

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT KAJIADO**  
**ELC APPEAL CASE NO. E019 OF 2022**

RHODA NTUTA KETUKEI NTUSHA ..... APPELLANT

AND

GEOFFREY MWANGI MBUTU .....

RESPONDENT

*(Being an appeal from the Judgment and Decree of the Honorable I. Kahuya, Principal Magistrate, delivered on the 24th March, 2022 in Kajiado MCELC Case No. E003 of 2020)*

**JUDGMENT**

**Introduction**

1. This appeal arises from the Judgment and Decree of the subordinate court (Hon. I. Kahuya, PM) delivered on 24th March 2022 in **Kajiado MCELC Case No. E003 of 2020**. In that suit, the trial court entered judgment in favor of the Respondent against the Appellant for Kshs. 1,700,000/- with interest at court rates from 19<sup>th</sup> October 2016 to 24<sup>th</sup> March 2022.
2. Aggrieved and dissatisfied with the said decision, the Appellant, **Rhoda Ntuta Ketukei Ntusha**, preferred this appeal vide an **Amended Memorandum of Appeal** dated **30th November 2023**.
3. The Appellant challenges the determination of the learned trial Magistrate on the following thirteen (13) grounds:

- 1) The learned trial Magistrate misdirected herself in law and in fact in awarding the Respondent a refund of **Kshs. 1,700,000/-** which amount was not based on any proof thus occasioning substantial injustice.
- 2) That the learned trial Magistrate erred in law and in fact in reaching her determination when the Respondent herein failed to satisfy the evidentiary threshold and burden imposed by law.
- 3) That the learned trial Magistrate erred in fact and in law by awarding interest on her award from 19/10/2016 – 24/03/2022 failing to appreciate the unique circumstances surrounding the transaction between the Appellant and the Respondent herein.
- 4) The learned trial Magistrate erred in law in dismissing the Appellant's defense, when there was enough evidence to support her said defense.
- 5) That the learned trial Magistrate erred in law and in fact by failing to consider the Appellant's evidence and the Appellant's written submissions.
- 6) The learned trial Magistrate misdirected herself in law by failing to consider all the issues that arose between the parties for determination.

- 7) The learned trial Magistrate erred in law and in fact by arriving at a decision that was against the weight of evidence adduced at the hearing.
- 8) The Learned trial Magistrate failed to appreciate that it was the Respondent who had defaulted in his payment obligation under the agreements.
- 9) The learned trial Magistrate failed to appreciate/note there was no concern recorded by the Appellant and the court erroneously noted as such giving rise to defective Judgement.
- 10) The Learned trial Magistrate failed to appreciate the settlement of the Kshs. 700,000/- was not towards the settlement of the impugned consent but towards the refund of the purchase price.
- 11) The Learned trial Magistrate failed to appreciate the Respondent was seeking to unjustly enrich himself by entering into an agreement he knew very well he would not settle thus demand for refunds and the monies as per the trial suit.
- 12) That the learned trial Magistrate erred in law and in fact as she failed to appreciate the rationale of agreement for sale as stipulated in the Law of Contract Act as the Appellant intentions had passed.

13) That the learned trial Magistrate did not exercise her discretion judiciously.

4. Consequently, the Appellant prays for orders that:

a) This Appeal be allowed.

b) The Judgment and decree of the trial Court awarding the Respondent **Kshs. 1,700,000/-** together with costs of the suit be set aside in its entirety.

c) That this Honorable court be pleased to award costs of this Appeal to the Appellant herein.

d) Any other relief that this Honorable court may deem fit to grant.

5. The appeal was canvassed by way of written submissions. Both parties duly complied by filing their submissions within the prescribed timelines.

#### Analysis of Submissions

#### Appellant's Submissions

6. The Appellant vehemently contests the validity of the sale agreement dated 19th October 2016, which formed the basis of the trial court's decision. The Appellant submits that this agreement was procured through misrepresentation and fraudulent inducement. Specifically, the Appellant argues that the agreement erroneously insinuated receipt of a purchase price

of Kshs. 2,400,000/=, a figure she contends is fictitious and unsupported by any documentary evidence.

7. It is the Appellant's submission that the Respondent only made payments totaling Kshs. 1,570,000/= between January and June 2015, out of which Kshs. 150,000/= was refunded at his request, leaving only a net sum received of Kshs. 1,420,000/=. The Appellant asserts that the disparity between the actual funds received (Kshs. 1.42M) and the figure in the impugned agreement (Kshs. 2.4M) constitutes a fundamental misstatement of fact that renders the contract voidable at her instance.
8. Relying on **Section 14 of the Law of Contract Act**, the Appellant argues that her consent to the 2016 agreement was not free as it was obtained through misrepresentation regarding the payment status. She further buttresses this argument by citing the case of *Kenya Breweries Ltd v. Kiambu General Transport Agency Ltd [2000] eKLR*, urging this court to look beyond the written document and examine the conduct of the parties to ascertain their true intentions.
9. The Appellant impugns the trial court's reliance on a consent document dated 14th May 2021. She raises a grave issue regarding the authenticity of the signature attributed to her on the said document. The Appellant submits

that she is illiterate and exclusively executes documents using her thumbprint, yet the consent in question bears a written signature. Citing *Mbugua v. Maina [1982] KLR*, she argues that a document must bear an authentic signature to be enforceable against a party.

10. Furthermore, the Appellant points out that the Consent was never formally adopted by the court. She drew the Court's attention to the proceedings of **23rd June 2021**, where the Respondent's own advocate expressly declined to have the consent adopted, citing the Appellant's alleged default.
11. On this point, the Appellant relies on the authority of *Hirani v. Kassam [1952] EACA 131* and *Flora N. Wasike v. Destimo Wamboko [1988] eKLR* to submit that a consent judgment or order only becomes binding once formally recorded and adopted by the Court. Since the Respondent refused its adoption and neither party relied on it subsequently, the Appellant contends it was an error for the trial court to let this unadopted document influence its final determination.
12. The Appellant submits that there was a significant disparity in the bargaining power and understanding between the parties. She highlights that her primary languages are Kiswahili and the Maasai language and that she relied on intermediaries during the transaction. Citing *Bank of Credit and*

*Commerce International SA v. Ali (No 1) [2001] UKHL 8*, she urges the court to exercise "additional care" in enforcing contract terms where language or cultural barriers may have prevented a true meeting of the minds. She posits that the Respondent exploited this barrier to introduce terms (specifically the Kshs. 2.4M figure) that she did not comprehend or agree to.

13. Finally, the Appellant invokes the equitable maxim that *"he who comes to equity must come with clean hands"*. She characterizes the Respondent as a defaulter who breached the original 2015 agreement for the sale of 20 acres and subsequently shifted goalposts to 10 acres and finally 3 acres.
14. The Appellant submits that the Respondent is attempting to unjustly enrich himself by claiming a refund of **Kshs. 1,700,000/=** (as awarded by the trial court) when the proven payments only amounts to Kshs. 1,420,000/=. She prays that the appeal be allowed, and the trial court's judgment be set aside to prevent this alleged injustice.

#### Respondent's Submissions

15. The Respondent vehemently opposes the Appeal and defends the trial court's reliance on the Sale Agreement dated 19th October 2016. He submits that the Appellant is bound by the terms of this written contract, which she voluntarily signed. Specifically, he relies on **Clause 3(a)** of the said

Agreement, where the Appellant expressly acknowledged receipt of **Kshs. 2,400,000/=** as part payment of the purchase price.

16. The Respondent invokes the **Parol Evidence Rule** (Sections 97 and 98 of the Evidence Act), arguing that oral evidence cannot be admitted to contradict, vary, add to, or subtract from the terms of a written contract. He cites the case of *CIS-Kenya Ltd vs. Hermannsburg Mission (1939) 19 KLR 30*, where it was held that, "*where the terms of a contract have been reduced to the form of a document... no evidence shall be given in proof of the terms of such contract except the document itself*".
17. The Respondent contends that the Appellant cannot now orally claim she received a lesser amount (Kshs. 1,420,000/=) when the document she signed states otherwise.
18. The Respondent submits that the Appellant's allegations of fraud, misrepresentation, and undue influence are merely afterthoughts intended to evade her contractual obligations. He points out that the burden of proving fraud is higher than the standard of balance of probabilities. He argues that the Appellant failed to tender any concrete evidence—such as calling the advocate who witnessed the agreement—to substantiate her claim that she was misled or coerced. The Respondent questions why the

Appellant remained silent for over three years (from 2016 to the filing of the suit in 2020) if indeed the agreement contained such a glaring error regarding the purchase price. He avers that this delay amounts to acquiescence.

19. On the specific sum awarded, the Respondent submits that the trial Magistrate's calculation was mathematically sound and based on the evidence. He explains that the trial court took the admitted figure from the 2016 Agreement (Kshs. 2,400,000/=) and deducted the Kshs. 700,000/= that the Appellant had already refunded resulting in the Kshs. 1,700,000/= awarded by the court. Therefore, the Respondent argues there was no "unjust enrichment" as claimed by the Appellant; rather, it was a restoration of the balance due after the land transaction failed to materialize.
20. The Respondent dismisses the Appellant's fixation on the unadopted consent order and the "thumbprint vs. signature" issue as a diversion. He submits that the trial court's judgment was not solely anchored on the consent but on the totality of the evidence, primarily the valid 2016 Agreement and the fact that the Appellant admitted to owing a refund (evidenced by her partial repayment of Kshs. 700,000).

21. He further contends that the Appellant's defense was rightly dismissed because she admitted to selling the suit land to a third party, thereby making specific performance impossible. Consequently, the only equitable remedy available was a refund of the purchase price to the Respondent.
22. The Respondent prays that this Honorable Court finds no merit in the Appeal, upholds the Judgment and Decree of the Subordinate Court, and dismisses the Appeal with costs.

### Issues for Determination

23. Before outlining the issues for determination, I must state that this court had vide its ruling of 22<sup>nd</sup> May 2025, invited the parties to address it on the issue of jurisdiction owing to a reservation expressed by my predecessor (M.N Gicheru J) when considering a motion by the Appellant dated 21<sup>st</sup> February 2024. The Learned Judge had expressed doubts as to whether the matter was indeed an Environment and Land Matter. In the proceedings of 22<sup>nd</sup> February 2024, the learned Judge had stated,

*“It is doubtful if this is an environment and Land (ELC) matter because of what was sought in CMCC E003 of 2020 – there was no claim to use, occupy or own any land.”*

24. The Parties indeed orally submitted on the issue before me. Both were in agreement that this is indeed a matter within the jurisdiction of this court. I fully agree with the Parties. The claim by the Respondent arose out of an agreement for sale of land. Jurisdiction is therefore a non-issue in this case. The court is duly seized of this appeal.

25. Having considered the Amended Memorandum of Appeal, the Record of Appeal, and the rival written submissions filed by both parties, this Court distills the following three main issues for determination:

- i. *Whether the Learned Trial Magistrate erred in allowing the Respondent's case, awarding the Respondent the sum of Kshs. 1,700,000/= and whether such award amounts to unjust enrichment;*
- ii. *Whether the trial Magistrate erred in awarding interest on the principal sum from the 19<sup>th</sup> October 2016 to the 24<sup>th</sup> March 2022; and,*
- iii. *What orders should issue on costs.*

### Analysis and Determination

A. Whether the Learned Trial Magistrate erred in allowing the Respondent's case, awarding the Respondent the sum of Kshs. 1,700,000/= and whether such award amounts to unjust enrichment

26. The crux of this appeal is the validity of the sale agreement dated 19th October 2016. The Appellant contends that the figure of Kshs. 2,400,000/= indicated therein as the purchase price duly received and acknowledged was incorrect. She asserts that she only received Kshs. 1,420,000/=.

27. It is common ground that the Appellant appended her signature to this document, the sale agreement of 19<sup>th</sup> October 2016.

28. It is a cardinal principle of the law of contract that parties are bound by the terms of the agreements they voluntarily sign. The doctrine, '*pacta sunt servanda*' (agreements must be kept), is the bedrock of commercial certainty.

29. The law regarding the effect of a signature on a contractual document was famously settled in the case of *L'Estrange v F Graucob Ltd [1934] 2 KB 394*, where Scrutton LJ held that:

*"When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the*

*party signing it is bound, and it is wholly immaterial whether he has read the document or not."*

30. The above position has been affirmed by the Court of Appeal of Kenya in *National Bank of Kenya Ltd v. Pipeplastic Samkolit (K) Ltd [2001] eKLR.*

where the Court held that:

*"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."*

31. Furthermore, the Evidence Act (Cap 80) strictly limits the admissibility of oral evidence to contradict written terms. Section 97(1) of the Evidence Act provides:

*"When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."*

32. Additionally, **Section 98** (of the Evidence Act) states that:

*"When the terms of any contract... have been proved according to section 97, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms...."*

33. The Appellant sought to introduce oral assertions—that she received lesser money than what is stated in the contract—to vary the express terms of the written agreement. Applying the sections quoted above, this Court finds that the written document supersedes the oral claims. The Appellant is therefore estopped by the Parol Evidence Rule from asserting a different factual position regarding the payments, unless she can strictly prove the exception of fraud.

34. The Appellant submits that she was "fraudulently induced" to sign the agreement and that the figures indicated therein were "fictitious." She further relies on her alleged illiteracy to claim protection.

35. The standard of proof for fraud is well settled. It is higher than the standard of balance of probabilities required in ordinary civil cases. In *Kinyanjui Kamau v George Kamau [2015] eKLR*, the Court of Appeal stated:

*"...allegations of fraud must be strictly proved... although the standard of proof may not be so high as that required in criminal cases, it is somewhat higher than the mere balance of probabilities."*

36. Before the trial court, the Appellant bore the burden of proving that she was misled as she alleges. Upon re-evaluating the record, this Court notes that the Appellant failed to call as witness the Advocate who drew the agreement or the witnesses who attested to her signature, to support her claim of inducement. Mere allegations in submissions, without concrete evidentiary support, cannot dislodge a written contract.
37. Regarding the issue of illiteracy, though the Appellant alleges illiteracy, the court notes that her witness statement submitted before the trial court and which she adopted as her evidence in chief was indeed signed; not thumb-printed. Her signature is on page 49 of the record of appeal.
38. While this Court is sympathetic to the barrier of language, the law requires that a party alleging *non est factum* (it is not my deed) must show that the document they signed was fundamentally different from what they thought they were signing. The Appellant did not demonstrate that she requested the

document to be read over to her and was refused, or that the interpreter lied to her. Consequently, the defense of fraud and *non est factum* fails.

39. The Appellant argues that the award of **Kshs. 1,700,000/=** constitutes unjust enrichment. This Court disagrees. The calculation adopted by the Learned Trial Magistrate is mathematically consistent with the 2016 Agreement, which the court finds was valid.
40. The Appellant's argument that the Respondent is "unjustly enriched" is predicated on the assumption that the 2016 agreement is invalid. Since this Court has upheld the validity of that agreement, the Respondent is merely being restored to the financial position he would have been in had the refund been completed as agreed.
41. Regarding the Appellant's submission on the **un-adopted Consent Order dated 14th May 2021**, this Court notes that while an un-adopted consent is indeed not an order of the court (as correctly cited in **Flora N. Wasike v. Destimo Wamboko [1988] eKLR**), the trial court's decision was not solely anchored on this consent. The Judgment is sustainable independent of the consent, based on the acknowledgement of the debt in the 2016 agreement and the failure of the land transaction. The procedural defect regarding the

consent does not invalidate the substantive finding that the Appellant owes the Respondent the balance of the purchase price.

**B. Whether the trial Magistrate erred in awarding interest on the principal sum from the 19<sup>th</sup> October 2016 to the 24<sup>th</sup> March 2022**

42. The impugned judgment in this case was delivered on 24<sup>th</sup> March 2022 whereby the trial court awarded the Respondent judgment for Kshs. 1,700,000/- with interest at court rates from 19<sup>th</sup> October 2016 to 24<sup>th</sup> March 2022.
43. From the pleadings and the evidence presented before the court, the date of 19<sup>th</sup> October 2016 was the date of the agreement giving rise to the claim by the Respondent whereas the date of 14<sup>th</sup> March 2022 is the date of the judgment of the trial court. Putting it into context, the trial court awarded the Respondent interest on the principal sum from the date of the agreement to the date of the judgment at court rates.
44. I have taken time to read the pleadings filed by the parties. The Respondent initiated the suit before the trial court vide the plaint dated 12<sup>th</sup> October 2020. The Respondent sought five (5) prayers as follows:-

- A. A declaration that the sale agreement dated 19<sup>th</sup> October 2016 between the plaintiff and the defendant for sale of 3 acres of

land to be hived off from Land Reference Number Kajiado/Kaputiei- North/85723 is null and void.

B. A mandatory order compelling the defendant to refund the purchase price received from the plaintiff being Kenya Shillings Two Million Four Hundred Thousand Kshs. 2,400, 000/-.

C. Costs of this suit.

D. Interest on (b) and (c) above at court rates until payment in full.

E. Any other relief that this Honourable Court may deem just and fair.

45. It is clear that the Respondent had not even sought interest on the claimed amount from the date of the agreement. He merely sought interest at court rates until payment in full. The trial Court had indeed correctly noted the prayers sought by the Respondent in the analysis of the pleadings and the evidence but went ahead, without any explanation at all, to award interest on the amount awarded to the Respondent at court rates from 19<sup>th</sup> October 2016 to 24<sup>th</sup> March 2022.

46. This award of interest in my opinion was arbitrary as it was neither based on the pleadings nor the law; nor was its grant justified in any way.

47. Beginning with the law, the starting point is *Section 26 of the Civil Procedure Act*, which provides as follows;

*“1) Where and in so far as a decree is for payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum of any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.*

*2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum”.*

48. Ngugi Judge (as he then was), in the case of *Jane Wanjiku Wambu –vs- Anthony Kigamba Hato & 3 others (2017) KEHC, 398* elaborated on the provision of *Section 26* in the following words;

*“Our superior courts have, over time, come up with several principles derived from this general rule in Section 26 of the Civil Procedure Act*

*which have, over time, acquired stable meanings. The following three principles in this regard seem relevant for the appeal at hand.*

*First, at all times, a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously.*

*Given this discretion, an appellate court is therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong.*

*Secondly, under Section 26 (1) of the Civil Procedure Act, the court has discretion to award and fix the rate of interests to cover two stages, namely;*

- i. The period from the date the suit is filed to the date when, the court gives its judgment; and*
- ii. The period from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix.*

*Third, when it comes to the period before the filing of the suit, Section 26 of the Civil Procedure Act has no application. Instead, interest prior*

*to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is (a) statutory right to interest or where an agreement to pay interest can be implied from the cause of dealing between the parties”.*

49. I said that the Respondent in this case had not pleaded for interest prior to the date of filing suit; neither did she prove it.

50. Parties are bound by their pleadings. The court too is bound by the pleadings of the parties. In *Raila Odinga & another –vs- IEBC & 2 others, (2017) eKLR*, the *Supreme Court of Kenya*, cited the decision of the *Malawi Supreme Court of Appeal in Malawi Railways Limited –vs- Nyasulu (1998) MWSC 3*, in which the court had quoted with approval from an article by Sir Jack Jacob entitled, *“The present importance of pleadings”*, where the author stated that;

*“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound*

*by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves”.*

51. Consequently, I have come to the conclusion that the learned trial Magistrate erred by not applying his mind on the issue of interest on the principal amount thereby proceeding on an erroneous principle and was plainly and obviously wrong in awarding interest for a period prior to the filing of the suit without any basis when the same was neither pleaded nor proved.

52. Accordingly, the appeal partially succeeds on the aspect of interest only. The court therefore sets aside the order of award of interest on the principal sum from the 19<sup>th</sup> October 2016 to 24<sup>th</sup> March 2022 and substitutes it with an order awarding interest on the principal amount at court rates from the date of judgement until payment in full. The interest rate shall be at the rate of 12% per annum.

**C. What orders should issue on the costs**

53. On the issue of the costs of this appeal, considering that the appeal has partially succeeded, the court exercising its discretion under *Section 27 of the Civil Procedure Act* orders that each party bears its own costs. The award of costs of the suit to the Respondent as awarded by the trial court remains.

**Final disposition**

54. The final disposition is that the appeal partially succeeds on the aspect interest on the principal sum only. The court makes the following final orders;

- a) *The Judgment and decree of the trial Court is hereby aside on the aspect of award of interest on the principal sum only from the 19<sup>th</sup> October 2016 to 24<sup>th</sup> March 2022 and substituted with an order awarding interest on the principal amount of Kshs. 1,700,000/- at the rate of 12% per annum from the date of judgement until payment in full.*
- b) *Each party shall bear its own costs of the appeal.*

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 19<sup>th</sup> Day of January 2026.

M.D. MWANGI  
JUDGE

In the virtual presence of:

Ms. Mageto for the Appellant

N/A by the Respondent

Court Assistant: Mpoye

M.D. MWANGI  
JUDGE