



**Ogembo v Nzinga (Environment and Land Appeal E036 of 2023)  
[2024] KEELC 13885 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13885 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E036 OF 2023  
CK YANO, J  
DECEMBER 19, 2024**

**BETWEEN**

**JAMES ONYONA OGEMBO ..... APPELLANT**

**AND**

**CHRISTINE TAABU NZINGA ..... RESPONDENT**

*(Being an appeal from the judgment by Hon. E.M Ayuka (SRM)  
delivered on 25th August 2022 in Nkubu PMCC No. 37 of 2019)*

**JUDGMENT**

1. The appellant, James Onyona Ogembo being aggrieved by the whole of judgment and decree of the lower court filed this appeal and set out the following grounds of appeal-;
  1. The learned trial magistrate erred in fact and in law by failing to consider the rights of the defendant over ownership of land parcel Number L.R No. Abothuguchi/L.Kaongo/1133.
  2. The learned trial magistrate erred in fact and law by relying on a dispute or a non-existing agreement allegedly dated 27<sup>th</sup> October, 2014.
  3. The learned trial magistrate erred in law and in fact in failing to consider there was a dispute especially on the acreage whereby the appellant bought the land in hectares while the respondent stated that she was selling in acres.
  4. The learned trial magistrate erred in fact and in law by failing to consider the standards of proof of the appellant had proved on a balance of probabilities that it is the respondent who breached the agreement for sale of land parcel Abothuguchi/L-Kaongo/1133.



5. The learned trial magistrate erred in fact and in law by ordering the respondent to refund a sum of Kshs. 440,000 and the same time awarding the respondent a sum of Kshs. 880,000 in general and liquidated damages.
6. The learned trial magistrate did not consider the evidence of the appellant in the claim and counterclaim to the effect that it is the appellant who had breached the said contract.
7. The learned trial magistrate judgement/decree is against the weight of evidence of the appellant.

### **Background Of The Appeal**

2. The respondent had instituted suit against the appellant vide a plaint filed in the subordinate court on 6<sup>th</sup> May, 2019 and amended on 24<sup>th</sup> September, 2020 principally seeking that the appellant be compelled to transfer to her L.R No. Abothuguchi/1133 and/or in the alternative a refund of the purchase plus interest, general damages for breach of agreement and payment of Kshs. 53,800/= for the damages occasioned to her crops and trees as well as costs and interest.
3. In the amended plaint, the respondent averred that on 27<sup>th</sup> October, 2014, the appellant offered to her for sale a portion of land measuring 1.0101 Hectares to be excised from LR. No. Abothuguchi/l.kaongo/1133 at a consideration of Kshs. 440,000/=. That they entered into a land sale agreement which upon execution, the respondent paid to the appellant the entire sum of Kshs. 440,000/- being the full and final consideration. The respondent averred that she took possession of the said portion of land and carried out developments thereon, including planting fruits, gravellia trees and nappier grass.
4. It was the respondent's further averment that the appellant however, in breach of the agreement, declined to meet his obligations, specifically to facilitate the transfer of the land sold. The particulars of breach on the part of the appellant were itemized in the plaint. It was the respondent's averment too that the appellant and/or agents acting under him destroyed her properties on the suit land occasioning her loss and damage. The particulars were also itemized in the amended plaint.
5. The appellant put in his defence and a counterclaim dated 22<sup>nd</sup> May, 2019. In the counterclaim, the appellant averred that the respondent, without any justification, lodged a caution upon the suit property thus making it impossible for him to transact, and that the respondent thereby frustrated and breached the sale agreement. He thus sought for general damages for breach of contract. The appellant pleaded that he was willing to refund the purchase price as per the sale agreement.
6. After hearing evidence from both the appellant and the respondent, the subordinate court dismissed the appellant's counterclaim with costs and allowed the respondent's suit in the following terms-;
  - i. A refund of the purchase price in the sum of Kshs. 440,000/= plus interest thereon at commercial rates from the date of the agreement 27<sup>th</sup> October, 2024 until payment in full.
  - ii. Kshs. 880,000/= in general and liquidated damages for breach of contract, plus interest thereon at court rate from the date of this judgment until payment in full.
  - iii. Kshs. 53,800/= being the value of damage to the respondent's crops and trees.
  - iv. Costs of the suit.
7. It is the above decision that triggered this appeal.
8. The appeal was canvassed by way of written submissions. The firm of Otieno C. & Co. Advocates filed submissions dated 14<sup>th</sup> July, 2024 on behalf of the appellant. Although the respondent's counsel



informed the court that they too had filed submissions, the same was not in the record or the CTS as at the time of writing this judgment.

### **Appellant's Submissions**

9. The appellant's counsel gave a brief fact of the case and identified two issues for determination. The first issue is whether the respondent's alleged sale of land agreement dated 27<sup>th</sup> October, 2014 was genuine, valid, binding and enforceable in law and the second issue is costs.
10. It was submitted on behalf of the appellant that there existed genuine, valid binding and enforceable sale of land agreement dated 13<sup>th</sup> October, 2014 made between the appellant and the respondent for the sale of parcel L.R NO. Abothuguchi/L-Kaongo/1133 and that it was produced in court as documentary evidence. That by inference and expressly the two had an agreement which indeed resulted to exchange and occupation of the suit property.
11. The appellant's counsel submitted that during the proceedings, the appellant raised a dispute especially on the acreage raised by the respondent claiming that she had purchased the suit land in hectares in her agreement of 27<sup>th</sup> October, 2014 which the appellant averred that he was not a party and that the signature thereon was disowned.
12. It was submitted that in his evidence in chief, the appellant brought it out that he had in the agreement dated 13<sup>th</sup> June 2014 sold to the respondent 1(one) acre only and not the hectare indicated on her alleged sale of land agreement. That he went ahead to inform the court that the signature appended thereon was not his and a fact that was ignored because the respondent had duty to order for a forensic scrutiny of the validity of the said signature by signature experts.
13. The appellant submitted that the respondent without any justification, lodged a caution over the suit property thus making it impossible for the appellant to transact hence it was from the foregoing that the appellant thought his advocate willingly wrote a demand to the respondent for the refund of the consideration as she had frustrated the contract and that he wished to terminate the contract which notice the respondent neglected, failed and or refused to comply.
14. The appellant urged the court to find that the learned trial magistrate erred in fact to find that the respondent's alleged sale of land agreement dated 27<sup>th</sup> October, 2014 was not genuine, valid, binding and enforceable in law hence reached at an unfair and wrong conclusion hence it prejudiced the appellant.
15. The appellant submitted that the lower court in its judgment failed to put into consideration that there was a dispute in terms of acreage and or Hectares of the suit property between the appellant and the respondent respectively, hence arriving at a wrong conclusion in the judgment as to what size of the property was being sold. That the issue left the court with more uncertainties as relates the agreement in question.
16. It was further submitted that the lower court disregarded the appellant's claim and counter claim by considering extraneous evidence, non-existing and bad law, hence arriving at wrong conclusion in the judgment in favour of the respondent though she had not proved her case on a balance of probabilities as is required in the law of evidence hence prejudicing the appellant.
17. The appellant submitted that he was not a party to and did not append his signature on the land agreement dated 27<sup>th</sup> October, 2024 drawn in the law firm of M/s Kiogora Arithi & associates Advocates and that the signatures thereon were not attested as required by the provisions of Section 3(3) of the [Law of Contract Act](#).



18. It was further submitted that the criminal case alleged was dismissed and that the same involved one Patrick Muriungi Muriira.
19. On costs, the appellant cited Section 27 of the *Civil Procedure Act* that provides that costs follow the event and urged the court to award costs to the appellant.

### **Analysis And Determination**

20. I have considered the record of appeal, the grounds of appeal and the submissions made. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. The issues that I find for determination is whether the lower court judgment was against the weight of evidence and whether the appellant proved his counter claim to the required standard.
21. The respondent pleaded that on 27<sup>th</sup> October, 2024, the appellant offered to sell her a portion of land measuring 1.0101 hectares to be excised from LR. No. Abothuguchi/L.Kaongo/113 at a consideration of Kshs. 440,000. That the sale agreement was drawn by the firm of Kiogora Arithi & Associates Advocates. The respondent averred that she paid the full consideration on execution of the agreement, but the appellant breached that agreement by selling the said land to a third party.
22. The respondent pleaded that it was an express clause of the said sale agreement that the appellant was to give the respondent actual possession and use of the property upon the official transfer of the land immediately without interferences whatsoever from his side or anybody else legally claiming under his name. That from 27<sup>th</sup> October, 2014 onwards, the respondent took possession of the subject matter and extensively developed the same by planting 80 mango trees, 200 gravellia trees, 15 orange trees, 5 avocado trees and nappier grass which were all mature and ready for harvesting. That she also dug trenches on the said property to prevent soil erosion and she has been planting seasonal crops from 2011 up to the date of filing suit.
23. The respondent itemized the particulars of breach of contract on the part of the appellant as failing to attend the Land Control Board and transfer the land to her, selling the land to a third party, failing to refund the purchase price plus interest and agreed liquidated damages for breach of the agreement, failing to respond to her demand letter, chasing away the respondent from the land and conspiring with a 3<sup>rd</sup> party and damaging her crops and other properties on the land.
24. The appellant denied the respondent's claim and filed a counterclaim to the effect that the respondent, without any justifiable reason, lodged a caution on his land and made it impossible for the appellant to transact any business on the land or transfer as per the agreement dated 13<sup>th</sup> October, 2014.
25. At the hearing, the respondent testified as Pw 1. She adopted her witness statement dated 21<sup>st</sup> July, 2020 as her evidence in chief. P.W 1 produced the agreement as P exh b1, a copy of a caution dated 4<sup>th</sup> October, 2016 against the suit land as P exh 3, a copy of certificate of official search as P exh 4, a copy of a demand letter dated 20<sup>th</sup> April 2010 as P exh 5 and copy of OB/No. 6/3/2019 as P exh 6. The respondent also produced a bond as P exh 7, Agricultural officer report as P exh 8 and an agreement drawn by Meenye & Kirima advocates as P exh 9.
26. The respondent testified that she never signed the agreement letter from Meenye and Kirima advocates produced as P exh 10. It was the respondent's evidence that the appellant claimed that he was ready to refund Kshs. 350,00/= but stated that she had paid Kshs. 440,000/= to the appellant. That the appellant breached the agreement as he refused to transfer the land to her and that he had already sold



- the land to a third party on 21<sup>st</sup> January, 2019. The respondent testified that she conducted a search and confirmed it. That she was not in occupation and she urged the court to order the appellant to either give her the land or refund her the money with interest, damages and costs of the case. The respondent denied the allegations in the counterclaim and argued that she was not the one who breached the agreement and she could not therefore pay damages.
27. The respondent was cross examined by Mr. Nyenyire learned counsel for the appellant and re-examined by Mr. Kiogora. She stated that they did not enter into any agreement at Meenye and Kirima advocates. That they did an agreement with Kiogora advocates office dated 27<sup>th</sup> October, 2014 and it had the appellant's signature.
  28. The respondent further stated that she paid the appellant Kshs. 440,000 and they executed the agreement and that she paid the whole in lumpsum. That the appellant signed the agreement and it shows he received the money. The respondent testified that she placed a caution on the land when she heard that the appellant was offering the land for sale to a third party.
  29. The respondent further stated that they did a criminal case in respect to the land and that the accused was acquitted. That the appellant had authorized the trees to be cut down and that the appellant offered her Kshs. 350,000 in settlement, but she declined.
  30. PW 2 was Lawrence Mbaabu. He adopted his witness statement dated 21<sup>st</sup> July, 2020 as his evidence in chief. P.W 2 testified that the purchaser was his wife and that the land was sold at a consideration of Kshs. 440, 000 which was paid on the date of the agreement. P.W 2 testified that the respondent was not given possession of the land which she bought from the appellant and was neither refunded the consideration paid to the appellant
  31. PW 3 was Paul Kinja. He adopted his witness statement dated 21<sup>st</sup> July, 2020 as his evidence in chief. P.W 3 testified he was present and saw the sale agreement being drawn.
  32. PW 4 was Julius M'Njuki. He adopted his witness statement dated 21<sup>st</sup> July, 2020 as his evidence in chief. He testified that he knew the appellant as a neighbour and that he sold part of his land to the respondent.
  33. James Onyuma Ogembo the appellant herein testified as D.W 1. He adopted his witness statement dated 4<sup>th</sup> August 2020 as his evidence in chief. He also produced his list of documents dated 30<sup>th</sup> July, 2020 which included a letter dated 1<sup>st</sup> February, 2019 (D exh 1) and an agreement dated 13<sup>th</sup> October, 2014. (D. EXH 2).
  34. The appellant testified that they entered into the sale agreement at Meenye and Kirima Advocates which the respondent failed to sign and she had been using the land in quo. The appellant testified further that it was impossible for him to subdivide the land since the respondent had put a caution on the land. That due to that he got frustrated because of the case so, he requested the respondent to take back her money through the Chief of Mwangathia Location and that he eventually sold the entire land to someone else.
  35. The appellant stated that the acreage was not true since the respondent was to buy it 1¼ acres, and the consideration was Kshs. 350,000/= which was given through Meenye and Kirima Advocates and the other Kshs. 90,000/= was verbal which the respondent paid to the appellant's wife. The appellant testified that he had never refused to refund the money but since the case was before court, he wanted the same concluded. The appellant testified that he has never been to the office of Kiogora Arithi and that he did not sign the agreement marked P exh 1.



36. The appellant urged the trial court to allow his counterclaim and find in his favor that the respondent frustrated the agreement and he be paid damages and costs of the suit.
37. The appellant testified that he never damaged the crops. That the case was at Githongo Law Courts, and it was dismissed. That it was not his agents who cut down some trees. That it was Kenya Power and Lighting Company initiating a power line which is in place to-date.
38. When he was cross examined, the appellant admitted that the respondent paid him a total of Kshs. 440,00/= . That he offered to refund Kshs. 350,000/= but had not done so. He also admitted that the respondent was not in possession of the land as he had sold it to someone else. He indicated that he was willing to refund the whole of Kshs. 440,000/= plus interest.
39. D.W 2 was Patrick Murungi Muriira who testified that he used to be a farm hand to the appellant. He stated that he was aware that the appellant sold land to the respondent. That there was a dispute on the location of the respondent's portion and the appellant sold the entire land to someone else.
40. D.W 3 was Japhet Muthiga. He is the area chief Nduruma location. He testified that he knew both parties and that the appellant has land No. 1133 Lower Kaongo but he did not know the acreage. D.W 3 testified that the respondent told him she was being sold land by the appellant and he issued her with a letter to the lands office since she wanted to caution the land.
41. D.W 3 confirmed that the appellant was the owner of the suit land and he was aware that the appellant offered the land for sale to the respondent and there was a time the respondent used to occupy and use the land but was no longer in occupation.
42. D.W 3 testified that the case at Githongo was between the respondent and a caretaker and not the appellant. D.W 3 testified that the appellant sent an agent to him to hand over a letter to the respondent. That the appellant wanted to refund money to the respondent and D.W 3 was not sure if the same was refunded.
43. From the evidence on record, there is no dispute that the parties entered into a sale of land agreement in respect of a portion in L.R Abothuguchi/Kaongo/1133. The agreement was made on 27<sup>th</sup> October, 2014 and was produced by the respondent as P exh 1.
44. It is also not disputed that the respondent paid Kshs. 440,000/= as consideration to the appellant which was the full purchase price agreed by the parties. The appellant admitted having sold the land to a third party. The appellant testified that he was willing to refund the respondent. Therefore, this was a clear breach on the part of the appellant. Having executed the agreement, it was expected that the appellant would have kept his end of bargain which he did not.
45. Whereas the appellant pleaded that they entered into another sale agreement dated 13<sup>th</sup> October, 2014 which he claimed the respondent refused to sign, I opine that the appellant is being dishonest. There is no logical explanation on why the respondent could have refused to sign the agreement. The appellant's evidence in my view, is not believable. Moreover, the appellant conceded in his evidence that he received Kshs. 440,000 from the respondent and not 350,000. The appellant was therefore not truthful.
46. In this case, the appellant raised a counterclaim where he pleaded that the respondent without any justification lodged a caution upon the suit property thus making it impossible for him to transact and thereby frustrated and breached the sale agreement and therefore was seeking for general damages for breach of contract.



47. It is common sense that the caution was only meant to secure the respondent's interest as a purchaser especially because she was apprehensive that the appellant was in the process of selling the land to a third party.
48. I find that the respondent had proved her case on a balance of probability, while the appellant's counterclaim had no merit and was rightly dismissed.
49. In this case, I am satisfied that the findings of the learned trial magistrate were right and he reached just conclusions in arriving at his decision. In my view, the decision of the trial court was correct and I uphold the same.
50. In the result, I find no merit in the appeal and the same is hereby dismissed with costs to the respondent.
51. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2024.**

In the Presence of

Court assistant – Tupet

Ms Mugo for respondent

No appearance for Otieno C for appellant

**C.K YANO**

**JUDGE**

