



REPUBLIC OF KENYA



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**Onyare v Otwori & another (Appeal E001 of 2022)
[2024] KEELC 1461 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1461 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
APPEAL E001 OF 2022**

M SILA, J

MARCH 19, 2024

BETWEEN

GEORGE ALFANUS ONYARE APPELLANT

AND

BOSIRE JULIUS OTWORI 1ST RESPONDENT

ALFRED OTWORI 2ND RESPONDENT

(Being an appeal against the judgment of Hon. S.N. Makila, Senior Resident Magistrate, delivered on 6 March 2020 in the suit Kisii CMCC No.116 of 2018 formerly Kisii High Court Civil Suit No. 110 of 2010)

JUDGMENT

1. The dispute between the appellant and the respondents dates back to about twenty years ago when George Alfanus Onyare, the appellant, entered into a sale transaction with the 2nd respondent, Alfred Otwori, who is the father of the 1st respondent, Bosire Julius Otwori. That agreement was entered into on 30 April 2004 wherein Alfred Otwori jointly sold to the appellant and one David Nyaega Ondieki three parcels of land being the land parcels Nyaribari Chache/Keumbu/1301, Nyaribari Chache/Keumbu/1264 and a parcel No. 1531. The purchase price was Kshs. 1,400,000/= with Kshs. 200,000/= having been paid at the time of the agreement and the sale agreement stipulating that the balance of Kshs. 1,200,000/= will be paid “between July and October 2004.” The sale agreement also provided, as part of the special conditions, that the vendor will deliver vacant possession for the purchasers’ occupation “immediately” and that the vendor shall accompany the purchaser to the relevant Land Control Board. There was a default clause where it was agreed that any party shall pay to the other a sum of Kshs. 300,00/= by way of liquidated damages.
2. The appellant did not make payments as agreed in the sale agreement, his explanation being that the seller asked to be paid in staggered installments to enable him pay University fees for his children,



including the 1st respondent, as and when such payments fell due. There is documentary evidence that staggered payments were made, received, and duly acknowledged, on various dates between the time of the sale agreement and 24 December 2008. According to the appellant, out of the purchase price of Kshs. 1,400,000/= he had paid the seller Kshs. 1,355,000/= as at 24 December 2008 which means that some money remained unpaid out of the transaction. Neither of the parties made any application to the Land Control Board and no consent was issued towards the transaction. The appellant however took possession, planted trees, and undertook various agricultural activities on the land.

3. The vendor did not transfer title to the appellant or to his co-purchaser. Instead on 7 November 2008, the 2nd respondent transferred two of the properties to the 1st respondent; those properties being the land parcels Nyaribari Chache/Keumbu/1301 and Nyaribari Chache/Keumbu/1264 (hereinafter referred to simply as parcels No. 1301 and 1264) and the 1st respondent became the registered proprietor thereof. Now having obtained proprietorship, the 1st respondent wished to make good his parcels of land but the appellant was already in possession pursuant to the sale agreement. He therefore proceeded to file suit against the appellant on 28 July 2009 registered as Kisii High Court Civil Suit No. 151 of 2009. It is not very clear what happened to this suit though all indications point at it having been withdrawn.
4. Subsequently on 22 April 2010, the 1st respondent (as plaintiff) filed this suit in the High Court at Kisii. The case was registered as Kisii HCCC No. 110 of 2010 and was subsequently transferred to the Magistrates' Court for disposal as it was agreed that the subject matter could fall within the jurisdiction of the Magistrates' Court. In his suit, the 1st respondent sought the following four prayers against the appellant (as sole defendant), being :-
 - a. A declaration that the appellant is a trespasser in the land parcels No. 1264 and 1301.
 - b. A permanent injunction to restrain the defendant or his agents from trespassing into the parcels No. 1264 and 1301.
 - c. Costs of the suit.
 - d. Interest on (b) above (sic).
5. The appellant filed a defence and counterclaim where he claimed that the transfer of the land to the 1st respondent was fraudulently done without the consent of the Land Control Board and without payment of stamp duty. He asserted that he was in possession of the suit properties as of right having purchased the same from the 2nd respondent. The 1st and 2nd respondents were sued as 1st and 2nd defendants in the counterclaim. In it he repeated that he purchased the two suit properties and the land parcel Nyaribari Chache/Keumbu/1531 from the 2nd respondent who is the father of the 1st respondent. He claimed that the two colluded to have the land fraudulently transferred to the 1st respondent on the particulars that the transfer was effected without consent of the Land Control Board; that the transfer was effected without payment of stamp duty; and the transfer was effected despite it being subject of a sale. In his counterclaim, he asked for the following orders :
 - a. A declaration that the transfer of the parcels No. 1264 and 1301 from the 2nd respondent to the 1st respondent is null and void and the same ought to be cancelled or in the alternative the 2nd respondent be ordered to refund the purchase price together with interest at 24% p.a and liquidated damages as per the sale agreement.
 - b. General damages for breach of contract from the 2nd respondent.
 - c. Costs of the suit and counterclaim.



- d. Costs and interest.
 - e. Any other remedy that the court would deem fit and just to grant in the circumstances.
6. It will at this juncture be observed that there were absolutely no pleadings regarding the land described as parcel No.1531 in the sale agreement. There is in fact controversy as to whether the land identified simply as No. 1531 in the sale agreement was the land parcel Nyaribari Chache/Keumbu/1531 or the land parcel Central Kitutu/Bogetaorio 1/1531. There was a search provided which showed that the latter parcel measures 0.02 Ha and was registered in February 1994 to four individuals being Samwel Machoka Sunda, Nyambane O. Sunda, Joash O. Sunda, and Justus G. Sunda. The 2nd respondent on the other hand displayed a title deed to Central Kitutu/Bogetaorio 1/1531 showing that he was the registered proprietor. This land measures 0.27 Ha which is in accordance with the size given in the sale agreement. Whatever the case, there were no pleadings regarding this parcel No. 1531, whether it be Nyaribari Chache/Keumbu/1531 or Central Kitutu/Bogetaorio 1/1531, and it was not part of the dispute that was before court.
 7. Another interesting issue is that although this was a joint sale to two individuals, that is, the appellant and David Nyaega Ondieki, the said David Nyaega Ondieki was not a party to the suit. It is not clear whether he abandoned the sale or what happened to his interest in the sale agreement. Whatever the case, since he was not a party, no orders could be made for or against him.
 8. Before this suit was filed, the appellant caused the 2nd respondent to be arrested and to be charged with the offence of Obtaining Money by False Pretences arising out of the sale agreement herein. The 2nd respondent took plea on 3 August 2009 and the matter proceeded for hearing with the appellant being the complainant. The prosecution called a total of nine witnesses and closed its case. Arguments were made on whether there was a prima facie case to put the 2nd respondent into his defence, but before a ruling was made on this, the parties compromised the case and the appellant proceeded to withdraw his complaint on 13 February 2012. The reason given for withdrawal was that the 2nd respondent had refunded the appellant his money, being Kshs. 1,355,000/=. In his statement made under oath, given at the time of withdrawal, the appellant stated that “the accused does not owe me any more money.” It is thus apparent that the appellant willingly accepted being refunded the purchase price which would mean that the alternative prayer in his counterclaim, seeking refund, had been met. I would have thought that at this juncture, given that a refund had been made, a finding would be made that the suit is compromised in so far as the plaintiff’s claim was concerned, and in so far as there was a prayer for cancellation of the title of the plaintiff by the appellant, but this is not what happened. Indeed, despite receiving the refund, the appellant did not vacate the suit properties and continued being in possession, meaning that the plaintiff’s suit for trespass and for a permanent injunction remained alive. The appellant also maintained that he would still pursue his suit and was keen to get his prayer for interest at 24% p.a and the prayer for general damages for breach of contract.
 9. Evidence was taken with the 1st respondent, as plaintiff, being the sole witness in respect of his case against the appellant. His evidence was that the land was transferred to him as a gift by his father (2nd respondent) . He stated that on going to the land he found it in possession of the appellant. On the sale of the land to the appellant, he stated that the appellant had already been refunded his money and compensated with a different portion of land. He was cross-examined on whether he paid stamp duty and whether they had a Land Control Board consent, and despite him saying that he complied with both, he did not have the consent of the Land Control Board nor a receipt for stamp duty.
 10. For his defence and counterclaim the appellant testified and called the Land Registrar, Kisii, as his witness. In his evidence, he referred to the sale agreement and the various acknowledgments of



payment. He stated that he was still in possession of the land. He insisted that the plaintiff did not have title to the land as he did not show that he had passed through the Land Control Board nor paid stamp duty. He still wished to have the transfer of the land nullified. On his claim for interest, he testified that he took a loan from Barclays Bank and Mwalimu Sacco to pay for the land and he paid interest for that loan. He asked for interest of Kshs. 465,877.85/=. He also wished to be paid the Kshs. 300,000/= liquidated damages which was in the sale agreement. He availed a valuation report for the land which valued the land at Kshs. 15,000,000/= and he wanted to be paid 1/3 of this amount “as compensation.” He also presented an auditor’s report to demonstrate his claim for the interest. Cross-examined, he admitted being refunded what he had paid as purchase price. He admitted making use of the land but could not say how much he had gained by being in possession.

11. The Land Registrar testified as DW-2. His evidence was that he could not see any transfer documents from the 2nd to the 1st respondent and there was also no evidence of consent of the Land Control Board nor payment of stamp duty. He could not tell if the documents were plucked out or misplaced.
12. On his part, the 2nd respondent admitted having entered into the sale agreement with the appellant but complained that he did not pay as agreed. He admitted transferring the suit lands to his son (the 1st respondent). He stated that in 2006 it rained heavily and the parcels of land got affected by River Gucha and the appellant asked for another parcel of land which he gave him. He acknowledged that he was charged in the criminal court and that the charges were withdrawn after he repaid the appellant. He thought that the appellant wants double compensation since he has already been refunded yet he is in possession and still wants to be paid interest.
13. With the above evidence the hearing was closed and counsel filed their written submissions culminating in the impugned judgment. In her judgment the trial Magistrate framed the following issues :
 - i. Which party breached the sale of land agreement dated 30 April 2004;
 - ii. Whether the plaintiff has proved ownership of the two parcels of land in dispute;
 - iii. Was George Alfanus Onyare refunded the purchase price;
 - iv. Which party deserves to be compensated for the breach;
 - v. Who shall bear the costs of the suit.
14. On the first issue, she was of the view that it was the appellant (as buyer) who breached the sale agreement by not making payment as stipulated and failed to complete payment of the balance within the agreed time. She held that there was no evidence that the parties renegotiated the time for payment. She also found that the agreement had a default clause where the party in breach would pay the other Kshs. 300,000/=. Curiously however, her words were framed as follows :

“I find that the evidence on record points to breach of the sale of land agreement by the purchaser (George). The purchaser is entitled to Kshs. 300,000/= for breach of contract but notably he did not seek the refund of the same and the Court will therefore not award any damages for breach of contract.”

15. On the second issue, she found that the Land Registrar had not invalidated the title deeds and in absence of contrary evidence of fraud or illegality she held that the plaintiff had proved on a balance of probabilities that he is the registered owner of the two parcels of land in dispute. She referred to Sections 26 and 24 of the *Land Registration Act*, 2012, on the protection of title. On the third issue, she found that the purchase price had been refunded. She was of opinion that having received the refund the appellant should have surrendered vacant possession. On whether the appellant deserved



to be paid interest, she held that this does not arise since it was not part of the agreement between the parties. Ultimately she held that the plaintiff deserves the order that the appellant was a trespasser but did not make any award for damages for trespass since the plaintiff did not pray for any. She also held that the plaintiff has not made any prayer for eviction so she wouldn't give the order. She declared the defendant a trespasser and issued the order of permanent injunction and granted the plaintiff the costs of the suit. She dismissed the counterclaim with costs to the defendants in the counterclaim.

16. Aggrieved by the judgment the appellant lodged this appeal on the following grounds (slightly paraphrased for brevity) :

1. That the trial Magistrate erred by not making a finding that the transfer of the suit lands was null and void for lack of Land Control Board consent and non payment of stamp duty.
2. That the trial Magistrate erred by not making a finding that the title deeds having been obtained fraudulently could not be accorded legal protection and recognition.
3. That the trial Magistrate erred by not making a finding that the respondents colluded to defeat the appellant's claim to the land as they continued receiving consideration even after transferring the land.
4. That the trial Magistrate erred by not putting weight on the evidence that the respondents did not have evidence of the Land Control Board consent.
5. That the trial Magistrate made a finding that the purchaser was entitled to Kshs. 300,000/= for breach of contract but declined to grant the same on assumption that it was not pleaded when in fact it was pleaded in the counterclaim.
6. That the trial Magistrate misapplied the law by not properly appreciating the provisions of Section 26 (a) and (b) of the [Land Registration Act](#) to invalidate the titles in the hands of the plaintiff.

The appellant proposes to ask this court for orders :

- a. That the transfer of land parcels Nyaribari Chache/Keumbu/1301 and Nyaribari Chache/Keumbu/1264 was null and void for lack of the mandatory Land Control Board consent and non payment of stamp duty.

17. The appeal was argued by way of written submissions and I have taken note of the submissions filed by Mr. Nyariki, learned counsel for the appellant, and Mr. Reuben Masese, learned counsel for the respondents. I observe that in his submissions, Mr. Nyariki asked this court to quash the order allowing the plaintiff's suit and that it be substituted with an order dismissing his suit with costs. He also asked that the order dismissing the appellant's counterclaim be vacated and be substituted with an order allowing the claim for breach of contract and liquidated damages of Kshs. 300,000/=. He urged that the transfer of the land to the 1st respondent was null and void for failure to obtain Land Control Board consent and pay stamp duty. He submitted that the court was wrong in not appreciating that under Section 26 of the [Land Registration Act](#), title could be nullified on account of fraud, misrepresentation, or illegality. He submitted that the appellant cannot be said to have trespassed into land whose title was fraudulently acquired and that he was a bona fide purchaser for value. He also urged that the sale transaction between the appellant and the 2nd respondent was valid. He submitted that it was the duty of the 2nd respondent to obtain consent of the Land Control Board and that a constructive trust was created in favour of the appellant and referred to the case of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* (2014) eKLR. He submitted that since the appellant did not seek specific performance he was entitled to compensation for both general and special damages. He submitted that



the sum of Kshs. 300,000/= ought to have been awarded to the appellant and that the 2nd respondent should be condemned to pay general damages for breach of contract.

18. For the respondents, Mr. Masese, learned counsel, submitted that once the appellant was refunded there was no case remaining. He submitted that nowhere did the trial court find that the appellant was entitled to Kshs. 300,000/= and that it is the respondents who are entitled to be paid the sum of Kshs. 300,000/= in this appeal. He submitted that there was no proof of fraud or illegality in acquisition of title. He also submitted on an issue of fact that the appellant moved out of the property on or about March 2020.
19. I have considered all the above. I will start with addressing the grounds of appeal which I outlined above. It will be observed that grounds 1, 2, 3, 4, and 6 more or less attack the title of the 1st respondent and it will in fact be seen that what the appellant seeks in this appeal is the nullification of the title of the 1st respondent on the ground that there was no Land Control Board consent and there was no payment of stamp duty. Ground 5 is related to the failure by the trial court to award Kshs. 300,000/= as damages for breach of contract. There is therefore no appeal on the failure by the trial court to make any award for compensation in the form of interest of 24% p.a as was pleaded and no appeal on the alleged compensation for 1/3 of the value of the land. There is also no cross-appeal by the respondents to be awarded the sum of Kshs. 300,000/= for breach of contract. I am aware that Mr. Masese did mention that the appellant moved out of the land but that is a matter for evidence and not something that can be brought about through submissions from the bar and I will disregard the same.
20. The appellant continues to insist that the title of the 1st respondent is a bad title and ought to be nullified. Within the context of this litigation, there is no basis for the appellant making this argument and in fact the appellant lacks the locus standi to do so. This is because he cannot purport to have any interest in the suit lands having already received a refund of the purchase price. Once he received a refund, he relinquished all rights over the land and lost locus to make any claim on it. Indeed the arguments of Mr. Nyariki that the appellant has a valid sale agreement for purchase of the land ring hollow. He is not seeking to enforce the sale agreement. Even the arguments that the transaction is still valid despite there being no consent of the Land Control Board are completely misplaced. The appellant has no sale agreement to enforce because he already accepted a refund of the purchase price. Immediately he accepted to be refunded, and the refund was done, he completely lost the right to enforce any claim for the land. And because he no longer has any right for the land it is completely unnecessary for the court to try and determine whether the title of the 1st respondent was obtained legally or not. It is only a person who seeks title to the land that can have locus to urge that the title of the 1st respondent is not a good title and ought to be nullified. In those few words, it will be seen that there is absolutely no substance in grounds 1, 2, 3, 4, and 6 of the appeal. There was therefore no error on the part of the Magistrate in declaring the 1st respondent to be the owner of the suit properties and issuing an order of permanent injunction to restrain the appellant from the said lands. In fact there is no way that the appellant could have a legal basis for being on the land. He had already received his refund and he therefore needed to vacate the land on receipt of the refund. He was only in occupation of the land pursuant to the terms of the contract and once he received his refund his right to continue in possession ended. He could have completely no defence to the suit that he is now a trespasser on the land. His continued presence on the land was illegal and contrary to the rights of the registered proprietor. If the 1st respondent had claimed general damages for trespass or mesne profits, he would have had a good case for it, but as correctly pointed out by the Magistrate, he made no prayers for such and I cannot fault the trial court for not making any award for general damages or mesne profits.
21. The only other ground of appeal which is left, that is ground 5, attacks the failure to award the appellant general damages of Kshs. 300,000/=. Before I go far, I had copied what the trial Magistrate noted in her



judgment. She did find that the appellant was the one in breach but she recorded that “the purchaser is entitled to Kshs. 300,000/= for breach of contract but notably he did not seek the refund of the same and the Court will therefore not award any damages for breach of contract.” In my opinion this was just an error in writing and I think the Magistrate meant that the seller is the one entitled to the Kshs. 300,000/= but will not get it because he did not make pleading for it. This is apparent from the context of the sentence.

22. In this appeal the appellant seeks this amount of money. The trial Magistrate thought that it was the appellant who breached the contract by not paying as noted in the letter of the agreement. I agree that the appellant did not make payments in accordance with the letter of the agreement but neither was the 2nd respondent complaining about the way the manner in which he was being paid in instalments. He was in fact gladly acknowledging them. His conduct displayed one who has accepted a modification of the contract and his continuous receipt of the purchase price in instalments means that he considered the contract to still be alive. If he thought that there was a breach of the contract by the appellant he ought to have informed him as much and rescinded the sale agreement but he did not do so. It was therefore wrong for him to transfer the parcels of land to the 1st respondent while continuing to receive the purchase price. The 2nd respondent in fact received money (Kshs. 65,000/=) on 17 December 2008 when he had already transferred title to the 1st respondent on 7 November 2008. The act of transferring the properties while he still considered the contract to be alive was a breach of contract for the effect was to obliterate the subject matter of the contract. One may argue that the appellant also did not complete payment of the purchase price but clearly he cannot be faulted for not completing the balance once he saw that the properties had already exchanged hands. It would be pointless continuing to make additional payments when the subject matter of the sale was no more. On those facts, I think it is the appellant who made out a case that the 2nd respondent breached the contract and is the one who deserved to be paid the sum of Kshs. 300,000/= for breach of contract. I will allow the appeal to this extent.
23. This appeal therefore succeeds to the extent that I will order the 2nd respondent to pay to the appellant damages of Kshs. 300,000/= for breach of contract. The said sum will attract interest from the date that the counterclaim was filed till satisfaction in full. There was attempt within the trial to urge that there will be double compensation to the appellant because the appellant continued to be in possession. The simple answer to that is if the respondents wished to be compensated for the duration of time that the appellant continued being in possession, they should have made pleadings to that effect, but they made none. However, if the appellant is still in possession, he has no basis to be in possession and he must give vacant possession forthwith. If he does not, the 1st respondent is at liberty to apply for his eviction. Though eviction was not pleaded, the trial court ought to have considered making the order especially given that she allowed the prayer for a permanent injunction against the appellant.
24. As I have earlier mentioned there is no ground of appeal seeking any other prayer and there is no basis for me to interrogate whether the appellant deserved to be paid interest at 24% p.a or other compensation. I will leave it at that, though I do not see any basis for it having been claimed in the first place, given that the contract had a default clause. That default clause would be what the parties agreed to be the compensation due to any party affected by default of the other and no more.
25. The last issue is costs. The appellant has partly succeeded. I will modify slightly the order on costs at trial. The plaintiff will still get costs of the suit against the defendant on the main suit. The appellant will however get costs of the counterclaim against the 2nd respondent to be calculated on the basis of an award of Kshs. 300,000/=. On the costs of this appeal, the appellant has partly succeeded and will have ½ costs of this appeal.



26. Judgment accordingly.

DATED AND DELIVERED THIS 19 DAY OF MARCH 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

