



REPUBLIC OF KENYA



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**Kinuthia v Githuka (Civil Appeal 140 of 2017)  
[2023] KEHC 21030 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21030 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 140 OF 2017**

**PM MULWA, J  
JULY 26, 2023**

**BETWEEN**

**JOSEPH KIGENYI KINUTHIA ..... APPELLANT**

**AND**

**SELAH MUTHONI GITHUKA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. B. Khaemba (SRM)  
delivered on 18th August 2017 in Kiambu CMCC No. 118A of 2016)*

**JUDGMENT**

1. This is the first appeal emanating from the judgment and decree of Hon B Khaemba in Kiambu CMCC No 118A of 2016.
2. The sequence of the events in the litigation giving rise to the appeal is that the appellant sued the respondent in the trial court vide a plaint dated March 31, 2016, seeking compensation of Kshs 4,104,220.12/= for loss incurred in the purchase of the property. The appellant vide a sale agreement dated August 15, 2014 purchased the property known as Kiambaa/Kanunga/283 (hereinafter referred to as the suit property) from the respondent. The purchase price was Kshs 1,700,000/=.
3. In the claim, it is alleged the respondent fraudulently misrepresented the status of the property to the appellant by failing to disclose the suit property was marked as a road reserve.
4. In rebuttal, defendant filed a statement of defence on May 20, 2026 filed by the firm of JK Gatere and Company. She averred that the overriding interest was not captured in the official search by the Land's Registry and thus was not within the knowledge of the respondent. That only part of the suit property is a road reserve which measures 0.23 acres. She urged the court to dismiss the suit as the appellant was in actual possession of the suit property and only seeks to unjustly enrich himself for a claim of damages for obtaining a loan of Kshs 7,048,724/= while the purchase price was Kshs 1,700,000/=.



5. The suit proceeded to hearing with both parties calling one witness each. At the end, the learned trial magistrate entered judgment in favour of the respondent, wherein he opined “...that the land in question did not have any encumbrances in breach of clause (f) of the sale agreement and thus the defendant cannot be said to have been fraudulent. In my view, the current position is that both parties especially the plaintiff did not exercise due diligence before executing the transaction.” He went further to find that “...going back to the definition of fraud, it is my finding that the plaintiff did not demonstrate how the defendant misrepresented or concealed to have any material fact...in addition, that information was available in the lands registry had a search been conducted by the plaintiff of which due diligence demanded that he ought to have done so...The defendant cannot be said to have fraudulently entered into the agreement since her rights over the property were not burdened by the road reserve... the allegation of fraud based on the existence of encumbrances cannot stand because there was no encumbrances on the title.
6. The learned trial magistrate dismissed the suit and ordered each party to bear their costs.
7. Dissatisfied by the judgment the appellant filed the instant appeal vide a Memorandum of Appeal dated September 14, 2017 citing the following grounds:
  - i. That the learned trial magistrate erred in law and in fact in dismissing the suit.
  - ii. That the learned trial magistrate erred in law and in fact in failing to appreciate and hold that there was breach of contract by the respondent.
  - iii. That the learned trial magistrate erred in law and in fact and misdirected himself in failing to consider the submissions by the appellant together with the authorities relied on by the appellant.
  - iv. That the learned trial magistrate wholly erred in law and in fact in holding that the respondent was blameless yet there was evidence to the contrary.
8. He proposed to ask the court for orders that the appeal be allowed and that the costs of the appeal be paid by the respondent.
9. By the directions of this court on December 14, 2022 the appeal was canvassed by way of written submissions. Both parties filed submissions.

### **Appellant’s Submissions**

10. Counsel submits the appellant’s claim is based on the respondent’s breach of the sale agreement dated August 15, 2014 in respect of the sale of the suit property being Kiambaa/Kanunga/283.
11. The issue in contention is that at the time of sale the respondent failed to disclose to the appellant that the property was marked as a road reserve contrary to the sale agreement which indicates the land is sold free from any encumbrances. The appellant has been faced with challenges in getting clearance to develop the land from the relevant authorities. The appellant wishes to surrender the land to the respondent subject to a refund of the purchase price.
12. It is further submitted that as a result of the breach of the sale agreement the appellant has suffered damages to wit the purchase price, legal fees, transfer charges and loan amount together with interest. He seeks reimbursement of the sum of Kshs 4,104,220.12/= being the loss incurred.



## Respondent's Submissions

13. In opposing the appeal, counsel submits that the acquisition of 0.23 acres to be exercised from Kiambaa/Kanunga/283 by the government for purposes of creating a road reserve did not amount to encumbrances as per the definition of encumbrances in the *Black's Law Dictionary* and Section 2 of the *Land Registration Act 2012*.
14. That the appellant failed to meet the threshold of proving fraud as envisaged under Section 107 of the *Evidence Act*. Counsel relied on the case of *Gichinga Kibuthia vs Caroline Nduku* (2018) eKLR where the court held; "fraud consists of some deceitful practice or wilful device resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, and intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other."
15. Counsel further submitted the respondent was unaware of the existence of any road reserve having inherited the property from his husband. An official search conducted in the land registry failed to indicate the road was a road reserve. The appellant conducted a search at the land registry and the same was not disclosed. The appellant failed to conduct due diligence before purchasing the suit property and satisfy himself on the size, boundaries and status of the land. He cited the case of *Aron Kiplagat vs Wilson Kotaba & Anor* (2022) eKLR where the court opined; "it would be against good practice to have every party that fails to conduct proper due diligence plead for the protection of this court over matters in which he could have had control over."
16. The appellant has failed to discharge the legal burden of proof placed on him to demonstrate he suffered the loss to the tune of Kshs 4,104,220.12/=. Counsel urged the court to find that the learned trial magistrate was justified in principle and in law in finding that the appellant did not demonstrate the allegation of fraud against the respondent. He pleaded with the court to dismiss the appeal and find the appellant will wrongly and unjustly be enriched if allowed to retain the land and also seek compensation.

## Analysis and determination

17. This being a first appeal, the principles guiding the duty of this court is as was stated in *Selle -vs- Associated Motor Boat Co* [1968] EA 123:

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put they are, that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

## Re-evaluation of the evidence of the trial court

18. Pw1 - Joseph Kigangi Kimbwai testified that he is an accountant with Britam as a Tax Manager, and he adopted his statement dated March 31, 2016. He purchased land from the defendant who failed to disclose the land had an encumbrance. The purchase price was Kshs 1,700,000/=. He paid Kshs



- 170,000/= as a deposit and the balance was paid through financing by Britam. He told the court that after the purchase he did not develop the land as he learned from neighbours it was a road reserve, he confirmed with the Ministry of Lands and he was given a gazette notice which indicated the land was gazetted in 1975. He adduced the gazette notice as exhibit 4, and a survey map as exhibit 5.
19. He further told the court that he spent Kshs 424,324/= on insurance premiums. Kshs 30,000/= on agent fees, Kshs 40,260/=stamp duty, Kshs 73,540/= on legal fees and he sought the interest of Kshs 934,096/= on the loan. He bought materials but did not develop the land and sought damages of Kshs 300,000/=
  20. According to the plaintiff the contract of sale clause (f) the land was not free from any encumbrances, thereby breaching the agreement. He sought a refund of Kshs 4,104,220/=.
  21. In cross-examination by Mr Gatere, Pw1 informed stated that he visited the land and saw the physical layout before he bought the land. That there was no indication of a road reserve. He did not conduct a land search as he entrusted the same to his financier. He was not aware whether there was any search done by Britam. He said the transfer was done by Britam after he submitted the necessary documents.
  22. According to Pw1 he had taken a second charge of kshs 7,048,724/= with the property as security, as he wished to develop the same. The loan of Kshs 7,048,724/ attracted the premiums which he is seeking a refund from the defendant. He claims Kshs 500,000/= as loss of user, based on the rent he pays as he wished to construct his residential house. He had purchased materials to develop the property and the materials are still on the site. He maintained that his claim is based on the losses he incurred for not developing the land.
  23. Dw1 – Selah Muthoni Githuka, the defendant herein, a resident of Kanunga in Kiambu, adopted her witness statement and the bundle of documents dated May 19, 2016.
  24. In cross-examination, she confirmed having sold the suit land to the plaintiff and received the purchase price of Kshs 1,700,000/=. At the moment she did not know the land was a road reserve. Though the abstract title indicates the land is a road reserve.
  25. She stated that she learned the land was a road reserve when the current suit was brought to court. That she had passed the title to the plaintiff.
  26. Having considered the memorandum of appeal, the submissions by the parties both in support and against the appeal, the trial court evidence and finding, the issues for determination are:
    - i. Whether there was a breach of the term of the sale agreement
    - ii. Whether the trial magistrate erred in finding that the appellant failed to prove the respondent was aware of the existence of the road reserve.
    - iii. Whether the trial magistrate erred in dismissing the suit
  27. The sale agreement dated August 15, 2014 was in writing and thus the provisions of Section 3(3) of the Contract Act apply. The section provides:

"Section 3(3) "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



(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:”

28. The appellant submits that the respondent fraudulently misrepresented information in the sale agreement dated August 15, 2014, in which she failed to disclose that the property was a road reserve and clause (f) which stipulates “the subject matter is sold free from any encumbrances, securing the repayment of monies or other obligation or liability of the vendor or other person and in the event of any such encumbrances it shall be the obligation of the vendor to discharge the same”
29. Did the failure on the part of the respondent to disclose the existence of the encumbrances occasion a breach of the sale agreement? Having scrutinized the title deed, it is noted there were no encumbrances registered for the benefit of the respondent at the time of selling the suit property. What was registered was an easement. I am not persuaded that the respondent breached the contract.
30. Counsel for the respondent submits that the appellant has failed to discharge his duty as envisaged under Section 107 of the *Evidence Act*.
31. The appellant has failed to demonstrate the particulars of fraud on the part of the respondent. The standard of proof of fraud was stated in *Ratilal Gordhanbhai Patel v Lalji Makanji* [1957] EA 314, 317: - “Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, but something more than a mere balance of probabilities is required.”
32. The appellant being the purchaser was entitled under the law to conduct due diligence as per the principle caveat emptor and establish if the land was free from any encumbrances, the measurements and status of the land. The appellant failed to do so and entrusted this duty of due diligence to the bank’s advocate. The court heard that the appellant had hoped that the bank’s advocate would conduct the due diligence before charging the mortgage. And that the appellant did not conduct any official search from the land registry.
33. It is evident that the appellant overlooked his duties and now blames the respondent for his omission. A copy of the title was issued to the appellant, which according to the respondent was for purposes of financing by the Bank. I have inspected the copy of the title and I note at the easement section it stipulates 0.23 acres of the suit property is a road reserve.
34. This information was thus available to the appellant even before the transaction was complete. It is not proper for the appellant to allege the issue of easements of the land was not disclosed. As a purchaser, he was expected to conduct due diligence including a perusal of the title deed but failed to do so.
35. In *Halsbury’s Laws of England*, Fourth Edition, Volume 42 para 51 - “Defects of quality may be either patent or latent. Patent defects such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase.”
36. The acquisition herein was done by the Commissioner of Lands vide a gazette notice of February 27, 1975. The approximate acquisition to be affected in the subject suit property was 0.23 acres. If the appellant had conducted due diligence this information was available to the public and thus could have not proceeded with the purchase of the suit property. The respondent submitted she was not aware of the existence of the road reserve on the suit land having inherited the suit land from her deceased husband.



37. This court is thus not convinced that the appellant has proved that the respondent misrepresented information to the appellant through concealment of material facts.
38. In *Nkuba v Nyamiro* [1983] KLR 403, the Court of Appeal stated: “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 a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
39. In the circumstances therefore, it is my finding that the trial magistrate did not err in reaching to a conclusion that there was no fraud on the part of the respondent. This court will therefore uphold the decision of the learned trial magistrate.
40. Clause (9) of the sale agreement stipulates - “the transaction is irrevocable and the interest sold to the purchaser is absolute.”
41. The parties are bound by the terms of the agreement and this court having made a determination that the appellant was to blame for his own omissions then he cannot shift his misfortunes and seek compensation from the respondent. The appellant is now the registered owner of the suit property and he has sought financial accommodation from the bank using the title as security. Thus, he has benefited from the ownership of the parcel of land.
42. In the upshot therefore, I find that the appeal herein lacks merit and the same is dismissed with costs to the respondent.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 26<sup>TH</sup> DAY OF JULY 2023.**

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**P.M. MULWA**

**JUDGE**

**In the presence of:**

Duale – Court Assistant

Ms. Sang h/b for Mr. Bwire for the Appellant

Mr. Thuo h/b for Mr. Gatere for the Respondent

