



**Kugunya v Makari (Environment and Land Appeal E019 of 2022)
[2024] KEELC 7555 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7555 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E019 OF 2022
JM MUTUNGI, J
NOVEMBER 14, 2024**

BETWEEN

BENSON WANJOHI KUGUNYA APPELLANT

AND

CAROLINE WAMAITHA MAKARI RESPONDENT

(Being an appeal from the Judgement of Hon. G. Kirugumi (P.M) delivered on 13th July, 2022 in Kerugoya Chief Magistrate's Court MCELC No. E18 of 2020))

JUDGMENT

1. The Respondent who was the Plaintiff in the suit before the Lower Court sued the Appellant who was the Defendant in the Lower Court and prayed for orders that the Appellant be evicted from LR. No. Mutira/Kathare/2024 which was a subdivision from LR. No. Mutira/Kathare/876 (original parcel) and for removal of any caution placed against the title. The Respondent claim was predicated on a sale agreement dated 8th December 2015 pursuant to which she claimed she paid to the Appellant the total of Kshs 350,000/- which was the agreed purchase price and an additional sum of Kshs 68,000/- over and above the purchase price. The Respondent claimed the additional amount was received by the Appellant fraudulently and sought to be refunded the same.
2. The Appellant vide a statement of defense and Counter claim denied the averments contained in the Respondent's Complaint and in particular denied receipt of the sum of Kshs 418,000/- from the Respondent on account of purchase price and further denied being in occupation of land parcel Mutira/Kathare/2024 to warrant being evicted from thereon.
3. The suit was heard before the Trial Court where the Respondent testified as the sole witness in support of her case and the Appellant and one Janet Muthoni (DW2) testified in support of the Appellant's case. The Learned Trial Magistrate after evaluation and analysis of the evidence found in favour of the Respondent and ordered that the Appellant be evicted from land parcel Mutira/Kathare/2024 and



that the Land Registrar do remove the caution placed against the title. The Respondent was awarded the costs of the suit.

4. Dissatisfied with the Judgment, the Appellant filed an Appeal by submitting a Memorandum of Appeal on 22/08/2022 and subsequently filed an Amended Memorandum on 3/02/2023 on the basis of the following grounds:
 - a. That the Learned Trial Magistrate erred in law and fact by failing to find and appreciate that the parties to the agreement dated 8th day of December, 2015 entered into fresh agreement whereby the Respondent was to pay the Appellant an additional Kshs. 200,000/- for the land.
 - b. That the Learned Trial Magistrate erred in law and fact by failing to find and appreciate that land parcel number Mutira/Kathare/876 though registered in the Appellant's brother's name was a family land and that the Appellant had to be consulted in all transactions involving the same.
 - c. That the Learned Trial Magistrate erred in law and fact by failing to find and appreciate that by paying money over and above monies agreed in the original agreement, the Respondent, endorsed existence of a fresh agreement.
 - d. That the Learned Trial Magistrate erred in law and fact by openly being biased against the Appellant.
 - e. That the Learned Trial Magistrate erred in law and fact by failing to find and appreciate that the Appellant did not apply for the Land Control Board consent for the transfer of land parcel number Mutira/Kathare/2024 or part thereof.
 - f. That the Learned Trial Magistrate erred in law and fact by failing to make a finding that the Respondent owed and still owes the Appellant a total of Kshs. 132,000/-.
 - g. That the Learned Trial Magistrate erred in law and fact by failing to find and appreciate that all the dealings by the Appellant's brother on land parcel number Mutira/Kathare/876 were illegal, null and void.
5. The Appellant prayed for orders quashing/setting aside the Learned Trial Magistrate's Orders/Judgement of 13th July, 2022 with costs.

Submissions, Analysis And Determination

6. The Appellant, in his written submissions dated 12th August 2024, argued that at the time the agreement was signed, the title to the land was still in his brother's name. He further stated that upon the subdivision of the land and the issuance of the title in his name, it was agreed that the Respondent would pay an additional Kshs. 200,000/-, bringing the total purchase price to Kshs. 550,000/-. Despite this agreement, he received only Kshs. 418,000/-, leaving an outstanding balance of Kshs. 132,000/-, which he was claiming. The Appellant contended that he was unaware if a title deed had been issued in the Respondent's favour, as he had not participated in any Land Control Board meetings for the consent to subdivide or transfer the land.
7. The Appellant argued that the Respondent had acknowledged in the Lower Court that the agreed purchase price was Kshs. 350,000/-, yet she had paid Kshs. 418,000/-. This overpayment, the Appellant submitted, served as an acknowledgement of an oral agreement between the two parties that included the additional payment of Kshs. 200,000/- on top of the initial Kshs. 350,000/- that was set out in the agreement.



8. The Court directed that the Appeal be canvassed by way of Written Submissions. The Appellant filed his submissions dated 12th August 2024 through the Firm of Wanjiru Waweru & Co. Advocates. The Respondent filed her written submissions dated 6th November 2024 belatedly on the same date.
9. The Appellant in his submissions reiterated that the initial agreement between him and the Respondent was amended such that the purchase price was agreed would be Kshs 550,000/- instead of Kshs 350,000/- specified in the agreement dated 8th December 2015. The Appellant contended the Respondent agreed to the adjusted price as she acknowledged she paid a total of Kshs 418,000/- which was Kshs 68,000/- over and above the initial price of Kshs 350,000/- as per the agreement.
10. The Appellant in his submissions stated the suit property at the time the agreement was entered into was in the name of his brother and contended that no consent of the Land Control Board was obtained for the transaction. The Appellant argued the Respondent failed to carry out appropriate due diligence which if she had done would have revealed the ownership status of the suit property. The Appellant further contended the Respondent ought not to be permitted to benefit from her negligence and that her recourse ought to have been a claim for refund.
11. The Appellant in support of his submission that the parties had by their conduct altered their agreement dated 8th December 2015 placed reliance on the Supreme Court decision in the United Kingdom Case of RTS Flexible Systems Ltd –vs- Molkerei Alois Muller GmbH & Co.KG (UK Production) (2010) UKSC 14 (45) where the Court stated as follows:-

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.”
12. The Appellant submitted that from the conduct of the parties where the Respondent paid Kshs 68,000/- above the initial consideration, it was indicative of the fact that the Respondent had agreed to pay the adjusted consideration of Kshs 550,000/- and hence the initial agreement was altered in that regard.
13. The Respondent for her part submitted that pursuant to the agreement of sale dated 8th December 2015 she purchased a portion of 0.05 hectares out of land Parcel Number Mutira/Kathare/876 which measured 0.23 hectares from the Appellant for the agreed sum of Kshs 350,000/-. The Respondent stated that though the transaction was completed and land parcel number Mutira/Kathare/2024 measuring 0.05 hectares was registered in her name the Appellant from on or about 27th July 2020 the Appellant started making demands to be paid additional money and refused to vacate the land and further also placed a caution against the title of her land. The Respondent submitted the said Appellant’s unlawful acts led her to institute the suit in the Lower Court against the Appellant praying for his eviction and removal of the Caution.
14. The Respondent contended other than the sale agreement dated 8th December, 2015 there was no other agreement entered into between her and the Appellant. The Respondent denied the additional sum of Kshs 68,000/- she paid to the Appellant was pursuant to any fresh agreement stating the payment was inadvertently made. The Respondent attributed, the overpayment to confusion owing to the repeated demands for payment by the Appellant which he made without providing any account of the amount paid.



15. The Respondent further submitted the issue whether or not the consent of the Land Control Board for the transfer was obtained was not raised before the Lower Court and could not be raised before the Appellate Court by way of submissions.
16. In a first Appeal such as this, the Court is under a duty and indeed is obligated to review and reconsider the evidence adduced before the Lower Court to determine whether the decision of the Trial Court was justified. The Court is not bound by the findings of fact of the Lower Court and may make its own findings based on the evidence.
17. This duty was well articulated in the Case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 where the Court stated:-

“An appeal to this Court from a trial by the High 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. In particular, this Court is not bound necessarily to follow the Trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”
18. I have reviewed the record of appeal and considered the submission made by the parties and the issues for determination in this Appeal are whether the parties entered into any Supplementary agreement that varied the agreement dated 8th December 2015 and whether the consideration for the purchase of the suit property was adjusted to Kshs 550,000/- from Kshs 350,000/- as per the agreement dated 8th December, 2015.
19. It is, clear and evident that the Appellant was committed to selling a portion of land, sized at 0.05 hectares which was to be excised from Land parcel Mutira/Kathare/876, to the Respondent as per the agreement of sale dated 8th December 2015. The Appellant contended there was a supplementary oral agreement that was made with the Respondent where the sale price was adjusted to Kshs 550,000/- from Kshs 350,000/-. In support of this position the Appellant argued it was for that reason the Respondent made a payment of Kshs 68,000/- over and above the initial agreed price of Kshs 350,000/-. The Respondent, however denied there was such an agreement stressing that the overpayment was on account of a mistake owing to insistent demands that the Appellant was making for payment.
20. It is noteworthy that the parties entered into a written agreement on 8th December 2015 where the Appellant agreed to sell to the Respondent a portion of his entitlement of land parcel Mutira/Kathare/876. The Appellant in the signed agreement described himself as the owner and the vendor of the land although in evidence before the Lower Court he indicated that the land was infact registered in his brother’s name and he was holding the same in trust for other family members. The Appellant however confirmed he got his title deed after the land was subdivided. The Respondent for her part testified that the Appellant executed all the necessary documents but the processing of the title took a long time and that the Appellant demanded that she adds more money which she declined to do.
21. The parties having entered into a written agreement, such agreement could only be varied and/or amended by a further agreement made in writing, and could not be altered or amended orally. Besides this having been an agreement that related to a disposition of an interest in land, the subsequent



agreement the Appellant sought to rely on ought to have been in writing in compliance with Section 3(3) of the [Law of Contract Act](#), Cap 23 Laws of Kenya.

Section 3(3) of the Act provides as follows:-

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

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- 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.
22. The Respondent in her Complaint pleaded the contract of sale dated 8th December, 2015 between her and the Appellant and it was her position she fulfilled the terms of this contract and got her portion of land transferred to her name. The assertion by the Appellant that there was a Supplementary oral agreement where the purchase price was raised to Kshs 550,000/- was not in writing and did not comply with the provisions of Section 3(3) of the [Law of Contract Act](#). To the extent that such agreement contravened Section 3(3) of the [Law of Contract Act](#), it was void and could not be relied upon and/or enforced. The Appellant had the burden of proving the existence of such an agreement and he never discharged the burden.
23. The Appellant in his evidence before the Lower Court introduced issues that he had not pleaded in his Defence and Counterclaim. The issue of land parcel Number Mutira/Kathare/876 being registered in the name of his brother at the time the agreement was entered into was not pleaded and neither was any evidence led to show that the land was indeed registered in the brother’s name. Parties are bound by the pleadings and ought not to introduce issues that were not pleaded in the pleadings.
24. The Appellant himself entered into the agreement for sale holding himself as the registered owner and was obligated to have the subdivision undertaken and the appropriate consents obtained. Evidently the land was subdivided and land parcel Number Mutira/Kathare/2024 measuring 0.05 hectares was transferred to the Respondent as per the agreement. The Respondent in her evidence stated the Appellant executed all the necessary documents. There was no evidence led by the Appellant to prove that the Respondent acquired her title fraudulently and it is my finding that the Respondent acquired her title pursuant to the agreement of sale. She was registered as owner and was issued with title which vested her the rights of ownership as provided under Section 24 and 25 of the [Land Registration Act](#), 2012. Her title could only be challenged under the provisions of Section 26(1) of the [Land Registration Act](#) which provides as follows:-

26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
25. As relates to the payment of the additional amount of Kshs 68,000/- it is my view that since the transaction took a long time to get completed, the Appellant may have wanted to get additional money by arm twisting the Respondent and that there was definitely no supplementary agreement oral or otherwise where the Respondent agreed to pay an extra Kshs 200,000/- towards the purchase price.
26. In the result it is my determination that the Learned Trial Magistrate reached the correct decision and that there is no basis to interfere with her decision. The Appeal lacks merit and the same is ordered dismissed with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 14TH DAY OF NOVEMBER 2024.

J. M. MUTUNGI

ELC - JUDGE

