



REPUBLIC OF KENYA



**Kariuki v Ndung'u (Land Case Appeal 14 of 2022)
[2023] KEELC 17428 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17428 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE APPEAL 14 OF 2022**

MAO ODENY, J

MAY 16, 2023

BETWEEN

JULIUS NDEGWA KARIUKI APPELLANT

AND

BETH WANJIRU NDUNG'U RESPONDENT

*(Being an appeal against the Judgment delivered by Hon.
T A SITATI 7th March 2022 Lamu PMCC No 6 of 2020)*

JUDGMENT

((Being an appeal against the Judgment delivered by Hon. T A SITATI 7th March 2022 Lamu PMCC No 6 of 2020)

JUDGMENT

1. This appeal arises from the Judgment dated 7th March 2022 by Hon. T A Temba Principal Magistrate Lamu delivered in Lamu PMCC No 6 of 2020. The Appellant herein being aggrieved by the Judgment lodged a Memorandum of Appeal dated 4th April 2022 on the following grounds: -
 - a. The learned Trial Magistrate erred in law and in fact in making a finding that the appellant is in breach of contract for failing to pay the balance of Kshs. 2,000,000 towards the consideration amount when the same had been settled.
 - b. The learned Trial Magistrate erred in law and in fact in issuing the decree against the weight of the evidence placed on record.
 - c. That the learned Trial Magistrate erred in law and fact in directing that the appellant herein grants vacant possession to the respondent notwithstanding the fact that the sale and purchase agreement for the subject matter of this



suit has not been rescinded, annulled or rendered impractical by alleged supervening circumstances.

- d. That the learned Trial Magistrate erred in law and in fact in holding and finding that fraud has been committed in the transfer and issuance of title deed to the appellant without a scintilla of evidence adduced by the registrar of land or the respondent herein save for the inadmissible story and/or theory explained.
 - e. The learned Trial Magistrate erred in law and fact by importing his own evidence and asserting that the appellant was in default by failing to promptly repay the loan when the bank itself was a party to the suit and did not tender such evidence of default and therefore the trial court's ratio decidendi was erroneous, misguided and invalid.
 - f. The learned Trial Magistrate erred in law and fact by ordering and directing that the respondent to refund the sum of Kshs. 2,000,000 to the appellant after deducting the litigation cost awarded to her contrary to what was specifically prayed for in the plaint and therefore occasioning a miscarriage of justice by importing his own prayer to the respondent's pleadings.
2. The Respondent herein had sued the Appellant alongside two other parties vide a Plaint dated 14th July 2020 seeking Judgment against the Defendants for;
 - a. An order compelling the 2nd Defendant to forthwith recall the title issued to the 1st Defendant for Lamu/Hindi/Magogoni/1379 for purposes of having the same transferred back to the Plaintiff.
 - b. An order compelling the 3rd Defendant to deliver the aforementioned title to the 2nd Defendant.
 - c. The 1st Defendant to pay to the Plaintiff general damages for breach of contract.
 - d. Costs of the suit be borne jointly by the Defendants
 - e. Any such other order or relief this Honourable Court may deem fit to grant.
 3. The Trial Magistrate heard the case and entered judgment in favour of the Plaintiff therefore necessitating the filing of this Appeal.
 4. Counsel agreed to canvas the Appeal vide written submissions which were duly filed.

APPELLANT'S SUBMISSIONS

5. Counsel submitted on the grounds of Appeal and stated that the Trial Magistrate erred in finding that there was an outstanding balance payable to the Respondent while the same had been paid in full. Further that the consideration was paid by way of bankers cheques, Mpesa, RTGS and cash money on diverse dates.
6. It was counsel's submission that the entire judgment and decree fell short of the weight of evidence adduced as there was no evidence to substantiate and/or prove the allegation of fraud other than assumptions postulated majorly by the Respondent. Counsel submitted that he who alleges must prove and cited the case of Sinohydro Corporation Ltd v George Kisivo Mulei [2018] eKLR.



7. Mr. Omwancha submitted that the orders granted by the Trial Magistrate were not supported by the pleadings hence were ultra vires and relied on the cases of Equity Bank Ltd –Vs- Gerald Wang’ombe Thuni [2015] eKLR and PRIMEAU V. MEAGHER, (1923) CanLII 117 (SK CA), cited in Civil Appeal 70 of 2018, Lucy Watiri Nduati v. George Kamau (2021) eKLR.
8. Counsel further submitted that the order directing the Appellant to give vacant possession of the suit property to the Respondent was in violation of express terms of a valid contract and relied on the case of Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR, where the court held that it is not the business of courts to rewrite contract for parties.

1ST RESPONDENT’S SUBMISSIONS

9. Counsel for the 1st Respondent submitted that the judgment of the lower court was sound as the Magistrate correctly established from the evidence tendered by the Respondent that the full amount received was Kshs. 2,000,000/= only which was proved by production of the copies of the Bank Cheques as well as the admission by the Respondent of receiving the initial Deposit.
10. On grounds 3 and 4, Counsel submitted that fraud was specifically pleaded as required by law and the same was duly proved in court to the required standard. The Advocate who was acting for both parties in the said transaction was called as a witness and he duly produced the Original Title Deed for LAMU/HINDI MAGOGONI/1379 which was the subject matter of the contract.
11. It was Mr. Soita’s further submission that the said title deed had been deposited with the Advocate during the signing of the contract and the Appellant was present and duly aware of this. That the Appellant in effecting his fraudulent transfer did not collect the said Title Deed from the mutual advocate and as such the only way he could have had the Title Deed transferred in his name was through a fraudulent scheme in collusion with the office of the then Land Registrar.
12. Counsel submitted that it was on record that the Respondent nether signed any Transfer document in favour of the Appellant nor appeared before the Land Control Board for the purpose of procuring a consent for the transfer of the suit property to the Appellant as the original Title Deed in the name of the Respondent did not leave the office of the mutual advocate at any time for the purpose of effecting a transfer in favour of the Appellant.
13. Further that the Land Registrar, Lamu County, was also called as a witness who confirmed to the Court that the original Title Deed which was in the possession of the mutual Advocate was the genuine one for the suit property. He further confirmed that the Parcel file as regards the Title Deed that was in the Appellant’s the name did not contain the necessary required documents such as copies of the transfer documents, stamp duty forms, LCB Consent.
14. Counsel also submitted that the Land Registrar informed the court that the particular parcel file for LAMU/HINDI MAGOGONI/1379 in the name of the Appellant had an anomaly as there was mischief involved at the very least because there was no cancelled Title Deed when the purported transfer was being made in favour of the Appellant herein.
15. Counsel therefore urged the court to dismiss the appeal with costs to the Respondent.

ANALYSIS AND DETERMINATION

16. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the



Appellant during the trial and can therefore only rely on the evidence that is on record as was held in the case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 as follows:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 an 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 this 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 (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”

17. Similarly the Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 Sir Kenneth O’Connor stated as follows:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

18. This appeal raises three major grounds namely whether the Trial Magistrate erred in finding that the transfer in respect of the suit property was fraudulent, whether the court erred in declaring that the Appellant breached the contract of 13th October 2014 and whether the court erred in finding that the purchase price was never paid in full.

19. This is a case involving a contract between the Appellant and the Respondent on purchase of the suit land. It is trite that courts do not rewrite contracts for parties however bad or unfair the terms would be. It is further acknowledged that parties are bound by the terms and conditions of the contracts.

20. In the case of *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal stated as follows: -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

21. Similarly, in the case of *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

22. It should be noted that there is no dispute that the Appellant and the Respondent entered into a sale agreement in respect of the suit property which terms are not disputed. It is further not disputed that the Appellant paid to the Respondent Kshs. 2000,000/- and there was a pending balance of Kshs.



2,000,000/-. The Appellant in his testimony at the trial court admitted that the amount paid was Kshs. 2,000,000/.

23. From the evidence on record, it shows that the Appellant entered into an agreement whereby he gave a deposit of Kshs 500,000/- and wrote postdated cheques for the balance which record and the evidence show that some of the cheques were returned unpaid due to insufficient funds especially one dated 6th June 2016 for Kshs 500,000/-. There was no evidence that the bad cheque was replaced with cash or another cheque. It was incumbent upon the Appellant to prove that this was done and how he paid the outstanding balance due to the Respondent.
24. Secondly on the issue as to whether the court erred in finding that the Respondent proved fraud, there is evidence that the Respondent specifically pleaded fraud and that it was proved by the evidence of the Advocate who gave evidence as one who had acted for both parties and further that the original title had been deposited in his office.
25. The Advocate who testified as PW2 it is suspect how the Appellant obtained title in respect of the suit property which he charged at the Bank yet he still had the original title with him. It was his evidence that the Respondent neither signed any transfer documents nor went to Land Control Board for a consent to transfer.
26. The Land Registrar Lamu County also confirmed to the Court that the original Title Deed which was in possession of the mutual Advocate was the genuine one and that the Parcel file as regards the Title Deed that was in the Appellant's name did not contain the necessary required documents such as copies of the transfer documents, stamp duty forms and LCB Consent. That the title deed in the Appellant's name had anomalies.
27. The evidence on record shows that the Appellant acted fraudulently as the Trial court had found and there would be no reason to interfere with such finding. The Respondent specifically pleaded and proved fraud against the Appellant. What is the explanation of producing another title in respect of the suit land while the original title is in place? The act of transferring the suit land fraudulently and taking a loan which the Appellant has continued to default as per the demand letters on record is suspect. This was in furtherance of a fraudulent activity.
28. It is trite that the registration of a person and Certificate of title held by such person as a proprietor of a property is conclusive proof that such person is the owner of the property. However, the holding of such title is not absolute as the same maybe impeached under circumstances provided for under Section 26 (1) of the *Land Registration Act*, which provides;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.



29. The Trial Magistrate correctly held that the title fell under the category of those that have been acquired through fraud or misrepresentation acquired illegally, unprocedurally or through a corrupt scheme as was held in the case of Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 Others [2015] eKLR, where the Court held that: -

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

30. The upshot is that the appeal lacks merit and is therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF MAY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

MALINDI ELCA CASE NO.14 OF 2022 JUDGMENT Page 4

