

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NANYUKI**

**ELC APPEAL NO.E001 OF 2025**

**GERALD WACHIRA NGUTHI.....**

**APPELLANT**

**VERSUS**

**PHILIP MUBURI MWANGI..**

**.....RESPONDENT**

***(Being an appeal from the judgement of Hon L.K. Mutai  
delivered at Nayuki Chief Magistrates Court on  
30.11.2017 in Civil Case No. 82 of 2012)***

**JUDGMENT**

**The Case before the Trial Court**

**1.** The suit before the trial court was instituted by the respondent herein vide a plaint dated 2.8.2012. He contends that he owned, and still owns the suit parcel GAKAWA/KAHURURA BLOCK 2/TEMU/139 measuring about 0.0464 hectares. That vide an agreement dated 22.2.2012, the plaintiff was to sell the suit parcel to the

defendant at a cost of Ksh. 1, 750 000, of which the defendant paid Ksh. 1, 200 000 upon execution of the agreement. However, due to family misunderstanding, the plaintiff was unable to conclude the transaction and therefore rescinded the agreement. He therefore refunded back the monies paid through the bankers cheques dated 22.5.2012 for the sum of Ksh. 700 000 and Ksh 500 000. He also forwarded to the parties advocate the sum of Ksh 175 000 being the agreed liquidated amount of damages set at 10% of the purchase price.

2. The plaintiff further pleaded that the defendant damaged the fence and the temporary structures and then started to develop the suit land, threatened to sell the same and was demanding payment of Ksh 1, 091 000 instead of sh.175 000.
3. The plaintiff therefore prayed for judgment in the following terms;

**“a) A permanent injunction to restrain the defendant, either by himself, his agents, servants, employees or anyone else claiming through him from selling, transferring,**

**alienating, damaging, wasting, stepping on building/constructing and/or in any manner whatsoever dealing and or interfering with the ownership, use and possession of the plaintiff's suit property known as land parcel title No. GAKAWA/KAHURURA BLOCK 2/TETU/139.**

- b) A declaration that the defendant is only entitled to a refund of the part purchase price and agreed liquidated damages.**
- c) An order to nullify and revoke the sale agreement in issue.**
- d) Costs of this suit and interests thereon”.**

**4.** The Appellant filed his statement of defence dated 23.8.2012 contending that the agreement had no room for unilateral rescission of the contract, adding that as per the agreement, he had a right to commence developments on the suit land.

**5.** At the trial, the respondent/plaintiff testified as PW1. He relied on his witness statement filed on 2.8.2012 as his evidence. His evidence mirrors his pleadings, adding that his wife Agnes Njeri Mwangi lodged a caution on the land.

- 6.** On cross examination, Pw1 stated that when he set out to sell the land, he had not consulted his wife who then objected to the sale. However, he had not expected her to object to the sale. He concedes to having sold yet another parcel on 12.3.2012 next to the suit land, No. Gakawa/Kahurura/Block 2/Temu/40 which his wife did not object to its sale because she had not known about the said sale. He sold the said plot for Ksh 3 million.
- 7.** He avers that as per the agreement, the defendant was to take possession on 22.2.2012, but he took possession on 17.6.2012. He also stated that the title was with the bank and failure to avail the same within 60 days was a breach on his part. He avers that the defendant did not issue a notice to terminate the agreement. He contends that if the court orders him to sell the land, he will oblige.
- 8.** PW2 was Agnes Njeri, she adopted her witness statement dated 3.2.2015 as her evidence. She identifies the plaintiff as her husband. She contends that it was not until April 2012 that she discovered that the plaintiff had secretly sold the suit land, of which her husband instructed his advocate to rescind the transaction. However in June of the same year,

her husband informed her that the defendant had declined to accept the refund. She contends that she contributed financially towards the acquisition of the suit property.

**9.** On cross examination, Pw1 stated that the suit land is registered in the name of the plaintiff, but she contributed a sum of Ksh 200 000 for its acquisition. She avers that they also had an adjacent plot no 140 which was transferred to Chamasis in March of the same year. She had made contribution towards acquisition of this plot too, she would have claimed this plot too if it was possible, but she was not aware of the sale.

**10.** The case for the defendant, now appellant was advanced by himself as DW1. He admits that indeed the parties entered into an agreement for the sale of the suit land, of which the title was held at the bank. He avers that clause 6 of the agreement dictated that the plot was his immediately the agreement was executed, thus he took possession and put up a perimeter wall. He avers that the sale price was Kshs. 1 750 000 of which he paid Ksh 1.2 million. That a week after the agreement, the plaintiff called him to his place where he was with his wife Pw2, and offered to sell plot

140. However, Dw1 told the plaintiff that he did not have money. Later, the plaintiff told him that his wife had refused the sale, that an offer of refund was made to him but he declined as he had paid brokers. The money was banked in his Equity account. He avers that the suit land was cautioned on 29.5.2012.

**11.** On cross examination, Dw1 stated that the suit plot is his because he took possession after two weeks. He contends that the sh.1.2 million was deposited into his account, along with the 10 % of the deposit, hence a total of Ksh. 1,375 000 adding that the sale agreement could be terminated at clause 13. He avers that he brought materials in August and kept a lorry to ensure that no one entered the plot. He avers that his fence is worth sh. 800 000.

**12.** In the judgment delivered on 30.11.2017, the trial court nullified the agreement making a finding that the defendant was only entitled to a refund and was condemned to pay costs.

### *The Appeal*

**13.** Aggrieved by the aforesaid decision, the appellant filed his memorandum of appeal dated 15.1.2018 raising eight (8) grounds of appeal enumerated as follows;

**“1. The learned Magistrate erred in failing to find that the respondent being a plaintiff in the case appealed from could not plead lack of consent of the land control board whose responsibility to procure lay with him.**

**2. The learned Chief Magistrate erred in failing to find that there was no evidence tendered by the respondent tending to show that the transaction between him and the appellant which was the subject of the suit was a controlled transaction within the relevant provisions of the Land Control Act and therefore requiring consent of the Land Control Board.**

**3. The learned Chief Magistrate misdirected herself in failing to make enquiry as to whether the transaction above was a**

**controlled one within the meaning of the Land Control Act.**

- 4. The Learned Chief Magistrate misdirected herself in misinterpreting the provisions of the agreement and in particular failing to find that rescission of the agreement was in terms of the agreement at the instance of the innocent party and not the defaulting party.**
- 5. The Learned Chief Magistrate misdirected herself in failing to find that the respondent had no cause of action against the appellant.**
- 6. The learned Magistrate misdirected herself in failing to find that the respondent was not truthful in his allegation that the transaction between him and the appellant was met with objection from the respondent's wife or in failing to find that under the then prevailing legislation the**

**respondent's wife had no interest in the transaction.**

**7. The Learned Magistrate erred in failing to consider that the respondent had given possession of the suit premises to the appellant who had taken such possession and commenced developments on the suit property based on the representations from the respondent.**

**8. The Learned Chief Magistrate erred in failing to consider the circumstances of the case in totality and refuse to award the costs of the suit to the respondent”.**

**14.** The appellant therefore prays that the judgment of the trial court be set aside, that the claim of the plaintiff be dismissed and that he be awarded costs.

**15.** The appeal was filed at the High court Nanyuki Civil Appeal no 2 of 2018 culminating in a decision delivered on 20.2.2025 where the court found that this being a land matter, the said court had no jurisdiction to handle the matter. The appeal was then transferred to this court and

was set down for hearing on 26.1.2026. On the said date, the advocates for the parties agreed that this court proceeds to write the judgment based on the directions given earlier on.

**16.** Against this back ground, the court has considered the submissions of the appellant dated 19.7.2023 and those of the respondent dated 9.9.2024 as well as the entire record. The issue falling for determination is whether the grounds raised in the memorandum of appeal warrant the setting aside of the trial court's judgment.

**17.** This being a first appeal, the court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the evidence and then determine whether the conclusions reached by the learned magistrate are to stand and give reasons either way as per the pronouncement of the court in the case of **Abok James Odera t/a A.J Odera & Associates Vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR.**

**18.** To start with, the agreement between the parties dated 22.2.2012 is not disputed and even the purchase price of Ksh 1 750 000. The case of the respondent is that he rescinded

the agreement after his wife objected to the sale, he then refunded the amounts paid by the appellant , the same being Ksh.1.2 million, plus the penalty of Ksh 175 000, the same being the 10% deposit. The appellant avers that indeed this money was paid into his bank, but he did not accept the rescission as he had taken over the suit land and had commenced developments.

**19.** I have scrutinized the agreement whereby clause 1.3. (a) provided for termination and rescission in the following terms;

**“Either party being ready and able to complete shall be entitled to terminate this Sale Agreement on the breach or default of the other party in complying with or performing their obligations in accordance with this Sale Agreement and the Law Society conditions applicable to the same”**

**20.** Sub sections (c) and (d) of the above clause stipulated that termination was on account of breach by the opposite party. The letter by the respondent dated 25.5.2012 rescinding the agreement does not fit the bill in the

aforementioned clauses as the same did not attribute any breach on the part of the appellant.

**21.** Does the above finding give the appellant any rights to the suit property? Again the fall back is the agreement. The appellant contends that he became the owner of the suit plot upon taking possession in terms of clause 6 of the agreement. The said clause provides as follows;

**“The property is sold with all the buildings developments and improvements and possession shall be given to the purchaser immediately upon execution of this agreement”.**

**22.** There is nothing in the said provision to indicate that possession was equated to ownership. This is because the sale transaction was tied to other steps particularly the one on completion of which such completion did not take place. Thus the appellant cannot assert his claim on the basis of taking up possession.

**23.** What I discern is that the transaction was frustrated by the respondent, however, this was done early enough, such that 3 months into the agreement, that is in MAY 2012, the

appellant had notice that the transaction had hit a snag, even as he continued with the developments.

**24.** In the Court of Appeal case of **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR**, the Court stated thus;

**“We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. See National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002]2 EA 503. The primary task of the court is to construe the contract and any terms implied in it”.**

**25.** In the case at hand, the appellant did not counter claim anything, yet it is clear beyond peradventure that rights and interests in the land did not crystalize in favour of the appellant as no transfer was effected. It is not the place of this court to resuscitate a dead contract. In that regard, and noting that the amounts paid by the appellant were refunded

at an early stage, I find no reason to disturb the findings of the trial court save on costs.

**26.** Thus this appeal is hereby dismissed. Each party is to bear their own costs at the appeal and before the trial court.

**DATED, SIGNED AND DELIVERED AT NANYUKI THIS  
22<sup>ND</sup> DAY OF APRIL 2026 THROUGH MICROSOFT  
TEAMS.**

**LUCY N. MBUGUA  
JUDGE**

**In the presence of:**

**Mwangi Kariuki for Appellant - absent**

**Kiget for Respondent**

**CA Nancy Mwangi**