



REPUBLIC OF KENYA



**Rading v Onyango & another (Environment and Land Appeal
E015 of 2022) [2023] KEELC 18222 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E015 OF 2022
SO OKONG'O, J
JUNE 22, 2023**

BETWEEN

JULIUS OTIENO RADING APPLICANT

AND

ERICK OCHIENG ONYANGO 1ST RESPONDENT

SHADRACK OGINDO 2ND RESPONDENT

*(Being an Appeal from the Ruling of Hon. E.A. Obina P.M delivered
on 12th November 2021 and endorsed and adopted as a judgment of
the court on 10th March 2022 in Kisumu CMCELC No. E166 of 2020)*

JUDGMENT

Brief facts

1. This appeal is challenging the ruling of Hon. E.A. Obina PM delivered on November 12, 2021 and adopted as a judgment of the court on March 10, 2022 in Kisumu CMCELC No. E166 of 2020 (hereinafter referred to as “the lower court”). The respondents instituted a suit in the lower court against the appellant through a plaint dated December 14, 2020 seeking the following reliefs;
 - a.
 - i) An order for a refund of Kshs. 8,500,000/= with interest thereon at court rates from July 13, 2020 until payment in full.
Failure to which and/or in the alternative;
 - ii. A declaration that Kshs. 8,500,000/= was sufficient consideration for the suit property and,



- iii. An order that the suit property be transferred to and registered in the names of the plaintiffs.
 - b. Damages for loss of bargain and interest thereon at court rates from the date of judgment until payment in full.
 - c. Damages for fraudulent misrepresentation and interest thereon at court rates from the date of judgment until payment in full.
 - d. Costs of the suit and interest thereon at court rates from the date of judgment until payment in full.
 - e. Any other relief that the court deems fit to grant.
2. In their plaint, respondents averred that on February 24, 2018, the 1st respondent and the appellant entered into an agreement for sale whereby the appellant offered to sell and the 1st respondent agreed to purchase a portion of land comprised in Title No. Kisumu Kanyakwar “B” /326 measuring approximately 0.82 Ha. at a consideration of Kshs. 12 Million (hereinafter referred to as “the 1st Agreement”).
3. The respondents averred that subsequently, the appellant subdivided the aforesaid parcel of land, and the portion thereof sold to the 1st respondent was registered as Title No. Kisumu Kanyakwar “B” /1678 (hereinafter referred to as “the suit property”). The respondents averred that on or about July 19, 2019, the 1st and 2nd respondents entered into another agreement with the appellant amending the 1st Agreement to add the 2nd respondent as a joint purchaser of the suit property (hereinafter referred to as “the 2nd Agreement”). The respondents averred that on various dates preceding the execution of the 2nd Agreement, the appellant took the respondents for a physical inspection of the suit property, during which visits, the appellant showed the respondents the supposed boundaries of the suit property and the respondents were particularly impressed with the topography of the property which according to the respondents was overlooking a slope.
4. The respondents averred that pursuant to the terms of the 1st and 2nd Agreements, the respondents paid to the appellant a total sum of Kshs. 8.5 Million as part payment of the purchase price. The respondents averred that as part of their due diligence, the respondents engaged a licensed surveyor on or about February 13, 2020 to ascertain the boundaries of the suit property with a view to initiating the process of subdivision of thereof between themselves. The respondents averred that to their shock and chagrin, the survey revealed that the boundaries as shown to them by the appellant were totally and completely different from the actual boundaries indicated on the official land survey records.
5. The respondents averred that contrary to what the appellant had shown the respondents on their various visits to the suit property, the survey revealed that the suit property only comprised of the slope excluding the portion overlooking the slope and consequently the respondents summoned the appellant to the suit property to re-ascertain the boundaries thereof during which the appellant admitted that he had fraudulently misrepresented the fact that the suit property comprised of the part overlooking the slope as well as the slope. The respondents pleaded several particulars of fraudulent misrepresentation, particulars of special damages/loss suffered, and particulars of breach of contract against the appellant.
6. The respondents averred that on 14th February 2020, they entered into another agreement with the appellant (hereinafter referred to as “the 3rd Agreement”) in which they mutually agreed to rescind the 1st and 2nd Agreements on condition that the appellant would refund to the respondents the sum of Kshs. 8,500,000/- that was paid to him towards the purchase price within 6 months of the date of



- the rescission agreement. The respondents averred that the parties agreed in the alternative that the appellant could offer the respondents another parcel of land of equal value. The respondents averred that in breach of the 3rd Agreement, the appellant failed to refund the said sum of Kshs. 8500,000/- to the respondents.
7. The respondents averred that the failure and/or refusal of the appellant to refund the sum of Kshs. 8,500,000/- paid to him as part of the purchase price for the suit property had occasioned them great loss particularly taking into account the fact that the respondents financed the purchase of the suit property through a credit facility the payment of which they had since defaulted on.
 8. The appellant did not file a defence to the respondents' claim within the prescribed time. The appellant filed a defence and counter-claim on April 1, 2021. The appellant admitted the three agreements that he entered into with the respondents. The appellant admitted further that he was supposed to refund the sum of Kshs. 8,500,000/- to the respondents within 6 months from February 14, 2020. The appellant averred that it was a term of the 3rd Agreement that in the event that he failed to make a refund within the said 6 months, the parties would review the agreement. The appellant averred that the respondents did not approach him for the review of the agreement but instead filed the lower court suit. In his counter-claim, the appellant averred that he was entitled to specific performance of the 2nd Agreement. He prayed for judgment against the respondents for a sum of Kshs. 3,500,000/- being the balance of the purchase price payable to him together with interest until payment in full.
 9. The respondents filed a Notice of Motion application dated February 8, 2021 on February 10, 2021 seeking an order for summary judgment on admission against the appellant for the liquidated claim of Kshs. 8,500,000/- together with compound interest at such rate as the court may deem just from July 19, 2019 until payment in full. The respondents prayed in the alternative that, the court be pleased to enter summary judgment in default of defence against the appellant for the liquidated claim prayed for in the plaint of Kshs. 8,500,000/- together with compound interest at such rate as the court may deem just from July 19, 2019 until payment in full.
 10. The appellant filed grounds of opposition together with a replying affidavit on February 11, 2021. In his grounds of opposition, the appellant termed the application defective and an abuse of the process of the court. In his replying affidavit, the appellant admitted having entered into the said three agreements with the respondents. The appellant also admitted receiving the sum of Kshs. 8,500,000/- from the respondents. The appellant admitted further that the 1st and 2nd Agreements were rescinded through the 3rd Agreement and that he was to refund the said sum of Kshs. 8,500,000/- to the respondents. The appellant averred that the rescission agreement provided for a review of the same in the event that the appellant did not make a refund within the agreed 6 months from the date of the agreement. The appellant termed the application frivolous, vexatious, and a waste of judicial time.
 11. The respondents' application was argued by way of written submissions. In a ruling delivered on November 12, 2021, the lower court entered judgment on admission for the respondents against the appellant in the sum of Kshs. 8,500,000/- together with interest at court rate from 14th February 2020 until payment in full. The lower court made a finding that the appellant had unequivocally admitted receiving the said sum of Kshs. 8,500,000/- from the respondents and had undertaken to refund the same. The said judgment of the lower court was adopted as the final judgment in the matter by the lower court on 10th March 2022 when the respondents abandoned the other claims that they had raised in the plaint against the appellant.



The appeal

12. The appellant was aggrieved by the said ruling and subsequent judgment and preferred the present appeal against the same. In his Memorandum of Appeal dated March 14, 2022, the appellant challenged the lower court's ruling and judgment on the following grounds;
 1. The Learned Magistrate erred in law and in fact by allowing the respondents' Application for summary judgment against the appellant yet the appellant had filed a statement of defence and counterclaim that established that indeed the appellant had a legitimate defence that raised triable issues.
 2. The Learned Magistrate erred in law and in fact by finding in favour of the respondents yet the respondents had failed to meet the tenets and/or legal threshold for being awarded a summary judgment.
 3. The Learned Magistrate erred in law and in fact by ignoring the fact that none of the respondents had put in a defence to the appellant's counterclaim and neither did they file a reply to the appellant's Statement of Defence thereby entitling the appellant to judgment against the respondents as prayed in the counterclaim.
 4. The Learned Magistrate erred in law and fact by failing to appreciate that the appellant's statement of defence raised a defence and that the same was not an admission of the truth of the whole or part of the claim thus warranting an order of summary judgment that resulted in an interlocutory judgment being entered in favour of the respondents.
 5. That the Learned Magistrate failed to appreciate that under clause 7 of the second sale agreement the respondents had undertaken a physical inspection of the suit property and were satisfied with existing boundaries, title thereto, and the appellant's right to sell the property.
 6. The Learned Magistrate erred in fact and law by not considering that the respondents immediately upon execution of the agreement took vacant possession of the sold parcel and the appellant allowed them to develop the same pursuant to clause 11 of the second agreement and they were still in possession of the suit property.
 7. The Learned Magistrate did not appreciate that the rescission agreement provided mechanisms for refunding the sum Kshs. 8,500,000/= paid to the appellant and that in the event of failure by the appellant to refund the same within 6 months from the date of the agreement the parties could review the terms of the agreement.
 8. The Learned Magistrate erred in fact and law by not appreciating that whereas the 6 months had lapsed, the respondents hastily moved to court and did not allow for the review of the terms of the rescission agreement.
 9. The Learned Magistrate erred in law in the interpretation of what constitutes an admission.
 10. The Learned Magistrate erred in law and in fact by not taking into consideration the appellant's defence and counterclaim and submissions in his findings.
 11. The Learned Magistrate erred in law by finding that the respondents' application as drafted could attract the orders sought as the same was defective and incurable.
 12. The Learned Magistrate erred in law and in fact by failing to apply its mind judicially and to adequately evaluate the evidence and exhibits tendered and thereby allowing the said application.



13. The Learned Magistrate erred in law and in fact by not putting his mind to the issues raised in the respondents' application hence arriving at a decision unsustainable in law.
13. The appellant sought the following reliefs in his appeal:
 - a. The appeal be allowed and the judgment and decree of the lower court delivered on November 12, 2021 be varied and set aside;
 - b. Alternatively, the court does vary and/or substitute the judgment of the lower court aforesaid with its own decision as the court may please;
 - c. Costs of the Appeal be awarded to the appellant.
14. The Appeal was argued by way of written submissions. The appellant filed his submissions on April 25, 2023 while the respondents filed their submissions on April 18, 2023.

Analysis and Determination

15. I have considered the pleadings and the proceedings of the lower court. I have also considered the ruling of that court that was adopted as the final judgment of the court. Finally, I have considered the Memorandum of Appeal and the submissions filed by the advocates for the parties. The issues raised by the appellant in his Memorandum of Appeal for determination by the court can be summarised as follows;
 - a. Whether there was an admission of the debt of Kshs.8,500,000/- by the appellant.
 - b. Whether the defence and counter-claim by the appellant was regularly filed and if it was, whether it raised triable issues.
 - c. Whether the lower court erred in entering judgment for the respondents in the sum of Kshs.8,500,000/-.
 - d. Whether the appellant is entitled to the reliefs sought in the appeal.
16. I will consider all these issues together since they are intertwined. On the issue of the admission, I am unable to fault the finding of the lower court that indeed the appellant had admitted owing the respondents a sum of Kshs. 8,500,000/- and had undertaken to pay the same. The appellant had admitted the debt in the rescission agreement and in his replying affidavit in response to the respondents' application in the lower court.
17. Order 13 Rule 2 of the *Civil Procedure Rules* provides: -

“any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

In *Choitram v. Nazari* [1984] KLR 327, the court (Madan, J.A.) stated as follows on admissions:

“For the purpose Order XII rule 6 (now Order 13 Rule 2), admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence...It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by



analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of the words even when faced with a Plaintiff such as the one in this case. To analyze pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provision of the established law by which a legal right is enforced.”

18. In his defence and counter-claim that was filed out of time without leave of the court, the appellant did not deny the fact that he had received part of the purchase price from the respondents in the sum of Kshs. 8,500,000/-. In the rescission agreement, the appellant undertook to refund the said amount within 6 months from the date of the agreement. It was common ground before the lower court and this court that the appellant failed to make payment of the said amount within the agreed period. With the unequivocal admission made by the appellant and evidence that the admitted amount had not been paid, I am of the view that the lower court did not err in entering summary judgment against the appellant for the admitted sum of Kshs. 8,500,000/- together with interest and costs.
19. On the issue of the competency of the appellant’s defence and counter-claim, the appellant entered an appearance in the lower court on January 5, 2021 but failed to file a defence thereafter until the application for judgment on admission was filed.
19. Order 7 rule 1 of the [Civil Procedure Rules](#), 2010 provides as follows:

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”
20. The appellant filed his defence and counter-claim on April 1, 2021 several months after entering appearance. It was common ground both in the lower court and before this court that the appellant did not seek leave of court to file a defence and counter-claim out of time. The said defence and counter-claim was therefore irregularly filed and the lower court did not err in ignoring the same. In any event, I am not in agreement with the appellant that the said defence and counter-claim raised triable issues. In [Job Kwach v. Nation Media Media Group Ltd.](#) [2015]eKLR the court stated as follows:

“Before the grant of summary judgment the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raised no bonafide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as “subject to liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”
21. I am unable to see any triable issue in the appellant’s defence and counter-claim filed in the lower court. The appellant entered into an agreement to sell to the respondents the suit property. A dispute arose thereafter over the boundaries of the said property which the parties were unable to resolve. The parties agreed to rescind the said agreement on the condition that the appellant refunded part of the



purchase price that had already been paid to him in the sum of Kshs. 8,500,000/- within 6 months. The appellant was given an option of giving the respondents an alternative parcel of land. The appellant neither refunded the said sum of Kshs. 8,500,000/- nor gave the respondents an alternative parcel of land within the agreed timeline. The appellant had no answer in his defence to the respondents' claim for a refund. The issues raised in the defence about the respondents having viewed the suit property and taken it as it was, was not a defence. The agreements relied on by the appellant to raise the said defence had been rescinded. The counter-claim also had no basis. The same was premised on an agreement that had been rescinded by mutual consent. A rescinded agreement cannot be performed. Contrary to the appellant's submissions, the rescission agreement did not make it mandatory for the respondents to negotiate with the appellant for a review of the agreement after the expiry of 6 months before coming to court in the event that the appellant failed to honour his part of the agreement. The respondents' suit was therefore not premature as claimed by the appellant.

22. In *Gupta v. Continental Builders Ltd.* [1978] KLR 83, the Court of Appeal stated that:

“...If no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it as much as it is against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in proper case. Prima facie triable issue ought to be allowed to go to trial a sham or bogus defence ought to be rejected peremptorily.”

23. It is my finding that the appellant's defence and the counter-claim did not raise any triable issue. I have already made a finding that the appellant had admitted owing the respondents a sum of Kshs. 8,500,000/- that was paid to him as part of the purchase price for the suit property. In the face of that admission and in the absence of a defence raising a triable issue, it is my finding that the lower court did not err in entering judgment for the respondents in the sum of Kshs. 8,500,000/- plus interest and costs.

Conclusion

24. In conclusion, I find no merit in the appeal before the court. The appeal is dismissed with costs to the respondents.

DELIVERED AND DATED AT KISUMU ON THIS 22ND DAY OF JUNE 2023

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Owiti h/b for Ms. Owuor for the appellant

Ms. Awuor for the respondent

