



**Wanjau v Migwi (Environment and Land Appeal 12 of 2022)  
[2024] KEELC 5867 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5867 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND APPEAL 12 OF 2022**

**AK BOR, J**

**AUGUST 20, 2024**

**BETWEEN**

**GEOFFREY MAINA WANJAU ..... APPELLANT**

**AND**

**MARTIN NDEGWA MIGWI ..... RESPONDENT**

**JUDGMENT**

1. Through this appeal, the Appellant challenges the decision of the Principal Magistrate, Hon. Ben Mararo, delivered on 23/8/2022 vide which the court declared that the acre of land already excised from Nanyuki/Marura Block 8/152 (“the Suit Property”) belonged to the Respondent and ought to be registered in his name. Further, the trial court made an order that the Executive Officer of the court would execute the documents which the Appellant was required to sign to facilitate the Respondent to obtain a title over the suit land. The court also directed the Respondent to compensate the Appellant the sum of Kshs. 350,000/= as general damages for breach of contract on the Respondent’s part.
2. The grounds of appeal are that the Learned Magistrate erred by affirming a void transaction yet the Respondent was in material breach of the conditions of the agreement. Further, that the trial court misdirected itself by holding that the agreement for sale was not null and void for failure to obtain the Land Control Board (LCB) consent within the stipulated time in law and in finding that the Respondent proved his case on a balance of probabilities. The Appellant seeks to have the judgment of the Learned Magistrate set aside with costs being awarded to him.
3. Through the Amended Originating Summons filed in court on 20/11/2019 in Nanyuki CMCCC No. 118 of 2018 (OS), the Respondent sought a declaration that the portion of one acre excised from Nanyuki Marura Block 8/152 belonged to him and ought to be registered in his name. He sought to have the Land Surveyor who subdivided the land directed to process the necessary documents with a view to having a title issued to him and to be registered by the Laikipia County Registrar without



the production of the mother title. The other prayer was for an order to restrain the Appellant from dealing with the suit land until the suit was heard and determined.

4. The suit was supported by the grounds that the Appellant and the Respondent's mother, Rosemary Wairimu Migwi, entered into an agreement for the sale of an acre to be hived out of Block 8/152. The Respondent claimed that part of the purchase price was paid and the survey work commenced with Rosemary Wairimu Migwi taking possession of the acre while awaiting processing of the mutations, registration and transfer of the land to herself. The Respondent claimed that the Appellant failed to abide by the terms of the sale agreement and did not avail the title deed to the surveyor or pursue the matter with the LCB as was required of him. Further, that the sale had not been completed even after payment of the full purchase price. The purchaser died before the Appellant transferred the land to her.
5. The Amended Originating Summons was supported by the Respondent's affidavit sworn on 24/10/2018 to which he annexed a copy of the sale agreement dated 24/3/2009. He made reference to several clauses in the agreement and averred that the sale had not been concluded despite the fact that the full purchase price was paid.
6. In his replying affidavit filed in court on 26/12/2018, the Appellant conceded that he sold a portion of Block 8/1252 to the Respondent's mother, Rosemary Wairimu Migwi, on 24/3/2009. He averred that the Respondent's mother breached the sale agreement when she failed to pay the full purchase price by 24/6/2009 as a result of which he did not complete the survey work because of the breach by the purchaser. He added that upon the expiry of six months from the date of the agreement, the contract became void and that the Respondent was only entitled to a refund of the purchase price paid. He denied that the Respondent fully paid the purchase price or that the Respondent was put into possession while contending that no survey work had been done. He explained that the Respondent invaded his land in 2016 and attempted to forcefully erect a fence and a temporary structure which his family resisted.
7. The matter was heard by the Learned Magistrate who noted that the Respondent's mother entered into an agreement with the Respondent on 24/3/2009 for the purchase of an acre and paid a deposit of Kshs. 150,000/= which the Appellant acknowledged, and the balance was to be paid on or before 24/7/2009. Further, that the Appellant was required to surrender the relevant original documents.
8. The Learned Magistrate summarised the evidence led by the parties. Martin Ndegwa Migwi stated in his evidence that after his mother bought the suit land, they developed it by digging a pit latrine and put up poles. That the surveyor subdivided the land in 2016 and showed his mother the boundaries. She built a house and occupied it immediately. They connected water to the suit land and they were cultivating the land but when his mother died the Appellant took over the suit land.
9. Sammy Mungai also gave evidence regarding the sale transaction and confirmed that he was present when the late Rosemary paid Kshs. 150,000/= to the Appellant in advocate Kiget's office. He stated that the Appellant showed Rosemary the land. When they asked him for the title the Appellant told them that he did not have it. He confirmed that the balance of the purchase price was paid on 19/10/2016 and the reason for the delay was because the Appellant did not have the mother title. He also confirmed that the purchaser took possession of the land after being shown the beacons, fenced it, constructed a house on it and began cultivating it. At first the Appellant was cooperative but he turned hostile when the Respondent's mother died.
10. The Respondent called William Kiget, the advocate who acted for both parties in the sale transaction as a witness. Mr. Kiget told the court that he drew the sale agreement and that the purchase price was Kshs. 175,000/=. Kshs. 150,000 was paid on 24/3/2009 and the balance was to be paid by 24/7/2009. He produced a receipt dated 6/10/2016 for Kshs. 25,000/= which was to be transmitted



to the Appellant. According to the advocate the purchaser had been shown the land and was to take immediate possession.

11. The Appellant testified and admitted that he sold an acre to the Respondent's mother and that she paid Kshs 150,000/= towards the purchase price leaving a balance of Kshs. 25,000/=. He was emphatic that the balance was not settled by 24/7/2009 and that indeed the purchaser was to take possession immediately. He told the trial court that the title was still at the bank and that it he built the two rooms on the disputed land which the Respondent demolished. When he reported the matter to the police he was advised to go to court. He maintained that the balance of the purchase price was not paid to him.
12. The issues which the Learned Magistrate considered were whether there was a breach of the agreement between the parties and who occasioned it. He reproduced clause 4 of the agreement which provided that the balance of Kshs. 25,000/= was to be paid on or before 24/7/2009. The court found that the purchaser did not pay the balance until 8/10/2016 and was therefore in breach of the agreement. The court adverted to the Law Society Conditions of Sale, 1989 and more specifically condition 4 (2) (a) which gave the remedies where there is breach or rescission of a contract.
13. The trial court found that when the purchaser delayed in paying the balance of the purchase price, the Appellant should have served a completion notice on the Respondent. Based on the maxim that equity aids the vigilant and not the indolent, the court found that the Appellant did not serve a completion notice, rescind the contract or refund the deposit towards the purchase price which he had received from the Respondent. According to the Learned Magistrate, the upshot of that was that the agreement dated 24/3/2009 remained enforceable and binding on the parties contrary to the Appellant's assertion that the agreement was void.
14. The court analysed clause 7 of the agreement which provided that the purchaser would have transfer forms processed with the assistance of the vendor after payment and that the vendor was to surrender all the original documents pertaining to the parcel of land immediately after the surveying, subdivision had been made and the whole consideration paid.
15. The Learned Magistrate was of the opinion that under Section 6 of the Land Control Board Act, the lack of consent from the Land Control Board did not preclude the court from giving effect to the doctrine of constructive trust since equity was one of the principles of justice which the court had to bear in mind when exercising judicial authority under Constitution. The trial Magistrate found that the agreement was not rendered void as a result of the failure to obtain the consent from the land control board. The Learned Magistrate found that the Respondent had proved his case on a balance of probability and that he was entitled to the remedy sought. However, that he was also liable to some extent and that the omission on his part could only be resolved in favour of the defendant.
16. The court directed parties to file and exchange submissions on the appeal. The Appellant submitted that under Section 107 of the *Evidence Act*, whoever alleges must prove and that Section 109 places the burden of proving a particular fact on the person who wished the court to believe in its existence unless the law provided that the proof fell on a particular person. The Appellant contended that the Respondent did not pay the balance of the purchase price for seven years and was therefore in breach of the agreement for sale. He emphasized that the transfer forms were to be processed after payment and he was only supposed to surrender all the completion documents upon the whole consideration being paid.
17. The Appellant contended that the issue of payment of the balance of the purchase price was neither here nor there because the agreement became void for want of consent to transfer. He relied on several decisions on this point including *Moses Kamande Nyambura v Francis Munyua Ngugi* [2018] eKLR and faulted the Learned Magistrate for his wrong interpretation of clause 7 of the agreement.



18. The Appellant emphasized that parties who enter into a contract are bound by its terms and the court has no mandate to rewrite the contract for the parties. He urged that he had sufficiently demonstrated that the Respondent was in breach of the sale agreement and failed to fulfil his obligations under the contract beside the fact that the consent was not obtained in six months and the transfer was not effected within a year as the agreement stipulated.
19. Regarding the role of this court on the appeal, the Appellant relied on *Sele & Another v Associated Motor Boat Co. Ltd* [1968] EA 123 on the duty to review the evidence on record, evaluate it and reach its own conclusion. Further, that the court must not interfere with the findings of fact made by the trial court unless they were not based on evidence or were based on a misapprehension of the law, or where it was shown that the court acted on wrong principles in reaching its findings. The Appellant contended that the Respondent and his mother who was the purchaser did not honour their part of the bargain in the agreement for sale and therefore were not deserving of the orders granted by the court.
20. The Appellant submitted that it was common ground that neither party rescinded the agreement for sale following the default nor did they execute another agreement to extend the timelines for compliance. The Appellant submitted that the Learned Magistrate was biased and his decision infringed on his rights over the suit property. He urged the court to set aside that decision and allow the appeal.
21. The Respondent submitted that the legal means of revoking an agreement include issuing a notice of revocation or termination of the agreement by either party. The Respondent relied on the response which the Respondent gave at the trial confirming that his mother built on the land after taking possession immediately. The Respondent questioned why the Appellant's title was being held at the bank if it had no loan and why he failed to process the subdivision and transfer of the land while pointing out the inconsistencies in the Appellant's evidence before the trial court.
22. Regarding the award of Kshs. 350,000/= made by the trial court to the Appellant as general damages, the Respondent submitted that the Appellant did not seek damages or give particulars in his defence through the replying affidavit. The Respondent contended that the award of damages by the trial court was not erroneous. The Respondent submitted that the Appellant had not opposed his cross appeal and he urged the court to dismiss the appeal and allow the cross appeal.
23. The issue for determination is whether the court should allow the appeal by setting aside the judgment of the trial court dated 23/7/2022 declaring that the acre hived off from Nanyuki/Marura Block 8/1252 belonged to the Plaintiff and was to be registered in his name or whether the court should allow the cross-appeal.
24. It is not in dispute that vide the sale agreement dated 24/3/2009, the Respondent's late mother entered into an agreement with the Appellant for the sale of an acre of land that was to be excised from Nanyuki/Marura Block 8/1252 at the agreed consideration of Kshs. 175,000/=. The purchaser paid Kshs. 150,000/= and the balance of Kshs. 25,000/= was to be paid on or before 24/7/2009. The balance was paid on 19/10/2016 to Kiget and Co. Advocates who represented both parties in the transaction.
25. Pursuant to clause 8 of the contract, the vendor undertook to allow the purchaser occupation of the hived portion with immediate effect with exclusive and peaceful possession without interference. Condition (b) stated that occupation would commence immediately. The evidence tendered by the Respondent was that his late mother took possession of the land, fenced it and erected a building on it.
26. The Appellant claims that the sale became void due to material breach by the purchaser and want of LCB consent. The court agrees with the findings of the Learned Magistrate that based on various



decisions from the Court of Appeal including *Willy Kimutai v Michael Kibet* [2018] eKLR, the lack of LCB consent does not preclude the court from giving effect to equitable principles such as the doctrine of constructive trust.

27. This court agrees with the findings of the Learned Magistrate that despite the fact that the purchaser had breached the terms of the sale agreement by failing to pay the balance of the purchase price, the vendor neither served a completion notice nor did he rescind the contract. The sale transaction was therefore not terminated. The vendor did not refund the purchase price.
28. The court notes that as at 6/7/2020 when the Appellant's wife registered a caution against the Appellant's land, it had not been subdivided and was still registered as Nanyuki Marura Block 8/1252, which confirms that the Appellant did not take steps to fulfil his obligations under the contract in terms of subdividing the land and excision of the acre to be transferred to the purchaser. The Respondent's contention was that the Appellant failed to produce the title over the land and stated that it was with the bank for safekeeping.
29. Clause 7 of the agreement stipulated that the purchaser would have the transfer forms processed with the vendor's assistance after payment and further, that the vendor would surrender all the original documents pertaining to the land immediately after surveying and subdivision and after the whole consideration had been paid. There is no evidence to show the steps the vendor took towards the survey and subdivision of the land to excise the acre he sold to the Respondent's mother. The transfer could not have been done within the one year contemplated under condition (e) of the agreement.
30. The trial court awarded the Appellant general damages of Kshs. 350,000/= against the Respondent for breach of the terms of the agreement yet the Appellant had not counterclaimed for general damages.
31. The appeal fails and is dismissed. The cross appeal dated 21/11/2022 filed by the Respondent succeeds. The award of general damages of Kshs. 350,000/= by the Learned Magistrate to the Appellant is set aside. Each party will bear its own costs for the appeal and the cross appeal.

**DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF AUGUST 2024.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. Kendi Kiruki for the Appellant

Mr. Solomon Mukhama for the Respondent

Court Assistant: Diana Kemboi

