



**Ingoi v Macharia & another (Environment & Land Case
648 of 2015) [2023] KEELC 17924 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 648 OF 2015**

AA OMOLLO, J

JUNE 9, 2023

BETWEEN

MAURICE INGOI PLAINTIFF

AND

JOSIAH MACHARIA 1ST DEFENDANT

LANDAN MBOTE HUTHU 2ND DEFENDANT

JUDGMENT

1. The Plaintiff brought the present suit vide a plaint dated 7th July, 2015 and filed on the 9th of July, 2015 praying for judgement against the Defendants for:
 - a. A declaration that the Plaintiff is the lawful owner of the suit property;
 - b. A permanent injunction restraining the Defendants, their employees and/or agents from interfering with/and or trespassing onto the suit property;
 - c. Interests on (a) and (b) above;
 - d. General damages;
 - e. Costs.
2. The Plaintiff avers that at all material times he is the bonafide proprietor of plot no. 63 and 68 Komarock (Suit Property). That sometime in the year 2012 he entered into an agreement for sale with the Defendants wherein they agreed to jointly purchase the suit property at a consideration of K.Shs. 600,000 per plot totalling to K.Shs. 1,200,000 for both plots. That the Defendants made several payments towards the purchase totalling to K.Shs. 590,000 after which they stopped making payments despite persistent demands from him.



3. The Plaintiff averred further that pursuant to the Defendants' breach of the contract he started refunding the monies paid to him. Despite the refunds, the Defendants have continued to interfere, trespass and violate the Plaintiff's proprietary rights by issuing notices to his tenants to vacate the suit property. That the said notices have made the Plaintiff's tenants unnecessarily anxious causing some of them to vacate the suit property. He urged the Court to declare him as the lawful owner of the suit property.
4. The Defendants filed a joint Statement of Defence and Counterclaim dated 14th August, 2015. They denied the allegations that the Plaintiff was the bonafide proprietor of Plot No. 63 and 68 Komarock Shopping Centre. The Defendants contended that they jointly own the said plots having bought them from the Plaintiff. The Defendants averred that they paid the entire purchase price for plot number 68 to the Plaintiff and on the 26th of April, 2012, the Plaintiff donated a special power of attorney to the Defendants in respect of the said plot so as to facilitate the transfer to the Defendants.
5. The Defendants averred further that the Plaintiff has been frustrating them by refusing to provide transfer documents to be used together with the special power of attorney in order to effect the transfer of the suit plot. That the Defendants then used the special power of attorney to transfer the said plot into their joint names.
6. The Defendants contended that the agreement for sale was initially for plot number 68 only but over time, the Plaintiff offered plot number 63 as security for various LPOs that the Plaintiff had entered into and invited the Defendants as subcontractors. The Defendants pleaded that they completed works for the several LPOs and incurred expenses amounting to a total of KShs. 1,062,170. In the year, 2013, the Defendants asked the Plaintiff to transfer Plot No. 63 for a consideration of K.Shs. 600,000 to be deducted from the said sum of K.Shs. 1,062,170 which he agreed leaving the balance of the money owed to them at K.Shs. 462,170.
7. They claim the Plaintiff became elusive and declined to transfer plot number 63 into the Defendants' joint names by declining to provide the relevant transfer documents. The Defendants stated that the amount of K.Shs. 372,000/- being claimed as a refund by the Plaintiff in paragraph 7 of the Plaint is part payment of the debt of K.Shs. 1,062, 170 the Plaintiff owed to them.
8. The Defendants contend that the Plaintiff's suit is actuated in fraud and malice ab initio and prayed that the Plaintiff's suit be dismissed with punitive costs assessed on the higher scale.

The Counterclaim

9. The Defendants in their counterclaim reiterated that they are the legal and rightful owners of Plot no. 68 Komarock Shopping Centre and as such are entitled to quiet enjoyment and possession of the same. They labelled the Plaintiff a trespasser on the said plot and that he continues to trespass and unless he is restrained by this Court, the Defendants will suffer loss and damages. The Defendants further claimed for the sum of K.Shs. 690,170 from the Plaintiff being sums paid to him on diverse dates between 2012 and 2013.
10. The Defendants prayed for:
 - a. A declaration that the Defendants are the legal joint owners of Plot No. 68 Komarock Shopping Center and a permanent injunction restraining the Plaintiff either by himself, agents or servants from interfering with the Defendant's possession, title and interest in No. 68 Komarock Shopping Center;



- b. In the alternative, the Plaintiff be ordered to refund the purchase price plus interest thereon paid as consideration for Plot No. 68 Komarock Shopping Center;
 - c. The Plaintiff be ordered to pay the sum of K.Shs. 690,170/- plus interest thereon owed to the Defendants from the Local Purchase Order;
 - d. General damages;
 - e. Costs of this suit with interest thereon.
11. The hearing commenced on the 18th of October, 2018 with the Plaintiff, Maurice Ashiondu Ingoi, testifying as the sole witness PW1. He adopted his witness statement dated 7th July, 2015 as his evidence in chief and produced the documents in his bundle of documents filed on the 9th of July, 2015. The letters dated 11/11/2014, 13/6/2015 were produced as PEx 1, 2 and 3, the letters of allotment dated 18/1/1994 were produced as PEx 4(a) and 4(b) and nine deposit slips for various amounts for deposits made to Equity Bank produced as PEx 5.
 12. PW1 testified that the Defendants are his neighbours and that in the year 2012, he got a contract with Total Kenya Limited but he did not have enough money for implementation and so together with his wife they agreed to sell their two plots for K.Shs. 600,000 each totalling to K.Shs. 1.2 million. That they entered into an agreement with the Defendants to sell the two plots and the Defendants paid K.Shs. 590,000/- which amount was paid over a one-year period. PW1 testified further that they never received the balance of the purchase making him write a letter to the Defendants rescinding the agreements.
 13. PW1 continued in his testimony that he wrote to the Defendants requesting for their bank accounts in order to refund the purchase price monies advanced for the purchase of the plots. That he refunded K.Shs. 430,000/-. Instead he received a letter from the Defendants' former advocates Rumba & Kinuthia advocates dated 13/6/2015 demanding that he vacates Plot No. 68. Consequently, the Plaintiffs advocates wrote back to the Defendants' advocates on the 23rd of June, 2015 protesting the eviction notice. He stated that he refunded the purchase price to the Defendants by way of MPESA and a search he conducted with the Housing Department at Dandora indicated that he was still registered owner of the plot.
 14. PW1 concluded by conceding that he still owe a balance of K.Shs. 160,000 to the Defendants and he was ready to make the payment but the Defendants should pay the costs of the suit.
 15. During cross-examination, PW1 reiterated that he had two plots, plot 68 registered in his name and plot 63 in his wife's name. He confirmed that he entered into the sale agreement with the Defendants' in 2012 but denied signing the sale agreement. He asserted that they sold two plots number 63 and 68 for K.Shs. 600,000/- each. PW1 admitted that the agreement did not provide for the duration within which the purchase price was to be paid but he acknowledged receipt of the payment whenever he was paid.
 16. PW1 continued to state in cross-examination that he was paid K.Shs. 590,000 although in the last paragraph of the documents he was shown which confirm that he was paid K.Shs. 600,000. He denied receiving the funds despite signing the documents. He also denied signing the power of attorney despite admitting the fact that the signature thereon was his. He stated that he was not aware that the Defendants had transferred plot 68 into their names and that he wanted the power of attorney investigated. On being shown the letter dated 29/9/2014 from Nairobi County, PW1 denied ever having sight of the same insisting that a search of the plot indicated that he was the owner of the suit property although he had not produced it in court.



17. The Plaintiff accepted that he got a contract to work with Total Kenya but denied the Defendants' averments that they assisted him to do the works that he had been assigned by Total Kenya. The witness insists that the only agreement between them was the purchase of his plots so that he could undertake the works. He said that he received the last payment on the 10/8/2012 being the sum of K.Shs. 40,000 making total monies received at K.Shs. 460,000. He denied receiving K.Shs. 140,000 on the 10/9/2012 but conceded the signature on the acknowledgement slip was his.
18. PW1 further stated that he refunded the purchase price of K.Shs. 100,000 on the 14th of February, 2013 although he rescinded the agreement for sale by a letter dated 11/11/2014. He denied that this payment was for the work done by the Defendants. PW1 denied that he agreed to give the Defendants Plot number 63 in exchange for the monies he owed them. He admitted to knowing the document headed "Cash to Maurice Ingoi for personal use" and that the payments were advanced to him by the 2nd Defendant but which amounts he refunded.
19. The Defence case commenced on the 18th of November, 2022 with the 1st Defendant, Josiah Maina Macharia testifying as DW1. He adopted his statement dated 14th August, 2015 as his evidence in chief. He also produced the documents on the list of documents dated 14th August, 2015 as DEx 1-12.
20. DW1 stated that there were two properties involved in the present suit with DEx 1 confirming that both parties executed the sale agreement for a consideration of K.Shs. 600,000/- which amount was paid gradually in cash. DW1 testified further that he made efforts to transfer the land to his name by getting the approval for transfer and even started paying for the property rates. That as far as he is concerned the suit plots belonged to the Defendants.
21. DW1 continued to state in evidence that they were subcontracted by the Plaintiff to do some business together. He avers that they verbally agreed that if the Plaintiff failed to pay for the works done, he would compensate them with a plot which explained their acquisition of plot 63. DW1 contended that the Defendants serviced a number of the Plaintiff's Local Purchase Orders amounting to K.Shs. 1,062,170. That the Plaintiff never gave them Plot no. 63 as agreed and neither did he pay them the monies due to them. That as per the allotment letter the said plot number 63 belonged to one Phoebe Akinyi Asiondo but the Plaintiff never informed him of the ownership of the said plot before they entered into the verbal agreement.
22. DW1 denied ever being refunded the monies for Plot no, 68 and clarified that the money paid to them was in regard to the LPOs and that the dates of the MPESA corresponded with the dates of the LPOs. He stated further that PEx 3 which is the letter dated 11/11/2014 was written after Plot No. 68 had already been transferred to him and that the Mpesa payment received on 14/2/2013 was before the rescission dated 11/11/2014. He prayed for orders as contained in the Counterclaim.
23. Upon cross-examination DW1 confirmed that he had the authority to act on behalf of the 2nd Defendant. He stated that he did not have an agreement showing that he had been sub contracted by the Plaintiff but they had a gentleman's understanding as regards the details of paragraph 5(ii) of the defence. DW1 stated further that he did not ask the Plaintiff to transfer Plot No. 63 to them as pleaded in the defence. DW1 concluded by stating that he had no documentation to confirm that Mimar Engineering Services belonged to the Plaintiff.
24. During re-examination, DW1 reiterated that the monies paid to them by the Plaintiff in the year 2012 were for the works they were doing for him. That they were neighbours with the Plaintiff and he invited them orally to join in in the works he was doing for Total Kenya Ltd. That DEx 5 was the summaries of the LPOs and the amounts they were demanding.



25. The Plaintiff opted not to file any closing written submissions. The Defendants filed their submissions dated The Defendants submissions are dated 17th April, 2023. They reiterated the facts in the pleadings and the evidence adduced during trial and submitted on the following issues for determination:
- a. Who is the proprietor of all that property known as Plot No.68 Komarock Shopping Centre?
 - b. Are the Defendants entitled to be paid of K.Shs. 690,170 as claimed.
26. On the first issue, the defendants submitted that their right to property was enshrined in article 40 of the *Constitution*. That the said Article did not only provide for protection of a person's property but also the individual's proprietary right including the right to alienate property. They relied on the case of *Titus Barasa Makhanu v Police Constable, Simon Kinuthia Gitau No. 83653 & 3 others* [2016] eKLR where the court at paragraph 33 stated thus:
- “Article 40 of the *Constitution* does not simply protect the physical property alone. The *Constitution* intended to and does indeed protect proprietary rights as well. Once acquired, one has the right to use his property without any hindrance. A person has a right to alienate and exclude others from the property as well.”
27. The Defendants submitted further that they entered into a valid agreement for sale as provided under section 3(3) of the *Law of Contract Act* Cap 23. Vide the agreement dated 12th August, 2012 for Plot Number 68 Komarock Centre at a consideration of Kshs. 600,000. That paragraph 2 of the agreement for sale obligated the Plaintiff to surrender to them the possession of the property, all documents and any other thing relating to the property upon payment of the entire purchase price. The Defendants contend that they paid the entire purchase price by way of cash instalments with the last instalments of Kshs. 140,000/- paid on the 10th off September, 2012, and the same was acknowledged by the Plaintiff when he appended his signature on the payment breakdown documents.
28. They submit that the suit property was transferred to them and it therefore belongs to them hence they are therefore the proprietors of the all that property known as Plot No. 68 Komarock Shopping Centre. The Defendants refuted the claims that the contract for sale was rescission and that the said contract did not contain any clause on the mode of the rescinding of the same. They relied on the case of *Beatrice Muthio Nzioka v Charles Akelo Ong'wen* [2014] eKLR where the Court stated as follows:-
- “This court is reminded that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract, and the parties can be restored to their former position. This position of law is provided in *Halsbury's Law of England* Volume 42, 4th Edition at paragraph 242.”
29. That the Plaintiff's letter purportedly revoking the agreement dated 11th November, 2014 was way after property had already been transferred to the Defendant on the 29th of September, 2014. That it is therefore impossible to rescind a contract for sale that had already been performed.
30. On the second issue, the Defendants submitted that it was not in dispute that they entered into an oral contract with the Plaintiff where they were to service Total Kenya Local Purchase Orders (LPOs) obtained by the Plaintiff in return for the transfer of Plot No. 63 Komarock Shopping Centre for the value of K.Shs. 600,000 and the balance to be paid to them when Total Kenya paid for the services



rendered. That the Plaintiff confirmed that he traded under the name and style of Mimar Engineering Services in whose favour the LPOs were drawn by Total Kenya Ltd.

31. The Defendants submitted further that the serviced some of the LPOs to the tune of K.Shs. 1,062,170 and the Plaintiff paid them K.Shs. 372,000 leaving a balance of K.Shs. 690,170. The Defendants acknowledged the weakness of their case claiming for the transfer of Plot No. 63 Komarock Shopping Centre because there was no written agreement between the Plaintiff and the Defendants since the Plot belongs to Phoebe Akinyi Ashiondo
32. That this Court is clothed with jurisdiction to order that the Plaintiff refunds to the Defendants K.Shs. 690.170 together with interest which was expended in servicing the Plaintiff's LPOs. They urged this Court to dismiss the Plaint and grant the prayers in their counterclaim.

Determination

33. I have considered the parties' pleadings, the evidence tendered, the submissions and the applicable law. The issues which in my opinion arise for determination are framed as follows:
 - a. Whether the parties entered into a legally binding contract for the sale of Plot No. 68 Komarock Shopping Center;
 - b. Whether the Defendants breached the contract for sale of Plot No. 68;
 - c. Whether there exists a valid sale agreement for Plot No. 63 Komarock Shopping Center;
 - d. Whether there was an implied contract between the Plaintiff and the Defendants for the service of the Total Petrol Stations; and
 - e. Who bears the costs of this suit?
34. With regards to the first issue, both witnesses have testified that there exists an agreement for sale between them for the purchase of Plot No. 68 Komarock Shopping Centre. PW1 testified that he entered into the agreement so as to fund his business but he did not produce his copy of the said agreement. The only agreement produced as DEx 1 by the Defendants demonstrates that the sale was for Plot No. 68 Komarock Shopping Center together with the improvements and erections thereon for a consideration of K.Shs. 600,000 to be paid in cash.
35. Section 3(3) of the Law of Contract Act provides in mandatory terms that no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit is founded is;
 - a.
 - (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.
36. PW1 denied executing the agreement but acknowledged the signature appearing on it as his. He however did not advance any proof that his signature on the document was without his knowledge and was a forgery. DW1 also produced a special power of attorney dated 26th April, 2012 and registered on the 18th of February, 2013. During cross-examination, PW1 confirmed that the document of power of attorney also bore his signature. In the absence of any evidence that the sale agreement was entered into under duress or there was misrepresentation or facts, it suffices to hold that a valid agreement



exists between the parties as regards the sale of plot 68. The Defendants further provided evidence of payment of the purchase price in full and which payments the Plaintiff acknowledged receipt.

37. This brings me to the second issue, on whether the Defendants breached the agreement for sale to warrant the termination. PW1 testified that he opted to rescind the agreement for sale and produced the letter dated 11th November 2014 (Pex1) as evidence of the said revocation. He stated that he refunded the purchase price to the Defendants evidenced by the cash deposit slips he produced as PEx 5. PW1 stated that the reason for the revocation was because the Defendants failed to pay the balance of the purchase price. In his letter dated 11th November 2014, the Plaintiff wrote that he had sold both plots to the Defendants who had only paid Kshs 590000 out of the expected Kshs 1,200,000.
37. DW1 while countering the allegations of breach of contract stated that the purported refunds started way before the alleged revocation of the contract. He asserted that the monies advanced to them before the ‘revocation’ related to a completely different agreement between the parties. He produced a copy of payment breakdown as Dex 6 regards the sale of plot no. 68 which the Plaintiff acknowledged that the signature thereon was his. On the copy of the breakdown, the Plaintiff on the 10th of September, 2012 acknowledged receiving K.Shs. 40,000 making the total amount received K.Shs. 600,000/- which was the agreed purchase price in the agreement for sale. That made the performance of the contract by the Defendant with regard to plot 68 as complete on the 10th of September, 2012. This makes the alleged revocation of title by the Plaintiff vide the letter dated 11th November 2014 void as it was done after the contract had been fully performed.
38. On the third issue of whether there was a valid contract for sale of Plot Number 63 Komarock Shopping Center, PW1 denied ever entering into such agreement with the Defendants. DW1 testified that they entered into an oral agreement for the sale of the Plot which was given as security for sums of money advanced to the Plaintiff. He stated that the agreement was verbal and that the same was never reduced into writing. PW1 had testified that Plot number 63 was registered in his wife’s name, a fact the Defendants claimed they did not know as at the time they got into the oral agreement. The failure to enter into a written contract was against the provision of section 3(3) of the *Law of Contract Act*. Furthermore, the fact that the said parcel was registered in the name of Phoebe Akinyi meant that the Plaintiff had no mandate to transact on the plot as he was not the registered proprietor.
39. The Court of Appeal in Civil Appeal Number 22 of 2013, *Peter Mbiru Michuki v Samuel Mugo Michuki* [2014] eKLR, held;
- “Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested.
- Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-
- (1) Has in part performance of the contract taken possession of the property or any part thereof; or
- (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”
40. The fourth issue arise from the Defendants’ counterclaim where the Defendants claim refund for monies spent in servicing the several Total Petrol Stations (LPOs) as agreed between them and the



Plaintiff. DW1 testified that the Plaintiff verbally invited them as subcontractors and gave them various LPOs to fulfill. They produced the local purchase orders as DEx 4:

- a. purchase order number 4556075657 dated 11.07.2013 for K.Shs. 400,223/-;
- b. Purchase order number 4556069503 dated 19.03.2013 for K.Shs. 104,400/-;
- c. Purchase order number 4556069258 dated 13.03.2013 for K.Shs. 164,998.40;
- d. Purchase order number 4556069079 dated 11.03.2013 for K.Shs. 229,772.80;
- e. Purchase order number 4556069010 dated 08.03.2013 for K.Shs. 353,162/-.

41. DW1 testified further that the total amount owed was K.Shs. 1,062, 170 but the Plaintiff started offsetting the amount on the 14th of February, 2013 by remitting the K.Shs. 100,000 in the 2nd Defendant's Equity Bank. The Defendants produced as Dex 7 and Dex 8, Mpesa account statement for the 1st Defendant and Equity Bank Statement for the 2nd Defendant's account as proof of the sums remitted in respect of the purchase orders.
42. Though PW1 testified that the said payments were made as refund of the purchase price for the contract he had revoked, however the letter of revocation of the sale contract was done in late 2014 after the payments had started. The LPOs indicated the Vendor as Mimar Engineering Limited, an entity PW1 confirmed he operated under. The Plaintiff also recognized the work carried out by the 2nd Defendant vide the handwritten letter attached as part of the Local Purchase Orders produced as DEx 4.
43. The question left for this court to determine is whether a contract can be inferred from the documents produced and relied on by the parties with regards to the alleged subcontract and from the conduct of the parties. The Court of Appeal in the case of *William Muthee Muthami v Bank of Baroda* (2014) eKLR observed that: -

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”

44. A court can imply a contract between parties under the circumstances discussed in the case of *The Aramis* (1989) 1 Lloyds Rep 213 as follows: -

“As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case – and also agree that no such contract should be implied on the facts of any given case unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist...”

45. The Defendants have produced various local purchase orders with their Mpesa and bank statements corresponding and stated that those deposits were made in consideration for the subcontracted works. The Plaintiff's efforts to refute the contract between the parties were threadbare with him alleging that the deposit slips he had produced were but refunds for the purchase price for the sale of Plot No. 63 and 68 Komarock. That argument is however watered down by the fact that he did not produce any evidence of sale agreement executed for the two plots. The Plaintiff introduced selling of plot 63 in his letter revoking the contract but does not produce a copy of the contract he was revoking.



46. The explanation given by the Defence that plot 63 was offered as security sounds more valid following their documents produced corroborating their evidence that the alleged refunds commenced way before the alleged revocation of the contract for sale of Plot Number 63 and 68. In the case of *Ali Abdi Mohamed v Kenya Shell & Company Limited* (2017) eKLR the Court of Appeal stated that: -

“It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded ...”

47. Further in the case of *Lamb v Evans* (1893) 1 Ch 218 the Court stated that: -

“... What is an implied contract or an implied promise in law” It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile.”

48. The aforementioned analysis fits to prove that there was indeed an implied contract between the Plaintiff and the Defendants for the supply of services to Total Kenya Limited where the Plaintiff was the main contractor. The Plaintiff cannot therefore at this juncture avoid his obligations to the Defendants under the said contract.

49. Consequently, I find and hold that the Plaintiff has failed to prove his case on a balance of probabilities and the same collapses. The Defendants on the other hand have ably proved their counterclaim and the same succeeds. In conclusion, judgement is entered for the Defendants as prayed in their counterclaim on the following terms:

- a. The Defendants are the legal joint owners of Plot No. 68 Komarock Shopping Centre;
- b. A permanent injunction is hereby issued restraining the Plaintiff either by himself, his servants, employees and/or agents from interfering with the Defendants’ possession, title and interest in Plot No. 68 Komarock Shopping Centre;
- c. The Plaintiff shall forthwith pay the Defendants the sum of K.Shs. 690,170/- being the balance of the consideration for the contract between them for the services offered to Total Kenya Limited.
- d. Interest on (c) above from the date of this judgment at Court rates until payment is made in full.
- e. The Defendants are awarded the costs of the suit.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 9TH DAY OF JUNE, 2023.

A. OMOLLO

JUDGE

In the presence of:

Mr Oduor advocate appearing for the Defendants

N/A for the Plaintiff and his counsel

