



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC APPEAL NO. E004 OF 2024

JOYCELINE NJERI NJOROGE.....
.....APPELLANT

VERSUS

BERNARD MUNGAI NG'ANG'A T/A
HUMUKA LAND BUYING AND SELLING AGENCIES.....
RESPONDENT

JUDGMENT

- 1) Vide a Memorandum of Appeal dated 18/01/2024, the Appellant who was the Plaintiff in the former suit before the trial Magistrate Court at **Thika CM-ELC NO. 76 of 2021** appeals to this Court challenging the Judgment delivered by Hon. V. Asiyo in Chief Magistrate's Court in which the Court dismissed the Plaintiff/Appellant's case with costs to the Defendant/Respondent. The Court ordered specific performance and directed the Plaintiff to release all the completion documents such as the original title deed of LR Juja/Juja East Block 1/205, transfer forms in triplicate, Land Board consent to transfer and the application thereof in respect to the suit property.

Background

2) The Appellant instituted this suit by way of a Plaint dated 16/07/2021 for Judgment against the Defendant for:

a) A declaration that the agreement dated 19/07/2017 between the parties has abated or expired and the Defendant is in breach thereof;

b) A permanent injunction be issued against the Defendant by himself or agents, orders of eviction and demolition do issue against the Defendants whether by himself; agents, employees, family or anyone claiming through him interfering in any manner whatsoever with land parcel Juja/Juja East Block 1/205;

c) That the OCS Area Police Station do supervise the orders and do ensure peace prevails;

d) Costs and interest of the suit.

3) The Plaintiff claims to be the absolute registered owner of all that land Juja/Juja East Block 1/205 which they had negotiated with the Defendant and he sold to the Defendant vide a sale agreement dated 19/07/2017 for Kesh 6,500,000/- The transaction had a completion date which the Plaintiff claims was not honored and there is an outstanding balance of Kesh 800,000/=.

4) That the Defendant has proceeded despite several warning he has proceeded to partition the suit land and sold the same to third parties who have now erected structures.

- 5) Upon being served with the Summons to Enter Appearance and the Plaint, the Defendant/Respondent filed a Statement of Defence and Counterclaim dated 3/08/2021 wherein he denied the Plaintiff/Appellant's claim and averred that he paid the purchase price in full and yet the Plaintiff has neither confirmed the availability of the title deed for the said parcel nor the Plaintiff's advocate issued a professional undertaking to avail completion documents.
- 6) Further that the said land has already been subdivided and sold to third parties who are already in occupation since the Sale Agreement gave him the liberty to take possession of the said parcel upon payment of the deposit of the purchase price.
- 7) The Defendant/Respondent averred that the suit is premature as no notice of 21 days was issued to remedy any alleged breach. That the Plaintiff in express breach of the sale agreement has failed to avail all the completion documents thus paralyzing the completion of the transaction. That whereas the Plaintiff claims a refund of Kshs 50,000 being the amount over and above the purchase price, the Defendant claims for an order of specific performance against the Plaintiff.
- 8) In the counter-claim the Defendant prays for Judgment against the Plaintiff for:
- a) An order for specific performance of sale agreement dated 19/07/2017**

- b) In default the Executive Officer of this Court to execute and or sign transfer forms on behalf of the Plaintiff in order to facilitate transfer of the land parcel No. JUJA/JUJA EAST BLOCK 1/205 into the name of Bernard Mungai Nganga, the Defendant.**
- c) The Land Registrar, Ruiru/Thika to dispense with production of the original title deed No. JUJA/JUJA EAST BLOCK 1/205 into the name of Benard Mungai Nganga the Defendant.**
- d) The Land Registrar, Ruiru/Thika to dispense with production of the original title deed No. JUJA/JUJA EAST BLOCK 1/205 during the transfer of and registration of land parcel No. JUJA/JUJA EAST BLOCK 1/205 into the name of the Defendant, Benard Mungai Nganga.**
- e) General damages for breach of contract.**
- f) Refund of Kesh 50,000/-.**
- g) Costs of the Counter-Claim.**
- 9) The Plaintiff filed a Reply to Defence and to counter-claim dated 30/08/2022 where she denied all the averments in the Defence and Counter-claim and stated that the Defence and Counter-claim is a mere denial and abuse of the Court process and a gimmick to escape from the legal implications of the agreement dated 19/07/2017. She further avers that she never breached the Sale Agreement and has been waiting to release all completion documents as provided in

Clause 4.3 of the Agreement upon proof of payment of the purchase.

- 10) She also stated that on 4/06/2018 she issued notice to rescind the agreement for breach of the agreement. She sought to have the Counter-claim dismissed.
- 11) When the former suit came before the trial Magistrate for directions, the parties agreed that the suit do proceed by way of viva voce evidence. During the hearing, the Plaintiff/Appellant testified as PW1, the only witness while the Defendant/Respondent also testified as DW1 and as the only witness.
- 12) PW1 Joyceline Njeri Njoroge testified on oath and adopted her witness statement dated 16/07/2021 as her evidence-in-chief. She also produced 12 documents contained in her bundle of documents in support of her case.
- 13) In cross examination she stated that she entered into a Sale Agreement with the Defendant/Respondent and that they agreed that once he pays Kesh 2,200,000, he could enter the shamba and he did. She however stated that that Defendant defaulted in payment and she issued him with a notice of recission vide the letter dated 4/06/2018 although it does not mention 21 days' notice.
- 14) When re-examined, she stated that she never received a cheque dated 3/11/2018 and that she did not receive money on 17/11/2018. She testified that she was not paid the full purchase price and that the Plaintiff breached the purchase contract.

- 15) DW1 Bernard Mungai Nganga adopted his witness statements dated 3/08/2021 as his evidence-in-chief. He produced into evidence a bundle of documents containing three documents. It was his testimony that he paid the full purchase price to the Plaintiff. Further that by the time he got the letter dated 4/06/2018 asking for refund less 10% and another letter dated 26/11/2020 he had paid the full purchase price.
- 16) He told the Court that he did not comply with the 120 days since he had informed the Plaintiff of financial difficulties and she was willing to accommodate him. He testified that he had paid Kesh 6,500,000 and that he had no knowledge and he was not informed that there was a cheque that bounced.
- 17) According to his testimony in cross-examination, he told the Court that there are people in occupation of the land. He further stated that whereas he did not complete payment within 120 days but as per his records he has completed paying the purchase price.
- 18) He told the Court that he paid the full purchase price and that he was not notified by the bank or the Plaintiff that the cheque did not go through. He testifies to have paid the full purchase price with an extra Kesh 50,000 but she claims not to have been given the title. Thus, the Plaintiff has breached the agreement because she failed to complete the transaction.

19) Upon analyzing the evidence and the materials placed before him, the trial magistrate delivered a Judgment dismissing the Plaintiff/Appellant's case and allowed the Respondent counter-claim with costs.

20) Aggrieved with the said Judgment, the Appellant preferred the current appeal on the following grounds;

1. That the learned trial Magistrate erred in law and fact by failing to interpret, analyse and understand the terms, intent and spirit of the agreement between the parties dated 19/07/2017 for land parcel JUJA/JUJA EAST BLOCK/1/205 thereby arriving at erroneous decision.

2. That the learned trial Magistrate erred in law and fact by failing to acknowledge the Appellant's evidence in terms of sums paid, outstanding amounts as stipulated in the bank statements and bank slips that indicated that the Respondent had not paid a sum of Kesh 1,100,000 thereby arriving at an erroneous decision.

3. That the learned trial Magistrate erred in law and fact in failing to arithmetically analyse by way of computation in his Judgment the sum paid, cheques that were honored, the RTGs that went through, the cheques that bounced as per the parties bank statements and evidence thereby arriving at an erroneous decision.

4. That the learned trial Magistrate erred in law and fact to dismiss the suit against the Appellant stating that the Appellant failed to prove her case on a balance of probabilities without looking at the Appellants evidence

that essentially the suit was more on arithmetic's and placed the burden of proof very high than is required in civil cases thereby arriving at an erroneous decision.

5. That the Learned trial Magistrate erred in law and fact by failing to appreciate the Appellants submission which very clearly elaborated the sums paid, the sums allegedly to have been paid but not paid and the ones unpaid through bounced cheques and the proof of the same and authorities filed by the Appellant herein which were contrary to his impugned Judgment hence failed to appreciate the hierarchy of the higher or superior Courts and that their Judgments are binding on the lower Court hence arriving at a gravely wrong decision.
6. That the trial magistrate erred in law and fact by failing to appreciate the fact that completion notices were all issued and despite the same being in the pleadings still ruled as against them thereby arriving at an erroneous decision.
7. That the learned trial magistrate erred in law and fact by putting more weight on the Respondent's evidence and ignoring the evidence by the Appellant's submissions and testimony thereby arriving at a wrong decision.
8. That the learned trial magistrate erred in law and fact by failing to appreciate that the Defendant never completed his payment within 120 days as stipulated in

the agreement dated 19th July 2017 and was therefore in breach of the contract and never honored the contract in full and that the Appellant played all her duties in the agreement thereby arriving at erroneous decision.

9. That the learned trial Magistrate erred in law and fact by failing to appreciate the fact that parties in a contract are bound to the terms of the contracts on which the Respondent was in breach of the contract and continues to be in breach to this day thereby arriving at an erroneous decision.

10. That the learned trial magistrate erred in law and facts by allowing the Respondents counter claim without computing on the Judgment and authenticating what was paid and what was never paid and by holding that the Respondent had over paid with over Kesh 50,000 gravely made an error

11. That the learned trial Magistrate erred in law and facts by framing the wrong issues for determination which in essence were whether the purchase price was paid in full proof of such payment since they were disputed and the unpaid amounts if any and then breach of contract thereby arriving at an erroneous decision.

REASONS WHEREFORE the Appellant prays that:

a) That the Judgment of the trial Chief Magistrate Court at Thika by Hon. V. Asiyu delivered on

20th Day of December 2023 in MCL & E E76 of 2021 be set aside;

b) That in the alternative the entire balance to the tune of Ksh 1,100,000 or any other not paid be paid in full or the Respondent do relinquish the proprietorship of land parcel JUJA/JUJA EAST BLOCK 1/205;

c) That the Respondent be compelled to pay costs of the appeal and the trial Court costs.

- 21) When this Appeal came up for directions, the parties agreed to have the same canvassed by way of written submissions.
- 22) At the time of preparing this Judgment the Appellant had filed their written submissions dated 10/04/2025 and the Respondent had filed their written submissions dated 24/03/2025.

Appellant's Submissions

- 23) In her written submissions, the Appellant, as the registered owner of the suit land, submits that she entered into a Sale Agreement with the Respondent on 19/07/2017, for a total consideration of Ksh 6,500,000, with a clear stipulation for completion within 120 days.
- 24) However, the Appellant contends that the Respondent breached this contract by failing to settle the full purchase price. Despite the passage of several years and numerous correspondences, including formal completion notices, a balance of Ksh 1,150,000 remains outstanding. This deficit is

attributed specifically to unsuccessful RTGS transfers totaling Ksh 750,000 and a bounced cheque dated October 1, 2018, in the amount of Ksh 400,000.

- 25) The Appeal primarily centers on the trial Magistrate's alleged failure to properly evaluate the evidence regarding this payment default. The Appellant maintains that the lower Court ignored critical bank statements and physical proof of the dishonored cheque, which demonstrated that the full price was never received. Furthermore, the Appellant argues that the Respondent failed to honor the 120-day spirit of the agreement, and that the Court overlooked valid completion notices and a subsequent notice for vacant possession. By placing undue weight on the Respondent's claims of payment while ignoring the Appellant's documentary proof of non-payment, the lower Court is said to have significantly misinterpreted the terms of the engagement.
- 26) From a legal standpoint, the submissions rely on the established duty of the First Appellate Court to conduct a retrial by reviewing and re-evaluating the evidence to reach its own independent conclusions. This process, as established in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123** and reaffirmed in **Njenga vs. Mungai [2024] KEELC 6213 (KLR)**, requires the Court to satisfy itself that the original decision was well-founded.
- 27) The Appellant also emphasizes the principle of the sanctity of contracts, citing **National Bank of Kenya Ltd**

vs. Pipeplastic Samkolit (K) Ltd [2001] eKLR to argue that Courts cannot rewrite agreements for parties who are strictly bound by their voluntarily entered terms. Additionally, the principle that costs follow the event is raised, supported by **DGM v EWG [2021] eKLR**, asserting that a successful party is generally entitled to costs unless there are compelling grounds to deviate.

28) Consequently, the Appellant seeks specific reliefs from the Court, primarily praying that the Judgment delivered on 20/12/2023, be set aside in its entirety. In the alternative, the Appellant requests an order compelling the Respondent to pay the outstanding balance of Ksh 1,100,000 or any other proven unpaid amount. Finally, the Appellant seeks to have the Respondent compelled to bear the costs of both the trial Court and the current appeal.

Respondent's Submissions

29) The Respondent's submissions in opposition to the Appeal are anchored on the assertion that the trial Magistrate reached a correct and well-founded decision based on the evidence presented. Central to the Respondent's position is the claim that the total purchase price of Ksh 6,500,000 for the land parcel JUJA/JUJA EAST BLOCK 1/205 was fully settled, with an additional overpayment of Ksh. 50,000 that the Appellant has failed to refund.

30) It is the contention of the Respondent that the Appellant failed to meet the requisite burden of proof in Civil

cases, as the claims of a breached contract and unpaid balances were not supported by a balance of probabilities. Specifically, the Respondent argues that while the Appellant alleged a cheque had bounced, no evidence of communication regarding the dishonored payment was produced, nor was any report made to the authorities, casting significant doubt on the validity of the claim.

31) Furthermore, the Respondent highlights significant procedural and contractual failures on the part of the Appellant. It is argued that the Appellant admitted during cross-examination to never issuing the mandatory 21-day notice required under Clauses 8.1.1 and 8.1.2 of their agreement, which is a prerequisite for rescinding a contract due to breach.

32) Additionally, the Respondent maintains that the Appellant breached her own obligations under Clause 4.3 by failing to provide the necessary completion documents and a professional undertaking through her Advocates. This failure to perform her part of the agreement, the Respondent suggests, means the Appellant did not approach the Court with clean hands and cannot now seek to penalize the Respondent for a purported breach that she herself may have frustrated.

33) Legal support for the Respondent's position is drawn from the Land Act of 2012, specifically Sections 38 and 39, which govern contracts over private land and the rights of a vendor when a purchaser has already entered into

possession. The Respondent emphasizes that having taken possession upon payment of the deposit, and with the Appellant failing to peaceably repossess the land or obtain a Court order, his occupation remains legally protected. The submissions also rely on the Evidence Act Cap 80, Sections 107 to 109, to remind the Court that the burden of proof rests entirely on the party making the allegations.

34) In terms of case law, the Respondent cites **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd and Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited [2014] eKLR** to reinforce the principle that a Court of law cannot rewrite a contract for the parties; they are strictly bound by the terms they have signed. The Respondent concludes by praying that the Appeal be dismissed with costs and that the original Judgment delivered on December 20, 2023, be upheld in its entirety, asserting that he has fulfilled all contractual conditions and has been unfairly subjected to prolonged litigation.

Analysis and Determination

35) I have considered the grounds in the Memorandum of Appeal, the Record of Appeal, written submissions filed and the Court record generally and to resolve this Appeal, the Court identifies the following three core issues:

- i. Whether the Appellant proved the alleged breach of contract (non-payment of Ksh 1,150,000) on a balance of probabilities, given the conflicting bank statements and the Respondent's claim of overpayment.*

- ii. Whether the Appellant's failure to issue a 21-day completion notice and provide completion documents under Clause 4.3 barred her from rescinding the agreement or seeking the return of the suit land.*
- iii. Whether there are sufficient grounds for this Court to disturb the trial Magistrate's findings of fact regarding the arithmetic of payments.*

36) The submissions reveal a stark contrast in the interpretation of both the financial history and the procedural conduct of the parties. The Appellant's case is built on arithmetic, claiming that the trial Court failed to account for a bounced cheque of Ksh 400,000 and failed RTGS transfers of Ksh 750,000. In total opposition, the Respondent asserts that the full purchase price of Ksh 6,500,000 was settled, alleging a surplus payment of Ksh 50,000. This creates a direct contradiction in the documentary evidence where the Appellant relies on bank records showing lack of funds, while the Respondent relies on trial exhibits showing successful settlement.

37) A further contradiction lies in the clean hand's doctrine. The Appellant argues the Respondent is the sole defaulter for failing to pay within the 120-day spirit of the contract. However, the Respondent highlights a critical admission by the Appellant by stating that she did not provide the professional undertaking or completion documents required by Clause 4.3.

- 38) Furthermore, while the Appellant claims to have issued completion notices, the Respondent notes that the Appellant conceded during cross-examination to failing to issue the specific 21-day notice mandated by Clause 8.1.1. Consequently, the Appellant views the contract as abated by the Respondent's default, while the Respondent views the contract as frustrated by the Appellant's refusal to finalize the transfer after receiving the funds.
- 39) While discussing the standard of proof in civil liability, 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) In exercising its mandate as a first Appellate Court, this Court has re-evaluated the evidence in accordance with the principles in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**. The Appellant's primary grievance is that the trial Magistrate erred in arithmetic. However, as held by the **Supreme Court of Kenya** in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, an Appellate Court should be slow to

disturb findings of fact by a trial Court which had the advantage of hearing and observing witnesses, unless those findings are shown to be perverse or based on no evidence. Here, the Respondent produced exhibits of payment which the trial Court found credible.

41) Regarding the alleged breach, the Court finds that the Appellant's failure to issue a 21-day completion notice is a fatal procedural defect. Under **Section 3 of the Law of Contract Act**, parties are bound by the terms of their agreement. The **Court of Appeal in National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd [2001] eKLR** famously held that Courts cannot rewrite contracts; since the agreement required a specific notice period before rescission, the Appellant could not unilaterally declare the contract expired without adhering to that Clause. This is reinforced by Sections 38 and 39 of the Land Act, 2012, which protect a purchaser in possession. Since the Respondent is in physical occupation, the Appellant was required to seek a Court order for possession under Section 41, which she failed to justify by proof of a validly rescinded contract.

42) The Court also draws persuasive authority from the English case of **Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26**, noting that even if a minor balance remained, it did not automatically entitle the Appellant to rescind the entire contract after substantial performance by the Respondent. The Appellant's

failure to provide completion documents under Clause 4.3 while demanding full payment further points to a breach on her part. As stated in the case of **Lornah Kiplagat vs. Shalien Masaba [2021] eKLR**, a party cannot benefit from their own breach of contractual obligations.

43) From the totality of my evaluation of the evidence on record and guided by the applicable principles of law, it is my finding that the learned trial Magistrate arrived at a reasoned and informed decision and I find no reason to upset his finding.

44) In view of the foregoing, I find no merit in the Appellant's Appeal and make the following orders:

i) The Appeal is hereby dismissed in its entirety for lack of merit.

ii) The Judgment of Hon. V. Asiyo delivered on 20/12/2023, is upheld and confirmed.

iii) The Respondent is awarded the costs of this Appeal and the costs of the trial Court, following the principle in Section 27 of the Civil Procedure Act.

iv) The Appellant is ordered to execute all necessary transfer documents for JUJA/JUJA EAST BLOCK 1/205 in favor of the Respondent within 30 days of this order.

45) **It is so ordered.**

**DATED, SIGNED AND DELIVERED AT THIKA VIA MICROSOFT
TEAMS ON THIS 10TH DAY MARCH 2026.**

**MOGENI J
JUDGE**

In the presence of:-

.....Appellant
.....Respondent
Melita.....Court Assistant

**MOGENI J
JUDGE**