

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCA NO. E014 OF 2023

KWANYA KARONDA CHIKO
APPELLANT

VERSUS
ALFRED NYADIMO AGUNGA
RESPONDENT

JUDGMENT

1. The background to the appeal is that the appellant lodged **Kilifi Land Civil Suit Number 59 Of 2020** against the respondent. In that case he claimed ownership, both legal and beneficial, of **Kilifi/Kijipwa/4** which he termed as his ancestral land and his home, and urged that he had lived in it for over 75 years; that he had also been allocated the said plot by the Ministry of Lands and Settlement in 1985 through the Settlement Fund Trustees; that on 4th March 2014, he agreed to sell the land to the respondent, and the respondent agreed to purchase it, for Kenya Shillings 6,000,000/-. Kshs 1,000,000/- million was to be paid upon the execution of the agreement. A further 1,500,000/- million was to be paid within 3 months from the date of the agreement, that is, by 4th July 2014.
2. However, on 5th August 2014, one month after the expiry of the agreed period for the second installment, he was paid Kenya Shillings 500,000/- by cheque by the respondent contrary to the agreement of 4th March 2014. He was further given a Kenya Shillings 200,000/- cheque dated 18th December 2014 which was dishonored by the bank. The sale agreement

had a forfeiture clause whereby the vendor would upon rescission be liable to refund Kenya Shillings 3,000,000/= as damages in addition to the refund of the sum already paid by the respondent, and if the purchaser defaulted, the sum already paid to the vendor would be the forfeited.

3. After the events described above, the respondent appeared in June and July 2020 and began to cut down food crops of the appellant on the suit land in preparation for construction perimeter wall in the store on the suit property despite being in breach of the agreement.
4. The appellant sought the following orders in the suit:
 - a. *An order of permanent injunction restraining the respondent by, his employees and or agents from further carrying on with the construction and or erection of perimeter wall, trespassing or dealing with the appellant's suit property in any way;*
 - b. *An order directing the defendants to demolish the structures and/or perimeter wall erected on the appellant's plot failure to which the appellant be at liberty to demolish the same under the supervision of the OCS Kijipwa Police Station;*
 - c. *Damages for breach of agreement for sale dated 4th of March 2014;*
 - d. *A declaration that the respondent breached the terms of the agreement dated 4th March 2014 and as such forfeited part of the purchase price paid to the appellant;*
 - e. *Costs of the suit.*

5. In his defence, the respondent denied the claim. In the counterclaim, the respondent stated that he paid the sum of Kenya Shillings 2,000,000/- in 2 installments and then realized that the appellant had sold his land in 1985 to one **Santo Ernest Simeon** and that all the documents of title are in the name of that Santo Ernest Simeon. He further claimed that the intent of the appellant was to defraud him. He claimed that upon finding out that he was being defrauded he could not continue with the transaction since

the plaintiff could not sell what he did not own. He claimed that the appellant is the one who had breached the sale agreement and that should refund him the sum of Kenya Shillings 2,000,000/-. He sought the following orders against the appellant

- a. General damages for breach of contract;*
- b. Refund of the sum paid plus interest of 14% per annum from March 2015;*
- c. Costs of the suit.*

6. In his judgment the learned trial magistrate noted that both parties were mutually accusing each other of breach and framed the following issues for determination:

- a. Whether the appellant had sold the suit property to a third party when (sic) he sold to the respondent;*
- b. Whether the appellant had capacity to sell the property to the respondent*
- c. Who is in breach of the agreement?*
- d. Appropriate reliefs.*

7. Regarding sale to a third party, the magistrate referred to **Exhibits 3 - 8** produced by the defendant and came to the conclusion that it had not been proved.

8. As to the appellant's capacity to sell the land he noted **Condition 1(a)(b)** of the Letter of Offer stating that the appellant could not sell the property without consent in writing of the Settlement Fund Trustees, and that the appellant had not shown that he had obtained such consent in writing. Further, that a Letter of Allotment does not confirm proprietary rights. He concluded that the appellant not being the registered owner of the suit

property could not pass title to the respondent or any other party as he was merely an allottee.

9. As to which party was in breach, the court found that this is an academic exercise in view of the finding that the plaintiff had no capacity to pass title to the respondent. He nevertheless stated that breach depended on whether time was of essence going by Clause Number 3 in the agreement. He found that no notice had been issued by them appellant so as to render time to be of essence; that by acceptance of the cheque for Kenya Shillings 200,000/- the appellant waved the condition that time be of essence; that **Clause 14** of the agreement had incorporated the provisions of the Law Society Of Kenya Conditions Of Sale 1989 and Completion Notice had to be issued under **Clause 4(7)** of the LSK Conditions Of Sale since the plaintiff had waived his right and could not therefore rely on **Clause 3** of the agreement; that since the appellant had no capacity to sell, the respondent had the right to repudiate the contract. The trial magistrate found that it was the appellant who had breached the contract since he had claimed to be having good legal title to the property which was not the position. He dismissed the suit with costs to the respondent and ordered the appellant to refund Kenya Shillings 2 million being the deposit, as well as pay general damages of Kshs 3 million to the respondent with interest from the date of filing of the suit until date of judgment. Those orders precipitated the present appeal whose grounds are that the learned trial magistrate erred in law and in fact in:

1. *Failing to properly consider and evaluate the pleadings as placed on record by the parties there by arriving at a wrong decision;*
2. *Failing to properly consider and evaluate the entire evidence placed on record by the parties thereby arriving at a wrong decision;*
3. *Failing to correctly apply the law on the required standard of proof in civil cases thereby arriving at a wrong decision;*
4. *Rendering a decision in favour of the respondent by failing to acknowledge at the court lacks jurisdiction to interpret and enforce illegal contracts their by arriving at a wrong decision;*
5. *Failing to consider the submission on record on behalf of the parties there by arriving at the wrong decision;*
6. *Misapprehending the evidence and taking into account extraneous issues and so arriving at a decision that was erroneous and not sustainable in law.*

10. Their appellant seeks the following orders in the present appeal:

1. *The appeal be allowed with costs;*
2. *The judgment and decree allowing the respondents counterclaim against the appellant and dismissing the appellant's suit against the respondent be set aside and judgment be entered in favour of their parent as prayed in the plaint.*

11. In this court's view the issues above can be coalesced into three issues as follows:

- a. *Who was in breach of the agreement?*
- b. *Who ought to bear the costs?*

12. The parties filed submissions on different dates, which I have had the benefit of reading while preparing the present judgment. This being a first appeal, the duty of this court, as set out in the decision of **Selle & Another versus Associated Motor Boat Co. Ltd & Others (1968) EA 123** is to reconsider the evidence, evaluate it and draw its own conclusion of facts and law, and this court will only depart from the findings by the trial court if they were not based on evidence on record, where the said court is shown to have acted on wrong principles of law as was held in

Jabane versus Olenja (1968) KLR 661, or where its discretion was exercised injudiciously as held in **Mbogo & Another versus Shah (1968) EA 93**.

13. This court is thus mandated to examine whether the learned trial magistrate properly evaluated the evidence presented or misapprehended the evidence, took into account extraneous issues and correctly applied the law on the required standard of proof which are in brief the elements to which are attributed the error on the part of the learned trial magistrate in arriving at his decision.
14. The version of the agreement produced by the respondent set the consideration at 6,000,000/= with deposit being 1,500,000/= at execution and a second instalment being 1,500,000/= within **either 3 or 6 months** depending on whether typed or the handwritten correction, appearing in **Clause 3** thereof, was applicable. The same case applies to the appellant's copy of the agreement. In this court's view therefore, the 3-month period was applicable because both the appellant's and the respondent's agreements have the same handwritten correction. If they were not, the respondent's agreement would be bearing no handwritten corrections.
15. The agreement had contents giving the sons of the appellant Kshs 500,000/= each out of the monies paid for the land by the respondent. the balance of Kshs 3,000,000/= would payable upon the successful registration of transfer in the respondent's name.

16. Despite the foregoing terms as to litigation and apparent recognition that title was in the name of a third party, **Clauses 6** and **11** were included stating that the vendor warrants that he has good title to the land and that the property is sold free from any claim from any third party whatsoever except that subject of the Judicial Review proceedings. The purchaser was also granted vacant possession of the land at the execution of the agreement. The parties retained a joint advocate at **Clause 17**. The **Default Clause** stated that if the vendor rescinded the agreement, he would be liable to refund the sums already paid together with damages of Kshs 3,000,000/= plus other costs that would have been incurred by the purchaser in the process and if the purchaser failed to meet his part of paying the balance the money paid shall be forfeited to the vendor.
17. The appellant's claim was that the respondent had breached **Clause 3** of the agreement and thus he does not have any claim against the appellant in respect of the agreement. The respondent on the other hand claimed that the appellant was in breach for claiming title where he had none over the suit land.
18. This court has already found that under **Clause 3** the respondent was to pay Kshs 1,500,000/= within 3 months of the execution of the agreement. He did not. He thus breached the agreement dated 4/3/14. The trial magistrate held that the appellant never issued notice to complete in order to make time be of essence in the contract. The

magistrate further relied on **paragraph 10** of the appellant's statement stating that:

"...despite the defendant's breach ...since I was keen on performing my part of the bargain on 18th December 2014, he issued me with a cheque of Kshs 200,000/=..."

19. The magistrate construed that statement to mean that the appellant had waived time to be of essence.
20. The 3-month period stipulated for payment of a further Kshs 1,500,000/= ended on 4/7/2014. No such amount was paid by the respondent within that period. However, the respondent paid, and the appellant accepted, Kshs 500,000/= outside the said period which impliedly extended the period in favour of the respondent.
21. On 18th December 2014, the respondent gave a cheque of Kshs 200,000/= to the appellant which was dishonoured by the bank. After that the respondent vanished for 5 years and reappeared in June 2020. In the proceedings before the lower court and in the present appeal, the respondent justified non-payment on the basis that he had conducted further due diligence and established that the appellant did not have proper title to the suit land, which confirms that and refusal to pay within the requisite period and indeed the issuance of a bouncing cheque and his subsequent disappearance, were willful acts. Upon reappearance, the respondent made the appellant execute some unknown documents, and then embarked on developments on the suit land.

22. The appellant stated that he wrote to the respondent on various occasions requiring payment to no avail. One such letter is dated 29/6/15.

In it the appellant states:

"I am writing to inform you that you have breached the agreement of sale between yourself and me of 4th March 2015... I ask you to immediately stop the construction of the wall fence until you pay the Kshs 1,500,000/=."

23. The notice was addressed to the respondent but copied to Mouko Advocates of Malindi who were the respondent's advocates and who have affixed their receipt stamp with the date 30/6/2015. It is needless to address the contents of the letter by the appellant to the respondent dated 27/7/2020 in detail as it reiterates the same warning and call in the letter dated 29/6/15, with the addition of notice of intention to institute legal proceedings against the respondent. In this court's view, the said letters were from their inception sufficient notices of breach setting out in clear terms the action required to remedy the breach but the respondent neglected to remedy the breach on the basis that he had discovered that the land belonged to someone else and not the appellant.

24. The two letters appear to have been written not by Mouko, the parties' joint advocate, but by the appellant himself and this is indicative of the crisis that arises when parties retain a joint advocate in a conveyancing transaction, and which practice ought to be discouraged.

25. The trial magistrate correctly analyzed the *Omweri Vs Kiptugen 2022 eKLR* case on the implications of a contract where time is not specified as of essence, stating that time may be rendered of essence where a notice

from the party not in default fixing a reasonable time for completion and stating that in the event of non-completion he intends to enforce or abandon the contract. He however inappropriately applied *Dhanjal Investments Ltd vs Shabaha Investments Ltd 2022 eKLR* on waiver concluding that the appellant had lost the right to terminate the contract despite fundamental breach by the respondent because he had affirmed the contract, and therefore could not rely on **Clause No 3** thereof.

26. The proper position that the trial magistrate ought to have appreciated was that payment of Kshs 1,500,000/= in the three months after execution was not the final stage in the transaction for the appellant, and that more action was expected in terms of litigation and the processing of title, which matters were to be financed by the respondent.

27. With respect to waiver of the condition that time be of essence the trial magistrate incorrectly applied the law by stating that by virtue of **paragraph 10** of his witness statement the appellant had waived that condition. It is not the appellant's witness statement that should have been the court's sole source of information, and it ought to have been considered alongside the letters written by the appellant giving notice to the respondent as analyzed herein above. Nevertheless, it is also clear that **paragraph 10** of the witness statement did not absolve the respondent of his acts of breach that would occur in the future, hence the letter dated **29/6/15** was sufficient notice of breach with sufficient details as to the remedy required.

28. The respondent never responded by remedying the breach specified in the letter dated 29/6/2015, and did not also comply when he was issued with notice to sue dated 27/7/2020. It is noteworthy that after the letter dated 29/6/2015 was served on him he proceeded with his developments on the suit land.
29. The conclusion of this court is that the learned trial magistrate erred in his assessment of the evidence laid before him and in arriving at the finding that the plaintiff could not rely on **Clause 3** of the agreement dated 4/3/2014. In this court's view, it was still open for the appellant to rely on that clause at all times unless he was the one in breach.
30. The second issue regarding breach is whether the appellant was in breach by reason of want of valid title to the land and thus want of capacity to transfer. In this court's view the proper diligence had been conducted by the respondent which made him accept, regardless of the third-party claim and litigation expressly mentioned in the agreement, to purchase the land. He was shown the SFT Charge in the name of the appellant as well as other documents evincing the appellant's claim to ownership. It was clear that title had not issued in the name of the appellant as at the time that the agreement was being executed; that it is records with the Land Adjudication and Settlement Officer which could indicate the real owner of the suit land. No searches at the land's registry were to be involved since the land was not yet registered in the appellant's name and both parties appreciated that fact. This court has

viewed the appellant's documents issued by the SFT including the receipt dated 26/1/1988 and demand notice dated 13/6/2011. A further document under the letterhead of the office of the Assistant Chief appears to be an agreement in which various persons consented to vacate the suit land in favour of the appellant.

31. The uncontroverted evidence before the trial court was that the parties had entered into a sale agreement pursuant to which Kshs 2,000,000/- had been paid to the appellant, and that there were penalties applicable against both sides depending on who breached the agreement.
32. The appellant denied knowing anyone called "*Santo*" to whom the respondent's defence had alleged the appellant had sold the land in **1985**. He denied selling the land to Santo. He also stated that the respondent had taken his fingerprints purportedly in order to obtain title and pave the way for the payment of the balance. His further evidence was that he normally executed documents by way of signature and not thumbprint.
33. The appellant's further evidence was that the respondent never gave any notice of rescission; that the parties only discussed the Santo issue orally since they thought it could be a forgery; that the respondent had conducted a search and that he believed that the land belonged to the appellant before the agreement was executed.
34. The evidence of the respondent was that he took possession after paying Kshs 2,000,000/= and began fencing during which exercise he was

informed that the land did not belong to the appellant. He therefore commenced his investigations which revealed it to belong to Santo, and Santo sent him the documents in support of his claim thereto. He therefore entered into another agreement with Santo, thereby purchasing the land from him. Santo also allegedly gave him his original title documents for the land. He stated that he was seeking a refund by the appellant. However, the respondent admitted on cross-examination that he purchased the land from the appellant on the strength of a charge in the name of the appellant. Santo had allegedly jointly with one Catherine Van Frag purchased the land, but the two persons were not called as witnesses for the defence at the hearing. The respondent *is said to have only communicated with Santo alone*, presumably by remote means such as phone or email, while the latter was abroad. The respondent admitted that he had not at the hearing produced any documents showing that he had purchased the same land from Santo. He admitted that he willfully refused to pay the balance when the alleged new evidence surfaced.

35. This court has examined the agreement dated 4/3/2015 in which the appellant agreed to sell the land to the respondent. That agreement recognized that the land was not in the name of the appellant. It stated that the land is in the name of one James Mwangi Gakahu, an alleged impostor, and that his title was being challenged in **Malindi HC JR No 4** of 2014. The agreement further recognized that the said judicial review

application would be funded by the respondent in order to enable the issuance of title in the respondent's name.

36. In this court's view, there was no valid ground for the respondent to travel far and wide outside of the confines of the agreement he had willingly executed and not only seek to loop in strange and suspicious third parties and claim, without presenting credible evidence that they and not the appellant were the owners of the land, but also to purport to purchase the suit land from them. By doing so he figuratively charged, judged and executed the appellant summarily and without due process. Parties are bound by the terms of the agreement they mutually execute. The respondent ought to have relied on the documents presented by the appellant until any third party appeared to claim the land, and his claim was tried and finalized by a court of competent jurisdiction. The conclusion as to whether any third party owned the land was not the respondents to make, or rely on, in order to refuse to proceed with the performance of his part of the contract with the appellant. Since it was the appellant who was in possession and who allowed the respondent vacant possession upon contract execution, any third party claim especially by persons not in possession, if at all it ever existed, remained a mere allegation to be verified in legal proceedings before court and subsequent final judgment. No such proceedings or final judgment were presented. In refusing to comply with the requirement that he pays Kshs 1,500,000/= within three months from execution, the respondent was in

serious breach, which continued till he was issued with the letter dated 29/6/2015 analyzed above, the terms of which he did not comply, consequently remaining in breach until he was issued with notice to sue, after which he also never complied. All this happened while the respondent was enjoying vacant possession of the suit land ostensibly under the unsubstantiated claim that Santo had sold it to him. This court finds the respondent's conduct to be not only in breach but also opprobrious and oppressive to the appellant.

37. The upshot of the foregoing is that the learned trial magistrate either failed to properly evaluate the evidence presented or misapprehended the evidence before him. All the evidence before him was against his conclusion that it was the appellant who was in breach and not the respondent.

38. The learned trial magistrate also took into account extraneous issues of sale to a third party and consequently incorrectly applied the law on the required standard of proof and therefore believed the respondent's unsubstantiated allegations that some fellow fabricated named Santo owned the land, and on that basis, concluded that the appellant lacked capacity to sell.

39. The conclusion of this court is that the present appeal has merit. I therefore issue the following final orders:

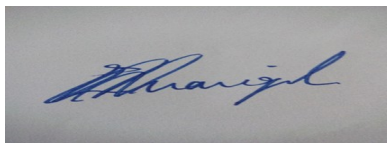
- a. *The present appeal is hereby allowed;*
- b. *The judgment and decree in **Kilifi Land Civil Suit Number 59 Of 2020** allowing the respondent's counterclaim against the appellant and dismissing the appellant's suit against the respondent is hereby*

set aside and judgment is hereby entered in that suit in favour of the appellant in the following terms:

- i. A declaration is hereby issued declaring that the respondent breached the terms of the agreement dated 4th March 2014 and as such wholly forfeited the part of the purchase price paid to the appellant;
 - ii. An order of permanent injunction is hereby issued restraining the respondent by himself his employees and/or agents from further remaining on, carrying on with construction and/or erection of perimeter wall, trespassing or dealing with the appellant's suit property known as plot number Kilifi/Kijipwa/4 in any manner whatsoever;
 - iii. An order directing the respondent to demolish the structures and/or perimeter wall erected on the appellant's plot known as Kilifi/Kijipwa/4 within 14 days from the date of this order and deliver vacant possession of the said plot to the appellant failure to which the appellant shall be at liberty to demolish the said structures and/or perimeter wall at the expense of the respondent and take possession of the suit property under the supervision of this OCS Kijipwa Police Station Kilifi;
 - iv. The respondent herein shall pay to the appellant a token Kenya Shillings 50,000/= being damages for breach of agreement for sale dated 4th March 2014;
 - v. The costs of the suit in the lower Court shall be borne by the respondent herein;
- c. The costs of the present appeal shall be borne by the respondent herein.

It is so ordered.

Dated, signed and delivered at Malindi on this 16th day of April, 2026.



**MWANGI NJOROGE,
JUDGE, ELC, MALINDI.**