

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELCLA NO. E011 OF 2025

HEZEKIAH ONG'UNDIAPPELLANT

VERSUS

DANIEL OJJO ODHIAMBO RESPONDENT

(Being a first appeal from decision, judgement and decree of Honorable K. Cheruiyot, Senior Principal Magistrate delivered on 21.01.2025 in Kisumu Chief Magistrate Court - EL Case No. 447 of 2018)

JUDGEMENT.

Introduction

The Appellant herein challenges the judgment and decree dated 21st January 2025 in Kisumu MCELC CASE NO. 447 OF 2018 (the Suit). Vide the Memorandum of Appeal dated 17th February, 2025, the appellant seeks that the appeal be allowed, the judgement be set aside and be substituted with an order dismissing the respondent's suit with costs. The appellant also seeks that the respondent be ordered to pay costs of the appeal.

A brief background of the appeal is that vide the plaint dated 26th October, 2018, the respondent sued the appellant in the suit over a parcel of land known as KISUMU/KARATENG/1282 (the suit land). The respondent claimed that he had entered into a land sale agreement dated 21st December 2015 with the appellant vide which the appellant was to sell to him the suit land at an agreed purchase price of Kshs. 4,900,000/= . That he had paid a total of Kshs. 3,305,509/= as part payment of the purchase price and that the balance of Kshs. 1,594,591/= was to be paid upon completion of the

transaction. That thereafter the appellant refused, failed and/or ignored to complete the transaction.

The respondent therefore sought for orders of specific performance or refund of the paid amount and interest thereon at 18% per annum from 19th September 2016 till payment in full and costs of the suit.

Vide the statement of defence dated 20th June 2022, the appellant denied the claim.

The suit was heard before the trial court which, vide the judgement dated 4th November, 2025 found that only the sum of Kshs. 2,307,509/= was refundable and entered judgement in favour of the respondent for the sum of Kshs. 2,307,509 with costs and interest from 22nd August 2016.

The appeal

Dissatisfied with the judgement, the appellant preferred the present appeal on the grounds that the learned Magistrate erred in law and fact: -

1. by considering and allowing the respondent's suit and thereby arriving at a grossly unfair decision and in all circumstances failed to do justice to the appellant.
2. by failing to consider the statement of defence, testimony and evidence of the appellant and in particular the fact that there was no evidence that money was paid to the appellant thereby making a decision that was not supported by any proof.

3. by considering and allowing the respondent's suit land on basis of a draft pleading that was not produced by any of the parties as an exhibit and therefore not available for consideration by the honourable court.
4. by considering and allowing the respondent's suit yet the respondent had not proved his case on the required standards of proof thereby arriving at a grossly unfair decision and in all circumstances failed to do justice to the appellant.
5. by failing to find that the respondents' suit lacked merit.

Submissions

The appeal was heard by way of written submissions. It was submitted on behalf of the appellant that in the judgment the court awarded the respondent a sum of Kshs. 2,307,509/= the basis of which was a purported draft defence filed in the court file. That the appellant had filed his defence denying the claim and that the burden of proof was with the respondent to prove that the appellant received money. That the burden was not discharged in the trial.

That the respondent filed the suit claiming to have paid to the appellant a sum of Kshs.3,305,509 which money was allegedly transferred by the respondent to his lawyers which lawyers allegedly transferred it to the J. W. Ngetho & Company Advocates who purported to be acting for the appellant and that it was alleged that J. W. Ngetho & Company Advocates sent the money to the appellant.

That the appellant testified and stated that he did not know J. W. Ngetho & Company Advocates and that he did not receive any

money from them. That there was no evidence to prove the movement of the money from the respondent to the appellant. That there was no document that supported deposit of the said amount in the appellants' account.

Counsel relied on the decision in Nyahururu HCCA NO. E018 OF 2024 Stanley Maira Kaguongo - vs - Isaac Kibiru Kahuthe to support the submission that the burden of proof was with the respondent as the party who desired the court to believe the fact that the appellant was paid the money. Counsel also relied on the case of Hellen Wngari Wangechi - vs - Carumesa Muthini Gathuna [2005] eKLR where it was held inter alia that "it is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed."

Counsel submitted further that without evidence, the respondent did not meet any threshold of proof that the appellant received money.

Counsel urged the court to allow the appeal set aside the judgment of the trial court and substitute it with an order dismissing the respondent's suit and order the respondent to bear the costs of the appeal.

No submissions were filed herein on behalf of the respondent. Affidavit of Service sworn by Cecil Kouko Advocate and filed herein shows that the respondent's Advocates were on 2nd October 2025 directions given on 31/7/2025 in respect of timelines for filing and exchange of written submissions and date for mention of the matter for a date for judgement.

Issues for determination

The substantive issue raised in the grounds of appeal is whether or not the trial court erred in allowing the respondent's claim for refund of the purchase price.

Analysis and determination

This being a first appeal the court has a duty to reconsider the whole evidence produced before the trial court, re-evaluate it and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which this court does not have, of seeing and hearing the parties and their witnesses first hand. In the case of *Gitobu Imanyara & 2 others -vs- Attorney General [2016] e KLR* the court held that the principles upon which a first appellate court proceeds are well settled and stated that:-

“ Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”.

The trial court found in paragraph 10 of the judgment that as for the refund there is no evidence of payment of monies to the defendant (appellant herein). that the demand letter produced was

not prove that the appellant received any money. The court found also that the evidence of PW2 was that she received Kshs. 2,305,509/= from the plaintiff's lawyer leaving a balance of Kshs. 2,592,491/=

In paragraph 12 of the judgment the court acknowledged that there were no bank transfer documents, banking slips or anything to support the claim that money was sent or paid or received by the defendant.

Perusal of the judgment shows that the trial court relied on a draft defence in the file and the evidence of PW2 to enter judgment in favour of respondent. The court observed in paragraph 11 of the judgement that; "curiously, there is a draft statement of defence attached to the defendant's application for setting aside of interlocutory judgment ... at paragraph 8 the defendant admitted receiving Kshs. 2,307,509/= from the plaintiff which is supported by Jane Ngetho's letter dated 22nd August 2016."

Further, in paragraph 12, the trial court noted that "the defendant and advocate who was said to have been acting for the defendant through informed brokers confirmed receipt of the sum of Kshs. 2,307,509/= only."

The court therefore proceeded to enter judgment for the said amount in favour of the respondent. The appellant faults the trial court for this.

I have considered the evidence placed before the trial court in respect of the amount claimed. Indeed, as rightly observed by the trial court, there was no evidence of payment of money to or

receipt of money by the appellant. The record shows that the respondent who testified as PW1 adopted the contents of his witness statement as his evidence in chief. He had stated partly in witness statement that of the consideration of Kshs. 4,900,000/= he paid the defendant a sum of Kshs. 3,305,509/= leaving a balance of Kshs. 1,594,591/=. The respondent pleaded in paragraph 3 of the plaint and averred in the witness statement that the monies were to be paid to the appellant through the appellant's advocates.

I have perused the land sale agreement dated 21st December, 2015 pursuant to which the said amounts of the purchase price were to be paid. Clause 2 of the agreement states regarding the purchase price and mode of payment thereof that: -

“the purchase price is Kenya shillings four million nine hundred thousand only (Kshs. 4,900,00/=) payable to the vendor in the following manner;

- (a) 10% deposit of Kenya shillings four hundred thousand (Kshs. 490,000/=) to be paid at the execution of the agreement (receipt whereof the vendor acknowledge)
- (b) Kenya shillings four million four hundred and ten thousand (Kshs.4,410,000/=) to be paid on or before the 30th April, 2016.”

I do not find any express provision in the agreement that payment was to be made to the defendant (appellant herein) through his advocates.

The record shows that on cross - examination, the respondent claimed that he paid the money through his lawyer who in turn paid

it to the defendant's lawyer. He stated that he did not pay the defendant directly. The record also shows that the documents the respondent produced in support of his claim were those listed on the list of documents dated 20/10/2018. These were sale agreement dated 21st December, 2015, copy of demand letter dated 1st November, 2017 and letters dated 22/8/2016 and 28/9/2016 from Ngetho Co. Advocates.

PW2 testified that the property was being sold at Kshs. 4,900,000/-. She testified that the defendant had instructed her to deposit the money in the defendant's Account at Equity Bank.

She testified that they did not receive the first cheque for 10% of the price of Kshs. 4,900,00/= on 7/1/2016. On cross - examination, PW2 stated that the amount of Kshs. 490,000/= was not paid at the time of signing of the agreement but that they were given a cheque in January. That no money was paid at the time of signing of the agreement.

This testimony from PW2 is contrary to what was stated in the agreement that receipt of the 10% of the purchase price had been acknowledged at the time of execution of the agreement.

PW2 also acknowledged receipt of Kshs. 2,307,509/-. And although she alleged that the money was deposited in the appellant's account, there was no documentary evidence in the form of bank statements, pay-in-slips or any other document produced to show this.

The appellant denied receipt of any amount. As submitted by Counsel for the appellant, the burden of proof rested with the

respondent to prove that he paid money to the appellant or that the appellant received the money. This burden was not discharged at least on a balance of probabilities.

The draft defence relied upon by the trial court was not a pleading in the case.

The respondent's claim which was allowed was for refund of the consideration allegedly paid to the appellant. The remedy of the refund is meant to return to the Claimant that which he/she paid to the defendant. In Kenya Commercial Bank Ltd vs Osebe[1982] KLR 296 the Court held that a court must be satisfied of the factual and legal foundation of an order before granting it. In the absence of such foundation, the order for refund could not stand."

And in Olegasalie New Properties Limited v Lematasho [2025] KEELC 6465 (KLR) the court held that "as regards refund of the purchase price, it is to be observed that restitution may only arise where it is demonstrated that one party has unjustly enriched itself at the expense of the other under an enforceable or at least partially performed contract.

In the absence of any kind of evidence that money was paid to the appellant, and in the absence of a clause in the agreement that payment was to be made through the appellant's advocate, I find that the trial court erred in finding in favour of the respondent.

The court finds that the appeal has merit and hereby allows it. The judgement of the trial court is hereby set aside and replaced with a judgement dismissing the respondent's suit.

Regarding costs of the appeal, the court has considered the provisions of section 27 of the Civil Procedure Act that costs ought to ordinarily follow the event but in the circumstances of this case that PW2 admitted having received money from the respondent, it will, in the court's view, be unconscionable to burden the respondent with costs of the appeal.

Each party to bear own costs of the appeal.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered virtually this 5th day of February 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen- Court Assistant.

Kouko for the appellant

N/A for the respondent.