



Dumbeyia v Kenya Industrial Estates Limited (Environment & Land Case 727 of 2017) [2023] KEELC 22157 (KLR) (13 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22157 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 727 OF 2017
MN GICHERU, J
DECEMBER 13, 2023**

BETWEEN

NELSON MUTURI DUMBEYIA PLAINTIFF

AND

KENYA INDUSTRIAL ESTATES LIMITED DEFENDANT

JUDGMENT

1. The plaintiff seeks the following reliefs against the defendant.
 - a. Rescission of a contract of sale of L.R. Ngong/Ngong/12800.
 - b. Refund of Kshs. 150,000/- together with interest thereon at commercial rates from the date of issue of the subject cheque.
 - c. Special damages on account of loss of investment that the bid property would have accrued to the plaintiff as at the date of filing of suit together with interest thereon from the date of filing.
 - d. General and exemplary damages for fraudulent and negligent misrepresentation and deceit.
 - e. Cost of the suit and interest on damages and costs.
 - f. Any further or other reliefs that the court may deem fit and just to grant. This is as per the plaint dated 16/4/2009.
2. The plaintiff's case is as follows. On 13/4/2006, the defendant through its authorized agent by the name of Whitestone Auctioneers (K) Ltd placed a newspaper advertisement which gave notice of intention to sell by public auction, the suit land. The notice read in in part,

“All that freehold parcel of land known as Ngong/Ngong/12800 Kajiado District situated off Maasai Lodge Road and to the North of Nazarene University and South of Rudolf



Sticker School measuring 0.405 hectares or 1 acre approximately and registered in the name of Georgina Mdenyo Lusiola. This is roughly rectangular shaped mixed soils plot whose boundaries are open and there are no permanent developments thereon.”

- “3. All interested purchasers are requested to view the properties and verify the details as the auctioneers do not warrant these”.
 4. A deposit of 25% of the purchase price must be paid in cash or by bankers cheque to the auctioneer at the fall of the hammer and the balance paid within fifteen days from the date of auction to the charge or their advocate, whichever is applicable”.
3. On 15/4/2006, the plaintiff was taken to the advertised land by an agent of the defendant who pointed out the location. A servant of the defendant gave the plaintiff a copy of the mutation form. A landmark to identify the land was a windvane. On 18/4/2006, the plaintiff attended the auction and bid for Kshs. 600,000/-. His bid was accepted by the defendant’s agent. The plaintiff paid for 25% of the purchase price vide a bankers cheque no. 00829473 for Kshs. 150,000/-. On 10/5/2006, the plaintiff wrote to the defendant’s agent so that the beacons could be pointed out. The agent was slow in taking action. The plaintiff therefore hired his own surveyor to assist him in locating the beacons. It was then established that the suit land was not at the advertised location but 35 kilometers away. This location was only accessible during the dry season. An acre at the true location had the value of Kshs. 150,000/- while at the advertised area, it cost approximately Kshs. 1.2 million. While land at the advertised area was described as Ngong/Ngong, the one at the true location was described as Kisaju/Ole Kasasi.
 4. On discovering the anomaly, the plaintiff wrote to the defendant’s agent who did not respond. He later asked for a refund of his deposit and this too was not responded to. The plaintiff tried to settle the matter amicably but when this failed, he filed this suit.
 5. It is the plaintiff’s contention that as at the time of filing the suit an acre of land at the advertised area was selling at Kshs. 6 million.
 6. In support of his case, the plaintiff filed the following evidence.
 - a. Copy of the contentious notice dated 13/4/2006.
 - b. Copy of valuation report which has only one page.
 - c. Copy of mutation form for L.R. No. Ngong/Ngong/11702.
 - d. Copies of bank statements and bankers cheques.
 - e. Correspondence between the plaintiff and the auctioneer dating between 10/5/2006 and 4/11/2008.
 - f. Copy of certificate of official search dated 13/9/2011 showing the registered owner of the suit land as David Kahindi Kiptum.
 - g. Copy of valuation report dated 25/1/2017 which shows that land in the area described in the notice would cost between Kshs. 25 to 30 million per acre and about Kshs. 10 million in the true location of the suit land.
 7. In its amended statement of defence dated 16/9/2009, the defendant avers as follows.

Firstly, the notice in the newspapers was not an offer but an invitation to treat.



Secondly, the notice was specific that it was up to the interested purchasers to confirm the physical location of the suit land.

Thirdly, the defendant denies having taken the plaintiff to the location of the suit land or showing him any wind vane as a landmark.

Fourthly, the defendant avers that the plaintiff should have located the beacons prior to the public auction and not after and he has only himself to blame for this failure. This failure renders the transaction unenforceable, null and void.

Fifthly, the defendant is unaware of the cheque of Kshs. 150,000/- prepared by the plaintiff in its favour. If there was any such payment, it should be recovered from the auctioneer not the defendant.

Sixthly, the notice was accurate in all the material particulars in that it did not mention distances or the state of the road and the land reference number given was the correct one.

Finally, it is the defendant's contention that it is the plaintiff who breached the fundamental terms of the auction by failing to complete the transaction within 15 days and his suit should therefore be dismissed with costs.

8. In support of its case, the defendant filed the following evidence.
 - i. Witness statement by Francis Kabuga, a manager with the defendant.
 - ii. Copy of title deed for L.R. Ngong/Ngong/12800 dated 21/5/1991 in the name of Betty Georgina Mdenyo Lusiola.
 - iii. Copy of mutation of L.R. Ngong/Ngong/11702 from which the suit land mutated.
 - iv. Copy of charge instrument dated 7/6/1993.
 - v. Copy of notice in the Daily Nation Newspaper of 2/3/2006.
 - vi. Copy of pre-disbursement valuation report of the suit land dated 24/8/1992 putting the value of the suit at Kshs. 300,000/-.
 - vii. Copy of valuation report for the same land dated 13/6/2005 showing the open market value as Kshs. 1.3 million and the forced sale value at Kshs. 800,000/-.
 - viii. Copy of certificate of official search dated 15/12/2010 showing Betty G.M. Lusiola as the registered proprietor.
 - ix. Copy of the letter of consent issued by Oloolaiser Land Control Board authorizing the charge and dated 1/9/1992.
 - x. Copy of valuation report dated 16/12/2010 showing the value of the suit land as Kshs. 2.5 million and forced sale at Kshs. 1.8 million.
9. At the trial, the plaintiff testified and adopted his witness statement and documents. He also called the valuer who prepared the report dated 25/1/2017. Both were cross-examined by the defendant's counsel. The defendant also called its witness who adopted his witness statement and was cross-examined by the plaintiff.
10. The parties filed written submissions on 5/4/2023 and 14/4/2023 respectively. The defendant identified the following issues.
 - i. Whether the defendant is liable for rescission of the contract?



ii. Whether the defendant should pay the damages claimed?

The plaintiff's submissions do not contain clear cut issues. A thorough perusal reveals the following issues.

- a. Whether the plaintiff's evidence on the site of the suit land vis-à-vis the site on the notice is controverted by any evidence by the defendant.
- b. Whether an auctioneer is by law required to describe the exact location of the land to be sold in an auction and any improvements and developments thereon.
- c. Whether a bidder in an auction can retract his bid at any time before the sale is complete.
- d. Whether the defendant is guilty of misrepresentation.

11. I have carefully considered all the evidence adduced in this case by both parties including the witness statements, documents and the testimony at the trial. I have also considered the submissions by learned counsel for the parties, the issues raised therein as well as the law cited in the submissions.

Before I decide on the issues raised by the parties, I wish to raise the issue of jurisdiction as follows, does this court have the requisite jurisdiction to determine this dispute.

12. Under Article 162 (2) (b) of the Constitution, the jurisdiction of this court is very specific. It provides as follows.

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

(b) the environment and the use and occupation of, and title to, land”.

This jurisdiction is repeated in Section 13 of the Environment and Land Court Act (Act No. 19 of 2011).

None of the prayers in paragraph 20 of the plaint dated 16/4/2009 is for use, occupation or title to land. None relates to the environment either. The prayers are for rescission of a contract, refund of Kshs. 150,000/- special damages, general damages, exemplary damages for fraudulent and negligent misrepresentation and deceit.

At paragraph 10 of the plaintiff's submissions dated 13/4/2023, there is mention of the law of torts. All these prayers are outside the jurisdiction of this court, in my view. Furthermore, the amount claimed by the plaintiff is within the pecuniary jurisdiction of the Magistrates Court.

Section 11 of the Civil Procedure Act provides as follows.

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts in the same district competent to try it, a suit may ... be instituted in any one of such subordinate courts...”

13. Be that as it may, since the parties did not raise this issue, I take it that they acquiesced to the jurisdiction of this court.

Secondly, this case has been pending for more than fourteen years and it is only fair that it be concluded in this court.



14. On the first of the plaintiff's issues on the site of the suit land, I find that it was incumbent upon the plaintiff to ascertain the correct location of the land before bidding at the auction. Condition 3 of the sale was very clear on this. It read

“all interested purchasers are requested to view the properties and verify the details as the auctioneers do not warrant these.”

From the plaintiff's own evidence, it is clear that he went to fix the beacons after he had already paid the 25% deposit. He should have done this prior to the bidding. He has only himself to blame for this lapse.

15. On the second of the plaintiff's issues, it is not correct to say that an auctioneer is by law required to describe the exact location of the land to be sold in an auction. Rule 11 of the *Auctioneers Rules 1997* deals with the contents of a court warrant or letter of instruction but not a notice of sale by an auctioneer. A warrant of sale or attachment is different from a public notice of sale by auction by an auctioneer.

16. Regarding the third issue, I find that a bidder in an auction can retract his bid before the sale is complete at the risk of breaching a contract that exists or is presumed.

17. As has been stated at paragraph 14 of this judgment, the defendant is not guilty of any misrepresentation.

18. Coming now to the defendant's first issue, I find that it is not liable for rescission of the contract because as stated in paragraph 14 of this judgment, the plaintiff should have visited the land with his surveyor to see the beacons before the bid and not after as the third condition of the sale required interested purchasers to verify the details as the auctioneer did not guarantee them.

19. On the final issue of whether the defendant should pay the damages claimed, I find that it should not pay for two reasons.

Firstly, the plaintiff has been found to be at fault so he should not benefit from his own fault.

Secondly, even though the plaintiff's witness statement runs into five (5) pages, he has not quantified any damages in the statement showing the loss that he suffered. Special damages must, by law, not only be pleaded but also proved. In this case, they are not quantified or proved.

20. Even though the defendant avers that it did not receive the plaintiff's deposit of Kshs. 150,000/- there is evidence to prove that the defendant's agent received Kshs. 150,000/-. I find that the plaintiff is entitled to a refund of this amount and since he has adduced evidence to prove that he sought for the refund before he filed this suit, he should also be paid the costs of the suit.

21. In conclusion, I enter judgment for the plaintiff against the defendant for Kshs. 150,000/- only together with costs and interest at court rates from the date of deposit of the amount to the date of refund.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 13TH DAY OF DECEMBER 2023.

M. N. GICHERU

JUDGE

