



**Mwangi (Suing as the Legal Representative of the Estate Of Patrick Nelson Gathu Mwangi) v Rotich (Environment and Land Appeal 001 of 2023) [2024] KEELC 810 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 810 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT AND LAND APPEAL 001 OF 2023  
YM ANGIMA, J  
FEBRUARY 15, 2024**

**BETWEEN**

**MARY WANJIRU MWANGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PATRICK NELSON GATHU MWANGI) ..... APPELLANT**

**AND**

**JOSPHAT KIPKEMOI ROTICH ..... RESPONDENT**

*(Being an appeal against the judgment and decree of Hon. Charles Obulutsa (CM) dated 02.12.2021 in Nyabururu CM ELC No. 355 of 2018)*

**JUDGMENT**

**A. Introduction**

1. This is an appeal against the judgment and decree of Hon. Charles Obulutsa (CM) dated 02.12.2021 in Nyahururu CM ELC No. 355 of 2018 – Josephat Kipkemoi Rotich -vs- Mary Mwangi (Sued as the legal representative of the estate of Patrick Nelson Gathu Mwangi). By the said judgment, the trial court allowed the Respondent’s claim and dismissed the Appellant’s counter-claim. The Respondent was awarded the costs of the suit and the counter-claim.

**B. Background**

2. Vide a plaint dated 09.10.2017 the Respondent sued the Appellant seeking the following reliefs:
  - a. A declaration that the defendant is in breach of contract and the aforesaid transfer of Nyandarua/Mawingo Salient/3137 is null and void following the defendant’s failure to pay the aforesaid outstanding balance of purchase price within the stipulated period and an order for cancellation and re-registration of the title of the suit property in the names of the plaintiff.



- b. Costs of the suit.
  - c. Any other and further relief this honourable court deems fit to grant.
3. The Respondent pleaded that vide a sale agreement dated 07.09.2009 he sold Title No. Nyandarua/Mawingo Salient/3137 to the late Nelson Gathu Mwangi (the deceased) for a sum of Kshs.5,460,000/=. It was pleaded that the deceased paid 10% of the purchase price at the material time whereas the balance was to be paid within 90 days upon presentation of a duly executed transfer form.
  4. The Respondent pleaded that in breach of the said agreement the deceased had failed to pay the balance of the purchase price in full despite the suit property having been successfully transferred to his name. He pleaded that there was an outstanding balance of Kshs.1,236,000/= which had not been paid inspite of demand. The Respondent, therefore, wanted a rescission of the sale agreement and cancellation of the transfer of the suit property.
  5. The Appellant filed a defence and counterclaim dated 10.05.2018 and amended on 13.06.2019 denying liability for the Respondent's claim. She conceded the existence of the sale agreement dated 07.09.2009 but pleaded that the agreement had a completion period of 90 days hence the same had lapsed on 08.12.2009. It was thus contended that the suit was time-barred since it was filed more than 6 years after the completion date.
  6. The Appellant pleaded that the deceased had paid a total of Kshs.4,223,990/= by the time of his death in 2014 hence the outstanding balance was only Kshs.1,236,010/= which the Respondent was entitled to but not the suit property. She did not, however, offer to pay the balance in her pleadings.
  7. The Appellant pleaded that it would be harsh, unfair, unconscionable and against the rules of natural justice to reverse the transfer since the purchaser had paid a substantial portion of the purchase price and the Respondent had benefited by utilizing and leasing the land for over 9 years.
  8. By her counterclaim, the Appellant reiterated the contents of her defence and pleaded that since the deceased had paid 70% of the purchase price the Respondent was not entitled to the reliefs sought but only to the outstanding balance of the purchase price. As a result, the Appellant sought the following reliefs in her counter-claim:
    - a. The plaintiff's suit against her be dismissed with costs.
    - b. A declaration that the deceased is entitled to Title Number Nyandarua/Mawingo Salient/3137 while the plaintiff is only entitled to the balance of consideration aforesaid.
    - c. An order that the plaintiff does deliver to the defendant vacant possession of the suit land forthwith.
    - d. Costs of the counterclaim.
    - e. Any other or further relief that this honourable court may deem fit to grant.
  9. The record shows that the Respondent filed a reply to defence and defence to counter-claim dated 20.06.2018. By his reply to defence the Respondent reiterated the contents of the plaint. He pleaded that the transfer of the suit property was done even though he never attended the Land Control Board (LCB) for consent to transfer and he never donated a power of attorney to any agent to do on his behalf. He pleaded that the consent which was purportedly granted pursuant to an LCB meeting of 20.08.2009 was not genuine since the sale agreement was made on 07.09.2009.



10. By his defence to counterclaim, the Respondent reiterated the contents of his reply to defence and pleaded that the completion period of 90 days was never extended and the non-payment of the balance was a breach of contract and that he was ready and willing to refund the deposit paid so far. He consequently prayed for dismissal of the counterclaim with costs.

### **C. Trial Court's Decision**

11. Upon a full hearing of the suit, the trial court found that the deceased was in breach of the agreement for the sale of the suit property by failing to pay the balance of the purchase price despite demand. As a result, the court ordered cancellation of the transfer of the suit property and ordered its registration in the Respondent's name. It also directed the Respondent to refund the purchase price which the deceased had paid for the suit property. The court also dismissed the Appellant's counterclaim.

### **D. Grounds of Appeal**

12. Aggrieved by the decision of the trial court, the Appellant filed a memorandum of appeal dated 20.12.2021 raising the following 8 grounds of appeal:
  - a. The learned magistrate erred in law and fact by upholding the Respondent's claim for cancellation of title despite the Respondent having not pleaded nor proved any of the grounds that would merit cancellation of title as provided for under the [Land Registration Act](#).
  - b. The learned magistrate erred in law and fact by failing to hold that the suit was statute barred by virtue of Section 4 of the law of [Limitation of Actions Act](#).
  - c. The learned magistrate erred in law and fact by finding that the Appellant was in breach of contract despite the fact that the Respondent had by his conduct waived the clause of time being of essence thus invoking the doctrine of estoppel.
  - d. The learned magistrate erred in law and fact in disregarding a persuasive authority; to wit Mwangi -vs- Kiiru [1987] KLR 324, on account of the authority referring to the repealed Registered [Land Act](#) Cap. 300, yet failed to note that the relevant sections referred therein are replicated in the now applicable [Land Registration Act](#) at Sections 26 and 80 thereof.
  - e. The learned magistrate erred in law and fact by considering facts which he ought not to have considered while disregarding factors which he ought to have considered and thereby arriving at a wrong decision.
  - f. The learned magistrate erred in law and fact by upholding the Respondent's claim without sufficient evidence having been availed in proof thereof.
  - g. The learned magistrate erred in law and fact by failing to uphold the Appellant's claim despite overwhelming evidence in proof thereof.
  - h. The learned magistrate erred in law and fact in giving a judgment that was against the weight of evidence and of the law.
13. As a result, the Appellant sought the following reliefs in the appeal:
  - a. That the appeal be allowed.
  - b. That any other or better relief deemed fit by the honourable court be granted.
  - c. That the Appellant be awarded costs of the appeal.



## **E. Directions on Submissions**

14. When the appeal was listed for directions, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on or about 01.12.2023 whereas the Respondent's submissions were filed on 04.10.2023.

## **F. Issues for Determination**

15. Although the Appellant raised 8 grounds in her memorandum of appeal, the court is of the opinion that the appeal may be determined by resolution of the following 4 key issues:
- a. Whether the trial court erred in law and fact in failing to hold that the Respondent's claim was time barred.
  - b. Whether the trial court erred in law and fact in holding that the Respondent had proved his claim on a balance of probabilities.
  - c. Whether the trial court erred in law and fact in disallowing the Appellant's counter-claim.
  - d. Who shall bear costs of the appeal.

## **G. Applicable legal principles**

16. As a first appellate court, this court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

“...Briefly put they are that this court must 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

17. Similarly, in the case of *Peters –vs- Sunday Post Ltd* [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

18. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in *Watt –vs- Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be



justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

19. In the case of *Kapsiran Clan -vs- Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:
  - a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

## **H. Analysis and Determination**

### **a. Whether the trial court erred in law and fact in failing to hold that the Respondent’s claim was time barred**

20. The court has considered the material and submissions on record on this issue. The Appellant contended that the Respondent’s suit was time-barred under Section 4(1) of the *Limitation of Actions Act* (LAA) (Cap.22) because it was based on a sale agreement dated 07.09.2009. It was the Appellant’s contention that since the suit was filed in 2017 then it was time-barred since it was filed more than 6 years after the accrual of the cause of action.
21. The Respondent on his part submitted that his claim was not time-barred since it was not an action for enforcement of the sale agreement but one for restoration or recovery of the suit property hence the applicable section was Section 7 of the LAA which provided for a limitation period of 12 years. It was thus contended that since the suit was filed in 2017 then it was filed before expiry of the limitation period.
22. Section 4(1) of the LAA provides as follows:



1. The following actions may not be brought after the end of six years from the date on which the cause of action accrued:-
  - a. Actions founded on contract;
  - b. Actions to enforce a recognizance;
  - c. Actions to enforce an award;
  - d. Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
  - e. Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
23. The court is of the opinion that the mere fact that the sale agreement was made on 07.09.2009 does not necessarily mean that the cause of action accrued on that date or on the completion date. The Appellant argued before the trial court (and has maintained the same position on appeal) that time was not of the essence because the Respondent had waived the completion period of 90 days by accepting further payments beyond the completion date. If that be so, then time was no longer of the essence and it could only be re-introduced through the giving of notice making time of the essence.
24. The material on record shows that by a notice dated 11.06.2012 the Respondent's advocates called upon the deceased (during his lifetime) to pay the balance of the purchase price within 14 days from the date of the letter in default of which the sale agreement would stand rescinded. It is evident that the deceased did not pay the balance of the purchase price and by the time of his demise in 2014 there was an outstanding balance of Kshs.1,236,000/= or thereabouts. The court is thus of the opinion that even though the Respondent had initially waived his rights on the completion period he validly made time of the essence vide the letter dated 11.06.2012. Thus, the cause of action accrued upon expiry of 14 days with effect from 11.06.2012. In the premises, by the time the Respondent filed his suit before the trial court in 2017, the 6 year limitation period had not expired.
25. The court finds it strange that although both the suit and counterclaim were based on the same transaction, that is, the sale agreement dated 07.09.2009, the Appellant contended that the Respondent's claim for restoration of his land was time-barred whereas his counterclaim for vacant possession of the same property was not time-barred. The court is of the view that since both the suit and counterclaim were based on the same transaction, then they should stand or fall together on account of limitation of actions. The Appellant cannot legitimately apply Section 4(1) of the LAA to the suit and conveniently apply Section 7 of the LAA to his counterclaim.

**b. Whether the trial court erred in law and fact in holding that the Respondent had proved his claim on a balance of probabilities**

26. The court has considered the material and submissions on record on this issue. The Appellant submitted that there was no sufficient evidence to demonstrate that the deceased was in breach of the sale agreement. It was contended that although the sale agreement provided for a completion period of 90 days, the Respondent had waived the same by accepting some instalment payments beyond that period. The Appellant relied upon the case of 748 Air Services Ltd -vs- Theuri Munyi [2017] eKLR and Beatrice Muthio Nzioka -vs- Charles Akelo Ogwen [2014] eKLR in support of that proposition.
27. There is no doubt that those two cases correctly state the position on waiver. The court also accepts that from the dealings between the parties, the Respondent indeed waived his right to insist on completion within 90 days by accepting further payments beyond the period. However, he did not waive his right



- to be paid the balance of the purchase price. He was still entitled to payment of the balance within a reasonable period of time or upon the giving of notice or giving a notice making time of the essence.
28. The court is of the view that the letter of 11.06.2012 was sufficient to make time of the essence. The Appellant submitted that there was no evidence that the said letter was ever received by the deceased since there was a mistake in the postal address used. The record shows that the letter was addressed to the deceased via P.O. Box 55917-00200 Mwingi instead of 55917-00200 – Nairobi. The court is aware that the post code 00200 is for City Square Post Office at Nairobi hence it is unlikely that the letter was directed to Mwingi by the Postal Corporation of Kenya since sorting of mail is usually done by post code.
  29. The Appellant submitted that the trial court erred in law in rescinding the sale agreement and ordering the cancellation of the title in the name of the deceased. It was submitted that the rights of the deceased or his estate were protected under Section 26 of the *Land Registration Act*, 2012 hence his title could not be cancelled unless he was party to fraud or misrepresentation or his certificate of title had been procured illegally or through corrupt conduct. It was further submitted that the Respondent's only remedy was to sue for the balance of the purchase price. He relied upon the case of *Mwangi -vs- Kiiru* [1987] KLR 324 in support of the proposition.
  30. The Respondent, on the other hand, submitted that the trial court was right in ordering cancellation of the deceased's registration and directing restoration of the suit property to him. He relied upon the case of *Jennifer Morigi Muthoni & 2 Others -vs- Homeland Development Investors Ltd* [2018] eKLR in support of his proposition. In that case, the trial court ordered cancellation of title on account of the purchaser's default to pay the full purchase price.
  31. The court has noted from the authorities on record that whereas some courts have previously ordered cancellation of a purchaser's title for failing to pay the full purchase price, some courts have taken the view that a vendor's remedy in such cases would be to seek recovery of the balance of the purchase price. The court also has noted that the case of *Mwangi -vs- Kiiru* (supra) was decided in 1987 when the repealed Registered *Land Act* was then in force.
  32. The court is of the opinion that rescission of a contract is one of the legal remedies which are available to an aggrieved contracting party against the defaulting party. The court is further of the view that a court of law has discretionary power to grant such a remedy even if it involves cancellation of title. The remedy of rescission should only be denied where it is not possible to restore the parties to their respective positions before they contracted. In the instant matter, it was possible for the Respondent to recover his land whereas the estate of the deceased could recover the purchase price paid (less 10% forfeiture as per the sale agreement). The court finds no fault on the part of the trial court in ordering rescission given that it was clear that the Appellant was not in a position to pay the balance of the purchase price for more than 10 years after the making of the sale agreement.
  33. In the circumstances of this case the court is satisfied that the Respondent had proved his claim against the Appellant on a balance of probabilities as required by law. The court is further satisfied that the trial court was right in ordering rescission of the agreement and directing cancellation of the title in the name of the deceased for the purpose of its restoration to the Respondent. It is evident from the material on record that the Respondent had no prospect of recovering the balance of the purchase price. The only variation which may be necessary is to order that the refund should be less 10% of the purchase price in accordance with clause 12 of the sale agreement.



#### **d. Whether the trial court erred in law and fact in disallowing the Appellant's counterclaim**

34. The court has considered the material and submissions on record. It is evident from the counterclaim and the material on record that the Appellant was essentially seeking specific performance of the sale agreement dated 07.09.2009. This is so because the Appellant was seeking a declaration that she was entitled to the suit property whereas the Respondent was entitled only to the balance of the purchase price. She was also seeking an order of vacant possession of the suit property on the basis of the sale agreement.
35. The trial court found and held that the deceased was in breach of the sale agreement by failing to pay the balance of the purchase price. The Appellant faulted the decision of the trial court on the basis that Respondent had waived his rights in terms of the completion period. The court has already held that although the Respondent had initially waived his rights, he later on made time of the essence and demanded payment of the balance of the purchase price in 2012. As conceded by the Appellant both in her pleadings and her evidence, the balance was never paid. The balance remains unpaid to date, more than 10 years after the making of the sale agreement.
36. As noted by the trial court, the Appellant did not demonstrate her ability and readiness to pay the balance of the purchase price. No books of account or business records were tendered at the trial by the Appellant to demonstrate her ability to pay the balance. She did not tender any bank statements to demonstrate the ability of the estate of the deceased to pay the balance of the purchase price. In the premises, the trial court was entitled to disallow the counterclaim. The court takes the view that a defaulting party to a sale agreement cannot seek enforcement of the agreement without demonstrating that he is able and willing to perform his part of the bargain. A bare statement that one is intending to comply would not be sufficient.

#### **e. Who shall bear costs of the appeal**

37. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should not be awarded costs of the appeal. Accordingly, the Respondent shall be awarded costs of the appeal.

#### **I. Conclusion and Disposal Orders**

38. The upshot of the foregoing is that the court finds no merit in the Appellant's appeal. Consequently, the court makes the following order for disposal thereof:
  - a. The appeal be and is hereby dismissed.
  - b. The judgment of the trial court dated 02.12.2021 in Nyahururu CM ELC No. 355 of 2018 is hereby affirmed. However, the Respondent shall refund the purchase price less 10% as per clause 12 of the sale agreement dated 07.09.2009.
  - c. The Respondent is hereby awarded costs of the appeal.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 15TH DAY OF FEBRUARY, 2024.**



**In the presence of:**

Ms. Eunice Ndegwa for the Appellant

N/A for the Respondent

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

