Muchina & another v Wakanga & another (Environment and Land Appeal E083 of 2022) [2025] KEELC 5758 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5758 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E083 OF 2022

JM ONYANGO, J

JULY 24, 2025

BETWEEN

HANNAH NDUTA MUCHINA ..... 1ST APPELLANT

MICHAEL CHEGE MOSHINAH ..... 2ND APPELLANT

AND

JOSEPH PETER GITAU WAKANGA ..... 1ST RESPONDENT

KENYA COMMERCIAL BANK LIMITED ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. Emily Ominde, Chief Magistrate in Kiambu CMELC No. 45 of 2019 delivered on 6th September, 2022)

JUDGMENT

1. The genesis of this appeal lies in a case filed in Kiambu Chief Magistrates Court in which the Appellants had sued the Respondents claiming that they are the rightful owners of the land parcel known as L.R No. Kiambaa/Mwaguthu/T.162.

2. A brief background of the case is that pursuant to a sale agreement dated 2nd February, 2005 the plaintiffs purchased the property known as L.R NO. Kiambaa/Mwaguthu/T.162 from the 1st Respondent for a consideration of Kshs.900,000. It was agreed that the Appellants would pay the deposit of Kshs.870,000 and the balance of Kshs. 30,000 upon the transfer of the title to their name. They Appellants paid the sum of Kshs. 870,000 after which they were given vacant possession of the suit property where they built their matrimonial home.3.

3. The 1st Respondent thereafter failed to transfer the suit property to the Appellants as the title was charged to 2nd Respondent as security for a loan advanced to Express Kenya Limited where the 1st Respondent was director.

4. In their Amended Plaint the Appellants sought the following reliefs:

   a. A permanent injunction restraining the Respondents from evicting them, transferring, selling and/or alienating the suit property.

   b. A declaration that the Appellants are the rightful owners of the suit property.

   c. An order directing the 2nd Respondent to discharge and release the title deed of the suit property.

   d. In the alternative, an order directing the Registrar to effect a discharge of the title to the suit property.

   e. An order compelling the transfer of the suit property to the Appellants.

   f. In the alternative to the above, an order directing the Registrar of Lands to issue a fresh title in the name of the Appellants

   g. Damages

   h. Costs of the suit.

5. The 1st Respondent admitted that he had sold the suit property to the Appellants and that he was paid the consideration of Kshs. 870,000 leaving a balance of Kshs. 30,000. However, he averred that the Appellants were aware that the title was being withheld by the 2nd Respondent even though the loan secured by the charge over the title to the suit property had been repaid in full. The 1st Respondent also admitted that he had given the appellants vacant possession of the suit property.

6. On its part, the 2nd Respondent filed a Defence stating that they were a stranger to the terms of the agreement between the Appellants and the 1st Respondent and stated that their only interest in the suit property was based on the charge instrument executed between itself and the 1st Respondent.

7. The hearing of the case proceeded between the Appellants and the 1st Respondent. The 2nd Respondent did not call any witnesses. The trial Magistrate then dismissed the Appellants case against the Respondents.

8. Being aggrieved by the said judgment, the Appellants filed this appeal citing the grounds that the learned Magistrate erred in law and in fact by:

   i. Failing to appreciate the evidence before her.

   ii. Misapprehending the evidence and facts on record.

   iii. Disallowing the Plaintiff's suit yet the same was not opposed.

   iv. Failing to find that the 1st Respondent is unreasonably withholding the original title of the property L.R NO. Kiambaa/Mwaguthu/T.162 against of the evidence before the court.

   v. Failing to consider the submissions by the Appellant.

9. They prayed that the judgment, decree and any consequential orders arising from the judgment in Kiambu Chief Magistrate's Court ELC Case no. 45 of 2019 be vacated and set aside; a finding be made that the 2nd Respondent was unreasonably withholding the discharge of the suit property and an order that the 2nd Respondent or in the alternative the Land Registrar, Kiambu be directed to discharge the suit property.

10. The appeal was disposed of through written submissions and the Appellants and 2nd Respondent duly complied. The 1st Respondent did not file any submissions.

Appellants' Submissions

11. In his submissions learned counsel for the Appellants faulted that trial magistrate for holding that there was no evidence of any threat to evict the Appellants yet there was a letter on record dated 6th February 2013 from the firm of Ndungu Njoroge and Kwach Advocates to the 1st Defendant's Advocates threatening to proceed with realization of the security as the loan was unpaid.

12. Counsel further criticized the trial magistrate for not addressing the prayer for a declaration that the Appellants are the owners of the suit property and instead referred to clause 6 of the sale agreement which provided for the manner in which the parties were to deal with the suit property in the event of default.

13. She was of the view that the trial magistrate ignored the evidence of the 1st defendant who stated that he was willing to transfer the suit property to the Appellants if the same was released to him by the Bank as he claimed that he had no outstanding loan with the 2nd Respondent.

14. He argued that the 2nd Defendant did not furnish any evidence challenging the Appellant's entitlement to the suit property yet the court did not take this into consideration.

15. Counsel submitted that even though the trial magistrate noted that the suit property was charged to the bank, she failed to direct that it be discharged in favour of the Appellants yet there was no outstanding loan. He pointed out that despite being served with a Notice to produce, the 2nd Respondent disregarded it yet the trial magistrate did not take this into consideration. He contended that had the trial magistrate taken this into account, she would have made an inference that there was no outstanding loan.

16. Counsel faulted the trial magistrate for failing to take into account the 1st Respondent's evidence that they had made numerous attempts to reach out to KCB to know the status of the account holding the title or have the title released to them to no avail. He was of the view that had the trial magistrate taken this evidence into account, she would have arrived at a different conclusion and granted the prayers sought in the Plaint.

17. It was counsel's submission that the learned trial magistrate erred in failing to take into account that the 2nd Respondent did not oppose the suit while the 1st Respondent admitted that he was ready to hand over the title to the Appellants once he received it from KCB. He maintained that he had no outstanding loan with the 2nd Respondent and that they ought to discharge his title.

18. He relied on the cases of Interchemie E.A Limited v Nakuru Veterinary Centre Limited (2001) KEHC 618 KLR and Mursal and Another v Manese (Suing as the legal Administrator of Dalphine Kanini (2022) KEHC 282 (KLR) for the proposition that where the defendant fails to call any evidence, the evidence tendered by the Plaintiff stands uncontroverted.

19. Counsel was therefore of the opinion that the trial court fell into error by disallowing a suit which was unopposed.

20. With regard to the release of the title to the suit property, counsel faulted the trial magistrate for disregarding the weight of the bank's refusal to release the title or provide information pertaining to the reason the why they were still holding onto the title yet the 1st Respondent insisted that he had repaid the loan.

2nd Respondent's Submissions

21. On his part, learned counsel for the 2nd Respondent submitted that the Appellants are misguided in believing that the suit was unopposed as the Respondents both filed their defences and the 1st Respondent testified. He submitted that even though the 2nd Respondent did not testify, its advocate cross-examined the Appellants and the 1st Respondent.

22. It was his contention that the learned trial magistrate was right in arriving at the conclusion that the Appellants had failed to prove their case on a balance of probabilities. He submitted that in line with sections 107 and 108 of the *Evidence Act*, the Appellants had the burden to prove their case but they failed to discharge that burden. He relied on Section 3 of the *Law of Contract Act* which provides as follows:

    Section 3

    1. No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

    2. No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit ability, trade, dealings of any other person. to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged.

    3. No suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded:

        i. Is in writing

        ii) Is signed by all the parties thereto.

23. It was counsel's submission that the bank was neither a party to the sale agreement nor privy to the same and therefore the Appellants could not purport to enforce it against the 2nd Respondents, He relied on the cases of Dunlop Pneumatic Tyre Company Ltd v Selfridge & Co Ltd (1915) AC 847 and AFC Lengetia 1982-1988 1KAR 722 for the proposition that a contract cannot be enforced by or against a person who is not a party thereto. He further relied on the case of Mark Otanga Otiende Oduor Aduol (2021) eKLR where Aburili J held that the Respondent who was a stranger to the contract had no locus standi to sue or be sued on the contract.

Analysis And Determination

24. I have carefully read and considered the Memorandum and entire Record of Appeal and the submissions filed by the Appellants and 2nd Respondent. In my view the grounds of appeal can be condensed to answer the question whether the judgment of the lower court should be overturned.

25. The principles governing the role of the first appellate court were set out in the case of Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212 where the court stated as follows:

    " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.

Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

26. The crux of the suit filed by the Appellants in the lower court is the sale agreement dated 2nd February 2005 entered between the 1st Respondent as the vendor and the Appellants as the purchasers for the sale of all that parcel of land known as L.R Number Kiambaa/Waguthu/T.162 for a consideration of Kshs. 900,000/=.

Clause 2 of the said agreement states as follows:

2. "The property is sold subject to the acts, conditions, covenants, stipulations, easements and reservations to which the land is presently held by the vendor but otherwise free from any encumbrances and with vacant possession."

27. It was agreed that the purchasers would pay the sum of Khs. 870,000 as the initial deposit and the balance of Kshs. 30,000 would be paid to the vendor upon transfer of the title to the purchasers.

28. It is not in dispute that the purchasers paid the deposit of Kshs. 870,000 and they were given vacant possession of the suit property where they constructed their matrimonial home.

29. Unbeknownst to the Appellants, at the time of signing the sale agreement, the title to the suit property was charged to KCB Bank to secure a loan facility acquired by Express Coffee Company Limited where the 1st Respondent was a director.

30. What precipitated this suit is the fact that despite having paid the agreed deposit of Kshs. 870,000/= and after a considerable lapse of time, the 1st Respondent failed to release the completion documents as the bank was in possession of the original title. The situation was compounded by the fact that the bank had threatened to sell the suit property by public auction.

31. In their evidence the Appellants testified that they had written to the bank to find out the position with regard to the title and the bank had indicated that there was no balance although they had refused to release the title to them. Upon cross-examination, the 2nd Appellant conceded that by the letter dated 6th February 2013 which appears as document 6 on his List of Documents, the firm of Ndungu Njoroge & Kwach wrote to the 1st Respondent's Advocates indicating that the loan remains unpaid. He also admitted that the bank was not a party to the agreement. He told the court that he had conducted a search before he signed the sale agreement, and the search certificate indicated that the suit property was charged to the bank.

32. On his part the 1st Respondent testified that he had been paid the sum of Kshs. 870,000/= leaving a balance of Kshs. 30,000/=. He told the court that he had written to the bank to find out about the loan balance but he did not receive any response. He stated that he had not produced any bank statement to show that there was no loan balance. He revealed that he had sued the bank in 1996 and the case was still on-going. He said he would be ready to release the title to the Appellants once he got it from the bank.

33. From the evidence on record, the Appellants appear to have knowingly entered into a sale agreement in respect of a title that was charged to the bank without bothering to involve the bank and they only have themselves to blame.

34. In HCCC No. E035 of 2020: Monica Waruguru Kamau & Anor vs. Innercity Properties Ltd., Tuiyott, J. in dismissing the claim for an injunction quoted with approval the case of Innercity Properties Limited vs. Housing Finance & 3 others- HCCC No. E030 of 2020 where Majanja, J. held as follows:

> " The Interested Parties' case is that they purchased their apartments from the plaintiff and that they have paid the purchase price and are in possession thereof. Quite apart from the fact that they do not have any claim to be litigated against the defendants which would entitle them to an injunction, they have not shown that they have a legal claim against the bank. Since the bank is the chargee, it must give consent to the Plaintiff to sell the property. The Interested Parties have not shown that they received the bank's consent to purchase the apartments or that they paid the Bank any money. Since they have not established a legal claim against the bank, the court cannot issue an injunction in their favour..." [own emphasis]

It is trite that a contract only binds persons who are party to it.

35. In the case of Dunlop Pneumatic Tyre Company Ltd v Selfridge & Co Ltd (1915) Ac 847 the court held that the essence of the doctrine of privity of contract is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms.

36. Similarly, in the case of AFC Lengetia 1982-1988 1KAR 722 the court held as follows:

> " As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party form whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract"

37. In view of the doctrine of privity of contract which has been elaborated in the above-mentioned authorities, the court cannot direct the bank to release the title to the Appellants, and the trial magistrate cannot be faulted for having failed to do so.

38. Additionally, the bank as opposed to the Appellants have a registered interest in the suit property as long as the title remains charged to the bank. Section 36(5) of the *Land Registration Act* provides that:-

> " Interests appearing in the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding that the actual entry in the register may be delayed:
>
> Provided that where an instrument is prepared in the registry, it shall be deemed to have been presented on the date which the application as made to the Registrar."

39. Flowing from the above analysis which is informed by the existing legal framework and authorities, I must come to the inescapable conclusion that there is no reason to warrant overturning the judgment of the lower court. The appeals lack merit and it is hereby dismissed.

40. In view of the circumstances of the case, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF JULY 2025.

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J. M ONYANGO

JUDGE.

In the presence of:

Mr. Onyango for the Appellants

Miss Swaka for the 2nd Respondent

No appearance for the 1st Respondent

Court Assistant: Hinga