



Mbugua & 3 others v Watila & 3 others (Environment and Land Appeal 02 of 2020 & 30 of 2019 (Consolidated)) [2024] KEELC 4347 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4347 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 02 OF 2020 & 30 OF 2019 (CONSOLIDATED)**

EC CHERONO, J

MAY 16, 2024

BETWEEN

ROBERT NJIRIRI MBUGUA APPELLANT

AND

ERUSTUS MAKARI WATILA 1ST RESPONDENT

SIMON WAMALWA 2ND RESPONDENT

MOSES WAKOLI WAMALWA 3RD RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND APPEAL 30 OF 2019

BETWEEN

ERUSTUS MAKARI WATILA 1ST APPELLANT

SIMON WAMALWA 2ND APPELLANT

MOSES WAKOLI WAMALWA 3RD APPELLANT

AND

ROBERT NJIRIRI MBUGUA RESPONDENT

(Appeals from the decree and judgment of Hon. J.Kingori (CM) in Bungoma CMCC No. 408 of 2013 delivered on the 7th days August, 2019)



JUDGMENT

a. Introduction

1. The two appeal herein arise from the judgment of the Chief Magistrate Hon. Hon. J. Kingori delivered on 7th August, 2019 in Bungoma ELC Case No. 408 OF 2013. The first appeal is ELCA No. 30 Of 2019 Erustus Makari Watila & 2 Others Vs. Robert Njiri Mbugua while the second appeal is ELCA 2 of 2022 Robert Njiri Mbugua Vs. Erustus Makari Watila & 2 Others. Both appeals came up for directions where parties agreed by consent to have the two appeals consolidated and heard together vide an order made on 1st November, 2023. ELCA 2 of 2022 Robert Njiri Mbugua Vs. Erustus Makari Watila & 2 Others was chosen as the lead file while ELCA NO. 30 of 2019 Erustus Makari Watila & 2 Others Vs. Robert Njiri Mbugua was agreed to be the cross appeal. For the purposes of this judgment therefore, Robert Njiri Mbugua shall be referred to as the Appellant while Erustus Makari Watila shall be the 1st Respondent, Simon Wamalwa the 2nd Respondent and Moses Wakoli Wamalwa the 3rd Respondent.

b. Background, Pleadings And Evidence By Parties

2. The brief background of this case is that the appellant filed a suit simultaneously with a Notice of Motion dated 28th October, 2013 under certificate of urgency. The appellant subsequently amended his plaint vide an amended plaint dated 29th April, 2014.
3. It was the appellants case that the 1st Respondent was the registered owner of all that parcel of land comprised in title number E. Bukusu/ N. Kanduyi/4646 (hereinafter 'the suit land'). He averred that the 1st respondent sold the said parcel of land to him at a consideration of Kshs. 1,500,000/= vide a written agreement dated 1st April, 2011 in which the appellant made a down payment of Kshs. 1,200,000/= leaving a balance of Kshs. 300,000/= agreed to be paid at the end of the year 2011.
4. It was his case that before the end of the year 2011, he tried to get the 1st respondent to come and collect the balance of Kshs. 300,000/= but he (the 1st respondent) was evasive. He averred that it was a term of the sale agreement that the title deed of the suit land would be deposited in the office of M/S Omudi Bw Onchiri Advocates from the date of execution of the agreement to full payment. He stated that unknown to him, the 1st respondent illegally and fraudulently subdivided the suit land into two plots i.e. E. Bukusu/ N. Kanduyi/6573 and E. Bukusu/ N. Kanduyi/6574 and transferred E. Bukusu/ N. Kanduyi/6574 to the 2nd and 3rd respondents.
5. The appellant in the Amended plaint set out the particulars of illegality and fraud against the respondents. The appellant therefore sought judgment against the defendants jointly and severally for;
 - a. A declaration that the sub-division of title number E. Bukusu/ N. Kanduyi/4642, creation of E. Bukusu/ N. Kanduyi/6573 and E. Bukusu/ N. Kanduyi/6574 and the subsequent transfer to the 2nd and 3rd defendants was illegal, unprocedural, fraudulent and actuated by malice and ill motive.
 - b. An order for rectification of the register and specific performance as hereinabove put in in paragraph 18 and 19.

Para 18. The plaintiff's claim against the defendants jointly and severally is for a declaration that the sub-division of title number E. Bukusu/ N. Kanduyi/4642, the subsequent creation of the two titles E. Bukusu/ N. Kanduyi/6573 and 6574



and transfer of the title E. Bukusu/ N. Kanduyi/6574 was illegal, unprocedural, fraudulent and actuated by bad faith.

Para 19. The plaintiff further claims against the defendant jointly and severally for an order for rectification of register, by cancellation of the two title deeds namely E. Bukusu/ N. Kanduyi/6573 and 6574 thereby reviving title number E. Bukusu/ N. Kanduyi/4642

- c. An injunction as in paragraph 21 above.

Para 21. In the alternative and without prejudice to the forgoing claim(s) the plaintiffs claim shall be for the current value of the subject matter.

- d. In the alternative and without prejudice to the forgoing prayers, an order directing the defendants to compensate the plaintiff to the extent of the current market value of the subject property.
- e. Costs of the suit.
- f. Any other relief that this Honourable Court shall deem fit to grant.

6. By way of a response, the 1st, 2nd & 3rd respondents filed an amended statement of defence and counter-claim dated 12th May, 2014 in defence to the amended plaint and averred that E. Bukusu/ N. Kanduyi/4642 did not exist. They confirmed that the original title deed was indeed agreed to be deposited with M/S Omundi Bw Onchiri & Co. Advocates until full payment which was to be made within 6 months from the date of execution. It was their case that the subdivision of Land Parcel No. E. Bukusu/ N. Kanduyi/4642 to the resultant plots was legal and procedural. They vehemently denied the particulars of fraud and illegality as set out and sought to have the case dismissed with costs.
7. In their counter-claim, the 1st respondent averred that indeed he entered into an agreement with the appellant for the sale of E. Bukusu/ N. Kanduyi/4642 for a consideration of Kshs. 1,500,000/= together with the buildings thereon. It was his contention that the appellant paid Kshs. 1,200,000/= leaving a balance of Kshs. 300,000/= which was payable on or before 30th September, 2011(within 6 months). He stated that upon execution of the agreement, the appellant took possession of the premises and has been enjoying mesne profits of Kshs. 36,000/= per month.
8. The 1st respondent averred that the appellant blatantly breached the said agreement and despite frantic efforts to have the balance cleared, the appellant neglected and or refused to honour his end of the bargain. The 1st respondent averred that as a result of the appellant's breach, he incurred unnecessary expenses causing him to sell the property to the 2nd and 3rd respondent who equally suffered losses and damages. The respondents jointly sought for the following orders against the appellant;
- a. An order of injunction restraining the plaintiff and his agents, servants and/or any other persons acting under the plaintiff from interfering with the L.R NO. E. Bukusu/ N. Kanduyi/4642, an order for eviction against the plaintiff and mesne profits in the sum of Kshs. 36,000/= per month from the date of default till the date of judgment.
- b. Costs of the suit and counter-claim.
- c. Any other relief as the court may deem fit.
9. The appellant testified as PW1 where he gave his evidence and produced documents before Hon.R. Ngetich(CM). In the course of the hearing and before the appellant called his second witness, the trial



magistrate was transferred and Hon. J. King'ori (CM) took over the matter and directions on how to proceed were taken on 15th March, 2016 where parties agreed to have the matter start de novo.

10. When the matter came up for hearing, the appellant called Omundi Bw'onchiri as PW2 who stated that he was an advocate of the High Court of Kenya. He confirmed that he prepared the sale agreement between the appellant and the 1st respondent involving Land Parcel No. E. Bukusu/ N. Kanduyi/4642 being sold at a consideration of Kshs, 1,500,000/=. It was his testimony that at the time of execution of the said agreement, the appellant paid a down payment of Kshs.1,200,000/= leaving a balance of Kshs. 300,000/= payable before the end of the year 2011. He testified that the 1st respondent deposited the original title with him pending payment of the balance and produced the title deed as PExhibit 8.
11. It was his evidence that the appellant visited his office on 4/5/2012 and deposited the balance of Kshs.300,000/= after explaining that he (the appellant) was unable to pay to the 1st respondent directly and a receipt (PExhibit 7) was issued to that effect. It was his testimony that in the event of breach, the offending party would be condemned to pay damages.
12. During cross-examination, he stated that the balance was paid in his office about 4 months after the completion date. It was his evidence that the appellant and 1st respondent had a confrontation in his office but did not know that it resulted to Criminal Case No. 2115 of 2013. He testified that he held the balance and title deed as he waited for the parties to attend his office and conclude the transaction as requested in numerous letters send to them.
13. DW1 Erastus Makali Watila Also confirmed the existence of the sale transaction and the payment of Kshs. 1,200,000/= paid to his wife's Equity account leaving a balance of Kshs.300,000/= payable by the end of 2011.It was his evidence that the appellant failed to pay the amount as agreed and as such, he visited the office of the advocate and various demand letter dated 9/3/2012 produced as DExhibit 2, demand letter dated 16/9/2012 produced as DExhibit 3, demand letter dated 18/4/2012 produced as DExhibit 4, demand letter dated 30.4.2012 produced as DExhibit 5. It was his evidence that in a meeting held at Bw'Onchiri Advocate's office on 17/9/2012, the appellant attacked him and he was later arrested and charged in Criminal Case No. 2115 of 2013 and produced documentation of the case as DExhibit 6 a, b & c.
14. The witness testified that he instructed BW'Onchri Advocate to write to the appellant so he could refund his money and a letter was written dated 23/10/2013(Dexhbit 7). It was his contention that after the appellant failed to pay him the balance of Kshs. 300,000/=, he sold the suit land to the 2nd and 3rd respondents. It was his further testimony that there were buildings on the suit land earning an income of Kshs. 36,000/= per month and an annual rent of Kshs.432,000/=. He produced a valuation report as DExhibit 8. Lastly, he stated that he transferred the suit land to the 2nd and 3rd respondents on 2nd May, 2013.
15. In cross-examination, he stated that he was not aware that BW'Onchiri Advocate was holding the Kshs,300,000/= balance. He stated that when he issued the final demand notice dated 30/4/2013, he had already sold the suit property.
16. DW2 Simon Wamalwa testified that he and his brother Moses Wamalwa-the 3rd respondent herein purchased Land Parcel No. E. Bukusu/ N. Kanduyi/4642 from the 1st respondent at Kshs. 1,500,000/= vide an agreement dated 22nd May, 2013. He testified that he therefore obtained all the documents necessary in processing title for his portion out of the suit land. He produced an application and letter of consent as DExhibit 10 and 11. He also produced a mutation form for the sub-division as Dexhibit 12. He produced a copy of green card as D-Exhibit13 and a duly signed transfer form as D-Exhibit 14. He sought to have the suit dismissed



17. The suit was heard on various dates and upon evaluating and analyzing the facts as presented, the trial court delivered its judgment on 7th August, 2019. In the said Judgment, the trial court ordered the 1st respondent to inter-alia refund the appellant the Kshs. 1,200,000/= paid, and the Kshs.300,000/= held by their joint advocate be released to the appellant. The 1st respondent was also found responsible for the losses incurred by the 2nd and 3rd respondents and the counter-claim was disallowed. Each party was ordered to pay its own costs. The appellant was also given 60 days to vacate from the suit property.
18. Aggrieved by the impugned Judgment, the appellants and respondents filed the two appeals alluded in the background of this appeal. The appellant filed a memorandum of appeal dated 29th August, 2019 on the following grounds;
 - a. The learned trial magistrate erred in law and fact when he in his judgment certainly sanctioned an illegality, when he dismissed the appellant's suit.
 - b. The learned trial magistrate erred in law and fact when he in his judgment took into account matters that were not canvassed in evidence to the prejudice of the appellant.
 - c. The learned trial magistrate erred in law and fact when in his judgment failed to take into account relevant materials that were placed before him, and or took into account irrelevant matters to the prejudice of the appellant's suit.
 - d. The learned trial magistrate completely failed in his duty to sufficiently analyze the evidence before, as required by law.
 - e. The learned trial magistrate's judgment was against the weight of the evidence on record.
19. Consequently, the appellant sought to have the trial court's judgment set aside and substituted with an order dismissing the same and allowing the appellant's counterclaim and judgment to be entered in his favour with costs of both the former suit and this appeal.
20. The Respondents on the other hand filed their memorandum of appeal dated 6th September, 2019(now the cross-appeal) on the following grounds;
 - a. The learned trial magistrate erred both in law and in fact in holding that the respondent had testified when in fact directions were taken on 15/3/2016 to the effect that the matter starts de novo.
 - b. The learned trial magistrate erred both in law and in fact by holding that the 1st appellant (now the 1st respondent) herein cunningly transferred the suit parcels of land to the 2nd and 3rd appellants (now 2nd and 3rd appellants).
 - c. The learned trial magistrate erred both in law and in fact dismissing the appellant's claim of mesne profits when the same had been specially pleaded and proven as by law require.
 - d. The learned trial magistrate misdirected himself in holding that the orders of status quo issued disentitled the appellants to the relief mesne profits.
 - e. The learned trial magistrate erred both in law and in fact during the trial by allowing the production of Exhibits by an incompetent witness in contravention of the provision of the Evidence Act hence arriving at a decision per incuriam.
 - f. The learned trial magistrate erred both in law and in fact by ordering the 1st appellant (now 1st respondent) to refund the deposited sum when the respondent (appellant) by virtue of being in possession of the suit land had earned mesne profit over and above the deposited sum.



- g. The learned trial magistrate erred both in law and in fact in granting the order of refund of deposit despite clear evidence that the respondent had rejected and declined the refund earlier offered.
- h. The learned trial magistrate erred both in law and in fact by failing to consider the efforts made by the 1st appellant (now 1st Respondent) to get the respondent (now appellant) to receive his deposit back and hence arrived at a decision per incuriam.
- i. The learned trial magistrate erred both in law and in fact by failing to consider documentary and oral evidence tendered by DW1 in their entirety hence arriving at a decision not properly grounded.

d. Parties Submissions On The Appeal

- 21. In support of this appeal and in opposition to the respondents cross-appeal, the appellant filed submissions dated 1st March, 2024 in which he submitted that he is a bona-fide purchaser for value without notice having purchased the suit land from the 1st respondent as was held in the case of Arthi Highway Developers Limited vs. West End Butchery Limited & 6 others (2015) eKLR and Reliable electrical engineers Ltd vs. Mantrac Kenya Limited (2006) eKLR.
- 22. The appellant further submitted that having engaged in a legal contract with the 1st respondent pursuant to Sec 3(3) of the Law of Contracts Act, the 1st respondent failed to meet his end of the bargain despite making full payment of the consideration. He submitted that the 1st respondent being in breach of the contract was expected to pay him 25% of the consideration as damages. He therefore prayed for orders of specific performance against the 1st respondent and relied on the case of Reliable Electricals Engineers Ltd vs. Mantrac Kenya Limited (2006)eKLR.

Legal Analysis And Determination

- 23. I have carefully considered the Memorandums of Appeal, the pleadings and evidence as adduced, written submissions filed by the parties and the court record generally and identify the following as the probable issues that commend for determination:
 - a. Whether fraud was proved on the part of the respondents
 - b. Whether the appellant is entitled to orders of specific performance and or compensation.
 - c. Whether the respondents are entitled to orders of eviction and injunction as against the appellant
 - d. Whether the 1st respondent is entitled to mesne profits.
- 24. As a first appellate court, this Court is charged with the mandate to examine the evidence afresh and make a determination on the Appellants' claim on its merits, as per *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 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 account of particular circumstances or probabilities materially to estimate the evidence ...”



25. It is trite that a first appellate court has jurisdiction to either reverse or affirm the findings of the trial court. However, that jurisdiction has to be decided on the basis of the facts as adduced and the law. In a first appeal, parties have the right to be heard on both questions of law as well as on facts and the court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to an independent conclusion.
26. From the evidence as presented, it is apparent that the appellant and the 1st respondent entered into an agreement dated 1st April, 2011 for the sale of Land Parcel No. E.Bukusu/ S.Kanduyi/ 4642 for a consideration of Kshs. 1,500,000/=. It is also not in contention that Kshs. 1,200,000/= as down payment was paid on execution of the agreement for sale and Kshs. 300,000/= being the balance was to be paid on or before the end of the year 2011 which was the completion date.
27. It however, emerges that the balance of Kshs. 300,000/= was not paid within the agreed period thus the current dispute. The appellant averred that he made all attempts to pay to the 1st respondent the balance but his attempts were futile forcing him to deposit the same with Omudi Bw'Onchiri Advocates on 4th May 2012. On the other hand, the 1st respondent stated that he instructed various advocates to demand for the balance. The first letter by the 1st respondent to the appellant was calling for a meeting at Omudi Bw'Onchiri Advocates office to discuss the issue vide a letter dated 9th March, 2012 (DExhibit 8), a demand letter dated 18th April, 2012 (DExhibit 9) demanding for payment of the unpaid balance, a second demand letter dated 30th April, 2012 (DExhibit 11) reminding the appellant to make payments, a letter dated 16th September, 2013 (DExhibit 12) requesting for a meeting at Omudi Bw'Onchiri Advocates office and finally a letter dated 23rd October, 2013 (DExhibit 13) asking the appellant to collect a refund of the deposit paid less damages.
28. The appellant contends that the 1st respondent fraudulently sold, sub-divided and transferred the suit land to the 2nd and 3rd respondents in breach of their agreement. The 1st respondent on his part denied the allegations of fraud and contends that he sold the suit land to the 2nd and 3rd respondents after the appellant failed to complete his payments. The 2nd and 3rd respondents on the other hand averred that they did not take part in any fraud or illegal dealings as they acquired the suit property regularly vide a sale agreement dated 22nd May, 2013 and caused for a sub-division.
29. On the first issue for determination, the court has to consider whether the appellant has proved fraud on the part of the respondents. To begin with, it is trite that the right to own property is protected under Article 40 of *the Constitution*, 2010 but the said right is curtailed under Article 40(6) when the property is found to have been unlawfully acquired. Section 24 and 25 of the *Land Registration Act* stipulates that the registration of a person as proprietor of land vest in that person the absolute ownership together with rights and privileges thereto and the rights of such proprietor shall not be defeated except as provided for by the Act.
30. Section 26 provides that all Courts shall take judicial notice of a certificate of title issued to a proprietor by the Land Registrar as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to easements restrictions and conditions endorsed on the title. The section provides two instances in which a title may be impugned; on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme
31. As it may be observed, the law is extremely protective of title but the protection can be removed and title impeached. The import of Section 26 of the *Land Registration Act* was considered in the case of *Elijah Makeri Nyangwra _vs- Stephen Mungai Njuguna & Another* [2013] eKLR where Munyao J,



answered the question as to whether title is impeachable under section 26 (1) (b) of the said Act as follows;

“First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

32. Black’s Law Dictionary, 9th Edition defines fraud as;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury.

33. In the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR, the Court held that; -

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.

34. The appellant/plaintiff in the plaint before the trial court set out particulars of fraud and illegality against the respondents. What this Court now seeks to establish is whether he proved the same to the required standard of proof. The appellant claimed that the 1st respondent in breach of their contract went ahead to sell the suit land to the 2nd and 3rd respondents who caused for a transfer and eventually subdivided the same. PW2 who was an advocate and an officer of this court stated in his testimony that he acted for both the appellant and 1st respondent in the sale agreement date 1st April, 2011. It was his evidence that the 1st respondent, being the seller of the suit property deposited the original tile deed of the suit land with him for safe custody pending payment of the balance. He (PW2) produced the said title as PExhibit 8.

35. DW1 on the other hand denied depositing the title with the advocate. In my view, I find the evidence of PW2 credible and believable that he held the title for safe keeping as and declined to release the same to the appellant despite him depositing the balance of Kshs.300,000/= with his office until all the parties appear before him and agree on the exchange of the balance and the title.

36. It therefore follows that the manner in which the respondents managed to transfer and subsequently sub-divide the suit land was suspicious. This court takes judicial notice of consequences where the Land Registrar can effect a transfer without the original title document but in the absence of evidence to this regard, I am persuaded to find and hold that there were irregularities and illegalities in the manner in which the respondents transferred and sub-divided the suit land.

37. Having said that, I now proceed to analyze whether the appellant is entitled to the reliefs sought in the plaint. As earlier mentioned, it is not in contention that the appellant and the 1st respondent entered into an agreement for sale of the suit land and that Kshs. 1,200,000/= was paid on execution leaving a balance of Kshs.300,000/=. From the chronology of events as summarized, it is evident that the appellant deposited with PW2 the Kshs. 300,000/= on 4th May, 2012 after explaining that he had been unable to reach the 1st respondent. This is after the 1st respondent had demanded for payment through the letters dated 18th April, 2012 and 30th April, 2012.



38. In *Gharib Suleman Gharib v Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 the Court held that: -“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”
39. In *Gurder Singh Birdi & Marinder Singh Ghatora vs. Abubakar Madhubuti*, Civil Appeal No. 165 of 1996, it was held that the underlying principle in granting the equitable relief of specific performance is that, “the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”
40. Further, in *Thrift Homes Ltd vs. Kenya Investment Ltd* 2015 eKLR, the court stated that: -“specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”.
41. It is unclear what efforts the appellant took to reach out to the 1st respondent after depositing the balance with their joint Advocate for payment. Further and as a matter of fact, PW2 admitted that the balance was paid late. From the foregoing therefore, it is evident that the appellant did not perform all the terms of the contract which he had undertaken to perform. As such he is not entitled to the equitable remedy of specific performance.
42. The appellant is similarly not entitled to any award for general damages against the 1st respondent because it was him who breached the contract. The sale agreement was self-executing in so far as failure by the purchaser to pay the balance of the purchase price in time was concerned. The agreement was to be nullified with the remedy being a refund of the deposit paid subject to damages. The 1st respondent in his letter dated 23rd October, 2013 and his oral testimony indicated that he has been willing to refund the purchase price. The only remedy that the appellant is entitled to is therefore a refund of the deposit which would be subject to damages.
43. The agreement did not provide for what would be deemed as damages and it is my considered view that nominal damages of Kshs. 100,000/= would suffice as damages in the circumstances. I will order a refund of the difference within the next 90 days. If no refund is forthcoming, the appellant will be at liberty to execute for the same.
44. The respondents on the other hand sought for eviction and injunctive orders against the appellant from the suit land. This court in its disposition in preceding paragraphs has made a finding that the manner in which the respondents caused the transfer and sub-division points to the existence of elements of fraud and irregularities. This court has also held that the appellant was in breach of the contractual terms and as such the 1st respondent had the right to rescind the contract as he did in his letter dated 23rd October, 2013.
45. The import of the above findings is that the appellant has no business being in occupation of the suit land and he should therefore vacate from the same. It is also my finding that the 1st respondent is entitled



to the orders of injunction barring anyone and in particular the appellant from entering or re-entering the suit properties without license and as such I grant the orders of injunction against the appellant.

46. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

47. The Court of Appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR considered when mesne profits could be awarded. The court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42.”

48. From the evidence on record, the appellant was put in possession by the 1st respondent. In my view and in the circumstances of this case, the 1st respondent placed the appellant in possession in the hope that the transaction would be completed. There is proof that the appellant deposited the balance albeit late with the advocate again in the hope to complete the transaction. Further, the 1st respondent has not proved that he demanded for vacant possession of the land and in my view therefore, the appellant cannot be said to have been a trespasser. I am therefore not convinced that this is a proper case where mesne profits can be awarded.

49. In the end, both the appeal and cross appeal partially succeeds and I make the following consequential orders;

- a. An order directing the 1st defendant to refund the plaintiff/appellant the down payment paid to his wife’s account (Margaret Wambui A/C NO. 0401xxxxxxx Equity Bank on 04/01/2011) of Kenya shillings one million two hundred thousand only (Kshs. 1,200,000/= less Kshs. 100,000/= general damages to be refunded to the Appellant within 90 days from the date of this Judgment.
- b. An order directing the appellant to vacate the suit property L.R. No. E.Bukusu/N.Kanduyi/4642 (now E.Bukusu/N.Kanduyi/6573 and 65740)
- c. A permanent injunction be and is hereby issued against the appellant, his agents, servants and/or any other persons acting under him from interfering with L.R. No. E.Bukusu/N.Kanduyi/4642. (now LR NO. E.Bukusu/N.Kanduyi/6573 and 6574)
- d. The appellant to pay the 1st Respondent General Damages in the sum of Kshs.100,000/=
- e. Each party to bear their own costs.

DATED SIGNED AND DELIVERD AT BUNGOMA THIS 16TH DAY OF MAY, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;



Appellant/Advocate-absent
Respondents/Advocate-absent
Bett C/A

