



**Githaiga v Kanyuira (Environment & Land Case E014 of 2023)
[2024] KEELC 6960 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6960 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E014 OF 2023
LN GACHERU, J
OCTOBER 24, 2024**

BETWEEN

JOHN KIMANI GITHAIGA APPELLANT

AND

CHRISTOPHER GITHIKA KANYUIRA RESPONDENT

*(Being an Appeal against the entire Judgement and Decree delivered by
the Hon. S. Mwangi (S.R.M) on the 23rd day of August 2023, in the Chief
Magistrate's Court at Murang'a in M.C.E.L.C Case No. E069 of 2022)*

JUDGMENT

1. The Appellant herein John Kimani Githaiga, was the Plaintiff in Muranga CMELC NO. E069 OF 2022, wherein he had sued the Respondent herein as a Defendant and sought for Judgement against the said Defendant for: -
 - a. Kshs. 3,400,000/= as set out at paragraph 12 above.
 - b. General damages for breach of contract.
 - c. Costs of this suit and interest thereon.
 - d. Such further or other reliefs that the court may deem fit and just to grant.
2. The Respondent herein Christopher Githika Kanyuira, as the Defendant in the said suit denied the claim, and filed his Statement of Defence, and Counter-claim dated 17th August 2022. He denied all the allegations made in the claim, and sought for Judgement against the Appellant as the Defendant in his Counter-claim for: -
 - a. Kenya Shillings Fifty Two Thousand Eight Hundred (Kshs. 52,800) being lease fees for 6 years that the Plaintiff now Defendant was in possession of the tea bushes;



- b. Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000) being loss of user for the period the Plaintiff now Defendant was in possession and use of the suit property.
 - c. General damages for breach of contract.
 - d. Cost of the suit.
3. The matter proceeded by way of viva voce evidence, wherein the Appellant as the Plaintiff gave evidence for himself and called no witness. The Respondent as the Defendant also gave evidence for himself and urged the trial court to dismiss the Plaintiff's/Appellant case and allow his Counter-claim.
 4. Thereafter, the trial court delivered its judgement on 23rd August 2023, wherein, it dismissed the Plaintiff's case (Appellant herein) for failing to prove his case on the required standard of balance of probabilities. However, the trial court on the other hand allowed the Defendant's (Respondent's) claim in his Counter-claim, plus an award of ksh 1000,000/=, as General damages for breach of contract.
 5. The Appellant as the Plaintiff thereon was aggrieved by the said Judgement of the trial court, and lodged this Appeal vide a Memorandum of Appeal dated 19th September 2023, wherein he has sought for these Order from this Court:
 1. That the Court do set aside the Judgment and Decree of the trial Court delivered on 23rd August 2023, in MCELC Case No. E069 of 2022 (Chief Magistrate's Court at Murang'a) and in its place allow the Plaintiff/Appellant's claim as sought in the Appellant's Plaint dated 2nd August, 2022, together with costs.
 2. That the Appellant be awarded costs of this Appeal.
 6. In the claim before the trial Court, the Appellant, as the Plaintiff laid claim to 1.066 Acres to be carved out of land parcel number LOC.19/Kiawambogo/432 (the suit property), being the Respondent's share of the said parcel of land, on the strength of two Agreements executed between the Appellant and the Respondent dated 6th February 2017 as amended on 3rd April, 2017 and 17th March, 2022.
 7. The Respondent had vehemently denied the Appellant's claim, and contended that it was the Appellant who was in breach of the said agreements, and he urged the court to allow his claim as set out in the Counter-claim.
 8. In its judgement, the trial Court found and held that the Appellant was responsible for the initial breach of the Agreement executed with the Respondent on 3rd April 2017, thereby, causing the Respondent not to discharge his contractual obligations. Further, the trial Court held that the Appellant failed to establish that the consent of the Kangema Land Control Board, was obtained which omission rendered the entire transaction void.
 9. Having found the Appellant's claim not merited, the trial Court allowed the Respondent's Counter-Claim as against the Appellant herein with costs as well as the costs of the suit before it.
 10. The Appeal herein is premised on these fourteen (14) grounds:
 1. That the trial Court erred in law and in fact in finding that the Plaintiff failed to prove on a balance of probabilities that he withdrew the Purchase Price from the bank, which issue was not on trial before it.
 2. That the trial Court erred in law and in fact in finding that the Plaintiff failed to prove that he paid money as per the terms of the Sale Agreement, yet the Sale Agreement spoke for itself.



3. That the trial Court erred in law and in fact in finding that the Sale Agreement was contradictory and the Plaintiff had conducted due diligence which issues were not in contention in the suit before it.
 4. That the trial Court erred in law and in fact in finding that it was the Plaintiff who breached the applicable Sale Agreement yet it was the Defendant who was in breach of the same.
 5. That the trial Court erred in law and in fact for failure to hold that the Plaintiff was entitled to a refund of the Purchase Price at the current value having entered the finding that the governing Sale Agreement was valid.
 6. That the trial Court erred in law and in fact in finding that it was the Plaintiff who was responsible for the initial breach of the Agreement executed with the Respondent on 3rd April, 2017 thereby, causing the Respondent not to discharge his contractual obligations.
 7. That the trial Court erred in law and in fact for voiding the Sale Agreement for want of the Land Control Board Consent yet the trial Court determined the same Sale Agreement to be valid.
 8. That the trial Court erred in law and in fact for failure to comprehend that the Plaintiff was only seeking the recovery of the current value of the suit property as opposed to the land itself so as to invoke the legal provisions pertaining to the Land Control Board's consent.
 9. That the trial Court erred in law and in fact for attempting to re-write the parties' Sale Agreement and drawing implications therefrom yet the aforesaid Sale Agreement is free of ambiguities.
 10. That the trial Court erred in law and in fact in finding that it was the Plaintiff who was in breach of the Sale Agreement, for undertaking a valuation of the suit land and for lodging a complaint against the local administration.
 11. That the trial Court erred in law and in fact in finding that it was the Plaintiff who coerced the Defendant to enter into another Sale Agreement yet there was no evidence to support the aforesaid conclusion.
 12. That the trial Court erred in law and in fact for finding that the Court cannot rewrite parties' contracts for the parties are bound by the same, yet the trial Court ruled against the same contracts.
 13. That the trial Court erred in law and in fact for failure to apply the relevant and applicable law in the circumstances and for ignoring the Plaintiff's written submissions and binding case-law/authorities.
 14. That the trial Court erred in law and in fact for delivering a Judgment that was against the weight of the pleadings and for misdirecting itself by taking into consideration irrelevant factors and disregarding relevant factors.
11. After the Appeal was admitted under Section 79B of the *Civil Procedure Act*, the Court directed that the same be canvassed by way of written submissions, and the parties complied.



12. On 12th March 2024, the Appellant filed his written submissions dated 10th March 2024 through the Law Firm of Bwononga & Co. Advocates, and submitted his Grounds of Appeal in clusters.
13. In respect to grounds numbered 1, 2 and 4 of the Memorandum of Appeal, the Appellant submitted that the Sale Agreement dated 6th February, 2017, the Amended Sale agreement dated 3rd April 2017, and the agreement dated 17th March 2022, which was executed before the local Chief and forming part of the Appellant's exhibits before the trial Court were clear and unambiguous in their respective terms. Further, that the said Agreements were witnessed by the Respondents' brother as well as area Chief.
14. The Appellant relied on his Exhibit No.3, which had been produced before the trial Court, being an Affidavit jointly sworn by the Appellant and the Respondent, wherein it was expressed that a penalty amounting to 100% of the value of the transaction shall be imposed on party for breach of any of the contractual terms. It was further submitted that the said Exhibit No.3 stated that no threats or intimidation were employed when the same was sworn by both the Appellant and the Respondent.
15. With regard to the grounds Nos. 3, 5, 6 and 9, the Appellant relied on Clause 4(b) of the Sale Agreement dated 6th February 2017, and the Amended Agreement dated 3rd April 2017, to buttress the submissions that the trial Court having determined that there existed a valid Agreement to dispose of the suit land, it ought to have held that the Appellant was entitled to a refund of the purchase price, as well as the 100% penalty for breach of Agreement. Further, that a valid sale Agreement cannot at the same time be voided.
16. It was the Appellant's further submission that during the trial, the Respondent admitted that he made attempts to get back to the suit land, and eventually succeeded in doing so which admission demonstrates that the Respondent breached his contractual obligations thus entitling the Appellant to be paid the penalty for breach of the Amended Agreement dated 3rd April, 2017.
17. Further, the Appellant submitted that the Respondent also admitted in their joint Affidavit sworn by himself and the Appellant on 3rd April 2017, that he received Kshs.500,000/=, from the Appellant, which demonstrates the Appellant's performance of his contractual obligations, and thus he did not owe the Respondent any money as purchase price.
18. On his Grounds of Appeal Nos 7, 8, 11 and 12, the Appellant faulted the trial Court for holding that he forced the Respondent to enter into another agreement, and for holding and finding against the established rule that Courts cannot rewrite parties' contracts. The Appellant reiterated that as evidenced by the prayers sought in his Plea, he was seeking to recover Kshs.3,400,000/=, being the current market value of a portion of land measuring 1.066 Acres, in respect of the suit property, in addition to General damages for breach of contract.
19. The Appellant was emphatic that he was not seeking for transfer of the 1.066 Acres, out of the suit land to himself. It was submitted that as the Respondent did not plead in the proceedings before the trial Court that force was exerted upon him by the Appellant to execute the agreements to dispose the suit property, then it follows that the trial Court was misadvised to infer the presence of coercion in the transactions between the Appellant and the Respondent. It was further submitted that where an agreement is adjudged to be valid by the Court, then, the parties thereto are bound by its terms.
20. With regard to grounds Nos 13 and 14, of the Memorandum of Appeal, it was submitted that the entire decision of the trial Court does not mention any of the case-law/legal authorities cited by the Appellant. Further, that the trial Court considered irrelevant factors in its holding, which also disregarded relevant factors.



21. Reliance was placed on Section 7 of the [Land Control Act](#) to buttress the proposition that the Appellant was entitled to a refund of the purchase price, which purchase price was paid to the Respondent.
22. It was further submitted that the Respondent's contention that the Appellant failed to deliver the purchase price of Kshs. 500,000/=, in itself was evidence of the existence of a contract for the disposal of the suit land. The Appellant argued that "there would be no breach of Agreements without the Agreements being in existence." Furthermore, the Respondent although alleging that he was coerced to sign the Agreement at the local Chief's office, he failed to produce any evidence of having lodged a report with the Police as against the area Chief.
23. Further, it was submitted that the fact that Respondent's ID card, KRA PIN appear as the Appellant's exhibits 4 and 12, sufficiently demonstrates the intention of the parties herein to dispose the suit land.
24. On the question of special damages, it was submitted that special damages must be pleaded and specifically proved. The Appellant stated that his prayer before the trial Court was for Kshs.3,400,000/=, and which prayer was anchored on a Valuation Report dated 19th May, 2022, undertaken by Paramount Valuers at the Appellant's instructions.
25. It was argued that the Appellant availed sufficient proof on the question of special damages and urged the Court to allow the said prayer. The Appellant further submitted that the conduct of the Respondent was oppressive, high-handed, outrageous, insolent and vindictive, and occasioned loss to the Appellant, which loss the Respondent must recompense in the form of damages.

The Respondent's Submissions

26. The Respondent filed his written submissions on 13th May, 2024, through the Law Firm of Eyase Kanyuira & Associates, and submitted that in the instant Appeal, the Appellant has violated the rules of lodging an Appeal which require an Appellant to keep the grounds clear and straightforward, avoiding repetition. Reliance was placed on the holding of the Court in the case of *Nasri Ibrahim vs IEBC & 2 Others* (2018) eKLR.
27. The Respondent identified two issues for determination as follows:
 1. Whether the Appellant breached the Sale Agreement; and,
 2. Whether the Respondent is entitled to the judgment by the Trial Court.
28. The Respondent further submitted that the trial Court's finding that the Appellant failed to prove that he paid Kshs.500,000/=, to the Respondent is proper and sound, because the said payment having been denied by the Respondent, it was the Appellant's obligation to demonstrate that indeed the payment was made. Further, that he who alleges must prove and there lacking sufficient evidence by the Appellant in respect of payment of Kshs.500,000/=, to the Respondent, the trial Court could only be inclined to find and hold that the money was never paid.
29. Further, it was submitted that the Appellant failed to transfer two of his parcels of land to the Respondent as per the terms of the contract executed between themselves. Reference was made to the Respondent's documents contained on pages 55 and 56 of the Record of Appeal, which reflects that the Appellant is the registered owner of the two parcels of land, which he was required to transfer to the Respondent according to the terms of the said contract.
30. The Respondent averred that the trial Court's finding and holding was sound, and that the Appellant failed to demonstrate that he paid Kshs.500,000/=, to the Respondent as contracted; Further, that the



Appellant still remains the registered owner of the two parcels of land, which he had covenanted to transfer to the Respondent.

31. The Respondent pointed out that the instant Appeal does not contest the trial Court's Decree on the Respondent's Counter-Claim, which the trial Court awarded Kshs.202,000/=, as prayed. That the above holding was not subject to the instant Appeal, which Appeal is only concerned with the trial Court's award of Kshs.1,000,000/=, being an award of General damages for breach of contract.
32. Further, that the suit before the trial court was founded on the Appellant's claim for compensation for breach of contract, yet the Appellant had approached the Court with unclean hands in violation of the rules of equity. That the Appellant, knowing that the Respondent was a habitual alcoholic, sought to take advantage of the Respondent's condition, hence the sloppy crafting of pleadings by the Appellant in the instant Appeal.
33. The Respondent urged the Court to dismiss the instant Appeal with costs, as it amounts to a waste of judicial time, because it does not address any particular subject.
34. The Court has considered the instant Appeal through the Memo of Appeal, Record of Appeal, the rival written submissions, the cited authorities and relevant provisions of law, and finds the issues for determination are;-
 - i). Whether this instant appeal is merited?
 - ii). Who shall bear the costs of the appeal?

i). Whether this instant appeal is merited?

35. The following facts were not disputed by the parties before the trial court; Firstly, that the Respondent as the Vendor, and the Appellant as the purchaser executed a contract for the sale of the suit land on 6th February 2017, for the consideration of land parcel Nos. LOC.19/Kiawambogo/T.106 and LOC.19/Kiawambogo/T.109, plus the amount of Kshs.500,000/=.
36. Further, the parties herein did not contest that they executed another amended Agreement dated 3rd April 2017, for the conveyance of the suit property, and for exactly the same consideration set out in the earlier Agreement dated 6th February, 2017.
37. Both contracts contained a Clause No 8, which provided that in the event of breach, the Vendor would compensate the purchaser for the breach at the rate of 100% . However, the parties further signed a joint Affidavit on 3rd April 2017, wherein in para 4, they deposed that in the event of default, the innocent party would be compensated by the guilty party at the rate of 100%, of the monies expended in the transaction.
38. In its Judgement, the trial Court find and held that the Appellant failed to establish that he had fully paid the purchase price of Kshs.500,000/=, to the Respondent and thereafter the Respondent backed away from the contract with the Appellant and failed to fulfill his obligation. Further the trial court held that the Appellant was guilty of failure to transfer the two plots as agreed to the Respondent.
39. Further, the trial Court held that while the Appellant claimed to have paid Kshs.500,000/=, to the Respondent in cash, and in the banking hall of the Respondent's bank, the Appellant did not present a withdrawal slip demonstrating that he had withdrawn the stated amount of ksh 500,000/= for purposes of delivery to the Respondent.
40. Though proof of withdrawal of the said amount was not necessary for the Appellant to prove that he had paid the stated purchase price, but since the Respondent herein denied having been paid the full



purchase price, it was incumbent upon the Appellant to prove that he indeed paid the said amount, maybe by production of acknowledgement of receipt of the money by the Respondent or by availing a witness who saw the exchange of the said amount.

41. This being a first Appeal, the Court is guided by the holding of the Court in the case of *Mursal & Another vs Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021)* [2022] KEHC 282 (KLR) (6 April 2022) (Judgment), where the Court stated as follows:

A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and 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.”

42. The duty of a first Appellate Court was elaborated in the case of Peter M. Kariuki v Attorney General [2014] eKLR, where it was held that;

“We have also, as we are duty bound to do as a first appellate Court, re-consider the evidence adduced before the trial Court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”

43. See also the decision of the Court in the case of *Selle & Another vs Associated Motor Boat Co. Ltd.& Others* [1968] EA 123, where the Court declared as follows:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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...”

44. Being guided by the above decided cases, this court is bound to re-evaluate and re- consider the totality of the evidence produced before the trial Court, and then arrives at its own conclusion, while taking into account that it never saw nor heard the witnesses, and should give allowance to that.

45. The trial Court determined that the available agreement being concerned with the disposal of the suit property, the consent of the Land Control Board, was necessary to convey the said land. The trial Court in its Judgment also found and held that the Appellant was responsible for the initial breach of the Agreement executed with the Respondent on 3rd April 2017, thereby causing the Respondent not to discharge his contractual obligations.

46. Further, the trial Court held and found that the Appellant failed to establish that the consent of the Kangema Land Control Board, was obtained, which omission rendered the entire transaction void. Further, the trial Court held that the Appellant failed to prove that he paid any amount of money to the Respondent as contracted. In dismissing the Appellant’s claim, the trial Court held that he failed to prove his case to the required standard in civil cases, which is on a balance of probabilities.



47. It is trite that he who alleges must prove. Section 107 of the Evidence Act provides as follows:

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.”

48. Further, Sections 109 and 112 of the Evidence Act (CAP. 80), provide as follows:

S.109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in the existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

S.112 “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

49. The Court has re- considered and critically re- analyzed the pleadings and the totality of the evidence and rival written submissions tendered by the parties before the trial Court and in the instant appeal, and finds that before the trial Court, it was a point of contention between the parties as to whether the Appellant delivered and/or paid the sum of Kshs.500,000/= to the Respondent herein as covenanted in the above referred Agreements.

50. The trial Court determined that being the claimant, the Appellant bore the burden of proof, or had a duty to call sufficient evidence to prove that he paid the sum of Kshs.500,000/=, to the Respondent herein. Further, that the Appellant failed to discharge that obligation, of proving his case on the required standard of balance of probabilities, and for that reasons, his claim was dismissed.

51. Having considered and reviewed the evidence adduced by the parties before the trial Court, this Court finds and holds that the Appellant did not prove and/or demonstrate that he indeed paid the said amount of Kshs.500,000/=, to the Respondent. The Appellant alleged that he paid the said amount to the Respondent while they were in the bank, but which allegation was denied by the Respondent. The burden of proof was upon the Appellant to demonstrate that he indeed paid and gave the said amount of money to the Respondent. He failed to do so.

52. Section 3 of the Law of Contract Act, provides as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- (a) the contract on which the suit is founded –
 - (i) is in writing.
 - (ii) is signed by all parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

53. The Court has perused the two Agreements dated 6th February 2017, and 3rd April 2017, and is satisfied that the parties herein did execute a contract for the disposal of the suit property. However in clause No. 2 of the said Agreements, the Vendor, who is the Respondent herein had an obligation of ensuring that all the clearance certificates and consents to transfer the 1.066 acres to the purchaser, who is the



- Appellant herein had been obtained. If that was the case, the trial court should not have shifted the burden of obtaining the Land Control Board Consent to the Appellant.
54. Though there is no evidence that the Appellant did pay the Ksh 500,000/= of the purchase price, the Respondent too was in breach of clause 2 of the sale agreement, as he had an obligation of ensuring all the clearing certificates and consents to transfer had been obtained. There was no evidence that he ever obtained any of them.
55. In the suit before the trial Court, the Appellant was seeking equitable remedies which, by nature, are discretionary remedies. In the case of *Joshua v Okworo & 3 others* (Environment & Land Case E003 of 2022) [2022] KEELC 14573 (KLR) (19 October 2022) (Judgment), the Court declared as follows:
- “Factors that are relevant to the Court before deciding whether to grant an equitable remedy include, but not limited to:
- (a) whether the remedy at common law is inadequate;
 - (b) whether the conduct of the claimant has been inequitable, that is whether the Claimant comes to Court ‘with clean hands’;
 - (c) whether the availability of the remedy sought may cause undue hardship to the Defendant;
 - (d) whether the imposition of the remedy may cause the Defendant to suffer undue hardship.”
56. In the proceedings before the trial Court, the Respondent was able to establish that he vacated the suit property, and entered into one of the two plots belonging to the Appellant as contracted in their sale agreements, while the Appellant in turn occupied the suit land, and started to harvest tea leaves therefrom and to receive proceeds from the sale of the same.
57. The Respondent in his Statement of Defence, while opposing the Appellant’s suit stated that he stayed on the Appellant’s plot for about six years, and departed therefrom upon realizing that he was being duped, because the Appellant did not render the payment of Kshs.500,000/=-, nor transfer his two plots to the him as contracted. For that reasons, the trial Court allowed the Respondent’s Counter-Claim as against the Appellant. The Respondent admitted that while he took possession of the said plots that belonged to the Appellant, he lived in a house that was put up for him by the Appellant.
58. Being the purchaser in the transaction, to convey the suit land, the Appellant needed to prove to the trial Court that he indeed paid the full purchase price to the Vendor (the Respondent), herein in order to support his prayer for an equitable remedy. The Appellant failed to establish that he delivered and/or paid the amount of Kshs.500,000/=-, to the Respondent as covenanted. Therefore, the court cannot hold and find that the Respondent herein fulfilled his obligation.
59. Additionally, the Appellant failed to explain his failure to transfer his two T-PLOTS to the Respondent as contracted. From the evidence adduced before the trial Court by the Respondent particularly on pages 55 and 56 of the Record of Appeal, the said two T-PLOTS are under the Appellant’s ownership. Due to the fact that there is no evidence that the Appellant paid the full purchase price and he also did not transfer his two T-PLOTS to the Respondent herein as contracted, this Court is satisfied that the Appellant was undeserving of the trial Court’s exercise of its discretion to grant him the equitable remedy sought.



60. Having further re-considered and re-analyzed the available evidence before the trial court, it is evident that both parties herein were in breach of the Agreement entered on 6th February 2017, and later amended on 3rd April 2017. The Respondent had also admitted that both of them were in breach of the agreement in place. For that reason, none of them should benefit from breach by any of the parties as stipulated in the default clause contained in the agreement and the Joint Affidavit.
61. Having thoroughly reviewed the available evidence before the trial Court and rival written submissions, this Court is satisfied that both the Appellant and the Respondent were in breach of the agreement and/or contract executed between the two of them, for disposal of the suit land, and therefore none of them was deserving of the equitable remedy of compensation for breach of contract.
62. The trial court erred in allowing the Respondents Counter-claim especially after having voided the said agreement for non-compliance with the provisions of the Land Control Act, as no Consent to transfer had been obtained as provided by Section 6 of the Land Control Act.
63. On the issue of the Agreement 17th March 2022, executed by the parties before the local Chief, the Respondent claimed he was coerced to sign the same by the Appellant, and the local Chief. Agreements for the disposal of land are not administrative matters falling within the mandate of the Chiefs or of that institution previously known as the Provincial Administration.
64. Further, it cannot escape the notice of this Court that the Appellant is reportedly a Director of the local tea factory, while the Respondent is by his own admission a known alcoholic. It is evident that the Appellant enjoys greater social status, as compared to the Respondent herein within the society.
65. It is noteworthy that the parties would execute two Agreements for the sale of the suit property between February and April 2017, before their Advocates and subsequently elect to execute a separate agreement in regard to the same property at the local Chief's Office. Accordingly, this Court upholds the findings and holdings by the trial Court of coercion of the Respondent that led to the execution of the Agreement dated 17th March 2022, by the Respondent.
66. However, this court is satisfied that the Respondent too was in breach of the agreement in place, as he intended to exchange his portion of land before subdivision, and acquisition of his own title deed. Therefore, without having a title deed, he could not fulfill his obligations as stipulated in clause No 2 of the said agreement.
67. This Court in its appellate jurisdiction having re-analyzed the available evidence as contained in the Record of Appeal finds that the trial Court only erred in finding that the Respondent had proved his claim as contained in his Counter-claim dated 17th August 2022. This court finds so, because both the Appellant and Respondent were in breach of the agreement, and none of them should benefit from the breach by the other party.
68. Further, the trial court had voided the Sale agreement for failure to obtain the Land Control Board Consent, and the only recourse was refund of the purchase price, which the Appellant failed to prove that he paid fully.
69. For the above reasons, this court finds that the instant Appeal succeeds only to the extent of finding that the trial court erred in allowing the Respondent's Counter-claim. Therefore, the court proceed to upset and set aside the finding and holding of the trial court, and proceeds to dismiss the Respondent's (Defendant before the trial court) Counter-claim dated 17th August 2022, with costs to the Appellant herein.



70. However, safe for setting aside of the Judgement in terms of the Counter-claim, the court finds the rest of the Appeal not merited, and further finds no compelling evidence to justify interference of the findings and decision of the trial Court vide its Judgement of 23rd August, 2023, which dismissed the Appellant's claim before the said court. The Appellant's (Plaintiff) claim before the trial court stands dismissed, and that dismissal is upheld by this court.
71. Having analyzed the available evidence as contained in the Record of Appeal as above, this court finds and holds that the Appeal herein succeeds only to the extend of setting aside the award of the prayers sought in the Counter-claim dated August 17, 2022. The rest of the Appeal is found not merited, and is accordingly dismissed, safe as held above.
72. On the issue of costs of this Appeal, the court finds that none of the parties herein is the successful litigant. Therefore, the court directs that each party to bear its own costs of this Appeal, safe that the Respondent(Defendant) Counter-claim dated August 17, 2022, is dismissed with costs to the Appellant(Plaintiff)

It is so Ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 24TH DAY OF OCTOBER, 2024

L. GACHERU

JUDGE

24/10/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr Onderi H/B for Mr Bwonwonga for the Appellant

Mr Kanyuira for the Respondent

L. GACHERU

Judge

24/10/2024

