



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCL APPEAL CASE NO. E055 OF 2024

BENSON **GIKUNDA**

ELIAS.....APPELLANT

=VERSUS=

SAMUEL **KINUTHIA** **KARIBA.....1ST**

RESPONDENT

PETER **MURITHI** **KARIGI.....2ND**

RESPONDENT

LILIAN **KAIRUTHI** **M'IKIUGU.....3RD**

RESPONDENT

(An Appeal against the Judgment of the Senior Resident Magistrate Court at Nkubu [Hon R. Ongira - SRM] dated 11/7/2024 in Nkubu SPMC E & L Case No. E052 of 2021)

JUDGMENT

Introduction

1. This appeal challenges the judgment of the Senior Resident Magistrate Court at Nkubu [Hon R. Ongira - SRM], rendered on 11/7/2024 in **Nkubu SPMC E & L Case No. E052 of 2021**. The suit challenged the registration of the 1st respondent as the sole and absolute proprietor of land parcel number **Nkuene/Taita/2247**, measuring **0.14 hectares** [*the suit land*]. The appellant and the 1st respondent had entered into an agreement for purchase of the suit land from the late **M'IKirigia M'Mwendwa** but the seller died before transferring the land to them. The 1st respondent and the seller's personal representatives subsequently caused the land to be registered in the name of the 1st respondent as the sole and absolute proprietor of the land. Some of the key issues that fell for determination in the trial court were: (i) Whether the appellant refused to pay his portion of the balance of the purchase price and his portion of the conveyance costs; and (ii) Whether by dint of the alleged refusal, the 1st respondent became the sole purchaser of the land and was entitled to be registered as the sole and absolute proprietor of the land.
2. Upon conducting trial and upon analyzing the pleadings and the evidence presented, the trial court came to the finding that the appellant had proved his claim to the required standards. The trial court did not, however, grant the appellant his plea for an order cancelling the 1st respondent's registration as the sole and absolute proprietor of the suit land and the plea for registration of the land in the joint names of the duo as proprietors-in-common. It instead decreed the 1st respondent to pay the appellant the sum of Kshs 200,000, being money had and received, with interest thereon at court

rate from 19/6/2009. The above two issues are some of the key issues that fall for determination in the appeal. Before I analyse and dispose the issues, I will briefly outline the background to the appeal; the grounds of appeal; and the parties' respective submissions in the appeal.

Background

- 3.** Through a plaint dated 29/11/2021 and amended on 16/5/2022, the appellant instituted Nkubu SPMC E & L Case No. 52 of 2021 against the respondent, seeking: (i) a permanent injunction restraining the 1st respondent against interfering with his [the appellant's] proprietary rights over the suit land; (ii) an order decreeing cancellation of the registration of the suit land in the name of the 1st respondent as a sole and absolute proprietor and directing registration of the land in the names of the appellant and the 1st respondent as proprietor-in-common; (iii) an order authorizing the Executive Officer of the Court to execute relevant transfer documents in the event the 1st respondent failed to do so; and (iv) an order awarding the appellant costs of the suit.
- 4.** During trial, the appellant testified as **PW1** and closed his case. The case of the appellant was that the suit land originally belonged to the late **M'Ikirigia M'Mwendwa** [the deceased]. On 19/6/2009, him and the 1st respondent entered into a land purchase agreement with the deceased, pursuant to which they jointly purchased the suit land from the deceased at a consideration of Kshs 700,000. They jointly paid to the deceased a deposit of Kshs 400,000, leaving a balance

of Kshs 300,000. The deceased subsequently died before completing the sale.

5. The appellant added that upon the demise of the deceased, the 2nd and 3rd respondents were, without his knowledge, appointed as the personal representatives of the deceased and, unknown to him, the 1st respondent approached them and the trio fraudulently caused the suit land to be registered in the name of the 1st respondent as the sole and absolute proprietor. He contended that the registration of the suit land in the name of the 1st respondent as the sole and absolute proprietor was wrongful and illegal, adding that the suit land was acquired jointly by him and the 1st respondent.
6. The 1st respondent filed a statement of defence dated 18/2/2022. He amended the statement of defence on 21/10/2022. During trial, the 1st respondent testified as DW1. He contested the appellant's claim. His case was that the appellant abandoned his interest in the suit land, and that the appellant failed to pay the agreed consideration. He contended that he solely proceeded with the transaction and paid the balance of the purchase price together with succession costs, stamp duty and transfer charges. He was subsequently issued with a title deed as the sole and absolute proprietor of the suit land. He stated that the appellant's claim was an afterthought and an abuse of the court process. He denied service of notice of intention to sue. In his testimony during cross-examination, he stated that the appellant only paid Kshs 200,000. He further stated in re-examination that he [the 1st respondent] solely paid the balance of the purchase price [Kshs 300,000]. Lastly, he stated that he was to refund

the appellant the sum of Kshs 200,000 which the appellant paid towards purchase price. He urged the trial court to reject and dismiss the appellant's claim.

7. The 2nd and 3rd respondents did not file pleadings in the suit. The 2nd respondent, nonetheless, testified as the 1st respondent's witness [**DW2**]. He testified that he wrote a written statement upon being asked by the 1st respondent to do so. He added that he was not aware that court documents had been served on him, adding that the WhatsApp message he received was to the effect that he was needed in court but he was not told the reason why he was needed in court. He added that he contacted the 1st respondent who told him that he [the 2nd respondent] was a witness in the case.
8. In his witness statement dated 18/2/2022 [*drawn and filed by M/s Kiogora Arithi & Associates who acted for the 1st respondent in the trial court*] the 2nd respondent stated that the 1st respondent was introduced to him by his late grandfather, **M'ikirigia M'Mwendwa**, who informed him that he was selling the suit land to the 1st respondent. His grandfather subsequently died before transferring the land. **Julius Muriungi** who was appointed as the deceased's initial personal representative also died. Him and the 3rd respondent were subsequently appointed as personal representatives and they transferred the suit land to the 1st respondent after the 1st respondent approached them.
9. The 2nd respondent testified that they effected the transfer on the basis of trust because they did not have documents relating to the sale, adding that if they knew that there was a

third party making a claim over the land, they would have listened to all the parties before effecting any transfer. He added that if they knew there were two purchasers, the transfer would have been executed in favour of the two purchasers as proprietors-in-common.

10. Upon conclusion of trial and upon receiving submissions, the trial court rendered the impugned judgment in which it found that the appellant had proved his claim as against the 1st respondent. The trial court proceeded to issue the following verbatim disposal orders:

- i. Judgment is entered for the plaintiff as against the 1st defendant for the sum of Kshs 200,000 being money had and received with interest thereon at court rates from 19th June 2009 until payment in full.***
- ii. Suit against the 2nd and 3rd defendants is dismissed with no order as to costs.***
- iii. That the costs of the suit to be borne by the 1st defendant.***

Appeal

11. Aggrieved by the judgment of the trial court, the appellant brought this appeal advancing the following verbatim grounds:

- 1. That the Learned Magistrate erred in law and fact by failing to grant the prayer of specific performance as prayed in the amended plaint despite finding that the appellant had proved***

- his claim against the 1st respondent in terms of the amended plaint.*
- 2. That the Learned Magistrate erred in law and fact by granting orders not specifically pleaded in the plaint without giving justifiable reasons.*
 - 3. That the Learned Magistrate erred in law and fact by entering judgement for the appellant as against the 1st respondent for the sum of Kshs 200,000/- being money received with interest thereon at court rate from 19th June 2009 until payment in full, without giving justifiable reasons for arriving at that decision, instead of ordering specific performance as prayed in the amended plaint.*
 - 4. That the Learned Magistrate erred in law and fact by dismissing the suit against the 2nd and 3rd defendants without reasons as to how she arrived at that decision.*
 - 5. That the Learned Magistrate erred in law and fact by disregarding the terms of the agreement for sale of land, which was the subject of the suit.*
 - 6. That the Learned Magistrate erred in law and in fact by confirming the irregular transfer of land, contrary to the terms and conditions of the sale agreement.*
 - 7. That the Learned Magistrate erred in law and fact by failing to find that the defendants were jointly and severally in breach of the agreement for sale of the suit land.*

8. That the Learned Magistrate erred in law and fact by finding that the 1st respondent paid the whole of the purchase price balance of kshs.300,000/- to the 2nd and 3rd respondents devoid of proof as required by law.

9. That the learned magistrate erred in law and fact by failing to consider and distinguish the authorities of the appellant together with his submissions.

10. That the learned magistrate erred in law and fact in arriving at the prayers granted against the weight of the evidence.

12. The appellant urged the court to allow the appeal in terms of prayers (a); (b) (b), (i); and (c) of the amended plaint.

Appellant's Submissions

13. On 2/12/2025, the appellant's counsel informed the court that the appellant was relying on the written submissions which he had tendered in the trial court, dated 4/4/2024. He also relied on the grounds of appeal as outlined in the memorandum of appeal. The court has read the said submissions and grounds of appeal.

14. The gist of the appellant's argument was that, together with the 1st respondent, they jointly purchased the suit land from the late M'IKirigia. He relied on the sale agreement dated 19/6/2009. He contended that the suit land ought to have been transferred to both of them as proprietors-in-common. He submitted that the suit land was secretly transferred to the 1st respondent as sole proprietor. The appellant argued that

the 1st respondent acknowledged and recognized the sale agreement dated 19/6/2009, adding that the 1st respondent failed to prove the allegation that the appellant refused to contribute his portion of the balance of the purchase price. The appellant added that the 2nd respondent testified that he was not aware that the appellant was a co-purchaser and that if that fact had come to his knowledge, he would have transferred the suit land to the appellant and the 1st respondent as proprietors-in-common.

15. The appellant argued that through their evidence, the respondents conceded that they acted contrary to the agreement dated 19/6/2009, adding that there was no justification for their departure from the terms of the agreement. The appellants argued that the respondents did not make any effort to contact him to remit his portion of the balance of the purchase price.
16. Vide his grounds of appeal dated 8/7/2024, the appellant contended that the trial court having found that the appellant proved his case, it erred when it failed to grant the relief which was sought in the plaint. He urged this court to allow the appeal.

1st Respondent's Submissions

17. The 1st respondent filed written submissions dated 8/122/2025 through ***M/s Kiogora Arithi & Associates***. Counsel for the 1st respondent identified the following as the three issues that fell for determination in the appeal: (i) Whether the trial court erred in declining the plea for specific performance, though pleaded; (ii) Whether the finding that the 1st respondent paid

the balance of the purchase price was erroneous; and (iii) Whether the trial magistrate erred in awarding the appellant Kshs 200,000.

- 18.** Counsel argued that making a plea of specific performance did not entitle the appellant to the said remedy, adding that the remedy of specific performance would be available only to a claimant who demonstrated full compliance with his own obligations and where the circumstances permitted enforcement. Citing various decisions, among them, the pronouncement of **Maraga J** [*as he was then*] in ***Reliable Electrical Engineers Ltd v Mantrac Kenya Ltd (2006) eKLR***, counsel argued that the appellant failed to participate in paying the balance of the purchase price and additional monies, adding that the appellant failed to participate in the succession cause relating to the estate of the late M'IKirigia. Counsel contended that the appellant failed to demonstrate his readiness/willingness/ ability to complete the purchase.
- 19.** Reciting the maxim "*equity aids the vigilant and not those who sleep on their rights*" counsel contended that the trial court was right in declining to grant the plea of specific performance. Counsel argued that the sum of Kshs. 200,000 which the trial court awarded to the appellant was a return of his deposit and it was an equitable adjustment after the appellant failed to pay the balance of the purchase price. Counsel urged this court to uphold the judgment of the trial court.

Analysis and Determination

20. I have read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The following are the key issues that fall for determination in the appeal: (i) Whether the appellant refused/declined to pay his portion of the balance of the purchase price and his portion of the requisite conveyance costs; (ii) Whether by dint of the alleged refusal, the 1st respondent became the sole purchaser of the suit land and was entitled to be registered as the sole and absolute proprietor of the suit land; (iii) Whether the trial court erred in failing to grant the substantive reliefs that were sought in the pleadings despite having found that the appellant had proved his case; and (iv) What orders should be made with regard to costs. Before I analyse and dispose the above issues, I will outline the principle that guides this court when exercising appellate jurisdiction.

21. The task of a first appellate court was summarized by the Court of Appeal in the case of ***Susan Munyi v Keshar Shiani (2013) eKLR*** as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

22. The principle was similarly outlined in **Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR** as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reason either way.”

23. Did the appellant refuse/decline to pay his portion of the purchase price and the requisite conveyance costs? There was common ground that the land purchase agreement which culminated in the registration of the 1st respondent as the sole and absolute proprietor of the suit land was dated 19/6/2009 and was between the late **M’Ikirigia M’Mwendwa** as the seller on one part and **Benson Gikunda Elias** [*the appellant*] and **Samuel Kinuthia Kariba** [the 1st respondent] as the two joint purchasers on the other part. The said agreement was produced as an exhibit. The agreed purchase price was Kshs 700,000. The two purchasers jointly paid Kshs 400,000, receipt of which the seller acknowledged at the time of signing the agreement. There was common ground that each of the two purchasers contributed Kshs 200,000, making a total of Kshs 400,000.
24. Under Clause 1 of the agreement, a further sum of Kshs 150,000 was to be paid on or before 30/9/2009. Under clause 1 (c), the last instalment [Kshs150,000] was to be paid on or

before 30/1/2000. There was common ground that the seller died before the sum of Kshs 300,000 had been paid. The appellant contended that upon the death of the seller, the three respondents fraudulently caused the suit land to be transferred to the 1st respondent as the sole and absolute proprietor.

- 25.** On his part, the 1st respondent denied the above allegation and contended that the appellant “abandoned his interest in the suit land” and “also failed to pay the agreed consideration”. He added that he [the 1st respondent] proceeded with the transaction and paid the balance of the agreed consideration together with succession and conveyance costs, whereafter he was issued with a title deed as the sole and absolute proprietor of the suit land.
- 26.** The 1st respondent produced copies of the following six exhibits: (i) the sale agreement dated 19/6/2009; (ii) receipt dated 4/2/2010 relating to alleged service fees alleged to have been paid to **M/s J.M & Company**; (iii) three official searches dated 29/11/2011, 5/7/2018 and 13/8/2020 all relating to the suit land; and (iv) title deed dated 29.11.2018 in the name of the 1st respondent. The 1st respondent did not tender any documentary evidence in form of a demand notice to prove the allegation that he approached the appellant to pay his portion of the balance of the purchase price and the conveyance costs and the appellant refused to do so. The 1st respondent completely failed to prove the allegation that the appellant refused/declined to pay his portion of the balance of the purchase price and the conveyance costs.

- 27.** That is not all. The 2nd respondent testified as **DW2**. His evidence was that him and the 3rd respondent caused the suit land to be transferred to the 1st respondent as the sole and absolute proprietor because they were not aware that the appellant was a co-purchaser under the sale agreement which the late M'Ikirigia executed in June 2009. The 2nd respondent testified that had the agreement been availed to them, they would have transferred the land to the two purchasers. It is clear from the evidence of DW2 that the 1st respondent failed to disclose to the administrators of the estate of the late M'Ikirigia the fact that the appellant was a co-purchaser.
- 28.** From the evidence on record, the initial administrator of the estate of the late M'Ikirigia was one Julius Muriungi Kirigia who became registered as trustee proprietor of the suit land on 7/1/2010. The 2nd and 3rd respondents were said to have become trustee proprietors on 13/8/2015. They transferred the suit land to the 1st respondent on 15/11/2018. If indeed the estate of the late M'Mwendwa or the 1st respondent invited the appellant to contribute a portion of the balance of the purchase price and the conveyance costs, there would have been documentary evidence proving that allegation. One would have expected the 1st respondent and the estate to tender documentary evidence relating to a notice issued to the appellant notifying him about the appointment of administrators of the estate and asking him to remit to the estate his portion of the balance of the purchase price. None was tendered. To the contrary, the estate, through DW2, contended that it was not aware that the appellant was a co-purchaser of the suit land.

- 29.** Given the above evidence and the above circumstances, it is the finding of this court that the 1st respondent failed to prove his allegation that the appellant refused/declined to contribute his portion of the balance of the purchase price and his portion of the requisite conveyance costs.
- 30.** Did the 1st respondent become the sole purchaser of the suit land? Was he entitled to be registered as the sole and absolute proprietor of the suit land? Under **Section 3(3)** of the **Law of Contract Act**, an agreement disposing an interest in land is required to be in writing, There was only one such agreement. It was dated 19/6/2009. That agreement had two purchasers and one seller/vendor. The seller died before completion of the transaction. The 1st respondent had no capacity to unilaterally designate himself as the sole transferee. If he wanted to purchase the suit land as a sole purchaser, he needed to first procure a lawful termination of the contract dated 19/6/2009. The lawful termination would have involved the two purchasers and the estate of the late M'likirigia, Upon lawful termination of the agreement, the 1st respondent would be expected to enter into a fresh compliant contract with the estate.
- 31.** It is clear from the pleadings of the 1st respondent and from the evidence of the two defence witnesses that upon the death of M'likirigia, the 1st respondent embarked on a concealed scheme to remove the appellant from the transaction. Regrettably the path he took was an illegal one.,
- 32.** For the above reasons, it is the finding of this court that the 1st respondent never became a legitimate sole purchaser. It is the further finding of the court that the 1st respondent was not

entitled to be registered as the sole and absolute proprietor of the suit land. The suit land was acquired jointly and was co-owned by the appellant and the 1st respondent.

- 33.** Did the trial court err in failing to grant the appellant the substantive reliefs sought in the pleadings? A perusal of the impugned judgment reveals that the trial court found that the appellant had proved his claim. Despite that finding, the trial court proceeded to decree a refund to the appellant of the purchase price which the appellant had paid in 2009. The appellant had not asked for a refund of the money. His key plea was plea for cancellation of the impugned registration and an order decreeing registration of the suit land in the joint names of the two purchasers as proprietors-in-common.
- 34.** The two parties purchased land in June 2009. In November 2018, the 1st respondent decided to secretly pay the balance of the purchase price to the estate and procure registration of the suit land into his name as the sole and absolute proprietor. The appellant successfully challenged the above registration. No proper reason was given to justify denial of the reliefs which the appellant had sought. Having found that the appellant had proved his claim, there had to be proper grounds for declining to grant the appellant the relief which he had sought in his pleadings.
- 35.** The appellant did not lend the 1st respondent money. He co-purchased land with the 1st respondent. He was entitled to the co-purchased land. The order decreeing a refund of money had and received was unpleaded and unjustified.

- 36.** The view this court takes is that the appellant was entitled to the reliefs that were sought in the amended plaint. The court is also alive to the fact that the appellant was obligated to pay his portion of the purchase price to the estate upon being notified about the appointment of personal representatives (administrators). The reason why he did not pay his portion is that he was not notified about appointment of the estate's administrators. Secondly, the 1st respondent had been found to have wanted to steal a march on the appellant by designating himself as the sole purchaser and the absolute proprietor of the suit land.
- 37.** The trial court was a court of law and at the same time a court of equity. So is this court. It would therefore be inequitable for this court to grant the appellant the reliefs sought in the amended plaint without a corresponding order requiring him to re-imburse the 1st respondent his portion of the balance of the purchase price and the conveyance costs.
- 38.** The estate of the late M'ikiriga admitted receipt of the balance of the purchase price [Kshs 300,000] from the 1st respondent. In terms of conveyance costs, the only evidence which the 1st respondent tendered relates to the sum of Kshs 25,000 which was paid to **M/s J. M & company**. If the 1st respondent spent any other money, he did not tender relevant evidence during trial. In the circumstances, the remittances that the two parties were to equally shoulder were the balance of the purchase price [Kshs 300,000] and the sum of Kshs 25,000 paid to **M/s J. M & Company**. The two items make a total of Kshs 325,000. An equal apportionment of the above sum

gives a figure of Kshs 162,500. The appellant will be required to re-imburse the 1st respondent the above sum.

39. Lastly, the plea for a permanent injunction against the 1st respondent will not issue because the 1st respondent is a co-owner of the suit land.
40. On costs, the error giving rise to this appeal was made by the trial court. Consequently, parties will bear their respective costs of the appeal. The 1st respondent will, however, bear the appellant's costs of the suit in the lower court.
41. For the above reasons, this appeal succeeds and is disposed in the following terms:

(a) The judgment of the trial court in Nkubu SPMC E & L Case No. E052 of 2021 is wholly set aside and is replaced with the following orders:

- i. The registration of Samuel Kinuthia Kariba as the sole and absolute proprietor of land parcel number Nkuene/Taita/2247 is hereby cancelled.**
- ii. The Land Registrar is hereby directed to register the said land in the joint names of Samuel Kinuthia Kariba and Benson Gikunda Elias as proprietors/tenants-in-common in equal shares.**
- iii. Within 30 days from the date when the trial court file is received in the Trial Court Registry, the appellant/ [Benson Gikunda Elias] shall deposit in the trial**

court the sum of Kshs 162,500 as his equal contribution towards balance of purchase price and conveyance expenses. The said sum shall be released to the 1st respondent upon registration of the suit land in the joint names of the two purchasers as decreed.

iv. In default of the sum of Kshs 162,500 being deposited as decreed in (iii) above, this appeal shall stand dismissed with costs and the impugned judgment of the trial court stand reinstated.

v. The 1st respondent [Samuel Kinuthia Kariba] shall bear the appellant's [Benson Gikunda Elias] costs of the suit in the trial court.

(b) Parties shall bear their respective costs of this appeal

**DATED, SIGNED AND DELIVERED AT MERU THIS 13TH DAY
OF APRIL, 2026.**

B M EBOSO [MR]

ELC JUDGE