**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 78 OF 14**

**EUNICE MUTHONI MUGENDA.....APPELLANT**

**- V E R S U S –**

**JOHN NDIRANGU KARIUKI**

**RAHAB WANJIRU KABUI.....RESPONDENTS**

**J U D G M E N T**

By a plaint dated 29th January 2014 Eunice Muthoni Magenda (the appellant) filed a suit against John Ndirangu Kariuki and Rahab Wanjiru Kabui alias Rahab Wanjiru John (1st and 2nd respondents respectively).

The respondents are sued as husband and wife. The claim was for the global sum of Ksh. 737,520.

According to paragraph 3 of her plaint, this was made of money she had paid to the couple, moneys, they had agreed to pay, together with penalty and interest, all arising out of the sale agreement made on 27th September, 2012, for a portion of 2 acres out of **L.R. Tetu/Muthuaini/2012** registered in the name of the 1st Respondent.

She alleged in the plaint that the claim was based on *misrepresentation, breach of contract, willful neglect* and *malafides*, particulars of which she set out at paragraph 3 as follows; -

*a) obtaining money by false pretences,*

*b) misrepresenting facts thus misleading the plaintiff to pay,*

*c) failing to attend Land Control Board,*

*d) willfully defaulting and/or refusing to transfer the land to the plaintiff,*

*e) allowing her to take possession only to prevent her working on land, by fencing it off thus exposing her crops to vagaries of weather,*

*f) Preventing the plaintiff to access the land,*

*g) breaking the land sale contract,*

At paragraph 6 she made a prayer for judgment against the defendants(respondents) jointly and severally for;

a) Ksh. 735,520/= plus interest from 27th September, 2012,

b) costs of the suit.

The defendants (respondents) through their lawyer Mbao Gitahi filed a statement of defence on 3rd March, 2014 and denied all the particulars of paragraph 3 of the plaint, and specifically owing the sum of Ksh. 737,520.

They also denied transferring the property to any other person – and all the particulars of misrepresentation, breach of contract, willful default, dishonesty Alleged in the plaint, and in turn accused the plaintiff/appellant of being the guilty party in breaching the contract and having failed to pay a sum of Ksh. 950,000/= on or before 27th September, 2014, of applying duress, coercion and intimidation upon the respondents to obtain alleged undertakings, from them.

They also averred that the 1st defendant/respondent suffered from amnesia and had no capacity to enter into the sale agreement; that the 2nd defendant/respondent was wrongly sued as she was not the registered proprietor of the land in question. They also complained about the plaintiff/appellant's lawyer who was the same person who had drawn the sale agreement for both parties. They sought the dismissal of the suit for being frivolous, unmerited, premature and an abuse of the process of court.

The reply to defence basically attacked the issue of the 1st defendant's medical incapacity, the allegations of impropriety on the part of counsel; – that there was no defence, no issue for trial, that the defence ought to be dismissed.

Be that as it may the suit was fixed for hearing on 21st August, 2014 before Hon. C. Mburu R.M. The court was satisfied that the defendant/respondents had been properly served and proceeded with the matter ex parte. The plaintiff/appellant testified and did not call any witnesses. On 30th October, 2014 the magistrate delivered the judgment dismissing the plaintiff/appellants suit with costs. That is what provoked this appeal.

In the memorandum of appeal filed on 26th November 2014, the magistrate's judgment is faulted in law and facts on the following grounds –

*1. that she delivered a judgment that was against the overwhelming evidence*

*2. that she did not appreciate or correctly apply the available unchallenged evidence in support of the appellant's claim.*

*3. That she did not appreciate the nature of the claim which was a simple refund of the purchase price*

*4. That she delivered a rush, skewed and unconsidered judgment.*

When the matter came for directions Justice Mativo allowed the appeal to be disposed off by way of written submissions.

When the matter came for mention before me on 6th March, 2017 I noted that M/S Mbao Gitau had been served but were absent. They had also not filed any submissions. I had to stay my completing writing of the judgment to ascertain whether the respondents or M/S Mbao Gitau advocates who were actually on record for the respondents had been served. In a considered ruling delivered on 21st April, 2017 I directed that the that the judgment would wait the confirmation that the respondents had been served personally

An affidavit of service sworn by Tobias Onyango Olum, licenced Court Process Server on the 7th November 2017, and filed on the same date, indicated that the second respondent had been served but the first one was too ill to receive his own service. The respondents did not file any response or make an appearance when the matter came for mention on the 5th December 2017, when this judgment date was given.

Hence I only had the appellant's submissions on record.

I have perused the submissions. The appellant through her lawyers C.M.Kingori & Co. Advocates argues that the appellants claim in the lower court was for the refund of the purchase price of Ksh. 460,000/= plus consequential expenses of Ksh. 277,250 totaling the full claim of 737,520, that the claim was not contested as the appellant's testimony was not contested, and that the trial magistrate wrongfully dismissed the claim as not specially pleaded and proved.

The appellant relies on the following cases;

1) **Jivanji vs. Sanyo Electrical Co. Ltd[2003] E.A. 98**

2) **Uganda Breweries Ltd. Vs. Uganda Railways Corporation [2002] E.A. 634**

3) **Castelino vs. Rodrigues [1972] E.A. 233.**

Reminding myself of my duty as an appeal court, I find guidance in the case of **Selle & Anor vs. Associated Motor Boat company Ltd. & others [1968]1E.A. 123** where the court said;

> *"An appeal to this court from a trial by the High Court* is by way of retrial *and* the principles *upon which the court acts in such an appeal* are well settled. *Briefly put they are that this court must reconsider the evidence, re-evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen nor heard the witnesses and should make due allowance in this respect." (emphasis mine)*

In this case only the appellant testified. She told the court that she entered into an agreement with the respondents dated 22nd September, 2012 for purchase of land. She produced the sale agreement as PEX.1 and the certificate of search for the land **Tetu/Muthuaini/2012**. She also produced a bundle of receipts to show that she had incurred expenses on the land amounting to Ksh. 65,520/= as PEX.3, that she had rented the land for 2 years but along the way she discovered that the land had been fenced off by the respondents. She said she had incurred a total of Ksh. 560,000, that by a letter dated 20th June 2013 the respondents committed to refund Ksh. 250,000/= with a 2nd installment of

ksh. 310,000/=. She produced a letter of commitment as PEX.6. That the second respondent made another committal on the 15th July 2013, PEx 7, to pay the amount by 15th August 2013. She never did. She said the two were a couple, but the land was registered in the name of the 1st Respondent. That she went to the Ministry of Agriculture to have the valued of her crops assessed but they were never assessed. That she did not take the Agricultural officer to the shamba because she was sick. That a report to the DCIO did not result in the arrest of the respondents, as she was referred to her advocates.

The plaintiff/appellant did not file any submissions at the close of her case.

In her judgment the trial magistrate considered the evidence tendered by the plaintiff/appellant and the defence filed by the defendants/respondents together were their statements filed together with their defence.

In re-evaluating the evidence, I found that there was an agreement for sale of land dated 27th September, 2012 between the 1st defendant/respondent and the plaintiff/appellant. The 1st respondent was to sell 2 acres of land out of **Tetu/Muthuaini/2012** at Ksh. 1,050,000, Ksh. 100,000 of which was paid, with the balance to be paid on or before 27th September, 2014.

It was also agreed that the vendor would attend the Land Control Board for necessary consents, that he would sign all the relevant documents to facilitate the transfer of the said 2 acres; that the parties would share survey fees equally; that the purchaser was at liberty to take possession of the 2 acres, after the signing of the sale agreement; *that any breach would result in the refund of the purchase money and a penalty of Ksh.100,000/= on the part of the vendor or a penalty of Ksh.100,000/= on the part of the purchaser plus liquidated damages all round.* (emphasis mine)

The trial magistrate found that the claim for ksh. 460,000/= towards purchase price was not proved. She found that only ksh. 100,000/= was acknowledged as having been received by the vendor in the sale agreement.

She also found that there was no proof that the appellant had paid ksh. 18,000/= for survey fees and in any event the fees was to be shared equally between the parties according to clause 4 of the sale agreement.

She also found the sums evidence in the liquidated damages to be contradictory as to whether it was Ksh. 100,000/=, Ksh. 212,000/= or Ksh.112,000/=. She found that clause 12 and 13 provided only for Ksh. 100, 000 as liquidated damages in case of breach. She said she was at a loss as to what should be paid as agreed liquidated damages.

She also found that the medical evidence was not conclusive of the 1st defendant/respondents' averred medical condition of memory loss medical condition, and was of the view that it was not clear whether at the time of executing the agreement the first defendant had the capacity to do so.

She found that the relationship between the parties was contractual. Relying on the case of **Karen Bypass Estate Ltd. vs. Print Avenue Co. Limited [2014] eKLR,** she concluded that it was not the province of the court to re-write contracts for parties, and that parties are bound by their own agreements. She found that the plaintiff had failed to prove her case on a balance of probabilities and proceeded to dismiss the claim for 737,200/=.

I have carefully considered the evidence on record and the submissions on record.

The issue is whether on the evidence before the trial court she was right to dismiss the plaintiff/appellant's case.

It was submitted that the trial magistrate ought to have considered that statements filed with the plaint as required by order 3 rule 2 of the CPR and the holding in the CASTELINO case. The trial magistrate heard the appellant who produced all at those documents as exhibits in support of her case. She also correctly considered the plaintiffs' documents, the defence by the respondents and the accompanying statements on record in arriving at her decision. I am bound to consider the same and I did.

John Ndirangu's defence and statement is that he suffers from amnesia and memory loss that he would not have entered into the sale agreement of the property out of his free will. From the medical card annexed to his statement he was 65 years old at the material time and the claim made would not be far-fetched. On her part Rahab Wanjiru Kibui expressed concern as to why she was made party to the suit yet she was not the registered proprietor of the land in question. She states she was arrested and locked up at Nyeri Police Station several times and forcefully made to enter into written undertakings for monies she never received. She also confirms that the 1st defendant/respondent was sickly and mentally retarded.

Starting with the pleadings, it is questionable why Rahab Wanjiru Kibui was joined in the suit as a co-defendant. From the sale agreement she was one of the attesting witnesses just like the others named as Alice Njoki Wahiu and Gladys Muthoni Njagi the sale agreement. Nowhere in that agreement of sale of land is she mentioned as a co-vendor. The agreement is between JOHN NDIRANGU KARIUKI in whose name the parcel of land is registered, and EUNICE MUTHONI MUGENDA both of whose particulars are well set out on the face of the agreement.

No evidence was produced to warrant her being sued as a co-defendant. It was not established how she moved from being an 'attesting witness' to a co- vender. Hence it is curious how she came to commit herself to paying any money to the firm of M/S Peter Muthomi and Company Advocates. That also places in doubt the other commitments alleged to have been signed by the defendants/respondents in the presence of the other persons. The respondents denied owing the money. They filed a defence, it was up to the appellant to produce proof that first, they received the money, and secondly they had agreed to pay.

The plaintiff's claim is for the global sum of Ksh 737, 520. In the plaint there is no breakdown of the claim. It is found in her statement

where she says;

1) Caution of land and title Ksh 2500

2) Payment towards purchase price Ksh 460,000

3) Survey fees Ksh 18000

4) Farm inputs Ksh 65,520

5) Agreed damages Ksh 212,000

**Total Ksh 737,520 plus interest**

None of these claims was specifically pleaded. None was specifically proved.

At paragraph 2 of the plaint the plaintiff states that the Ksh 737,520 is

> *'the money she paid to them( the defendants ) and /or on their account , agreed interest, and penalty inclusively, in furtherance of the agreements for sale of land made on 27th September 2012, under which the defendants agreed to sell the plaintiff two acres of land out of land parcel TETU/MUTHUAINI/2012 registered in the name of the 1st defendant , at their instance which was transferred to their brother …and the plaintiff contends that the defendants took undue monetary advantage of her by misrepresentation, dishonesty, breaching the agreement.'*

The defendants defence was simple. Apart from denying owing all that money, they pointed out that the plaintiff had not justified the claim. More importantly they contended that the suit was premature, that it was the plaintiff who was in breach as she had not paid the balance of the purchase price.

It was submitted for the appellant that the claim was clear to the defendants, as to its certainty and particularity. On this the appellant relied on the JIVANJI case above, where it was held inter alia that *'special damages must be pleaded and strictly proved. The degree of certainty and particularity depends on the circumstances and the nature of the act complained of.'*

No special damages were pleaded in the plaint dated 29th January 2014. The plaint seeks the global sum of Ksh 737, 520. No circumstances peculiar to this case were set out to bring this claim under the exception mentioned above. It cannot be said that he particularity and certainty of the claim was known to the defendant respondents. How would they know? The whole claim was denied. It was upon the plaintiff to prove her claim.

Firstly, the appellant produced no evidence that she had paid the purchase price as alleged.

Secondly, there was no evidence that the alleged farm inputs had been applied to the said parcel of land, or that there were any crops that had been planted which were damaged by an act of the defendant respondents. The fact that no assessment was conducted by the Ministry of Agriculture, and lack of action by the police can lead to only one conclusion. That there were no crops to be assessed and there could not have been any damage to warrant police action. The allegation that she did not take the agricultural personnel to the shamba because she was sick cannot hold water.

No evidence was produced with regard to payment of survey fees. When was that survey done? In any event the sale agreement clearly indicated that the same fees would be share equally.

There was also no evidence that parties had sat down and agreed on any damages amounting to Ksh 212,000. The sale agreement provided for Ksh 100,000 upon breach by either party. There was no provision for more than that and the appellant had not justified the claim.

There is no evidence to support the need to pay to lodge a caution on the title. There is nothing placed before the trial magistrate to show that the land was at the risk of being sold, and even if there was such a risk the sale agreement contains a recourse clause for the refund of the purchase price already paid and the penalty. The plaintiff/appellant had no good reason to lodge the caution having paid only a tenth of the purchase price.

The appellant also alleged misrepresentation, breach of contract, willful default, dishonesty and *malafides*. These had been denied in the defendants /respondents defence. It was her obligation to prove the same as she who alleges must prove.

The evidence on record shows that;

- there was a parcel of land in existence hence the statement that the defendant/respondent obtained money by false pretenses is false in itself.
- there is no evidence the plaintiff/appellant was misled to pay for anything. At the execution of the sale agreement there was a parcel of land, certificate of search. The plaintiff/ appellant was aware that the person she was entering into a sale agreement with was an elderly person unless she never saw him.
- There is no evidence of that there was a Land Control Board meeting which the 1st defendant/respondent failed and or refused to

attend.

- The appellant could not have expected to take full control/ownership of the property without paying for it. It is not clear how the she expected the 1st defendant/respondent to transfer the land to her when she had paid only Ksh. 100,000/= out of the agreed Ksh. 1,050,000?
- She produced no evidence at all to show that she was prevented from utilising the land.
- The agreement was signed on 27th September 2012, she filed the suit on 29th January 2014, seven (7) months to the end of the contract. The fact that she did not prove she had paid a single cent on top of the initial Ksh. 100,000/= points to her as the party in breach of the sale agreement.

The sale agreement was very clear. That default by any party would result in the refund of the purchase price and a penalty of Ksh 100,000 on top of the refund. Where did the appellant get the 'authority' to claim more that this? Either party was at liberty to sue for breach.

The trial magistrate was correct in finding that it was not the premise of courts to rewrite contracts between parties.

Was the 1st respondent in breach of the sale agreement? It was submitted on the strength of the holding in the UGANDA BREWERIES case that the 1st respondent was in breach and therefor the appellant was entitled to that part of the claim.

The appellant breached the agreement by not meeting the terms of the same. She did not do anything towards acquiring title to the property. Did not set the process in place including inviting the 1st respondent to the Land Control Board, or to execute any documents, or pay any additional funds towards the purchase price. Instead she engaged in activities that were not part of the sale agreement and purported to hold the respondents responsible. From what is before me the respondents did not do anything outside the agreement of sale.

It is therefore not correct as submitted by counsel that this was a mere case of refund of purchase price. The appellant made numerous claims against the defendant/respondents, which formed the basis for the claim for money. It was her duty to prove them since they were all denied. The claims placed before the trial magistrate were premised on allegations that required proof, that proof was not forthcoming.

In the upshot I find no reason to interfere with the trial magistrate's decision as it was based on the evidence and the application of the correct principles. The appeal is dismissed with costs to the respondents.

**Dated, delivered and signed this 31st Day of January 2018.**

**Teresia M Matheka**

**Judge**