

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO. E007 OF 2024

MARGARET NDUTA KARANJA.....
APPELLANT

VERSUS

ESTHER NJOKI
WAMATHAI.....RESPONDENT

***(Being an appeal from the judgement of Hon E. H Keago
(CM) delivered at Nyahururu Law Courts on 27.3.2024 in
CMELC No.76 of 2021)***

JUDGMENT

The Case before the trial court

- 1.** The suit before the trial court was instituted by the appellant herein vide a plaint dated 19.10.2021. The plaintiff pleaded that vide an agreement dated 14.10.2016, the plaintiff purchased the suit property NYANDARUA/OLJOROROK SALIENT/20561 from the vendor (1st defendant), now the respondent at a cost of sh. 3 000 000. That the plaintiff paid a deposit of sh.1,500,000/, while the balance was to be paid once the vendor hands

over the consent from the Lands Control Board. However, the vendor informed the plaintiff that the transaction could not be completed as an objection had been filed in the Nakuru succession case no. 683 of 2014, of which the vendor approached the plaintiff to finance the case in terms of legal fees and other costs and the plaintiff obliged.

- 2.** That sometime in year 2019, the plaintiff informed the vendor of her inability to pay the balance of the purchase price as her funds were held up in an investment, the subject of a court case in Milimani commercial Court case no. 7397 of 2019. That the two parties agreed on immediate transfer of the suit land to the plaintiff whereby the plaintiff undertook to pay the balance of the purchase price.
- 3.** That on 19.6.2021, the Nakuru succession case was ruled in favour of the vendor, but the vendor refused to transfer the land to the plaintiff insisting on full payments. The plaintiff then proposed that the vendor subdivides the suit land and transfer a portion of the suit property equivalent to the deposit paid, but the vendor declined this proposal,

insisting on full payment. The plaintiff then made an application for the suit land to be cautioned. She then learnt that the vendor was in the process of selling the suit land.

4. The plaintiff therefore sought the following orders;

“a) An order against the 1st Defendant for the immediate subdivision of the suit properties and transfer to the Plaintiff of a portion of land equivalent to the sums already spent by the Plaintiff, plus the cost incurred in this suit inclusive of the legal fees and incidental costs.

b) An order against the 1st Defendant that the transferred portion of land as prayed in order a) above shall strictly be the portion which does not contain the grave of her deceased husband and that is accessible through the public access road as well as being adjacent to the public/community water tank in the vicinity.

c) An order against the 1st Defendant that save for stamp duty, all costs related to the transfer, registration, subdivision and any other

associated and or incidental cost related to the enforcement of orders (a), (b) above shall be borne by the 1st Defendant.

d) An order that the 2nd and 3rd Defendant shall immediately and or within 60 days implement the orders a) to c) above and shall file a compliance report with the 4th Defendant and this honourable court at the end of the sixty (60) days from the date of issuance of the above orders.

e) An order that the 4th Defendant shall monitor the progress of implementation of the orders and shall file a report with this honourable court at the end of sixty (60) days from the date of issuance of the above order.

f) Any appropriate injunctive relief.

g) Costs of this suit; and

h) Other remedies this honourable court may deem fit”.

- 5.** The respondent/ 1st defendant/ vendor opposed the suit vide her statement of defence dated 8.11.2021 where she admitted that she is the bonafide registered owner of the

suit land and that the parties had an agreement dated 14.10.2016 for the sale of the suit land at sh. 3 000 000 of which the plaintiff paid sh.1 500 000 as deposit.

- 6.** She avers that there was no good reason advanced by the plaintiff as to why she failed to pay the purchase price. She denies authorizing any one to pay her legal fees or advertising the land for sale. The 1st defendant sought orders to rescind the agreement, sell the land to a 3rd party and to refund the purchase price.
- 7.** The 2nd - 4th defendants opposed the suit vide their joint statement of defence dated 3.11.2021 which contains a general denial of the plaintiff's case.
- 8.** At the trial, the plaintiff testified as PW1 MARGARET NDUTA KARANJA. She adopted her witness statement dated 19.10.2021 as her evidence which mirrors her pleadings. She produced the documents at page 31-59 of her trial bundle as exhibits 1 - 5.
- 9.** On cross examination, Pw1 stated that they only had the sale agreement which was before the court, she had no agreement relating to paying legal fees for the vendor and she has no minutes for the Kitengela meeting. However,

they had an agreement that the vendor was to plough the land before the balance was cleared. She never took possession of the suit land. She didn't pay the entire purchase price due to the case which sought to revoke the deed, still she doesn't have money to pay the balance of the purchase price.

- 10.** PW2 is one JOSEPH WAWERU KARANJA, he adopted his witness statement dated 19.10.2021 as his evidence. His evidence is more or less similar to that of Pw1. He avers that he was present when the Nakuru court case was discussed where the vendor sought the support of the plaintiff to finance the court case. He was also present during the Kitengela meeting in year 2019 where the plaintiff disclosed that she was unable to pay the balance of the purchase price.
- 11.** The case for the 1st defendant was advanced by herself, ESTHER NJOKI WAMATHAI as DW1. She adopted her witness statement dated 11.3.2022 as her evidence which similarly mirrors her pleading. On cross examination, she admits that indeed the parties had the agreement of 14.10.2016 where by, the balance was to be paid after a

consent from the land control board was obtained, but she didn't go for the consent after the succession cause ruling which case was concluded in year 2021.

- 12.** In the judgment dated 27.3.2024, the trial court, found that;

“ The contract between the Plaintiff and the 1st Defendant became invalid as the defendant refused to comply by obtaining the consent and also by the plaintiff paying the balance of the purchase price thereby frustrating the contract, and hence there is no valid contract capable of being enforced by way of specific performance.”

- 13.** The court further found that the defendant (read the vendor) could not hold onto the money and the land, and therefore ordered the sum of sh. 1 500 000 to be refunded plus interest as agreed at clause 9 to run from the date of the judgment until payment in full. The plaintiff was also awarded the costs of the suit as against the 1st defendant.

The Appeal

- 14.** Aggrieved by the aforesaid decision, the plaintiff, now the appellant filed her memorandum of appeal dated

18.4.2024 and amended on 5.8.2025 raising the following grounds;

“(i) The learned magistrate erred in law in failing to appreciate and to take into account the Appellant’s evidence in support of the said case

(ii) That the learned magistrate erred in law and in fact by failing to factor in the legal fees paid by the Appellant on behalf of the Respondent in succession cause 683 of 2014

(iii) That the learned magistrate erred in fact and in law in misdirecting himself on the law and facts and as a result he arrived at a wrong decision. The learned magistrate particularly misdirected himself on the facts by finding that both parties were responsible for breach of the sale agreement.

(iv) That the learned magistrate erred in fact and in law by failing to appreciate the fact that the value of Kenya shillings one million five hundred thousand, deposit of the purchase

price, (Ksh 1,500,000/=) has significantly appreciated from 14th October 2016 based on the principle and reality of the time value of money

(v) That the learned magistrate erred in fact and in law by failing to appreciate the fact that the penalties and interest incurred upon breach of sale agreement. The interest should be incurred from the date of breach and not from the date of judgment.

(vi) That in all the circumstances of the case, the learned Magistrate failed to render justice to the appellant”.

15. The appellant therefore prays for judgment in the following terms;

a) That the orders of the subordinate court delivered on the 27th March 2024 be set aside

b) For specific performance against the respondent as per the terms of the sale agreement dated 14th October 2016

- c) In the alternative, an order for refund of sum of Kenya shillings two million six hundred thousand, (Kshs 2,600,000/=) (being the deposit amount of Kshs 1,500,000 multiplied by the average inflation rate of 6 percent per annum multiplied by 9 years from 14th October 2016 to 2025.**
- d) An order a refund of the legal fees and related costs paid by the appellant on behalf of the respondent in succession cause number 683 of 2014. The sum of Kenya shillings two hundred and six thousand, two hundred and forty (Kshs 206,240/=)**
- e) That the respondent pays interest at court rate for breach of contract from the date of breach until payment in full.**
- f) That the appellant be awarded the costs of this appeal.**
- g) That any further or other orders that this Honourable court may deem fit to make.**

16. This court directed the parties to canvass the appeal through written submissions, of which both parties have duly complied. The submissions of the appellant are dated 12.1.2026 where it is argued that the trial court did not consider the existence of the oral agreement where the in which the appellant met the legal costs in the succession case. To this end, the appellant proffered the case of **Morjaria v Patel (civil case no. 153 of 2018) (2015) KECH 2930 (KLR)** where the court emphasized that lack of a formal document does not preclude the possibility of a binding agreement. That the court did not consider penalties for breach of the contract and that the appellant has never been in possession of the suit land from the time she paid half of the purchase price.

17. It is further argued that the respondent was solely responsible for the breach as she did not get the consent from the land control board. It is argued that the refund mentioned in the judgment is not clear, adding that the trial court deviated from the terms of the agreement and failed to appreciate the value of the shilling. To this end,

the case of **Mwaringa v Washe (Civil Appeal E012 OF 2022) (2025) KECA** was proffered.

- 18.** The submissions of the respondent are dated 19.1.2026. She argues that a party is bound by her pleadings, and in the case at hand, the appellant did not seek a refund and legal fees in her pleadings. Thus, she cannot introduce new claims at the appellate stage. The respondent relies on the case of **Antony Francis Wareham t/a AF Wareham & 2 Others vs Kenya Post Office Savings Bank (2004) eKLR** amongst other cases.
- 19.** It is further submitted that the appellant is not entitled to an order of specific performance as the agreement was void and her remedy lies in a refund which was Kshs 1,500,000. She argues that there was no agreement between the parties for the appellant to pay legal fees on behalf of the respondent in the succession case.
- 20.** This court has considered the record at the trial court as well as the rival submissions. As the 1st appellate court, the court has a duty to reconsider the evidence, evaluate it itself and draw its own conclusion as was explained in

the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123.**

21. The parties herein do not dispute that they entered into an agreement dated 14.10.2016 where the respondent was selling the suit property to the appellant less the 40 by 80 feet portion containing a grave. The transaction was not finalized, hence the question; Who breached the agreement?

22. In the case of National **Bank of Kenya (Ltd) V Pipelastic Samkolit (k) Ltd and Another (2002) EA 503**, it was stated that;

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

23. At clause 7, the agreement provided that the balance of the purchase price, Kshs 1,500,000 was to be paid once the vendor hands over the consent of the land control board to the appellant. The respondent did not comply

with this clause, an issue that was well captured by the trial court at page 8 of the judgment.

- 24.** However, in her own pleadings at paragraph 24 of the plaint, the appellant stated that she had disclosed to the respondent her inability to raise the balance of the purchase price as she didn't have funds. And during cross examination, the appellant had stated that *"I don't have money to pay the entire balance now...."*. Thus, the failure by the appellant to pay the balance was not on account of breach by the respondent alone. The appellant too had her own issues which impacted negatively on the performance of the contract. Thus, the frustration of the contract was a two way traffic which does not entitle the appellant for an order of specific performance.
- 25.** On the oral agreements allegedly entered into by the parties post the written agreement of 14.10.2026, I pose the question; What was so difficult in reducing the subsequent agreements into writing so as to avoid any ambiguities? No plausible explanation has been proffered by the appellant as to why the parties were engaging in variation of the contract without writing the terms thereof.

26. Finally, and as rightly submitted by the respondent, parties are bound by their pleadings; In the case of **Raila Odinga & Another -Vs- IEBC & 2 others (2017) eKLR**, the Supreme Court of Kenya pronounced the essence of pleadings and stated that

“It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

27. In her pleadings, the appellant only sought orders for the transfer of the suit property. It is therefore not open to her

to seek refund of legal fees, or refund which takes into account the inflation.

28. Having found that both parties were responsible for the frustration of the contract, then I come to the conclusion that parties should revert to the position they held before the agreement of 14.10.2016. In essence, the court not only dismisses this appeal, but varies the judgment of the trial court to the extent that the refund of sh. 1 500 000 shall be effected by the respondent within 30 days without any penalties hitched on the agreement. However, the said sum shall attract interests at courts rate after the 30th day from the date of delivery of this judgment. Each party shall also bear their own costs at the appeal and before the trial court.

**DATED, SIGNED AND DELIVERED AT NYAHURURU
THIS 6TH DAY OF MAY 2026 THROUGH MICROSOFT
TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:

Bedan - Court Assistant

Gakuru for Appellant

No appearance for Respondent

FINAL COPY