



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL APPEAL NO. E020 OF 2024

RAPHAEL OJIAMBO BUBOLU AKA

OTHIAMBO OBUBOLU 1ST

APPELLANT

SALA OGANA 2ND

APPELLANT

= VERSUS =

NICHOLAS OUMA

RESPONDENT

JUDGMENT

(Being an appeal from the judgement of Hon Nyaloti delivered on 28th August 2024 in Busia CM Civil case No. 490 of 2024)

1. By a plaint dated 3rd December 2014 and amended on 30th September 2019, the respondent herein instituted a suit in the lower court *to wit* Busia CMC Civil Suit No.490 of 2014

seeking judgment against the defendants, now appellants, for: -

- i) Refund by the 1st defendant/1st appellant of Kshs.480,000 or in the alternative transfer of title to land parcel Samia/Bujwanga "A"/980 to him;
- ii) The 2nd defendant to refund Kshs.133,989 to him;
- iii) Interest;
- iv) Damages;
- v) Costs.

2. As can be discerned from the averments/contentions in the amended plaint, the respondent's suit was premised on the ground that pursuant to an agreement for sale of land dated 7th May 2014, the 1st defendant (now 1st appellant) received Kshs.480,000/- from him but refused to transfer the portion of the land that was being sold, Samia/Bunjwanga/ "A"/980 to him. The respondent also claimed Kshs.133,989/- being money given to the 2nd defendant (now second appellant) for running Upendo Academy.

3. The respondent pleaded that the 2nd appellant made him believe that the school (Upendo Academy) existed and that he, the respondent was a director of the school, when in actual fact no such school existed.
4. The appellants filed a Statement of Defence, dated 5th January 2019 and amended on 14th January 2020, in which they denied having entered into the agreement relied on by the respondent in support of his case and contended that if there was any agreement, it was between the 1st Appellant and Upendo Academy.
5. Terming the respondent's suit incompetent, bad in law and an abuse of the process of the court, the appellants urged the court to dismiss the suit with costs to them.
6. When the suit came up for hearing, the respondent relied on his witness statement dated 13th February 2020 after it was adopted as his evidence in chief. The respondent also

produced the documents listed in his list of documents, dated 13th February 2020, as Pexbt 1 to 6.

7. The respondent informed the court that the appellants are his cousins and that he was seeking refund of Kshs.480,000/- and in the alternative part of the suit land as prayed in the plaint.
8. In cross examination, the respondent stated that he was buying the land in question on behalf of Upendo School, which school the 2nd appellant made him believe existed and that he was one of the directors of the school. The respondent further informed the court that he was acting in good faith believing that the appellants were going to complete the sale.
9. The respondent further informed the court that the 2nd appellant signed the sale agreement on behalf of the school and as the principal of the school.

10. In re-examination, the respondent admitted/acknowledged that his name is not in the sale agreement as a director and that the 2nd appellant signed as an employee of the school.
11. PW2, Joseph Ochieng Odhiambo, relied on his witness statement dated 13th February 2020 after it was adopted as his evidence in chief. He informed the court that he knew the defendants/appellants who are a couple.
12. In cross examination, PW2 stated that he was a witness to the sale agreement dated 7th May 2014 and acknowledged that the agreement was between Upendo Academy and the 1st appellant and maintained that it is the respondent who paid the purchase price. He witnessed the payment of Kshs.150,000/- by the respondent.
13. PW3, Moses Barasa Mujibi, a retired chief, relied on his witness statement dated 13th February 2020 after it was adopted as his evidence in chief. Like PW2, he informed the court that the appellants are a couple and stated that he

witnessed and signed both the sale agreement and the revocation agreement relied on in evidence by respondent.

14. In cross examination, PW3 maintained that he witnessed payment of the purchase price by the respondent to the appellants.

15. In re-examination, PW3 stated that the appellants signed the three agreements in his presence.

16. DW1, Raphael Ojiambo Bubolu, relied on his witness statement dated 14th January 2020 after it was adopted as his evidence in chief. He acknowledged/admitted that he entered into the sale agreement dated 7th May 2014 with Upendo Academy. He also admitted that PW3, witnessed the sale agreement and that he is not the one who paid Raphael Makhulo. He maintained that he had no agreement with the respondent.

17. DW2 stated that on 7th May 2024, she entered into an agreement to buy land from Raphael Ojiambo; that she had

a school known as Upendo Academy with 387 students. She denied receiving money from the respondent and urged the court to dismiss the respondent's suit with costs.

18. Upon considering the case presented before her, the learned trial magistrate determined that the respondent had proved his case on a balance of probabilities and entered judgment in his favour in the following terms: -

“The plaintiff is awarded Kshs.480, 000 as a refund and in the alternative the 1st defendant to transfer land reference number Samia/Bujwang’a A/980. The 2nd defendant to refund the plaintiff Kshs.133, 000/-. The plaintiff is also awarded the costs of the suit and interest at court rates from the date of the judgment”.

19. Dissatisfied with the judgment of the learned trial magistrate, the appellants appealed to this court on the grounds that the learned trial magistrate erred by: -

- i) Finding that there existed a sale agreement between the plaintiff and the defendants;
- ii) Finding that the plaintiff and the defendants entered into a sale agreement on 7th May 2014 for purchase of LR No.Samia/Bujwanga A/980;
- iii) Failing to take into account that the sale agreement dated 7th May 2014 was between the 1st appellant and Upendo Academy having been represented by the 2nd appellant;
- iv) By wholly relying on uncorroborated evidence by the respondent on issues of facts;
- v) In awarding plaintiff Kshs. 480,000/- as refund and in the alternative the 1st defendant to transfer land reference number Samia/Bujwanga A/980.
- vi) In ordering the 2nd defendant to refund the plaintiff Kshs.133,000/-.
- vii) In holding that the defendants breached the agreement and that the plaintiff is entitled to damages.

- viii) In holding that the plaintiff has been able to establish his case on a balance of probabilities;
 - ix) Failing to completely consider the question as to whether the plaintiff had *locus standi* against the defendants.
20. The appellants prayed that the judgment of Hon. E. A Nyaloti in Busia Civil Case No.490 of 2024 delivered on 28th August 2024 be set aside, the appeal be allowed and the respondent be condemned to pay costs of the appeal and of the case at the lower court.
21. The appeal was disposed of by way of written submissions.
22. In their submissions dated 22nd December 2025, the appellants have identified two issues for the court's determination namely;
- i) Whether the trial magistrate erred in finding that there was a sale agreement

ii) Whether the 1st appellant is in a position to transfer parcel number Samia/Bunjwang'a A/980 to the respondent as ordered by the court.

23. On whether the learned trial magistrate erred in finding that there was a sale agreement, the appellants maintain that the parties to the agreement dated 7th May 2014 were Raphael O. Bubolu and Upendo Academy. The property that was being sold was Samia/Bujwanga-980 at a consideration of Kshs.480,000/-. Explaining that the buyer of the suit land is a registered institution, whose manager is Bobulu Florence Aoko, the appellants submit that the respondent failed to demonstrate to the trial court on what grounds he claims to be a party to the said agreement.

24. The appellants point out that in cross examination, the respondent indicated to the court that he was buying the suit land as a director of the school and submits that the plaintiff failed to lead evidence capable of corroborating his claim that he was a director of the school. Based on the

provisions of **Sections 107** and **109** of the Evidence Act and the decisions in the cases of **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another (2005) 1 EA 334** and **Evans Nyakwana v Cleophas Bwana Ongaro (2015) e KLR**, the appellants submit that there was no breach of contract occasioned against the respondent as he was not a party to the said contract. The appellants further submit that the seller of the suit land had no legal obligation upon the respondent who was merely a witness to the said agreement dated 7th May 2014.

25. The appellants further submit that the learned trial magistrate failed to make a fundamental determination as to whether there was in fact an agreement between the plaintiff and them and whether they breached the terms of the said agreement.

26. Based on the provisions of **section 3(3)** of the Law of Contract Act, the appellants submit that the 1st appellant owed no legal obligation to the respondent in respect of the

agreement dated 7th May 2014 because the respondent was merely a witness to the agreement and not a party to it.

27. The Appellants also fault the learned trial magistrate for entering judgment against the 2nd appellant yet she was merely acting on behalf of the Upendo school.
28. The appellants further submit that condemning them to refund the respondent Kshs.480,000/- or transfer the suit land to him while at the same time ordering the 2nd appellant to pay the respondent Kshs.133,000/- is tantamount to awarding the respondent twice. According to the appellants, the cumulative effect of the judgment of the lower court is to award the plaintiff/respondent Kshs.613,000/- plus interest.
29. As to whether 1st appellant is in a position to transfer parcel number Samia/Bujwanga A/980 to the respondent as ordered by the court, the appellants submit as follows: -

**“...parcel number Samia/Bujwanga 980
admittedly owned by the 1st Appellant/1st**

Defendant is distinctively different from parcel No. Samia/Bujwang'a A/980...The 1st Appellant... was never the proprietor of parcel number Samia/Bujwang'a A/980 as the Plaintiff/Respondent had made the trial court to believe. In the contrary the 1st Defendant had been registered as proprietor with a 1/3 share of parcel number Samia/Bujwang'a/980...this was not a mere typographical error that one would argue could be cured by Article 159 of constitution, 2010...parties are bound by their pleadings...with the above consideration, we respectively submit that the trial court misdirected itself in issuing orders that "in the alternative the 1st Defendant to transfer land reference number Samia/Bujwang'a A/980 to the plaintiff whereas the 1st Appellant herein does not own such land parcel."

30. Terming their appeal merited, the appellants urge this court to allow it with costs.

31. In his submissions dated 28th January 2026, the respondent has addressed the court as follows: -

“The Respondent by his amended plaint...sought refund of Kshs.480,000/- that he had paid the 1st Appellant and claimed Kshs.133,989 from the 2nd Appellant being the money paid to her for allegedly running a non-existent school.

The Appellants are husband and wife. The husband is a cousin to the respondent.

During the hearing the Respondent testified and called 2 witnesses to the agreement, PW2 Joseph Ochieng and PW3 Moses Mujibi. He then tendered documentary evidence of payment.

The Appellant has submitted at length on the law of contract. In that instant case the issue was that the appellants wanted to defraud the Respondent by convincing him to invest in a non-

existent school called Upendo Academy. They made him buy L.R No. Samia/Bujwanga “A”/980 belonging to the 1st Appellant with a view to building the Upendo Academy on it. When the truth came out, the 1st Appellant refused to transfer the land hence the suit in the lower court.

The learned chief magistrate was correct in arriving at the decision she made. The 1st Appellant wanted to get the Respondent’s money, Kshs.480,000, and also remain with the land. The Court of Appeal in Antique Auctions Ltd vs. Pan African Auctions Ltd....held that to deny a party a chance of refund when the property had been repossessed by the seller would defeat the ends of justice as the seller would have both the property and the purchase price.”

32. The respondent further submits: -

“As regards the 2nd Appellant, she received Kshs. 133, 989 from the Respondent through false pretences. The Respondent tendered Mpesa statements showing the amount and date when the payments to her were made. The appellants did not have any defence only hiding behind the parties to the agreement. The lower court saw through the smokescreen. The Respondent urges the court to dismiss the appeal with costs.”

Analysis and determination

33. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see

Selle & another vs. Associated Motor Boat Co. Ltd (1968) E.A 123 and Mwanasokoni vs. Kenya Bus Service Ltd (1982-88)1 KAR and Kiruga vs. Kiruga & Another (1988) KLR 348.

34. A review of the pleading filed in this case, particularly the amended plaint dated 15th November 2019, shows that the respondent participated in the agreement dated 7th May 2014 (Pexbt 3) not as a party to the agreement, but a witness to it. The parties to the agreement were the 1st appellant and the Upendo Academy represented by the 2nd appellant.
35. In his witness statement dated 13th February 2020 which was adopted as his evidence in chief, the respondent gave evidence concerning the circumstances leading to his involvement in the agreement dated 7th May 2014. The evidence is to the effect that the appellants who are his relatives, had made him believe that Upendo Academy, which was buying the suit land, was in existence and that he

was investing in the school as a potential Director of the School. In that regard, see the respondent's statement, which at the relevant part is as follows: -

"...In 2013 while in my home in Busembe sub location, Bwiri Location, Samia Sub County, I was approached by Sarah Ogonu who is the wife of my cousin, Raphael Obubolu and Sylvanus Ojiambo Olumbe. They told me they had bought me a school. I told them I do not want a school because I lacked experience to run a school. They convinced me that it was a good school with very bright students with nowhere to go as they had been thrown out of the church compound which they operated from. ...

The school that Sarah Ogonu and Sylvanus Ojiambo talked about was Upendo Academy. Upendo Academy was a business name of Sara Ogonu, Raphael Obubolu and Sylvanus Ojiambo Olumbe...Sarah Ogonu and Sylvanus Ojiambo Olumbe were well known to me since Sarah is my

cousin, Raphael Obubolu's wife and Sylvanus Ojiambo is my very close young cousin....Sarah and Sylvanus explained to me that they needed land and building structures for the school. They invited me to visit Upendo Academy, which I did at a later date...Having the community at heart, I requested Sarah and Sylvanus to look for a parcel of land measuring between 3 and 4 acres fit for a school. I told them I would pay the purchase price of the land on condition that we run Upendo Academy together as a business. Sara Ogoni, Raphael Obubolu and Sylvanus Ojiambo Olumbe brought me into the business as one of the directors. Upendo Academy now became a business name of Sara Ogoni, Raphael Obubolu, Sylvanus Ojiambo Olumbe and I...The following day, 3 people came to my home. These were Salah Ogoni, Raphael Obubolu and Sylvanus Ojiambo Olumbe. They told me that they had found the land for the school, however,

Raphael said that it was not necessary to acquire land elsewhere since he had land. He said he would donate the land to the school. I asked him whether he was donating or selling. Raphael, Sarah, Sylvanus and I settled on the fact that he was selling the land since the same was clarified by him.

Since Upendo Academy was a business with Directors involved, Sarah, Raphael, Sylvanus and I resolved that I pay for the land as my shares...I agreed to pay for 3 acres of L.R No.Samia/Bunjang'a/980 from Raphael Obubolu for the purpose of building the school then known as Upendo Academy."

36. From the above account given by the respondent concerning his involvement in the agreement executed between the 1st appellant and Upendo Academy, and which account was not controverted by the appellants in any way, I do find and hold that the respondent participated in the agreement not

merely as a witness to it but as a person who had an interest in it as an investor in the school.

37. It is the respondent's case that he later learnt that the School was none existent and that the sale agreement purportedly entered into between the 1st appellant and Upendo Academy, represented in the agreement by the 2nd appellant, was just a scheme by the appellants calculated at defrauding him. In that regard the respondent states as follows in his witness statement/evidence in chief: -

“...All this time Sarah, Raphael and Sylvanus had convinced me that it was a registered private school, a fact they knew was false. Sarah, Raphael and Sylvanus and I agreed that I would pay Kshs.160,000/- per acre to Raphael Obubolu. In total I was to pay Kshs.480, 000/- for the 3 acres of land.”

38. As to whether the respondent ultimately paid the purchase price for the land in question, the respondent states as follows in his evidence in chief: -

“On 29/2/2014 in the presence of the Assistant Chief of Busembe Sub Location and in the presence of Sara Ogana, Sylvanus Ojiambo Olumbe, Florence Mutindi I gave Raphael Obubolu Kshs.100,000 as part payment of the purchase price of the 3 acres of LR. Samia/Bunjwang’a/980 for the purpose of building a school known as Upendo Academy...I gave them Kshs.40,000/- in cash on 28.04.2014.”

39. It is the respondent’s case that he later learnt that a portion of the suit land measuring 2 acres had earlier on, in 2009, been sold to one Linet A. Kaboche. The said buyer demanded for refund of her purchase price upon learning that the suit land had been sold to Upendo Academy. To facilitate refund of the money owed by Linet by Raphael so that they would not expose the school to legal tussle, he gave Raphael

Kshs.40,000/- on 28th March 2014. On 3rd March 2014 he gave Raphael a further Kshs.10,000/- to refund to Linet.

40. It was the respondent's case that in total, he gave Raphael Kshs.150,000/- as detailed above (Kshs.100,000/-; Kshs.40,000/- and Kshs.10,000/-).

41. Concerning the rest of the purchase price amounting to Kshs.330,000/-, the respondent in his evidence in chief states as follows: -

“The balance of Kshs.330, 000/- of the purchase price was to be considered an ongoing payment.”

42. As to whether he paid the balance of the purchase price amounting to Kshs.330,000/- and how he paid it, if at all, the respondent states as follows in his evidence in chief: -

“On 2.05.2014 I also gave him 12,000/- in cash which he had requested to apply for a certificate of search of LR. Samia/Bujwang'a/980. This was considered as part payment of the purchase

price. Later on Linet A. Kaboche through her agent Paul Oduma reported to the assistant Chief Moses B. Mujibi, Raphael's failure to refund her the balance of Kshs. 85,000/- as had been agreed in the revocation of 30.03.2014. The Assistant Chief convened a meeting and those present were Peter Juma Obubolu, Raphael Obubolu, Sala O. Ogana, Sylvanus Ojiambo Olumbe, Peter Oduma, Florence Mutindi and I. It was resolved in the said meeting that since Raphael could not be trusted with money; I would directly refund Linet A. Kaboche her balance of Kshs.85,000 which I paid to her agent Paul Oduma mobile number 0711748812 in installments of Kshs. 60,000 on 12.05.2014 and Kshs.25,000/- on 23.05.2014. The said amount was considered part payment of the balance of purchase price.

The total sum I paid for the land was Kshs.235,000/- Kshs.217,989 was the amount I spent on other expenses of Upendo Academy

such as buying books, survey fees, teacher’s salaries and teacher’s motivation amongst others as shown in the list of expenses incurred...”

43. The respondent by himself and through his witnesses and the documentary exhibits he produced in court, proved to the required standard on a balance of probabilities, that he participated in the agreement entered into between the 1st appellant and Upendo Academy, represented by the 2nd appellant, not as a mere witness but also as a person who had interest in the transaction as a potential investor/owner of the school.

44. For the foregoing reasons, I do find and hold that despite not being a party to the agreement entered into between the 1st appellant and Upendo Academy, represented by the 2nd appellant, the respondent had sufficient stake in the agreement in question and could maintain a case for refund of the amount he paid to the appellant and/or received by

the appellants on account of their representation that he was buying a stake or acquiring interest in the School.

45. As to whether the respondent proved his pleaded case on a balance of probability, upon review of the totality of the evidence adduced by the respondent comprised in his oral testimony and the oral testimony of his witnesses and the documentary exhibits he produced in evidence, I do find that the respondent proved, on a balance of probabilities, that he paid the appellants or persons owed money by the appellants, with the knowledge and approval of the appellants, Kshs.235,000/-.

46. As to whether the respondent proved his claim for Kshs.217,889/- and Kshs.133,989/-, that claim being in the nature of a claim for special damages (expenses incurred), the appellant was under a legal obligation to specifically plead it and strictly prove it. That legal imperative was not met in the circumstances of this case.

47. Concerning the Statement of Defence filed by the appellants and the evidence adduced in respect thereof, I do find it to be incapable of affording the appellants a plausible defence in the circumstances of this case, particularly against the respondent's claim for refund of moneys received pursuant to the agreement entered into between the 1st appellant and Upendo Academy, in which agreement, the respondent participated in not merely as a witness but also as an investor in the School. The consideration in respect of which the appellants received money from the respondent having failed, the appellants cannot be heard to claim that they can hide in legal technicalities, especially as relates to the respondent's right to seek refund of the monies received by them in respect of their fraudulent representation to him, which representation he acted upon to his detriment.

48. As to whether description of the suit property as **SAMIA/BUNJWANG'A "A"/980** as opposed to **SAMIA/BUNJWANG'A/980** is an error that is incapable of being cured under **Article 159** of the Constitution, from the evidence led before the trial court particularly the witness

statement of the respondent and the documentary exhibits produced in respect thereof, this court entertains no doubt that both parties understood the subject matter of the suit to be the property known as **SAMIA/BUNJWANG'A/980**. For that reason, I do not agree with the appellants' submission that the judgment and decree of the lower court is in executable.

49. The upshot of the foregoing is that the appeal partially succeeds in that the judgment of Hon. E A Nyaloti CM delivered on 28th August, 2020 is hereby set aside and substituted with an award of Kshs.235,000/-, costs of the suit in the lower court and interest of the sum awarded plus costs from the date of delivery of the judgment in the lower court.

50. Parties shall bear their own costs of the appeal.

51. Orders accordingly.

**Judgement dated, signed and delivered virtually at Busia
this 20th day of April, 2026**

L. N. WAITHAKA

JUDGE

In the presence of;

Mr Ochieng for the Appellants

N/A for the Respondent

Court Assistant; Tracy