



**Makobi v Achola & another (Environment and Land Appeal
71 of 2021) [2023] KEELC 16651 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 71 OF 2021**

JG KEMEI, J

MARCH 23, 2023

BETWEEN

ALEXANDER SHIBONJE MAKOBI APPELLANT

AND

EMILY ACHOLA 1ST RESPONDENT

URIITHI HOUSING COOPERTAIVE SOCIETY 2ND RESPONDENT

*(Being an appeal against the Judgement and decree delivered by
Hon R Riany SRM on the 25/8/2021 in CMCC NO 131 OF 20218)*

JUDGMENT

1. This appeal arises from the Judgement of the Hon Court in CMCC No 131 of 20218, the Judgment having been delivered on the August 25, 2021. In the trial Court the Appellant was the Plaintiff and the Respondents were the 1st and 2nd Defendants respectively.
2. The Appellant's case before the trial Court was that he and the 1st Respondent were in a relationship for a period of 9 years. When the relationship broke down they mutually agreed vide an agreement dated the December 13, 2017 to share the assets that they had acquired together. Pursuant to the agreement, the suit land Juja/Juja/Block 1386 (suit land) was given to the Appellant subject interalia to the payment of the outstanding purchase price. In compliance with the terms of the agreement aforesaid the Appellant has entered into a commitment plan with the 2nd Respondent on the payment of the balance of the purchase price.
3. Despite his efforts set out above, the 1st Respondent in breach of the agreement, has threatened to sell the property which was acquired through her name from the 2nd Respondent. Inter alia that the 1st Respondent has refused to transfer the suit land to him as agreed, an act that he terms illegal, and



unlawful deprivation of his property. He stands to suffer loss and damage arising from being rendered destitute and landless contrary to his statutory and constitutional rights.

4. The Appellant urged the Court for the orders as follows;
 - a. A permanent injunction restraining the Defendants jointly and severally either by themselves their servants and or employees and or any other persons working under their instructions from selling transferring alienating disposing interfering and or dealing with the suit property.
 - b. A declaration that the agreement dated the December 13, 2017 is valid and that the Plaintiff is the legal owner of the suit land subject to the completion of the purchase price to the 2nd Defendant.
 - c. A declaration that the 1st Defendant's actions of failing to transfer the suit property to the Plaintiff amounts to breach of contract
 - d. An order compelling g the 1st Defendant to specifically perform the contract dated the December 13, 2017 and transfer the suit land to the Plaintiff
 - e. Costs of the suit.
5. The 1st Defendant denied the Plaintiff's claim and contended that the Appellant failed to comply with the agreement by failing to pay the balance of the purchase price. Arising from the default, the 2nd Defendant resolved on the 9/6/18 to withdraw the houses of defaulters, the 1st Defendant being one of them. The Plaintiff refused to attend the meeting called by the 1st Defendant to resolve the default forcing the 1st Defendant to write to the Appellant on the 13/6/18 demanding that he pays the outstanding balance of the purchase price within 7 days from the date of the demand, in default the agreement would be rescinded. The Appellant refused to respond to the demand nor paid the purchase price o/s. Faced with the risk of losing the house, the 1st Defendant on the 20/6/18 committed to pay the balance of the purchase price to salvage the house. Inter alia that the 1st Defendant contends that she has not benefitted from the agreement of the 13/12/17 as alleged by the Appellant.
6. In her counterclaim, she averred that arising from the default of the Appellant, she has had to pay the o/s balance of the purchase price in the sum of Kshs 581,800/- causing her financial loss and anxiety. She reiterated that the Appellant has refused to transfer Mavoko Town Block 3/1437 contrary to para in (i) of the agreement dated the December 13, 2017. She urged the Court to grant her the orders as follows;
 - a. A declaration that the Plaintiff breached the terms of the distribution of the properties agreement by defaulting in payments of lump sum amount of Kshs 581,900/- and monthly installments to the 2nd Defendant as required in the distribution of properties agreement.
 - b. A declaration that the Plaintiffs breached the terms of the distribution of properties agreement by failing to transfer the Matalia plot Mavoko Town Block 3/1437 (the Mavoko title) to the 1st Defendant as required in the distribution property agreement.
 - c. An order do issue against the Plaintiff requiring the Plaintiff to transfer the Mavoko title to the 1st Defendant as required by the in the distribution agreement.
 - d. A declaration that the rescission of the distribution of properties agreement dated the December 13, 2017 by the 1st Defendant was lawful.
 - e. An order for damages for the breach of contract against the Plaintiff
 - f. Costs of the counterclaim be awarded to the `1st Defendant.



7. The 2nd Defendant denied the Plaintiffs claim and was categorical that the Plaintiff has failed to demonstrate any cause of action against it and urged the Court to strike it out for want of a cause; secondly that there is no privity of contract between the Plaintiff and the 2nd Defendant noting that the suit land was purchased by its member, the 1st Defendant partly through financing advanced to her by the 2nd Defendant.
8. Upon hearing of the parties, the trial magistrate delivered its Judgement on the 25/8/2021 dismissing the Plaintiff's case for lack of proof.
9. The above decision of the Hon Trial Court provoked the instant appeal premised on the grounds set out below;
 - a. That the Learned Magistrate erred in law and in fact in dismissing the Plaintiff's suit with costs by finding that the Plaintiff had failed to prove his case on a balance of probability.
 - b. That the Learned Magistrate erred in law and in fact in holding that the 1st Defendant acquired the suit property that is Juja/Juja/Block/ 1386 in October 2014 which is the date when the 1st Defendant joined the 2nd Defendant and not the date of the purchase of the suit premises yet the Plaintiff's witness testified as being the agent who introduced the Plaintiff and the 1st Defendant to the 2nd Defendants project thereby arriving at a wrong conclusion.
 - c. That the Learned Magistrate erred in law and in fact by totally disregarding the evidence adduced by the Plaintiffs witnesses and the cross-examination of the 1st Defendant and admissions that the 1st Defendant received funds from the Plaintiff to pay for the suit property thus arriving at a wrong conclusion.
 - d. That the Learned Magistrate erred in law and in fact in failing to consider that the Plaintiffs made significant payment towards the clearance of the monthly installments and failed to factor into account the understanding between the Plaintiff and the 2nd Defendant regarding the acquisition of the suit property.
 - e. That the Learned Magistrate erred in law and in fact in failing to consider the evidence by the Plaintiff and the communication made between the Plaintiff and the 2nd Defendant with regards to the suit property thereby arriving at a wrong finding.
 - f. That the Learned Magistrate erred in law and in fact by considering extrinsic evidence by the 2nd Defendant that was not substantiated during the trial thus arriving at a wrong conclusion.
 - g. That the Learned Magistrate erred in law and in fact by failing to find that the 1st Defendant had an agreement with the Plaintiff for the share of the property acquired together in which the 1st Defendant had significantly benefitted from including having another property transferred to her by virtue of that agreement thus arriving at a wrong finding.
 - h. That the Learned Magistrate erred in law and in fact by failing to consider the account statements showing transfer of funds to the 1st Defendant for the acquisition of the suit property, a fact which was admitted by the 1st Defendant on cross-examination thereby arriving at a wrong finding.
 - i. That the Learned Magistrate erred in law and in fact in failing to consider the Plaintiff's submissions in totality thereby arriving at a wrong finding.
10. The Appellant urged orders for;



- a. That the Judgment delivered on the 25/8/2021 be set aside
 - b. The appeal be allowed.
 - c. The suit land be transferred to the Appellant herein
 - d. Costs of the appeal be awarded to the Appellant.
11. On the November 15, 2022 the parties elected to canvass the appeal by way of written submissions. None of the parties complied with the Court’s directions to file written submissions by the deadline of 16/1/2023. By leave of the Court issued on the 27/2/2023, the 1st Respondent’s written submissions filed on the 31/1/2013 were admitted on record. By the time of writing the Judgement only the 1st Respondent had complied. I have read and considered the said submissions.
 12. Did the Appellant prove his case on a balance of probabilities? The 1st Respondent submitted in the negative. Relying on section 107 of the *Evidence Act*, the 1st Respondent contended that the Appellant failed to prove his case. The Appellant failed to honour the agreement by making the required payments in order to satisfy monies owed to the 2nd Respondent despite communication by the 1st Respondent to comply forcing the 1st Respondent to commit to pay the o/s balance. In support of this position the 1st Respondent relies on the cases of; *Kanyungu Njogu v Danial Kimani Maingi* (2002) eKLR; *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Anor* (2015) eKLR; *Miller v Minister of Pensions* (1947) 2 ALL ER 372 .
 13. As to whether the Hon trial Court disregarded the evidence of the Appellant, the 1st Respondent relied on the case of *Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & Anor* (2014) eKLR that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person. It was further submitted that the Appellant failed to show that he had acquired any rights under the agreement; secondly that any rights had been infringed by the 1st Respondent. He failed to perform his obligations under the agreement.
 14. Having read and considered the record of appeal, the written submissions filed by the 1st Respondent, the record of the trial Court and all the material placed before the Court, the issues that commend themselves for determination are;
 - a. Whether the agreement dated the December 13, 2017 was breached; if yes by whom; what are consequences of breach?
 - b. Whether the Appellant proved his case in the trial Court.
 - c. Whether the appeal is merited
 - d. Who meets the cost of the appeal?
 15. It is commonly acknowledged that the Appellant and the 1st Respondent were in a love relationship and as it blossomed it is alleged by the Appellant that they acquired properties together. One of which is the suit land. When the relationship broke down they entered into an agreement dated the December 13, 2017 to regulate their affairs post break up. I shall refer to the relevant provisions as thus;
 - “ A. the parties own the following properties either individually or jointly;
 - a. Matalia Plot 50m by 100m Title Mavoko Town Block 3/14379
 - b. Juja Plot title deed No Juja block/ 1386



- c. Anyanga Plot
 - d. Britam Policy No 030000xxxxx Donholm Brach Account No Emily Achola Okoth & Alexander Shibonje Makobi
 - e. Big Five Investment Club
 - f. New Sacco Investment Club.
- B. The parties have agreed to distribute their respective properties above upon the terms and conditions hereinafter appearing.

Now this agreement witnesseth as follows;

The properties will be distributed as follows;

Matalia plot – this property is currently owned jointly by Emily and Alex. Alex is hereby required to transfer his interest and rights in the property to Emily exclusively. The cost of the transfer will be equally between the parties.

Juja/Juja/Block /1386 – Emily is currently registered as the sole benefactor resulting from the completion of payments towards Uriithi Housing Project Juja Phase 2. Emily hereby undertakes to transfer her rights and interest of ownership in the house to Alex. Alex will undertake payment of the monthly Sacco premiums and repayment of any monies in relation to this property. On completion the title will be registered under Alex.”

16. It is not in dispute that the 1st Respondent became a member of the 2nd Defendant in 2014. In 2015 she was issued with a share certificate No 4701 dated the 26/2/2015 upon payment of membership fee in the sum of Kshs 35,000/- . In her membership form dated the 13/4/2015 she nominated her sister and mother as her nominees. The purchase price of the land was Kshs 1.6 Million. On the 18/2/2016 she was advanced a loan of Kshs 1.0 Million by the 2nd Respondent towards the purchase of the suit lands.
17. As at the time of entering the agreement on the December 13, 2017 there is no dispute that the suit land was in the process of being acquired in the name of the 1st Respondent. The intention of the parties is clearly captured in the agreement. The 1st Respondent was to transfer he interest and rights to Appellant. The parties were cognizant of the fact that at this time there was a balance of Kshs 581,500/- outstanding on account of the suit land and payable to the 2nd Respondent. It fell on the Appellant to pay the monthly Sacco premiums and repayment of any monies in relation to this property. It was on completion of the payments that the suit land would be transferred to the Appellant.
18. It is the Appellants case that he paid some monies and made a commitment to clear the sum by the 30/8/2018. Except for the sum of Kshs 60,000/- there appears to be no evidence led by the Appellant as to the payment of the purchase price. The 1st Respondent on the other hand has painted a picture of default on the part of the Appellant.
19. On the 9/6/18 the 2nd Respondent resolved and gave 30 days to the members to clear outstanding payments. Further it resolved that those who will not have paid within 15 days would have their houses withdrawn and sold to other interested purchasers. Evidence was led by the 1st Respondent that she communicated to the Appellant the need to pay the monies. That he refused to attend the meetings scheduled for the 11/6/2018 and 13/6/18. Vide a letter dated the 13/6/18 the 1st Respondent to



the Appellant demanding that he pays the monies within 7 days in default the agreement would be rescinded.

20. The Appellant has led evidence and referred to the meeting between his representative Mr Kabetu and Njuguna of the 2nd Defendant wherein the resolution and the demand by the 2nd Defendant of 20/6/18 demanding the monies were emailed to him. The Appellant sent a commitment letter to the 2nd Respondent on the payment plan. The Court finds that the Appellant was not candid when he informed the Court that he was not aware of the resolution of the company since all the information was sent directly to the 1st Defendant.
21. The 1st Respondent alarmed by the inaction of the Appellant and to save the house from being withdrawn avers that she paid the balance of the purchase price and rescinded the agreement on the 3/7/2018.
22. Flowing from the above the Court finds that the agreement was breached by the Appellant when he failed to pay the balance of the purchase price. The 1st Respondent cannot be faulted for stepping in as she was going to risk losing the colossal deposit of Kshs 1.0 Million already paid.
23. Whether the Appellant proved his case, the Court has not been shown any evidence to show that the Appellant complied with the terms of the agreement then and even now. Save from the commitment to pay there is no evidence placed before this Court to show that he paid the balance of the purchase price.
24. Grounds Nos 1, 2, 4, 5 and 8 have been assessed in the negative.
25. With respect to ground No 3, I have reassessed the evidence of PW1 and PW2 as led at the hearing and I find that though the Appellant repeatedly stated that he paid the balance of the purchase price, he failed to lead evidence in support. The evidence would have been in form of a receipt from the 2nd Respondent. The evidence of PW2 is in respect to pre-agreement stage.
26. On ground 6 – I have perused the Judgement of the Court and I find no fault in the same. There is no requirement to reproduce the submissions in the Judgement. It suffices to state that the Judgement is in accordance with the provisions of Order 21 of the Civil Procedure Rules.
27. As regards the counterclaim I find that the appellant did not proof his counterclaim and the appeal therefore is without merit.
28. Final orders-
 - a. I find the appeal is without merit.
 - b. I find no grounds to fault the trial court.
 - c. The appellant is condemned to pay the costs of the trial court and those of this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23RD DAY OF MARCH, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Mukonyi for Appellant

1st Respondent – Absent

2nd Respondent – Absent



