



**Ndungu & 19 others v Lusiola (Civil Appeal 363 of 2019)
[2023] KECA 743 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 743 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 363 OF 2019
DK MUSINGA, F SICHALE & PM GACHOKA, JJA
JUNE 22, 2023**

BETWEEN

ELIAS MBAU NDUNGU & 19 OTHERS APPELLANT

AND

GRACE JENDEKA LUSIOLA RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya
at Nairobi (Bor, J.) dated 30th May 2018 in ELC Case No. 650 of 2012)*

JUDGMENT

1. Before this Court is an appeal against the judgment of the Environment & Land Court at Nairobi (Bor, J.) delivered on 30th May 2018 in ELC Case No. 650 of 2012. The dispute relates to ownership of a parcel of land known as Title Number Ruiru/Ruiru East Block 2/4842 (hereinafter referred to as “the suit property”).
2. *Vide* a plaint dated 10th October 2012, the respondent instituted suit against the appellants at the Environment & Land Court; ELC Case No. 650 of 2012. She claimed that she was the rightful registered owner of the suit property. However, sometime between the years 2008-2011, the appellants wrongfully and without any colour of right entered the suit property, took possession thereof and put-up residential premises thereon. She argued that the appellants’ actions had deprived her of the use and enjoyment of the suit property and had subjected her to loss and damage.
3. Among the orders she sought were vacant possession of the suit property, and an order directing the District Land Registrar, Thika, to remove a caution that had been registered against the suit property as well general damages for trespass.
4. The appellants filed a joint statement of defence dated 5th December 2012. They denied that the respondent was the rightful owner of the suit property and put her to strict proof thereof. They



claimed that they were *bona fide* purchasers of several portions of the land, all of which were subdivisions of the suit property.

5. Part of the documents produced before the trial court were correspondences exchanged between the respondent's advocate and one Kenneth Gikonyo Mungai (Mr. Gikonyo), whom she had entered into a sale agreement with for the purchase of the suit property. The documents revealed that a sale agreement was entered into on 9th July 2007 and the purchase price for the suit property was Kshs.2,000,000.00. Mr. Gikonyo paid Kshs.1,000,000.00 only to the respondent. Before he paid the full purchase price, Mr. Gikonyo subdivided the suit property into various plots and entered into separate sale agreements over the subdivisions with the appellants through his land sale company, Phibs Investments, and issued the appellants with Ownership Certificates in respect of their individual plots.
6. Owing to the failure by Mr. Gikonyo to complete the transaction between him and the respondent, the respondent, vide a letter dated 22nd September 2011 rescinded the entire transaction. Thereafter, the appellants held negotiations with the respondent's advocate on different dates and had at some point agreed to make good the outstanding amount of Kshs.1,000,000.00 directly with the respondent so that they could safeguard their interests on the suit property but they also failed to do so.
7. *Vide* an application dated 20th March 2013, the appellants sought leave of court to serve a third-party notice on Mr. Gikonyo, and the trial court granted them leave on 4th July 2013. They were also allowed to effect service upon him by way of substituted service in the "Daily Nation" newspaper through an order of the court dated 10th October 2014.
8. On 6th February 2015, the appellants requested for entry of judgment against Mr. Gikonyo, who, upon being served with the third-party notice failed to enter appearance or file defence within the stipulated timeline. On 29th October 2015 interlocutory judgment was entered against him at the request of the appellants.
9. The suit proceeded to hearing, where Edwin Kaniaru Mungai, who had been given power of attorney by the respondent testified as the only plaintiff's witness, whereas the 1st, 2nd and 15th appellants testified as defence witnesses.
10. *Vide* a judgment dated 30th May 2018, the trial court held as follows:
 11. It is not in dispute that the Suit Land is registered in the name of the Plaintiff. It is also not in dispute that the Defendants did not buy the land from the Plaintiff but they claim to have bought land from Kenneth Gikonyo and were issued with ownership certificates by Phibs Investment.
 12. The sale agreement entered into between the Plaintiff and Kenneth Gikonyo was not tendered in evidence. The contract entered into between the Plaintiff and Mr. Kenneth Gikonyo cannot be enforced by the Defendants who were not parties to it. While it is unfortunate that the Defendants paid money to Kenneth Gikonyo Mungai for the purchase of the Suit Property, this person was incapable of passing title to the Defendants over the Suit Property which is registered in the Plaintiff's name. Their claim can only lie against Kenneth Gikonyo and his land buying company which issued ownership certificates to the Defendants.
 13. On a balance of probabilities the court finds that the Plaintiff has proved her case and grants prayers (a), (b), (c), (e). The Plaintiff did not submit on the



issue of general damages and the court declines to grant prayer (d) sought in the Plaint.”

11. Subsequently, the trial court issued orders of permanent injunction restraining the appellants, their servants, agents, and/or employees from remaining or continuing in occupation of the suit property; mandatory injunction compelling the appellants, their servants, agents, and/or employees to immediately and unconditionally vacate the property for the respondent’s use and occupation, and in default, the respondent to be at liberty to evict the appellants and demolish all structures on the suit property; and an order directing the District Land Registrar, Thika, to remove the caution registered against the suit property by the appellants.
12. Being dissatisfied with the decision of the trial court, the appellants preferred this appeal. They fault the learned judge for: not considering that Edwin Kaniaru Mungai denied knowing Kenneth Gikonyo Mungai and also denied knowledge about sale of the suit property despite there being a demand for the balance of the purchase price from the respondent’s advocate; not considering that the appellants had made an effort to settle the balance owed to the respondent but her advocate declined to accept payment; by not questioning the absence of the respondent, both in court and on the suit land; by not looking into the authenticity and admissibility of the power of attorney issued to Edwin Kaniaru Mungai by the respondent; by not considering that the appellants had taken possession and developed the suit property with permanent houses for almost 10 years; by acknowledging that the sale agreement between the respondent and Kenneth Gikonyo Mungai was not tendered in evidence then proceeding to base her judgment on the same sale agreement; by failing to apportion blame or liability on Kenneth Gikonyo Mungai, yet interlocutory judgment had been entered against him; by ordering permanent and mandatory injunctions against the appellants without justifiable reasons or any basis in law; and failing to properly evaluate the evidence before her and misdirecting herself by granting the said orders without any evidence.
13. The appellants urged us to allow their appeal, set aside the impugned judgment, and substitute therefor an order dismissing the respondent’s case before the trial court, or in the alternative, order a fresh hearing of the suit and award them costs in the High Court and in this Court.
14. At the hearing of the appeal, Mrs. Kinyua, learned counsel appeared for the appellants, while Mr. Thuku, learned counsel holding brief for Mr. Muli was present for the respondent. Mrs. Kinyua relied on her written submissions, which she highlighted briefly. Counsel submitted, *inter alia*, that around ten (10) appellants have built permanent houses in the suit property and are living there with their families. On the third- party proceedings, counsel submitted that the appellants did not proceed against the third party, Mr. Gikonyo; that the appellants were innocent purchasers for value, though she conceded that had they conducted an official search before the purchase of the suit property, they would have known that the suit property was registered in the respondent’s name.
15. In their written submissions, the appellants maintained that they had made effort by talking to the respondent and thereafter held a meeting with the respondent’s advocate and had agreed that they would settle the balance of the purchase price that was to be paid by Mr. Gikonyo; that they raised a part of the balance and forwarded a bankers cheque of Kshs.225,000.00 to the respondent’s advocate, but the respondent declined to receive it.
16. Further, the appellants contended that the learned judge was wrong in basing her judgment on a sale agreement between the respondent and Mr. Gikonyo, which was not tendered in evidence; that the learned judge erred by failing to apportion blame or liability on Mr. Gikonyo, yet an interlocutory judgment had been entered against him, and had also received monies from the appellants.



17. Relying on the case of *Kanyungu Njogu v Daniel Kimani Maingi* [2000] eKLR, where the burden of proof in civil cases on the balance of probability was defined, the appellants submitted that the learned judge erred in issuing a permanent injunction against them, without considering the fact that they had taken possession and some of them had constructed permanent homes on the suit land and were living there together with their families for over 10 years.
18. In rebuttal, Mr. Thuku submitted that it was not in dispute that majority of the appellants were in occupation of the suit property, but the occupation was not sanctioned by the respondent; that it was also not in dispute that Mr. Gikonyo had failed to pay the full purchase price to the respondent; and that ownership of the suit property was lawfully vested upon the respondent. Counsel confirmed that there was a meeting held between the appellants and the respondent's advocate in an attempt to resolve the dispute, in which the appellants undertook to clear the balance of the purchase price amounting to Kshs.1,000,000.00, which Mr. Gikonyo ought to have paid, and that the purported part payment of Kshs.225,000.00 by the appellants was long after the agreement between the respondent and Mr. Gikonyo had been rescinded. In any event, the appellants could not purport to perform a contract that they were not privy to.
19. On the issue raised by the appellants that the learned judge erred in law and fact in not questioning the absence of the respondent, both in court during the proceedings and on the suit land, counsel submitted that the respondent resides in Tanzania and had lawfully appointed an attorney to represent her, who held a properly executed Power of Attorney that had been duly registered.
20. In sum, the respondent urged this Court to dismiss the appeal, there being no dispute that she was the lawful owner of the suit property, and there was no privity of contract whatsoever between her and the appellants.
21. From our perusal of the written submissions by both parties and the brief highlights thereof by counsel, this appeal turns on two main issues:
 - a) Whether Kenneth Gikonyo Mungai, the third party, had acquired good title to the suit property which he could have passed on to the appellants.
 - b) Whether the trial court erred by not apportioning liability against the third party, Kenneth Gikonyo Mungai.
22. This being a first appeal, our remit is to re-appraise the evidence that was tendered before the trial court and arrive at our own impartial conclusion. We ought not to interfere with the trial court's findings unless we are satisfied that the findings made by the trial court were based on no evidence, on a misapprehension of the evidence adduced, or that the learned judge demonstrably relied on wrong principles. See. *Selle v Associated Motor Boat Company* [1968] EA 123.
23. On the first issue as to whether Mr. Gikonyo, the third party, had acquired good title to the suit property which he could have passed on to the appellants, it is not in dispute that the appellants bought the suit property from Mr. Gikonyo, the same is evident from the various sale agreements between the appellants and Mr. Gikonyo, receipts and Ownership Certificates issued by Phibs Investment, where Mr. Gikonyo is one of the directors. The issue is whether Mr. Gikonyo had a proprietary interest in the said property.
24. From the evidence on record, it is clear that there was a sale agreement over the suit property between the respondent and Mr. Gikonyo. The appellants confirmed in their submissions that the respondent sold the suit property to Mr. Gikonyo, who in turn sold it to them. The appellants in their case relied on a letter dated 1st August 2011, which is a notice of rescission of the agreement within twenty-one



days due to failure on the part of Mr. Gikonyo to complete payment of the balance of the purchase price of the property. They also relied on a letter dated 24th August 2011 which extended the notice period to 12th September 2011.

25. In *Lucy Njeri Njoroge v Kaiyabe Njoroge* [2015] eKLR, this Court stated as follows:

“As to whether the contract had indeed been rescinded is a matter of fact. *Black’s Law Dictionary*, Ninth Edition defines “rescission” as,

“A party’s unilateral unmaking of a contract, for a legally sufficient reason such as the other party’s material breach or a judgment rescinding the contract... Rescission is generally available as a remedy or defence for a non-defaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their precontractual position.”

In the instant case, when the appellant defaulted in the payment of the balance of the purchase price, there is no doubt that the respondent was at liberty at any time to rescind the agreement, by notifying or communicating such rescission to the appellant. In so doing, the respondent would in turn have had to return any amounts paid to him in part performance of the contract, so as to return the parties to the position they would have been prior to entering into the agreement.”

26. In this appeal, Mr. Gikonyo had not paid the balance of the purchase price of Kshs.1,000,000.00. The respondent issued him with a notice to settle the balance and a further extension of the said notice period to 12th September 2011, failing which the sale agreement would stand rescinded.

27. The appellants in their submissions argued that they had made an effort to settle the balance owed to the respondent by Mr. Gikonyo. They said that a meeting was held on 12th September 2011 between themselves and the respondent’s advocate and it was agreed that the balance of Kshs.1,000,000.00 was to be settled by themselves and paid directly to the respondent; that they drew a banker’s cheque of Kshs.225,000.00 in part payment but the cheque was rejected by the respondent. In rebuttal, the respondent submitted that the appellants could not purport to perform a contract that they were not privy to; that the purported cheque was drawn on 30th September 2011, long after the agreement between herself and Mr. Gikonyo had been rescinded; and the amount of Kshs.225,000.00 was a far cry from the outstanding balance of Kshs.1,000,000.00.

28. From our perusal of the record, we find that Mr. Gikonyo was served with a rescission notice by the respondent due to his inability to pay the balance of the purchase price. We agree with the learned judge that after 12th September 2011, the sale agreement between the respondent and Mr. Gikonyo stood rescinded. On whether the appellants could thereafter settle the balance owed to the respondent by Mr. Gikonyo, we concur that they were not parties to the agreement between Mr. Gikonyo and the respondent, and for that reason, they could not perform it, and in any event, the sale agreement had already been rescinded.

29. In *Agriculture Finance Corporation v Lengetia Ltd & Jack Mwangi* [1985] eKLR, quoting with approval from *Halsbury’s Laws of England*, 3rd Edition, Volume 8, at paragraph 110, Hancox, JA. reiterated that:

“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger



to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

30. In view of the foregoing, the suit property did not pass to Mr. Gikonyo. It follows, therefore, that Mr. Gikonyo had not acquired any proprietary rights over the suit property which he could pass on to the appellants. The respondent remains the registered proprietor of the suit property.
31. The appellants argued that they are innocent purchasers for value without notice. We do not agree. In Lawrence *P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others* [2017] eKLR, this Court quoted with approval *Katende v Haridar & Company Limited* [2008] where the Court of Appeal in Uganda held that:
- “For the purpose of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine (he) must prove that:
- (a) he holds a certificate of title;
 - (b) he purchased the property in good faith;
 - (c) he had no knowledge of the fraud;
 - (d) he purchased for valuable consideration;
 - (e) the vendor had apparent valid title;
 - (f) he purchased without notice of any fraud;
 - (g) he was not party to any fraud.”
32. In the instant appeal, Mrs. Kinyua admitted that Mr. Gikonyo had no valid title over the suit property and that an official search on the title revealed the respondent as the proprietor thereof. She further stated that although an official search was done, it was however done after the appellants had already purchased the suit property and that if the same had been done much earlier before the purported purchase, it would have been obvious to the appellants that Mr. Gikonyo was not the owner of the suit property and would have refrained from any dealings with him. In those circumstances, the appellants cannot be described as *bona fide* purchasers. The appellants were not diligent in their transactions with Mr. Gikonyo. Therefore, this ground of appeal fails.
33. Turning to the second issue, the appellants argue that the learned judge ought to have apportioned liability against the third party for the reason that interlocutory judgment had been entered against him.
34. *Vide* a chamber summons filed on 27th March 2013, the appellants sought leave to serve a third-party notice upon Mr. Gikonyo, which was granted on 4th July 2013 and subsequently, they filed and served him. As a result of the failure by Mr. Gikonyo to enter appearance or file a defence within the stipulated timelines, the appellants proceeded to request for interlocutory judgment against him under the provisions of order 10 rule 4 of the *Civil Procedure Rules*, 2010. Interlocutory judgment was entered on 29th October 2015.



35. Order 10 rule 4 provides that:

“ 4.

(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.”

36. The appellants argued that the learned judge erred in not apportioning liability against Mr. Gikonyo since there was an interlocutory judgment against him. An interlocutory judgment is defined by *Black's Law Dictionary*, Ninth Edition as follows:

“ An intermediate judgment that determines a preliminary or subordinate point or plea but does not finally decide the case. A judgment or order given on a provisional or accessory claim or contention is general interlocutory.”

37. Order 10 rule 6 of the *Civil Procedure Rules*, 2010 provides for interlocutory judgment and it states as follows:

“ 6. Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No.3 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.”

38. The appellants did not institute any suit against Mr. Gikonyo seeking pecuniary damages or for detention of goods. They could not, therefore, seek interlocutory judgment against him for failure to enter appearance or file a defence under Order 10 rule 6 of the *Civil Procedure Rules*, 2010. The appellants had instituted third party proceedings, which obtains where a defendant claims to be entitled to relief or indemnity from a third party and therefore applies for a joinder of the third party to prosecute a separate action between the defendant and the third party in the same action as with the plaintiff.

39. It was for the appellants to prosecute their case against Mr. Gikonyo, and if the trial court entered judgment against him in their favour, they would only have executed the judgment against him alone, they would have done nothing against the respondent. The record of appeal does not indicate that the case against the third party was set down for formal proof. At the hearing of the appeal, Mrs. Kinyua confirmed that the appellants did not proceed against the third party. As this was done, we cannot fault the learned judge for failing to apportion liability against the third party. In the circumstances, failure by the learned judge to allude to the interlocutory judgment that had been entered against the third party in her final judgment did not negate the trial court's findings in respect of the suit property. This ground of appeal is therefore without any merit.



40. In the upshot, this appeal has no merit, and we dismiss it in its entirety and award costs thereof to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

D. K. MUSINGA, (P).

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

