



**Muigai v Kamiri & 5 others (Civil Appeal 197 of 2018)  
[2024] KECA 1554 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1554 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 197 OF 2018  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**FREDRICK MAHIHU MUIGAI ..... APPELLANT**

**AND**

**JOSEPH KAMIRI ..... 1<sup>ST</sup> RESPONDENT**

**JOHN K MATIVO ..... 2<sup>ND</sup> RESPONDENT**

**DUNCUN N WANJIGI ..... 3<sup>RD</sup> RESPONDENT**

**SIMON KABOCHO ..... 4<sup>TH</sup> RESPONDENT**

**JOSHUA KITONGA ..... 5<sup>TH</sup> RESPONDENT**

**CHRISTIAN CHURCH INTERNATIONAL ..... 6<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Environment and Land Court of Kenya at Nyeri (L.N. Waithaka, J.) dated the 20th day of December, 2017 in Nyeri ELC case No. 79 of 2014)*

**JUDGMENT**

**Background**

1. Fredrick Mahihu Muigai, the appellant herein, was the plaintiff before the Environment and Land Court at Nyeri. Joseph Kamiri, John K. Mativo, Duncun N. Wanjigi, Simon Kabocho and Joshua Kitonga (the 1<sup>st</sup> – 5<sup>th</sup> respondents respectively) are the registered trustees of Christian Church International (the 6<sup>th</sup> respondent) which is a church. The appellant claims to be the registered owner of the property known as parcel No. LR No 4148/226 (the suit property), situate in North East of Ruiru Township within Thika which is the subject of the dispute between the parties.



2. According to the appellant, the respondents had expressed interest in purchasing the suit property in March 2008 at an agreed consideration of Kshs.300,000. The respondents paid the sum of Kshs.150,000 as a deposit towards the purchase price, and were to pay the balance of Kshs.150,000 at a later date. That it was only after payment of the purchase price in full that the parties would then proceed to execute a sale agreement as well as the requisite applications for consents to transfer from the Land Control Board and the transfer instruments.
3. The appellant further contended that the respondents failed to honour the understanding that the parties had and refused to settle the balance of the purchase price. As a result, the appellant instructed his advocates to refund the deposit paid and rescind the agreement. The appellant also claimed that prior to his rescinding the agreement, the respondents had, without his consent or knowledge, taken possession of the suit property and were in the process of developing it, and that they had refused to vacate even after demand to do so had been given.
4. The appellant therefore filed suit before the Environment and Land Court (ELC) praying for various orders, chief among them: an order of eviction of the respondents from the suit property; an order of permanent injunction to restrain the respondents from trespassing, obstructing or interfering in any manner with the suit property; or from doing anything adversely affecting his interest in the suit property.
5. The respondents on their part had a different account. They admitted that they had identified the suit property for purchase and had taken steps to secure it for the 6<sup>th</sup> respondent. They claimed that they made payments to the appellant's agent, one Festus Odede Ogaya (Festus) who was described as a director of a company called Ndarugu Githobokoni Development Limited (the agent) who was acting as an agent for the vendor. The respondents claimed that they had paid the sum of Kshs.430,000, comprising the sum of Kshs.300,000 towards the purchase price of the suit property, as well as Kshs.130,000 which was for the payment of costs of the transfer of the suit property. The 1<sup>st</sup> respondent claimed that these funds were paid through the agent for onward transmission to the appellant's advocate.
6. The respondents further contended that they had been in possession of the suit property since 2007 when they were allowed to take occupation by the agent. Further, that it was a failure on the part of the appellant's advocate that the sale agreement was not prepared for execution by the parties.
7. After a hearing in which the appellant and two witnesses on behalf of the respondents testified, the trial court found for the respondents on four issues. The first was that there existed a contractual relationship between the parties. On this issue, the ELC considered the correspondence between the parties that indicated that there was an agreement for sale of the suit property, and that the respondent had acted towards fulfilling the agreement between the parties. The ELC further considered that in that sale, the appellant was represented by the agent in view of the fact that the initial deposit of Kshs.150,000.00 had been received through it, and that the appellant had given authority to the agent to act on his behalf. The ELC held that:

“...[the appellant] had either authorized the sale of the suit property to the defendants or if he had not, he ratified whatever arrangement there was between the defendants and the persons who represented him in the agreement for sale of the suit property.”
8. The ELC further found that it was clear, based on affidavit evidence sworn by Festus, that he had received the balance of the purchase price from the respondents, but had failed to remit it to the appellant. Further, that he remained personally liable for the said sum of money.



9. Based on the two findings, the ELC found that the appellant had not laid a basis for an order of injunction barring the respondents from dealing in the suit property. The ELC also considered a prayer by the respondents for an order that they held a beneficial interest in the suit property but dismissed this, holding that the respondents did not file a counterclaim and therefore had not laid a basis for the claim made. For those reasons, the ELC found that suit against the respondents was devoid of merit and dismissed it with costs.
10. Our duty in this appeal, as stated by this Court in *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR is to re-evaluate, analyze and re-assess the evidence on record and reach our own conclusions in the matter. It is for this reason that we have set out the evidence led and the conclusion reached by the trial court.

In the instant appeal, the appellant sets out seven grounds of appeal upon which he would have us set aside the judgment of the ELC. These, summarized, are that the trial court erred in law and fact by: holding that there existed a contract for the sale of the suit property between the parties; failing to consider that the agreement entered into by the parties did not meet the legal threshold for an agreement under Section 3(3) of the *Law of Contract Act*; holding that the appellant had authorized the agent to enter into an agreement for the sale of the suit property and that the agent had authority to act on his behalf in the sale of the suit property, and in sum, coming to conclusions that were contrary to the evidence and the law.

#### **Submissions by Counsel.**

11. At the hearing of the appeal the appellant canvassed the appeal by way of written submissions, which learned counsel, Mr. Thiga briefly highlighted. Counsel for the respondents were not present at the hearing and did not file any documents to oppose the appeal, despite service.
12. Mr. Thiga submitted that there was no contract of sale that conforms with Section 3(3) of the *Law of Contract Act*. Counsel further submitted that the learned Judge erred in finding that there was a contract when there was no written or signed contract between the parties. Counsel asserted that there was no demonstrated authority for the agent to act on behalf of the appellant and that the ELC therefore erred in finding as it did. Counsel urged us to allow the appeal with costs. Determination
13. We have considered the record of appeal, the submissions filed by the appellant, the authorities cited and the law. On the first issue, as to whether there existed a contract for the sale of the suit property, and therefore a contractual relationship between the parties, we have considered the handwritten document that is dated 31<sup>st</sup> October, 2007 and also noted that the 1<sup>st</sup> respondent, as he was testifying, conceded that no formal sale agreement had been drawn up by the parties. While the appellant also contends that this agreement cannot be binding on him as he was not a party to it, our view is that the handwritten agreement made by the parties appears to be the basis upon which the parties began to engage with each other, with the deposit of Kshs.150,000 being paid to the agent, who ostensibly forwarded this sum to the appellant's advocate. In this regard, we agree with the finding of the trial court that:

“it is clear what the parties' obligation to each other was under the agreement. The defendant was to pay to the plaintiff either directly or through his advocate the agreed purchase price of Kshs.300,000/- after which the plaintiff would execute the relevant documents to facilitate transfer of the suit property to the defendants. The letter from the plaintiff's advocate under reference confirms as much.”

The ground of appeal that there was no agreement between the parties therefore fails.



14. This leads us to the second attack on the impugned judgment which is to the effect that the appellant had not given any authority to the agent to act as agent on his behalf. The appellant contends that he had not authorized the purported agent to act on his behalf, and that the respondents ought to have provided a letter of authorization that allowed the said agent to receive the balance of the purchase price on his behalf. In the appellant's view, since no such evidence was produced, the ELC erred in holding that the company acted on behalf of the appellant.
15. It is not contested by the appellant that the deposit of Kshs.150,000 was paid by the respondents to the agent. The respondents have adduced evidence demonstrating that they paid the full amount of Kshs.430,000 directly to the agent as outlined in the handwritten agreement. It is also not contested by the appellant that at some point, his advocates came into possession of the deposit. The appellant, or his advocates gave no explanation how they came to receive the deposit of the purchase price from the person that they now claimed is a stranger. 16. Section 107 of the *Evidence Act* requires any party to prove facts that are asserted. The respondents have outlined the terms of the agreement entered into between the parties, and indicated that they paid the full purchase price as well as amounts intended to facilitate the transfer of the suit property. From the facts adduced, it is clear to us that the respondents properly discharged the burden of proving that there was a contract that existed between the parties, and that they took steps towards fulfilling their obligations towards payment of the purchase price. Section 119 of the *Evidence Act* allows us to "presume the existence of any fact which [we] think likely to have happened, regard being to the common course of natural events, human conduct and private and public business, in relation to the facts of the particular case".
17. From the record, all the receipts issued by the agent are in the name of the 6<sup>th</sup> respondent. We have also taken note of the affidavit by a director of the agent (Festus) indicating that he did indeed receive the balance of the purchase price but failed to remit the same to the appellant's advocates. This authority is also seen in the fact that the appellant's counsel attended a meeting with the respondents' representatives to discuss the sale of the suit property before the appellant purportedly rescinded the sale of the suit property. The evidence on record therefore demonstrates that the agent had authority to act on behalf of the appellant in the course of the sale of the suit property. In the circumstances, we find no fault with the findings of the ELC in this regard. For these reasons, the challenge on the judgment of the ELC must fail.
18. After consideration of the facts in this appeal and the positions taken by the rival parties, we come to the conclusion that the ELC properly applied the law to the facts at hand and that the challenge to the judgment and orders of ELC is without merit.
19. The upshot is that the appeal is dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

