



**Fwamba v Nyairo (Environment and Land Appeal 20 of 2021)
[2023] KEELC 15792 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15792 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 20 OF 2021
EC CHERONO, J
FEBRUARY 27, 2023**

BETWEEN

FRANCIS WANJALA FWAMBA APPELLANT

AND

MICAH MUGAKA NYAIRO RESPONDENT

*((An appeal from the Judgment/Decree of Hon. Odawo, Senior Resident
Magistrate delivered on 04/10/2021 vide CM-ELC NO.289 od 2019))*

JUDGMENT

Background

1. By a plaint dated 6th September 2019, the Appellant Francis Wanjala Fwamba sued Micah Mugaka Nyairo who is also the Repondent herein for a refund of Kshs. 1,080,000/ plus interests and costs. The Respondent denied the Appellant's claim vide a statement of Defence and Counter-claim dated 30th September, 2019. The parties filed their compliance documents pursuant to order 3, 7 & 11 of the [Civil Procedure Rules](#). Thereafter, the trial court certified the matter ripe for hearing. The case proceeded for hearing between 3/5/2021 and 6/9/2021
2. On 4/10/2021, the trial Magistrate delivered judgment by dismissing the plaintiff's claim and allowed the defendant's counterclaim for specific performance. Each party was ordered to bear their own costs.
3. The plaintiff was aggrieved by the Judgment/Decree of the trial court and preferred the present Appeal on the following grounds;
 1. The learned trial Magistrate erred both in fact and law by allowing the Respondent's prayer for specific performance without evidence that would entitle the court to issue the orders sought against the Appellant.



2. The Learned Trial Magistrate erred both in fact and law by failing to appreciate that the Land Sale Agreement between Micah Mugaka Nyairo and Francis Wanjala Fwamba dated 7th November 2017 was not enforceable.
3. The Learned Trial Magistrate misconstrued the evidence adduced and as a result arrived at a wrong conclusion in the judgment.
4. The Learned Trial Magistrate erred in law and fact by not appreciating that the Respondent has no title to the land referred to in the agreement of 7/11/2017
5. The Learned Trial Magistrate failed to analyse the Appellant's evidence and the Appellant's submissions by Counsel and as a result arrived at a wrong conclusion.

Plaintiff's/appellant's Evidence Before The Trial Court.

5. The Plaintiff/Appellant testified on 3/5/2021 by adopting his witness statement dated 6/9/2019. He also produced in evidence documents contained in a list of documents of even date as P-Exhibits 1, 2, 3, 4 & 5 respectively. In his testimony, the Plaintiff/Appellant stated that on 7/11/2017, he entered into a sale of land agreement with the Defendant/Respondent for the sale of 1 1/2 of land comprised in the Title Number Muungano/Sabatia Block 4 within Bungoma County for a consideration of Kenya Shillings one million five Hundred Thousand only (Kshs. 1,500,000/=)
6. He said that he paid the Defendant/Respondent one million and eighty only (Kshs 1,080,000/=) and the balance of Kenya Shillings four hundred and twenty thousand only (Kshs 420,000/) was to be cleared on or before the expiry of two months from the date the agreement was made.
7. He stated that his attempts to meet the Defendant/Respondent with a view to clear the balance of Kshs 420,000/ has been in vain. He said that he learned that the Defendant/Respondent never owned land parcel No. Muungano Sabatia Block 4. He referred to the list of documents dated 6th September 2019 which he produced as P-Exhibit NO. 1, 2, 3a 3b & 4

Defendant's/respondent's Evidence Before The Trial Court.

8. The Defendant/Respondent testified on oath as DW1 and stated that on 7th November 2017, he entered into an agreement with him selling him one and a half acres of land to be hived off parcel contained in Muungano/Sabatia Block 4 at Kshs. 1,500,000/=
9. He further stated that he was paid Kshs. 1,000,000/= at the execution of the agreement and the balance was to be paid within 2 months from the date of the signing of the agreement. The Defendant further said that the Plaintiff/Appellant later sent him Kshs. 80,000/= on m-pesa leaving a balance of Kshs. 420,000/=which remains outstanding to date. He said that the Plaintiff/Appellant has refused and/or declined to pay him the balance as he has opted to use unorthodox means to frustrate and injure his person and character as he has on several occasions used the police to arrest and frustrate him on pretext that he obtained Kshs. 1,080,000/=from him by false pretence.
10. He stated that sometime in January 2019, the Plaintiff/Appellant and his surveyor and advocate in the company of police officers from Bungoma police station together with him visited the land the subject of the contract whereby they proceeded to measure the portion of land purchased by the Plaintiff/Appellant after which the Plaintiff/Appellant was to pay him the balance of the purchase price and thereafter occupy the same. He said that after measuring the land and upon the police telling him to clear his balance and thereafter occupy the portion, he declined stating that he had no money



11. In conclusion, the Defendant/Respondent stated that it is not true that the parcel of land does not exist or that he has breached the terms of the agreement but to the contrary, it is the Plaintiff/Appellant who has breached the agreement by failing to pay the balance of the purchase price and also trying to run away from an agreement that is irrevocable.
12. The Defendant called No. 234508 Inspector Geoffrey Mogere who by then was stationed at Nyandarua Sub-County as the staffing officer traffic. He said that in January 2019, he was stationed as Deputy Station Commander, Bungoma. He confirmed having recorded his witness statement on 21/6/2021 which was adopted by the court in his evidence. The witness also produced a copy of the O.B extract no. 4/25/10/2018 at 1050 hours

Appellant's Submissions.

13. The Appellant through the firm of R.e Nyamu & Co. Advocates submitted that during the hearing of the former suit, the respondent emerged in court with certificates of search of different parcels of land from the subject of the sale agreement dated 7/11/2017. He submitted that it is clear that the subject on the agreement dated 7/11/2017 was non-existent. He said that in such a scenario, the lower court erred and misconstrued the facts of the case before it in ordering specific performance of the agreement when it was apparent that the subject matter in the agreement dated 7/11/2017 was not in the name of the respondent. He stated that the said Agreement remains unenforceable in view of the fact that the court did not even direct on which parcel of land should the orders of specific performance be enforced on now that the Respondent had emerged in court with different official certificates of searches for pieces of land that were not part and parcel of the Agreement dated 7/11/2017.

Respondent's Submissions

14. The Respondent through the firm of Anwar & company Advocates submitted on all the five grounds of Appeal as follow;

Whether the learned Magistrate erred in fact and in law by allowing the Respondent's prayer for specific performance without evidence that would entitle the Court to issue the orders sought against the Appellant?

15. On this ground, the Respondent submitted that in the sale agreement contained at page 25&26 of the record of Appeal, the Appellant was purchasing land from the Respondent where part payment of the consideration was paid leaving a balance and therefore there was nothing wrong with the court ordering specific performance. The Respondent further submitted that the learned Magistrate did not err as the land the subject of the Agreement did exist as can be confirmed from the evidence of the Respondent at page 14 to 16 and 88 of the record of Appeal. The Respondent also submitted that the Appellant was not candid with the court and his evidence is incapable of believe. He referred to the following cases in support;

1. *Lole v Butcher* (1949) ALL ER 1107
2. *Robert Omumu Okang'a v Isaiab Indeties Ojiangu* (2005) eKLR

Whether the learned Magistrate erred in fact and in law by failing to appreciate that the land Sale Agreement between Micah Mugaka Nyairo and Francis Wanjala Fwamba dated 7th November 2017 was not enforceable?

16. The Respondent submitted that the Agreement dated 7/11/2017 was enforceable as it defines the land being disposed of as Muungano/Sabatia Block 4. He also submitted that the Plaintiff was shown the



land, the subject of the Agreement as confirmed by the documentary evidence adduced during the hearing. He submitted that the Agreement was enforceable and that Muungano/Sabatia Block 4 is where the land is situated. He cited the case of *Kiplangat Arap Biator v Esther Tala Chepyegon* (2016) eKLR.

Whether the learned Magistrate erred in law and in fact by not appreciating that the Respondent has no title to the land referred in the agreement of 7th November 2017.

17. The Respondent submitted that the trial Magistrate did not err by ordering specific performance as the land the subject of the Agreement was in existence and the Appellant did not also complete the purchase price.

Whether the learned Magistrate misconstrued the evidence adduced as a result arrived at a wrong conclusion in the judgment.

18. On this limb, the Respondent submitted that there was nothing wrong in the learned Magistrate enforcing the agreement by ordering specific performance as the Land, the subject of the Agreement was in existence and the Appellant did not complete the purchase price,

Whether the learned Magistrate erred in law and in fact by not appreciating that the Respondent has no Title to the land referred in the agreement of 7th November 2017.

19. It was submitted by the respondent that the land the subject of the agreement is situated at Muungano/Sabati Block 4 area and is now known as Kiminini/Matunda Block 4/ Cheptarit/170 and 171. He submitted that the trial Magistrate did not err in her judgment.

Whether the learned Magistrate failed to analyse the Appellant's evidence and submissions by counsel and as a result arrived at a wrong conclusion?

20. On this last ground, the Respondent submitted that the learned Magistrate did not err as the issues raised in the Appellant's submissions were addressed in the analysis of the judgment by the trial court.

Analysis and Determination

21. I have dutifully re- evaluated the evidence adduced by the appellant and the Respondent as well as the witnesses contained in the record of appeal. I have also re-analysed the impugned judgment by the trial court and the submissions by their advocates. I now consider the five grounds of Appeal in one consolidated ground as follows-

Whether the learned trial Magistrate erred both in fact and law by allowing the Respondent's prayer for specific performance without evidence that would entitle the court to issue the orders sought against the Appellant?

22. It is not in dispute that the Appellant and the Respondent entered into an Agreement for the Sale of land dated 7th November, 2017. The said Agreement was produced by the plaintiff as P-Exhibit 1. The description of the property being sold is said to be a portion of land registered in the names of the vendor measuring one and a half acres to be hived from land parcel No. Muungano/Sabatia Block 4 registered in his name. The purchase price of the demised property was agreed at Kenya Shillings one million five hundred thousand (Kshs. 1,500,000/=). The vendor/seller acknowledged receipt of one million (Kshs 1000,000/=) on execution of the said Agreement. The balance of Kenya shillings five hundred (Kshs.500,000/=) was agreed to be paid within two months from the date of the Sale Agreement. The Plaintiff/Appellant in his testimony stated that he later made further payments



- towards the purchase price in the sum of Kenya shillings eighty thousand (Kshs 80,000/=) leaving a balance of Kenya shillings four hundred and eighty (Kshs 480,000/=)
22. From his witness statement dated 30/09/2019 which was adopted in his evidence, the Defendant/ Respondent confirmed that the portion of land he agreed to sell to the Plaintiff/Appellant is land measuring one and a half acres to be hived from land parcel No. Muungano/Sabatia Block 4 Measuring six acres. Contrary to the averments in the Sale Agreement, the Defendant stated in his testimony that the suit land parcel No. Muungano/Sabatia Block 4 was not registered in his name after all but the same belonged to one Jane Busienei. He produced a land Purchase Agreement between him and one Sabatia Khaemba for a different land being Plot no. 26 in Mungano Farm Measuring five acres. The Defendant/Respondent also produced Title Deeds for two other parcels of land being land parcel No. Kiminini/Matunda Block 4 Cheptarit /170 and Kiminini/Matunda Block 4/Cheptarit/171 Measuring 0.254 and 2.296 HA. respectively. It is clear from the Sale Agreement dated 7th November 2017 and produced as P-Exhibit 1 that the property being sold by the Respondent to the Appellant was land parcel No. Muungano/sabatia Block 4 Registered in his(Respondent's) name.
 23. The three parcels of land in the names of the Respondent being No. Kiminini/Matunda Block/ Cheptarit/170, Kiminini/Matunda Block/Cheptarit/171 and Mutation For Kiminini/Matunda Block 4/Cheptarit/81 are different from the one sold to the Appellant. A Land surveyor or any expert on land survey was not called as a witness to give any causal link or correlation between the three parcels and the demised land parcel No. Muungano/Sabatia Block 4.
 24. I therefore agree with the appellant that the trial Magistrate erred both in law and in fact by granting an order for specific performance without sufficient evidence.
 25. It is also clear from the Sale Agreement dated 7th November 2017 that contrary to the terms set out thereunder, the subject land parcel No. Muungano/Sabatia Block 4 was not registered in the name of the Seller, Micah Mugaka Nyairo as alleged. It was therefore erroneous to indicate that the parties were to appear before the relevant land Boards to effect transfer of the said portion into the name of the purchaser.
 26. The other issue of concern relates to Section 6(1) of the [Land Control Act](#) which provides as follows;

“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any part thereto.”
 27. Again Section 8(1) of the same [Act](#) provides that the High Court may, notwithstanding that the period of six months having expired extend that period where it considers that there is sufficient reason to do so, upon such conditions, if any, as it thinks fit. From the foregoing, it is clear that the sale agreement between the respondent and the Appellant has been voided by failure by the parties to seek and obtain consent of the land control board within six months from the date of the Agreement as prescribed by law.
 28. The transaction herein became void and the trial magistrate erred in ordering specific performance over a transaction that is void and therefore unenforceable. In the case of [Onyango & Another v Luwayi](#) (1986) KLR 513 where Nyarangi J (as he then was) held;

“The appellants admitted that no consent for the proposed transaction concerning agricultural land had been given by the divisional land control Board. The transaction was therefore for all purposes under section 6(1) of the [land control Act](#), Cap 302, because the transaction was not excluded by section 6(3). An application for consent in respect of the



proposed sale of the material parcel had to be made to the appropriate land control Board within six months of the making of agreement between Samson Luwayi and Javan Bulemi. No such application was made. That agreement therefore is of no effect and no question of specific performance can lawfully arise."

29. In yet another case of *Willy Kimutai Kitilit v Michael Kibet* (2018) KLR, the court held as follows;

"A contract for the sale of land to which the *land Control Act* applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the land control board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see section 9(2). The *land control Act* prescribes the time within which the application for consent should be made to the land control board but does not prescribe the time within which the land control board should reach a decision or the time within which any appeal should be determined. The process from the time of the making the application to the time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement and the provisions of section 7 of the *land control Act* for the recovery of the consideration is an indication that parliament intended that controlled land transactions should be concluded within a reasonable time."

30. I agree with the two decisions by the learned judges. It is clear from the evidence adduced before the trial court that no application for consent was made to the land control board within six months from the making of the Agreement and further no application was made for extension of time within which to apply for the consent of the land control board pursuant to the provisions of section 8(1) of the *land control Act*.

Section 7 of the *land control Act* provides as follows;

"If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this *Act*, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22."

31. Having carefully analysed and re-evaluated the extract of evidence adduced by the parties before the trial Magistrate, the provisions of the law and the authorities, I find that the judgment delivered by the trial Magistrate was based on misapprehension of the principles of law and against the weight of the evidence.

32. The upshot of my finding is that this Appeal is merited and the same is hereby allowed in the following terms;

1. The Judgment of the trial magistrate ordering for specific performance by the plaintiff/Appellant delivered on 4th October 2021 be and is hereby set aside
2. The said judgment is hereby substituted with an order allowing the Appellant's/plaintiff's claim for a refund of Kenya Shillings one million and eighty only (Kshs. 1,080,000/= plus interest at court rates from date of the Agreement on 7th November 2017 till payment in full.
3. The Defendant/Respondent is hereby condemned to pay the costs of this Appeal and of the lower court.

READ, DELIVERED AND SIGNED VIRTUALLY THIS 27TH FEBRUARY, 2023



HON. E C CHERONO

ELC JUDGE

In the presence of;

1. Mr Waswa H/B for Anwar for Respondent
2. Mr Nyamu for Appellant

