



**M'imathiu (As Legal Representative of Mburia Mucheke Ntokimbutu - Deceased) v Mburia (As Legal Representative of Mburia Mucheke Ntokimbutu - Deceased) (Environment and Land Appeal E016 of 2023) [2023] KEELC 21625 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21625 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E016 OF 2023  
CK NZILI, J  
NOVEMBER 15, 2023**

**BETWEEN**

**VALENTINE KIMATHI M'IMATHIU (AS LEGAL REPRESENTATIVE OF MBUIRIA MUCHEKE NTOKIMBUTU - DECEASED) ..... APPELLANT**

**AND**

**JOSEPH NDUNGU MBURIA (AS LEGAL REPRESENTATIVE OF MBUIRIA MUCHEKE NTOKIMBUTU - DECEASED) ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. T.M. Mwangi Senior Principal Magistrate Court at Meru delivered on 16<sup>th</sup> February 2023 in Meru CM's Court ELC No. 34 of 2020)*

**JUDGMENT**

1. The appellant, the plaintiff in the lower court, sued the respondent as the defendant, claiming that land Parcel No. Igoji/Gikui/608 and 609, hereinafter, the suit land belonged to the estate of the late John M'Imathiu M'Mwirii on account of constructive trust due to taking up of possession following an aborted sale agreement.
2. The respondent opposed the claim through a defense dated 12.1.2021, accompanied by a list of witnesses and documents dated 12.7.2021. The respondent denied the existence of any such sale agreement for the alleged two parcels of land or vacant possession. He averred that the suit was res-judicata due to Meru HCC No. 124/1995. The respondent termed the outcome of Nkubu SPM Succession Case No. 216/2014 as regular, since the appellant was never a beneficiary of the deceased's estate, save to add that an inhibition order was issued pending this suit. The respondent termed the suit as raising no cause of action against him, was time-barred, fictitious, res judicata, and an abuse of the court process.



3. At the lower court, the respondent testified as DW1. In support of his defense, DW1 produced a confirmation letter from the area chief, demand letters, confirmation of grant, citation to accept letters of administration, objection to the grant, photographs, and crops assessment report as P. Exh No's 1-11, respectively. He also called two witnesses.
4. The appellant testified as PW1. The appellant produced a sale agreement and acknowledgment receipts dated 3.5.1995 and 6.8.1995 and a dismissal order as P. Exh No's. 1, 2 & 3, respectively. He admitted that his late father had sold both parcels of land to the father of PW 1. The appellant did not call any other witness. Following the closure of the defense case, the trial court rendered its judgment on 16.2.2023, dismissing the suit and triggering the appeal before this court.
5. By a memorandum of appeal dated 13.3.2023, the judgment of the trial court is faulted for not appreciating the appellant's pleadings, facts, evidence and list of issues, written submissions the law; relying on and determining matters not raised in the pleadings and submissions; misdirecting himself on the law on evaluation of evidence and lastly; for ignoring supportive testimonies and admissions, hence arriving at a wrong judgment.
6. The role of an appellate court is to rehearse, re-hear, or reappraise the lower court record to come up with independent findings as to facts and the law while bearing in mind that the trial court saw and heard the parties and their witnesses firsthand. See *Peters vs Sunday Post Limited (1958) EA 424*.
7. In arguing the grounds of appeal, the appellant, following directions issued on 19.9.2023, relied on written submissions dated 16.10.2023. On whether the trial court considered controverted matters or issues, the appellant submitted that the issue of the sale and possession was not in dispute, going by the testimony on pages 65 and 66 of the appeal record. The appellant submitted that he produced the sale agreement on page 55 of the record of appeal to buttress his claims that a sale for the land and the taking up vacant possession had taken place in 1979.
8. The appellant urged the court to find that the parties were bound by their pleadings and that the trial court should not have determined the issues that were not pleaded. Reliance was placed on [\*Daniel Toroitich Arap Moi vs Stephen Murithi \(2014\)\*](#) eKLR, [\*Malawi Railway Ltd vs Njasulu \(1998\) MWSC 3 as cited in Ewo vs Chairman Board of Governors Agoro Yombe Secondary School \(2018\)\*](#) eKLR and urged the court to find that no issues were in his pleadings raised on breach of contractual obligations or trust other than a declaration of rights over the two parcels of land.
9. The appellant urged the court to find that the trial court delved into the realm of speculation regarding rescission of the contract, refund, and intention to rescind the contract when the respondent called no letters or receipts to support such issues. The appellant submitted that the absence of a land control board consent could not assist the respondent in reneging on the agreement, yet he had sold the land and put the appellant into possession. Reliance was placed on [\*William Kipsoi Sigei vs Kipkoech Arusei and another \(2019\)\*](#) eKLR.
10. The appellant submitted that the burden of proving that the sale agreement had been rescinded and a refund made was on the respondent under Sections 107 and 109 of the [\*Evidence Act\*](#). Since the advocate who received the money was never called to support rescission and a refund, the appellant urged the court to find the defense unsubstantiated. On issuance of declaratory orders, the appellant submitted under Section 13 (7) (a) of the [\*Environment Land Court Act\*](#) that, the trial court had powers to grant such orders, especially in this instance where the respondent, in his evidence, admitted the sale and hand over of vacant possession since 1977. Reliance was placed on [\*Peter Gitau Kinyanjui vs Teresia Wangari Kinyanjui \(2014\)\*](#) eKLR and [\*Nicholas Njeru vs Attorney General and 3 others \(2013\)\*](#) eKLR.



11. On the other hand, by written submissions dated 2.10.2023, the respondent isolated three issues for determination. On whether the trial court correctly analyzed the testimony before it, the appellant submitted the gist of the claim was a purchase by his father of two parcels of land from the respondent's deceased father, which issues were fully considered by the trial court, especially at pages 2 & 75 of the record of appeal. On the language used in the sale agreement and its implication in line with Section 98 of the *Evidence Act* and Section 6 (1) of the *Land Control Act*, the respondent submitted that the trial court considered all the issues as pleaded and arrived at the correct judgment.
12. On whether there was an admission of the claim, the respondent submitted that the production of the sale agreement did not amount to admission since there was already a defense before the trial court denying the claim. Reliance was placed on *Kiplagat Kokut vs Rose Jebor Kipngok (2014)* eKLR.
13. The issues calling for the court's determination are:
  - i. Whether the suit at the lower court was res judicata.
  - ii. Whether the appellant had pleaded and proved her claim to the required standards.
  - iii. If the respondent had pleaded any breach of the sale agreement, its revocation, illegality, voidability, unenforceability, and statute limitation.
  - iv. If the appeal has merits.
  - v. What is the order as costs?
14. The primary pleading before the trial court was the plaint dated 6.11.2020 and the defense dated 12.1.2021. The plaint captured the appellant's claim in paragraphs 4, 5, 6, 8, 10 & 12. He pleaded that his late father bought two parcels of land, namely LR No's. Igoji/Gikui/608 and 609, measuring 136 and 109 acres, respectively, in 1977. That vacant possession given to him by the respondent's late father, following clearance of the agreed purchase price. The appellant averred that the seller passed on before the transfer could be effected filed an objection in the probate court, and eventually was referred to the ELC court to ventilate his claim. The plaint was accompanied by a list of documents, namely the sale agreement in Kimeru and English translation. The appellant eventually produced the two documents as P. Exh No's. 1 & 2, respectively.
15. In his defense before the court, the respondent denied the contents of paragraphs 4, 5, 6, 7, 8, 9, 10, and 11 of the plaint in general terms. He did not attack the sale agreement on account of legality; as offensive to the *Land Control Act*, void, and unenforceable, the suit as res judicata and time-barred. The respondent did not plead the rescission of the sale agreement and a refund for the consideration.
16. Order 2 Rule 4 of the Civil Procedure Rules relates to matters that have to be specifically pleaded. In particular Sub, Rule (2) & (3) provide that a defendant to an action for the recovery of land must specifically plead every ground of the defense on which he relies and a plea that he is in possession of the land by himself or his tenant shall not be sufficient. Order 2 Rule 6 forbids parties from departing from their pleadings. Further, Order 2 Rule 10 requires parties to plead particulars of misrepresentation, fraud, breach of trust, willful default, or undue influence. On admission and denial, Order 2 Rule 11 thereof provides that a party must specifically traverse every allegation of fact, since general denial or non-admission of such allegations shall not be sufficient.
17. In trite law, parties are bound by their pleadings, and issues flow from them. See *Raila vs IEBC (2017)* eKLR, *Mutinda Mule vs IEBC, (2014)*. In this appeal, the respondent neither pleaded nor gave particulars of the breach of the sale agreement or attacked it on account of legality, denied vacant



- possession by the appellant, and raised the issues of its rescission and the refund. It is through pleadings that parties set the agenda for the trial to avoid trial by ambush. The court can only determine issues as pleaded by the parties. The bone of contention before the trial court was whether there was a sale agreement, taking up of vacant possession, and failure to transfer the land formally. Both parties relied on the sale agreement. The appellant produced the sale agreement as P. Exh No's. (1) and (2) duly translated into English. The respondent also produced the English translation as D. Exh No. (1).
18. The law on sale agreements in 1977 only required an acknowledgment note and evidence of occupation. In *Peter Mbiru Michuki vs Samuel Mugo Michuki (2013)* eKLR, the court held that Section 3 (7) of the *Law of Contract Act* makes exceptions to oral contracts for sale coupled with part performance. The court said that before Section 3 (3) of the Act came into force in 2003, Section 3 (3) was inapplicable. The court said what was applicable in 1964 was evidence of taking possession in part performance or already being in actual or constructive possession out of the oral contract. The court cited with approval *Mwangi & another vs Mwangi (1986) KLR 328*, that the right of a person in possession or occupation of land was equitable or overriding rights binding on the land under Sections 18 (4) and 20 (1) of the *Limitations of Actions Act* which rights would not be extinguished by the death of the owner.
  19. The appellant had averred in the plaint that she had been in occupation or possession of the suit land up to filing the suit. Similarly, at the hearing of the suit, PW1 said she was still on the land. The respondent did not plead any recovery of the land or issuance of a notice to vacate the land served upon the appellant.
  20. In *Willy Kitilit Kimutai vs Michael Kibet (2018)* eKLR, the court dwelt with Sections 16 (2), 39, 40 & 41 of the *Land Act*. It cited with approval *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri (2014) eKLR* on implications of receiving the total purchase price and putting a purchaser into possession, developments therein, and default in applying for a land control board consent. The court further cited *Macharia Mwangi (supra)* that the transaction between the parties had created a constructive trust in favor of all the persons who had paid the monies. Regarding the implications of a *Land Control Act*, the court said the doctrines of equity were part of our laws and that Sections 3 (3) of the *Law of Contract Act* and Section 38 (2) of the *Land Act* did not affect the creation of resulting implied or constructive trust. The court said that since trusts were overriding interests, a person put into possession by the proprietor and claiming equitable interest could not be in possession illegally. The court said Article 10 (2) (b) of *the Constitution* expects the court to be guided by equity as a principle of justice.
  21. The appellant produced photographs and a crop damage assessment report by a divisional agricultural officer for Kshs.66,400/=. All these point to his possession and occupation of the suit land. The respondent did not dispute her pleadings and evidence in court. The dispute between the two parcels of land was also captured in the succession cause in 2019. The Order for the dismissal of H.C No. 124 of 1995 was made under Order XVI Rule 6 of the Civil Procedure Rules. It was not a conclusive determination of the suit on finality as per Section 7 of the *Civil Procedure Act*. See *Tee Gee Electrics and Plastics Co. Ltd vs Kenya Industrial Estates Ltd (2005) KLR 97*. Consequently, I hold that the sale agreements was pleaded, and a translated copy formed part of the documentary evidence before the trial court. The respondent had also admitted the same in his demand letter produced as D. Exh No. (4). The respondent did not plead the breach, revocation, rescission, and the intention to refund the purchase price or its actual refund. Above all, the evidence of payment of the total purchase price and the taking up of vacant possession was not disputed by the respondent in his pleadings or testimony before the trial court. The issues raised in the plaint and determined by the trial court were never



determined in the succession cause. The upshot is that the appellant had proved his case to the required standard. The appeal is allowed and substituted with an order allowing the appellant's claim.

22. Costs of this appeal to the appellant.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**In presence of**

C.A Kananu/Mukami

Karanja for appellant

**HON. CK NZILI**

**ELC JUDGE**

