



**Chege v Ngumba (Environment and Land Appeal 49 of 2023)
[2024] KEELC 3499 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3499 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 49 OF 2023**

**YM ANGIMA, J
APRIL 25, 2024**

BETWEEN

JOHN NJOROGE CHEGE APPELLANT

AND

STEPHEN NGECHO NGUMBA RESPONDENT

*(Being an appeal against the judgment and decree of Hon. S.N. Mwangi
(SRM) dated 26.01.2023 in Nyabururu CM ELC No. E038 of 202)*

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 26.01.2023 in Nyabururu CM ELC No. E038 of 2021 – John Njoroge Chege -vs- Stephen Ngecho Ngumba. By the said judgment, the trial court dismissed the Appellant’s suit against the Respondent with costs.

B. Background

2. The material on record shows that vide a plaint dated 05.05.2021 the Appellant sued the Respondent seeking the following reliefs:
 - a. An order for specific performance compelling the defendant to execute Land Control Board consent, land transfer forms and to avail all necessary documents to facilitate the registration of Title No. Nyandarua/Passenga/617(measuring approximately 0.191 ha) in the plaintiff’s name.
 - b. Alternatively, the defendant be compelled to compensate the plaintiff the purchase price paid at the prevailing market value of the suit land.
 - c. General damages for breach of contract.



- d. Costs of this suit with interest thereon.
3. The Appellant pleaded that vide a sale agreement dated 10.12.2010 the Respondent sold him Title No. Nyandarua/Passenga/617 (the suit property) for a consideration of Kshs.75,000/= which he stated to have paid in full. He pleaded that he thereupon took occupation and developed the suit property but the Respondent had in breach of the said agreement refused, failed or neglected to transfer the suit property to him. It was the Appellant's case that despite issuance of a demand and notice of intention to sue the Respondent had failed to make good the claim hence the suit.
 4. The record shows that the Respondent filed a statement of defence dated 21.06.2021 denying liability for the Appellant's claim. The Respondent admitted the existence of the sale agreement but denied that the purchase price of Kshs.75,000/= was paid in full. He denied that the Appellant had taken possession of the suit property and pleaded that the Appellant had never requested him to sign any documents for transfer of the suit property.
 5. The Respondent further denied that he was in breach of the sale agreement and pleaded that he had over the years made attempts to reach the Appellant for the purpose of refunding the purchase price without success. He further pleaded that the Appellant's suit was time-barred under the *Limitation of Actions Act* (Cap.22). The Respondent consequently prayed for dismissal of the Appellant's suit with costs.
 6. Vide a reply to defence dated 27.06.2021 the Appellant joined issue upon the Respondent's defence and reiterated the contents of the plaint. He denied any default in the payment of the purchase price and pleaded that he had prior to the filing of the suit reported the matter to local administrators who had directed the Respondent to complete the sale.
 7. The Appellant further pleaded that the Respondent had never claimed non-payment of the purchase price for over 10 years and had never raised the issue before the local administrators during arbitration meetings and he had never issued a demand letter claiming the alleged balance. It was the Appellant's case that it was the duty of the Respondent to avail all the necessary completion documents and that he had failed to do so over the years. The Appellant denied that his claim was time-barred and pleaded that he was entitled to the suit property on account of the doctrines of trust and equitable estoppel.

C. Trial Court's Decision

8. The record shows that upon a full hearing of the suit the trial court held that the Appellant was the one in breach of the sale agreement because he had failed to provide evidence of payment of the full purchase price as it appeared that he had paid only a sum Kshs.50,000/=. The trial court declined to order a refund of the said amount on the basis that the Appellant was the party in default. As a result, the trial court dismissed the Appellant's suit in its entirety with costs to the Respondent.

D. Grounds of Appeal

9. Being aggrieved by the said judgment the Appellant filed a memorandum of appeal dated 24.02.2023 raising the following 5 grounds of appeal:
 - a. That the learned trial magistrate erred in law and in fact in finding that the Appellant was in breach of the sale agreement contrary to the evidence on record which shows that there was constructive trust and proprietary estoppel.
 - b. That the learned trial magistrate erred in law and in fact in disregarding standard conveyancing practice on land transfers.



- c. That the learned trial magistrate erred in law and in fact by failing to award the Appellant a refund of the purchase price at market value.
 - d. That the learned trial magistrate erred in law and in fact by failing to award the Appellant damages for breach of contract.
 - e. That the learned trial magistrate erred in law and in fact in finding that the Appellant was in breach of the sale agreement contrary to the inaction of the Respondent to effect transfer of the property.
10. As a result, the Appellant sought the following reliefs in the appeal:
- a. That the judgment of the trial court dated 26.01.2023 be set aside.
 - b. That judgment be entered for the Appellant as prayed in the plaint with costs.
 - c. That the Appellant be awarded costs of the appeal.

E. Directions on Submissions

11. When the appeal was listed for directions, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Respondent filed written submissions dated 12.01.2024 whereas the Appellant's submissions were not on record by the time of preparation of the judgment.

F. Issues for Determination

12. Although the Appellant raised 5 grounds in his memorandum of appeal the court is of the opinion that the same may be summarized into the following 3 grounds:
- a. Whether the trial court erred in law and fact in holding that the Appellant had failed to prove his claim against the Respondent.
 - b. Whether the Appellant is entitled to the reliefs sought in the appeal.
 - c. Who shall bear costs of the appeal.

G. Applicable legal principles

13. As a first appellate court, this court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at page 126 as follows:

“...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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally.”



14. Similarly, in the case of *Peters –vs- Sunday Post Ltd* [1958] EA 424 Sir Kenneth O’ Connor, P. rendered the applicable principles as follows:

“...it is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

15. In the same case, Sir Kenneth O’Connor quoted Viscount Simon, L.C in *Watt –vs- Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

16. In the case of *Kapsiran Clan -vs- Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:

- a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.



H. Analysis and Determination

Whether the trial court erred in law and fact in holding that the Appellant had failed to prove his claim against the Respondent

17. The court has considered the material and submissions on record. It is evident from the judgment of the trial court that it held that the Appellant had failed to prove his case against the Respondent because the deposit slips he produced did not add up to Kshs.75,000/=. That is the main reason why the trial court held that the Appellant was the one in breach of the sale agreement by failing to pay the purchase price in full since the Appellant's documentation showed a deficit of Kshs.25,000/=.
18. The court is of the opinion that the trial court did not correctly evaluate the totality of the evidence before it including the conduct of parties both prior to the filing of the suit and after the filing of the suit. The trial court did not consider the fact that prior to the filing of the suit the Respondent had never raised the issue of non-payment of the alleged balance of Kshs.25,000/= at any forum. In particular, the issue was not raised with the Chief to whom the matter was reported for arbitration. Instead, the Respondent offered to transfer an alternative parcel of land located at a place called Captain with an alternative of refunding the purchase price.
19. It is also noteworthy that no demand letter or notice of termination of the sale agreement was issued by the Respondent on account of non-payment of the balance of the purchase price. It is also interesting to note that even after the filing of the suit, the Respondent was quite ambivalent and evasive on the issue of payment of the purchase price. Although he disputed full payment in his defence, he pleaded that he was ready and willing to refund the purchase price without specifying how much he was ready to refund and without pleading the alleged outstanding balance of Kshs.25,000/=. If the Respondent truly believed that the Appellant owed such a balance he would not have hesitated in pleading such a straightforward defence.
20. The court is thus of the opinion that the question of payment of the purchase price ought not to have been determined solely on the basis of the deposit slips which were available before the court. The trial court ought to have considered all the relevant circumstances and the conduct of the parties both before and after the filing of the suit. It must be remembered that the standard of proof in civil cases is on a balance of probabilities and not beyond any reasonable doubt. In the premises, the court is satisfied that the trial court erred both in law and fact in holding that the Appellant was the one who was in breach of the sale agreement by failing to pay the balance of the purchase price in the sum of Kshs.25,000/=.

Whether the Appellant is entitled to the reliefs sought in the appeal

21. It is well settled that a court of law ought not to grant the remedy of specific performance where the contract in question is not enforceable due to some vitiating factors. It is evident from the material on record that the suit property was agricultural land located in Passenga Settlement Scheme and that no consent of the Land Control Board was obtained for the sale transaction. The material on record further shows that the suit property was later on sold to a different purchaser for a sum of Kshs.250,000/=. In the premises, the court is of the opinion that a court ought not to issue the equitable remedy of specific performance when the suit property is no longer available.
22. The court is, however, satisfied that the Appellant is entitled to the alternative prayer for a refund of the purchase price paid together with interest thereon at court rates from the date of filing suit until payment in full. The court is unable to accede to the Appellant's plea for compensation for the current market value of the suit property. No basis was laid for this relief at the trial and no valuation report



was tendered at the trial to demonstrate the current market value of the suit property. The court is also unable to award the Appellant general damages for breach of contract because the court is of the view that a refund of the purchase price together with interest thereon shall be sufficient compensation in the circumstances of this case.

Who shall bear costs of the appeal

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Appellant shall be awarded costs of the appeal.

I. Conclusion and Disposal Orders

24. The upshot of the foregoing is that the court finds merit in the Appellant's appeal. However, the Appellant is entitled to some but not all the reliefs sought in the appeal. As a consequence, the court makes the following orders for the disposal of the appeal:
- a. The appeal be and is hereby allowed.
 - b. The judgment of the trial court dated 26.01.2023 is hereby set aside and in place thereof judgment is hereby entered for the Appellant against the Respondent in the following terms only:
 - i. The Respondent, Stephen Ngecho Ngumba, shall refund the Appellant the purchase price in the sum of Kshs.75,000/= together with interest thereon at court rates from the date of filing suit until payment in full.
 - ii. The Appellant, John Njoroge Chege, is hereby awarded costs of the suit.
 - (c) The Appellant is hereby awarded costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 25TH DAY OF APRIL, 2024.

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Muchangi Patrick for the Appellant

Ms. Eunice Ndegwa for the Respondent

C/A - Carol

