



Dungarwalla (Substituted with Neelam Dungarwalla) v Uzima Press Limited & 2 others (Civil Appeal 54 of 2019) [2025] KECA 876 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 876 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 54 OF 2019
J MOHAMMED, F TUIYOTT & JM NGUGI, JJA
MAY 23, 2025**

BETWEEN

SALIM HUSSEIN DUNGARWALLA (SUBSTITUTED WITH NEELAM DUNGARWALLA) APPELLANT

AND

UZIMA PRESS LIMITED 1ST RESPONDENT

RIGHT END PROPERTIES LIMITED 2ND RESPONDENT

THE REGISTRAR OF TITLES 3RD RESPONDENT

(Being an Appeal from the Judgment and/or Decree of the Environment and Land Court at Nairobi (K. Bor, J.) dated 4th July, 2018 in ELC Cause No. 2315 of 2007))

JUDGMENT

1. This appeal is from the judgment dated 4th July, 2018 in Nairobi ELC Case No. 2315 of 2007. In that case, the appellant herein had sued the respondents herein seeking, in the main, specific performance of an agreement between himself and the 1st respondent for the sale of the property known as LR No. 1870/X/724 (suit property). The sale agreement is dated 23rd June, 2005. The 1st respondent counter-claimed for a declaration that the agreement was voided by reason of fraud, misrepresentation and deceit on the part of the appellant.
2. The suit went to full trial in which the appellant testified and each of the 1st and 2nd respondents called a single witness. After the parties duly filed their written submissions, the Environment and Land Court (ELC) (K. Bor, J) reserved the case for judgment, which was delivered on 4th July, 2018.
3. The appellant was aggrieved by the judgment and timeously filed the present appeal. In his memorandum of appeal dated 12th July, 2018, the appellant has listed seven (7) grounds of appeal as follows:



- a. That the Learned Judge erred in law and in fact in failing to acknowledge that the termination of the contract was not done properly as provided for under the contract or as per the LSK Conditions of Law which were applicable to the Agreement.
 - b. That the Learned Judge erred in law and in fact in failing to appreciate that no notice of rescission was issued to the Appellant by the 1st Respondent with respect to the Sale Agreement of 23rd June, 2005.
 - c. That the Learned Judge erred in law and in fact failing to address her decision on the foundation of the 1st Respondent's allegations of fraud which was the sole basis for which the contract between the 1st Respondent and the Appellant was rescinded and which allegations were not proven.
 - d. That the Learned Judge erred in law and in fact by failing to consider the evidence captured in the proceedings wherein the 1st Respondent perpetuated the illegal and unlawful removal of a caution duly registered by the Appellant pursuant to the Court Order and the consequent reprimand by the court.
 - e. That the Learned Judge erred in law and in fact in holding that the Appellant had failed to make out a case for specific performance.
 - f. That the Learned Judge erred in law and in fact by holding that the Appellant failed to prove that he was ready able and willing to pay the balance of the purchase price.
 - g. That the Learned Judge erred in law and in fact by allowing the prayers sought in the 1st Respondent's Defence which prayers in effect voided the agreement between the Appellant and 1st Respondent.
 1. The appeal before us was canvassed by way of written submissions. The appellant's submissions are dated 17th August, 2022 while the 1st respondent's are dated 11th December, 2023; and the 2nd respondent's are dated 15th July, 2024. The parties' counsel appeared before us for plenary hearing of the appeal on 12th May, 2025 and gave oral highlights of their submissions. Mr. Ngugi appeared for the appellant; Mr. Masika for the 1st respondent; and Mr. Mulanya for the 2nd respondent.
 2. We have perused the record of appeal, the grounds of appeal and the parties' respective submissions and have keenly considered the oral highlights of the counsel. After doing so, we have noted that the third ground of appeal attacks the judgment for failing to do due analysis and sufficiently consider the evidence on the main ground upon which the judgment turns: that the appellant committed fraud which, in turn, the court held, was the proper basis for rescinding the agreement dated 23rd June, 2005.
6. We have carefully read the judgment dated 4th July, 2008 and we constrained to agree with the appellant on this point. The learned Judge failed to subject the evidence, which she admirably summarizes in the judgment, to a thorough analysis before coming to a conclusion. As such, the learned Judge's conclusions on both the allegations of fraud as well as on the question whether the 1st respondent had proved the appellant's inability to perform the contract, are reached in a rather peremptory manner. Because both the parties and this Court are entitled to the reasoning by the trial court on the major points of facts and law, this Court finds it imprudent to delve into any of the questions of merit raised in the appeal. The optimum, fairest and the only procedurally feasible course is to remand the case for a rehearing before another judge of the ELC (see section 78(1)(b) of the *Civil Procedure Act*). This will



give this Court, should the matter not be resolved to the satisfaction of all the parties at the ELC, the benefit of the trial court's reasoning before reaching its verdict.

7. In the circumstances, we will not address any of the substantive issues addressed by the parties in the appeal for the fear that we may embarrass the trial court that will eventually hear the case. Instead, we simply remand the case to be heard by a judge of the Environment and Land Court other than K. Bor, J. We further direct that the new trial shall be scheduled on a priority basis. Towards this end, therefore, we direct that the case be placed before the Principal Judge of the Environment and Land Court within fourteen (14) days of today for re-assignment of the case.
8. In view of this disposition, each party will bear its own costs.
9. Those shall be the orders of the Court.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY, 2025.

JAMILA MOHAMMED

..... **JUDGE OF APPEAL**

F. TUIYOTT

..... **JUDGE OF APPEAL**

JOEL NGUGI

..... **JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

