

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ELC APPEAL NO. E007 OF 2025

SALLY NJERI RWIMBO.....

APPELLANT

VERSUS

FRANCIS KIURA GACHAGUA.....

RESPONDENT

***(Being an appeal from the judgement of Hon L. Mutai
(CM) delivered at Nanyuki Law Courts on 8.6.2018 in
CMCC No.99 of 2011)***

JUDGMENT

The case before the trial court

1.The suit before the trial court was instituted by the respondent vide a plaint dated 18.10.2011. The plaintiff avers that on 21.7.2008, the parties entered into an agreement for the sale of the suit property at ksh.380 000 of which the defendant paid the sum. It was however a term of the contract that the defendant was to pay outstanding rates and rent, but he didn't.

2. That thereafter, the defendant purportedly and mysteriously amended the sale agreement, culminating in the rescission of the contract. Then the defendant through her letter of 11.12.2009 demanded Ksh915 000. The plaintiff therefore sought the following orders.

“ a) A permanent injunction to restrain the defendant either by herself , her agents , servants, employees or any one else through her from selling, disposing off, alienating or interfering with the ownership, use and possession of the plaintiff’s suit property known as UNSURVEYED RESIDENTIAL PLOT A2 PLOT NO.21NANYUKI MUNICIPALITY,

b) A declaration that the defendant is only entitled to refund of the purchase price,

c) Costs of the suit and interest there on”

3. In opposition thereof, the defendant, now the appellant filed a statement of defence dated 1.11.2011 where she admits that the parties had an agreement for the sale of the suit land, but the outstanding rates and rents were to

be paid by the plaintiff. She denies that she breached the agreement or that she revoked the same. She adds that she was a bonafide purchaser of the suit plot which is a half plot hived from UNS RESIDENTIAL A2-PLOT NO.21-NANYUKI MUNICIPALITY which she has since sold to one Flora Wanja Kimotho who is in possession of the said land.

4. At the trial, the respondent/plaintiff testified as PW1, (FRANCIS KURIA GACHAGUA). He avers that he sold the suit plot to the defendant vide the agreement dated 21.7.2008, produced as exhibit 1, of which the husband of the defendant signed the agreement. He had bought the said plot from one John Kipanin via a sale agreement of 20.4.2005. produced as exhibit2. He contends that the defendant was to pay the rates, but he altered the agreement to indicate that he was the one to pay the said rates. Upon seeking legal advice, he revoked the agreement vide the letter from his advocate dated 13.3.2009 and also called the defendant to collect the purchase price. That in a letter of 11.1.2010, the

defendant demanded the sum of Ksh 915 000. The plaintiff had drawn a bankers cheque of Ksh 380 000 in favour of the defendant and deposited the same with her advocate.

5. He contends that the defendant breached clause 5 and 8 of the agreement. He denies demolishing structures on the suit property.

6. On cross-examination, Pw1 reiterated that he revoked the agreement vide his letter of 13.3.2009. He avers that he was required to pay rates from 20.4.2005, but he didn't. He also had no evidence of the outstanding rates as at 21.7.2008. He reiterated that clause 5 of the agreement required the defendant to pay rates. He contends that by 13.3.2009, he had deposited the refund of sh 380 000 with his advocate, then on 19.9.2011, he did the cheques. Pw1 does not know who Flora is, the one who apparently bought the suit land from the defendant.

7. In re-examination, Pw1 stated that he saw the altered agreement two months after July 2008.

8. The defence case was advanced by the appellant Sally Njeri Rwimbo, DW1 and her witness. She says that their sale agreement is dated 21.7.2008 and she was not shown any documents on rates. She paid the total purchase price of sh 380 000. Then on 6.2.2009, that is 6 months after the purchase, she sold the suit plot to Flora Wanja Kamotho. She confirms that the plaintiff wrote the letter of 13.3.2009 revoking the agreement. She avers that her advocate did not inform her that the cheque for refund had been deposited. However, she did demand the sum of Kshs. 915000 through her advocate. She averred that it is the plaintiff who was supposed to pay the rates.

9. On cross-examination, Dw1 admits that she gave her husband authority to sign the agreement on her behalf. She does not know who altered the agreement. She avers that the plaintiff asked her to collect the purchase price but she declined as the agreement was still valid. She avers that she sold the land at sh 750 000 of which the new purchaser has put up a fence and a structure.

She also paid rates of Kshs. 6840 for the plot on 13.10.2011.

10. In re-examination, Dw1 avers that she paid rates on behalf of Flora so that her construction plan could be approved. She denies having received the purchase price.

11. Dw2 is one Flora Wanja Kimotho. She adopted her witness statement dated 21.1.2015 as her evidence. She avers that she bought the suit plot from the defendant at a cost of Kshs. 750 000 vide an agreement dated 6.2.2009. She deposited materials on the plot but a court order restrained her.

12. On cross-examination, Dw2 stated that in their agreement, it stated that the plaintiff was to be contacted in relation to the lease of which the allotment letter she was given bore the name of the plaintiff. She is not aware that the agreement between Francis and Sally was revoked.

13. In the judgment delivered by the trial court, the final findings were as follows;

“Having said that this court finds it extremely difficult to find who altered the agreement leading to the breach of the sale agreement. I therefor find that the two sale agreement herein is null and void as we cannot ascertain which is the genuine and direct that status quo ante be maintained. Plot number Unsurveyed Residential A2 Plot No. 21 Nanyuki Municipality, the suit property herein therefore reverts back to the plaintiff. The defendant herein is directed to vacate the suit property and collect the purchase price from her advocate. Each party shall bear its own costs”.

The Appeal

14. Aggrieved by the aforesaid decision, the appellant filed her memorandum of appeal dated 6.7.2018 raising six (6) grounds of appeal summarized as follows. That

the learned magistrate erred in law and fact in acting suo moto in holding that she could not ascertain as to which was the genuine agreement hence the two agreements were null and void, directing that the status quo ante be maintained, and applying erroneous standard of proof thereby reaching a conclusion that was contrary to the evidence.

15. The appellant therefore prays for judgment that the appeal be allowed, that the judgment of the trial court be set aside and that she be awarded costs

Analysis and Determination

16. The duty of the 1st appellate court was explained in the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] Ea 123**, where it was observed thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put

they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion.”

17. I have looked at the evidence on record and the rival submissions. There is no dispute that the protagonists had entered into a land sale agreement dated 21.7.2008 of which the appellant paid the purchase price. The respondent blames the appellant for breaching the agreement and altering the same to reflect that the rates and rent were to be paid by the respondent yet they were to be paid by the appellant. The appellant denies any breach and contends that she has since sold the plot to Dw2.

18. It has been held that courts cannot re-write contracts for parties and courts are also bound by what parties agreed to. The Court of Appeal in the case of **Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR** cited in agreement the case of **Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR** which stated that;

“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.”

19. The whole dispute turns on the sale agreement. The respondent availed the two agreements where at clause 5, there is a variance, one stating that the rates were to be paid by the purchaser, while the other one stated that they were to be paid by the vendor. The appellant has only availed the version of the agreement which states that the rates were to be paid by the vendor. The revocation letter of 13.3.2009 by the respondent gives one of the reasons for revocation of the agreement as unilateral alteration of the same. This would mean that the respondent was by then aware of the offending version of the agreement. The respondent does not explain the circumstances under which he got hold of the new version of the agreement.

20. As for the response made by the appellant vide her letter of 11.12.2009, it does not shed light at all on the existence of the two agreements. The appellant made a general denial of the allegations, emphasizing more on how she had already sold the suit land. For an accusation that was attracting revocation, the appellant dealt with the matter casually, particularly on the issue of rate payments and alteration of the agreement. What more, she embarked on selling the suit land when the rights in the said land had not been transferred to her.

21. In **William Kazungu Karisa v Cosmas Angore Chanzera [2006] e KLR** the Court held that,

“The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them”.

22. I pose the question? What were the respective obligations of the parties in light of the existence of two sale agreements? Only the culprits in the alteration would know. And from the evidence tendered before the

trial court and re-appraised herein, the culprit could not be pointed out. It follows that the trial court cannot be faulted in making a finding that parties revert back to their original position. To this end, it is noted that no transfer had been effected by the respondent in favour of the appellant. Thus the appellant had no good interests in the land capable of being transmitted to a third party.

23. In the end, I find no reason to disturb the decision of the trial court, thus this appeal is hereby dismissed with costs to the respondent.

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

**LUCY N. MBUGUA
JUDGE**

In the presence of:

M/s Njuguna h/b for Wahome Gikonyo for Appellant

M/s Lenaola for Respondent

CA Nancy Mwangi

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