



**Muiruri & another v Ngugi (Environment and Land Appeal E096 of 2022)
[2024] KEELC 13337 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13337 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E096 OF 2022**

JG KEMEI, J

NOVEMBER 19, 2024

BETWEEN

ELIUD NDUNGU MUIRURI 1ST APPELLANT

MARGARET NJERI MACHARIA 2ND APPELLANT

AND

JOSEPH MBUGUA NGUGI RESPONDENT

JUDGMENT

1. Both Appellants filed their separate appeals dated the 6/12/2023 and 8/5/2023 respectively arising from the Judgement of Hon C N Mugo, SRM in MCELC NO 33 of 2018 delivered on the 25/10/2022.
2. In the trial Court, the 1st and 2nd Appellants were the Defendant and the Interested Party respectively while the Respondent was the Plaintiff.
3. Vide a Complaint filed 5/5/2012 the Plaintiff sued the Defendant seeking specific performance with respect to the sale agreement dated the 25/2/2010 entered into between the Plaintiff and the Defendant over the sale and purchase of the Defendant's share of the land in L.R No. 19097/87 (suit land) which land was owned as tenants in common by the Defendant and his brother one Karuma Muiruri. The gist of the Plaintiff's case thereat was that despite entering into the agreement of sale and paying the purchase price in full, the Defendant had refused to effect the transfer of the suit land to him.
4. On his part, whilst admitting co-tenancy in common, the Defendant denied the claim of the Plaintiff in toto and stated that if indeed there was any sale agreement between the parties, the same was a product of inducement and false misrepresentation by the Plaintiff and dared the Plaintiff to strict proof. Particulars of fraudulent misrepresentation and or inducement were cited under para 6 of the Defence. Lastly, he urged the Court to dismiss the Plaintiff's claim.



5. Upon hearing the suit, the Trial Court entered Judgment in favour of the Plaintiff as follows;
 - “That the Plaintiff having proved his case against the Defendant on a balance of probabilities, I enter Judgement as per prayers Nos a, b, c of the Plaint dated the 5/5/12.”
6. The above impugned Judgement aggrieved the Appellants who filed separate Memorandums of Appeal.
7. The 1st Appellant’s appeal is premised on the following grounds;
 - a. The learned Magistrate erred in law and fact by arbitrarily and unilaterally depriving the Appellant of his title No. L.R. 19097/87 without compensation contrary to Articles 40 and 65 of *the Constitution* of Kenya, 2010.
 - b. The learned Magistrate erred in law and in facts by ultimately finding in favour of the Respondent, yet the Respondent only produced a sale agreement as documentary evidence to support his claim. The Respondent did not produce any other documentary evidence such receipts and or acknowledgment letters confirming that payments if any of the entire purchase price to the aforesaid suit property was ever made.
 - c. The learned Magistrate erred in law and in facts by ultimately finding in favour of the Respondent, by failing to appreciate that the suit property was Matrimonial land and that the Appellant has lived in that parcel of land for over 30 years.
 - d. That the Learned trial Magistrate clearly erred in law and facts expressed outright bias against the Appellant and wholly disregarded their arguments.
 - e. The learned Magistrate erred in law and in facts in failing to hold that on evidence adduced the Respondent had failed to establish a case on a balance of probability.
 - f. That the learned trial Magistrate erred in law and facts in failing to appreciate the Appellant’s arguments that all the needy gritty in a sale transaction had not been complied with which includes due diligence doctrine.
 - g. The learned Magistrate erred in law and facts in failing to appreciate the long established principle of stare decisis, bringing law into confusion and thereby arriving at an erroneous finding/conclusion.
8. While the grounds of the 2nd Appellant’s appeal are;
 - a. That the learned Magistrate erred in both law and fact in making a final Judgment and Ruling on through on balance of probability without calling for full proof.
 - b. That the learned Magistrate erred in both law and fact by taking the Appellant’s evidence as an academic exercise without the consideration of family and stake in regard to the matrimonial home which has been established in L.R. 19097 and the subject property of reference to the suit.
 - c. That learned trial Magistrate erred in both law and fact by making a final decision of the matter while inclining on the version of the Respondent and who coerced and or caused for the separation of the Appellant’s husband with her in order to unjustly acquire the subject land parcel through dubious means.



- d. That the learned trial Magistrate erred in both law and fact by arriving into a decision which clearly proved bias and thus the Judgment was ambiguous and imprecise.
 - e. That the learned Magistrate erred in both law and fact by not considering that the Appellant and her children would be unjustly denied of their rights of homage by her Judgment based on probability and not full proof.
 - f. That the learned Magistrate erred in both law and fact by failing to consider that the Respondent had illegally and unlawfully lied to her husband (Eliud Ndungu Muiruri) to achieve or score unjustly and on offside through deceit and taking the advantage of her absence during the alleged sale.
 - g. That the learned Magistrate erred in both law and fact considering that the Appellant's case amounted to an academic exercise without any legal reprieve thus causing her suffer denial of their matrimonial property.
 - h. That the learned Magistrate erred in both law and fact considering that the Appellant's Area Assistant Chief Cianda (George Ithebu) mis-used his office by using his official status contrary to the public service act to cause for the Respondent's undue advantage against the Appellant over ownership of the subject property.
 - i. That the learned Magistrate failed in both law and fact by failing to consider that a Judgment on balance of probabilities would leave the Appellant's justice subverted.
 - j. That the learned Magistrate erred in both law and fact by failing to consider the evidence presented before her by the Appellant was the chief evidence to Court.
 - k. That the learned Magistrate failed in both law and facts by failing to incline on basis of equity to otherwise allow the Respondent's freeway and will and without considering that the Appellant deserved a fair trial.
 - l. That the learned Magistrate failed in both law and fact in holding the burden of proof lied with the Appellant in establishing her claim.
 - m. That the learned Magistrate failed in both law and fact by taking into account failure to proof a case beyond any reasonable doubt by the Respondent did not warrant any or such a decision.
 - n. That the learned Magistrate failed in both law and fact proceeded to award the Respondent despite him not co-operating with the orders of Court that required him to submit on his case thereby proving bias.
 - o. That the learned Magistrate failed in both law and fact in finding that the Respondent proved his case against the Appellant on balance of probability and by making a decision against the Appellant.
9. On application of the parties, the ELCA 93 of 2022 and ELCA 96 of 2022 were consolidated with the leave of the Court on the 18/3/2024, with ELCA 96 of 2022 being the lead file. The Appellants being the 1st and 2nd Appellants as set out herein against the Respondent. On even date the parties elected to canvass the appeal by way of written submissions.
10. By the time of writing this Judgment only the Appellants had complied with the directions of the Court despite evidence of service. It would therefore appear that the appeal before the Court is not opposed. Be that as it may, the Court will proceed to determine the appeal based on the material before me.



11. The firm of J N Ngeresa & Company Advocates filed written submissions on behalf of the 1st Appellant while that of Kibue Mugiira & Mbagara Advocates filed submissions on behalf of the 2nd Appellant.
12. Counsel for the 1st Appellant submitted and faulted the trial Court for failing to consider that the suit land was the only property of the Appellants where they have constructed their matrimonial home and allowing the Plaintiff's case renders them and their children destitute. That the transaction having been carried out in the absence of the 2nd Appellant runs afoul the provisions of section 2 of the [Land Act](#) which decrees that any property that is owned or leased by one or both spouses and occupied by the spouses as their family homes is protected by the law under [Matrimonial Property Act](#). Aware that the cause of action herein arose pre the land reforms and laws of 2012, it was submitted that the dictum of the Court of Appeal in the case of Mugo Muiru Investments Vs. E W B & 2 Others (2017)eKLR would be applicable.
13. It was further submitted that the Court erred in entering Judgment for the Respondent in the absence of proof of his claim in accordance with the provisions. The Court was urged to allow the appeal.
14. Counsel for the 2nd Appellant agreed with the 1st Appellant that the Court erred in not holding that the suit land was matrimonial property in which the Appellants have enjoyed proprietary rights and quiet possession over a period of over 30 years. That the 2nd Appellant held an overriding interest over the suit land whereupon any dealing on the suit land would be subject to the said overriding interest. The Learned Trial Magistrate was faulted for failing to consider the 2nd Appellant's equitable interest over the suit property and that such interest was sufficient to invalidate the alleged sale. It was also submitted that the Respondent produced a sale agreement as the sole proof of the transaction devoid of proof of consideration, due diligence on the capacity of the 1st Appellant to dispose the land noting that he was a cousin and a neighbor of the Appellants thus was aware of the 2nd Appellant's marital status as well as the existence of her overriding interest on the property. In the end it was submitted that the Respondent fell short of bonafides in the transaction and the Court erred in entering Judgment in his favour. This Court was urged to allow the appeal.

Analysis and determination.

15. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial Court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: Peter Vs. Sunday Post (1958) at pg. 429).
16. As a first Appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the [Civil Procedure Act](#) which espouses the role of a first appellate Court which is to: '.... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.'
17. Besides, that duty has been affirmed in numerous decisions of the Superior Courts. Notably in the case of Selle & Another Vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was pronounced thus:

“ ... 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 ...”

18. It is a principle of law that whoever lays a claim before the Court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:

107. (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 fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

19. Reliance is made on the case of Muriungi Kanoru Jeremiah Vs. Stephen Ungu M’warabua [2015] eKLR where the Court held as follows with regard to the burden of proof:

“... As I have already stated, in law, the burden of proving the claim was the Appellant’s including the allegation that the Respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the Appellant The Appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the Respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial Court magistrate held that the Respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.”

20. The Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it as follows:-

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

21. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

22. I think I have said as much on the burden of proof. In Kenya, the burden of proof in civil cases is to prove a case by a preponderance of the evidence, or on a balance of probabilities. This means that the evidence must be more probable than not, but not as high as the standard required in criminal cases. The *Evidence Act* of Kenya, Cap. 80, as set out above places the burden of proof on the person who wants the Court to believe in a particular fact. This is unless the law states that the proof should lie on a specific person.



23. The Court will therefore bear this in mind in evaluating the case in addition to its duty as a first Appellate Court. The Respondent therefore bore the duty to prove his case to the required standard.
24. The Respondent's case as set out in the plaint is rather straight forward. He averred that vide an agreement dated the 25/2/2010 he entered into a sale agreement with the 1st Appellant for a portion of the suit land. Without leading any evidence he stated that he paid the purchase price in full. That the 1st Appellant despite receiving the full purchase price has refused to transfer the land to him hence the suit seeking specific performance. The 1st Respondent on the other hand has accused the Respondent with others of inducing him and using fraudulent misrepresentation to get him execute the sale agreement. The case of the 2nd Appellant on the other hand is that her overriding interest as a spouse of the 1st Appellant was disregarded and that if the suit land is disposed she and her children will be rendered destitute.
25. The key issues for determination are;
 - a. Whether there was a valid agreement between the parties.
 - b. Whether the Respondent was entitled to orders of specific performance
 - c. Costs of the appeal
26. Section 3 (3) of the Law of Contract provides as follows;

“3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—(a)the contract upon which the suit is founded—(i)is in writing;(ii)is signed by all the 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:Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”
27. I have perused the agreement dated the 25/2/2010 and I find that the agreement by and large complies with the provisions of the law. That said the 1st Appellant averred that he was induced to sign the agreement by the Respondent, the chief, his brother and his mother. His brother led evidence that he witnessed the agreement of sale however the advocate who prepared and witnessed the agreement informed the Court that he met with the 1st Appellant and the Respondent and the others who accompanied them were left at the reception. This creates doubt as whether indeed he witnessed the signing of the sale agreement. Para 11, 12, and 13 of the 1st Appellant's Replying Affidavit sworn on 15/6/2020 states as follows;
 11. That on or about 25/02/2010 I entered into an agreement with the Plaintiff/Applicant for the sale of my half portion of the property the subject matter hereof.
 12. That I was however not able to conclude the said sale as members of my family objected to the said transaction for the reason that I hold the said portion for myself and in trust of my wife namely; Margaret Njeri Macharia who had contributed towards the acquisition of the said property.
 13. That my said wife personally took the initiative to file suit against me and the Plaintiff/Applicant hereof in the Limuru SPMCC No. 187 of 2010 seeking relevant declaration of her entitlement to the said property. Annexed herewith and marked as “ENM 4” is a copy of the Plaint filed in the said suit.”



28. From the above averments the Court finds that the 1st Appellant offers an admission that indeed he signed the sale agreement and that the same has been frustrated for other reasons. In view of the said admission the Court finds that the issue of fraudulent inducement falls away.
29. I shall now consider the vitiating factors in the agreement of sale. It is the Respondent's case that he paid fully for the land. PW2, the 1st Appellant's brother confirmed as much that he handed over the money from the Respondent to the 1st Appellant before the advocate. However, PW3 in his testimony informed the Court that he did not witness any payments and according to him the parties had already paid themselves elsewhere. The 1st Appellant stated that he never received any monies for the sale. None of the alleged attesting witnesses were called to confirm this evidence during the hearing. The upshot of the analysis is that the Respondent failed to lead evidence in support of the payment of the purchase price. This would have been in form of a receipt or an acknowledgement. The Court finds no evidence of payment of the purchase price.
30. Next is the title, the subject of the dispute in Court. The title is registered in the names of the 1st Appellant and Karuma Muiruri, the brother of the 1st Appellant. The land measures 0.0088 ha and is held as tenants in common in equal shares. Tenancy in common is where there are two or more owners of the same property, and each owner has a distinct and undivided share in the property. Each co-owner holds their share in the property individually with a concurrent interest in the whole property held by all the co-owners. The interest of each owner is identifiable and distinct, but the property remains undivided during the period of ownership as tenants in common. There is no right of survivorship meaning that unlike in joint tenancy, the interest of a co-owner (their share) passes to their estate upon death subject to succession proceeding.
31. Section 91 (5) and (6) of the [Land Registration Act](#) provides as follows;
- “(5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.
6. No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.”
32. Having noted that the tenure of the title to the suit land is tenancy in common, the Court finds that the parties herein have not complied with the provisions of the [Land Registration Act](#) with respect to the partitioning and dealing of the suit land. Neither the 1st Appellant nor the Respondent demonstrated any evidence that the consent of the co tenant was sought and obtained and whether the statutory provisions with respect to co – tenancy was complied with.
33. Further, a close scrutiny of the title before Court shows that under Clause 7 of the title contains a condition as follows;
- “The Grantees shall not sell transfer sublet charge or part with the possession of the land or any part thereof or and buildings thereon except with the prior consent in writing of the Commissioner of Lands.”
34. The wording of the above clause is “shall” denoting a mandatory edict. There was no evidence led by the Respondent that this condition under the title was complied with. In the absence of any demonstrable compliance, it is not difficult for the Court to make a finding that the transaction was valid to the extent that the consent of the Commissioner of Lands was not obtained. I do not agree with the counsel for



- the Appellants that land control board consent was applicable to the transaction on the basis that there was no evidence that this was agricultural land going by the terms and conditions contained in the title.
35. Evidence was led that the transaction took place in the absence of the 2nd Appellant who is the wife of the 1st Appellant. She led evidence that due to family squabbles she ran away to her maternal home only to discover on her return that her husband, the 1st Appellant had sold the only land to the Respondent who happens to be her cousin and neighbor. It was her evidence that the transaction was carried out without her knowledge consent and involvement. She stated that she and her family live on the land having constructed their home and other ancillary developments. That she has no other land to relocate her family to. It was her evidence that as soon as she discovered the impugned sale she filed suit in CMCC No. 187 of 2010, Limuru. That the trial Court disregarded her overriding interest on the suit land.
36. This Court agrees with both Counsel of the Appellants that this transaction predates the [Land Registration Act](#), 2012 and the express provisions of the Matrimonial Properties Act, 2014.
37. Courts in Kenya have paid attention to rights of a spouse even before the enactment of the [Land Registration Act](#) and the Matrimonial Properties Act. I am guided by the decision of the Court in Mugo Muiro Investments Limited Vs. E B & 2 Others (2017)eKLR where the Court emphatically rooted for overriding rights of a spouse in property. It stated as follows;
- “Even before the [Land Registration Act](#) Cap 300 came into force on 2nd May 2012, the equitable beneficial interest of a spouse in a matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interest. It is immaterial that there was not at the time statutory provision expressly declaring it to be an overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property.”
38. It has not been demonstrated that the 2nd Appellant is not a spouse of the 1st Appellant. She led unchallenged evidence that she contributed a sum in excess of Kshs. 300,000/- for the developments on the property. This evidence was not controverted.
39. The Court holds that the 2nd Appellant held an overriding interest in the suit land and to the extent that dealings were carried out without her consent the transaction cannot be valid. Moreso, when the Respondent knew too well that she was a spouse of the 1st Appellant being her own cousin.
40. I will now turn to issue number two which is whether the Respondent was entitled to orders of Specific performance. The gravamen of the Respondent’s case in the trial Court was that having entered into a valid agreement with the 1st Appellant and paid the full purchase price, he was entitled to specific performance of the contract.
41. In the case of Reliable Electrical Engineers Ltd Vs. Mantrac Kenya Limited (2006) eKLR, Justice Maraga (as he then was) stated that:-
- “Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles.
- The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract



invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”

42. Arising from the analysis of the evidence placed before the trial Court, the agreement of sale has been assailed on the grounds of lack of consent of the Commissioner of Lands, no evidence of the payment of the purchase price, the disregard of the overriding interest of the 2nd Appellant, the availability of an alternative remedy being a refund; and the severe hardship that the family will face in the event that they are rendered destitute.
43. The Court finds that specific performance is not available for the Respondent and the Hon Trial Magistrate erred in so finding.
44. Turning to the alternative remedy, the Court would have ordered refunds to the Respondent but for want of proof of payment of the purchase price. The Respondent failed to proof that he paid any monies to the 1st Appellant. Having found no evidence to support payment of the purchase price, the alternative remedy of refunds is equally not available to the Respondent.
45. I think I have said much to show that the transaction between the Respondent and the 1st Appellant was null and void for the reasons given above.
46. In the upshot I find the appeal is merited. It is allowed as follows;
 - a. The Judgement of the trial Court rendered on the 25/10/22 be and is hereby set aside and in its place the Plaintiff's suit be and is hereby dismissed.
 - b. The costs of the suit in the trial Court and on Appeal shall be in favour of the Appellants.
47. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ngeresa for the 1st Appellant

Kamau HB Kibue for the 2nd Appellant

Respondent – Absent

Court Assistant – Phyllis

