

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT**  
**EMBU**  
**ELC APPEAL NO. E008 OF 2023**

**MICHAEL KARUGANO MURAGE.....**  
**APPELLANT**

**VERSUS**

**SOLOMON MBUO WAGANAGWA.....1<sup>ST</sup>**  
**RESPONDENT**

**ROSEMARY NJERI MBUO.....2<sup>ND</sup>**  
**RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment of Hon. J.W Gichimu. Senior Principal Magistrate, delivered on 7/3/2023 in **Embu CM ELC Case No. E25 of 2021- Michael Karugano Murage v Solomon Mbuo Waganagwa & Another**, which the Appellant instituted vide the plaint filed on 29/9/2021 seeking specific performance of an oral and written contract between him and the Respondents. He sought general damages, costs and any other relief the court deemed fit to grant. The Appellant amended the plaint on 25/8/2022 and abandoned the prayers in the original plaint and sought a refund of Kshs. 400,000/=, which he claimed was fraudulently paid to the Respondents. He also

sought general damages at 30% of the consideration and interest at 14% from the date of filing the suit.

2. The Appellant's case was that he entered into an agreement with the Respondents for the purchase of plot numbers Ugweri Market 59 and 60 (the suit land) at the agreed sum of Kshs. 400,000/=, which he paid in full to the 1<sup>st</sup> Respondent. However, the Respondents failed to transfer the land to him.
3. In their defence, the Respondents denied that it was their responsibility to follow up on the transfer process. They contended that having surrendered all the executed transfer documents and with the relevant authorities having approved the transfer, they had fulfilled their part of the bargain and it was incumbent upon the Appellant to follow up on the transfer process.
4. During the hearing, the Appellant testified that on 15/1/2015 the Respondents agreed to sell him the suit land, which had two stalls. They entered into a sale agreement before an advocate and he paid them Kshs. 400,000/=. That they agreed to transfer the stalls to him but they did not do so. His efforts to get a refund from them did not bear fruit. He realized that a police post had been built on the suit land, making it clear that the suit land was public property for it belonged to the national government. On cross-examination, he told the court that he saw the land in 2018 and was shown a map of the area. That at the time, there was a large shed on the land. He was given the allotment letter. He confirmed that the two parcels of land were registered in the Respondents' names.

5. The 1<sup>st</sup> Respondent, Solomon Mbuo Waganagwa told the court that the 2<sup>nd</sup> Respondent was his wife. He acknowledged that they entered into a sale agreement with the Appellant for the sale of the suit land. He explained that he acquired the plots through a fair and open ballot from the Municipal Council of Runyenjes, and that plot no. 60 was registered in favour of his wife whereas plot no. 59 was registered in his son's name. He stated that he had authority from his wife and son to sell the plots. He stated that the plots were within Runyenjes Municipal Council, with Ugweri Market as their project. He emphasised that the plots existed when he sold them and that letters of allotment for the two plots had been issued to him. He acknowledged receipt of the full purchase price of Kshs. 400,000/= from the Appellant.
6. The 1<sup>st</sup> Respondent averred that he surrendered the documents of ownership over the suit land to the Appellant. They filled the transfer form and paid the transfer fees and the Appellant was given the receipts for payment to follow up on the allotment letters. He maintained that it was the Appellant's responsibility to follow up on the transfer as he had all the documents including the ownership documents and that he did not therefore owe him any duty regarding the transfer of the suit land.
7. He acknowledged that there was a police post at Ugweri Market, which was not there when he sold the plots to the Appellant and added that although Ugweri Market was not operational, it is still in existence. The Respondents relied on a copy of the application to the Embu County Government to transfer the suit land.

8. In its judgment, the trial court dismissed the Appellant's suit and found that he failed to prove his case on a balance of probabilities. The court held that the amended plaintiff, filed nearly a year after the close of pleadings and without leave, was irregular and expunged it from the record. Further, it found that the prayer for specific performance was untenable in light of the Appellant's admission that the suit land comprised public land and was not available for transfer. The court held that general damages are not awardable for breach of contract and that it could only grant orders that were pleaded and since the only relief sought was specific performance, it could not be granted. The court dismissed the Appellant's suit.
9. The Appellant raised four grounds of appeal in his memorandum of appeal. He faulted the trial court for deliberating on reliefs that he had abandoned and failing to deliberate on the amended plaintiff, which sought a refund of the consideration and not specific performance of the agreement. He faulted the court for failing to find that the amendment was valid under the Civil Procedure Act and for disregarding, dismissing or striking out the amended plaintiff yet the law allowed it. The Appellant urged this court to set aside the judgment of the trial court and grant the reliefs sought in the amended plaintiff dated 14/7/2022. The Appellant also sought costs of the appeal.
10. The court directed the parties to file and exchange written submissions, which it has read and considered. The Appellant gave a brief background to the case and submitted that the appeal was properly before the court. He argued that although

the trial court's judgment was delivered on 7/3/2023, the memorandum of appeal, prepared on 5/4/2023, was lodged on 11/4/2023, which was the first working day after the Easter holiday. He invited the court to take judicial notice that although 6/4/2023 was a working day, many court registries across the country including this court operated at a minimal capacity or were entirely inactive in anticipation of the long Easter weekend. He submitted that the delay in filing his appeal was minimal, unintentional, and was not occasioned by indolence.

11. In addition, the Appellant submitted that the trial court erred by failing to consider the amended plaint dated 14/7/2022 and filed on 25/8/2022, which superseded the original plaint and which showed that he had abandoned the prayer for specific performance and was instead seeking a refund of the consideration paid in the sum of Kshs. 400,000/= together with general damages for breach of contract and costs of the suit. He contended that the court failed to consider the amended plaint altogether and rendered a decision on the original pleadings contrary to the law and which resulted in a miscarriage of justice.
12. The Appellant maintained that he paid the full purchase price of Kshs. 400,000/= stipulated in the sale agreement dated 15/1/2015 for land which ultimately could not be transferred due to interference by a public development, in the form of a police post. He submitted that the Respondents retained the money without providing title, alternative land, or a refund, which in his amounted to unjust enrichment and warranted restitution. He

urged the court to exercise its discretion under Sections 1A, 1B, and 3A of the Civil Procedure Act and allow the appeal.

13. The Respondents submitted that the appeal is incompetent having been filed out of time and without leave of the court and in any case no satisfactory explanation was given for filing the appeal out of time. It was submitted that there is no appeal before this court and that the court lacked jurisdiction. The Respondents contended that the Appellant's failure to seek leave to file the appeal out of time was not a mere procedural defect or a technicality curable by Article 159 (2)(d) of the Constitution or Order 51 Rule 10(2) of the Civil procedure Rules. Several authorities were cited in support of that proposition.
14. They submitted that the issue of whether the Appellant was granted leave to file an amended plaint and whether the amended plaint was served upon the Respondent did not arise in the trial court and the appellate could not entertain that issue. They averred that the amended plaint was neither filed with the leave of court nor was it served upon them. They urged that the Appellant testified in the trial court but did not rely on the amended plaint and he could not allege at this stage that the trial court did not consider it. Ultimately the court was urged to dismiss the appeal for being incompetent and without merit.
15. The issue for determination is whether the appeal has merit. Before delving into the merits of the appeal, this court must first address the issue raised by the Respondents that the appeal was filed out of time. Under Section 79G of the Civil Procedure Act, an appeal from a subordinate court to the High Court must be

filed within thirty (30) days from the date of the decree or order appealed against, exclusive of any time certified by the lower court as necessary for the preparation and delivery of a copy of the decree or order. The proviso to the section allows the court to admit an appeal out of time if the Appellant satisfies the court that there was good and sufficient cause for the delay.

16. The judgment appealed from was delivered on 7/3/2023. The record shows that the memorandum of appeal was lodged on 11/4/2023. The Appellant explained that court processes in the registry are slow or minimal during the Easter holidays and therefore he could not lodge his appeal on time. The 30 day period ended on 7/4/2023, which fell on Good Friday. Pursuant to Order 50 Rule 3 of the Civil Procedure Rules and since the last day for filing the appeal fell on Good Friday, the Appellant ought to have lodged the appeal on 11/4/2023, the day after Easter Monday. The appeal is properly before court.
17. The other matter that falls for determination in this appeal is whether the trial court properly exercised its discretion when it struck out the Amended Plaintiff and proceeded to determine the dispute on the basis of the claim for specific performance of the agreement, which was rendered moot after the suit land was taken up for public purposes through the construction of the Police Post.
18. The fact that the Appellant paid the Respondents Kshs. 400,000/= for two plots at Ugweri Market pursuant to the written sale agreement is not contested. It is also not disputed that the plots were not transferred to him, nor was the consideration

refunded to the Appellant. The suit land could not be transferred to the Appellant because it turned out that they constituted public land and was not available for transfer. The Respondents retained the purchase price, which in this court's view amounts to unjust enrichment because the Respondent could not pass a good title over public land.

19. The Plaintiff was initially represented by counsel but on 2/8/2022 he filed a notice of intention to act in person, which is dated 20/5/2022.
20. By expunging the amended plaint, the trial court failed to consider the substance of the Appellant's claim for refund. Even if the amended plaint were irregularly filed, the court was still required to render substantive justice by considering the evidence adduced which clearly demonstrated that the Respondents were paid the full purchase price but failed to transfer the suit land to the Appellant or offer him a refund or alternative land. Allowing the Respondents to keep the Appellant's money without transferring the suit land to him amounted to unjust enrichment, which equity abhors.
21. The appeal succeeds. The judgment of the trial court delivered on 7/3/2023 is set aside. Judgment is entered for the Appellant against the Respondents jointly and severally in the sum of Kshs. 400,000/= being the consideration paid, together with interest at court rates from the date of filing suit until payment in full.
22. The Appellant will have costs of the appeal.

Delivered virtually at Bungoma this 11<sup>th</sup> day of February 2026.

**K. BOR  
JUDGE**

**In the presence of: -**

Mr. Michael Karugano Murage - the Appellant

Mr. James Mugane for the Respondents

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