



**Nganga v Njiiri & 2 others (Environment & Land Case 50 of 2020)  
[2023] KEELC 338 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 338 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 50 OF 2020**

**BM EBOSO, J  
JANUARY 17, 2023**

**BETWEEN**

**GEORGE NJENGA NGANGA ..... APPELLANT**

**AND**

**JOSEPH GITHAE NJIIRI ..... 1<sup>ST</sup> RESPONDENT**

**SIKA PROPERTIES ..... 2<sup>ND</sup> RESPONDENT**

**GERISHON NGANGA THUO ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Judgment of Hon J. A Agonda (SRM) delivered in the Senior Principal Magistrate Court at Ruiru on 12/11/2020 in Ruiru MCLE Case No. 20 of 2020)*

**JUDGMENT**

**Background**

1. This appeal challenges the Judgment rendered on 12/11/2020 by Hon J A Agonda [SRM] in Ruiru SPMC Environment & Land Case No 20 of 2020. The appellant, George Njenga Nganga, was the 1st defendant in the said suit. The 2nd and 3rd respondents in this appeal were the 2nd and 3rd defendants in the suit. Joseph Githae Njiiri [the 1st respondent in this appeal] was the plaintiff in the suit. Before disposing the key issues that fall for determination in the appeal, I will briefly outline a brief background to the appeal.
2. Through an undated plaint filed in the Senior Principal Magistrate Court at Ruiru on 12/2/2020, the 1st respondent sued: (i) the appellant; (ii) the 2nd respondent; and (iii) the 3rd respondent. His claim was that, through a sale agreement dated 22/8/2016, the appellant sold to him what he described as “a parcel of Plot Ruiru/Kiu Block 2 (Githunguri) 2598 Measuring 50 x 80 Feet” at a purchase price of Kshs 550,000. He contended that in pursuance of the said agreement, he paid the appellant a total of



- Kshs 430,000. He added that the appellant subsequently failed/neglected and/or refused to transfer the land to him. It was his case that the appellant had breached the sale agreement.
3. Consequently, he sought, among other reliefs, an order of specific performance against the 2nd respondent who was the 2nd defendant in the suit. He also sought a relief that he described as “restitution of the contract.” Further, he sought a permanent injunction restraining an unidentified defendant against occupying, constructing on, interfering with, selling, transferring, disposing or dealing with the suit property, in any way. As an alternative relief, he prayed for a refund of “all the monies paid plus interest at the prevailing market rates from date of payment.” Lastly, he prayed for costs of the suit.
  4. Through a statement of defence dated 23/7/2020, the appellant contested the claim. He averred that he entered into a sale agreement with the 1st respondent, dated 22/8/2016, in relation to Plot No 9, measuring 50 x 80, which was a portion of Ruiru Kiu Block 2 (Githunguri) 2598 and which was registered in the name of the 2nd respondent, Sika Properties Ltd. He also averred that the agreed purchase price was Kshs 550,000. He denied the 1st respondent’s contention that he paid to him the agreed deposit of Kshs 150,000 and the alleged subsequent sum of Kshs 280,000 making a total of Kshs 430,000. It was his case that the 1st respondent was the one who breached the sale agreement “by failing to complete payment of purchase price for 3 years.” He added that vide a letter dated 15/8/2019, he rescinded the contract due to breach by the 1st respondent. He urged the court to dismiss the 1st respondent’s suit.
  5. The 2nd and 3rd respondents neither entered appearance nor filed defences in the suit.
  6. Upon taking evidence from the 1st respondent and from the appellant, the trial court rendered the impugned Judgement, in which it made a finding to the effect that the 1st respondent (the plaintiff in the trial court) had proved his case on the required standard. He further found that the reliefs sought in the plaint were not available and that the 1st respondent was entitled to a refund of Kshs 430,000, being monies that he had paid to the appellant as part of the purchase price. The trial court awarded the 1st respondent the said sum together with general damages of Kshs 200,000 and costs of the suit.

## **Appeal**

7. Aggrieved by the findings and award of the trial court, the appellant brought this appeal, through a memorandum of appeal dated 18/11/2020, in which he advanced the following 19 grounds of appeal:
  1. The Learned Magistrate having taken cognizance of the evidence presented or not presented before her misdirected herself in finding that the first respondent’s claim that he allegedly paid the appellant Kshs 430,000 on various dates and varied amounts was proved on a balance of probabilities.
  2. The Learned Magistrate erred in law and fact by failing to consider that the first respondent’s claim for a refund of the purchase price allegedly paid of Kshs 430,000 lacked particulars as pleaded and that it was not specifically provided, demonstrated and proven [sic].
  3. The Learned Magistrate erroneously found that the 1st respondent proved by way of acknowledgement receipts which were never produced as exhibits before and during trial that payments were made to the appellant’s wife who was neither a party to the sale agreement dated 22nd August 2016 nor a party in the suit.
  4. The Learned Magistrate erred in law and fact by failing to consider that the sale agreement dated 22nd August 2016, was rescinded by the appellant vide a letter dated 15th August 2019, due to the 1st respondent’s failure to pay the balance of the purchase price which amounted



to breach of contract and entitled the appellant to 10% of the purchase price as liquidated damages in accordance with the Law Society of Kenya Conditions of Sale.

5. The Learned Magistrate erred in law and fact by disregarding the 1st respondent's letter dated 4th September 2019, in response to the appellant's rescission letter, in which the 1st respondent acquiesced to the said rescission.
6. The Learned Magistrate erred in law and fact by failing to consider that the 1st respondent did not issue the appellant with a completion notice and or a demand letter as required under law, thereby the 1st respondent is not entitled to any of the remedies granted by the Learned Magistrate.
7. The Learned Magistrate misapprehended the law applicable and the facts before her by granting the 1st respondent general damages which the 1st respondent did not specifically plead and or pray for in its pleadings.
8. The Learned Magistrate misapprehended the law applicable and the facts before her by failing to consider that the appellant's proof of ownership of the suit property, Plot Number 9 measuring 50 by 80 feet, is a plot allocation certificate issued by the 2nd respondent which cannot be subject to attendance of Land Control Board meetings in a sale transaction because the suit property is yet to be surveyed, subdivided and its title processed so as to be recognizable under the [Land Control Act](#), the [Land Act](#) and the [Land Registration Act](#).
9. The Learned Magistrate erred in law and fact by misinterpreting the sale agreement and rewriting the terms of the agreement by finding that payment of the balance of the purchase price, Kshs 400,000, was subject to the precondition that the appellant attends meetings to facilitate the transfer of the suit property.
10. The Learned Magistrate misapprehended the law applicable and the facts before her by disregarding the Law Society of Kenya Conditions of Sale as adopted in the sale agreement by erroneously disregarding the provisions under the Conditions which deal with the event of default by the 1st respondent and the rights and remedies available to the appellant, to wit, rescission of the agreement and retaining 10% of the purchase price.
11. The Learned Magistrate erred in law and fact by finding that the sale agreement was not frustrated by the 1st respondent because the 1st respondent actually breached the agreement by failing to pay the full purchase price despite repeated requests, as such the appellant could not transfer the plot allocation certificate to the 1st respondent.
12. The Learned Magistrate erroneously found, in the absence of any iota of evidence tendered by the 1st respondent, that the appellant entered into agreements with third parties and that they are in possession and occupation of the suit property.
13. The Learned Magistrate misapprehended the law applicable and the facts before her by failing to consider that it is only upon the full payment of the purchase price that the appellant could be required to execute a conveyance and deliver to the 1st respondent the suit property.
14. The Learned Magistrate's findings and judgement were not supported by the law and are grounded on her opinion thus lacking any sound legal basis supported by law and rendering her judgement grossly incompetent.
15. The Learned Magistrate erroneously found that it is the appellant and not the 1st respondent who breached the agreement and failed to consider the appellant's rescission letter dated 15th August 2019.



16. The Learned Magistrate erred in law and fact by finding that the sale agreement is still enforceable and blatantly disregarded the appellant's rescission of the agreement upon the 1st respondent's breach of contract.
  17. The Learned Magistrate misapprehended the law applicable and the facts before her by awarding the 1st respondent general damages of Kshs 200,000 without any legal and factual basis, precedent or general principles of law, to support the same.
  18. The Learned Magistrate erred in law and fact by failing to consider that the 1st respondent was guilty of laches by failing to complete the sale transaction over a period of 3 years and prejudicing the appellant by instituting the lower court suit and the resultant orders.
  19. The Learned Magistrate erred in law and fact by arriving at a manifestly and grossly unmerited decision which upholds the unjust and unsubstantiated claim of the 1st respondent.
8. He prayed for the following verbatim reliefs from this court:
1. This appeal be and is hereby allowed.
  2. The Judgment and Decree of the Senior Principal Magistrate Court at Ruiru, delivered by J. A Agonda (SRM) on 12th November 2020, be and is hereby set aside in its entirety.
  3. The 1st respondent be deemed to be in breach of contract of the Sale Agreement dated 22nd August 2016.
  4. Accordingly, the appellant be deemed to have duly rescinded the sale agreement dated 22nd August 2016, vide the latter dated 15th August 2019.
  5. The appellant be entitled to retain 10% of the purchase price in the sum of Kshs 55,000 and the 1st respondent be deemed to be entitled to a refund of Kshs 95,000.
  6. Costs of this Appeal.

### Submissions

9. The appeal was canvassed through written submissions dated 18/5/2022, filed through the firm of Kihara Njuguna & Co Advocates. Counsel for the appellant condensed grounds number 1, 2, 3, 12, 14 and 19 and submitted that the 1st respondent "did not provide any statements, exhibits, particulars and/ documentary evidence to support his allegations of payment of Kshs.430,000 to the appellant or his wife." Counsel faulted the trial court for holding that evidence in form of "acknowledgement of receipts" had been produced as exhibits, contending that no such evidence had been tendered. Counsel faulted the 1st respondent for failing to join the alleged recipient of the sum of Kshs 250,000 as a party to the suit or have her summoned as a witness. Counsel contended that the 1st respondent had failed to prove payment of sums totaling Kshs 430,000.
10. Counsel further argued that in the absence of particulars of special damages, the court had no basis for ordering the appellant to refund the 1st respondent a total of Kshs 430,000 plus interest. Relying on the Court of Appeal decision in *Kenya Breweries Limited v Kiambu General Transport Agency Limited* [2002 eKLR, counsel argued that the 1st respondent was not entitled to a refund of Kshs 430,000 because he had failed to particularize and prove payment of Kshs 30,000 on 14/12/2016 and payment of Kshs 250,000 alleged to have been subsequently paid to him by the 1st respondent on diverse dates.
11. On grounds number 4, 5, 6, 7, 10, 11, 13, 15, 16 and 17, counsel submitted that the trial magistrate erred in finding that completion of the contract was frustrated through no fault of the 1st respondent.



Counsel contended that balance of the purchase price was to be released in exchange for completion documents. Counsel added that the 1st respondent had admitted during cross-examination that he never issued a notice to complete, hence there was no basis for the alleged breach. Counsel contended that under Clause 13.4 of the Law Society Conditions of Sale 2015, the appellant rightfully rescinded the contract vide the letter dated 15/8/2019 due to the 1st respondent's non-payment of balance of the purchase price. Counsel argued that non-payment of balance of the purchase price was breach of contract on part of the 1st respondent, hence the appellant was entitled to retain 10% of the purchase price as liquidated damages. He argued that the 1st respondent was only entitled to a refund of Kshs 95,000. Counsel contended that the trial court should not have found the appellant in breach of an agreement which had been terminated and which was unenforceable and invalid.

12. Counsel further faulted the trial court for awarding the 1st respondent general damages in the sum of Kshs 200,000, contending that, as a general principle, general damages are not recoverable in cases of alleged breach of contract. Counsel contended that the trial magistrate had disregarded established and applicable law on general damages.
13. On ground number 8, counsel submitted that, given that the suit property was an unsurveyed plot within Ruiru Kiu Block 2 (Githunguri) 2598, it could not be the subject of a statutory meeting on an application for consent under the *Land Control Act*.
14. On ground number 9, counsel argued that the trial magistrate had misinterpreted the sale agreement and had re-written the terms of the sale agreement by making a finding to the effect that payment of balance of the purchase price was subject to the pre-condition that the appellant attended meetings to facilitate transfer of the suit property.
15. On ground number 18, counsel argued that the trial magistrate erred by failing to consider the fact that the 1st respondent was guilty of laches by failing to complete the sale transaction for over a period of 3 years. Counsel added that the suit giving rise to this appeal was instituted as an afterthought after the appellant served on the 1st respondent a "rescission letter" terminating the agreement. Counsel urged the court to allow the appeal and grant the orders sought in the memorandum of appeal.
16. The 2nd and 3rd respondents did not participate in the appeal. The 1st respondent was represented by a Ms Gathua who appeared before the Deputy Registrar and before me. On 31/5/2022, she requested for 30 days within which to file and serve written submissions. The 1st respondent did not, however, file and serve written submissions. On 19/7/2022, Ms Gathua once again pleaded for 3 days within which to file and serve written submissions. The court granted her 5 days to file and serve the 1st respondent written submissions. She did not file and serve the written submissions. The court subsequently proceeded to fix a judgment date in the appeal.

### **Analysis and Determination**

17. I have perused the original record of the trial court together with the entire record relating to this appeal, including the memorandum of appeal and the submissions tendered in the appeal. I have also considered the relevant legal frameworks and jurisprudential principles on the key issues in the appeal. The following are the four key issues that fall for determination in the appeal: (i) Whether the 1st respondent proved breach of the agreement dated 22/8/2016 by the appellant; (ii) Whether the 1st respondent proved payment of a total of Kshs 430,000 to the appellant as part of the agreed purchase price; (iii) Whether the relief of general damages was available to the 1st respondent; and (iv) What order should be made in relation to costs of the suit in the trial court and in relation to this appeal. I will dispose the four issues sequentially in the above order. Before I dispose the four issues, I will briefly outline the principle upon which this court exercises appellate jurisdiction.



18. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013)eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

19. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

20. The first issue that falls for determination is whether the 1st respondent proved breach of the sale agreement dated 22/8/2016 by the appellant. The key terms of the material sale agreement were contained in paragraph 4 and provided as follows:

“The vendor will sell to the purchaser a portion of land measuring 50 feet x 80 feet marked as Plot No. 9 comprising from land known as Ruiru Kiu Block 2 (Githunguri) 2598 at a consideration price of Kshs 550,000/= (Five Hundred Thousand) only.

- a. The purchaser shall pay to the vendor an amount of Kshs 150,000 (one hundred and fifty thousand) only in cash receipt of which the vendor shall acknowledge by executing this sale agreement.
- b. The balance of Kshs 400,000 (four hundred thousand) only shall be paid as the parties herein agree.
- c. The payments indicated under paragraph (b) hereinabove shall be subject to the vendor attending all such meetings as shall be necessary to facilitate the transfer of the subject matter hereof to the purchaser.
- d. The purchaser shall take possession of the subject matter hereof after full payment.
- e. The transaction hereof is irrevocable and the interest sold to the purchaser is absolute.
- f. The Law Society of Kenya Conditions under CAP 160 are incorporated in this agreement in so far as the same are not inconsistent with or specifically excluded by terms of this agreement.
- g. The parties herein abide by the terms and conditions of this agreement and in case anyone is aggrieved shall have right to legal recourse and shall seek the enforcement of the terms of this agreement in their full and natural meaning and shall further have right to claim any damage occasioned by such breach.”



21. The 1st respondent's sworn evidence-in-chief consisted of five short sentences in which he adopted his written witness statement. An examination of the record of the trial court reveals that he did not produce any documentary evidence in support of his claim.
22. The plot which was the subject matter of the sale agreement was an unsurveyed piece of land measuring 50 x 80 feet and forming part of parcel number Ruiru Kiu Block 2 (Githunguri) 2598. Secondly, the edition of the Law Society of Kenya Conditions of Sale which were contemplated under clause (f) above was not specified. "CAP 160" which the sale agreement alluded to relates to the [Law of Succession Act](#) which does not contain any conditions of sale. Thirdly, no evidence was tendered in relation to any formal demand made to the appellant specifying any specific breach and requiring the appellant to remedy the specified breach. Further, no evidence was tendered in relation to any formal completion notice that may have been issued to the appellant requiring the appellant to complete the sale contract. The totality of the foregoing is that there was completely no evidence tendered by the 1st respondent to demonstrate that the appellant had breached a specific term of the agreement dated 22/8/2016.
23. Under Section 107 of the [Evidence Act](#), the burden of proof in relation to the 1st respondent's allegation of breach lay on the 1st respondent. The 1st respondent, regrettably, did not discharge that burden. The trial court therefore had no basis for its finding to the effect that the appellant was in breach of the sale agreement dated 22/8/2016. Indeed, no evidence was tendered in relation to any land control board meeting which was convened on a particular day but which the appellant deliberately failed to attend.
24. The totality of the foregoing is that the 1st respondent failed to prove breach of the sale agreement dated 22/8/2016 by the appellant. That is my finding on the first issue.
25. The second issue is whether the 1st respondent proved payment of a total of Kshs 430,000 to the appellant as part of the agreed purchase price. By signing the agreement dated 22/8/2016, the appellant acknowledged receipt of the initial deposit of Kshs 150,000. Indeed sub-paragraph (a) of the duly executed sale agreement provided thus:
  - “(a) The purchaser shall pay to the vendor an amount of Kshs 150,000 (one hundred and fifty thousand) only in cash receipt of which the vendor shall acknowledge by executing this sale agreement.”
26. Based on the above clause, it follows that by executing the sale agreement, the appellant acknowledged receipt of Kshs 150,000.
27. Other than the above acknowledgement of receipt of Kshs 150,000 by the appellant, there was no evidence tendered to demonstrate that a further sum of Kshs 280 was subsequently paid to the appellant. In his statement of defence dated 23/7/2020, the appellant denied having been paid the alleged sum of Kshs 280,000. He subsequently filed a notice to produce, requiring the 1st respondent to avail to him and to the trial court, particulars of the alleged payments. The 1st respondent did not avail the particulars. Similarly, he did not tender evidence to demonstrate that he paid the sum of Kshs 280,000 to the appellant. He did not call, as a witness, the person who allegedly received the said sum on behalf of the appellant. He did not produce evidence of the Mpesa remittance which he alleged.
28. From the totality of the record of the trial court, it is clear that the trial court had no basis for arriving at the conclusion that, besides the initial payment of Kshs 150,000, the 1st respondent subsequently paid to the appellant a further sum of Kshs 280,000 making a total of Kshs 430,000. What the 1st respondent proved was payment of Kshs 150,000 to the appellant, which the appellant acknowledged by executing



the sale agreement dated 22/8/2016. He did not prove payment of a further sum of Kshs 250,000. That is the finding of this court on the second issue.

29. The third issue is the question as to whether the relief of general damages was available to the 1st respondent. My answer to the question is in the negative. First, the 1st respondent did not prove breach of the agreement dated 22/8/2016 by the appellant. Secondly, as a general principle, general damages are not available in actions founded on breach of contract. The Court of Appeal emphasized this principle not too long ago in the case of *Kenya Tourism Development Corporation v Sundowner Lodge Ltd* [2018] eKLR. Our superior courts have, in a line of decisions, upheld this general principle. The trial court clearly erred by ignoring this principle. I will not say more on the issue. My finding on the issue is that the relief of general damages was not available to the 1st respondent, hence the award of Kshs 200,000 as general damages was an error.
30. What was available to the 1st respondent, in my view, was the relief of refund of the purchase price which the 1st respondent paid to the appellant. This was pleaded in prayer 4 as an alternative relief. As demonstrated in the preceding paragraphs, the 1st respondent proved payment of only Kshs 150,000. He did not prove payment of a subsequent sum of Kshs 280,000.
31. The appellant prayed in the memorandum of appeal and submitted in this appeal that he was entitled to 10% of the purchase price as liquidated damages. First, if the appellant wanted to ventilate a counterclaim or a set-off, he had every right to do so through pleadings in the trial court at the point of responding to the 1st respondent's claim. He elected not to do so. He cannot use this appeal as the platform on which to ventilate the claim. Secondly, the agreement dated 22/8/2022 did not provide for liquidated damages equivalent to 10% of the purchase price. Further, the 2015 edition of the Law Society of Kenya Conditions of Sale, which counsel for the appellant alluded to and invited the court to invoke, was not incorporated into the sale agreement. What the parties purported to incorporate into the agreement for sale were non-existent conditions described as the "The Law Society of Kenya Conditions under CAP 160". Consequently, the plea to this court to award the appellant liquidated damages equivalent to 10% of the purchase price has no basis and is misplaced.
32. The totality of the foregoing is that the 1st respondent was only entitled to a refund of the sum of Kshs 150,000. Had the appellant tendered the money at the time of entering appearance, he would have escaped paying interest. He, however, elected to keep the money despite having earlier offered to refund the money through his letter dated 15/8/2019. He would, in the circumstances, pay interest at court rate from the date of filing suit in the trial court. He will also bear costs of the suit in the trial court, for the same reason.
33. In the end, this court finds merit in this appeal. Because the errors giving rise to the appeal were committed by the trial court, parties will bear their respective costs of the appeal.

### **Disposal Orders**

34. For the above reasons, this appeal is allowed and is disposed in the following terms:
  - a. The Judgment of the trial rendered on 12/11/2020 in Ruiru SPMC E & L Case No 20 of 2020 is set aside and is substituted with the following award in favour of the plaintiff against the 1st defendant in the said suit.
    - i. A refund of Kshs 150,000 to the plaintiff by the 1st defendant.
    - ii. Interest at court rate on the above sum from the date of filing suit till payment in full.
    - iii. Costs of the suit.



(b) Parties shall bear their respective costs of this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF  
JANUARY, 2023.**

**B M EBOSO**

**JUDGE**

Mr Macharia holding brief for Mr Kihara Njuguna for the Appellant

**Court Assistant: Ms Osodo**

