



Mutua v Shariff & another (Being sued as the Legal Representative of the Estate of Abdulla Shariff Omar Mohamed) (Environment and Land Appeal E007 of 2024) [2024] KEELC 13199 (KLR) (Environment and Land) (18 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13199 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E007 OF 2024
EK WABWOTO, J
NOVEMBER 18, 2024
(FORMERLY MOMBASA ELC APPEAL NO. E024 OF 2023)**

BETWEEN

PENINAH KIMERU MUTUA APPELLANT

AND

MAHER ABDULLA SHARIFF 1ST RESPONDENT

SIMON KATUA MUTIA 2ND RESPONDENT

**BEING SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF
ABDULLA SHARIFF OMAR MOHAMED**

(Being an appeal from the judgment of Hon. A. M. Obura (Mrs.) – CM delivered on 11th August 2023)

JUDGMENT

1. This is an appeal from the judgment delivered by Hon. A. M. Obura (Mrs.) CM on 11th August 2023 in respect to Voi CMC ELC Case No. 17 of 2018. The Learned Magistrate in her judgment issued the following orders:-
 1. An order of permanent injunction is hereby issued against the Defendant, her agents and or servants and/or other persons acting on her behalf from selling any part, demolishing the structures or interfering in any way with any part of portion of plot known as 1956/K/IX/396 Voi Township sold to the Plaintiffs.



2. A declaration that the 1st and 2nd Plaintiff's are entitled to a portion of 200ft by 100ft and 50ft by 100ft respectively of plot known as 1956/K/IX/396 Voi Township.
 3. An order is hereby issued that the Plaintiffs shall immediately occupy the part bought by the 1st and 2nd Plaintiff's upon depositing the balance in court.
 4. In the alternative to (1), (2) and (3) above, the Defendant shall refund the amount paid by the 2nd Plaintiff therein within 30 days hereof.
 5. The Plaintiff's are awarded costs of the suit and interest at court rates.
2. This being a first appeal, this court is reminded that the task at hand is to reappraise, reassess and reanalyse the evidence as asserted by the parties in the record of appeal and lower court record and to establish if the findings reached by the learned trial magistrate should stand and give reasons if they do not. See oft-cited case of *Selle vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123.
 3. In line with the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212, the court must keep in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. Further, this court is called upon not to be quick to interfere with the discretion of the lower court unless it is satisfied that the decision of the learned trial magistrate was clearly wrong because of some misdirection, failed to take into consideration relevant matters, considered irrelevant matters and as a result arrived at a wrong conclusion or abused his discretion.
 4. It is also worth noting that pursuant to Section 78 (2) of the *Civil Procedure Act*, first appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.

The Appeal

5. The Appellant being aggrieved by the judgment of the Learned Magistrate filed the instant appeal vide a Memorandum of Appeal dated 7th September 2023. The following grounds were raised in their Memorandum of Appeal:-
 1. That the Learned trial Magistrate erred in law and in fact in finding that the Respondents had proved their case on a balance of probability.
 2. That the Learned trial Magistrate erred in law and in fact in failing to find that the Respondents were trespassers on the suit plot described as Plot No. 1956/K/IX/396 and that they had breached the contract between them and the Appellant to which the Appellant tendered uncontroverted evidence.
 3. That the Learned trial Magistrate erred in law and in fact by finding that the Appellant failed to prove fraud on the Respondent's part.
 4. That the Learned trial Magistrate erred in law and in fact by failing to find that the Respondents were actually in occupation of the suit plot, were collecting rent and harassing tenants.
 5. That the Learned trial Magistrate erred in law and in fact by finding that the Appellant had approached third parties in a bid to sell the suit plot.
 6. That the Learned trial Magistrate erred in law and in fact by finding that the Appellant had delayed the titling process and that she refused to receive further payments from the Respondents when it is the Respondents who delayed and/or refused to pay the full purchase price.



7. That the Learned trial Magistrate erred in law and in fact by holding that the Appellant's defence and counterclaim were unmerited and that the declaration orders, special, general damages and aggravated damages were unjustified.
 8. That the Learned trial Magistrate erred in law and in fact by finding that the Respondents are entitled to the reliefs sought by issuing an order of permanent injunction and further a declaration that the Respondents are entitled to a portion of the suit plot when it is clear and on record that the Respondents had failed to pay the full purchase price hence are not entitled.
 9. That the Learned trial Magistrate erred in law and in fact by coming to the conclusion that he did without any sufficient cause.
6. The Appellant prayed for the following reliefs in respect to her appeal:-
- i. That the Appeal be allowed.
 - ii. That the judgment delivered on the 11th August 2023 be quashed and/or set aside.
 - iii. That the counter claim be allowed.
 - iv. That the costs of this Appeal be borne by the Respondent.
7. The appeal was contested by the Respondents and parties took directions to have it canvassed by way of written submissions. The Appellant filed her written submissions dated 4th October 2024 while the 1st Respondent filed written submissions dated 11th October 2024 and 2nd Respondent filed written submissions dated 20th September 2024

The Appellant's submissions

8. The Appellant submitted that the claim between the Appellant and Respondents was premised on the contract for sale of land dated 16th December 2017 and 30th June 2017. It was submitted that it was not in dispute that the agreement for sale of land dated 16th December 2017 and 30th June 2017 complied with the provisions of Section 3(3) of the Contract Act hence valid contract existed between the parties herein. Counsel submitted that the Respondents did not furnish the trial court with any evidence to prove that the full purchase of the suit property was deposited in the Appellant's Bank account so as to warrant the ownership of the suit plot. According to the Appellant the Learned Magistrate erred in law and in fact in finding that the Respondents had proved their case on a balance of probabilities hence entitled to the reliefs sought in the plaint despite the Respondents having failed to discharge the evidential burden of proof that lies upon them to prove the existence of facts which they claim against the Appellant. The case of Solomon Ndegwa Kuria =Versus= Peter Nditu Gitau (2014) eKLR was cited in support.
9. Citing Section 3 of the *Trespass act*, and also while making reference to Clause 6 and Clause 8 of the sale agreement dated 16th December 2017 between the Appellant and the 1st Respondent as demonstrated at pages 175 – 176 of the Record of Appeal and Clause 3 and Clause 6 of the Sale agreement dated 30th June 2017 between the Appellant and the 2nd Respondent as evidenced at pages 172 – 174 of the Record of Appeal, Counsel submitted that from the evidence adduced during trial, none of the Respondents had completed the balance of the purchase price even though the Appellant was willing to fulfilling her obligation and was following the requisite steps in order to pass a good title to the Respondents. According to the Appellant, despite their efforts the Respondents breached the contract by creating an abusive and oppressive environment hence making it difficult for the Appellant to complete the contract. The cases of Amakor =Versus= Obiejuna (1974) S.C and Rhoda S. Kiilu



=Versus= Jiangxi Water and Hydropower Construction Kenya Limited (2019) eKLR were cited in support.

10. It was further submitted that the suit property herein belonged to the late Harrison Mwaliko and the Appellant was the Administrator hence she had the requisite authority to enter into land sale agreements with the Respondents. It was further submitted that it was not in dispute that the parties herein entered into a consent dated 8th September 2020 and the said consent did not authorize the 1st Respondent to collect rent from the tenants who were residing on the suit property herein.
11. The Appellant faulted the Learned Magistrate for failing to find that the Respondents action to proceed to suit plot and collect rent from the tenants without authority amounted to trespass.
12. In respect to fraud, it was submitted that the 1st Respondent together with another party, fraudulently wrote a letter to the National Land Commission requesting for a title deed as confirmed by the 1st Respondent during cross-examination. None of them had the authority to act on behalf of the Appellant but they were only driven by selfish interest and gain.
13. As to whether the Learned Magistrate erred in law and in fact by failing to find that the Respondents were actually in occupation of the suit plot and were collecting rent and harassing tenants, Counsel submitted that according to the sale agreement, the Respondents could only acquire possession of the suit property upon payment of the full purchase price. The consent did not authorize the 1st Respondent to take possession of the suit property and or to collect rent from the tenants who were residing on the suit property. It was further submitted that the 1st Respondents action to operate from the suit property and to collect rent from the tenants without the authority of the Appellant herein amounts to taking possession of the suit property and this is in total breach of the agreement and as such the Learned trial Magistrate erred in law and in fact by failing to find that the Respondents were actually in occupation of the suit plot, were collecting rent and harassing tenants.
14. As to whether the Learned trial Magistrate erred in law and in fact by finding that the Appellant had approached parties in a bid to sell the suit land, it was submitted that the Appellant meticulously explained before the trial court that the contract for sale of land dated 16th December 2017 and 30th June 2017 were only to the extent of portions measuring 200 by 100ft by 100ft which portions were to be hived from Plot No. 1956/K/IX/396. It was contended that from the evidence by the 1st Respondent, it was clear that if at all the Appellant had been approached by other third parties who were also interested in the purchase of the suit property the Appellant would have sold them other remaining shares and not the shares belonging to the Respondents herein and therefore the Learned Magistrate erred in law and in fact by finding that the Appellant had approached third parties in a bid to sell the suit land.
15. As to whether the Learned Magistrate erred in law and in fact by holding the Appellant's Defence and Counterclaim were unmerited, it was contended that the Appellant defence and counter claim is merited. Counsel submitted that from the evidence adduced during trial, it was not in dispute that the Respondents have not yet finalized the payment of the balance of the purchase price and therefore the claim against the Appellant is unmerited.
16. The Appellant further submitted that the Learned trial Magistrate erred in law and in fact by finding that the Appellant had delayed the titling process. It was contended that the Appellant has not in any way delayed the titling process of the suit property. The Appellant in her Counterclaim and also during hearing of the suit explained that the delay was occasioned by the Ministry of Lands which to date had not issued the title to the suit property despite the efforts of the Appellant to acquire the title. The Respondents had obtained an injunction order which made it impossible to further process



the title, therefore occasioning further delays. The Appellant refusal to accept payment of the balance was necessitated by the 1st Respondent who did not adhere to the mode of payment agreed upon. The money was to be deposited in the Appellants KCB account and she did not see any reason why the 1st Respondent was going to her house to facilitate payment. The 1st Respondent never deposited any money thereafter which made it clear that the Respondent is the one who refused to pay the full purchase price.

17. The Appellant concluded his submissions by submitting that the Learned Magistrate erred in law and in fact by issuing an order of permanent injunction against the Appellant and a declaration that the Respondents are entitled to a portion of the suit plot. According to the record, the Respondents failed to pay the full purchase price of the suit property and are therefore in breach of the Contract. As such they are not in any way entitled to the suit property not unless they pay the purchase in full amount as per the sale agreement. It was contended that the Appellant Counterclaim is merited and the prayers sought should be granted. The court was urged to set aside the judgment and grant the prayers sought in the Counterclaim.

The 1st Respondent's submissions

18. The 1st Respondent filed written submissions dated 11th October 2024. It was submitted that the Learned Magistrate did not err in law and in fact in finding that the Respondents had proved their case on a balance of probability and there was no fault in her decision.
19. It was submitted that the 1st Respondent testified in court and produced several documents. He testified that on the 16th December 2017 he entered into a Contract with the Appellant to purchase a portion measuring 200ft x 100ft to be curved from the Appellant's plot known as 1956/K/IX/396 Voi Township for a price of Kshs. 7,500,000/= and by the time of signing the agreement had paid Kshs. 950,000/= a fact which was not disputed. It was further submitted that as at 12th March 2018 a total of Kshs. 5,728,000/= had been paid leaving a balance of Kshs. 1,718,000/=. The said balance was offered to the Appellant on 10th July 2018 but the Appellant declined the same prompting him to move this court.
20. It was also submitted that the 1st Respondent cannot be found to be a trespasser into the suit property as submitted by the Appellant since the 1st Respondent testified that he could be referred to as trespasser due to the consent which was entered between the parties dated 8th September 2020 which consent the Appellant acknowledged its existence.
21. On the ground of fraud, it was submitted that there was no fraud at all and no forgery. Counsel also submitted that the Appellant is so dishonest in the entire transaction and could not and did not even attempt to give tangible evidence to prove fraud as against the 1st Respondent and hence the trial Magistrate was right to find so.
22. On the aspect of the 1st Respondent being in occupation of the suit land, it was submitted that it was upon the Appellant to prove the same and the trial Magistrate rightfully found so.
23. In respect to the counter claim on record, it was submitted that the same was never proven to the required standard. The Appellant declined to accept money at her home in Machakos and the court did not err in arriving at her decision.

The 2nd Respondents submissions

24. The 2nd Respondent filed written submissions dated 20th September 2024. The 2nd Respondent submitted on the following issues:-



- i. Whether the trial court erred in allowing the 2nd Respondent's case.
 - ii. What orders should issue as to costs.
25. It was contended that the Appellant herein entered into an agreement with Abdulla Shariff Omar Mohamed (deceased) on 30th June 2017 (PEXH-7) for the purchase of a portion of the suit plot measuring 50ft x 100ft. The purchase price was agreed at Kshs. 4,000,000/= out of which the sum of Kshs. 2,500,000/= per the acknowledgment dated 30.4.2018 (PEXH-8). This position was as well acknowledged by the Appellant in her testimony on cross-examination in Page 48 of the Record of Appeal. Additionally, it is not as well disputed that the 2nd Respondent through the estate he represents, never defaulted in his obligations in the agreement dated 30th June, 2017 he had never occupied the portion purchased, he does not collect rent and that it is the appellant who had frustrated the 2nd Respondent in completing the agreement and in fact, the appellant was the one who had stopped the 2nd respondent from clearing the balance of the purchase price.
26. It was contended that, the Appellant in her testimony confirmed that by her acts of breach, the 2nd respondent was by dint of clause 2 of the agreement, entitled to compensation. She as well testified that she was willing to refund the 2nd Respondent the sum of Kshs. 2,500,000/= which she had received because she had agreed with the 2nd respondent to that effect.
27. It was further submitted that the 2nd Respondent performed his duties in respect of the agreement dated 30th June 2017. The Appellant frustrated the agreement and made it difficult for the 2nd Respondent to perform his obligations. The 2nd Respondent by virtue of his compliance with the terms of the agreement was entitled to the very minimum, a refund of the purchase price, paid amount to Kshs. 2,500,000/= as an alternative remedy. The 2nd Respondent urged the court to dismiss the appeal with costs.

Analysis and Determination

28. Having considered the entire Record of Appeal and written submissions filed by the parties, this court proceeds to determine the Appeal on the following issues;-
- i. Whether the trial court was justified based on the facts, evidence and the law in arriving at the decision to grant the Respondents the reliefs that were sought.
 - ii. Whether the Appellant's Counterclaim before the trial court was proven to the required standard.
 - iii. What orders should issue as to costs.
29. The said issues shall be determined sequentially.

Issue No. (i)

Whether the trial court was justified based on facts, evidence and the law in arriving at the decision to grant the Respondents the reliefs that were sought

30. The Respondents case before the trial court was that sometimes in 2017 the 1st Respondent met and agreed with the Appellant to purchase a portion of 200ft by 100ft for Kshs. 7,500,000/= which was to be paid by instalments. The 2nd Respondent agreed with the Appellant to purchase 50ft by 100ft at Kshs. 4,000,000/=. The 1st Respondent had paid a sum of Kshs. 5,782,000/= as at 12th March 2018



leaving a balance of Kshs. 1,718,000/=. The 2nd Respondent had made a payment of Kshs. 2,520,000/= as at 24th August 2017.

31. The 1st Respondent averred that he gave the Appellant the remaining balance but she refused to accept the same and hence they moved to court.
32. The Appellant's case was that the Respondents breached the agreement by creating an abusive and oppressive environment but was still willing to fulfil her obligation and was following the requisite steps in order to pass a good title to the Respondents.
33. During trial before the lower court, the 1st and 2nd Respondents testified in support of their respective cases and equally the Appellant testified in support of his case. The trial court upon considering the evidence adduced and the applicable law granted the reliefs sought in favour of the Respondents.
34. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the [Evidence Act](#), which 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 fact it is said that the burden of proof lies on that person.”
35. In the instant case, there was a sale agreement upon which the trial court referred to in arriving at its decision. From the evidence that was tendered herein, the balance of the purchase price would be paid before the title deed is issued to the purchaser and that the seller shall give the buyer possession of the plot upon full payment of the balance. Evidence was also adduced to the effect that the Appellant was given the remaining balance but declined the same which action necessitated the Respondents to move the court. The Appellant while being cross-examined before the trial court and as evident at page 48 of the Record of Appeal, conceded that the 2nd Respondent never defaulted on payment of purchase price and that he is entitled to the land. She also stated that he had not occupied the land and neither is he collecting rent and that he is willing to refund the money since he was no longer interested in the land. In respect to the 1st Respondent he stated in cross-examination that the payment was delayed and he declined to take the money because the same was to be made to the bank and not her house. She also denied the consent dated 8th September 2020 which was produced in evidence.
36. From the analysis of the evidence tendered herein, it was evident that the 1st Respondent made a substantial payment of Kshs. 5,728,000/= leaving a balance of Kshs. 1,718,000/= which was declined by the Appellant. There was also consent dated 8th September 2020. In respect to the 2nd Respondent, the purchase price was agreed at Kshs. 4,000,000/= out of which the sum of Kshs. 2,500,000/= was paid and acknowledged by the Appellant. This position was as well acknowledged by the Appellant in her testimony on cross-examination at Page 48 of the Record of Appeal. It was also evident that the 2nd Respondent never defaulted in his obligations in the agreement dated 30th June, 2017, he had never occupied the portion purchased, he does not collect rent and that it is the Appellant who had frustrated the 2nd Respondent in completing the agreement and in fact, the Appellant was the one who had stopped the 2nd Respondent from clearing the balance of the purchase price.
37. From the foregoing, there was indeed frustration by the Respondents on the part of the Appellant in respect to their transactions and as such the trial court did not err in law and fact when it found that the Respondents had proved their case to the required standard and were entitled to the reliefs sought.



Issue No. (ii)

Whether the Appellant's counterclaim was proven to the required standard

38. A Counterclaim is just like a suit and ought to be proved to the required standard.
39. The Appellant filed a Statement of Defence and Counterclaim dated 31st October 2022 in which she sought the following reliefs:-
1. The Plaintiff's case be dismissed with costs.
 2. The 1st Plaintiff be compelled to pay the balance of the purchase price.
 3. Damages for breach of Contract by the 1st Plaintiff.
 4. Costs of the suit.
 5. Any other relief that this court may deem fit to grant.
40. From the evidence adduced during trial it emerged that the 1st Respondent was ready and willing to pay the remaining balance and even travelled to the Appellant's home in Machakos to settle the same but the Appellant declined to receive the said payment. From the analysis of the testimony adduced before the trial court in respect to the counterclaim, the Appellant kept blowing hot and cold as to how the Respondents had not complied with the obligations imposed on the agreement while at the same time she had clearly frustrated the Respondents even after receiving a substantial amount in respect to the purchase price of the properties.
41. This Court is a court of equity and that he who comes to equity must come with clean hands. In *Caliph Properties Limited vs. Barbel Sharma & Another* [2015] eKLR, the Court stated:-
- “..... He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfil all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity.”
42. The Appellant's conduct and action worked against her in respect to her counterclaim. There was frustration of the Respondents by the Appellant and as such the trial court was right in finding that the Appellant had not proved her counterclaim to the required standard and hence was not entitled to the reliefs sought.

Issue No. (iii)

What orders should issue as to costs

43. Costs follow the event, unless otherwise ordered by the Court. In the instant Appeal, the Respondents are the successful party in this Appeal and as such they are entitled to costs. This court has no reason to hold otherwise.

Final Orders

44. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, this court finds no fault with the decision of the Learned Magistrate. It is therefore not open for this court to interfere with the same. In conclusion, this appeal is therefore determined as follows: -



- i. The Appeal is devoid of merit and is dismissed.
- ii. Costs of this Appeal are awarded to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 18TH DAY OF NOVEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Ms. Odhiambo for the Appellant.

Mr. Muthami for the 1st Respondent.

Mr. Mutinda for the 2nd Respondent.

Court Assistants: Mary Ngoira and Norah Chao.

