



**Matheka v Kangwe (Environment and Land Appeal E003 of 2023)
[2024] KEELC 3414 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3414 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

LG KIMANI, J

APRIL 24, 2024

BETWEEN

JOSEPHAT MUSILI MATHEKA APPELLANT

AND

STEPHEN MAITHYA KANGWE RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate Honourable M. Kasera (Mrs.) at Kitui Law Courts delivered on 20th January 2023 in Civil Suit Number 111 of 2014)

JUDGMENT

1. This appeal is from the judgment of the Senior Principal Magistrate Honourable M. Kasera(Mrs.) at Kitui law courts delivered on 20th January 2023 in civil suit number 111 of 2014. The Memorandum of Appeal dated 3rd February 2023 sets forth the following grounds:
 1. That the Learned Magistrate erred in law and fact by dismissing the suit filed on 12/5/2014 and amended on 8/9/2021 on the ground that the suit lacked merit.
 2. That the Learned Magistrate erred in law and fact by dismissing the suit by holding that the defendant refunded the plaintiff the purchase price paid to him.
 3. That the Learned Magistrate erred in law and fact by holding that the refund was in compliance with a court order and yet there was no evidence of any existing court case.
 4. That the Learned Magistrate erred in law and fact totally failing to take into account the evidence of the Plaintiff/Appellant.
 5. That the Learned Magistrate erred in law and fact by totally failing to take the submissions of the Appellant's counsel together with the case laws in support into account.



2. The Appellant prays that the appeal be allowed the judgment of the Honourable Magistrate be set aside and the same be substituted by the judgment of this Honourable Court.
3. The suit before the trial court was instituted by the appellant herein vide the plaint dated 9th April 2014 and amended on 8th September 2021. He claimed that on or about the 24th of September 2005 he entered into an agreement with the defendant for the sale of a portion of land measuring three (3) acres of out of land parcel No. 2554 Mutonguni/Kauwi in Kitui-West for a sum of Ksh.105,000. That he paid a deposit of Ksh.45,000 on the date of the agreement and later the balance of Ksh.60,000 and a further Kshs.6,485/= for processing of the title deed.
4. The Plaintiff averred that in breach of the agreement, the defendant neglected/failed/refused and/or ignored to process the title deed and effect the transfer of the suit property. He prayed for an order of specific performance, refund of the purchase price and damages for breach of contract as well as costs of the suit with interest.
5. The defendant filed a statement of defence dated 31st July 2014 and amended on 21st September 2021 stating that if there was an agreement of sale with the plaintiff the same was invalid, null and void and of no legal consequences as it contravened the mandatory provisions of the Land Control Act CAP 30 Laws of Kenya. He further denied receiving any consideration from the plaintiff and stated that he could not breach a sale agreement that never existed. The defendant further objected to lumping together a claim for specific performance and a refund of the sale price and averred that the claim was bad in law.

Summary of the proceedings during the trial

6. PW 1, Josephat Musili Matheka, the plaintiff, gave evidence before the trial court and adopted his witness statement. He stated that he entered into an agreement of sale dated 24th September 2005 where he purchased land parcel number Mutonguni/Kauwi/254 for Kshs.105,000. He paid a deposit of Kshs.45,000 on the same date in the presence of three witnesses and the balance of Ksh.60,000/= was withheld by one witness Francis Sande Mwamuli at the defendants' request which was later paid in cash on 26th September 2005 in the presence of another witness Boniface Kelly Makau. He then paid a further Kshs. 6,700/= on 29th April 2009 via Mpesa to Defendant for transfer of the title deed. However, the defendant did not process the title and is therefore in breach of the agreement of sale. He produced the said agreement as evidence.
7. On cross-examination, the Plaintiff denied that on 2.4.2015 the firm of Muinde & Co. Advocates wrote to him for a refund and denied knowledge of one Joseph Muli Kalavi.
8. PW 2 Francis Sande Mwamuli testified that he was a witness to the sale agreement of land measuring 3 acres to the plaintiff for a sum of Kshs.105,000 but that the defendant refused to transfer the land to the plaintiff. Upon cross-examination, PW 2 confirmed that the land title number 2554 was the mother title from which a portion was sold.
9. The defence case commenced with the defendant, DW 1 Stephen Maithya Kagwe testifying. He adopted his witness statement as evidence. He stated that he knew the plaintiff and that he had paid the money he demanded in the suit through the firm of J.M Muinde and Company Advocates. He stated that on 2nd April 2014, the said law firm wrote to the plaintiff to collect his money after the defendant effected the transfer of Kshs.105,000 through his bank to the law firm on 21st November 2013.
10. On cross-examination, he acknowledged that the plaintiff had given him money to buy land but then sold it to another individual without his consent. The issue was addressed in another court case



98/2011 where the court returned the land to him and he gave his advocate the money for a refund but the plaintiff refused to collect it.

11. The trial court delivered judgment on 20.1.2023 finding that there existed a previous suit between the parties' land case 98/2011 over the same subject matter and the court was convinced that the Plaintiff paid Kshs.105,000 to his then advocate Messrs. J.M Muinde for transmission to the plaintiff herein who was informed to collect the money. She therefore dismissed the suit with costs to the defendant.

The Appellant's Written Submissions

12. Counsel for the Appellant submitted on the validity of the sale agreement stating that it was in writing, was signed in the presence of witnesses and the consideration of Kshs 105,000 was paid as required by law. Counsel relied on the case of Peter Mbiriri Michuki v Samuel Mogo Michuki(2014)eKLR.
13. Submitting on whether there was a refund of the purchase price as a result of an order in court case number 98/2011, the appellant stated that the existence of the court case was not proven as the respondent did not produce the alleged court order or any court documents.
14. Further, counsel contends that no evidence was provided to show that the money was refunded and the Appellant denies any receipt of such money. They relied on the definition of burden of proof in the case of Ahmed Mohammed Noor v. Abdi Aziz Osman(2019)eKLR and the Supreme Court case of Raila Amolo Odinga 7 Anther-vs- IEBC & 2 others(2017)eKLR.
15. On whether the Appellant is entitled to the remedy of specific performance, counsel for the Appellant relied on the case of Joseph Kiprono Maswan v. Veronica Mukami Reithi 7 another(2021)eKLR stating that the equitable remedy of specific performance is an equitable one where a plaintiff must show that he has performed all the terms of the contract which he ought to have performed.

The Respondent's Written Submissions

16. Counsel for the Respondent submitted that the Appellant's claim was time-barred under section 4 (1) of the Limitation of Actions Act since the suit was filed 9 years after the cause of action is said to have accrued and the plaintiff had not sought an extension of time.
17. Further, it was submitted that the transaction was over agricultural land and section 6 of the Land Control Act CAP 302 Laws of Kenya renders a disposition without the Land Control Board's consent to be null and void.
18. Counsel further submitted that exhibits were produced to show that the Respondent refunded the purchase price through JM Muinde & Co. Advocates through an order in civil case number 98 of 2011 between the Appellant and the Respondent, where the Respondent was to refund the Appellant the purchase price.
19. It was further submitted that the Appellants divested himself of any interests in the land as evidenced by the agreement exhibited between him and one Joseph Muli Kalavi and that he had no interest in filing the suit. He relied on the cases of Gitanga Mwaniki and another vs Annuncata Waithera Kibue (2013)eKLR and Leonard Njonjo Kariuki vs Njoroge Kariuki alias Benson Njonjo Nairobi Civil Appeal No.26 of 1979 on the lack of the Land Control Board Consent rendering the transaction null and void.

Analysis and Determination

20. As a first appellate court, this court must approach the whole of the evidence on record from a fresh perspective and with an open mind and to evaluate and re-examine the evidence adduced in the trial



court, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified. This was espoused in the Court of Appeal case of *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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 into account of particular circumstances or probabilities materially to estimate the evidence.”

21. It is also trite law that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence. The Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

23. The court has considered the grounds of appeal, the record of appeal, submissions by Counsel and the authorities cited and proposes to consolidate the grounds of appeal and deal with them as one issue: “Whether the trial court erred in fact and law in finding that the respondent refunded the purchase price as directed in a case number 98 of 2011 and in dismissing the plaintiff's suit:”

21. Counsel for the Respondent raised two preliminary issues that were also raised before the trial court for determination. The first issue is whether the suit was time-barred under section 4 (1) of the *Limitation of Actions Act* CAP 22 Laws of Kenya since the suit was filed 9 years after the cause of action is said to have accrued.

22. The cause of action in the suit before the trial court is stated in paragraph 3 of the amended plaint as a claim based on an agreement of sale of three acres out of land parcel No. Mutonguni/Kauwi/2554. The Appellant sought an order of specific performance of the contract, refund of the purchase price and damages for breach of contract.

23. From the pleadings and the evidence on record, the agreement of sale was entered into on 24th September 2005, the balance was paid on 26th September 2005 and payment of Kshs 6700 for processing transfer was made on 29th April 2009 while this suit was filed on 12th May 2014.

24. Section 4(1)(a) of the *Limitation of Actions Act* provides that:

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

- (a) actions founded on contract;”



25. In the case of Edward Moonge Lengusuranga v James Lanaiyara & another [2019] eKLR it was held that:

“The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the *Limitation of Actions Act*. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred. In the case of Bosire Ongero vs Royal Media Services [2015] eKLR the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.”

26. From a casual look at the foregoing provisions of the law, it would appear that from the date of payment of the balance of the purchase price on 26th September 2005 to the date of filing the suit on 12th May 2014, the six years provided under the *Limitation of Actions Act* had lapsed. However, the court is of the view that other matters came into play in this suit that led to a different conclusion on this matter.

27. The court is of the view and finds that the evidence on record shows that there was acknowledgement and admission by the respondent of the transaction herein, there was payment of the purchase price by the appellant, admission of indebtedness and commencement of the process of refund of the said purchase price by the Respondent whether on the respondent’s own volition or as a result of a court order.

28. The above finding is based on the fact that first the Respondent pleaded in his defence that he refunded the sum of Kshs. 105,000 to the Appellant through his then Advocate J. M. Muinde & Co. Advocates. The letter dated 21st November 2013 from the said Advocate addressed to the Manager Equity Bank Kitui was such an acknowledgement. Further, the letter from the advocates addressed to the Appellant herein Josphat Musili Matheka dated 2nd April 2014 where the Advocate indicated that the transaction for the sale of three acres out of land parcel Mutonguni/Kauwi/2554 had been frustrated by operation of the law was an acknowledgement. The Advocates stated further that;

“Our client has consequently deposited the entire consideration paid (Kshs. 105,000/=) for onward transmission to you. Kindly call on the undersigned within the next two weeks for purposes of refund.”

29. In the court’s view, the admission and acknowledgement of the claim by the Respondent affected the question of Limitation of Actions. Section 23 (3) of the deals with acknowledgement and part payment of a claim and provides that:

Fresh accrual of right of action on acknowledgement or part payment

(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.

30. Section 24 provides for formalities as to acknowledgement and part payments of a claim and states that:



1. Every acknowledgement of the kind mentioned in section 23 of this Act must be in writing and signed by the person making it.
 2. The acknowledgement or payment mentioned in section 23 of this Act is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is required by that section to be made.
31. Section 25 (5) provides for the consequences or effects of acknowledgement and part payment and states that:
- “Effect of acknowledgement or part payment on person other than maker or recipient
5. An acknowledgement of a debt or other liquidated pecuniary claim binds the acknowledgor and his successors but not any other person
32. From the foregoing provisions of the law and applying them to the facts herein the cause of action accrued on and not before the date of the acknowledgements.
33. The trial court in its judgement found that the purchase price was refunded to the Appellant in the year 2013 before the suit was filed. The trial court found that from the documents produced by the Respondent herein, she was convinced that there existed a case between the two parties case number 98/2011. The court further stated as follows;
- “I am convinced that the plaintiff paid Kshs. 105,000 to his then Advocate M/S J. M. Muinde for the transaction to the plaintiff herein. I am convinced that J.M. Muinde called Mr. Matheka plaintiff to collect the refund in 2013 before this suit was instituted. I find the case lacks merit and I dismiss it with costs to the defendant”
34. The court has reviewed, evaluated and considered the evidence adduced concerning this issue of refund especially the documents produced by the Respondent. The documents start with a letter dated 21st November 2013 from J. M Muinde Advocate addressed to the Manager Equity Bank Kitui In the said letter the advocate states that he was representing the Respondent herein Stephen Maithya Kangwe. The Advocate refers to a case where he was representing the said Kangwe and where the court ordered to refund of the money received in a land transaction. The Advocate then issued a receipt to Stephen Maithya Kangwe dated 22nd November 2013 and indicated that the payment was for a refund of consideration paid. The next was a letter from the advocates addressed to the Appellant herein Josphat Musili Matheka dated 2nd April 2014 where the Advocate indicated that the transaction for the sale of three acres out of land parcel Mutonguni/Kauwi/2554 had been frustrated by operation of the law. He states further that;
- “Our client has consequently deposited the entire consideration paid (Kshs. 105,000/=) for onward transmission to you. Kindly call on the undersigned within the next two weeks for purposes of refund.”
35. At the bottom of the said letter, it is indicated that the letter was given to one Francis to alert the appellant of the appointment in two weeks to collect his dues. The last letter was one from the Respondent herein dated 27th March 2014 addressed to the Advocates J. M. Muinde in which it was indicated that the money had still not been paid to the Appellant herein and a request that the amount of Kshs. 105,000/= be paid within one week of the letter.



36. From the foregoing communication, it is clear that the defendant only showed proof that the sum of Kshs. 105,000/= was paid to his Advocate J. M. Muinde & Co. Advocates for onward transmission to the appellant herein. The Respondent did not prove that he had paid the Appellant the sum of Kshs. 105,000/= or any sum at all or that his then Advocate J. M. Muinde & Co. paid the amount deposited with them to the Appellant herein.
37. The court finds that the conclusion of the trial court that the firm of 'J.M.Muinde called Mr. Matheka plaintiff to collect the refund in 2013 before this suit was instituted' is unsupported by any evidence adduced before the said court and indeed contradicts the said evidence and in particular the letter from J.M.Muinde & Co. Advocates dated 2nd April 2014 addressed to the appellant herein and the Respondent's letter to the Advocates dated 27th March 2014.
38. In the court's view payment to his own Advocate of money owed to the Appellant did not discharge the Respondent of his obligation to the appellant especially when it was not shown that the said advocate paid the said money to the appellant.
39. The court further finds that the Respondent did not prove that there existed a case number 98 of 2011 that ordered the refund of the purchase price to the Appellant. None of the documents produced emanated from the court where the case is said to have been filed and are in the court's view insufficient to prove the existence of the case.

Was the Appellant entitled to an order of specific performance?

40. The appellant prayed for an order of specific performance of the agreement dated 24th September 2005. Counsel for the Respondent submitted that the transaction entered into between the parties herein was null and void on the ground that the parties did not obtain the consent of the Land Control Board as provided under the *Land Control Act* CAP 302 Laws of Kenya.
41. The court agrees with Counsel for the Respondent that the lack of consent from the Land Control Board renders the agreement for sale between the Appellant herein and the Respondent void for all purposes. Section 6(1) of the *Land Control Act* provides that:

“ Each of the following transactions that is to say—

 - (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
 - (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;
 - (c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.



42. The Court of Appeal in the case of David Sirona Ole Tukai vs. Francis Arap Muge & 2 Others (2014) eKLR held that:

“First and foremost, we have already stated that in our opinion, granted the express, unequivocal and comprehensive provisions of the Land Control Act, there is no room for the courts to import doctrines of equity into the Act. This is the simple message of section 3 of the Judicature Act. Consequently, the invocation of equitable doctrines of constructive trust and estoppel to override the provisions of the Land Control Act has, in our view, no legal foundation. We have also noted that this Court had previously held in a line of consistent decisions and very clear terms, that there was no room for application of the doctrines of equity in the Land Control Act. Those previous judgments were not referred to in the judgment in *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (supra).”

43. For the above reasons, the prayer for the specific performance of the agreement herein was properly rejected by the trial court.

44. However, despite the Land Control Act declaring the transaction void for all purposes, the court finds that the consideration paid under the transaction was recoverable under Section 7 of the Land Control Act which provides that:

If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.

Did the trial court err in dismissing the suit?

45. As discussed above, the court finds that the trial court did not err in dismissing the claim for specific performance of the agreement for sale dated 24th September 2005. The court finds that the trial court erred in dismissing the Appellant’s claim for a refund of the purchase price together with interest thereon.

46. The final order of the court is as follows:

1. This appeal is hereby allowed.
2. The Judgment of the Senior Principal Magistrate Honourable M. Kasera (Mrs.) delivered on 20th January 2023 in Kitui Chief Magistrates Civil Suit Number 111 of 2014 Josephat Musili Matheka vs Stephen Maithya Kangwe be and is hereby set aside and the same is substituted by the judgement of this court.
3. Judgement be and is hereby entered in favour of the Plaintiff in Kitui Chief Magistrates Civil Suit Number 111 of 2014, Josephat Musili Matheka vs Stephen Maithya Kangwe for a refund of the purchase price in the sum of Kshs 105,000/= together with interest at court rates from the date of filing the suit till payment in full.
4. Costs of the suit before the trial court are awarded to the Appellant.
5. Costs of this appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT KITUI THIS 24TH DAY OF APRIL 2024

L. G. KIMANI



JUDGE

ENVIRONMENT AND LAND COURT, KITUI

Judgement read in open court and virtually in the presence of:

C/A Musyoki

Alusiola for the Appellant

Kasimu holding brief for Kalili for the for Respondent

