Kamau v Maelo (Civil Appeal 93 of 2020) [2025] KEHC 11545 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11545 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 93 OF 2020

HI ONG'UDI, J

JULY 31, 2025

BETWEEN

JOHN WACHIRA KAMAU ..... APPELLANT

AND

MICHAEL WANYONYI MAELO ..... RESPONDENT

(Being an appeal from the Judgment of Hon. F. Munyi (PM) in Nakuru Civil Case No. 512 of 2011, delivered on 30th April 2020)

JUDGMENT

1. This appeal arises from a judgment and Orders issued in Nakuru Chief Magistrate Court Civil Suit No. 512 of 2011. In the said suit, the appellant (who was the plaintiff) sued the respondent (who was the defendant) seeking judgment against the respondent for an order directing the defendant to sign and surrender all transfer forms and original title documents to plot no. Kiambogo/Kiambogo Block 2/14620. Additionally, the respondent prayed for general damages for breach of agreement and costs of the suit.

2. The appellant stated in the plaint that vide an agreement dated 30th May 2009, he bought all that parcel of land known as Kiambogo/Kiambogo Block 2/14620 from the respondent and duly paid the required purchase price. He stated that he moved into the said land and had been in occupation since then but the defendant had failed to transfer the same to him.

3. On his part the respondent filed a defence where he denied the claim by the appellant and instead filed a counterclaim for kshs. 96,000/= against the appellant for breach of the agreement dated 30th May 2009.

4. The matter was fully heard and the trial magistrate delivered Judgment on 30th April, 2020 dismissing the appellant's suit with costs to the respondent.

5. Being aggrieved with the judgment the appellant lodged the appeal dated 26th May, 2020 on the following grounds:

i. The trial magistrate erred in fact and in law, in failing to hold the respondent culpable for breach of the sale agreement terms by terminating the sale agreement without notifying the appellant.

ii. The trial magistrate gravely erred in fact and in law, in holding that the appellant was not entitled to specific performance of the sale agreement dated 30th May, 2009 despite overwhelming evidence tendered by the appellant.

iii. The trial magistrate erred in law and in fact in finding that Charles Mwai was an agent of the appellant.

iv. The trial magistrate erred in law and in fact in relying on an agreement dated 26th July, 2011 and which agreement was done in the absence of the respondent which finding was fallacious in the circumstances.

v. The trial magistrate erred in law and in fact in failing to find that the respondent had prior agency relationship with Charles Mwai.

vi. The trial magistrate totally ignored the weighty submissions made by the appellant resulting to misapprehension of the law and wrong conclusion.

6. The appellant urged the court to allow the appeal and proceed to set aside the judgment delivered on 30th April 2020. He also prayed for the costs of the appeal.

7. The Appeal was canvassed through written submissions.

Appellant's submissions

8. These were filed by Frank Mwangi & company advocates and are dated 25th February, 2025. Counsel identified four issues for determination by this court.

9. The first issue is whether the trial magistrate erred in fact and in law in failing to hold the respondent culpable for breach of the sale agreement terms by terminating the sale agreement without notifying the appellant. Counsel submitted that it was an expressed provision of the sale agreement that the sale was subject to the Law Society conditions of sale (1989) which mandated the respondent to issue the appellant with a completion notice 21 days before terminating the contract. He urged the court to find that the respondent was in breach of the sale agreement having acted illegally and unlawfully by terminating the contract without informing him.

10. He placed reliance on the decision in Joseph Mutua Muinde & another v Geoffrey Kithuka Mwangangi & another [2018] KEELC 4387 KLR where the court held as below in regards to completion notice.

> " In any event, even if the defendants are the ones who are in breach of the sale agreement, the plaintiffs cannot rescind the agreement of sale before service on the defendants the requisite completion notice as provided for under Clause 4 of the Law Society Conditions of Sale (1989). It is only upon service of a completion notice that it shall become a term of the contract that the transaction shall be completed within twenty-one (21) days of service and, in respect of such period, time shall be of the essence of the contract. Having not done so, I find that the suit was nonstarter ab initio."

11. On the second issue on whether the trial magistrate erred in fact and in law in finding that Charles Mwai was the appellant's agent, counsel submitted that there was no agent-principal relationship between him and the said agent and no evidence was produced to prove that fact. He cited section 107 (1) (2)

of the *Evidence Act*, the decision in Heifer Project International v Forest City Export Services Limited & Another [2017] KEHC 7834 (KLR) and urged the court to find that the trial magistrate erred in law and fact in finding Charles Mwai to be the appellant's agent.

12. The third issue is whether the appellant is entitled to specific performance of the sale agreement dated 30th May 2009. Counsel submitted that it was common ground between the parties that the sale agreement dated 30th May 2009 was a valid contract entered into freely between the parties. Thus, specific performance was an appropriate remedy in this instance as the suit parcel was still available. Further, the grant of the said remedy was unlikely to cause hardship to the respondent.

13. Lastly, on whether the appeal should be allowed with costs, counsel submitted in the affirmative and urged the court to set aside the trial court's decision.

Respondent's submissions

14. These were filed by Geoffrey Otieno & company advocates and are dated 5th May, 2025. Counsel identified three (3) issues for determination by this court.

15. On the first issue on whether the trial magistrate erred in law and fact in finding that Charles Mwangi was the appellant's agent, counsel submitted that the respondent stated in the trial court that Charles Mwai Mwangi approached him stating that he was the appellant's relative and was interested in buying the subject land. He signed the agreement on behalf of the appellant and even paid the first instalment as was agreed.

16. Counsel stated that the respondent refunded kshs. 300,000/= to the agent. He also took his title deed and rescinded the agreement. He placed reliance on Halsbury Law of England 4th Volume 1 (2) at paragraphs *19* and *20* which states as follows;

> "A principal agency relationship is created by the express or implied agreement of principal and agent or by ratification by the principal of the agent's acts done on his behalf. Express agency is created where the principal or some person authorized by him, expressly appoints the agent whether by deed, by writing under hand or orally. Implied agency arises from the conduct or situation of parties."

17. Regarding the second issue, on whether the trial magistrate erred in law and fact in finding that the appellant was not entitled to specific performance, counsel submitted that the agreement was frustrated by the acts of the appellant in breaching the terms of the agreement being payment of the balance within 90 days. Thus, the respondent rescinded the sale agreement due to the delay in the payment of the balance of the purchase price by the appellant.

18. He referred to the decision in Sagoo v Sagoo [1983] KLR 365 where the Court of Appeal held as follows;

> "The Law Society Conditions of Sale provides that it is only upon the payment of the purchase price that the vendor could be required to execute a conveyance and deliver to a purchaser.....the appellants never became entitled to ask the respondents to execute the conveyance because they never proferred to the respondents the balance of the purchase money..."
>
> See also;
>
> Ngere Tea Factory Ltd v Alice Wambui Ndone [2018] eKLR

19. Lastly, counsel urged the court to dismiss the appeal with costs to the respondent.

Analysis and Determination

20. I have considered the record of appeal, grounds of appeal as well as the submissions and the authorities relied on by the parties. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own independent conclusion. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated 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-analyze 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."

21. The law is clear that this court as an appellate court will only interfere with the decision of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held as follows;

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

22. The appellant through his counsel argued that the trial magistrate erred in fact and in law in failing to hold the respondent culpable for breach of the sale agreement terms by terminating the sale agreement without notifying the appellant. Further, that the trial magistrate erred in law and fact in finding Charles Mwai to be the appellant's agent yet no evidence was produced to prove that fact. During trial PW1 testified that in 2009 the respondent sold him a plot known as Kiambogo/2/14/260, they entered into an agreement on 30th May 2009 and the purchase price was kshs. 480,000. He paid kshs 300,000 through the respondent's agent Dalic Imex Company and he acknowledged the payment. The balance of the purchase price kshs. 180,000/= was to be paid within ninety (90) days and he also paid the same through the agent on 1/8/2009. He stated that the respondent's claim that he did not complete paying the purchase was false.

23. Upon cross examination, PW1 confirmed that he did not know the respondent before they came to court and he also had no document to show that money was paid to him. He further confirmed that money was paid to Charles Mwai and that Dalix Imex company did not appear to testify in court.

24. On re-examination, he stated that the respondent was a party to the agreement and him together with Charles Maina signed the said agreement.

25. PW2 Charles Njoroge testified that he introduced the plaintiff to Dalix Imex company who had sold land to him before. He stated that the plaintiff was interested in purchasing the land adjacent to his and they got into an agreement with Dalix.

26. On cross-examination he stated that he introduced the plaintiff to Charles Mwangi though he did not take part in the transaction

27. The respondent on his part argued that Charles Mwai Mwangi approached him stating that he was the appellant's relative and was interested in buying the subject land. He also signed the agreement on behalf of the appellant and even paid the first instalment as was agreed. However, the agreement was

frustrated by the acts of the appellant in breaching the terms of the agreement. Thus, the respondent rescinded the sale agreement due to the delay in the payment of the purchase price balance.

28. During trial at the lower court the respondent testified as DW1, he stated that he met Charles Mwai in 2009 and he informed them that the appellant who is his relative wished to purchase their land (Kiambogo/Kiambogo block 2/14620). Mr. Mwai bargained the price on behalf of the appellant, he also prepared the sale agreement dated 30th May 2009 and the respondent was paid kshs. 300,000/= upon its execution.

29. He further stated that the balance of the purchase price was never paid, so after the lapse of ninety (90) days they called Charles and they agreed that he refunds the kshs. 300,000/=. Upon refunding the said amount Charles gave him back the title deed. Furthermore, that Mr. Charles Mwai was not his agent and that in the sale agreement dated 26th July 2011, Mr. Mwai admitted to having received kshs. 300, 000/= for onward transmission to the appellant. He added that he was not a director of Dalix Imex company and he did not breach the agreement between him and the appellant.

30. DW2 testified that she had never met with the appellant and that Mr. Mwai was acting on his behalf in the purchase of land parcel number Kiambogo/Kiambogo 2/14620 from her husband (the respondent). She added that they complied with terms of the agreement but the appellant did not and so the respondent decided to refund the kshs. 300,000/= which was the only money paid to him.

31. The trial magistrate in his judgment noted that the agreement between the appellant and the respondent was frustrated by the actions of the agent and so the appellant was not entitled to the orders sought. He therefore dismissed the suit with costs to the respondent. Additionally, the counterclaim by the respondent was equally dismissed.

32. Upon perusal of the evidence tendered before the trial court, this court notes that it is not disputed that the appellant was a willing buyer and the respondent a willing seller. However, the land transaction was done by an agent whom they both denied to having appointed.

33. There is no doubt that there was no direct engagement between the appellant and the respondent since both of them relied on a third party. Other than the sale agreement which indicates the appellant as the buyer and the respondent as the seller, nothing else shows that the land in question was sold to the appellant by the respondent. The appellant does not deny that he dealt with Charles Mwai whom he thought was an agent of the respondent. However, he failed to adduce any evidence that Mr. Mwai was indeed an agent of the respondent. Further, a look at the agreement (PEXH 1) which was produced in court by the appellant in support of his claim I note that against the appellant's name there is a signature and a stamp by Dalic Imex company. It is the same company that the appellant claims to have paid the purchase price to and he was issued with receipts (PEXH 2). In my view, the same is not sufficient proof that the appellant bought land from the respondent since the execution was done by a different person other than the appellant. He also does not deny having made payments to Dalic Imex Company and not directly to respondent who denies owning or being in any association with the said company. He equally did not adduce any evidence to the contrary. There was no one called from Dalic Imex company to come and support the appellant's claim.

34. The burden of proof in a civil case is generally cast upon the plaintiff (respondent). This is well illustrated under Section 107 (1) of the *Evidence Act* Cap 80 of the Laws of Kenya which provides:

> "(1) Whoever desires any Court to give judgment as to any legal right or liability on the existence of facts which he asserts must prove those facts exists. (2) When

a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

35. The Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others [2014] eKLR, in distinguishing between legal and evidential burden held inter alia;

> " The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue".

36. The legal burden was on the appellant to demonstrate that he had bought land from the respondent and that it was the respondent who had failed or refused to transfer the same to him.

37. Having observed as above it is this court's considered opinion that the appellant failed to prove his case on a balance of probabilities.

38. The respondent filed a counter claim for Ksh 96,000/= being payment of the sale price. It is not clear on what grounds he was claiming the said amount when he had not given the land to the appellant. The agreement having been frustrated he had no right to claim the amount. The trial Magistrate was right in dismissing the counter claim.

39. The upshot is that the appeal lacks merit and is hereby dismissed. The lower court Judgment is upheld. Each party to bear his own costs for the appeal.

40. Orders accordingly.

DELIVERED VIRTUALLY DATED AND SIGNED THIS 31ST DAY OF JULY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE