



REPUBLIC OF KENYA



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Kayo v Nkolope; Ketere (Interested Party) (Environment and Land Appeal 15 of 2021) [2023] KEELC 15769 (KLR) (21 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15769 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 15 OF 2021
EM WASHE, J
FEBRUARY 21, 2023
(FORMERLY NAROK ELC APPEAL NO. 9 OF 2019)

BETWEEN

EMMANUEL LEKAKENY KAYO APPELLANT

AND

OLELIMPASO SAITOTI PETER NKOLOPE RESPONDENT

AND

NENKOKO NONKIPA KETERE INTERESTED PARTY

(An appeal challenging the judgement by Hon. Robert M. oanda (PM) dated 27th June 2019 in Kilgoris PM ELC Case No. 34 of 2019.)

JUDGMENT

1. The Appellant herein filed a Memorandum of Appeal dated 8th July 2019 (hereinafter referred to as “the Appeal”) challenging the judgement of Hon. Robert Moanda (PM) pronounced on the 27th June 2019 (hereinafter referred to as “the Trial Court Judgement”) in the proceedings known as Kilgoris PM ELC Case No. 34 of 2019 (hereinafter referred to as “the Trial court proceedings”).
2. The grounds for Appeal against the Trial Court Judgement are outlined as follows; -
 - i. That the Learned Trial Magistrate erred in law in ordering specific performance of land reference L.R.NO. TRANSMARA/OLOMISMIS/769 instead of L.R.NO.TRANSMARA/OLOMISMIS/491.
 - ii. That the Learned Trial Magistrate erred in law and fact in ordering specific performance where the Respondent was in breach of the Sale Agreement having not paid the full purchase price.



- iii. That the Learned Trial Magistrate erred in law in conferring da benefit to the Respondent in outright disregard of Section 6 (1) of the [Land Control Act](#) (Cap 302) Laws of Kenya.
- iv. That the Learned Trial Magistrate erred in law in granting a permanent injunction against L.R.NO. TRANSMARA/OLOMISMIS/769 when the same was not available from the contract executed between the parties.
- v. That the Learned Trial Court misdirected himself by finding that the Sale Agreement gave the Respondent rights which were not stipulated therein.
- vi. That the Learned Trial Magistrate misdirected himself by finding that the Applicant had not taken any steps towards performing the Contract.
- vii. That the Learned Trial Magistrate erred in law in arrogating to the Court the duty to take counts, which was not prayed for.
- viii. That the Learned Trial Magistrate erred in law by ordering penalties spelt out in Clause 7 of the Sale Agreement without pleadings and a prayer in the Plaint.
- ix. That the Learned Trial Magistrate erred in law in overlooking the fact that L.R.NO. TRANSMARA/OLOMISMIS/769 was subject to succession at the time of the sale.
- x. That the Learned Trial Magistrate erred in law in overlooking the fact that the only remedy open to the Respondent was refund of the deposit which in any event had not been prayed for.
- xi. That the Learned Trial Magistrate erred in law and fact by failing to find the Sale Agreement was indeed breached by the Respondent.
- xii. That the Learned Trial Magistrate erred in law in failing to find that there was no alternative plea for refund of the purchase price.
- xiii. That the Learned Trial Magistrate erred in law in failing to find that the Sale Agreement was null and void in terms of Section 6 (1) of the [Land Control Act](#).
- xiv. That the Learned Trial Magistrate failed to consider the law governing the Sale of Land and the [Land Control Act](#) in controlled transactions.
- xv. That the learned Trial Magistrate did not take into account the Appellant's evidence, submissions and the law in his determination of the suit.
- xvi. That the learned Trial Magistrate erred in law by determining issues not pleaded and grounds not submitted.
- xvii. That the Learned Trial Magistrate failed to consider the authorities submitted guiding the ownership of the property and specific performance.

3. At the end of the grounds pleaded in the Appeal, the Appellant sought the Court to set-aside the Trial Court Judgement with costs.



4. It is also important that the Court outlines the Trial Court Judgement and the subsequent Decree for ease of reference; -
 - a. A permanent injunction is hereby issued restraining the Defendant either by himself, agents, assigns and/or whomsoever is claiming through him from alienating, selling, transferring and or leasing and interfering the Plaintiff's possession, occupation and the use of the Ten (10) acres on L.R.NO. TRANSMARA/OLOMISMIS/769 sold to the Plaintiff pursuant to the Sale Agreement dated 29th October 2013.
 - b. The Defendant herein within Sixty (60) days from the date of this judgement to transfer to the Plaintiff Ten(10) acres of land from the suit property subject to the following terms;-
 - i. The Plaintiff within Thirty (30) days from this day to pay to the Defendant the un-disputed sum of KShs 62,170/- to the Defendant.
 - ii. The disputed balance of the Purchase Price to be subject of audit by the Court, upon completion of the process and any sum that shall be found due to be paid by the defaulting party, with interest as shall be determined by this Court.
 - c. In default thereof, penalties spelt out in the Clause 7 of the Agreement dated 29th October 2013 to be effected and execution to issue.
 - d. Each party to bear its own costs.
5. The Trial Court proceedings were initiated by the Respondent through a Plaint dated 7th of December 2015 (hereinafter referred to as "the Plaint") seeking for the following Orders; -
 - i. An Order of permanent injunction restraining the Defendant either by himself, agents, assigns and/or whomsoever is claiming through him from alienating, selling, transferring and/or leasing and interfering with the Plaintiff's possession, occupation and use of the ten (10) acres of L.R.NO. TRANSMARA/OLOMISMIS GROUP RANCH/769 sold to the Plaintiff pursuant to Sale Agreement dated 29th October 2013.
 - ii. An Order of specific performance compelling the Defendant to take all necessary legal steps to transfer Ten (10) acres being part of all that parcel of land known as L.R.NO. TRANSMARA/OLOMISMIS GROUP RANCH/769.
 - iii. In the alternative to (b) above, the Defendant be held to be in breach of specific terms of agreement and be condemned to penalties spelt out under Clause 7 of the Agreement dated 29th October 2013.
 - iv. Costs of the suit and incidentals thereto to the Plaintiff.



6. The Plaintiff was accompanied with other documents which included (i) A List of Witnesses dated 7th December 2015 (ii) the substantive witness statement from the Respondent (iii) A List of Documents dated 7th December 2015 together with copies of the documents as well.
7. The Plaintiff was then duly served on the Appellant who entered appearance on the 21st of December 2015 and thereafter filed their substantive Defence dated 6th January 2016 (hereinafter referred to as “the Defence”) on the 7th of January 2016.
8. The hearing at the Trial Court commenced on the 24/01/2019 with the evidence of the Respondent.
9. The Respondent first and foremost adopted his witness statement as Plaintiff Exhibit 1.
10. The Respondent testified that he had accepted to buy a portion measuring Ten (10) Acres on the property known as L.R.NO. TRANSMARA/OLOMISMIS/491 offered by the Appellant.
11. The Respondent confirmed his acceptance to the offer by the Appellant and an Agreement For Sale was duly prepared and executed.
12. The value for the portion of Ten (10) Acres to be purchased by the Respondent was KShs 750,000/-.
13. Later on, the Respondent discovered that the portion of Ten (10) Acres which he had purchased was actually within the property known as L.R.NO. TRANSMARA/OLOMISMIS/769 and not the original number known as L.R.NO. TRANSMARA/OLOMISMIS/491.
14. Be as it may, the Respondent testified that he paid the following amounts to the Appellant as part of the purchase Price.
 - i. A sum of Kenya Shillings 100,000/- on execution of the Agreement for Sale.
 - ii. A further sum of Kenya Shillings 250,000/-
 - iii. A further sum of Kenya Shillings 100,000/
 - iv. A last payment of Kenya Shillings 187,830/- through M-pesa.
15. The Respondent then produced various documents to confirm the payments done to the Appellant.
16. According to the Respondent, the only outstanding amount to the Appellant was Kenya Shillings 62,170/-.
17. As regards possession, the Respondent testified that the Appellant had granted him partial possession of the 10 Acres which he accepted and occupied.
18. However, subsequently thereafter, the Appellant refused to undertake the sub-division of the original property and hand over the entire portion of Ten (10) acres purchased.
19. The Respondent’s prayer to the Trial Court was that the Appellant should either yield possession of the entire Ten (10) Acres purchased or refund the Purchase Price paid plus the costs.
20. The Respondent was then cross-examined by the Appellant’s advocate.
21. The Respondent confirmed that indeed there was an Agreement for Sale between the Appellant and the Respondent.
22. The Respondent informed the Court that he made the initial payment of Kenya Shillings 100,000 on the 29/10/2013 and continued to make payments in line with the terms of the Contract.



23. The Respondent further stated that the second payment was done on the 16/4/2014 before the advocate that had prepared the Agreement For Sale.
24. The Respondent reiterated that according to the Agreement For Sale, if any party was in breach of the same, then a sum of Kenya Shillings 5,000,000/- was payable as damages.
25. The Respondent indicated to the Court that the entire purchase price was payable by 15/02/2014 but there was no specific date the last payment was to be done.
26. The Respondent nevertheless stated that he was in partial occupation of the Ten (10) acres purchased from the Appellant.
27. However, the Respondent informed the Court that the portion he occupies is a property that is subject to a litigation known as Kisii High Court Civil Case No. 539 of 2015.
28. In concluding the cross-examination, the Respondent reiterated that he had paid part of the purchase price through the M-pesa platform and did not want a refund of the purchase price.
29. In Re-examination, the Respondent informed the Court that he had made an Application in the proceedings known as Kisii High Court Civil Case No. 539 of 2015.
30. Similarly, the Respondent reconfirmed that he had made the second payment on 17/02/2014.
31. The Respondent's testimony was that the Appellant continued to receive the purchase price even after the completion date and therefore both parties were in breach of the Agreement For Sale.
32. After this brief Re-examination, the Respondent then closed his case.
33. When the Appellant was called to mount his defence, the Respondent's Counsel objected to the Trial Court taking his evidence on the basis that no witness statement had been prepared in advance.
34. Consequently therefore, the Appellant's Counsel simply adopted the Defence filed in Court and requested to be given a date for submissions.
35. The Respondent then filed his submissions dated 11th February 2019 while the Appellant filed his dated 31st January 2019.
36. The Trial Court then delivered its judgement on the 27th June 2019
37. However, during the pendency of this Appeal, one Nenkoko Nonkipa Ketele made an application to be joined as an Interested Party in this Appeal for the reason that the outcome of this Appeal would affect him as the registered owner of the property known as property known as L.R.NO. TRANSMARA/OLOMISMIS/769.
38. The Application by Nenkoko Nonkipa Ketele was allowed pursuant to the Ruling dated 19th September 2022.
39. The Interested Party then filed their submissions dated 22nd November 2022.
40. The Court upon considering the pleadings filed in the Trial Court, the proceedings thereof, the Memorandum of Appeal filed herein as well as the submissions of all the parties in this Appeal, it is of the considered opinion that the issues for determination are as follows; -
 - i. Which property did the appellant offer to the respondent for sale?



- ii. Is there a valid agreement for sale for the said property between the appellant and respondent?
 - iii. Has the appellant breached any part of the said agreement for sale?
 - iv. Has the respondent breached any part of the said agreement for sale?
 - v. What are the remedies available to the parties of the agreement for sale between the appellant and respondent?
 - vi. Who bears the costs of the suit & appeal herein?
41. The Court having identified the various issues mentioned hereinabove, it will now proceed to discuss the same below and make its necessary determination thereof.

Which property did the appellant offer to the respondent for sale?

42. The Respondent herein placed before the Trial Court a copy of the Agreement For Sale dated 29th October 2013 through the List of Documents dated 7th December 2015 establishing his relationship with the Appellant.
43. According to the description provided in the Agreement For Sale dated 29th October 2013, the property being offered for Sale by the Appellant was a portion of Ten (10) Acres within Parcel No. TRANSMARA/OLOMISMIS GROUP RANCH/491 later issued with a title known as L.R.NO. TRANSMARA/OLOMISMIS/491.
44. The Agreement For Sale dated 29th October 2013 was duly executed by the Appellant and the Respondent and their signatures witnessed by their Advocate S.M.Sagwe.
45. The Respondent after the execution of this Agreement For Sale dated 29th October 2013 was allowed partial occupation of the portion he had purchased from the Appellant.
46. However, the Respondent informed the Court that later on, he discovered that the portion which the Appellant had allowed him possession was actually not on the property offered in the Agreement For Sale dated 29th October 2013 but was actually in the property known as TRANSMARA/OLOMISMIS/769.
47. The only available document for this Court to consider on behalf of the Appellant is the Defence dated 6th January 2016 and filed on the 7th of January 2016.
48. The Appellant's Defence did not include any list of witness(es), their substantive witness statements and list of documents.
49. In addition to the above, the Appellant did not also testify in the Trial Court as expected.
50. Be as it may, the Defence by the Appellant does not deny the existence of the Agreement For Sale dated 29th October 2013.
51. This in the Court's considered view confirms that the Appellant offered to sale a portion of the property known as L.R.NO. TRANSMARA/OLOMISMIS/491.
52. So far, this Court has not been supplied with either an amended Agreement For Sale or an addendum of the Agreement for Sale dated 29th October 2013 rectifying and/or altering the property offered for Sale by the Appellant through the Agreement For Sale dated 29th October 2013.



53. In conclusion therefore, the Court is of the finding that the property offered for Sale by the Appellant to the Respondent was L.R.NO. TRANSMARA/OLOMISMIS/491.

Is there a valid agreement for sale for the said property between the appellant and respondent?

54. The Court having identified the correct property offered by the Appellant for Sale to the Respondent, the next question is whether or not the Agreement For Sale was indeed valid and binding.

55. The Black's Law Dictionary defines a contract as follows: -

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

56. The Agreement between the two or more parties must demonstrate four cardinal ingredients to make it legally binding.

57. In the Court of Appeal case known William Muthee Muthami-versus- Bank Of Baroda (2014) eKLR, the Court held as follows; - -

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”

58. The fourth cardinal ingredient is found in Section 3 (3) of the Law of Contract, Cap 23 as amended in 2003 which provides as follows; -

“No suit shall be brought upon a contract for the disposition of an interest in land unless; -

a. The contract upon which the suit is founded: -

i. Is in writing

ii. Is signed by all the parties thereto; and

The signature of each party signing has been attested by a witness who is present when the Contract was signed by such a party.”

59. Turning to the Agreement For Sale dated 29th October 2013, the Court has thoroughly gone through the same and confirms that indeed, there was an Offer by the Appellant to sell a portion of Ten (10) acres on the property known as L.R.NO. TRANSMARA/OLOMISMIS/491 which offer was accepted by the Respondent executing the said Agreement For Sale dated 29th October 2013.

60. The Consideration for the portion measuring Ten (10) acres within the property known as L.R.NO. TRANSMARA/OLOMISMIS/491 was agreed at Kenya Shillings 750,000/-.

61. The entire transaction was reduced into writing in compliance with Section 3 (1) and (3) of the [*Law of Contract Act*](#), Cap 23 Laws of Kenya.

62. In essence therefore, the Court herein makes a finding that indeed the Agreement For Sale dated 29th October 2013 is lawful and binding between the Appellant and the Respondent.

Has the appellant breached any part of the said agreement for sale dated 29th october 2013?

63. The Respondent herein instituted a suit in the Trial Court through the Complaint dated 7th December 2015.



64. The Respondent in the Plaint alleged two broad omissions, defaults and/or breaches occasioned by the Appellant namely; -
- i. The Appellant failed to give vacant possession of the entire portion of Ten (10) acres on the property known as L.R.NO. TRANSMARA/OLOMISMIS/769 to the Respondent.
 - ii. Despite the Respondent paying a substantive part of the purchase price agreed, the Appellant has refused to have the portion of Ten (10) acres excised from the property known as L.R.NO. TRANSMARA/OLOMISMIS/769 and thereafter facilitate the completion documents.
65. The Appellant through its Defence dated 6th January 2016 has denied any omission, default or breach of the Agreement dated 29th October 2013 and responded as follows; -
- I. The Appellant pleaded that he had some interest only in the property known as L.R.NO. TRANSMARA/OLOMISMIS/491.
 - II. The Agreement For Sale dated 29th October 2013 was in regards to the property known as L.R.NO. TRANSMARA/OLOMISMIS/491.
 - III. The Respondent had failed to settle the entire purchase price of Kenya shillings 750,000/- by 15/02/2014 as provided in the Agreement For Sale dated 29th October 2013.
 - IV. The Appellant disputed the Respondents allegation that he was the one who placed the Appellant in possession of a portion of land within the property known as L.R.NO. TRANSMARA/OLOMISMIS/769.
 - V. The purported purchase and/or acquisition of Ten (10) Acres either within the properties known as L.R.NO. TRANSMARA/OLOMISMIS/491 or L.R.NO. TRANSMARA/OLOMISMIS/769 were null and void *ab initio* for the reason that the consent by the Registrar of Group Ranches or the Group Representatives were not obtained.
66. Referring to the Agreement For Sale dated 29th October 2013, the Appellant who was the Vendor of the property known as L.R.NO. TRANSMARA/OLOMISMIS/491 had certain legal obligations once the same was executed.
67. The first obligation was to excise and demarcate the portion of Ten (10) Acres sold to the Respondent within the property known as L.R.NO. TRANSMARA/OLOMISMIS/491.
68. Secondly, the Appellant was required in law to prepare the relevant completion documents for the portion of Ten (10) Acres sold to the Respondent to transfer proper title for value.
69. Indeed, Clause 4 of the Agreement For Sale dated 29th October 2013 specifically provides for this obligations on the Appellant.
70. However, the Appellant in the Defence dated 6th January 2016 seems to now go back on his intention to abide by the terms of the Agreement For Sale dated 29th October 2013 by alleging that the entire transaction lacked the Land Control Board Consent as required in the [Land Control Act](#), Cap 302.
71. Similarly, the Appellant is also further indicating under paragraph 14 of the Defence that the said transaction was null and void *ab initio* for lack of consents from either the Registrar of Group Ranches or the local Group Representatives.



72. It is important even before we analyse this issue of omissions, defaults and breaches that the property known as L.R.NO. TRANSMARA/OLOMISMIS/769 was never a subject matter of the Agreement For Sale dated 29th October 2013.
73. Consequently therefore, any obligations arising from the Agreement For Sale dated 29th October 2013 squarely affected the property known as L.R.NO. TRANSMARA/OLOMISMIS/491.
74. Turning to the Agreement For Sale dated 29th October 2013, the paragraph that describes the Appellant as the Vendor reads as follows; -
- “Whereas the vendor is a sucesor owner of a piece of land known as L.R.NO. TRANSMARA/OLOMISMIS GROUP RANCH/491 within the republic of kenya and whereas the vendor is desirous and willing to sell a portion of out of the main proeprty measuring approximately ten (10) acres and whereas the purchaser is also desirous and willing to purchase the same.”
75. The use of the words “The Vendor Is A Successor Owner” creates the impression that the Appellant was not the legal owner of the property known as L.R.NO. TRANSMARA/OLOMISMIS GROUP RANCH/491 which was later titled as L.R.NO. TRANSMARA/OLOMISMIS/491.
76. The Court recognises that indeed maybe the Appellant had an interest in one way or the other in the property known as L.R.NO. TRANSMARA/OLOMISMIS GROUP RANCH/491 and later titled as L.R.NO. TRANSMARA/OLOMISMIS/491, but the exclusive capability and/or authority to deal with and/or alienate ownership rights to the Respondent is definitely in doubt.
77. The Appellant has not produced any ownership documents either as a member of Olomismis group ranch duly registered and entitled to be registered as the beneficial owner of the property known as L.R.NO. TRANSMARA/OLOMISMIS GROUP RANCH/491 now titled as L.R.NO. TRANSMARA/OLOMISMIS/491 or a copy of the Title Deed duly registered in his name.
78. The Court is therefore not surprised to see that the Appellant is now bring in the issue of the Consent from the Registrar of the Group Ranches and/or the Group Representatives.
79. Strictly speaking, the obligation to secure and/or obtain the consents from the Registrar of Group Ranches and/or the Group Representatives squarely fall on the Appellant to obtain the same even before approaching the Respondent and/or any other willing purchaser and executing an Agreement For Sale thereof.
80. Secondly, the purported requirement of obtaining the Consents from the Registrar of Group Representatives as well as the Group Representatives re-emphasize the position that the Appellant at the time of executing the Agreement For Sale dated 29th October 2013 did not have the appropriate capacity and/or legal ownership to alienate any lawful interests over the property known as L.R.NO. TRANSMARA/OLOMISMIS GROUP RANCH/491 and now titled as L.R.NO. TRANSMARA/OLOMISMIS/491.
81. Consequently therefore, the Appellant herein despite executing the Agreement For Sale dated 29th October 2013 and receiving a substantive part of the purchase price was not and did not demonstrated his capacity and/or legal ownership to be able to alienate lawful rights as expected in the Agreement For Sale dated 29th October 2013.



82. In actual sense, the Appellant under Paragraph 14 of the Defence dated 6th January 2016 deems the entire Agreement For Sale dated 29th October 2013 null and void abinitio hence incapable of completion.
83. Looking at the totality of the above facts, the Court herein finds that the Appellants misrepresented material facts to the Respondents in terms of his capability and/or legal ownership of the property known as L.R.NO. TRANSMARA/OLOMISMIS GROUP RANCH/491 now titled as L.R.NO. TRANSMARA/OLOMISMIS/491 as well as his ability to grant vacant possession which is in breach of Clauses 3 and 4 of the Agreement for Sale dated 29th October 2013.

Has the respondent breached any part of the said agreement for sale dated 29th october 2013?

84. The Appellant herein in the Defence dated 6th January 2016 pleaded that the Respondent was in breach of the Agreement For Sale dated 29th October 2013 principally for failing to liquidate the full purchase price by 15/02/2014.
85. According to the Appellant, the Respondents only made payment of Kenya Shillings 500,000/- by the 15/02/2014 out of the expected Kenya Shillings 750,000/-.
86. The Respondent's response is that the total amount paid to the Appellant based on the Agreement For Sale dated 29th October 2013 was Kenya Shillings 687,830/-.
87. Whichever way you look at it, the Court takes note that the Respondent made efforts to liquidate the purchase price agreed in the Agreement For Sale dated 29th October 2013 to the Appellants.
88. However, the Appellant being incapable of transmitting lawful ownership rights and/or even possession of the property known as L.R.NO. TRANSMARA/OLOMISMIS GROUP RANCH/491 now titled as L.R.NO. TRANSMARA/OLOMISMIS/491 as provided in Clauses 3 & 4 of the Agreement For Sale dated 29th October 2013, then it would be irresponsible to the Respondent to continue making payment for a property that he will never take possession or acquire lawful proprietary rights from the Appellant.
89. The first logical step to take by the Respondent is to withhold any further payment until the dispute is resolved.
90. The Respondents actions to withhold the balance of the purchase price under the Agreement For Sale dated 29th October 2013 while the dispute is being adjudicated by the Court can not be deemed to be a default in view of the issues for determination.
91. In conclusion therefore, the Court is of the view that the Respondent is not in breach of the Agreement For Sale dated 29th October 2013.

What are the remedies available to the parties of the agreement for sale between the appellant and respondent?

92. The Court having made a finding that the Appellants are in breach of the Agreement For Sale dated 29th October 2013, the issue for determination in this issue is what are the available remedies available to the Respondent herein?



93. According to Clause 7 of the Sale of Agreement dated 29th October 2013, the Appellant and the Respondent agreed as follows; -

“That any party which shall make breach of this Agreement shall be liable to pay damages to the innocent party for KShs 5,000,000/- (Five Million Kenya Shillings) apart from refunding the purchase price herein shall the defaulting party be the vendor and this purchase price herein starts to attract interest of 30% per annum with effect from the date hereof shall the vendor opt to breach this Agreement.”

94. It therefore goes without saying that the terms provided in this Clause will also be binding on the Appellant as the Vendor in the Agreement For Sale dated 29th October 2013.

95. The first aspect in the default clause is the refund of the purchase price.

96. According to the Respondent, the amount paid to the Appellant is Kenya Shillings 687,830 made as follows; -

- i. A sum of KShs 100,000/- paid on the 29/10/2013.
- ii. A sum of KShs 250,000/- paid on the 17/02/2014
- iii. A sum of KShs 150,000/- paid on the 19/05/2014
- iv. M-pesa payments of KShs 187,830/- made on 03/01/2014 and 02/04/2015.

97. The Appellant confines receipt of Kenya Shillings 500,000/- in his Defence dated 6th January 2016 but denies the M-pesa payments amounting to Kenya Shillings 187,830/-

98. The Respondent has adduced a copy of this M-pesa Statement from Safaricom which shows various transfers as follows; -

- i. 21/12/2014- KShs 5,000/-
- ii. 11/12/2014-KShs 25,000/-
- iii. 06/11/2014-KShs 20,100/-
- iv. 26/10/2014-KShs 5,050/-
- v. 15/02/2014-Kshs 3,000/-
- vi. 01/05/2014-KShs 9,000/-
- vii. 06/08/2014-KShs 2,040/-
- viii. 04/08/2014-KShs 3,030/-
- ix. 18/10/2014-KShs 15,100/-
- x. 07/02/2015-KShs 7,000/-
- xi. 20/01/2015-KShs 15,000/-
- xii. 02/04/2015-KShs 10,000/-
- xiii. 26/11/2014-KShs 5,030/-
- xiv. 17/11/2014-KShs 20,000/-



xv. 09/01/2014-KShs 3,050/-

Total = Kshs147,400/=

99. The Appellant herein has not filed any documents to dispute receiving the above-mentioned transfers into his cell-phone number as his name appears on the said statement.
100. The net-effect therefore is that the above amounts were duly transferred to the Appellant's cell phone and duly received thereof.
101. The total amount indicated in the M-pesa Statements is KShs 147,400/-.
102. In essence, the total purchase price paid by the Respondent to the Appellant is a sum of KShs 647,400/- which is now refundable.
103. As earlier held, the Appellant herein is in breach of the Agreement For Sale and therefore liable to pay damages of KShs 5,000,000/-.
104. The damages of KShs 5,000,000/- also attract interest at the rate of 30% per annum from the date of default until pronouncement of this judgement.
105. According to the Court, the date of default can only be apportioned from the date of completion within the Agreement For Sale dated 29th December 2013 which is the 15th of February 2014.
106. In essence therefore, the period for computation of interest shall be 15th February 2014 to 15th February 2023.

Who bears the costs of the suit & appeal herein?

107. The Appellant having being found in breach of the Agreement For Sale dated 29th October 2013, the costs of the suit and well as the Appeal herein shall be borne by him.
108. In conclusion therefore, the Court hereby makes the following Orders as appertains the Memorandum of Appeal dated 8th July 2019; -
 - A. That memorandum of appeal dated 8th July 2019 be and is hereby dismissed.
 - B. The judgement and decree dated 27th June 2019 be and is hereby set-aside forthwith and subsituated with the following orders;
 - i. The interested party known as nonkoko nonkipa ketere is the legal and bonafide owner of the property known as L.R.NO. TRANSMARA/OLOMISMIS/769 to the exclusion of the parties herein.
 - ii. The appellant herein is in breach of the agreement for sale dated 29th October 2013 by being incapable of transferring any lawful propertiroery interests and possession of the ten (10) acres within the property known as L.R.NO. TRANSMARA/OLOMISMIS/491 to the respondent herein.
 - iii. The agreement for sale dated 29th October 2013 be and is hereby terminated on the basis of the breaches occasioned by the appellant herein.
 - iv. The appellant be and is hereby ordered to refund the purchase price amounting to Kenya shillings 647,400/- to the respondent herein within 60 days from the date of this judgement.



v. The appellant shall further pay damages of kshs 5,000,000/- to the respondent for breach of the agreement for sale dated 29th october 2013 together with interest of 30% per annum from 15th february 2014 to 15th february 2023 within a period of 180 days from the date of the judgement.

vi. The respondent be & is hereby ordered & directed to vacate, remove any structures and/or buildings and yield vacant possession of the portion in his occupation within the property known as L.R.NO. TRANSMARA/OLOMISMIS/769 within 60 days from the date of this judgement.

vii. In default of order no. vi hereinabove, an order of eviction against the respondent shall automatically issue to be enforced by a licensed court bailiff.

viii. The appellant and the respondent are further prohibited by way of a permanent injunction from entering, occupying, residing and/or in whatsoever manner from interfering with the quiet occupation and possession of the interested parties property known as L.R.NO. TRANSMARA/OLOMISMIS/769.

ix. The appellant shall bear the costs of this appeal as well as the suit in the lower court.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 21ST FEBRUARY 2023.

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

Court Assistant: Ngeno

Advocates for the Appellant: Mukoya

Advocates for the Respondent: No Appearance

Advocates for the Interested Parties: No Appearance

