



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC APPEAL NO. 53 OF 2021

JOHN MUCHIRI MWANIKI.....

APPELLANT

-VERSUS-

NAOMI GATHONI MUNYUA.....

RESPONDENT

(Being an appeal from the Judgment and Decree of the Senior Principal Magistrate Hon. Mathias Okuche delivered on November 16, 2021, in Nyeri MCL & E No. E013 of 2021).

JUDGMENT

1. The appellant filed this appeal, dissatisfied with the judgment of Senior Principal Magistrate Hon. Mathias Okuche delivered on November 16, 2021, in **Nyeri MCL & E No. E013 of 2021**. The Memorandum of Appeal dated December 10, 2021, details the grounds of appeal as follows:

- 1) The learned trial magistrate failed to consider his mind to the pleadings on record and evidence by the appellant, especially regarding the support for the prayers sought.**
- 2) The learned trial Magistrate erred in both law and fact by failing to consider and evaluate all the evidence and supporting documents submitted by the applicant, resulting in a miscarriage of justice.**
- 3) The learned trial magistrate erred both in law and fact by failing to recognize and consider the history of the suit land. A miscarriage of justice was caused.**
- 4) The learned trial magistrate failed to consider that the appellant and his family were forcefully dispossessed of their property, leaving them destitute and desolate. A miscarriage of justice occurred.**
- 5) The learned trial magistrate erred both in law and fact in dismissing the appellant's case, even**

though the appellant had presented sufficient evidence to justify the orders sought.

1. The appellant prays for the following orders:

1. The appeal should be allowed in its entirety.

2. The judgment of the Hon. Senior Principal Magistrate Hon. Mathias Okuche issued on November 16, 2021, in Nyeri MCL & E No. E013 of 2021 should be set aside and/or varied.

3. The Court does grant any other or further relief it may deem necessary.

4. The costs of this appeal are to be provided for.

Summary of the case before the Trial Court

2. The suit before the Trial Court was filed through a plaint dated October 16, 2020, in which the plaintiff, who is the appellant here, stated that at all relevant times, he was the rightful owner of Land Parcel No. Nyeri/Naromoru/3730 and land parcel No. Nyeri/Naromoru/3731. He claimed to have purchased both parcels for value from the late Geoffrey Munyua and Esther Wairimu Munyua, the defendants' parents. He bought the land in parts and installments.

- 3.** Apart from the purchase price for the suit lands, the plaintiff stated that he paid Kshs.50,000/= to the defendant for the expenses of the Advocate and Surveyor. During this surveying process, he discovered that his two parcels of land did not measure up to the agreed-upon 1 acre and 3 acres, and that the defendant's parents had shortchanged him.
- 4.** Furthermore, on July 20, 2020, the plaintiff received a letter from the defendant's parents accusing him of trespassing on Land Parcel No. Nyeri/Naromoru/3730 and claiming ownership. The defendant also entered the suit premises, intending to evict the plaintiff from part of the land, and has frequently summoned the plaintiff to Naromoru Police Station.
- 5.** The plaintiff denied committing any acts of trespass and prayed for a permanent injunction to restrain the defendant from interfering with his peaceful use and occupation of the suit land, and that he be declared the rightful owner of the same.
- 6.** The defendant filed her statement of defence dated 16th November 2020, denying the averments in the plaint and only admitting that the plaintiff purchased half an acre and 0.405

acres of land from her parents, stating that the plaintiff's suit raises no triable issues.

- 7.** The hearing of the case began on May 4th, 2021, when the plaintiff, PW 1, testified about the claims in his plaint and witness statement, stating that he purchased the disputed land from the defendants' parents. He also submitted his list of documents as exhibits.
- 8.** During cross-examination, he stated that he resides on the parcel of land in question and has not sold it; furthermore, no other individuals are residing on the disputed land. He purchased a total of 4 acres; however, they do not collectively equal the stated acreage.
- 9.** PW 2 Lucy Nyawira Muchiri stated that she is the plaintiff's wife. She relied on her witness statement, in which she stated that they had purchased a total of 4 acres of land, but now the defendant intends to evict them from the suit land.
- 10.** PW 3 Duncan Mwangi testified that the plaintiff is his friend and relied on his witness statement dated March 18, 2021, as his evidence in chief. He stated that he witnessed one

agreement for the sale of land, which was produced as plaintiff Exhibit 2.

11. DW 1 Naomi Gathoni Munyua, the defendant herein, adopted her witness statement as her evidence in chief as well as her bundle of documents. In her witness statement dated 16th November 2020, she stated that the plaintiff entered into an agreement for the sale of half an acre in Nyeri/Naromoru/3730 at a consideration of Kshs. 85,000/= from her late father and a further agreement to purchase 0.405Ha of Nyeri/Naromoru/3731 at a consideration price of Ksh 180,000/=.

12. When the defendant's parents passed away, she, as the administratrix of their estates, sought the help of the area chief to determine the ownership of the parcels of land that her parents had sold. The plaintiff had only told the chief verbally that he had purchased 4 acres. However, upon requesting the sale agreements, he provided only the agreements for the purchase of half an acre at Nyeri/Naromoru/3730, which he later sold to Joseph Kahiga, and one acre at Nyeri/Naromoru/3731.

- 13.** Upon request for additional documentation, the plaintiff submitted acknowledgments from her late mother, Esther Wairimu Munyua, for Kshs. 160,000 dated November 12, 2011, and another for Kshs. 190,000 dated April 25, 2012, indicating these were the balances owed for 3 acres of land he had purchased.
- 14.** The defendant stated that her deceased mother could not read or write, and only signed documents after they had been read to her. The parcels of land sold were subsequently subdivided in accordance with the documentation provided.
- 15.** She accused the plaintiff of fencing off unsold land to him, claiming they belonged to him, thereby dispossessing the legitimate owners of the parcels of land. She reported the issue to the police, who advised her to seek legal redress.
- 16.** Upon cross-examination, the defendant stated that it was her brother who wrote down the agreements. She contended that the agreement dated 25 April 2012 is not genuine because it was neither witnessed nor written by her brothers.
- 17.** DW 2 Charles Gathangu Munyua stated that the defendant is his sister and adopted his witness statement as his main

evidence. He mentioned that the plaintiff only bought 1.5 acres of land from his mother. He also noted during cross-examination that some agreements were presented as having been signed by him; he and his siblings had signed them because their mother was illiterate.

18. DW 3 Daniel Kathenea, Area Chief Kahuriene, located within Kieni sub-county, relied on his witness statement and testified that he knows both the plaintiff and defendant, who are within his jurisdiction. He stated that the plaintiff, during a meeting with the parties, initially claimed 1.5 acres of the suit land but later claimed 4 acres. He mentioned that he was not present when the agreements were made, but he had a chance to see them. This marked the close of the defense case.

19. The Trial Court delivered its verdict on the 11th of November 2021, finding that the plaintiff had not proven his case on a balance of probabilities, and proceeded to dismiss the suit with costs to the defendant.

Appellant's written submissions

20. The counsel for the appellant argued that the Trial Court found evidence that payment for the suit lands was made, and

the remaining balance was settled through an acknowledgment of receipt of funds, which satisfies the requirements under section 3(3) of the Law of Contract Act.

21. It was also emphasized that the respondent's claim that the acknowledgment notes dated November 12, 2011, and April 25, 2012, were fraudulent was not proven, despite the legal requirement that allegations of fraud must be substantiated. Reliance was placed on the authority of **Urmila w/o Mahendra Shah v. Barclays Bank International Ltd & another [1979] KECA 15 (KLR)**.

22. The appellant argues that he was a bona fide purchaser for value, which he demonstrated and relied on the Ugandan case of **Katende v. Haridar & Company Limited [2008] 2 E.A 173**.

23. Counsel concluded that the appellant's continuous, open, and uncontested occupation of the property for eight years further supports the status as rightful owner of the property and submits that the Trial Court erred in deciding against the weight of evidence, and prayed for their appeal to be allowed.

Respondent's written submissions

24. The respondent's submissions mainly addressed issues regarding whether the appeal was filed within the required time, whether the suit before the Trial Court was time-barred, whether the appellant proved his case on a balance of probabilities, and who should bear the costs of this appeal.

25. The respondent contended that the appellant submitted this appeal six (6) days subsequent to the expiration of the thirty (30) days prescribed by law. The appellant did not seek leave from the Court prior to filing the appeal and has not provided any explanation for the delay. See **Nick Salat v. Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR)**, citing, with approval, the decision of the Supreme Court of California in **Silverbrand v. County of Los Angeles [2009] 46 Cal. 4th 106.**

26. Regarding the merits of the appeal, the respondent argues that, based on the plaint, the appellant's suit relies on an alleged sale agreement made between 2011 and 2012. Therefore, the suit was based on an alleged contract, and under Section 4(1) of the Limitation of Actions Act, it should

have been filed within six (6) years from the date the cause of action arose, which was on or before 2017. This suit was filed on October 20th, 2020, which is more than nine (9) years later. The respondent relies on the decisions in **Silverbird Kenya Limited v. Junction Ltd & 3 Others [2013] eKLR**, **Michael Benhardt Otieno v. National Cereals & Produce Board (2017) eKLR**, **Gathoni v. Kenya Cooperative Creameries Ltd (1982) KLR 104**, **Iga v. Makerere University [1972] EA**, **Bosire Ogero v. Royal Media Services [2015] eKLR**, and **Mehta v. Shah [1965] E.A 321**.

27. Regarding the merits of the appeal, the respondent argues that a quick review of the alleged agreements shows that the land being sold to the appellant was not clearly identified. The alleged sale agreements do not specify the land parcel(s) involved. The appellant's pleadings mention parcels of land Nos. Nyeri/Narumoro/3730 and 3731. A review of the alleged sale agreements confirms they are invalid and unenforceable because they do not describe the land being sold. The respondent, in this regard, cited the case of **Broadspect Investment Limited v. Francis Njoroge Mwangi**

[2017] KEELC 3786 (KLR), which quoted with approval the decision in **Nelson Kivuvani v. Yuda Komora & Another, Nairobi HCC No. 956 of 1991.**

28. The respondent argues the sale agreement lacked Land Control Board approval, which is mandatory within six months for agricultural land. No approval was sought or granted, citing Section 8(1) of the Land Control Act and the case **David Sironga Ole Tukai v. Francis Arap Muge & 2 Others [2014] eKLR.** Without approval, the agreement is null and void.

29. The respondent finally asserts that the appellant did not prove his case on a balance of probabilities. The disputed agreements, dated November 12, 2011, and April 25, 2012, lacked signatures and/or witnesses, as is typical of agreements executed by the respondent's mother. The respondent, in her defense, denied that these agreements existed. As previously argued, it was the appellant's duty to present evidence showing that the respondent's mother did indeed sign the sale agreements and received the payment. The appellant did not call the individuals who allegedly drafted the sale agreements.

Additionally, the witnesses called by the appellant confirmed they were not witnesses to the said agreements. The court was asked to investigate the authenticity, truthfulness, and validity of the alleged sale agreements and to note that the court cannot ignore the clear provisions of the law. This is supported by the ruling in **Trust Bank Limited v. Paramount Universal Bank Limited & 2 Others [2009] KEHC 2494 (KLR)** as cited by the respondent.

30. The respondent contends that the learned magistrate did not err in law or fact in dismissing the case. The appellant's evidence was sparse and questionable; therefore, the Trial Court's decision was justified. Furthermore, the question arises as to why the appellant took over nine years to institute this suit. The respondent's father passed away in 2016, and her mother in 2017. The appellant did not file suit against the respondent's father or her mother until after their death. Additionally, the appellant remained inactive until the year 2020, which was over four years after the death of the respondent's father, when he finally filed this suit.

Analysis and determination

31. The role of the first appellate court was outlined in the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR**, and was summarized 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 reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

32. In **Peters v. Sunday Post Limited [1958] EA 424**, and **Mbogo & Others v. Shah [1968] EA 93** on the principle that an appellate court should not interfere with a Trial Court's discretion unless it is convinced that the court, in exercising its discretion, misdirected itself on some matter and consequently reached a wrong decision, or it is clearly evident from the case as a whole that the court was plainly wrong in exercising its discretion, resulting in a miscarriage of justice.

33. Having considered the Appellant's Memorandum of Appeal and submissions of the parties, the issues to be determined

can be summarized as follows: whether the appeal was filed out of time; whether the suit before the Trial Court was statutorily barred; whether the Trial Court erred in not finding that the appellant had proved his case on a balance of probabilities; whether the appellant was entitled to the reliefs sought in the Lower Court and who should bear the costs of the appeal.

34. Regarding whether the appeal was filed late, a review of the record shows that no judgment was delivered on November 16, 2021. Instead, the Trial Court delivered its judgment on November 11, 2021, as confirmed by the judgment and decree on pages 137-150 of the Record of Appeal.

35. This appeal was filed after the thirty (30) days allowed by law. According to the appeal record, the Memorandum of Appeal was paid for on December 17th, 2021, with payment receipt Reference number EYNTHE94. The law requires (see section 79G of the Civil Procedure Act) that an appeal from a Lower Court to the High Court be filed within thirty (30) days of the decision date.

36. In this case, the thirty (30) day period expired on October 27th, 2024. The Appellant filed this appeal six (6) days after the deadline. The appellant did not seek leave from the Court before filing and has not explained this delay. It is well-established law that even a one (1) day delay must be adequately explained, and the Court will decide whether the delay is unreasonable.

37. The appellant has not done so here. I am guided by the decision in **Nick Salat v. Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR)**, citing with approval the Supreme Court of California decision in **Silverbrand v. County of Los Angeles [2009] 46 Cal. 4th 106**, holding that:

“As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite.... Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal..... The purpose of this requirement is to promote the finality of judgements by

forcing the losing party to take an appeal expeditiously or not at all.

38. Further in **Namukana v Barasa & 4 others**

[2025] KEELC 337 (KLR), the ELC made this statement regarding the discretion to enlarge the time within which to appeal:

“Even when there is a delay of a day which is not sufficiently explained, the Court may not exercise discretion to extend time just because the duration is short. There has to be a reasonable explanation given to the Court’s satisfaction after which it will consider whether the period of delay is short or unreasonably long.”

39. The appeal we have is based on a non-existent judgment claimed to have been delivered on November 16, 2021; however, the disputed judgment was actually issued on November 11, 2021, well after the 30-day window to file an appeal had expired.

40. This court was never prompted to extend the time within which to appeal, meaning the current appeal is being considered without proper jurisdiction. In that regard, I agree

with the respondent that there is no competent appeal before this Court for determination.

41. Regarding the limitation of time, although I agree with the respondent that we are dealing with the enforcement of land sale agreements and that any action stemming from those agreements should have been filed within six years of signing them, even if it is jurisdictional, this issue was never discussed in the Lower Court. I do not need to address it here.

42. From the pleadings, as can be inferred from the plaint, it appears that the suit is based on allegations that, between 2011 and 2012, the appellant purchased two land parcels from the respondent's parents. The appellant was required to produce a sale agreement to support his claims, in accordance with Section 3(3) of the Law of Contract, which became effective on June 1, 2003, and mandates that all transactions involving the purchase of land be in writing. It states as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party...”

43. In the Kenyan context, the burden of proof lies with whoever wishes the court to accept the facts he claims. Section 107 of the Evidence Act Cap 80 states that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

44. Mativo J. (as he then was) in the case of **Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR)** examined the concept of burden of proof in this manner:

“Whereas it is true that where a party fails to adduce evidence, its pleadings remain mere allegations is correct, this proposition is not a statement of general application to be applied blindly and without due regard to the facts and circumstances of the facts at hand. The peculiar facts of each case must be considered. As we all know, in both criminal and civil cases, the phrase ‘burden of proof’ is commonly said to be used in two quite distinct senses. In one sense it means ‘The peculiar duty of him who has the risk of any given proposition on which the parties are at issue — who will lose the case if he does not make this

proposition out, when all has been said and done.’ A basic test for determining which party has the burden of proof is contained in the judgment of Walsh JA in Currie v Dempsey. His Honour stated “in my opinion [the legal burden of proof] lies on a plaintiff, if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, e.g., if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an “avoidance” of the claim which, prima facie, the plaintiff has.”

45. A review of the alleged sale agreements confirms that they are invalid, unenforceable, or not valid at all. I am fortified by the decision in the case of **Broadspect Investment Limited v. Francis Njoroge Mwangi [2017] KEELC 3786 (KLR)**, the court, citing **Nelson Kivuvani v. Yuda Komora & Another, Nairobi HCC No. 956 of 1991**, observed that:

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and

signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

46. All the ingredients listed above have not been satisfied in the instant sale agreements alleged by the appellant, and therefore, they are all null, invalid, and unenforceable in law.

47. Notably, as previously mentioned, the various sale agreements do not specify which parcels of land were sold to the appellant. This issue is further complicated by the fact that there are two acknowledgments allegedly signed by the respondent's late mother, Esther Wairimu Munyua, for Kshs. 160,000 dated November 12, 2011, and another for Kshs. 190,000 dated April 25, 2012. These documents suggest that these amounts were the remaining balances owed for 3 acres of land the appellant purchased, but they do not specify which land. As the Trial Court found, unlike the earlier agreements witnessed by his children, she could neither read nor write, and the Trial Court correctly cast doubts on these acknowledgments, especially since they were brought in late, well after the death of the respondent's parents, making it unclear whether the deceased ever received these payments.

48. Furthermore, no approval was ever secured from the relevant Land Control Board to complete the transaction between the parties, as it involved agricultural land, even though the ELC now emphasizes the parties' intentions more than formal legal procedures like obtaining consent from the LCB for agricultural land transactions.

49. In the case of **Benjamin Leonard McFoy v United Africa Company Limited [1961] ALL ER 1169**, the court stated as follows:

“If an Act is void, then it is in Law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

50. In my view, the sale of land agreements subject to the Lower Court's trial were legally null and void. I agree with the Trial Court's conclusion on this point.

51. On trespass, the appellant claimed that the respondent trespassed onto his parcels of land. Trespass is a tort that requires proof, which was not presented before the Trial Court.

52. The Court of Appeal sitting in Eldoret, in **Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR**, cited the following references with approval:

“In M’Mukanya v M’Mbijiwe (1984) KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated as follows:

“trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See Thomson v Ward, (1953) 2QB 153.”

Further, in Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition, at page 428 states as follows:

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of

several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.” [Emphasis supplied].

53. Based on the above analysis, I opine that the Trial Court did not err in concluding that the appellant failed to prove his case on a balance of probabilities regarding his claim that the respondent trespassed onto his land, his request for a permanent injunction, and his assertion that both suit properties should total 4 acres beyond the parcels of land he had purchased cannot hold.

54. In a nutshell, the appellant was not entitled to the orders as sought in the Lower Court.

55. Arising from the foregoing, the current appeal has no merit; it is dismissed with costs.

Dated, signed, and electronically delivered in Nyeri on this 9th day of April, 2026.

E. K. MAKORI

JUDGE

In the presence of:

Ms. Kimotho for the Respondent

Kendi: Court Assistant

In the absence of:

Mr. Ombongi for the Appellant