



REPUBLIC OF KENYA



**Kiarri v Kamande (Civil Appeal E425 of 2023)
[2024] KEHC 9415 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 9415 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E425 OF 2023
AB MWAMUYE, J
JUNE 27, 2024**

BETWEEN

AYUB MWANGI KIARII APPELLANT

AND

LUCY NJERI KAMANDE RESPONDENT

*(Being an Appeal against the Judgment & Decree of the Hon. L.K. Nyabando
(SPM) delivered on 31st October, 2023 in Kikuyu CMCC No. E036 of 2022)*

JUDGMENT

1. The Judgment of the Trial Court dated 31st October, 2023 concluded with the following statement at Paragraph 22:

“In the upshot, the court finds that the sale agreement was void from the onset as the defendant could not have purported to sell that which did not belong to her in the first place. In the foregoing, the plaintiff’s suit is hereby dismissed. The counterclaim succeeds in terms of prayer d only, being an order of immediate release of the title for L.R. Dagoretti/ Kinoo/T.384/37. Each party shall bear their own costs of the suit. 30 days right of appeal explained.”

1. The basic facts of the case before the lower court are simple, and they are agreed between the parties. The parties agree that the Appellant sought to purchase L.R. Dagoretti/Kinoo/T.384/37 from the Respondent vide a Sale Agreement dated 17th July, 2020. It is also agreed that the parties entered into a Revocation Agreement dated 13th January, 2021. Finally, the parties agree that the title to L.R. Dagoretti/Kinoo/T.384/37 was in the name of one Samuel



Kiambuthi Kinyanjui (Deceased); an individual said to have sold that property to the Respondent's husband, one Jeremiah Kamande Mburu, also deceased.

2. The Appellant's Written Submissions dated 11th June, 2024 collapse the eight grounds of appeal contained in the Memorandum of Appeal date 23rd November, 2023 into just three issues for determination, namely:
 - i. The Learned Magistrate erred in fact and law by failing to acknowledge that the parties herein entered into an "Agreement to Revoke" and consequently refusing to make an order for repayment of the part of the purchase price that had been paid out to the Respondent by the Appellant (Ground 1,2 and 3 of the Memorandum of Appeal);
 - ii. The Learned Magistrate erred in fact and law by adopting and considering the Respondent's witness statement despite her non-attendance during the Defence hearing (Ground 4 of the Memorandum of Appeal); and
 - iii. The Learned Magistrate erred in fact and law in finding that the Respondent had no capacity to transfer the suit property due to lack of grant for letters of administration but went ahead to direct for the title document to be issued back to the Respondent while failing to make an order for repayment of part of the purchase price that had been paid out to the Respondent by the Appellant. (Ground 6 of the Memorandum of Appeal).
3. The Respondent's Written Submissions dated 19th June, 2024 canvass the same three issues, albeit wording them differently, and support the Trial Court's decision in toto. Critically, Paragraphs 17-20 of the Respondent's Written Submissions make clear that the Respondent agrees with the Trial Court's finding that she lacked the legal capacity to enter into the Sale Agreement dated 17th July, 2020 and to sell the property that was its subject matter.
4. The Appellant also agrees that the Respondent lacked the legal capacity to sell, but is aggrieved that the Trial Court not only failed to order at least a refund of the sums paid by the Appellant under the Sale Agreement if not the Appellant's full entitlement under the Revocation Agreement but also thereafter proceeded to order the return of the title to the Respondent.
5. This appeal on the face of it should be a simple one. The Appellant and Respondent agree that the Respondent had no legal capacity to enter into the Sale Agreement and to sell the subject property. It follows, that the Respondent's position is that notwithstanding the stark and admitted lack of legal right to the sums paid by the Appellant, she should nonetheless be allowed to keep those sums. That is not a position supported by the law.
6. Equity does not allow unjust enrichment. As a court of equity, this Court, as well as the Trial Court, is under a duty to apply restitution as a remedy so as to remove from the hands of the Respondent sums of money received from the Appellant which the Respondent had no legal right or authority to have received. It is agreed between the parties that the amount in question is the deposit sum paid by the Appellant to the Respondent in the amount of KShs.1,087,000.00.
7. I agree with the Trial Court's finding that the Revocation Agreement was moot as it flowed from a Sale Agreement that was void. Thus, the Appellant cannot be entitled to any sums due under that Revocation Agreement.
8. The third issue is whether the Trial Court was right to order that the title be returned to the Respondent, I tread careful so as not to depart from this court's jurisdiction and into that of another court of equal status. It suffices for this court to say that the Appellant's position was that the return of that title should have been matched with a return of the deposit paid as both are logically connected.



This is a correct interpretation of how equity should operate in the present case; with each party being returned to their former positions.

9. The dividing line between whether an appeal falls within the province of the Environment and Land Court or within the mandate of the High Court is dependent on many factors; including the nature of the appellant's grievance with the trial court's decision, the prayers being sought by the appellant, the legal and factual basis applied by the trial court, and any agreed positions between the parties. The present appeal is not a mixed grill matter but rather it is a straight forward civil claim where the High Court is being called upon to determine the probity of a lower court's decision with reference only to statutes and principles that fall comfortably within its jurisdiction.
10. The way in which this appeal has been framed, together with the way in which the impugned judgment was framed, falls within the jurisdiction of the High Court; but admittedly at its very periphery. Had the Appellant sought different prayers or expressly or by implication sought to resuscitate the Sale Agreement extinguished by the lower court then this Court would have lacked jurisdiction. Had the Respondent cross-appealed, and specifically sought to canvass on appeal the Trial Court's refusal to allow the counterclaim brought by the Respondent, this Court would have lacked jurisdiction. ad Had Had the Trial Court's decision hinged on contested interpretation of land law then this Court would have lacked jurisdiction.
11. This Court has jurisdiction because the lower court's decision was made not on an interpretation of land law but rather on intermeddling under Section 45 of the *Law of Succession Act* and a lack of legal capacity under Section 82 of that Act. This Court's application of the doctrines of equity are a natural and just next step which the Trial Court ought to have taken.
12. The parties are equally to blame for the creation and subsistence of the dispute that gave rise to the lower court case. Given those circumstances, it is fair and just that each Party bears its own costs in this appeal, just as they did at the trial stage.
13. In conclusion, the Appeal has partially succeeded, and it has done so as follows:
 - a. The Respondent pay the sum of Kshs. 1,087,000.00 to the Appellant within the next thirty (30) days from the date hereof;
 - b. Interest on (a) above shall accrue at court rates on the amounts outstanding after the lapse of the thirty days; and
 - c. Each Party shall bear its own costs both for the Trial and for this Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JUNE, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:

Mr. Amasa counsel for the appellant

Mr. Kipruto counsel for the Respondent

Mr. Guyo, Court Assistant

