



Ngumbi v Kanyiva alias Rosemary Kakonzi Mwangangi (Environment and Land Appeal 24 of 2023) [2024] KEELC 6000 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6000 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 24 OF 2023
A NYUKURI, J
SEPTEMBER 18, 2024**

BETWEEN

PETER NGILA NGUMBI APPELLANT

AND

**ROSEMARY KANYIVA ALIAS ROSEMARY KAKONZI
MWANGANGI RESPONDENT**

(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos by Hon. C. N. Ondieki, PM delivered on 19th April 2023 in ELC Case No. 11 of 2019)

JUDGMENT

Introduction

1. This appeal was filed by Peter Ngila Ngumbi vide a Memorandum of Appeal dated 17th May 2023 against the judgment of Hon. C. N. Ondieki Principal Magistrate, delivered on 19th April 2023 in Machakos CMC ELC Case No. 11 of 2019. In the impugned judgment, the learned trial magistrate allowed the respondent's claim for refund of Kshs. 2,500,292/- comprised of monies deposited by the respondent herein in the appellant's bank account for purchase of land on behalf of the respondent and sums of money spent by the respondent as cost of flights to and from Switzerland, plus costs and interest.

Introduction

2. By a plaint dated 23rd January 2019, the plaintiff (respondent herein) filed suit against the defendant (appellant herein) vide Machakos CMC ELC No. 11 of 2019 seeking the following orders;

- Payment of Kshs. 2,142,358/- being the principal amount/balance.
- Payment of Kshs. 357,754 being costs of flight to and from Switzerland.



- c. Interests on (a) and (b) above from the date of receipt of deposit until payment in full.
 - d. Costs of the suit.
 - e. Any other order the court deems fit.
3. The plaintiff stated that on 20th June 2017, she deposited in the defendant's bank account number 088xxxxxx26 at Equity Bank, 20,000 Swiss Francs which are equivalent to a sum of Kshs. 2,042,358/- for purposes of purchase of land on her behalf. That she further deposited a sum of Kshs. 800,000/- for construction of rental units on the purchased land, but later learnt that the defendant only used fraud to receive the said monies from her. Further that in an endeavor to have the matter resolved, she was constrained to travel to and from Switzerland by flight hence incurring flight costs of Kshs. 357,754/- for three return flights.
 4. The plaintiff stated that the defendant refunded a total sum of Kshs. 700,000/- leaving a balance of Kshs. 2,142,358/-. She therefore claimed for payment of the balance of Kshs. 2,142,358/-, costs of flight to and from Switzerland in the sum of Kshs. 357,754/- interest thereon and costs.
 5. In a defence dated 4th February 2019, the defendant denied the plaintiff's claim in toto. He however stated that the plaintiff and defendant had been lovers and that the suit was due to their now sour relationship. He alleged that they had an agreement to jointly invest in rental houses whereof the plaintiff was to contribute towards the purchase of the plot while the defendant was to supervise construction, pay for labour and purchase building materials. He alleged that when their relationship became sour, the plaintiff got him arrested and that he signed the agreement for refund under undue influence and intimidation as he was forced to do so by the police.
 6. The suit proceeded to hearing by way of viva voce evidence. Both the plaintiff and the defendant testified as the only witnesses in support of their respective cases.

Plaintiff's evidence

7. PW1 was Rosemary Kakonzi Mwangangi. She adopted the evidence contained in her witness statement as her evidence in chief and produced documents filed in court. Her testimony was that the defendant was a family friend and a Land Surveyor. She stated that she sent him Kshs. 20,000 Swiss Francs for him to purchase on her behalf land known as Mavoko Town Block 3/44331. That she was not given any title as the land was never transferred to her. She stated that she also sent him Kshs. 800,000/- for purposes of construction. That she later came to see the land and realized the land was not hers. Further that upon having the defendant arrested, he agreed to refund the money and even signed an agreement. That he only refunded a total of Kshs. 700,000/-, despite attending mediation sessions and promising to pay the entire amount.
8. On cross examination, she stated that the purchase price for the property was the one stated in the agreement being Kshs. 1,965,000/- and not Kshs. 1,950,000/- as stated in her witness statement. She stated that although she did not provide the exchange rate, the sum of 20,000 Swiss Francs were equivalent to Kshs. 2,042,358/- according to the exchange rate on the date of the deposit. She denied being in any relationship with the defendant and denied writing letters produced by the defendant and alleged that she learnt that the defendant was a conman. That marked the close of the plaintiff's case.

Defendant's case

9. DW1 was Peter Ngila Ngumbi the defendant. He adopted the contents of his witness statement dated 25th August 2022 as his evidence in chief and produced documents on his list of documents dated



- 9th April 2019. He stated that in 1993, he became the plaintiff's lover and that he used to assist the plaintiff with money and treated her like his wife. He stated that the plaintiff sent him Kshs. 2,000,000/- through his bank account for joint investment as husband and wife but that thereafter, she began to quarrel him. He stated that he did not invest and he began returning the money immediately and returned Kshs. 700,000/-. He conceded that he was unable to refund the entire amount received. He stated that he did not ask her to travel, hence the travel expenses were necessary. He conceded receiving a further Kshs. 800,000/-. He stated that he had planned to refund the plaintiff the money before she filed the case and stated that he was willing to refund the balance.
10. In cross examination, he confirmed that he had no problem returning the money. He also stated that he received a total of Kshs. 2,800,000/- but had only refunded Kshs. 700,000/-. He conceded that there were mediations done but the same failed because of the plaintiff's claim for interest and cost of flight. He stated that although he used to assist the plaintiff when she was poor, he had no evidence to prove the assistance. He conceded that he did not buy land as was agreed with the plaintiff. He also conceded that having looked at the messages between them by WhatsApp, there were no love messages.
11. Upon consideration of the evidence, pleadings and submissions, the learned trial magistrate found that there was a contract between the plaintiff and defendant which was binding and enforceable. The court further found that the defendant breached the contract and therefore the plaintiff was entitled to restitution of Kshs. 2,142,538/- plus interest. The court also found contradiction in the defence case when he stated that he had no problem in refunding the balance having refunded Kshs. 700,000/-. Therefore the court allowed the plaintiff's claim as sought.
12. The appellant being aggrieved with the decision of the lower court, filed the appeal herein vide the memorandum of appeal dated 17th May 2023 citing the following 13 grounds;
- a. That the learned magistrate erred in law and in fact in failing to hold that the case before the court was invoking environment and land court powers thus misapplying the provisions of Section 3 of the Law of Contract.
 - b. That the learned magistrate erred in law and in fact in holding Section 3 of the Law of Contract was not applicable to the case yet the same was premised on an alleged purchase of land which is a disposition on interest in land.
 - c. That the learned magistrate erred in law by failing to interpret the powers of the court under Section 13 of the *Environment and Land Court Act* as read together with the provisions of Section 3 of the Law of Contract.
 - d. That the learned magistrate erred in law and in fact in holding that 20,000 swiss franc was equivalent to Kshs. 2,142,358/- when there was no evidence from central bank certifying the exchange rate as the sole custodian of that information in Kenya.
 - e. That the learned magistrate erred in law and in fact in holding that there was unjust enrichment by the appellant when there was no such allegation nor prayer on the pleadings by the respondent.
 - f. That the learned magistrate erred in law and fact by holding that the respondent was entitled to a refund of air tickets when there was no evidence nor documents in court file to show that the respondent was travelling to court or to sign court documents.
 - g. That the learned magistrate erred in fact and law by failing to consider, analyze and apply credible evidence tendered by the appellant.



- h. That the learned magistrate erred in fact and law by considering extraneous factors while deciding the case.
 - i. That the learned magistrate erred in law and fact by shifting the burden of proof to the appellant.
 - j. That the learned magistrate erred in law and in fact in holding that the respondent had proved her case to the required standard when there was no evidence to support it.
 - k. That the learned magistrate erred in law and fact by failing to consider the evidence tendered by the appellant before arriving at its finding.
 - l. That the learned magistrate erred in law and fact by failing to hold that the plaintiff claimed in prayers based on alleged purchase of land yet there was no sale agreement between the parties.
 - m. That the learned magistrate erred in law and in fact by failing to hold that the case was not filed as a civil case but an environment and court case thus incompetent.
13. Consequently, the appellant sought the following orders;
- a. That the judgment of the court delivered on the 19th April 2023 and any subsequent order and/or decree be set aside and the respondent's case before the trial court be dismissed with costs.
 - b. That the costs of this appeal and the suit in the trial court be awarded to the appellant.
14. The appeal was disposed by way of written submissions. On record are submissions filed by the appellant on 23rd October 2023 and those filed by the respondent on 15th December 2023.

Appellant's submissions

15. Counsel for the appellant submitted that the court misapplied the provisions of the [Law of Contract Act](#) and failed to hold that the court was invoking Environment and Land Court powers. Counsel argued that as the plaintiff was based on alleged purchase of land and there was no sale agreement, that violated Section 3 of the [Law of Contract Act](#). Reliance was placed on Section 13 of [Environment and Land Court Act](#) and the case of Savings & Loan (K) Limited v. Kanyenje Karangaita Gakombe & Another [2015] eKLR and argued that a contract affects only parties to the contract. Counsel contended that in the land sale agreement produced by the respondent, the appellant was not part of it.
16. Counsel further argued that the respondent had no locus to institute the suit as an Environment and Land Court Case and relied on the case of Patrick Tarzan Matu & Another v. Nassim Shariff Abdulla & 2 Others [2009] eKLR to argue that where there is no written contract as required under Section 3 (3) of the Contract Act, the same cannot be enforced.
17. Further reliance was placed on the case of Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR for the proposition that the trial court had no jurisdiction to determine the matter on the basis that the cause of action arose in Nairobi where the contract was executed.

Respondent's submissions

18. Counsel for the respondent submitted that the basis of instituting the suit property as an ELC suit was because, the appellant entered into a sale of land agreement for purchase of land known as Mavoko Town Block 3/44331 (suit property) on behalf of the respondent after receiving Kshs. 2,042,358/- from the respondent and thereafter receiving Kshs. 800,000/- for construction of rental houses thereon and that the appellant omitted her name from the sale agreement and had the property sold to a



- third party. Counsel argued that receipt of the above amounts was not disputed and therefore the respondents claim was for fraud and misrepresentation and refund of the monies lost.
19. Counsel relied on Section 12 of the *Civil Procedure Act* and argued that the suit was properly filed in a court that had jurisdiction as the issue was touching on property in the court's jurisdiction. Counsel maintained that the suit was not to enforce the sale agreement dated 19th June 2017 but to recover the money's deposited in the appellant's account.
 20. Further reliance was placed in Section 13 of the *Environment and Land Court Act* for the proposition that the court has power to handle matters relating to instruments granting any enforceable interests in land. Counsel argued that the court has power to enforce instruments beyond contracts. Counsel argued that the respondent produced a power of attorney which empowered the appellant to "buy, sell and mortgage movable and immovable property" and do all acts stated in the said power of attorney.
 21. Counsel observed that the appellant conceded to receiving the amount stated in the plaint and only having repaid Kshs. 700,000/- leaving a balance of Kshs. 2,142,538/- and that the respondent produced tickets used to pursue this matter for an out of court amicable settlement. The court was referred to the case of *Evans Nyakwana v. Cleophas Bwana Ongaro* [2015] eKLR for the proposition that whoever makes an allegation has the burden to prove their allegation and that the respondent discharged that burden.

Analysis and determination

22. The court has carefully considered the appeal, rival submissions and the entire record. The role of this duty as the first appellate court is to reevaluate, reanalyze, reconsider and reassess the evidence before the trial court, and make its own independent conclusions bearing in mind that it had no opportunity to hear or see witnesses and make due allowance for that. (See *Selle v. Associated Motor Boat Company Ltd & Others* [1968] EA).
23. In this appeal the appellant has raised the following issues;
 - a. Whether the trial court had jurisdiction to hear and determine the dispute before it.
 - b. Whether the respondent proved her claim.
 - c. Whether the respondent was entitled to the orders granted by the trial court.
24. Although the appellant in his submissions raised the question of jurisdiction on the basis of place of filing suit, that question was not raised in the memorandum of appeal. Submissions are not a substitute for pleadings and a party cannot raise a matter in the submissions if the same was not raised in the memorandum of appeal. Therefore the question of the place of filing suit does not arise and this court will disregard it and not address it.
25. On the question of jurisdiction, the appellant in grounds 3 and 13 of the memorandum of appeal, complained that "the learned magistrate erred in law by failing to interpret the powers of the court under Section 13 of the *Environment and Land Court Act* as read together with the provisions of Section 3 of the *Law of Contract Act*". He further contended that the learned magistrate erred in law and in fact by failing to hold that "the case was not filed as a civil case but an environment and land court case thus incompetent".
26. What I understand the appellant to be stating is that the trial court ought to have exercised its jurisdiction under Section 13 of the *Environment and Land Court Act* and ought to have proceeded as such, but then, that the respondent was wrong in stating the title of her case as an ELC Case. This is



clearly contradictory and the appellant is both approbating and reprobating as the court cannot be said to have jurisdiction and at the same time the suit to be termed as incompetent for being titled ELC.

27. Sections 6,7 and 9 of the Magistrates Court Act provides for the jurisdiction of a Magistrate Court as follows;

6. Powers of District Magistrate

A district magistrate shall have power to hold a magistrate's court of such class as is designated by the Judicial Service Commission.

7. Establishment of district magistrate's courts

1. There is hereby established for each district a district magistrate's court, each of which shall be a court subordinate to the High Court and shall be duly constituted when held by a District Magistrate who has been assigned to the district in question by the Judicial Service Commission.

2. The Chief Justice may, by order, designate any two or more districts a joint district for the purposes of this Act, and thereupon those districts shall be deemed to be one district for those purposes.

3. A district magistrate's court shall have jurisdiction throughout the district in respect of which it is established: Provided that the Chief Justice may, by notice in the Gazette, extend the area of jurisdiction of a district magistrate's court, and the Court shall then have jurisdiction throughout the extended area.

9. Civil jurisdiction of district magistrate's court

A district magistrate's court shall have and exercise jurisdiction and powers in proceedings of a civil nature where either—

a. the proceedings concern a claim under customary law; or

b. the value of the subject matter in dispute does not exceed five thousand shillings, or ten thousand shillings where the court is constituted by a district magistrate having power to hold a magistrate's court of the first class.

28. Therefore, unlike this court whose jurisdiction is limited to matters touching on the environment and use and occupation of and title to land, the magistrates courts has wide original jurisdiction to hear and determine both criminal and civil cases. Regarding civil cases, the magistrate courts' jurisdiction is capped at pecuniary jurisdiction of Kshs. 20,000,000/- for the Chief Magistrate. In addition, the magistrates court can deal with various civil matters including matters of a commercial nature, family and succession matters, land matters, environment matters and employment matters.

29. The jurisdiction of this court is both original and appellate in regard to matters touching on the environment and use and occupation of, and title to land. Article 162 (2) (b) of *the Constitution* as read with Section 13 of the *Environment and Land Court Act* provides for the jurisdiction of this court as follows;

Article 162 (2) (b) of *the Constitution* provides as follows;

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(b) the environment and the use and occupation of, and title to, land.



Section 13 of the [Environment and Land Court Act](#) provides as follows;

Jurisdiction of the Court

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of [the Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162(2)(b) of [the Constitution](#), the Court shall have power to hear and determine disputes——
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of [the Constitution](#).
4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
5. Deleted by [Act No. 12 of 2012](#), Sch.
6. Deleted by [Act No. 12 of 2012](#), Sch.
7. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including——
 - a. interim or permanent preservation orders including injunctions;
 - b. prerogative orders;
 - c. award of damages;
 - d. compensation;
 - e. specific performance;
 - f. restitution;
 - g. declaration; or
 - h. costs.



30. It follows that this court cannot hear and determine appeals from the magistrates court that do not touch on the environment and use and occupation of and title to land.
31. Does the respondent's claim relate to use, and occupation of or title to land or any instrument granting an enforceable interest in land? Having considered the dispute before the trial court, it is clear that the respondent sent the appellant money for him to purchase land and construct on her behalf. However upon receipt of the money the appellant did not comply with what the parties had agreed, as the property was never purchased. In addition, parties agreed that the amount paid by the respondent be refunded by the appellant. Upon default on the part of the appellant, the respondent filed the suit before the magistrates court for refund of the money received from her by the appellant, together with the cost of flights incurred to and from Switzerland in pursuit of her money, costs and interest.
32. Clearly, the respondents claim was for refund of money and has nothing to do with use and occupation of, and title to land. The respondent never sought to enforce any contract on land, choses in action or other instrument granting enforceable interest in land. The respondent only claimed for a civil debt and the issue before the lower court was whether or not the appellant received money from the respondent and whether the amount was refundable on the basis that the appellant did not perform his part of the agreement. I therefore find and hold that the respondent's claim was a civil claim for refund and payment of expenses incurred and therefore a civil claim having nothing to do with the Environment and Land Court or the magistrates jurisdiction to determine Environment and Land Court matters.
33. The fact that parties had agreed that the money sent to the appellant was for purposes of purchasing land, did not transform the respondent's claim into a claim on land, in the same way, if that money was for say, purchase of carbon credits, that could not transform the claim for refund of the same into a matter touching on climate change and therefore an environment dispute. The titling of the matter as an ELC matter was in my view inconsequential, as jurisdiction is the power of the court and is not found in the title of a claim. As the respondent's claim was a civil claim for refund, it follows that the magistrates court had jurisdiction to determine the same under Section 7 of the Magistrates Courts Act. As this court's jurisdiction is limited to matters touching on use and occupation of and title to land and the environment, an appeal arising from the decision of the magistrates court on refund of a civil debt is an appeal which does not fall within this court's jurisdiction.
34. In the premises, I find and hold that this court has no jurisdiction to hear and determine this appeal and the same is hereby struck out with costs to the respondent.
35. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms Muthoki for appellant

No appearance for respondent

Court assistant – Josephine

