

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT
KERUGOYA

ELCA NO. E031 OF 2022

DAVID MWAI KABIBI

APPELLANT

VERSUS

ROBERT KARIMI MURIITHI

RESPONDENT

(Being an appeal from the judgment of Hon. Cheruto C. Kipkorir, PM, in Kerugoya MELC Case No. E183 of 2021 delivered on 26th October 2022)

JUDGMENT

1. This appeal arises from the judgment of **Hon. Cheruto C. Kipkorir, PM**, delivered on **26th October 2022** in **Kerugoya MELC No. E183 of 2021**, where the learned trial magistrate held that the sale agreement between the parties was void for want of consent of the Land Control Board and declined to order transfer of the suit property to the appellant.

The trial court further found that the appellant was in breach of the agreement, noting that no explanation had been offered for failure to pay the balance of the purchase price despite the respondent having issued most of the

completion documents. The claim for refund was consequently declined and the suit dismissed with costs to the respondent.

2. Aggrieved and dissatisfied with that decision, the appellant lodged this appeal through the Memorandum of Appeal dated 21st November 2022, advancing the following grounds:

1) That the learned trial magistrate erred in law and in fact in failing to consider that the material presented and the evidence led by the appellant demonstrated that the respondent was in breach of the fundamental obligations set out in the sale agreement dated 7th August 2019.

2) That the learned magistrate erred in law and in fact in holding that the respondent had executed and/or granted to the appellant all completion documents.

3) That the learned trial magistrate erred in law and in fact in failing to consider that the appellant had adhered to the substantive law and statutory procedure before and after execution of the sale agreement dated 7th August 2019.

4) That the learned trial magistrate erred in law and in fact in holding that failure to pay the

outstanding balance of the purchase price was a bar to recovery of the consideration paid.

5) That the learned trial magistrate erred in law and in fact in failing to consider **Section 7 of the Land Control Act**, which provides that where a transaction becomes void for lack of Land Control Board consent, any money or consideration paid by the purchaser is recoverable as a debt.

6) That the learned trial magistrate erred in law and in fact by basing her judgment on extraneous matters not pleaded and thereby rendered a decision not supported by the evidence.

The appellant prays for inter alia that the appeal be allowed; that the judgment and/or decree of the learned trial magistrate be set aside and substituted with an order for refund of the purchase price paid pursuant to the sale agreement dated 7th August 2019, together with interest thereon; and that the costs of the appeal and of the lower court be borne by the respondent.

3. The appellant instituted the suit before the subordinate court through the plaint dated 26th November 2021, seeking for the following reliefs: an order for the transfer of **Title No. Mutira/Kaguyu/6050** and/or in the alternative refund of the purchase price paid pursuant to

the sale agreement dated 7th August 2019, together with interest thereon; costs of the suit; interest on (a) and (b) above; and any other or further relief the court deemed fit to grant.

His case was that by a sale agreement dated 7th August 2019, the respondent agreed to sell to him **Title No. Mutira/Kaguyu/6050** at a consideration of **Kshs.1,800,000/=**. He pleaded that the respondent acknowledge receipt of **Kshs. 1,176,000/=**, leaving a balance of **Kshs.624,000/=**. He averred that the respondent had refused and/or neglected to honour the agreement. He therefore sought transfer of the suit property and/or payment of **Kshs.1,176,000/=** together with interest at 40% per annum from 7th August 2019.

4. The respondent filed a statement of defence dated 6th January 2022 denying the claim. He pleaded that on 7th August 2019, the appellant advanced to him **Kshs.100,000/=** as a friendly loan repayable within one month at an agreed interest of **Kshs.17,600/=**, making a total of **Kshs. 117,600/=**. He averred that he gave the appellant his original title deed for the suit property as security for the said loan. He denied having sold the land to or receiving **Kshs. 1,176,000/=** from the appellant.

The respondent further pleaded that the alleged sale agreement dated 7th August 2019 was not executed by

him and was not enforceable against him. He stated that between 7th August 2019 and December 2020, he paid the appellant a total sum of **Kshs.126,000/=**, and that his indebtedness had thereby been settled. He contended that the suit disclosed no reasonable cause of action against him.

5. The appeal was canvassed by way of written submissions pursuant to directions of the Court. The learned counsel for the appellant filed their written submissions dated 12th May 2025 in which three issues were identified for determination.

On the first issue of whether the sale agreement dated 7th August 2019 was lawful and valid, counsel submitted that the agreement satisfied the requirements of **Section 3 of the Law of Contract Act** and was therefore proper, lawful, and enforceable.

It was submitted that the respondent both signed and thumbprinted the agreement, thereby demonstrating the parties' concurrence. Counsel further contended that the respondent's allegations of fraud were not proved.

6. On the second issue concerning the remedies available to the parties, counsel relied on **Sections 8 and 7 of the Land Control Act**. Counsel submitted that **Section 8** requires an application for consent of a controlled

transaction be made to the relevant Land Control Board within six months of the agreement. Counsel also quoted **Section 7**, which provides that:

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”

Counsel referred to clause 4 of the sale agreement, which provided that the balance of **Kshs.624,000/=** was to be paid upon obtaining the Land Control Board consent for transfer in favour of the purchaser, and submitted that though the respondent executed the application for consent, no consent was not issued within six months of the agreement, and no extension of time was sought. Counsel therefore contended that the transaction became void and pursuant to **Section 7 of the Act**, the consideration paid became recoverable. The appellant consequently urged the Court to set aside the judgment of the trial court and substitute it with an order for payment of **Kshs.1,176,000/=** together with interest at 40% per annum from 7th August 2019 until payment in full.

On the third issue, counsel submitted that costs should follow the event and prayed for costs of the appeal and of the lower court.

7. The learned counsel for the respondent filed their written submissions dated 24th April 2025, raising a single issue for determination namely, whether the parties entered into a sale agreement or a loan agreement.

The Counsel submitted that the respondent's intention was not to sell the suit property but to obtain a soft loan from the appellant. It was contended that the transaction between the parties was a loan, not a sale. Counsel contended that the surrounding circumstances did not support the existence of a sale transaction and questioned the plausibility of the appellant's account, including the timing of the alleged search at the land registry, the absence of evidence as to payment of the balance of **Kshs. 624,000/=**, and alterations appearing on the face of the agreement.

Counsel submitted that these matters cast doubt on the authenticity and nature of the alleged sale agreement.

The Counsel further submitted that the appellant failed to prove his case on a balance of probabilities and that although the alleged sale agreement bore the names of

four witnesses, none was called to corroborate the appellant's evidence.

It was also submitted that although the respondent testified that he was a married man, the affidavit produced by the appellant was handwritten and was not commissioned by an advocate. Counsel maintained that the respondent did not receive the alleged sum of **Kshs.1,176,000/=**, and that the appellant failed to produce evidence demonstrating payment of that amount. The respondent therefore urged the Court to dismiss the appeal with costs.

8. The issues arising in this appeal for determinations by the court are as follows:
 - a. *Whether there was a valid sale agreement between the parties.*
 - b. *Whether consent was obtained in accordance with the Land Control Act, and the remedies available.*
 - c. *Whether the appellant has discharged the evidential burden to recover the consideration paid.*
 - d. *Who pays the costs?*

9. I have carefully considered the grounds on the memorandum of appeal, record of appeal, the parties' rival submissions, superior court decisions cited thereon, and come to the following findings:

- a. As this is a first appeal, the duty of this Court is to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses. This principle was stated in **Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123, where the Court of Appeal held:**

“This Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial... 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 allowance in this respect.”

- b. The first issue is whether the parties entered into a valid sale agreement or whether the transaction constituted a loan. The starting point in determining the validity of the impugned agreement is **Section 3(3) of the Law of Contract Act**. The provision is couched in mandatory terms. It bars the institution of a suit upon a contract for the disposition of an interest in land unless the contract:
- 1. Is in writing;*
 - 2. Is signed by all the parties thereto; and*

3. The signature of each party is attested by a witness present at the time of execution.

The only statutory exceptions relate to public auctions and equitable doctrines such as resulting, implied, or constructive trusts. None of those exceptions arises in the present appeal.

- c. The record before this Court shows that there exists a written agreement dated 7th August 2019. The agreement identifies the parties, describes the suit property, and stipulates the consideration as **Kshs.1,800,000/=**, and acknowledges receipt of part payment. It bears the signatures and thumbprints of both parties. It further contains a list of witnesses. Although the respondent sought to disparage the agreement on account of its brevity and the manner in which it was drafted, the law does not prescribe the elegance, format, or length of a land sale agreement. **Section 3(3)** is concerned with the form and execution of the agreement and not its stylistic sophistication. Once the statutory elements are satisfied, the agreement cannot be invalidated merely because it is inelegantly drawn or condensed into a single page.
- d. The respondent alleged that the transaction was in fact a loan arrangement and that the title deed was

only given as security. However, no loan agreement was produced before the trial court, and no documentary evidence was tendered to demonstrate the disbursement of loan proceeds by the respondent to the appellant or repayment thereof. The alleged loan, therefore, remains a bare assertion by the respondent that is unsupported by evidence.

e. Further, while the respondent made references to forgery and impropriety, fraud was neither specifically pleaded nor strictly proved. It is trite that allegations of fraud must be distinctly pleaded and proved to a standard higher than a balance of probabilities, though not beyond a reasonable doubt. A party cannot casually impeach a written agreement without laying a proper evidential foundation. No handwriting expert was called by either party, no forensic examination undertaken, and no credible evidence was adduced to dislodge the authenticity of the signatures on the agreement.

f. In the absence of proof of fraud, coercion, misrepresentation, or other vitiating factors, this Court is bound to give effect to the agreement as executed. Courts do not rewrite contracts for parties nor relieve them from their bargains merely because they later consider them imprudent. Accordingly, this Court finds that the agreement dated 7th August 2019

satisfies the mandatory requirements of **Section 3(3) of the Law of Contract Act**, and was valid in form and execution. The respondent's attempt to recharacterize it as a loan arrangement is unsupported by evidence and cannot stand. The agreement was therefore a valid contract for the disposition of an interest in land, subject only to the statutory requirements of the **Land Control Act**, whose effect will be considered here below.

- g. Having found that the agreement dated 7th August 2019 met the formal requirements of **Section 3(3) of the Law of Contract Act**, the next question is whether the transaction was rendered void by operation of the **Land Control Act**. It is not disputed that the suit property is agricultural land. The transaction was therefore a "*controlled transaction*" within the meaning of **Section 6(1) of the Land Control Act**. **Section 6(1) of the Act** provides as follows:

"Each of the following transactions, that is to say— (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

The language of the statute is unequivocal, that a sale of agricultural land within a land control area is void for all purposes unless the Land Control Board gives its consent in accordance with the **Act**.

h. **Section 8(1) of the Act** further provides that:

“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.”

The agreement herein was executed on 7th August 2019, and although an application for consent was prepared and signed, there is no evidence that consent was obtained or granted within six months of the agreement. There is equally no evidence that any party sought extension of time from the court as permitted under the proviso to **Section 8(1) of the Act**.

- i. The consequence of failure to obtain consent within the statutory period is addressed by **Section 7 of the Act**, which provides:

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22.”

The statutory effect is therefore automatic, that where consent is not obtained within six months, and no extension is sought and granted, the transaction becomes void for all purposes. The voidness is not discretionary, but it arises by operation of law.

j. It follows that although the agreement of 7th August 2019 was valid in form under the **Law of Contract Act**, it became void by operation of **Section 6(1) of the Land Control Act**, upon the lapse of six months without consent being obtained, and the Court had no jurisdiction to issue specific performance orders or to give effect to the transfer of the suit property. The only statutory relief preserved under the **Act** is that provided under **Section 7**, of recovery of money or consideration paid, subject always to proof of such payment.

Accordingly, this Court finds that the sale agreement between the parties herein dated 7th August 2019 became void for all purposes under **Section 6(1) of the Land Control Act** for want of Land Control Board consent within the prescribed period.

k. Having found that the agreement became void by operation of **Section 6(1) of the Land Control Act**, the only residual remedy available to the appellant lies under **Section 7 of the Act**, which provision creates a statutory cause of action in debt. However, it does not presume payment. The right to recovery arises only *“if any money has been paid.”* Proof of payment is, therefore, a foundational prerequisite. The appellant contends that **Kshs.1,176,000/=** was paid. The sole evidentiary basis for that assertion is

the acknowledgment contained in the sale agreement, which states that the vendor “*acknowledges receipt*” of that sum. However, no receipts or bank transfers or withdrawal slips or deposit slips or mobile money statements were tendered or produced before the trial court, and no witness testimony were adduced to corroborate the alleged payment.

- I. The respondent on the other hand, expressly denied receipt of that amount and challenged the appellant to prove the same. The question that therefore arises is whether the acknowledgment clause, standing alone, is sufficient proof of payment on a balance of probabilities.

An acknowledgment in a duly executed agreement constitutes prima facie evidence of payment. It is an admission against interest and, if unchallenged, may suffice. However, where payment is specifically denied and the sum involved is substantial, the evidential burden resting upon the claimant cannot be discharged by reliance on form alone, without regard to surrounding circumstances.

The amount in question exceeds one million shillings. In ordinary commercial practice, such a transaction would ordinarily leave an objective financial trail, as

financial institutions impose reporting and verification requirements for transactions of that magnitude. Even in cash transactions, some independent documentation or witness corroboration would reasonably be expected.

- m. Here, the appellant did not even attempt to explain the mode of payment of the amount. He did not state whether the payment was made in cash, by cheque, by bank transfer, or otherwise. He did not demonstrate withdrawal of such funds from his account, nor did he call any witness who was present during the alleged payment. The evidential record is therefore silent as to how, when, and in what manner the **Kshs.1,176,000/=** changed hands from the appellant to the respondent.

Section 107 of the Evidence Act, Chapter 80 of Laws of Kenya places the burden of proof upon the party who asserts a fact. Once the respondent denied receipt, the evidential burden shifted back to the appellant to demonstrate payment on a balance of probabilities. That burden required more than reliance on a pre-printed acknowledgement clause in a one-page agreement whose surrounding circumstances are contested.

n. It is important to emphasise that **Section 7 of the Land Control Act** does not operate automatically upon a declaration of voidness. The statute does not state that consideration “*shall be deemed to have been paid.*” It states that consideration is recoverable if paid. The Court must therefore be satisfied, as a matter of evidence, that payment of the consideration or part thereof occurred. In the present case, the acknowledgement clause establishes a prima facie position, but it is not conclusive proof. In the face of a direct denial and in the absence of corroborative evidence, this Court is not persuaded that the appellant had proved, on a balance of probabilities, that the sum of **Kshs.1,176,000/=** was in fact paid to the respondent.

o. To hold otherwise would be to treat every acknowledgement clause in an agreement as irrebuttable proof, thereby relieving a claimant of the evidential burden imposed by law. That is not the import or function of **Section 7 of the Land Control Act.**

Accordingly, while it is a fact the agreement became void under **Section 6(1) of the Land Control Act**, the appellant has failed to establish the factual foundation of payment of part of the consideration, which proof is necessary to invoke **Section 7** of the

said **Act**, and his claim for recovery of Kshs.1,176,000/=, therefore fails.

p. **Section 27(1) of the Civil Procedure Act chapter 21 of Laws of Kenya** vests this Court with discretion in matters of costs, subject to the general principle that costs follow the event unless the Court, for good reason, orders otherwise. In the present appeal, the appellant succeeded on the first and second issues. Though this Court has through the appeal affirmed that the agreement satisfied **Section 3(3) of the Law of Contract Act**, and clarified the legal effect of **Sections 6 and 7 of the Land Control Act**, it has importantly found that the appellant has failed in his appeal on the substantive question of recovery of purchase price paid, having not discharged the evidentiary burden of proving payment of **Kshs.1,176,000/=** to the respondent. The appellant will therefore pay the respondent's costs in the appeal.

10. Flowing from the above determinations on this appeal, the court finds and orders as follows:

a. That the appeal is without merit and is dismissed in its entirety.

b. That the judgement of Hon. Cheruto C. Kipkorir, PM, in Kerugoya MELC Case No. E183 of 2021 delivered on 26th October 2022, is hereby affirmed.

c. That the appellant will bear the respondent's costs in the appeal.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS
15TH DAY OF APRIL 2026.**

Kibunja

S. M.

ELC

JUDGE

In the presence of:

Appellant -

Respondent -

Kinyua - Court Assistant.

S. M.

Kibunja

ELC

JUDGE

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