



REPUBLIC OF KENYA



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**Kiriamburi v M'ananga (Environment and Land Appeal 13 of 2022)
[2023] KEELC 16893 (KLR) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16893 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 13 OF 2022**

CK NZILI, J

APRIL 19, 2023

BETWEEN

DANIEL MBURUNGA KIRIAMBURI APPELLANT

AND

MURUNGI M'ANANGA RESPONDENT

*(Being an appeal from the judgment of Hon. A.G Munene Principal
Magistrate Maua in Maua CMCC No. 252 of 2015 dated 24.11.2015)*

JUDGMENT

1. The appellant as the plaintiff in the primary court sued the respondent herein, by a plaint dated 28.10.2015 claiming that he had failed to transfer to him a portion of LR No Njia/Ciamwendwa measuring approximately 0.324 Ha, which the respondent had subdivided and agreed to sell or transfer to him despite granting him vacant possession, applying for and acquiring a land control board consent for the transfer. He prayed for an order that the respondent transfers the land to him in default the Executive Officer of the court to sign all the necessary forms leading to the transfer.
2. By a defence and counterclaim dated 18.10.2017, the respondent denied the contents of the plaint, especially regarding the alleged sale agreement, terming the thumbprints, its contents, purported consent to transfer as forged, invalid, and fraudulent.
3. In a counterclaim, the respondent averred that on 23.8.2015, the appellant alongside his relatives forcefully arrested him and menacingly forced effect his thumbprints onto some strange documents which action he reported to both the police and the Njuri Ncheke council of elders for investigations, who warned the appellant to stop interfering with his land. Instead of heeding the warning, the respondent allegedly moved to court and obtained orders which he used to evict, demolish and cast away all the appellant's properties worth Kshs 1,342,870/= in a web of fraudulent conspiracy to disentitle him of his land worth Kshs 900,000/= allegedly claimed to have been sold by him for Kshs



- 160,000/=. He sought an order of eviction of the appellant from his land, general, punitive, and exemplary damages for the illegal eviction from his land.
4. Following a trial, the trial court held that the appellant was unable to prove the alleged sale of the suit land. Similarly, the trial court dismissed the counterclaim with each party being ordered to bear their costs. It is the said dismissal of the suit by the primary court dated 24.11.2021 that forms the basis of this appeal, which was filed following leave to appeal out of time obtained on 22.2.2022.
 5. The appellant has attacked the said judgment on the reasons that the trial court; relied solely on the sale agreement and made a finding that the appellant failed to adduce adequate evidence; failed to appreciate other issues raised in the matter; failed to appreciate and consider the weight of the evidence before it and lastly; reached a judgment which is bad in law.
 6. The role of the appellant court in the first instance has been determined in several decided cases. In *Nanchang Foreign Engineering Co. Ltd v Shakuwira & 17 others* (civil appeal) 141 of 2017 (2022) KECA 199 (KLR) 17th February 2023) (Judgment) the court cited with approval *Gitobu Imanyara & 2 others v AG* (2016) eKLR where it was held that the principles to apply as inter-alia to reconsider and evaluate the evidence and draw its conclusions while always bearing in mind that the appellant court has neither seen nor heard the witness and should make due allowance in that respect.
 7. As indicated above, the primary pleadings at the lower court were the plaint dated 28.10.2015, accompanied by a case summary, list of witnesses, list of witnesses statements, a list of documents dated 31.3.2017 and two filed on 12.11.2015 dated 25.9.2009 and 16.12.2010 while the respondents relied on a statement of defence and counterclaim, accompanied by defence witnesses, list of exhibits, case summary and list of issues all dated 17.10.2017.
 8. At the trial, the appellant adopted his witness statement dated 26.10.2018 as his evidence in chief. He produced a land control board consent dated 29.5.2013 as P. Exh No (1) and a sale agreement dated 25.9.2009 as P. Exh No (2), which was drawn by M/S Mbogo and Kariuki Advocates. His testimony was that on 25.9.2010, he purchased 0.50 acres of land from the respondent's LR No Njia/Ciamwendwa/1513 and cleared the purchase price. He, later on, bought an extra 0.30 acres and cleared the consideration after which the respondent applied for consent to transfer the land then measuring 0.8 acres but eventually refused to transfer it. In cross-examination, the appellant insisted the land he bought was LR No Njia/Ciamwendwa/1733 whose resultant subdivisions in favor of him was LR No Njia/Ciamwendwa/3889. The appellant said that he neither had a mutation form to show the origin of LR No 3889, nor did he either make a request for the transfer or produce a search certificate to confirm the ownership or perhaps obtain a Kenya Revenue Authority stamp to prove that any transfer of the land had occurred. He termed his witness statements as containing some errors in the description of the property. However, he insisted that the respondents attended before the land control board for the necessary consent.
 9. The respondent adopted his witness statement dated 18.10.2017 as his evidence- in -chief. His testimony was that he had known the appellant for long to whom he leased in his miraa shamba. He denied ever selling his land to him. PW1 specifically termed the alleged sale agreement as a forgery. Further, PW1 said that his advocate Mr. Mbogo Muriuki had also denounced the signature appearing on the sale agreement following which he reported the matter to the police vide OB 07-/23/08/2015. DW1 testified that the issue was later on referred to both the clan elders as well as the local chief. The respondent termed the temporary injunction issued herein in favor of the appellant as procured on perjury and was used to evict him leading to the destruction of his property valued over Kshs 3 million, hence rendering him homeless. Similarly, DW1 termed the land control board consent as a forgery that



had also been disowned by the land control board chairman on the basis that no such meeting ever took place.

10. At the close of the defense testimony, parties were directed to file and exchange written submissions. The appellant by written submissions dated 22.9.2021 took the view that his cause of action was substantiated through the two sale agreements duly signed before an advocate after the payment of Kshs 160,000/=, followed by consent to transfer the land. He submitted that the respondent had failed to transfer the two parcels of land, yet there were no intervening circumstances, amendments, or modifications of their terms and conditions. He urged the court to grant him the reliefs sought. The trial court however dismissed the suit with costs triggering this appeal.
11. Following the admission of this appeal for hearing, parties agreed and directions were issued to canvass the appeal through written submissions whose deadline to file was on 26.2.2023. It was only the appellant who filed his written submissions dated 23.2.2023, taking the view that after the sale agreements and the consent to transfer the land were obtained, the respondent failed to sign the transfer forms, after he had found another buyer promising to pay more money. The appellant submitted that though the respondent denied signing the sale agreements or appearing before the land control board, no evidence was tendered to prove any alleged fraud or forgery.
12. The appellant submitted that the trial court failed to consider all the steps which were taken to transfer the parcel of land to him including being put into possession and extensively developing the land. Further, the appellant submitted that in paragraph 85 of the record of appeal, the respondent had admitted signing the sale agreement before his previous lawyer, Mr. Mbogo advocate to sell the land as a subdivision of LR No Njia/Ciamwendwa/1513. The appellant submitted that the evidence before the trial court was enough to prove his claim against the respondents.
13. The court has carefully gone through the pleadings, the lower court record, the evidence tendered, the grounds of the appeal, and the written submissions filed. The issues seeking the court's determination are:-
 - a. If the appellant pleaded and proved any breach of the sale agreements against the respondent.
 - b. If the respondent pleaded and proved any forgery, illegality, fraud, undue influence, or coercion in the manner in which the sale agreements and the land control board consent were signed and or procured.
 - c. If the appellant's entry into and taking of vacant possession was lawful or caused any destruction or losses to the respondent.
 - d. If the respective parties were entitled to the reliefs sought.
14. A party seeking recovery of land or breach of a sale agreement has to plead material facts under Order 2 Rule (3) of the [Civil Procedure Rules](#) and not the evidence including the effect of any document. Further, Order 2 Rule 4 of [Civil Procedure Rules](#) requires that a party in any pleading after a plaint specifically plead *inter alia*, fraud or any fact showing illegality. Sub-rule (4) (3) thereof requires that a defendant to an action for the recovery of land shall plead specifically every ground of defense on which he relies and that a plea that he owns the land would not be enough.
15. Order 2 Rule 10 of the Civil Procedure Rules provides that any pleading shall contain the necessary particulars of any claim or defence regarding misrepresentation, fraud, breach of trust, willful default or undue influence, fraudulent intention, or any malice. Additionally, Order 2 Rule 11 of the [Civil Procedure Rules](#) provides that any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or joinder of issue



which under Rule 10 thereof operates as a denial of it, in which under Sub-rule (2) thereof states that can be made by either as a denial or by way of a statement of non-admission.

16. Moreover Order 2 Rule 11 (3) of the [Civil Procedure Rules](#) provides that every allegation of fact made in a plaint or counterclaim which a party on whom is served does not intend to admit shall be specifically traversed by him in his defence or defence to counterclaim, including allegations on a party suffering damage or the amount of damages. Order 2 Rule 12 (3) of the [Civil Procedure Rules](#) provides that there can be no joinder of issue on a plaint or counterclaim.
17. Having laid down the law as to pleadings, the appellant in his plaint dated 28.10.2017 did plead the dates, terms, and or conditions of the sale agreements including the completion date of the aforesaid transactions. The particulars of the breach of the sale agreements and land transfer forms were also not pleaded. Additionally, the appellant did not specifically plead whether he was handed over vacant possession, the nature of the alleged possession, and any developments thereof. In particular, there was no pleading on whether time was of the essence in sale agreements.
18. Coming to the respondent's defence and counterclaim, no specific particulars of forgery, illegality, impropriety, fraud, and or conspiracy were pleaded. Even though the respondent listed particulars of special damages of Kshs 1, 342, 870/=, no such relief was either prayed or paid for.

Similarly, the appellant did not file a reply to the defence and defense to the counterclaim as required under the aforestated rules.
19. In the case of [Christopher Kiprotich v Daniel Gathua and 5 others](#) (1976) eKLR, the defence and counterclaim had not been replied to. The court held that that amounted to constructive admission arising out of the failure to file a reply to a counterclaim. In the case of [Jobu Muthigani v Shadrack Macharia Ndekere and another](#) (2021) eKLR, the court cited with approval [Joash M. Nyabicha v KTD](#) (2013) eKLR, where the Court of Appeal held that having failed to file a defence and counterclaim, there was a joinder of issue and not an admission which served to deny those allegations.
20. In [Dhanjal Investment Ltd v Shabaha Investment Ltd](#) (Civil Appeal No 80 of 2019) (2022) KECA 366 (KLB) 18th February 2022 (Judgment), at issue was whether there was any breach of the sale agreement, its validity, and effects, whether the appellant was entitled to damages for breach, if time was of the essence and lastly whether a completion notice was issued. The court held that the legal significance of a term in a contract that time is of the essence is that it elevates the time in which one party must complete its contractual obligations to the other party, to a condition in the agreement, and that the failure to perform the obligations within the stipulated deadline would amount to a fundamental breach of the agreement, with consequences flowing therefrom such as the termination of the contract and for a claim of damages from the contract breaker. The court cited with approval [Kukal Properties Development Ltd v Tafazzal H. Maloo & others](#) (1993) eKLR, on the options available to the innocent party such as treating the contract as repudiated, claim for damage, discharge of parties from further performance of the contract or applying for an order of specific performance alongside damages for the loss during the delay. The court went on to state that the right to terminate a contract when there was a fundamental breach may be lost where the innocent party affirms the contract or is held to have waived, or is estopped from exercising the right to terminate.
21. Coming to the issue of alleged duress, coercion, or undue influence the court in [Nabro Properties Ltd v Sky Structures Ltd of Z.R. Shah](#) [Southfork Investments Ltd](#) (1986) eKLR, cited with approval [Cheshire & Fifoots Law of contract](#) 8th ED at page 281 on the proposition that duress at common law means any actual violence or threats to violence calculated to produce fear of loss of live or bodily harm and that a contract procured by a threat to prosecute for a crime is not as a general rule, available for duress.



22. Further, in *KCB Ltd & another v S.K Macharia & 2 others* (2008) eKLR, the court cited with approval *Willson on Contracts*, 3rd Edition 1970 Chapter 47 that for duress to be proved the victim must have entered into a contract against his will; must have had no alternative course open to him and must have been confronted with coercive acts by the party exerting the pressure.
23. Applying the foregoing principles to the instant suit, the appellant relied on the sale agreements dated 25.9.2009 and 16.12.2010 signed before Mbogo Muriuki advocates and the letter of caution dated 29.5.2013. In his efforts to impeach both the sale agreements and the consent letter, the respondent pleaded fraud, forgery, undue influence, duress, and illegalities. It is trite law that fraud must not only be specifically pleaded but must also be proved on a balance of proof above the ordinary standard, but below proof beyond reasonable doubt. This was the holding in *Arithi Highway Developers limited v West End Butchery Ltd* (2015) eKLR and *Vijay Morjaria v Nasingh Madhusing Darbar & another* (2000) eKLR.
24. In this suit, no forensic document examiner's report was brought to void or challenge the thumbprints or the particulars appearing on the sale agreements and the consent letter. The respondent failed to call the maker(s), the signatories, or witnesses to the said exhibits to come and support the assertions that indeed they were not made or signed by him or to confirm that the entries therein were forgeries. The respondent alleged that his thumbprints were affected under duress following which he made a report to the police and to a panel of elders. Unfortunately, no witnesses were called to support such serious allegations. Similarly, over and above the issue of vacant possession, allegedly taken up forcefully or under duress, the respondent failed to put across such questions to the respondent during his cross-examination.
25. In my considered view therefore, I find no basis to make a finding that the respondent did not willingly and or voluntarily append his signatures to the sale agreements and attend the meeting for land control board consent.
26. Coming to the aspect of the sale agreements, the terms and conditions were clear as to the rights and obligations of each of the signatories. The appellant pleaded and testified that he had met the aforesaid conditions to an extent of taking vacant possession and obtaining a consent to transfer the land to him.
27. The reasons for non-compliance on the part of the respondent were not pleaded. It is trite law that parole evidence cannot be used to vitiate and courts cannot rewrite contracts on behalf of the parties. The court must enforce contracts unless the same is void, illegal, and or procured through duress. The court has made a finding that the respondent was unable to offer evidence to vitiate the said sale agreements. Therefore, in the absence of any evidence to the contrary, I find the sale agreements enforceable. Consequently based on the evidence, the appellant had proved his claim to the required standards. The upshot is that the trial court erred in fact and law in dismissing the suit. The appeal is allowed and judgment is entered as prayed in the plaint. The respondent's defence and counterclaim are dismissed. Costs of this appeal and at the lower court are granted to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 19TH DAY OF APRIL, 2023

HON. C.K. NZILI

ELC JUDGE

In presence of:

C/A: John Paul

Wambua for the appellant



Moses advocate - absent

