



**Masinjila v Kanda (Civil Appeal 111 of 2019)  
[2024] KECA 1086 (KLR) (19 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1086 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL 111 OF 2019  
F SICHALE, LA ACHODE & WK KORIR, JJA  
AUGUST 19, 2024**

**BETWEEN**

**JOSEPH MAKARIOS MASINJILA ..... APPELLANT**

**AND**

**GABRIEL BIWOTT KANDA ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Kitale  
(M. Njoroge, J.) dated 25th October, 2018) in E.L.C Case No.23 of 2017)*

**JUDGMENT**

1. This is an appeal against the judgment of Mwangi Njoroge, J. delivered on October 25, 2018. A brief background will provide context.
2. The appellant herein, (the then plaintiff) filed a plaint dated February 14, 2017. The respondent herein was named as the then defendant. In the plaint, the appellant averred that on December 10, 2013, he entered into a sale/purchase agreement for the sale of 5 acres of land at a consideration of Kshs. 1,425,000; that the respondent paid Kshs. 700,000/- towards the purchase price; that the balance of Kshs.725,000/- was to be paid on or before December 31, 2014; that the respondent acquired possession of the land by fraudulently misrepresenting that he was in a position to pay the balance of the purchase price. The appellant sought the following orders:
  - a. An order for rescission of the sale agreement dated December 10, 2013.
  - b. An order directing, the defendant to deliver up vacant possession of the land to the plaintiff.
  - c. Mesne profits.
  - d. Damages for fraudulent misrepresentation.
  - e. The costs of the suit.



- f. Interest on (c), (d) and (c) above.
  - g. Any other relief which this Honourable Court may deem just and fit to grant.”
3. In a defence dated March 2, 2017, the respondent refuted the appellant’s contention that he has failed to pay the balance of the purchase price. In return, the respondent maintained that he had faced a litany of suits filed against him in order to frustrate his bid in purchasing the suit land. These are:-
- “ a. Bungoma Succession Cause No.119 of 2011.
  - b. Bungoma High Court Misc.Case NO.55 of 2012.
  - c. Bungoma High Court Succession Cause No.8 of 2014.
  - d. Kitale ELC Case No.63 of 2016.”
4. The matter was heard by Njoroge, J. who dismissed the appellant’s suit.
5. Undeterred, the appellant has filed this appeal, raising 11 grounds of appeal in his Memorandum of Appeal dated May 16, 2019. These are:
- “ i. That the learned Judge erred in law and in fact in dismissing the suit.
  - ii. The learned Judge erred in law and in fact when he failed to consider the covenants between the parties in spite of the succession that ensued.
  - iii. That the learned Judge erred in law and in fact in failing to consider the facts of the case as presented before the court for consideration and that these facts are unique in themselves and weighty in so far as this case is concerned.
  - iv. That the learned Judge erred in law and in fact in holding that the defendant [respondent herein] was not in breach of the sale agreement dated December 10, 2013 in spite of his admission that he has not to date paid the balance of the purchase price.
  - v. That the learned Judge erred in law and in fact in considering evidence that was not adduced by the defendant [respondent herein] during hearing of the case at the High Court.
  - vi. That the learned judge erred in law and in fact in failing to consider the fact the defendant (respondent herein) had no counterclaim in his defence and for that matter he had not asked at all to complete making payments as per the agreement.
  - vii. That the learned judge erred in law and in fact in basing on cases that were filed later in time after the breach of contract.
  - viii. That the learned Judge erred in law and in fact in basing on cases that the Plaintiff was not party to.
  - ix. That the learned judge erred in law and fact in basing on cases that were extraneous to this case.
  - x. That the learned Judge erred in law and in fact in failing to consider the spirit of the law in so far as the facts of the case are concerned.



- xi. That the learned Judge erred in law and in fact in failing to consider the principles of natural justice in so far as the facts of this case are concerned.”
6. On October 24, 2023 when the appeal came up for plenary hearing before us, learned Counsel Mr. Richard Nyamu and Miss Risper Arunga for the appellant and respondent respectively both opted to wholly rely on their written submissions.
  7. In the submissions dated December 30, 2022, it was submitted for the appellant that the trial court failed to find that the respondent had breached the sale agreement of December 10, 2013; that the balance of the purchase price which remains unpaid to-date was to be paid on or before December 31, 2014; that the respondent has been in uninterrupted possession of the suit land; that the appellant is unaware of injunctive reliefs as against the respondent in Bungoma Miscellaneous Cause No.55 of 2015 or at all, as the appellant has never been a party to a suit seeking to injunct the respondent from the use of the suit land; that the trial court erred in directing the respondent to pay the balance of the purchase price subject to the appellant demonstrating that he can effect a transfer in the absence of a counter-claim.
  8. The appeal was resisted by the respondent’s submissions dated May 6, 2022. It was submitted that the respondent had not failed to pay the balance of the purchase price by the agreed date of December 31, 2014 as a series of litigation filed by the appellant’s family members against the respondent had frustrated his bid to pay the balance of the purchase price. In particular, that in Kitale ELC No.63 of 2016 the respondent was sued by the appellant’s mother who sought an order of eviction against the respondent; then in Bungoma High Court Succession Cause No.119 of 2011 the court issued an injunctive relief prohibiting any person from taking possession of the suit land. We were urged to find that ELC Case No.63 of 2016 having been determined as between the respondent and the appellant’s mother, the suit, the subject of this appeal was *res judicata*.
  9. On our part, we have considered the record, the oral submissions, the authorities cited by the respondent, and the law. We note that the appeal before us is a first appeal. Our mandate in respect of first appeal has been enunciated by numerous decisions of this court. In the case of *Selle versus Associated Motor Boat Co.* [1968] EA 123, this Court held:

“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 demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E.A.C.A 270.”
  10. The facts of this case are fairly straightforward. The fact of the sale agreement dated December 10, 2013 for the sale of 5 acres being part of No.6614/10 Noigam is not disputed. It is also common ground that the agreed purchase price was Kshs. 1,425,000/-out of which the respondent paid Kshs.700,000/ on execution of the sale agreement. The respondent took immediate possession and the balance of the purchase price of Kshs. 725,000/- was to be paid on or before December 31, 2014.
  11. What is not common ground is whether the respondent is in breach of the sale agreement by failing to pay the balance of the purchase price by December 31, 2014. The respondent maintained that he



has faced a multiplicity of suits filed against him by the appellant's relatives. These are: - Bungoma Succession Cause No.118 of 2011, Bungoma Misc.Cause No.55 of 2012, Bungoma High Court Succession Cause No.8 of 2014 and Kitale ELC No,63 of 2016.

12. The respondent contended that in view of the above suits, the appellant has no intention of transferring the suit land to him.
13. The appellant's contention, however, was that he was not a party to the suits referred to by the respondent; that the suit land was part of the land registered in Barnabas Masinjila's name (now deceased); that the respondent has been on the suit land since 2013 and that all suits referred to by the respondent were filed after December 31, 2014.
14. In his finding Njoroge, J. found that the respondent was prevented from paying the balance of the purchase price due to family wrangles of the appellant. In dismissing the appellant's suit, the learned Judge rendered himself thus: - "ordinarily, through the eyes of the purchaser, the essence of an agreement for the purchase of land is the ability of the seller to deliver title to him. In this case the plaintiff has been shown to lack that ability. It is the plaintiff who should be held to be in breach for lack of capacity. However, it is noted that the plaintiff is a beneficiary and his lack of capacity may be temporal. Nevertheless, it is still understandable when the defendant, not knowing what the future may bring through the litigation mentioned above, fails to pay the balance of purchase price. The defendant has already committed himself to his willingness to complete the agreement when the plaintiff finally obtains title to the land. The conclusion of this court is that the defendant is not in breach of the agreement."
15. We agree. The respondent could not be expected to pay the balance of the purchase price given that he faced a plethora of suits from the appellant's immediate family members.
16. As pointed out by the trial Judge, the appellant failed to give the respondent quiet enjoyment of the suit land. As to the contention that the trial judge gave orders not sought by the respondent, we do not see such order(s). The Judge simply dismissed the appellant's suit with costs to the respondent. He did not direct the respondent to pay the balance of the purchase price but merely reckoned that the balance of the purchase price maybe paid once the appellant is ready and willing to transact. We shall say no more on this.
17. Finally, the respondent urged us to find that the suit was *res judicata* in view of Kitale ELC Case No.63 of 2016. We hasten to add that the respondent did not file a counter-claim and neither was the issue of *res judicata* raised at all in the course of the trial.
18. We cannot in good conscience determine a matter raised for the 1<sup>st</sup> time in an appeal, the said issue not having been raised and a determination made thereof which determination then becomes the subject of an appeal.
19. Be that as it may, we believe we have said enough to demonstrate that this appeal is for dismissal. It is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2024.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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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**

