



**Wambugu v Wambugu (Environment and Land Appeal
E018 of 2022) [2024] KEELC 5487 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E018 OF 2022**

**JO OLOLA, J
JULY 26, 2024**

BETWEEN

JAMES KIMUNYU WAMBUGU APPELLANT

AND

BEATRICE WAMUYU WAMBUGU RESPONDENT

*(Being an Appeal from the judgment and Decree of Hon. K.M. Njalale
(Principal Magistrate) in the Principal Magistrate's Court at Karatina
delivered on 8th June, 2022 in Karatina PMCELC NO. 9 of 2020)*

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable K. M Njalae, PM delivered on 8th June 2022 in Karatina PMCELC No. 9 of 2020.
2. By a Plaintiff dated 8th July 2020, James Kimunyu Wanjugu (the Appellant herein) had sought for Judgment against the Respondent for:
 - a). An order of Specific Performance compelling the Defendant to transfer LR. No. Magutu/ Ragati/1822 to the Plaintiff;
 - b). An order authorizing the Executive Officer of the court to sign all relevant documents to facilitate the transfer of Land Parcel No. Magutu/ Ragati/1822 to the Plaintiff;
 - c). In the alternative, the Defendant be ordered to refund the purchase price paid and in addition compensate the Plaintiff the current market value of the property and the development thereon;
 - d). Costs; and
 - e). Any further relief that the court may deem fit to grant.



3. The basis for those prayers was the Appellant's contention that vide an agreement dated 24th May 2017, the Respondent had agreed to sell to him a portion of land measuring 0.0505 Ha that was to be excised from the Respondent's parcel of land number Magutu/Ragati/1800 at a consideration of Kshs. 300,000/=.
4. The Appellant pleaded that he paid the full purchase price a head of the agreed completion date and that the Respondent put him into possession of the agreed portion of land and allowed him to construct his house thereon. It was further his case that the Respondent caused the sub-division to be done and his portion of land came to be known as Parcel No. Magutu/Ragati/1822 but the Respondent had thereafter refused to transfer the same to himself.
5. Beatrice Wamuyu Wambugu (the Respondent) was opposed to the grant of the orders sought by the Plaintiff. In her Amended Statement of Defence and Counterclaim as filed in court on 19th November 2020, the Respondent denied selling any land to the Appellant. It was her case that if she indeed did sell the said parcel of land to the Appellant, then the Appellant had acted in breach of the sale agreement thereby rescinding the same and becoming a trespasser on the suit land.
6. The Respondent denied that the Appellant had paid the purchase price in full and/or that she had put the Appellant in possession and allowed him to construct his family home on the suit property. It was the Respondent's case that any form of development done by the Appellant on the said parcel of land was done at the Appellant's own risk.
7. By way of her counterclaim, the Respondent contended that the Appellant was in breach of the sale agreement executed by the parties and was therefore a trespasser on the suit land. It was her case that in addition to the said breach the Appellant had caused damage to the suit land and to the developments thereon including crops planted thereon.
8. Accordingly, the Respondent sought Judgment against the Appellant for:-
 - a). An order that the Plaintiff's case be dismissed in its entirety with costs and interest at court rates;
 - b). An order of eviction against the Plaintiff personally, his agents and/or anybody else occupying the suit land under his authority;
 - c). An order directing the OCS Karatina Police Station to ensure compliance with prayer No. (b) above;
 - d). General damages for trespass and breach of contract;
 - e). Special damages for Kshs. 9,944/= with interest at court rates from 30/8/2017;
 - f). Any other order that the court may deem fit to grant; and
 - g). Costs of the counterclaim with interest at court rates.
9. Upon hearing the dispute and in her Judgment delivered on 18th June 2022 aforesaid, the Learned Trial Magistrate came to the conclusion that there was neither merit in the Appellant's case nor in the Respondent's counterclaim and proceeded to dismiss both with an order that each party do bear their own costs.
10. Aggrieved by the said determination, the Appellant moved to this court and lodged the Memorandum of Appeal dated 5th July 2022 wherein he has urged this court to set aside the said Judgment on the grounds that:-



- 1). The Honourable Trial Court erred in law and in fact in that it misdirected and misapplied itself by proceeding to dismiss the Appellant's suit;
 - 2). The Honourable Tria Court erred in law and in fact and misdirected itself by finding that the Appellant had not paid the full purchase price for the suit property Magutu/Ragati/1822 and/or Magutu/Ragati/1800 while the evidence before the court stated otherwise;
 - 3). The Honourable Trial Court erred in law and in fact by deliberately ignoring the Judgment of the Honourable Court in Karatina PMELC No. 48 of 2018, delivered on 21st November 2019, and which has not been stayed or set aside;
 - 4). The Honourable Trial Court erred in law and in fact by failing to consider the pleadings in Karatina PMELC No. 48 of 2018, which formed part of the Appellant's bundle of documents, containing proof of full payment of the purchase price, thereby arriving at its erroneous decision; and
 5. The Honourable Trial Court erred in law and fact by misconstruing the evidence before it in arriving at its decision.
11. This being a first appeal, this court is mandated to re-evaluate the evidence that was placed before the trial court as well as the Judgment and thereafter to arrive at its 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 {See *Selle & Another -vs- Associated Motor Boat Co. Ltd & Others* [1968) EA 123]}.
 12. I have accordingly carefully scrutinized the Record of Appeal as well as the impugned Judgment. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties herein.
 13. By his suit as instituted in the Lower Court, the Appellant had sought an order of Specific Performance to compel the Respondent to transfer the parcel of land known as Magutu/Ragati/1822 to the Appellant. In addition, the Appellant had sought an order authorizing the Executive Officer of the court to execute all the relevant documents to facilitate the transfer of the said property to the Appellant's name. In the alternative the Appellant had sought for a refund of the purchase price paid to the Respondent and for compensation for the developments he had carried out on the suit property at the current market value thereof.
 14. The gist of the Appellant's case was that he had bought the said parcel of land which was prior the subdivision comprised in the Respondent's parcel of land known as LR. No. Magutu/Ragati/1800. It was the Appellant's case that he had bought his portion measuring some 0.0505 Ha from the Respondent vide a Sale Agreement dated 24th May 2017 and that the Respondent had put him into possession of the land. The Appellant was aggrieved that in spite of the fact that he had paid to the Respondent the full purchase price agreed at Kshs. 300,000/=, the Respondent had refused, declined and/or neglected to transfer the suit property to his name.
 15. On her part, the Respondent contended that there was no sale agreement between herself and the Appellant. She pleaded that if indeed there was any sale agreement as claimed by the Appellant then it was the Appellant who had breached the same by failing to comply with the terms thereof.



16. The Respondent accused the Appellant of trespassing into the suit property and proceeding to cause damage thereto. By her counterclaim, she sought the eviction of the Appellant therefrom and for compensation for the damage done to her property.

17. Having heard the testimonies of the witnesses and considered the evidence placed before her, the Learned Trial Magistrate concluded as follows at Page 5 of her Judgment (Page 115 of the Record):

“Granting of Specific Performance is discretionary and as such the court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative.

This court has perused the sale agreement and has noted that the same provided for consideration of the sale of the suit land. The court has also seen payment acknowledgement and noted that the payments for the purchase of the suit land were paid though not to completion as the Plaintiff has not proved the same. Had the Plaintiff fully paid as per the agreement, it would thus be incumbent upon the Defendant to fulfill her part of the bargain as she is bound by the contract. This was however not the case. A search had been produced by the Plaintiff confirming the proprietorship of the suit land.

As already held by the court, the evidence of the Plaintiff is controverted and the same is therefore challenged. That being the case it would therefore mean that compensation to the Plaintiff in terms of damages would be adequate. However, land is unique and cannot be equated. In this instant therefore, nonetheless, damages may be an appropriate remedy in the circumstances since the contract was frustrated by the Plaintiff. The contract between the Plaintiff and the Defendant was terminated on completion on 29th December 2017. The consideration as has been opined above, was not paid in full by the Plaintiff. As such Specific Performance is not the best way to ensure that Justice has been served. The award (of) Specific Performance will prejudice the Defendant. The Plaintiff is not entitled to it.”

18. Arising from the foregoing, it was evident that the only reason that the trial court relied on to deny the Appellant the order sought for of specific performance was the conclusion that the Appellant had failed to pay the purchase price in full to the Respondent.

19. It was however, difficult to agree with the conclusion reached by the Trial Court that the full purchase price had not been paid by the Appellant. It was to begin with noteworthy that while the Respondent pleaded that the Appellant had breached the Sale Agreement, she was not specific as to how and by what extent the agreement had been breached.

20. As it were, a perusal of the sale Agreement dated 24th May 2017 (Page 25 of the Record) reveals that the purchase price was agreed by the parties at Kshs. 300,000/= which sum was to be paid before the completion date cited therein as 29th December 2017. It was clear from a further perusal of the Agreement that on the very date of execution, the Appellant paid unto the Respondent a deposit of Kshs. 50,000/=.

21. In addition, the Appellant led evidence during the trial to the effect that he paid the Respondent a sum of Kshs. 45,000/= on 31st July 2017 and another sum of Kshs. 88,000/= on an undisclosed date and that the Respondent issued him with acknowledgement notes for the same. The Respondent conceded at the trial that she wrote the acknowledgement notes upon receipt of the said sums. Those acknowledgement notes were exhibited before the court (Page 11 to 13 of the Record).

22. Further and in addition to the foregoing, the Appellant testified that that he had paid various sums of money to the Respondent through the M-pesa mobile money transfer system. At Page 69 to 71 of



the Record, the Appellant has exhibited various sheets of his M-pesa account which were produced at the trial. While it was not clear from the small print in which they are made as to the various amounts that were paid to the Respondent on different dates, it is clear from Page 23 of the Record that the Respondent concedes to have received the same.

23. Giving her evidence in chief before the court, the Respondent testified as follows in regard to the payments:-

“.....He sent money to me via M-pesa. He already had the demand letter of eviction. He responded to it saying he was not in breach of the agreement. I have never allowed him to fix water and electricity. The M-pesa amount was Kshs. 113,000/= in total....”

24. Arising from the foregoing and from my own rudimentary arithmetic, it was evident that the Respondent on her own concedes to have received at least the sum of Kshs. 296,000/= from the Appellant and that if anything, there was only a balance of Kshs. 4,000/= which she does not acknowledge. From a perusal of the aggregate sum indicated at the end of the Appellant’s M-pesa Statement dated 14th September 2017, it points to a sum of Kshs. 117,000/= paid to the Respondent, and not Kshs. 113,000/= as she told the court. That can only mean that she had received literally the entire purchase price and that she had no reason whatsoever to refuse to transfer the property as agreed.

25. In the circumstance herein, I was persuaded that the Learned Trial Magistrate had misdirected herself when she arrived at the conclusion that the contract had been frustrated by the Appellant’s failure to pay the purchase price in full.

26. It follows that I am persuaded that there is merit in this Appeal. Accordingly, I hereby allow the same, set aside the Judgment and decree of the court dated 8th June 2022 and hereby substitute the same with an order allowing Prayers (a) and (b) as sought by the Appellant in his Plaint dated 8th July 2020 with costs.

27. Each party shall bear their own costs in regard to this Appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 26TH DAY OF JULY, 2024.

In the presence of:

Mr. James Kamunyu Wambugu – the Appellant in person.

No appearance for the Respondent.

Court Assistant: Michael

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J. O. OLOLA

JUDGE

