



**Gregory v Mwangi (Environment and Land Appeal 27 of 2022)  
[2024] KEELC 4529 (KLR) (7 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4529 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 27 OF 2022**

**JO OLOLA, J**

**JUNE 7, 2024**

**BETWEEN**

**GITHIRI MAINA GREGORY ..... APPELLANT**

**AND**

**JOHNSTONE KAMAU MWANGI ..... RESPONDENT**

*(From the Judgment and order of the Chief Magistrate Court Nyeri (Hon. M. Okuche – PM) in the CMCC No. 91 of 2020 dated 17th March 2020)*

**JUDGMENT**

1. This is an Appeal arising from the Judgment of the Honourable M. Okuche, PM as delivered on 17<sup>th</sup> March 2020 in Nyeri CMCC No. 91 of 2020.
2. By a Plaint dated 18<sup>th</sup> June 2020 as filed in the Lower Court, Johnstone Kamau Mwangi (the Respondent herein) had sought Judgment against Githiri Maina Gregory (the Appellant herein) for:-
  - a). An order of specific performance against the Defendant to transfer 3 acres excised from Mugunda/Nairutia Block 1/483 to the Plaintiff;
  - b). In the alternative, an order compelling the Land Registrar Nyeri to effect transfer of 3 acres excised from the suit land to the Plaintiff;
  - c). Specific damages for destruction of fence at Kshs. 29,450/=;
  - d). General damages for breach of contract; and
  - f). Costs of the suit plus interest.
3. Those prayers were the result of the Respondent’s contention that sometimes on 18<sup>th</sup> February 2016, he had entered into a sale agreement with the Appellant to purchase 3 acres of land that were to be excised



from the said LR. No. Mugunda/Nairutia Block 1/483. It was the Respondent's case that pursuant to the said agreement, the Appellant had sought and obtained the Land Control Board consent to transfer the said 3 acres of land but had thereafter refused and/or neglected to effect the transfer.

4. But in his brief Statement of Defence dated 30<sup>th</sup> June 2020, the Appellant denied the averments made by the Respondent in the Plaintiff and instead accused the Respondent of refusing to honour the said sale agreement. It was the Appellant's case that the Respondent had never occupied the said 3 acres portion of land but was only using the same for grazing purposes.
5. In addition, the Appellant asserted that his own parcel of land was Mugunda/Nairutia Block 1/485 and not Mugunda/Nairutia Block 1/483 as stated in the Plaintiff. The Appellant further denied that he had obtained the Land Control Board consent for the transfer as required by the law and urged the court to dismiss the Respondent's suit with costs.
6. Having heard the dispute and in his Judgment delivered on 17<sup>th</sup> March 2022 aforesaid, the Learned Trial Magistrate held that the Respondent had proved his case and that he was entitled to an order of specific performance subject to his paying the balance of the purchase price in the sum of Kshs. 70,000/= within 30 days of the Judgment date. In essence, the Learned Trial Magistrate allowed Prayer No. (b) of the Plaintiff and issued orders directing the Land Registrar Nyeri to effect the transfer of the 3 acres piece of land to the Respondent.
7. Aggrieved and dissatisfied with the said determination, the Appellant moved to this court and lodged a Memorandum of Appeal dated 4<sup>th</sup> November 2022 urging this court to set aside the said Judgment on the grounds listed therein as follows:
  - 1). The Learned Principal Magistrate erred in law and in fact in holding that the Plaintiff's case and evidence were true and worth of any credit while all the Plaintiff's witness statements on which they relied were not served on the Appellant to enable him know what was in the statements relied upon;
  - 2). The Learned Principal Magistrate erred in law and in fact in considering that the contract entered between the parties was enforceable, yet he contract between the parties herein was subject to the provisions of the Land Control Act, Cap 302 Laws of Kenya which governs land agreements;
  - 3). The Learned Principal Magistrate erred in law and in fact in allowing the specific performance yet the relevant Land Control Board had not granted consent for the transfer of the disputed portion of 3 acres from the land parcel No. Mugunda/Nairutia Block 1/483 because it had not been given a new number by the District Surveyor to enable the Appellant to transfer to the Respondent even to date it has no number (sic);
  - 4). The Learned Principal Magistrate erred in law and in fact in ordering a portion of land which is not there and not in existence making the whole Judgment a nullity and without any (capability) of being prosecuted and/or executed by that court;
  - 5). The Learned Principal Magistrate erred in law and in fact in failing to consider that in the Criminal Case No. 1242 of 2020 which was brought about by that agreement in which the Respondent was the complainant, the CID Officer Zablon Wambani from the Regional Head Quarters Nyeri told the court that unless the Land Registrar is given time to rectify the register of land in question, the court was only wasting time; but the Learned Principal Magistrate went on favouring the Respondent without any provisions of the law in place of such a case (sic);
  - 6). The Learned Principal Magistrate erred in law and in fact in considering a defective Plaintiff which did not have an alternative prayer of the refund of the money paid by the Respondent to the Appellant making the Judgment a dictatorial Judgment which is out of the Principals (sic) of the law of contract; and



- 7). The Learned Principal Magistrate erred in law and in fact in failing to consider that the Land Registrar is in a Constitutional Office and that the court has no jurisdiction to show him (Land Registrar) what to do in a defective Register of land and/or how to rectify the register of the affected lands as the Principal Magistrate implies thereby making the said judgment a nullity.
8. This being the first appellate court, this court is mandated to re-evaluate the evidence before the trial court as well as the Judgment and to arrive at its own independent Judgment on whether or not to allow the Appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand (Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123.
  9. I have accordingly and carefully perused the Record of Appeal as well as the Judgment delivered by the trial court. I have similarly perused and considered the submissions placed before the court by the parties herein.
  10. By his Plaint dated 18<sup>th</sup> June 2020 as filed in the Lower Court, the Respondent herein had sought an order of specific performance against the Appellant to have the Appellant transfer 3 acres of land that were to be excised from a parcel of land known as Mugunda/Nairutia Block 1/483 to the Respondent. In the alternative, the Respondent sought an order compelling the Land Registrar Nyeri to effect the transfer of the 3 acres of land from the suit property. In addition, the Respondent sought to be paid the sum of Kshs. 29,450/= for the destruction of his fence as well as general damages for breach of contract.
  11. The reason behind those prayers was the Respondents' contention that by a sale agreement dated 18<sup>th</sup> February 2016, the Appellant had sold to him some 3 acres of land that were to be excised from the suit property. It was the Respondent's case that despite payment of the purchase price which was agreed at Kshs. 870,000/=, the Appellant had failed, refused and/or neglected to transfer the said portion of land to himself.
  12. In his defence, the Appellant accused the Respondent of being the one who had refused to honour the agreement. In addition, the Appellant asserted that LR NO. Mugunda/Nairutia Block 1/483 belonged to his uncle, and that his own parcel was Mugunda/Nairutia Block 1/485 and hence his inability to transfer the same.
  13. From a perusal of both the Record of Appeal as well as the impugned Judgment, it was apparent that the Record was incomplete. The written statement by the Respondent upon which he relied as his evidence-in-chief as well as a number of exhibits produced appear not to have been included therein. While the sale Agreement produced by the Respondent refers to the sum paid as deposit at Kshs. 480,000/=, a perusal of page 9 of the Judgment reveals that the court was persuaded that an additional Kshs. 130,000/= was paid through M-pesa while another Kshs. 180,000/= was paid to the Appellant in cash thereby leaving only a balance of Kshs. 70,000/= unpaid.
  14. It was however clear to me that the issue regarding the amounts paid as a result of the said sale agreement was a non-issue as the Appellant has not contested the same in the grounds set out in the Memorandum of Appeal lodged herein.
  15. The first ground of Appeal was the Appellant's contention that he had not been supplied with the witness statements that were relied upon by the Respondent and his witnesses. A perusal of the Record does not however reveal any instance wherein the Appellant objected to the proceedings on account that he had not been served with the witness statements. On the contrary, the Record reveals that the Appellant participated at the trial and cross-examined the Respondent and a number of his witnesses.



16. In grounds 2 and 3 of the Appeal, the Appellant faults the trial court for finding that the contract between the parties was enforceable when according to him, the relevant Land Control Board consent has not been granted and the parcel numbers had not been rectified.
17. In his testimony before the court, the Appellant testified that he had intended to sell the 3 acres of land to the Respondent. It was however his case that after they executed the sale agreement, they proceeded to the suit property with a surveyor who then discovered that the parcel of land did not measure a total of 3.911 acres as indicated in his title. It was his case that it was then that the surveyor advised them to go back to the Land Registry and that that is when he discovered that LR No. Mugunda/Nairutia Block 1/483 belongs to his uncle while his own parcel was Block 1/485, measuring 3.911 acres.
18. Upon considering the said issue, the Learned Trial Magistrate held as follows at page 8 of the Judgment;-

“The law is that he who wishes to rely on this defence must prove. The Plaintiff have stated that in their claim that they carried out a search before entering into agreement. The suit land was in the name of the defendant. There is no evidence that the land that they bought was in the name of the defendant’s uncle. There is also no iota of evidence that the defendant owns parcel No. Mugunda/Nairutia Block 1/485. The defendant asserts that the ground identification is different. That his land on the ground is parcel No. 485. However that cannot be a defence to the Plaintiff’s claim.”

19. As it were, I was unable to find any fault with the Learned Magistrate’s conclusion that the agreement executed by the parties was sound and enforceable. Under section 9 (2) of the *Land Control Act* cited by the Appellant, such a contract only becomes void when the Land Control Board consent has been declined. Considering a similar issue in *Lilian Mosonke & Another –vs- Management Committee of AGC Riverside Church* [2022] eKLR, the court held as follows:-

“Looking at the provision of section 9 (2) of the *Land Control Act*, it is not the failure to secure the consent from the Land Control Board that makes an agreement null and void; but rather it is where an application for the consent of the Land Control Board has been refused that makes an agreement for a controlled transaction void. I have looked at the proceedings in the trial court as well as the exhibits produced therein, I find that there was no evidence adduced to confirm that either the deceased or Respondent had applied for consent to the Land Control Board within six months of the making of the agreement, whereby the application had been rejected. It cannot therefore be said that their agreement became void by virtue of there having been no consent obtained.”

20. Similarly in the matter before me, there was nothing placed before the trial court to indicate that such consent had been refused. While the Respondent contended that the Land Control Board consent had been given, the Appellant denied that the consent had been so given.
21. It was also apparent from the Appellant’s testimony that while he claims the parcel he sold was the wrong one, he is the one who showed it to the Respondent who confirmed through a search at the Lands Registry that the same was in the name of the Appellant who resides on a portion thereof. Testifying during his cross –examination at the trial, the Record (page 25) captures the Appellant’s testimony as follows:-

“I signed the agreement with the Plaintiff. My land was not 483. It belonged to my uncle. Plot No. 485 belongs to my uncle as per a search shown to me. I have not called my uncle as



my witness. I don't have receipts for payment to the surveyor. I have not called the District Registrar as a witness.

My title deed was issued on 2/7/1996. In a letter dated 8<sup>th</sup> June 2020 I confirmed that the land No. 483 belonged to me. I still stay in parcel No. 483. The Plaintiff fenced the three acres he bought from me. The fence is still standing. Nobody is in occupation of the suit land.”

22. That being the case, the contention by the Appellant that the suit property is non-existent cannot be taken seriously. As the trial court rightfully found, no one else has made a claim against the Respondent on account that he had fenced off a parcel of land that did not belong to him. It was the very same Appellant who also resides on a portion of the same parcel who was trying to chase out the Respondent from the same land he had sold.
23. It follows that I was not persuaded that the Learned Trial Magistrate misdirected himself on any of the issues that were before him. This Appeal is therefore totally misconceived and must fail. The same is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 7<sup>TH</sup> DAY OF JUNE, 2024.**

In the presence of:

Ms. Wamuyu holding brief for Muthee for the Respondent.

Mr. Githiri Maina the Appellant in person.

Court Assistant: Kendi

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**J. O. OLOLA**

**JUDGE**

