



**Gitau v Ng'ang'a & 2 others (Civil Appeal 37 (129) of 2019)
[2024] KECA 528 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KECA 528 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 37 (129) OF 2019
FA OCHIENG, LA ACHODE & WK KORIR, JJA
MAY 9, 2024**

BETWEEN

SAMUEL MWEHIA GITAU APPELLANT

AND

JOHN MUTURI NG'ANG'A 1ST RESPONDENT

BENSON M KANGETHE 2ND RESPONDENT

JAMES NJIRAINI KARANJA 3RD RESPONDENT

*(Being an appeal from the judgment/Decree of the High Court at Nakuru
(Ohungo.J) delivered on 20th November 2018 in Nakuru ELC No.291 of 2013))*

JUDGMENT

1. This is the first appeal of Samuel Mwehia Gitau (the appellant) against the judgment of Ohungo J delivered on November 20, 2018, in Nakuru Environment and Land Court. John Muturi Ng'ang'a, Benson M. Kangethe and James Njiraini Karanja are the 1st, 2nd, and 3rd respondents respectively.
2. The backdrop of this matter is a plaint dated April 5, 2013 that was filed by the appellant in the Environment and Land Court.

In the plaint, he pleaded that he is the registered proprietor of all that parcel of land known as Nakuru/rotharini/3 measuring approximately 23Ha (suit land). It was further pleaded that on July 13, 2007 the appellant entered an agreement with the respondents for sale of 2.7 acres, to be excised from the suit land at a purchase price of Kes 630,000/=. The respondents paid to the appellant Kes 550,000/= leaving a balance of 80,000 which was to be paid by October 13, 2007. It was pleaded that the balance was not paid, and that the contract is void for contravening the provisions of the Land Control Act. As such, the appellant sought judgment against the respondents jointly and severally for:



- a. A declaration that the land transaction was void *ab initio* and the same cannot be completed as it contravenes the provisions of the [Land Control Act](#).
- b. An order for permanent injunction restraining the defendants by themselves their agents and/or legal representatives from trespassing into, occupying, cultivating, remaining on and/or in any way whatsoever interfering with 2.7 acres of that parcel of land known as Nakuru/Rotharini/3.
- c. Costs of the suit.
- d. Any other relief the honourable court may deem fit and just to grant.
 1. The respondents filed a statement of defence dated April 15, 2013, in which they denied the appellant's averments and urged the court to dismiss the suit with costs. They averred that they are the owners of the suit property, that clause 5 of the sale agreement stated that the appellant would not be entitled to any further benefit in respect of the suit property and that the appellant had failed to obtain consent to subdivide the suit property and to transfer it to the respondents.
4. During the hearing, the appellant, 1st respondent and 2nd respondent testified in support of their respective cases.
5. The appellant testified that on July 16, 2007, the 1st respondent presented him with a sale agreement dated 13th July 2007 between himself and the respondents. The agreement was in regard of a sale of a parcel of land measuring 2.7 acres which was to be hived from the suit land, the appellant's property. He testified that the purchase price was Kes 630,000/- and he was paid Kes 500,000/-, whereupon he signed the agreement in the absence of an advocate. A further Kes 50,000/- was paid to him on August 7, 2007, leaving a balance of Kes 80,000/- which was to be paid on October 13, 2007 as per the agreement. That the 1st respondent took the agreement to the other respondents to sign, then sent it back to the appellant. He admitted that it was him to obtain the Land Control Board consent but could not do so before he was paid the balance of the purchase price. Albeit he handed over possession of the suit land to the purchasers and they have been cultivating it.
6. On cross-examination, the appellant conceded that the purchase price was fixed on a willing buyer willing seller basis and that the 1st respondent was a land agent. He also told the court that they agreed on the purchase before July 16, 2007, however the other contents of the sale agreement were not agreed on. Also, that he signed on all the pages of the agreement.
7. The 1st respondent told the court that the appellant called him sometimes in June 2006 and asked him to get him a buyer for his plot. That he issued him a letter of authority enabling him to market the plot. He then told the 2nd respondent of the sale of the land, who in turn told his brother who lives in the United States of America (USA) to buy the plot. That the parties agreed on the purchase price of Kshs 630,000/- and the appellant asked the 1st respondent to draft an agreement. He testified that the agreement was signed by the 1st and 2nd respondents on behalf of the 3rd respondent. The 1st respondent then took it to the appellant who read it and also signed it together with the transfer form and the application for consent.
8. The 2nd respondent generally rehashed the evidence of the 1st respondent and added that the appellant was supposed to conduct a survey and obtain title, but he had not yet done so. For that reason, they decided not to pay the balance of the purchase price until the appellant did the survey.



9. Upon considering the matter before him, the learned judge gave the following orders:

- a) The plaintiff's case is dismissed.
- b. Time within which to apply for the consent of the Land Control Board in respect of the transaction comprised in the Land Sale Agreement dated July 13, 2007 is hereby extended by a period of 6 (six) months. The extended period to run from the date of delivery of this judgment.
- c. The plaintiff is hereby compelled to execute all the necessary documents and take all necessary steps to ensure completion of the transaction comprised in the Land Sale Agreement dated July 13, 2007. Such execution and such steps to be done within 30 (thirty) days from the date of delivery of this judgment. In default, the Deputy Registrar of this court to execute such documents and take such steps in the place of the plaintiff.
- d. Upon certificate of title in respect of the portion of Nakuru/Rotharini/3 measuring 2.7 acres being issued to the 3rd defendant, the 3rd defendant to immediately pay to the plaintiff Kes 80,000 being the balance of the purchase price.
- e. I award the defendants costs of the suit and interest thereon”

10. The appellant was aggrieved and dissatisfied by the above decision. He filed this appeal on the grounds that the learned judge erred in fact and in law:

- a. In dismissing the plaintiff's case, yet the plaintiff had proved his case to the required standard.
- b. By extending the time within which to apply for consent of land control board for the transaction comprised in the land sale agreement dated July 13, 2007 by a period of 6 months from the date of delivery of judgment, when there was no such prayer in the respondents' pleadings.
- c. In compelling the plaintiff to execute all the necessary documents and take all the necessary steps to ensure completion of the transaction comprised in the land sale agreement dated July 13, 2007 within 30 days failure to which the deputy registrar of the court to execute such documents and take such steps in the place of the plaintiff, when he already made a finding that the defendants owed the plaintiff a balance of Kes 80,000/- past the stipulated completion date.
- d. In ordering that upon certificate of title in respect of the portion of Nakuru/Rotharini/3 measuring 2.7 acres being issued to the 3rd defendant, the 3rd defendant to immediately pay the plaintiff Kes 80,000/- being the balance of the purchase price, thereby rewriting the terms of the agreement, which is not a function of the court.
- e. By awarding damages to the defendants, yet they did not deserve to be awarded such costs.
 1. This appeal was disposed of by way of written submissions. The firm of M/S Tombe & Co Advocates filed written submissions dated 30th of April 2023. There was neither representation in the virtual Court for the respondents nor were there written submissions filed on their behalf.
 2. The appellant urged that the judge erred by extending the time within which to apply for Consent of the Land Control Board for the transaction comprised in the land sale



agreement by a period of 6 months from the date of delivery of judgment, when there was no such prayer in the respondent's pleadings. That Order 15 of the Civil Procedure Rules provides that points of Law ought to be affirmed by one party and denied by the other to form legal issues for determination by the court.

3. He argued that the judge failed to consider how the appellant would get the Kes 80,000/= that he found still owing to him as he only made orders directing the appellant to sign all the completion documents.
4. It was also argued that the judge rewrote the sale agreement between the parties, in ordering that upon certificate of title in respect of portion of Nakuru/Rotharini/3 measuring 2.7 acres being issued to the 3rd respondent, he was to immediately pay the appellant Kes80,000/=.
5. The appellant urged that it was unjust that the court awarded costs to the respondent despite finding that both parties had not completed the sale agreement, as each was required by the court to perform their part.
6. This being the first appeal, our duty is as stated in this Court's decision in *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR 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 allowances in this respect”

17. We have considered the record of appeal, the rival submissions and the law applicable and the issues that crystallize for determination are:

- a. Whether the appellant proved his case to the standard required,
- b. whether the learned judge erred by extending the time within which to apply for consent of land control board for the transaction by a period of 6 months from the date of delivery of judgment, when there was no such prayer in the respondents' pleadings,
- c. Whether the learned judge rewrote the parties' agreement, and
- d. Whether the costs of the suit were unjustly awarded to the respondent.

18. It is a principle of law that whoever lays a claim before the court against another has the burden of proving it. Sections 107 and 108 of the *Evidence Act* provide as follows:

“107(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”



19. Regarding the standard of proof in civil matters, Lord Denning in *Miller vs Minister of Pensions* [1942] 2 ALL ER 372 pronounced himself thus:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

20. The appellant sought orders that the land transaction was void *ab initio* and the same cannot be completed as it contravenes the provisions of the [Land Control Act](#), and a permanent injunction restraining the respondent from trespassing into the 2.7 acres of suit land. On the other hand, it was the respondents’ testimony that the appellant was supposed to conduct the land survey and to obtain the land control board consent which he did not. As a result, they decided not to pay the appellant the balance of the purchase price, being Kes 80,000/-.

21. Paragraph 3 to 7 of the sale agreement dated July 13, 2007 provides as follows:

- “ 3. The balance of Kes 130,000 to be paid on or before October 13, 2007.
4. The survey costs to be met by the Vendor.
5. The Purchaser shall take possession of the said parcel of land upon signing this agreement and the Vendor shall not be entitled to any further benefits whatsoever in respect of the said piece of land.
4. The transfer of the said piece of land to be borne by the purchaser.

5. The vendor to obtain all relevant land control consents to subdivide and to transfer the said 2.7 acres to the purchaser.”

22. It is not contested that the parties herein executed the sale agreement dated July 13, 2007. From the agreement the appellant had a duty to obtain the land control board consent and the respondents were to pay the balance of the purchase price of Kes 130,000/-. It is common ground that the respondents paid the appellant a further Kes 50,000/- hence remaining with a balance of Kshs, 80,000/- that has not been paid. Further, that the appellant did not obtain the relevant land control board consent to effect the transfer of the 2.7 acres of the suit land. In the circumstances, guided by *Miller supra* we agree with the learned judge that the appellant did not prove his case on the balance of preponderance.

23. Application for a land control board consent is provided for in section 8 (1) of the [Land Control Act](#). It provides thus:

- “(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto: Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.”



- 24. In their submissions, the appellant faulted the judge for extending the time within which to apply for consent of land control board, when there was no such prayer in the respondent’s pleadings.
- 25. The learned judge while extending the time pronounced himself as follows:

“I found earlier in this judgment that the plaintiff received over 87% of the purchase price and that the defendants took possession of the suit property immediately upon execution of the sale agreement and that they remain in such possession. I also found that the plaintiff had an obligation under the agreement to obtain the consent among other consents and that he cannot fault the defendants for not paying the balance of Kes 80,000 prior to him availing the consent of the land control board. I further found that although the plaintiff remains registered proprietor of the suit land, he does so as a trustee for the 3rd defendant and that he is estopped from denying the 3rd defendant’s claim to the land. In the circumstances, this is a fit and proper case in which to facilitate completion of the transaction by granting extension of time within which to obtain consent of the land control board as well as orders compelling the defendant to execute necessary forms in that regard. I am convinced that that is where the justice of the case lies. The court has a duty to see to it that disputes are resolved expeditiously and affordably.”

- 26. We find that the appellant benefitted from the land transactions, and he gave the respondents possession of the land. The only thing that stood between the transfer of title was the Land Control Board consent and the balance of the purchase price. We concur with the learned judge’s decision to extend the time for applying for the Land Control Board Consent as it is the only way that the agreement between the parties would be completed.
- 27. Turning to whether the learned judge rewrote the agreement between the parties herein, we have looked at the sale agreement dated July 13, 2007. The intention of the parties was to transact in the 2.7 acres of the suit land. The orders that the court gave were to ensure that the completion of the agreement is achieved. Therefore, we are not persuaded by the appellant’s argument that the learned judge rewrote the parties’ agreement.
- 28. Finally, on the cost, the appellant’s suit was dismissed with cost to the respondent. Section 27(1) of the [Civil Procedure Act](#) provides that:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

- 29. Ultimately, this appeal is dismissed in its entirety, with no orders as to costs as the respondents neither appeared in court nor filed written submissions.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR

