



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwenzwa v Ndooni (Environment and Land Appeal E010 of 2022)  
[2024] KEELC 419 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 419 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL E010 OF 2022**

**LG KIMANI, J**

**JANUARY 30, 2024**

**BETWEEN**

**MWANGANGI MWENZWA ..... APPELLANT**

**AND**

**PIUS MWANGANGI NDOONI ..... RESPONDENT**

*(Being an appeal arising from the judgement of Honourable M.K  
Mwangi Chief Magistrate sitting at Mwingi ELC Case E002 of 2021)*

**JUDGMENT**

1. Before the Court is an Appeal against the judgement of Honourable M.K Mwangi Chief Magistrate sitting at Mwingi ELC Case E002 of 2021 delivered on 25<sup>th</sup> May 2022. The Memorandum of Appeal dated 21<sup>st</sup> June 2022 sets forth ten grounds of appeal, in summary, that the learned magistrate erred in law for failure to evaluate and assess the Appellant's evidence and submissions. That the trial magistrate relied on the Respondent's contradictory evidence and his witnesses did not corroborate each other while disregarding the evidence of the Appellant and deviating from the said evidence.
2. Another ground is that the trial magistrate erred in law and fact by failing to find that the Respondent was duty-bound to prove the existence of the facts on a balance of probabilities and that he deviated from material facts on the substance of the matter as it relates to land and environment issues but that he treated it as a civil matter.
3. The Appellant also contends that the learned trial magistrate erred in law and fact in taking into consideration extraneous and antecedent matters and not matters before the court. He is therefore of the opinion that the learned magistrate erred in finding that the appellant should refund the amount of the purchase price of the land without proof of payment.
4. The Appellant prays for:



- a. The Appellant prays that this appeal be allowed and the judgment of the court be set aside and/or varied.
  - b. The Appellant be awarded the costs of the lower court and the appeal.
  - c. Any other relief that this Honourable Court deem fit to grant.
5. The suit was instituted by the Respondent herein who was the Plaintiff in Mwingi Principal Magistrates Court Case No. E002 of 2021. The Plaintiff claimed that by a written sale agreement dated 24<sup>th</sup> October 2005, he purchased a portion of land measuring approximately three acres which is title number Mwingi/Kazanzu/1835 from the Defendant at a consideration of Kshs.202,000/=. The Plaintiff averred that he paid a sum of Kshs.144,000/= as a deposit at the time of the agreement, leaving a balance of Kshs.58,000/=.
  6. The Plaintiff states that the Defendant allowed him to utilize the portion of land pending the subdivision and the transfer process and he fenced it off, made new terraces and started cultivating on it without interference from the Defendant.
  7. On 30<sup>th</sup> June 2020, the Defendant allegedly chased him away from the suit land and he has never been able to access it. Despite pleading with the Defendant to refund his money, the defendant has declined to do so.
  8. In the statement of defence, the defendant denied the allegations in the plaint and stated that he only leased the land to the Plaintiff for grazing during rainy seasons.
  9. The suit was heard and judgment was delivered on 25<sup>th</sup> March 2022 by M.K Mwangi, Chief Magistrate in favour of the Plaintiff, holding that he was satisfied on a balance of probabilities that the Plaintiff paid the purchase price of Kshs 202,000/= and ordered a refund of the same with interests at court rates from the date of filing the suit.

### **Evidence at the trial**

10. The hearing before the trial court proceeded on 27<sup>th</sup> October 2021 where the Plaintiff, Pius Mwangangi Ndooni adopted the witness statement filed in court. The said statement repeated what was contained in the plaint as summarized above. He testified that the suit land belongs to him and that he bought it from the defendant on 24<sup>th</sup> October 2005 through the agreement which he produced as evidence. He purchased 3 acres for a consideration price of Kshs.202,000/=. He paid up to Kshs.144,000 and the balance of Kshs.58,000/= was to be paid in installments. He stated that the agreement was executed by both parties and 2 witnesses.
11. PW 1 stated that he paid for the land in instalments totalling Kshs.204,000/= but later conducted a search and found that the land was still in the name of the defendant. He had been using the suit property from the time he bought it up to the year 2020 when he was chased away and evicted by the defendant. He prayed that he be refunded his money with interest and that he no longer wanted the land again since the Defendant was hostile. Upon cross-examination, the Plaintiff denied that the defendant leased him the land and said that if it had been a lease, it would be in writing.
12. PW 2, Regina Saani Mwangangi, the wife to the Plaintiff, testified adopting her witness statement which repeated the contents of the plaint. She testified that she was a witness to the said agreement for sale and that Plaintiff did buy the land from the Defendant. Upon cross-examination, she stated that there were no other witnesses.



13. PW 3 Safali Mwangangi stated that the Plaintiff was his father while the defendant was his neighbour and that he was a witness to the Agreement for the sale of land. The witness confirmed witnessing the Plaintiff pay Kshs.144,000/= and was present and that he paid the balance. Upon cross-examination, PW 2 stated that the Defendant's witness was his brother but he is now deceased.
14. The Defendant, Mwangangi Mwenzwa testified that he leased land to the Plaintiff for grazing and that the Plaintiff grazed over his tilled land and destroyed his crops and they chased him away with a panga when he asked about it. He then reported the matter to the area chief and was given a letter to remove them from the land and when they refused, the Plaintiff brought this matter to court.
15. On cross-examination, the Defendant stated that he did not inform his children about the lease. He also acknowledged that he had not produced the letter from the chief. He stated that the Plaintiff used to give him Kshs.10,000/= for the lease per year but did not pay consistently.

### **Appellant's written submissions**

16. The Appellant's Counsel filed written submissions and summarized the case before the trial court submitting that the exhibited agreement for sale did not indicate how the amount was paid to him and that the Appellant did not sign against his name to confirm that he received the purchase price.
17. The Appellant also noted that PW 2 is the Respondent's wife and denied her statement and that PW 3 stated that she saw the entire amount of Kshs 202,000/= being counted and paid to the Appellant while only a deposit of Shs144,000/=was paid.
18. It is also submitted that the agreement does not name the land which was subject to purchase and only states that it was 3 acres and that it bears the name of the Appellant and his son but not signatures and ID numbers. It was submitted that the Appellant did not append his signature to show he received the money and that his son David Mwangangi's signature was forged and had exhibited a copy of his identity card to show that the two signatures are different and that this was not explained by the Respondent during the hearing. He therefore states that the court failed to note that land transactions are not handled in this manner and that the said agreement was forged.
19. It is therefore the Appellant's submission that the agreement was vague and was not conclusive evidence that the money was paid and that the defence had overwhelming evidence which the court disregarded when making its finding.
20. Further, that the learned magistrate erred in law by shifting the burden of proof to the appellant as opposed to the Respondent who was duty-bound to prove his case which he failed to do on a balance of probabilities. He submitted that there is no evidence of payment of the Kshs 202,000 that the trial magistrate entered judgment for and that the said agreement fails to meet the requirements in law. The appellant urged the court to find that the appeal has merit and allow it with costs.

### **Respondent's submissions**

21. Counsel for the Respondent submitted on the issue of whether the parties entered into an agreement for the purchase of the suit property, that the sale agreement dated 24<sup>th</sup> October 2005 was evidence of this and that at no point did the Appellant rebut the said facts of the transaction, noting that there were witnesses to the agreement who were called by the Respondent to testify.
22. Relying on Section 109 of the *Evidence Act*, the Respondent submitted that the Appellant did not produce the alleged agreement for the lease of land that he alluded to and also cited the case of



*Nyambicha v Kenya Tea Development Authority and others* (2010) eKLR and the Supreme Court of Malawi case *Malawi Railways Limited v Nyasulu*(1998)MWSC 3.

23. It is the Respondent's submission that they had established a *prima facie* case that indeed the Respondent did purchase Land Parcel Mwingi/Kazanzu/1835 from the Appellant as per the agreement dated 24<sup>th</sup> October 2005 and that the Appellant did not defend his case and did not call a witness.
24. The Respondent states that he stands to suffer irreparable harm in the event that the appeal is allowed as his rights under Article 40 would be breached. They relied on the case of *Charles Kamau Njoroge v Mary Wakamba Ndung'u* (2020) eKLR and submitted that the Plaintiff proved his case on a balance of probability.

### **Analysis and Determination**

25. The duty of a first appellate Court was summarized by the Court of Appeal in *Selle & Another v Associated Motor Boat Company & Others*, [1968] EA 123 being that the first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal, taking into account that it did not have the opportunity to hear the witnesses.
26. The Memorandum of Appeal sets out 10 grounds of appeal. Having looked at the said grounds the court is of the view that the same can be consolidated and summarized into two issues for determination;
  - a. Whether the Trial Magistrate erred in law and in fact in finding that the Respondent had discharged his burden of proof that he had paid the purchase price of Kshs 202,000/- as per the agreement of sale produced in court.
  - b. Whether the learned magistrate erred in law and fact for failing to evaluate the evidence and submissions of the Appellant and taking into account the contradictory evidence of the Respondent.

### **1) Validity of the agreement of sale dated 24<sup>th</sup> October 2005**

27. The Appellant has challenged the Agreement for Sale which was the basis of the Judgment of the trial Court. Section 3(3) of the *Law of Contract Act* provides that;

“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.”

28. Section 44 of the *Land Registration Act* further provides that every instrument effecting any disposition shall be executed by each of the parties consenting to it appending his/her signature on it or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument. Further, the Appellant contends that the agreement for sale did not indicate how the contractual amount was



- allegedly paid to him and that he did not sign against his name to confirm that he received the purchase price.
29. A look at the agreement shows the Appellant's name, Mwangangi Mwenzwa is written thereon with no signature next to it and there are 2 other names of witnesses with no signatures appended. Interestingly, the agreement is drawn in the first person with the Appellant being the one acknowledging having sold his land to the Appellant yet when it came to the signing the Respondent signed the said agreement but the seller did not sign.
30. The trial court stated that: "The Plaintiff was justifying in his testimony how he entered into a land sale agreement. He said that the issue belonged to the defendant and he produced a sale agreement. His evidence is corroborated by the evidence of PW1 and PW2 who were present when the agreement was drawn" The court went on to state that "The defendant failed on his responsibility by failing to complete the sale agreement given the evidence therefore I am satisfied on a balance of probabilities that the Plaintiff paid the purchase price of Kshs. 202,000/- the defendant produced their binding agreement and is bound in law to refund the said purchase price".
31. The court finds fault with the finding of the trial court for the reason that it did not address its mind and did not mention the lack of the signature on the purported agreement. The presence of PW2 and PW3 during the alleged exchange of money does not in my mind change the position that there was no valid agreement between the parties. The said witnesses are related to the Respondent and did not explain the circumstances under which they signed the agreement but the Appellant did not sign or acknowledge the sale of land or receipt of money.
32. The Court finds that the trial court misdirected itself in finding that there was a valid sale agreement binding to the parties while the agreement dated 24<sup>th</sup> October 2005 was not signed by one of the parties. It is the Court's finding that this agreement was not valid for not having been executed by all the parties thereto.
33. The Court of Appeal in the case of *Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others* [1993] eKLR found as follows:
- "With the greatest respect, the learned trial judge misdirected himself completely. In the first place, it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties, and if not, what were the legal consequences" Put it another way – was the agreement executed by the parties, and if not, was the agreement binding and enforceable against any of the parties? It is trite law on this point and is made beyond doubt under section 3 (3) of the *Contracts Act* (Cap 23 Laws of Kenya.)"
34. Similarly, in the case of *Silverbird Kenya Limited v Junction Limited and 3 others* (2013) eKLR, where the Court held:-
- "The plaintiff did not have a contract that satisfied the mandatory provisions of the *Law of Contract Act*. In my view, it matters not that the plaintiff had been let into possession of the premises if the Contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19th August 2009 in my view does not satisfy the requirement of Section 3(3) of the *Law of Contract Act* to be the foundation of the Plaintiff's claim against the Defendants. Section 3(3) of the *Law of Contract Act* is indeed couched in mandatory terms and does divest the court of jurisdiction in instances where



there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act.”

35. In the case at hand, the court is satisfied that the agreement produced in Court by the Respondent dated 24<sup>th</sup> October 2005 was invalid and unenforceable for lack of execution by the Appellant who was the purported seller and that the trial court erred in enforcing it.
36. Related to the question of validity of the agreement dated 24<sup>th</sup> October 2005, is the contention by the Appellant that there was no evidence that the purchase price of Kshs. 202,000/= was paid to him yet the trial court ordered him to refund the said amount to the Respondent.
37. It is the court’s view that this ground of appeal has merit for the reason that the Court has already found that the sale agreement produced in court was not valid and thus was unenforceable. Apart from the evidence of the Plaintiff’s witnesses who did not explain how the Appellant did not sign the agreement, there was no other evidence of payment of the sum claimed to the Appellant apart from the said agreement. In the Court’s view, the Respondent did not discharge the burden of proof on a balance of probabilities that the purchase price was paid as he stated or at all. The holding in the Mumbi M’Nabea v David M.Wachira [2016] eKLR.

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not? Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:-

“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.”

The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”

38. Further, the court has considered that the sum claimed by the Respondent was for a specific amount of money in the sum of Kshs. 202,000/= being money said to have been paid as the purchase price for the land. It is trite law that special damages must be both pleaded and proved before they can be awarded by the Court. I am guided by the decision of the Court of Appeal in the similar case of Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR wherein it was observed.

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

39. The Court notes that the amount claimed was specifically pleaded in the plaint and the Respondent gave specific days when the said amounts were paid stating that he paid the sum of Kshs 144,000/= on 24<sup>th</sup> October 2005 and the balance of Kshs 58,000/= on 10<sup>th</sup> May 2011. However, there is no



acknowledgement of receipt of the said money by the Appellant. The court thus finds that the claim was not specifically proved.

**2) Whether the learned magistrate erred in law and fact for failing to evaluate the evidence and submissions of the Appellant and taking into account the contradictory evidence of the Respondent.**

40. The Appellant's Counsel submitted that the trial court did not consider his overwhelming evidence. His defence was that he had leased the suit land to the Respondent for grazing and that he did not sell the land to him. However, he did not exhibit a copy of the said lease, a fact that was raised during the trial. The Court is of the view that having found that the Respondent did not discharge the burden of proof that the purchase price was paid the Court need not examine this issue further.
41. In the final analysis having assessed and evaluated the oral, documentary and real evidence advanced by each of the parties to the suit before the trial court and, being aware that the court does not have the benefit of hearing and seeing the witnesses as they testify, the Court finds that the trial court erred in finding that the agreement produced in court was binding on the parties and in finding that the Respondent paid to the Appellant the purchase price of Kshs. 202,000.00 based on the said agreement.
42. The Court thus finds that the appeal has merit and orders as follows;
- a. The appeal be and is hereby allowed.
  - b. The judgment of the trial court be and is hereby set aside and the suit before the trial court is dismissed.
  - c. The Appellant is awarded the costs of the trial court and the appeal herein.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 30<sup>TH</sup> DAY OF JANUARY 2024.**

**HON. L. G. KIMANI**

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**ENVIRONMENT AND LAND COURT JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**Judgement read in open court in the presence of-**

Musyoki Court Assistant

Mbaluka for the Appellant

N/A for the Respondent

