Mbugua v Waweru (Civil Appeal 667 of 2019) [2025] KECA 787 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 787 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 667 OF 2019

DK MUSINGA, F SICHALE & FA OCHIENG, JJA

MAY 9, 2025

BETWEEN

KURIA MBUGUA ..... APPELLANT

AND

DICK WAWERU ..... RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court at Thika (Gacheru, J.) dated 4th October 2019 in ELC Case No. 361 of 2017)

JUDGMENT

1. This appeal arises from the decision of the Environment and Land Court at Thika delivered on 4th October 2019 in ELC Case No. 361 of 2017. The parties, Kuria Mbugua (the appellant) and Dick Waweru (the respondent), are brothers who became entangled in a land dispute concerning portions of land registered as Githunguri/giatheko/7X9, 7X0, 8X3, and 8X4.

2. The siblings had inherited Githunguri/giatheko/7X9 and 7X0, respectively, from their late father. By an amended plaint dated 29th May 2017, the appellant brought a suit against the respondent, seeking orders that the respondent transfer an equal portion from Githunguri/giatheko/7X0 to him; and that the respondent should pay him mesne profits; and costs of the suit.

3. The appellant's case was that he and the respondent entered into a verbal or informal reciprocal arrangement in or around 2001. Pursuant to this understanding, the appellant subdivided his land (Githunguri/giatheko/7X9) and transferred one portion (Githunguri/giatheko/8X4) to the respondent. In return, the respondent was to apportion and transfer a portion of his land (Githunguri/giatheko/7X0) to the appellant. The appellant asserted that he had fulfilled his part of the bargain and claimed that the respondent had not.

4. The respondent, on the other hand, filed a counterclaim seeking a permanent injunction against the appellant for trespass, a declaration that the appellant was only entitled to a specific portion of land, general damages for trespass, mesne profits, and costs.

5. The respondent's case was that the appellant was only entitled to 0.076 hectares of Githunguri/giatheko/7X0 as was shown in Mutation Form 115452, to which he had taken

possession thereof in the year 2001. The respondent stated that the appellant owed money to a third party. In order to repay what was owed, he approached the respondent and requested him to purchase ½ acre of his Githunguri/giatheko/7X9, for a consideration of Kshs. 280,000.

6. The respondent agreed, and they entered into the sale agreement dated 27th February 2001. Thereafter, the appellant subdivided Githunguri/giatheko/7X9 into parcels 8X3 and 8X4, and transferred parcel 8X4 to the respondent on 1st April 2003. However, parcel 8X4 was slightly above ½ an acre by 0.076 hectares, and it was agreed that the respondent was to compensate the appellant by excising a similar portion from parcel 7X0.

7. The respondent stated that he obtained consent from the Land Control Board for the subdivision of parcel 7X0 into 0.94 hectares and 0.076 hectares, to transfer the latter to the appellant. However, the appellant made an application to the LCB seeking to transfer the whole of 7X0, which was contrary to the agreement.

8. The trial court identified several issues for determination, including the existence and validity of a sale agreement dated 27th February 2001; the portion of the respondent's land, title No. Githunguri/giatheko/7X0, which the appellant was entitled to; and claims for mesne profits and costs.

9. In the impugned judgment, the trial court held that there existed a valid sale agreement dated 27th February 2001 between the parties. Regarding the portion of land, the court ruled that the appellant was only entitled to 0.076 hectares of the respondent's land, being the portion shown on Mutation Form Serial No. 11XXX2. The appellant's prayer for an equal portion of land was therefore disallowed.

10. The trial court dismissed the appellant's claim for mesne profits because they were not specifically pleaded and proved. However, the court awarded the respondent general damages of Kshs. 100,000 for trespass by the appellant.

11. In terms of costs, the court dismissed the appellant's suit with costs to the respondent, and also awarded the respondent the costs of the suit and the counterclaim.

12. Furthermore, the court issued a permanent injunction restraining the appellant from trespassing on the respondent's land, title No. Githunguri/giatheko/7X0, except for the

0.076 hectares portion he had possessed since 2001. Finally, the respondent was ordered to pay the appellant Kshs. 40,000, which was the amount awarded by the elders in a prior resolution attempt.

13. Aggrieved by the judgment of the court, the appellant filed the present appeal in which he raised the following grounds:

    a. The learned judge erred in law and fact in failing to find that the agreement dated 27th February 2001 was a gift and not a contract.

    b. The learned judge erred in law and fact in ordering specific performance of an agreement, which by law was declared to be null and void.

    c. The learned judge erred in law and fact in failing to find that the appellant was not present at the execution of the agreement, and the evidence of the witnesses was contradictory.

    d. The learned judge erred in law and fact in making contradictory findings.

e. The learned judge erred in law and fact by ignoring binding precedent without any cogent reasons.

f. The whole judgment was against the weight of the evidence before the court.

14. As a result of these alleged errors, the appellant prays for the following:

a. The setting aside of the judgment of the High Court delivered on 4th October 2019.

b. Judgment to be drafted based on the evidence before the court and the prevailing range of comparable authorities and awards.

15. When the appeal came up for hearing on 17th December 2024, Mr. J. Thuo, learned counsel, appeared for the appellant. The firm of Mbugua Makumi was noted as the counsel for the respondent. However, there was no appearance from the said firm.

16. Mr. Thuo submitted that the trial court had disregarded Section 3 of the *Law of Contract Act*. He pointed out that the alleged agreement presented by the respondent did not meet the requirements of this section, as the parties had entered into a verbal agreement. The said agreement failed to comply with the provisions of the law requiring contracts for the sale of land to be in writing, and they must be attested.

17. Counsel further submitted that the court disregarded Section 6(3) of the *Land Control Act*, as the mandatory provisions regarding Land Control Board consent were not considered. The appellant relied on several cases, including; James Njuguna Mwaura vs. Paul Wandati Mbochi [2018] eKLR; Joseph Kamau Kiguoya vs. Rose Wambui Muthike [2016] eKLR; and Amar Singh vs. Kulubya [1963] E. A 408, to buttress this submission.

18. Counsel submitted that the court disregarded Section 44(1) of the *Land Registration Act*, which not only requires each consenting party to execute instruments affecting the disposition of agricultural land, but also the appellant's lack of attestation to the agreement.

19. Mr. Thuo further submitted that the learned judge erred in ordering specific performance of an agreement deemed null and void due to the aforementioned legal provisions, emphasizing the lack of consent from the appellant on the agreement. He faulted the court for finding that lack of consent could be

ignored. He reiterated that consent from the Land Control Board is mandatory and cannot be cured by equity.

20. Counsel pointed out that the agreement between the parties regarding the exchange of parcels was entirely verbal. He further stated that the respondent was currently in possession of the disputed land (Githunguri/giatheko/8X4), on which he had begun construction. He also mentioned that the appellant had filed an application for an injunction to halt further construction pending the appeal's determination.

21. Counsel submitted that the appellant had obtained the Land Control Board consent for the transfer to the respondent, and the same still subsisted.

22. In his written submissions, the appellant submitted that the intention of the agreement dated 27th February 2001 was not clear. To him, it was a gift and not a contract, as the consideration was not met, and it did not meet the tenets of Section 3 of the *Law of Contract Act*.

23. The appellant stated that their cause of action was founded on a verbal agreement entered into in 2001, where the respondent verbally agreed to apportion a piece of his land known as Githunguri/giatheko/7X0 in exchange for a portion of land known as Githunguri/giatheko/7X9 belonging to the appellant.

24. Following this verbal understanding, the appellant subdivided his land Githunguri/giatheko/7X9 into two portions, namely Githunguri/giatheko/8X3 and Githunguri/giatheko/8XX5. The appellant caused land known as Githunguri/giatheko/8X4 to be transferred to the respondent, which was approved by the Githunguri Land Control Board in 2003, and the respondent was issued with a title deed for Githunguri/giatheko/8X4. The appellant claimed that he had honoured his obligations under the verbal agreement, but the respondent had refused to honour his part.

25. The appellant prayed for the court to set aside the judgment of the High Court, and to issue a judgment based on the evidence before the court and prevailing legal authorities.

26. This is a first appeal, and it is our duty to analyze and reassess the evidence on record and reach our own independent conclusions in the matter. The said duty was put more appropriately in Selle vs. Associated Motor Boat Co., [1968] E A 123, where the court expressed itself thus:

> " An appeal to this court from a trial by the High Court is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. 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 this 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 based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)".

27. We have carefully considered the record, submissions, authorities cited, and the law. The issues for determination are: whether the trial court erred in finding the agreement of 27th February 2001 to be valid and enforceable; whether the trial court's grant of specific performance and injunctive orders was contrary to statute; whether the respondent's award of general damages for trespass and costs was justifiable; and whether the appellant's case was wrongly dismissed.

28. The appellant challenged the validity of the written agreement on the basis that it was either a gift or a void contract due to a lack of formal compliance with section 3(3) of the *Law of Contract Act*. That section provides:

> 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:
>
> Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act*

(Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust."

29. The trial court examined the Mutation Form Serial No. 115452 and the agreement dated 27th February 2001. Though the appellant disputed execution, no evidence was produced to dislodge the document's presumption of regularity.

30. The disputed sale agreement dated 27th February 2001, was witnessed by the siblings of both parties, Margaret Bibi and Dave Day Kimotho. Margaret Bibi confirmed she was called as a witness to the agreement, and Dave Day Kimotho was also present and witnessed it. Dave Day Kimotho also confirmed that he witnessed the agreement. The respondent testified that his two siblings witnessed the signing of the agreement and were present when the appellant signed it.

31. It is from the foregoing that the trial court made the finding that the sale agreement was in writing; signed by the parties; and witnessed by their siblings.

32. Based on the information in the agreement dated 27th February 2001, we find that the agreement was intended as a contract for the sale and exchange of land, and not the transfer of a gift. This is so because there was a monetary consideration of Kshs. 280,000 involved, which the respondent was to pay to the appellant for the purchase of a portion of his land. The respondent testified that a substantial part of this was paid.

33. The agreement stipulated an exchange of land: the appellant was to transfer a portion of his land (Title No. Githunguri/giathieko/7X9) to the respondent, and in return, the respondent was to transfer a portion of his adjacent land (Title No. Githunguri/giatheko/7X0) to the appellant as compensation for the part exceeding half an acre. This reciprocal transfer indicates a contractual exchange rather than a gratuitous transfer.

34. The agreement was reduced into writing; executed by both of them; and witnessed by their siblings, Margaret Bibi and Dave Day Kimotho. The formality of a written, signed, and witnessed document constituted a legally binding contract.

35. The respondent, in his testimony, explicitly stated that "the

purpose was for the purchase of the appellant's land."

Although the respondent's advocate's letter at one point mentioned that the "consideration is a gift", this appears to be a statement made in the context of the unregistered share and potentially a legal argument, and is contradicted by the overwhelming evidence of a purchase price and exchange of land. The court also ultimately treated it as a sale agreement.

36. According to Section 120 of the *Evidence Act*, a party who benefits from an agreement cannot later back out of it. Having taken possession of 0.076 hectares and occupied the same since 2001, the appellant cannot now seek to invalidate the agreement and proceed to claim more land.

37. The appellant also invoked Section 6(1) of the *Land Control Act*, which renders void for all purposes any controlled transaction in agricultural land that is not accompanied by consent of the Land Control Board (LCB), which was issued within six months, from the date of the agreement.

38. It is evident from the record that the sale agreement was executed on 2nd February 2001. Consent of the LCB was to be obtained on or before 2nd August 2001. The application for the consent was made on 18th February 2001 and obtained on the same date. This was within the 6-months' period.

39. The trial court noted that no transfer had taken place beyond the 0.076 hectares. That portion was already in occupation by the appellant and had formed the subject of a mutation. The agreement, to the extent that it was not fully performed, had not matured into a registrable disposition requiring the Land Control Board's consent.

40. In Macfoy vs. United Africa Co. Ltd. [1961] 3 All ER 1169,

the Privy Council stated that:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

41. In this case, the trial court did not enforce an unlawful transfer. It merely confirmed the status quo of partial performance. The appellant's entitlement did not extend to the full portion of the land as sought.

42. The trial court did not grant specific performance of an unenforceable agreement as alleged. Instead, the court recognized a specific portion (0.076 ha) which had been agreed upon, demarcated, and possessed since 2001. The court's order merely affirmed existing occupation, consistent with the equitable principle that courts do not aid a party who has failed to honour their side of an obligation.

43. The appellant, having occupied more than what was agreed upon and demarcated in 2001, was rightly found to have

trespassed onto the respondent's land. In Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, the court held that:

> " The measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less."

44. The award of Kshs. 100,000 in general damages was reasonable in the circumstances and consistent with the nature of encroachment. The trial court relied on a nominal amount for trespass, in consonance with the decision in Philip Ayaya Aluchio vs. Crispinus Ngayo (supra).

45. We also find that the permanent injunction was properly issued to restrain any further trespass. There is no evidence of disproportionality or illegality in the manner the injunctive relief was granted.

46. Therefore, we find no basis to interfere with the well-reasoned and legally sound decision of the learned trial judge. The appeal lacks merit and fails on all grounds.

47. For the foregoing reasons:

    a. The appeal is dismissed in its entirety.

    b. The judgment and decree of the Environment and Land Court delivered on 4th October 2019 are upheld.

    c. The appellant shall bear the costs of this appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR