



REPUBLIC OF KENYA



**Mulechi v Salamba (Environment and Land Appeal 21 of 2020)
[2023] KEELC 164 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 164 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL 21 OF 2020
DO OHUNGO, J
JANUARY 25, 2023**

BETWEEN

HEZBORNE MULECHI APPELLANT

AND

ROSE MAKUNGU SALAMBA RESPONDENT

(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Butali (Hon. Z. J. Nyakundi, Senior Principal Magistrate) delivered on 23rd April 2020 in Butali ELC No. 47 of 2018 Hezborne Mulechi v Rose Makungu Salamba)

JUDGMENT

1. The background of this appeal is that the appellant herein filed a suit against the respondent through a plaint dated March 16, 2017 wherein he averred that he was the registered owner of the parcel of land known as Kakamega/Moi's Bridge/1526 (the suit property) and that the respondent had breached the terms of a sale agreement dated January 7, 2014 and trespassed on the suit property by putting up structures. That the appellant's efforts to evict the respondent from the suit property became futile. The appellant therefore prayed for eviction of the respondent from the suit property, a declaration rescinding the sale agreement, costs and any further or other relief as the court deemed just.
2. The respondent filed a statement of defence wherein she stated that the orders sought by the appellant in the plaint were unattainable since the respondent had not only paid the appellant a substantial part of the purchase price but also developed the suit property by putting up a residential home. The respondent therefore prayed that the appellant's suit be dismissed with costs.
3. Upon hearing the matter, the subordinate court (Hon ZJ Nyakundi, Senior Principal Magistrate) delivered judgment on April 23, 2020, which was erroneously headed 'Ruling'. The learned magistrate ordered that the respondent be given four months to pay the appellant a total sum of Kshs 178,000



being the balance of the purchase price. Aggrieved by the judgment, the appellant filed this appeal through Memorandum of Appeal dated June 8, 2020.

4. The following grounds of appeal are listed on the face of the Memorandum of Appeal:
 1. That the learned magistrate erred in law and fact by awarding the respondent herein prayers not pleaded in her defence.
 2. That the learned magistrate erred in law and fact by ruling in favor of the respondent despite finding her to be in breach.
 3. That the learned magistrate erred in law and fact by reviewing the terms of the agreement of sale and introducing new terms of the agreement of sale.
 4. That the learned magistrate erred in law and fact by rendering judgment in a matter heard by Hon EW Muleka SRM without consent of the parties.
 5. That the learned magistrate erred in law and in fact in basing his findings on irrelevant issues not supported by evidence adduced or the applicable law as clearly captured in his judgment.
5. Based on those grounds, the appellant prayed that the appeal be allowed, and that the judgment of the Subordinate Court be set aside.
6. The appeal was canvassed through written submissions. The appellant filed his submissions on May 17, 2022 and framed issues for determination in terms of the respective grounds of appeal.
7. On whether the learned magistrate erred in law in awarding the respondent prayers not pleaded for in her defence, the appellant submitted that in her defence, the respondent prayed for the suit to be dismissed and or struck out with costs and that the respondent never pleaded a counter-claim to warrant the orders by the learned magistrate thereby prejudicing the appellant who did not have an opportunity to lead evidence or plead on the issue. He relied on *Blay V Pollard and Morris (1930) 1 KB 682* as quoted with approval in *Aga Wanjiru Mwaniki V Jane Wanjiru Mwaniki [1997] eKLR*.
8. On whether the learned magistrate erred in ruling in favour of the respondent despite finding her in breach, the appellant submitted that the court's finding in its judgment was that the respondent was in breach and that despite finding so, the court went ahead to amend the terms of the agreement of sale in favour of the respondent. On the issue of whether the learned magistrate erred in reviewing the terms of the sale agreement and introducing new terms, the appellant submitted that parties to a contract are bound by the terms thereof and that it is not the business of the court to rewrite contracts. That the court ought to have been bound by the terms of the contract and that the trial court erred in extending time for payment of consideration. The case of *Trocaire v Catherine Wambui Karuno [2018] eKLR* was cited. The appellant therefore urged that the appeal be allowed with costs.
9. The respondent filed her submissions on May 16, 2022 and argued that the learned magistrate issued the correct orders based on the facts and evidence on record. That the learned magistrate made his decision based on the fact that the respondent had paid a total of Kshs 750,000/= which sum was more than $\frac{3}{4}$ of the purchase price and that the trial court duly considered the respondent's reasons for delay and found it reasonable since it was beyond the respondent's control. Further that the sale agreement never indicated time being of essence, the court rightly granted the respondent more time within which to complete the payment of outstanding balance. The case of *Anne Murambi vs John Munyao Nyamu & Another [2018] eKLR* was cited in support of those arguments. The respondent further submitted that in the instant appeal herein, time was not expressed to be of essence in the sale agreement and that the parties to the agreement never indicated that the contract would stand terminated if there was no completion by June 2014 and further submitted that her efforts to pay the outstanding balance were



frustrated by the appellant and his wife who wanted the respondent to pay an additional sum of Kshs 500,000 as opposed to the due balance of Kshs 178,000.

10. In submitting that the learned trial magistrate did not err in rendering judgment in a matter heard by Hon EW Muleka Senior Resident Magistrate without consent of the parties, the respondent submitted that the issue of Hon ZJ Nyakundi pronouncing judgment of the court simply because he was not the one who heard the matter and or without the consent of the parties does not hold water because as at April 9, 2020 when the learned magistrate was to deliver the judgment, there was the global COVID 19 pandemic which halted court operations and as such the court had to come up with a means of delivering the judgment which in anyway did not prejudice the appellant who was absent during the delivery of the judgment and further that being aggrieved by the subordinate court judgment, the appellant has preferred this appeal to cure any defects. That even before commencing the suit in the subordinate court, the respondent was already in occupation of the suit property by virtue of the sale agreement and that the appellant having been paid a substantial amount as at the time of filing the suit, he cannot purport to be suffering. It was the respondent's further submissions that there is no hard and fast rule stating that a magistrate cannot render a judgment in a matter that was heard and concluded by his predecessor unless the parties consent. In conclusion, the respondent submitted that the decision of the learned trial magistrate was sound, just, equitable and balanced interests of both parties. The respondent therefore urged this Honourable Court to uphold the decision of the learned trial magistrate and dismiss the appeal with costs.
11. This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See [*Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates \[2013\] eKLR.*](#)
12. I have considered the grounds of appeal and the parties' respective submissions. The issues that arise for determination are whether the learned magistrate erred in delivering judgment in the matter and whether the learned magistrate erred in granting the orders.
13. A perusal of the record shows that the trial of the suit started on June 27, 2019, before Hon EW Muleka, Principal Magistrate when PW1 testified. Trial was concluded on October 17, 2019, before the said magistrate. The matter was later mentioned on February 20, 2020 before Hon ZJ Nyakundi, Senior Principal Magistrate, when directions for filing of written submissions were taken and judgment was scheduled for delivery on April 9, 2020. The appellant, who was represented by counsel on February 20, 2020 before Hon ZJ Nyakundi, did not object to the proceedings of the said date taking place before the learned magistrate and did not also object to the learned magistrate proceeding to write judgment.
14. The appellant has not cited any provision of law that bars one judicial officer from proceeding with or concluding a case on the basis of evidence recorded by another judicial officer. On the contrary, Order 18 rule 8 (1) of the [*Civil Procedure Rules, 2010*](#) provides as follows:

'Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.'



15. Further, as noted by *Duffus, JA in Mandavia -vs- Rattan Singh [1968] EA 146*, the proper test in such a scenario is whether the successor magistrate is in as good a position as his predecessor would have been in to evaluate the evidence and submissions which have been put forward and to continue the hearing on that basis.
16. The appellant has not shown in what way the actions of the learned magistrate went outside the scope of Order 18 rule 8 (1) of the Civil Procedure Rules, 2010. On the contrary, Hon ZJ Nyakundi had before him the entire record and proceeded to consider it and deliver judgment without any objection by the appellant who was ably represented by counsel. It is likely that Hon EW Muleka, Principal Magistrate had proceeded on transfer by the time Hon ZJ Nyakundi. I find and hold that the learned magistrate did not err in delivering judgment in the matter.
17. That leads us to the last issue, as to whether the learned magistrate erred in granting the orders. It is common ground that the appellant and the respondent entered into a sale agreement dated January 7, 2014 pursuant to which the appellant sold to the respondent the parcel of land known as Kakamega/Moi's Bridge/1526 (the suit property) at a consideration of Kshs 928,000. The respondent paid a total of Kshs 750,000, leaving a balance of Kshs 178,000.
18. A reading of the agreement reveals that payment of the purchase price was to be completed by June 2014 and that the respondent was at liberty to take possession immediately upon execution on January 7, 2014 and to erect any structure or use the suit property in any way. It is not in dispute that the respondent took possession and that she did not pay the balance of Kshs 178,000 by June 2014. Fully aware of that background, including that he had received a total of Kshs 750,000 which is over $\frac{3}{4}$ of the purchase price, the appellant filed the plaint wherein he prayed for eviction of the respondent from the suit property and a declaration rescinding the sale agreement. He did not include in his prayers what was to happen to the amount he had received.
19. The learned magistrate observed as follows in the judgment:

'The court has taken into consideration that the defendant took possession of the land, built a structure where she is staying, that the defendant is ready and willing to clear the a balance amount, the question the court is asking itself, which is the burdensome option, that will not cause a lot of incontinence and damage to either party, to my mind, the court, the court being a court of fairness and justice, the defendant should be allowed to clear the balance amount instead of evicting the defendant with all her house from the suit property.'
20. The appellant has contended that the learned magistrate granted orders which were not sought by the respondent and that he reviewed the terms of the sale agreement. Whereas it is correct to state that it is not the business of the court to rewrite the terms of a contract, it must be remembered that the court has a duty to render substantive justice in terms of the provisions of Article 159 (2) (d) of the *Constitution*. The duty to do justice is not upon the court alone. Parties who approach the court should be ready and willing to do justice. Perhaps in realisation of that, the appellant included in his plaint a prayer for any further or other relief as the court deemed just. The learned magistrate seized that opportunity since it would be totally unjust to order eviction of the respondent when she took possession and developed the suit property pursuant to the terms of the agreement and paid over $\frac{3}{4}$ of the purchase price.
21. The upshot of the foregoing is that the learned magistrate did not err in granting the orders. That being the case, this appeal is without merit, and I therefore dismiss it. Considering the circumstances of the dispute, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF JANUARY 2023.



D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the appellant

No appearance for the respondent

Court Assistant: E. Juma

