

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND COURT LAND APPEAL NO.
E001 OF 2025

ALICE NYABOKE OKEMWA.....

APPELLANT

VERSUS

NICHOLAS OCHIENG

OGOWO.....RESPONDENT

*(Being an Appeal from the Judgement and Decree
delivered by Hon. J. Orwa CM in Homa Bay ELC No. E016
of 2024 on 20th December 2024)*

JUDGEMENT

1. By way of an Amended Plaintiff dated 17th July 2024 the Appellant sought the following orders in the trial court;

1) Order of declaration that the agreement between the Plaintiff and the Defendant is repudiated by actions of the Defendant and is therefore null and void.

2) Costs of the suit and interest thereon as from the date of filing this suit until payment in full.

2. The Appellant, then the Plaintiff, pleaded that she entered into a sale agreement with the Respondent, then the defendant, for the purchase of a piece of land within Homa Bay for consideration of Kshs. 3,800,000/-. Further, that the

Defendant failed to meet the terms of the agreement and as a result, the Plaintiff sought the reliefs above.

3. In his defence, the respondent filed a statement of defence and counterclaim dated 31st July 2024. He denied the allegations of the plaintiff and contended that the frustration of the contract was occasioned by the plaintiff by reason that she concealed material facts and information to the Defendant of the true nature of ownership of land property KANYADA/KOTIENO/KATUMA'A'/1541. Further, that he discovered that the Plaintiff held the land as an administratrix of the estate of a deceased and therefore the contract became voidable when the defendant's title was cancelled immediately he acquired it, by virtue of an order for revocation of grant issued to the Plaintiff herein in HOMA BAY CHIEF MAGISTRATE'S COURT SUCCESSION 165 OF 2018. Additionally, he pleaded that the initial deposit was remitted fully to the plaintiff except for the remaining balance that was to be paid upon successful transfer, which the defendant withheld by reason of an order for revocation of grant issued to the Plaintiff.
4. The defendant urged that the default was not on his part as the plaintiff had agreed to the alteration of the terms in the

agreement and she never issued any notice as contemplated under clause 16 of the agreement.

5. In the counterclaim, the defendant sought the following orders

a) An order of declaration that the agreement between the Counterclaimant and Defendant is repudiated by actions of the Defendant and is therefore null and void.

b) An order to the Defendant to refund the initial deposit of Kshs 3,600,000/= paid to her at current market rates with interest thereon.

c) Refund of Kshs 300000/= being transfer of title deed expenses.

d) General damages for breach of contract.

e) Costs of the suit be borne by the Defendant.

f) Any other relief that this honorable court may deem fit to grant.

6. The Appellant then filed a reply to the statement of defence which were denials of the allegations therein. She also filed a defence to the counterclaim, urging that the deposit was agreed upon but no transfer effected and denying the allegations therein.

7. The matter then proceeded for full hearing

Hearing at the trial court

8. **PW1** was **Alice Nyaboke Okemwa** who testified that she was introduced to the defendant on 16th December 2021 for purposes of the sale of land parcel number Kanyada Kotieno Katuma A 1541 which was her fathers' land. The succession proceedings had been conducted by the time the land sale agreement took place and she was the Administrator of Estate of deceased. She stated that her siblings were aware of the transaction and the purchase price was Kshs. 3,800,000 and the agreement was executed on 15/12/2021. The initial deposit to be paid on the date of execution was Kshs. 3,600,000 and Kshs. 200,000 was to be paid after transfer of the land in name of Nicholas. She urged that he never paid her Kshs. 3,500,000 on 16/12/2021. She denied all the allegations that she received payment and further, that she came to realize that the suit land was registered in name of Nicholas. She reiterated that his registration was fraudulent and denied attending any Land Control Board.
9. During cross examination, she stated that she understood the content of the agreement before signing it and that she informed the purchaser orally that she was holding the land

in trust for her siblings. She denied the acknowledging receipt of any money from the Respondent. She acknowledged that the respondent took possession of the land.

10. The Appellant closed his case and the defendant called his witnesses.

11. **DW1** was **Bernard Owuor Ganda** a cousin to the Respondent who testified that he was present during the execution of the sale agreement. Further, that on the first day, the respondent paid Kshs. 200,000 and that the Appellant was paid Kshs. 2,000,000 in the account and Kshs, 300,000 was paid in cash. He stated that he represented the respondent at the land control board.

12. **DW2** was **Christian Humphrey Odhiambo Obach** an advocate practicing in the name of H. Obach and Co, Advocates in Homabay. He stated that he attested an agreement on 16/2/2021 and that the parties appeared before him on 13/12/2021 prior to the execution of the agreement, and he called for time to conduct a search. That on 16/12/2021, Nicholas was not around and all parties Signed save for Nicholas who came later and signed. On 15/12/2021 Kshs. 200,000 was paid to Alice and Nicholas

wired money into their account being Kshs. 2,000,000. Kshs. 500,000 was paid to Alice in cash to meet expenses of brokers and she signed an acknowledgement of receipt on 16/3/2022 for Kshs, 1,500,000. He stated that he did a transfer of forms for consent on 16/3/2022 and Alice and Bernard attended the land control board, with Bernard attending on behalf of Nicholas Ogowo.

13. He stated that he went for the title deed and was told that an issue cropped up pertaining to transfer of the land in favor of Nicholas Ogowo. He stopped it at that.

14. **DW3** was **Nicholas Ogowo**, the Respondent. He adopted his witness statement as evidence in chief and stated that the Appellant received Kshs 200, 000 from his Attorney. That when he came to sign the agreement, he wired all the money to his Attorney and it was paid to Alice. The purchase price was Kshs 3,800.000 and she received Ksh.3, 600,000 of which Ksh.200, 000 was not paid to Alice due to encumbrances touching on the land. He further stated that his cousin went to the land board on his behalf.

15. During cross examination, he stated that he his cousin represented him at the land control board. Further, that Alice was not present when he came to sign the agreement. That

he spoke to Alice when the agreement was reduced in writing and he wired the money to his Attorney. He stated that the agreement was not executed on 16/12/2021 and was given to him on 17/12/2021 and once he showed it to the bank he was able to wire the money to the account of his attorney who then paid the appellant.

16.**DW4** was **Joseph Owiti Nyajwaya** who stated that he connected Alice and Nicholas through his cousin as Alice told him she wanted a buyer for her land. Further, that on 16/12/2021 they went to Obach and Co. the advocates' office in company of Alice. An agreement was reduced in writing, and Kshs. 200,000 was paid to Alice. She came back after a week and Kshs. 2,000,000 was wired to her account at Equity bank. Kshs. 500,000 was paid in cash to Alice to cater for the brokers charges. There was a balance of Kshs 900,000 and she advised Obach and Co. to retain the money on her behalf. On 16/3/2022, she signed an acknowledgment of receipt of entire purchase price and later, he went to the Land Control Board for consent to transfer the land with Bernard and Alice.

17. During cross examination he stated that on 15/12/2021, he was with Alice and saw her receiving Kshs. 200,000 from

Obach and Co. Advocates. On the date of signing the agreement, Alice was to be paid Ksh.3, 600,000 and she requested to be paid Kshs. 200,000. He maintained that on 16/12/2021 Nicholas was not around and she needed money to go back to her residence. He repeated the series of transactions as set out in his examination in chief.

18. The trial court, upon considering the evidence tendered in court and the testimonies of the parties, and the submissions on record, the trial court held as follows;

a) The Agreement between the Plaintiff and Defendant executed on 16th December 2021 is hereby deemed as frustrated by Plaintiff and Defendant hence null and void.

b) The Plaintiff is hereby ordered to refund the sum of Kshs 1,600,000/= to the Defendant with interest at court rates from date of filing of Counterclaim till payment in full.

c) A claim for Damages for Breach of Contract is hereby disallowed.

d) A claim for refund of Kshs 300,000/= being transfer of title deed expenses is hereby disallowed.

e) Each party to bear their own costs of the suit.

19. Being aggrieved with part of the judgement, the appellant instituted the present appeal vide a Memorandum of Appeal dated 6th January 2025 premised on the following grounds;

1) The Judgment of the Subordinate Court that the contract was frustrated by both parties was bad as from the onset, it is the Respondent who failed to meet his part of the bargain in the impugned sale of land Agreement.

2) The Subordinate Court having correctly found that there was no & evidence to prove the payment of the alleged initial Kshs. 200,000/= went ahead to rely on pleadings by the Appellant that had already been amended and which amended pleadings denied any payment at all from the Respondent.

3) In essence, the Subordinate Court failed to refer to the Appellants amended Plaintiff and instead, relied on the wrong pleadings.

4) The Subordinate Court relied on purported acknowledgment of payment for Kshs. 1,600,000/= that the Appellant denied and the Appellant contends reliance on the fraudulent acknowledgment was unsafe in that;-

- a. **The Respondent contends that the aforesaid payment was in bits through the Bank and by Mpesa yet no documents were availed to support such transactions.**
- b. **DW2 gave evidence that the alleged payments under the acknowledgment documents were from DW2's client account but failed to produce any records of withdrawals or transfer to support the allegations of payment.**
- c. **Evidence of DW1 contradicts the Subordinates Courts position.**
- d. **Evidence of DW4 equally contradicts the Subordinates Courts' position.**

Further the Appellant states that the evidence of DW-3 (Respondent) alluded to Bank transactions that were never produced in Court yet the Subordinate Court still went ahead to believe the Respondents' allegations.

5) The issue of NOTICE is neither here nor there as there is evidence that immediately after the impugned agreed was signed, the Respondent defaulted.

6) Further the Appellant states that her evidence was to the effect that the Respondent had failed to honor his part of the bargain and as such, the Agreement was already repudiated by the Respondents' conduct.

7) Evidence on record by the Appellant is that as the Administrator of her deceased fathers' estate, she was selling the land to the Respondent without any encumbrance PROVIDED that the Respondent honored his part of the bargain.

8) Either way, the Title acquired by the Respondent was fraudulent as he could not proceed to transfer the suit Title without making payments as agreed.

9) The Appellant is thus entitled to Judgment in her favor together with cost.

20. The respondent filed a Cross Appeal vide a memorandum of Cross Appeal dated 20th January 2025 premised on the following grounds;

1) That the Learned Trial Magistrate erred in law and fact in acknowledging that the Appellant had confirmed receipt of Kenyan shillings. 1,600,000/= (One million Six Hundred Thousand) and failing to

consider that the said acknowledgement was towards advancement of the balance of the entire deposit of the purchase price.

2) That the Learned Trial Magistrate erred in law and fact in finding that only the sum of Kenya shillings. 1,600,000/= was proven despite evidence to the contrary.

3) That the Learned trial Magistrate erred in law and fact in finding that the Plaintiff had not proven payment of Kenyan shillings. 3,600,000/= (Three million Six hundred thousand shillings) despite glaring evidence on the face of record.

4) That the Learned trial Magistrate erred in law and in fact in finding that the Cross - Appellant's Counter-Claim was devoid of merits despite glaring evidence on the face of record.

21. The parties prosecuted the appeal by way of written submissions. The Appellant filed submissions dated 29th September 2025 through Messrs. Aluoch Odera & Nyauke Advocates whereas the Respondent filed submissions through the firm of Messrs. Odindo & Company Advocates.

Appellants' submissions

22. Learned counsel for the appellant summarized the history of the suit and urged that the appeal did not have merit as it was on common grounds that the Respondent never lived up to the terms of the contract. Despite the appellant giving the respondent possession of the land, no money was paid to the appellant and therefore there was breach of contract. Counsel submitted that the trial court relied on pleadings that had denied any payment from the respondent and as such, relied on wrong pleadings as they had been amended. Counsel reiterated that there was an agreement between the parties that was never varied and therefore the trial court decision ought to be quashed.

Respondents Submissions

23. Learned counsel for the respondent submitted that he was in agreement with the trial court on the issue that the agreement executed on 16th December 2021 was frustrated by the parties thus null and void but, he disagreed with the Court on the issue to refund of only the sum of Kshs. 1,600,000/= yet the Appellant was paid the entire purchase price in the sum of Kshs. 3,600,000/=. He also disagreed with the finding that the Cross-Appellant was not entitled to a claim for refund of Kshs. 300,000/= for expenses for

transfer of title deed. He urged that the Cross-Appellant incurred costs in processing the title deed that was revoked by reason of the Appellants actions of withholding information and thus it is only right that he be refunded the said expenses. He placed reliance on the case of Kimani vs Maina (Civil Appeal No. E007 of 2023) (2025) KEHC 4271 (KLR) (2 April 2025) (Judgment).

24. Counsel highlighted the evidence of the witnesses and submitted that the Appellant could not have signed an agreement without receiving any payment or part thereof, which the Appellant confirmed to have signed. Further, that the Appellant accepted receipt of the full amount of the deposit of the purchase price, contrary to her averments while giving evidence that she never received any money. She disputed having signed the document, however, no evidence to the contrary was brought to contradict or displace that particular document. Counsel urged that as at the time of the sale, the Appellant was the proprietor of that entire parcel of land and due diligence as conducted by the Respondent/Cross-Appellant through his Counsel revealed as much. At no point during the entire period of sale did the Appellant indicate to the Respondent/Cross-Appellant that

she held the land in trust for any of her siblings. The Cross-appellant processed his title deed and when his counsel went to pick the same was informed that the same was revoked.

25. Counsel submitted that the claim that the reason that led to the siblings asking to remove the Appellant as an Administratrix of the estate in question was because the Cross-appellant did not pay the agreed purchase price as set forth in the agreement was a lie as the Appellant never disclosed to the Cross-appellant that she held the land in trust of her siblings. Counsel urged that the appellant's version of events kept shifting and was not truthful. He cited the holding in Civil Appeal No.61 of 2013, Fidelity Commercial bank Limited vs Kenya Grange Vehicle Industries Limited (eKLR) in this regard and additionally cited Section 109 and Section 107 of the Evidence Act. Counsel submitted that it was upon that acknowledgement that the transfer process began and the Cross-appellant got his title registered, only for the same to be revoked pursuant to revocation of grant that had been issued to the Appellant herein. This fact was never disclosed to the Defendant that the land was being held in trust.

26. Counsel urged the court to find that the cross appeal has merits and dismiss the appeal with costs.

Analysis and Determination

27. This being an appeal, I must state the duty of the appellate court. In **Williamson Diamonds Ltd and another v Brown [1970] EA 1**, the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

28. Further, in **PIL Kenya Limited v Oppong [2009] KLR 442**, it was held that:

“It is the duty...of a first appellate court to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that”.

29. The issues that arise for determination are;

- a) **Whether the trial court erred by finding that the contract was frustrated by both the parties**
- b) **Whether the trial court relied on the wrong pleadings**
- c) **Whether the trial court relied on a fraudulent acknowledgment of payment of Kshs. 1,600,000/- in its determination**
- d) **Who to bear the costs**

30. I begin the analysis by looking at the first issue for determination.

- a) **Whether the trial court erred by finding that the contract was frustrated by both the parties**

31. The Appellant contended had sought orders of repudiation of the contract on the basis of the actions of the Respondent, urging that the breach of contract on his part, is what prompted the repudiation. The Cross appellant equally sought a repudiation of contract on the basis of the appellants' actions. From the evidence on record, the parties entered into an agreement for the sale of the suit land for a consideration of Kshs. 3,600,000/- and there was payment of a deposit of Kshs. 1,600,000/- the evidence of which was the

acknowledgment of payment by the Appellant which she later disowned.

32. In my analysis of the evidence, I found that there is no dispute that the title was cancelled due to revocation of the grant which had been issued to the appellant. She was the administratrix of the estate of their late father and the suit land formed part of the estate, which material information she had not disclosed to the cross appellant at the time of the sale. It follows that on her part, she breached the contract clauses, specifically clause no. 5 which stated that the land was free from any encumbrances, which it clearly was not. The cross appellant equally did not abide by the terms of the agreement as he did not pay the purchase price in full as per the agreement.

33. The trial court having based its decision on the doctrine of frustration, I must consider the same and briefly discuss it. In **Charles Muirigi Miriti Versus Thananga Growers Sacco Limited and Other [2014] eKLR**, the Court held as follows:

“As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature

of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to

bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea".

34. The Appellant, having stated that the sale of the land was within the knowledge of her siblings, did not orchestrate the revocation of grant that resulted in the cancellation of title and therefore, cannot be said to have been at fault for the revocation of grant and consequently, the breach of the contract. On his part, the respondent testified that he wired the purchase price of Kshs. 3,800,000 to his advocate on record for the transaction. His advocate, who testified as DW2 testified in cross examination, stated that Kshs. 3,600,000/- was wired to the cross appellant but did not provide any evidence of the same. The only evidence on record was the acknowledgement of receipt of Kshs.

1,600,000/- which was the deposit. It follows that the failure of the purchaser to pay the balance was not his own but that of his advocate. It therefore follows that the contract of sale was frustrated by the actions of other parties aside from the appellant and the respondent.

35. It is therefore my considered view that the trial court was correct in its finding that the sale agreement was frustrated by both the parties.

b) Whether the trial court relied on the wrong pleadings in making its decision

36. The Appellant contended that the trial court erred by failing to rely on the amended pleadings when making its decision. However, a perusal of the impugned decision reveals that the trial magistrate expressly stated at the start of the decision, that the appellant approached the court vide an amended plaint dated 17th July 2024. The upshot of the foregoing is that this ground of appeal fails in its entirety as it is clear that the trial court relied on the correct proceedings in rendering its decision.

c) Whether the trial court relied on a fraudulent acknowledgment of Kshs. 1,600,000/- as evidence of the deposit

37. The appellant contended that she never received the deposit of Kshs. 1,600,000 as deposit of the purchase price and the acknowledgment that was produced was fraudulent. It is trite law that he who alleges must prove, which position is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

38. Sections 109 and 112 of the same Act states as follows:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to

those proceedings, the burden of proving or disproving that fact is upon him.”

39. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in **Mumbi M'Nabea vs David M. Wachira [2016] eKLR** stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”

40. Despite claiming that the acknowledgment produced was fraudulent, there was no evidence tendered to this effect. DW3 contended that he sent the full purchase price of Kshs. 3,600,000 to his advocate who was to wire the same to the appellant. DW2 stated that the appellant was paid Kshs. 200,000 in cash on the first day before the purchaser signed the agreement, then paid Kshs. 500,000 in cash on the next day. He stated that she signed an acknowledgment of the payment of Kshs. 1,600,000/-. DW1 testified that the

Appellant received Kshs. 200,000/- in cash and Kshs. 2,000,000/- was deposited in her account but no evidence of the same was tendered in the trial court. The cross appellant filed an application to introduce a 'list of additional documents' in the Appeal which application was dismissed vide an order of the court on 23rd September 2025.

41. It is therefore my considered view that the cross appellant failed to convince the trial court that the full purchase price had been paid to the appellant. The only amount that was proved to have been received was the Kshs. 1,600,000/-. Additionally, the Appellants' allegations of the acknowledgment being fraudulent were not proved to the required standard.

42. The upshot of the foregoing is that both the appeal and the cross-appeal lack merit. They are dismissed in their entirety.

d) On costs

43. Each party shall bear its own costs.

44. It is so ordered.

Judgment dated, signed and delivered virtually via the Teams Platform this 18th day of February 2026.

HON. DR. IUR NYAGAKA

In the presence of,

- 1. Shikuku Advocate for the Appellant.**
- 2. Ms. Ochieng holding brief for Owuor for Cross Appellant.**