, 2018.

    2. The Learned Magistrate erred in Law and fact in finding that the Appellant had not fulfilled his obligation under the contract and was thereby not entitled to his lawfully purchased property being 0.4Ha within the remaining portion of L.R.NO. 26693 (Original No. 20064/7) Kiambu.

    3. The Learned Magistrate erred in Law and fact in dismissing the Appellants request for an Order of permanent injunction to restrain the Respondent by himself, his servants, agents and/or whomsoever in any means howsoever from selling, alienating, disposing off, charging and/or in any other way interfering with the remaining portion of L.R. No. 26693(Original No. 20064/7) Kiambu measuring approximately 0.8Ha or thereabouts unless and/or until he transfer of 0.4 Ha thereof is effected in favor of the Appellant and thereby exposing the Appellant purchased portion to risk of being sold to 3rd party purchaser.

    4. The Learned Magistrate erred in Law and fact by overlooking the fact that there are lawfully binding Agreements between the Appellant and the Respondent in respect to purchase

of 0.4Ha within L.R. NO. 26693 (Original No. 20064/7) Kiambu which Agreements the Respondent did not dispute.

5. The Learned Magistrate erred in Law and fact by failing to take into consideration the fact that the Appellant had paid a substantial deposit towards the purchase of 0.4Ha within the remaining portion of L.R.NO. 26693 (Original No. 20064/7) Kiambu being Kenya Shillings One Million, One Hundred Thousand (Kshs. l,100,000) only which payment the Respondent had acknowledged.

6. The Learned Magistrate erred in Law and fact by ignoring to make a Judgement in respect to the deposit paid by the Appellant to the Respondent in respect to purchase of 0.4Ha within the remaining portion of L.R.NO. 26693 (Original No. 20064/7) Kiambu being Kenya Shillings One Million, One Hundred Thousand (Kshs. l,100,000) only which amounts to unjust enrichment by the Respondent.

7. The Learned Magistrate erred in Law and fact by attaching less significance to the fact that the Appellants deposit was utilized towards clearing the Respondent's loan arrears with Chase Bank Kenya Ltd and thereby ensuring the original title was released by the bank and the charge as against the title was discharged which demonstrated performance by the Appellant.

8. The Learned Magistrate erred in Law and fact by awarding a Judgement whose effect was to create a lacuna on what is to become of the purchasing price paid by the Appellant as well as the Appellant purchased property.

9. The Learned Magistrate erred in Law and fact by ignoring the provisions of Clause 10 (D) of the Agreement for Sale dated 14th February, 2018 which required the Respondent to have furnished the Appellant with all completion documents even if the Appellant had not made payment of the full purchase price before completion date.

10. The Learned Magistrate erred in Law and fact by failing to find reasonableness in the Appellant's action of withholding the balance of the purchase price.

11. The Learned Magistrate erred in Law and fact by attaching undue weight to the Respondent testimony and thereby occasion miscarriage of justice to the Appellant.

12. The Learned Magistrate erred in Law and fact by failing to appreciate the fact that the Respondent did not dispute purchase of O.4Ha within the remaining portion of L.R.NO. 26693 (Original No. 20064/7) Kiambu by the Appellant.

13. The Learned Magistrate erred in Law and fact by willfully ignoring the fact that the Respondent had breached the Agreements for Sale by failing to release to the Appellant completion documents.

14. The Learned Magistrate erred in Law and fact by entering Judgement whose effect was to unjustly punish the Appellant who at all times had expressed willingness to complete the transaction of purchase of 0.4Ha within the remaining portion of L.R.NO. 26693 (Original No. 20064/7) Kiambu and the Respondent was willing to accommodate the Appellant.

15. The Learned Magistrate erred in Law and fact by overlooking Clause 11 of the Agreement for Sale dated 14th February, 2018 which provided that "Any party in default of this agreement shall pay the innocent party damages equivalent to 50% of the purchase price" and thereby unjustly denying the Appellant damages suffered from the year 2018 when contract of purchase was made.

16. The Learned Magistrate erred in Law and fact by failing to find that land is a very emotive matter with all issues deserving to be determined.

17. The Learned Magistrate erred in Law and fact by failing to take into consideration the fact that the Judgement creates a bad precedent for the Respondent to escape transferring to other bonafide purchasers their lawfully purchased portions within L.R.NO. 26693 (Original No. 20064/7) Kiambu.

18. The Learned Magistrate erred in Law and fact by failing to see that the effect of dismissing the Appellant's suit serves the purpose of unjustly denying the Appellant his right to his lawfully purchased portion within L.R.NO. 26693 (Original No. 20064/7) Kiambu.

19. The Learned Magistrate erred in Law and fact by unjustly taking away from the Appellant his Constitutional right to acquire property as well as condoning fraudulent sale of property.

20. The Learned Magistrate was openly biased in her Judgement against the Appellant by entering Judgement contrary to the provisions of Section 3.2.2 of the Law Society Condition of Sale, 2015 which calls for equality in actions of both the Vendor and Purchase by providing that "The Vendor and the Purchaser must comply with their respective obligations under the Agreement"

21. The Learned Magistrate by dismissing the Appellant's suit condoned unjust enrichment by the Respondent.

22. AII in all, the Learned Magistrate misdirected and contracted herself on matters of both Law and facts to occasion a miscarriage of justice against the Appellant.

23. The Subordinates' Court decision was manifestly unfair and prejudicial to the Appellant.

10. The Appellant therefore prays:-

i. That this Appeal be allowed and the Judgement entered in the Subordinate Court be quashed and/or set aside.

ii. That this Appeal be allowed and the Judgement entered in the Subordinate Court be quashed and lor set aside and Judgement be entered in favour of the Appellant as against the Respondent.

iii. That in the alternative Appellant suit be reinstated for hearing a fresh in the Subordinate Court before a different Judicial Officer.

iv. That 0.4 Ha within the remaining portion of L.R.NO. 26693 (Original No. 20064/7) Kiambu be preserved pending hearing and determination of the Suit in the Subordinate Court pursuant to Section 13(7)(a) of the Environment and Land Court Act 2011

v. That costs of this Appeal and the Subordinate Court Suit be borne by the Respondent

11. When the Appeal was listed for directions on 03/04/2025, the Counsel for the Appellant confirmed receiving Grounds of Opposition to the Appeal filed by the Respondent.

12. The Respondent filed Grounds of opposition dated 23/05/2023 in response to each Ground of Appeal and stated as follows:

i. For Ground 1, 2, 4, 5 it is the Respondent's contention that the Lower Court correctly found the Appellant breached the Agreements for Sale by false misrepresentation he had made FULL

payment with balance secured by transfer to motor vehicle registration number KBX 106W Nissan March when he was not the owner.

ii. For Ground 3, the Lower Court correctly held the Appellant failed to establish grounds for granting an order for permanent injunction set out the case of GIELLA BROWN v CASSMAN BROWN and in particular failed to establish a Prima Facie case on right of ownership, payment of full purchase price, obtaining Land Control Board consent to Transfer.

iii. For ground 5, 6, 7 the Lower Court was correct in holding the explanations by the Appellant on payments and loan clearance were immaterial in establishing his entitlement of Injunction and Transfer orders and had come to Court with 'Dirty Hands'

iv. For ground 8,17,18 and 19 the Respondent stated that the subordinate Court correctly dismissed the Appellants case per the Prayers sought and the Appellant now seeks the Court to grant alternative Prayers that were not neither prayed for nor sought.

v. For ground 9 it was the Respondent's position that the Subordinate Court correctly held completion by the Respondents was subject to the completion of payment and the fact that the Agreement was rescinded by the False Misrepresentation and a void Transfer of the motor vehicle.

vi. The Respondent observed for ground 10, 11, 16 and 20 that the subordinate Court awarded Judgment after a full defended hearing. This being the case he observed that reasonableness or emotiveness was neither sought neither a legal ground to grant a Land Transfer order.

vii. The Respondent also observed that ground 12, 13, 14, 15, and 16 the Subordinate Court examined the sale agreement produced by the Appellant and rightfully determined the Appellant had not established his right of transfer per prayers sought.

viii. Lastly the Respondent observed that for grounds 20, 21, 22 and 23 the subordinate Court decision was following a full defended hearing where the Appellant was represented by Counsel. The Court made a proper reasoned determination. The Learned Magistrate made a well-founded legal decision based on the Prayers sought for Transfer, Found the Appellant in breach, found the Appellant had not obtained Land Control Board Consent and dismissed his claim.

13. It was directed that the Appeal shall be canvassed through written submissions. The Appellant was granted leave to file a Supplementary Record of Appeal within 14 days and written submissions within 30 days. The Respondent was granted 30 days upon the lapse of the Appellant's period to file her submissions.

14. There is no indication on record of the Appellant having filed any Supplementary Record of Appeal within the stipulated period or at all. The material on record indicates that the Appellant filed his written submissions on xxxxxxxxxxx and the Respondent's submissions were filed on xxxxxxxxxxxxxxxxxx not on record by the time of preparation of the Judgement.

15. The Court has perused the grounds set out in the Appellant's Memorandum of Appeal as well as the material on record. Although the Appellant raised 23 Grounds of Appeal, the Court is of the opinion that resolution of the following issues would effectively determine the appeal:

a. Whether the appeal should be allowed as prayed.

b. Who shall bear costs of the appeal?

16. As a first Appellate Court, this Court is enjoined to relook at the evidence that was adduced before the trial Court afresh, analyse it, evaluate it and come to its own independent conclusion. However, the Court must revisit the evidence bearing in mind that it did not have the opportunity like the trial Court of seeing and hearing the witnesses first hand. Plus observing their demeanor for which allowance should be given as was stated in the case of Seascapes Limited v Development Finance Company of Kenya Limited [2009] KLR 384 and in Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123.

17. The guiding parameters for this Court are therefore, on first Appeal; the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; secondly, in reconsidering and re-evaluating the evidence, the first Appellate Court must bear in mind and give due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses testify before her; and lastly it is not open to the first Appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.

18. The Plaintiff/Appellant testified and stated that whereas the reason he had not transferred the motor vehicle to the Defendant was because the Motor Vehicle was not in his name and that the Defendant was aware. Further that he had orally changed the terms of the contract by informing the Defendant that he will pay him Kesh 5,000,000 in lieu of the motor vehicle. A fact that was denied by the Defendant.

19. The Plaintiff/Appellant also testified that he was not willing to pay the balance of the money since he had paid Kesh 1,100,000 to offset the loan at Chase Bank which saw the bank discharge the suit property. It is the Appellant's contention that he wanted the Defendant to give him the completion documents first, which was not a condition in the Agreement since it was clearly stipulated that the completion documents and vacant possession will only happen when the full purchase price has been paid.

20. Clause 11 of the Sale Agreement stipulated that the party in default is to pay the innocent party damages equivalent to 50% of the purchase price. Again, the Sale Agreement made time of essence and the 90-day period was factored into the second Agreement.

21. There is a clear indication at Clause C about what would happen if payment was not made within the time stipulated in the Sale Agreement. Recission of Contract was provided as an option for both parties and in this case the Defendant/Respondent exercised that right. The parties did not expressly state in the contract what would happen to the deposit received. In view of the foregoing, whilst there is evidence that the Appellant did not pay the purchase price within the time stipulated in the Sale Agreement, from the conduct of the parties, in particular failure of the Appellant to pay the whole purchase price as was required by the Sale Agreement confirms the finding of the trial Court that the contract was breached thereby leading to rescission of the contract by the seller.

22. There is therefore no evidence or grounds that have been placed before this Court to warrant interference with that finding/ determination by the trial Court.

23. I therefore do not find the trial Magistrate's finding at fault since it is settled law, as submitted by the Respondent that contracts are voluntary undertakings and Courts cannot be seen to re-write contracts for the contracting parties.

24. Lastly, on the prayer for costs, Section 27 of the *Civil Procedure Act* provides;

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"27. Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order.

(2) The Court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

25. The Section is clear that an award of costs is in the discretionary preserve of the Court. In this case the suit was dismissed and the Learned Magistrate directed each party to bear its own costs. The Appellant has argued that he fulfilled his obligations under the contract. However, from the testimony of PW1 he confessed that he did not transfer the Motor Vehicle KBX 106 W Nissan March and Clause C & D of the Agreement dated 14/02/2018 specifically provided for rescinding of the agreement by the vendor if the Plaintiff/Appellant did not transfer the vehicle in the name of the Defendant within 90 days.

26. It is therefore clear that the contract at the expiry of 90 days was rescinded due to the failure of the Plaintiff/Appellant to fulfill his obligations. The prayer for specific performance would therefore not be awarded in the circumstances the Respondent ought to have been awarded costs. As already indicated, it is not open for this Court to overturn the trial Court finding of dismissing the suit.

27. Ultimately, it is the view of the Court that the Appellant has not demonstrated any manifest error on the part of the Learned Magistrate's decision and thus the Appeal fails.

28. Costs to the Respondent.

29. Orders accordingly.

DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 3RD DAY OF NOVEMBER, 2025.

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MOGENI J

JUDGE

In the presence of:-

Mr. Gacau Kariuki for the Appellant

Ms. Muhuhu for the Respondent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE