



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ogutu v Anjichi (Civil Appeal E010 of 2024)  
[2025] KEHC 3875 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3875 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E010 OF 2024**

**DK KEMEL, J  
MARCH 28, 2025**

**BETWEEN**

**WALTER OMINDE OGUTU ..... APPELLANT**

**AND**

**STEPHEN NAMAN ANJICHI ..... RESPONDENT**

*(Being appeal from the Judgment of Hon. JP Mkala (RM)  
in Siaya CMCC No. E39/2023 delivered on 29/2/2024)*

**JUDGMENT**

1. The appeal arises from the judgment of Hon. Mkala (RM) in Siaya CMCC No. 39/2024 delivered on 29/2/2024 wherein he entered judgment for the Respondent against the Appellant in the sum of Kshs 2,000,000/=.
2. The Appellant was aggrieved by the aforesaid judgment and filed his memorandum of appeal dated 20/3/2024 wherein he raised the following grounds of appeal:
  - i. That the learned magistrate erred in law and in fact in failing to appreciate that it was the Respondent who breached the contract and not the Appellant.
  - ii. That the learned magistrate misdirected himself by relying on LSK condition of sale of 1989 while the applicable condition should have been LSK condition of sale of 2015.
  - iii. That the learned magistrate misdirected himself by ordering that the Respondent be refunded back the entire deposit paid for the land purchase when the said Respondent was the one in breach of the sale agreement.
  - iv. That the learned magistrate misdirected himself by failing to appreciate that the Appellant suffered damages as a result of breach of the sale agreement.



- v. That the learned magistrate misdirected himself by failing to deduct 10% of the deposit paid or 15% of the damages because the Appellant had not filed a counter claim.
3. This being the first appellate court, its duty is to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at an independent conclusion as to whether or not to uphold the decision of the trial court. This court will also take cognizance of the fact that it neither saw nor heard the witnesses testify. See *Selle Vs Associated Motor Boat Company Ltd* [1968] EA 123.
4. The Respondent Stephen Anjichi (PW1) adopted his witness statement dated 23/3/2023 as his evidence in chief. He also relied on his list of documents which comprised of a sale agreement dated 26/10/2018, demand letter dated 30/8/2021, bank transfer dated 8/8/2018, bank statements dated 1/8/2018 – 22/3/2023. He sought for the recovery of money from the Appellant in the sum of Kshs 2,000,000/=.

On cross examination, he stated inter alia; that he entered into a sale agreement with the Appellant; that the agreement was to be conducted within three(3) months and that he was supposed to pay within the said period; that he did not pay the balance within the three months; that he requested for additional three months to make the payment; that he has not provided proof of extension of time to pay; that he made the request for extension orally; that he is not aware when the land was sold to a third party; that the property was sold to a third party on 1/8/2019 as per the copy of the official search certificate shown to him; that the agreement indicates that time was of essence; that he agrees he had challenges in getting the money to pay the seller; that the agreement was subject to the Law Society of Kenya Conditions of Sale; that he does not know the LSK conditions of sale; that he is entitled to the entire amount because the land was sold; that the seller had an obligation to tell him when he was re-selling the land.

On re-examination, he stated that he paid Kshs 2000,000/= and that when he contacted the seller to pay the balance, he was informed that he had sold the land to a third party.

The Respondent closed his case.

5. The Appellant (DW1) Walter Ominde Ogutu adopted his statement dated 8/4/2023 as well as his list of documents which comprised of certificate of official search for land reference East Gem/Uranga/439. He stated that the balance of Kshs 3,000,000/= was to be paid within ninety days. That the Respondent took four (4) years before he came back and that he did not contact him for extension of time after the lapse of ninety days. That he is entitled to 10% of the Kshs 5,000,000/=. That he needed the money to take his wife to hospital.

On cross examination, he stated inter alia; that he is not sure whether his wife was part of the agreement since her name is not on the agreement; that the agreement was to be completed within ninety days according to Clause 8; that he did not deliver the original title deed to the purchaser's advocate; that the purchaser paid him Kshs 2,000,000/=; that the 10% is not part of the agreement; that he did not file any case against the Respondent; that he could not recall the date he sold the land; that he took a long time to sell the land.

On re-examination, he stated that the 10% is part of the agreement according to the LSK Conditions of Sale.

The Appellant closed his defence case.

6. The appeal was canvassed by way of written submissions. Both parties duly complied.
7. The Appellant's submissions are dated 21/11/2024. It was submitted that the Sale Agreement indicated that time is of essence and therefore there was no room for delay. It was submitted that



the Respondent did not comply with the timelines as he failed to pay the balance within ninety days provided and therefore the same amounted to breach of contract and thus the Appellant was at liberty to rescind the same. It was submitted that the trial court erred in coming to the finding that the Appellant equally breached the contract when it was the Respondent who did so. The Appellant placed reliance on the case of *Kihuba Holdings Limited v. Charo Kirisa Ngulu* [2021] eKLR where it was held:

“I do not see why the Plaintiff is alleging that the Defendant breached the contract. It is the Plaintiff who failed to make available the balance of the purchase price within time and she cannot complain. She was accommodated by the Defendant in order to salvage the sale transaction, albeit out of time, but the Plaintiff refused to tender a professional undertaking. In fact, I wonder why the Plaintiff came to court. If she was willing to proceed with the sale then all she needed to do was make the money available to the Defendant and/or issue the professional undertaking. The Defendant did not appear to have any problem with completion so long as he was guaranteed payment of the balance.”

8. The Appellant also submitted that the trial court went into error when it relied on LSK Conditions of Sale for 1989 instead of 2015. It was also submitted that the Appellant was entitled to damages for breach of contract and that he is entitled to 10% of the purchase price amounting to Kshs 500,000/=. Further, it was submitted that the Respondent should be ordered to pay the Appellant loan interest of Kshs 750,000/= to cater for damages since he had taken a loan when the Respondent failed to pay the balance. The Appellant finally submitted that the appeal has merit and should be allowed with costs.
9. The Respondent submitted that after failure to pay the balance within ninety days as stipulated in the sale agreement, he sought for extension of time from the Appellant for three months to enable him complete the same as agreed and that after the said period, he contacted the Appellant who informed him that he had already sold the land to a third party. The Respondent contended that the Appellant acted in bad faith by failing to inform him about the new turn of events and therefore the Appellant ended up benefiting twice by keeping the Respondent’s deposit as well as the new purchase price from the third party.
10. It was submitted that the learned trial magistrate came with the correct finding that the Appellant was in breach of the sale agreement in that the Appellant failed to give the Respondent a twenty one days’ notice to complete the contract or else he proceeds to sell the property to a third party. It was submitted that the Appellant was in breach of the agreement.
11. It was further submitted that the trial court was correct in relying on the LSK conditions of sale 1989 Edition because both parties appended their signatures on the sale agreement and that they were bound by the conditions. It was not the court’s business to rewrite the contract for the parties. It was also submitted that the trial court was correct in ordering the Appellant to refund the deposit of the purchase price to the Respondent.
12. It was finally submitted by the Respondent that the Appellant’s claim for damages for breach of contract lacks basis because the Appellant did not file a counterclaim to the suit. The Respondent therefore sought for the dismissal of the appeal with costs.
13. I have considered the evidence tendered before the lower court as well as submissions by the parties. It is not in dispute that the parties herein entered into a sale agreement dated 26/10/2018 wherein the Appellant agreed to sell his parcel of land East Gem/Uranga/439 to the Respondent at a purchase price of Kshs 5,000,000/= . It is also not in dispute that the Respondent paid a deposit of Ksh 2,000,000/= and the balance of Kshs3,000,000/- was to be cleared within ninety days. It is not in dispute that the



Respondent did not pay the balance within the said period and that the Appellant sold the property to a third party.

The issue for determination is whether the Respondent proved his case against the Appellant on balance of probabilities.

14. As noted by the trial magistrate that both parties breached the sale agreement, both parties herein are in agreement with the said finding. The only point of departure is on the issue of the refund of the deposit of Kshs 2 million. Whereas the Appellant claims a 10% on the purchase price consideration plus damages for breach of contract, the Respondent on the other hand maintains that he is entitled to the deposit as the Appellant later sold the parcel of land to third party. I have perused the said agreement and note that the same was subject to the Law Society Conditions of sale 1989 edition. That being the position, clause 4(7) thereof makes it mandatory for the Vendor to issue a twenty one notice to the purchaser to complete the contract before he could proceed with any sale of the property to a third party. The Appellant has vociferously maintained that the appropriate edition should be that of 2015. I am unable to agree with the Appellant since the agreement provided that the LSK conditions of sale was to be those for 1989 edition. The parties duly signed the agreement and thus they cannot opt out at this stage just because the terms do not suit their changed circumstances. In any case, it is trite law that a court cannot rewrite contracts for parties. The parties are bound by the terms of their agreement and that the bed that they must lie on the bed that they made. Again, a perusal of the agreement reveals that there is no ambiguity whatsoever as the parties used clear and straight forward terms. Even though the Appellant has pitched camp for the LSK conditions of sale 2015 edition, it is instructive that he had the opportunity to seek to have the agreement be subject thereto but that he did not indicate the same and agreed to go by the 1989 edition. I find that he cannot now attempt to run away or resile from what he had entered into. Even though the Respondent did not pay the balance within the stipulated period, the Appellant was obliged to issue him with the notice aforesaid in line with the provisions of the LSK Conditions of sale 1989. I am unable to find fault with the finding of the learned trial magistrate regarding that issue. That being the position, the Appellant was obligated to give the Respondent the requisite 21 days' notice of intention to sell the property to a third party.
15. As the deal failed to sail through and that the Respondent failed to clear the balance while the Appellant failed to give the Respondent the requisite 21 days' notice, it is only natural that the parties should be taken back to the position they were before things fell apart. They should be restituted back. The Appellant seemed to have moved on and sold the property to a third party and hopefully made some profit as he did not disclose as to the amount he raked in. It would be unconscionable for the Appellant to keep the deposit of the monies and at the same time enjoy the sums from the third party and seek to elbow out the Respondent from accessing the deposit. I am satisfied that the learned trial magistrate arrived at the correct finding that the deposit should be restored to the Respondent.
16. As regards the Appellant's claim for damages for breach of contract, it is trite that damages are not awardable in such circumstances as it is believed that parties to a contract are at liberty to put default clauses therein so as to take care in the event of breach. All the parties are required to put everything into the contract so that none of them is allowed to seek for redress for damages in the event of breach. Indeed, the party who has suffered loss is entitled to be restituted back in the same position he was prior to the breach (restitution in integrum). In the present case, it is noted that the Appellant did not file a counterclaim against the Respondent in the matter before the trial court regarding the issue of damages as a result of the breach. The circumstances of the case does not favour an order for grant of general damages for breach to the Appellant since he has been in possession of the deposit as well as having been able to sell the property to a third party and hence he has not suffered any damage as compared to the Respondent. It is instructive that the Appellant only filed a defence in which he made



a general denial of the Respondent's claims and did not put in a counterclaim against the claim. That being the position, the claim for damages at this stage is a belated claim and ought to be rejected.

17. In view of the foregoing observations, it is my finding that the Appellant's appeal is bereft of merit. The same is dismissed with costs.

**DATED AND DELIVERED AT SIAYA THIS 28<sup>TH</sup> DAY OF MARCH, 2025.**

**D.KEMEI**

**JUDGE**

In the presence of:

Ooro F....for Appellant

Alego.....for Respondent

Mboya.....Court Assistant

