



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. E037 OF 2021**

**MERCY NKIROTE.....APPELLANT**

**VERSUS**

**LAWRENCE NGAKU BUNDI.....1<sup>ST</sup> RESPONDENT**

**MWENDA TIMOTHY MANYARA.....2<sup>ND</sup> RESPONDENT**

**JOHN MANYARA.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. S. Ndegwa (P.M.)*

*delivered on 9<sup>th</sup> December 2019, in Githongo PM ELC No.28 of 2018)*

**JUDGMENT**

**A. PLEADINGS**

1. The appellant as the plaintiff in the lower court had sued the respondents for breach of a sale agreement dated 12.8.2014 over **L.R No. Abothuguchi/Makandune/2035** and crop destruction. She prayed for a refund of **Kshs. 290,000/=** and general damages against the 1<sup>st</sup> respondent, crop, trees/grass damages as against the 2<sup>nd</sup> respondent and for a permanent injunction on trespass and inference against the respondents.
2. The 1<sup>st</sup> respondents was duly served with summons to enter appearance but failed to do so following which a request for interlocutory judgment dated 12.2.2019 was filed on 14.2.2019.
3. By a statement of defence dated 9.5.2018, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents entirely opposed the averments in the plaint.
4. The 2<sup>nd</sup> respondent averred he had lawfully bought the subject land on 8.11.2014 for valuable consideration from the 1<sup>st</sup> respondent and eventually became a registered owner with no objection from the appellant and thereafter took vacant possession and started developing the suit land as an absolute owner.
5. In a reply dated 13.6.2018, the appellant averred that she had bought the land on 12.8.2014 and took vacant possession hence had the 2<sup>nd</sup> and 3<sup>rd</sup> respondents done due diligence, they would have established that she had bought the suit land and taken vacant possession.
6. Further, the appellant averred that she had placed a caution on the land which was fraudulently removed on 8.11.2016 paving way for the transfer in favour of the 2<sup>nd</sup> respondent.

**A. TESTIMONY**

7. The appellant testimony was that she bought two acres of **L.R No. Abothuguchi/Makandune/2035** from the 1<sup>st</sup> respondent at **Kshs. 500,000/=** through an agreement dated 12.8.2014 after which she paid a deposit of **Kshs. 250,000/=**, took vacant possession and started occupying and developing the land until 2017.
8. As to the balance, the appellant testified that the 1<sup>st</sup> respondent kept on telling her to wait until he could collect the balance and transfer the

land. She was however chased away from the land in 2017 by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who also destroyed her crops. She reported to the police and her crop damage was assessed at **Kshs. 232,800/=**. The intruder was arrested, charged and convicted in **Githongo CRCC No. 1137 of 2017**. She produced the sale agreement as **P exh (1)**, photographs as **P exh (2)**, certificate of official search as **P exh (3)**, police abstract as **P exh (4)**, agricultural officer's report **MFI (5)** and a copy of the charge sheet for **Githongo CR 1137 of 2017** as **P exh (6)**. She however admitted she gave the purchase amount to Denis Munene Bundi who was not a party to the suit but the sale agreement involved him and the 1<sup>st</sup> respondent as the vendors.

9. Regarding the balance as per **clause 1 (b) of P exh 1**, she said it was to be cleared by 1.9.2014, but could not pay since she could not trace the seller(s) though she produced no demand letter demanding for them to collect the balance and transfer the land since they did not attend the land control board and or secure a consent to transfer to that effect. She however clarified she placed a caution on the land on 18.12.2014 as indicated in the search, marked as **DMF 1 (1)**.

10. Further, the appellant testified that she did not know if the same land on 8.11.2014 as per the sale agreement marked as **DMF1 (2)** had been sold to the 2<sup>nd</sup> respondent.

11. Regarding her development on the land, PW1 clarified at the time she moved in, the 1<sup>st</sup> respondent had already demolished his house and that she did not plant any trees on the land.

12. PW2 as a neighbor of PW1 adopted his witness statement dated 21.2.2018 confirming PW1 had bought the land from the 1<sup>st</sup> respondent and started cultivation until 17.8.2017 when the 2<sup>nd</sup> respondent descended on the land, cut 6 mango trees, 1 lemon tree, 1 eucalyptus and 15 banana stems all belonging to the appellant.

13. PW3 told the court on 6.10.2017 he received a letter from Gaitu police station to visit the appellant's land for crop damage assessment at Makandune location. According to him, the land measured approximately 2 acres. He found out assorted crops, fruit trees and exotic trees had been destroyed to which he made the assessment as per his report.

14. Following his assessment, PW3 compiled a report dated 6.10.2017 based on the prevailing market rates at the time. The total damage was **Kshs. 232,800/=**. He produced the report previous marked as **MFI 5 as P exh 5**.

15. DW1 relying on his witness statement dated 26.4.2018 told the court he became the registered owner of the suit land on 8.11.2014 after lawfully entering into a sale agreement with the 1<sup>st</sup> respondent, obtaining land control board consent and a transfer after which he took vacant possession. He denied any trespass, alleged crop damage and the prayer sought against him since he was a lawful registered owner of the property. He produced a sale agreement as **D exh (1)**, acknowledgement receipts for payments as **D exh (2)**, a copy of title dated 10.11.2016 as **D Exh (3)** and photographs reflecting his developments as **D exh (4)**. He denied knowledge of the appellant's alleged prior sale agreement with the 1<sup>st</sup> respondent though he was aware that the 1<sup>st</sup> respondent had been found guilty under **Section 313 of the Penal Code in Githongo Cr. 1137** of 2017.

16. Further, DW1 admitted he had cleared the land to start off cultivation through the 3<sup>rd</sup> respondent who was his caretaker. Additionally, DW1 said he was not handed over vacant possession on 10.11.2014 in line with clause 3 and 4 of **D exh 1**.

17. DW2 adopted his witness statement dated 9.5.2018 confirming that his son DW1 had bought the suit land from the 1<sup>st</sup> respondent. He told the court he did not know why he had been enjoined in the suit since his work was only to supervise the casuals who were working on the land on behalf of his son then based in Nairobi after vacant possession was handed over to him by the 1<sup>st</sup> respondent.

## **B. GROUNDS OF APPEAL**

18. Pursuant to leave granted on 17.2.2021 to appeal out of time, the appellant attacks the lower court judgment and decree on the grounds that: the court failed to analyse and or isolate all the salient issues for determination as contained in the pleadings, failed to make a finding of fact on collusion and connivance by the respondents against the appellant; failed to make a finding of fact that the appellant had proved her claim to the required standards especially her documentary evidence regarding **Githongo Cr. Case No. 1137 of 2017** and its implications on the suit; failed to make a finding she was in actual possession and occupation of the property before it was sold and transferred to the 2<sup>nd</sup> respondent hence entry into the property and also the 2<sup>nd</sup> sale offended her existing sale agreement; failed to find the sale and transfer by the 1<sup>st</sup> respondent to 2<sup>nd</sup> respondent was fraudulent, illegal and unprocedural; attached weight to the respondents' evidence despite lack of such evidence to rebut or controvert her own evidence; made a finding the 2<sup>nd</sup> respondent had proved ownership and possession of the suit land; failed to find the respondents were liable for her crop damage and lastly failed to consider her submissions.

## **C. WRITTEN SUBMISSIONS**

19. In line with **Order 42 Rule 16 of the Civil Procedure Rules**, parties filed written submissions dated 29.10.2021 and 24.11.2021 respectively.

20. The appellant submitted the court failed to frame proper issues for determination, failed to find that she was the first one to purchase the property or give weight to the conviction at the Tigania Law Courts.

21. On the part of the respondents, it was submitted that the court at page 69 of the record of appeal drew out the issues hence ground 1 of the appeal was baseless; that there was no evidence tendered on collusion or connivance; that the purported vendor Denis Munene Bundi was not enjoined in the suit for the refund; that it was not possible for the appellant to take vacant possession on 1.9.2014 and the plant crops to

mature by 10.11.2014; that the claim for a refund could not hold against the 1<sup>st</sup> respondent who did not receive the entire money in the first instance except **Kshs. 42,000/=**; that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents bought the land with all the developments thereon similarly with the appellant's agreement but failed to complete the agreement hence could not purport to have taken vacant possession and commenced developments before clearing the purchase price; that the record of appeal did not include the charge sheet of **Criminal Case No. 1137 of 2017** though it was marked as **P exh 6** and proceedings or judgment was never produced before the trial court hence the trial court could not be faulted; that the failure to honour the terms of **P exh 1** meant that the caution could not exist endlessly; that there was no evidence of the appellant being handed over vacant possession before she cleared the consideration on 1.9.2014 more so if the seller was unavailable; that the failure to clear the balance meant the 1<sup>st</sup> respondent could freely sell the land to the 2<sup>nd</sup> respondent who was an innocent purchaser, in any event the appellant never pleaded any breach of the sale agreement; that a copy of title in favour of the 2<sup>nd</sup> respondent the prima facie evidence of ownership besides the appellant only claimed for a refund, damages and injunction in the primary suit; that the appellant could not benefit from a property that she did not own in the first instance and there was no evidence tendered pointing at the 3<sup>rd</sup> respondent as the one who alleged caused the damaged particularly when it was doubtful the appellant had validly acquired or assumed vacant possession.

22. Lastly, it was submitted by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the trial court exercised its judicial mind competently in analyzing all the evidence, submissions and came to a conclusion that the appellant had no cause of action against the respondents.

23. This being a first appeal, **Section 78 of the Civil Procedure Act** mandates the court to rehear, reassess and re-evaluate the record of the lower court, come up with independent findings and conclusions while fully aware the trial court had the occasion to hear the witnesses and assess their demeanor.

#### **D. ISSUES FOR DETERMINATION**

24. In my considered view, the issues commending themselves for determination by this court are:-

- I. If there was a valid sale agreement between the appellant and the 1<sup>st</sup> respondent.**
- II. If the appellant met the terms and conditions of the sale agreement and legally took vacant possession as agreed or at all.**
- III. If the appellant was legally on the suit premises as alleged or at all and suffered any alleged loss and damage.**
- IV. If the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' entry to the suit land and subsequent activities thereon were lawful.**
- V. If the respondents were liable for any loss or damage occasioned against the appellant as alleged or at all.**
- VI. If the appellant pleaded and proved any loss, damage, breach, collusion, fraud or connivance between the respondents herein.**
- VII. What is the order as to costs.**

25. It is trite law that parties are bound by their pleadings. A court of law can only determine issues arising out of pleadings and that issues flow from pleadings. See **Stephen Mutinda Mule & 3 Others –vs- Independent Electoral and Boundaries Commission [2014] eKLR.**

26. In this suit, the appellant alleged she had bought 2 acres of **L.R No. Abothuguchi/Makandune/2035** on 12.8.2014 from the 1<sup>st</sup> respondent for **Kshs. 500,000/=** and paid a deposit of **Kshs. 250,000/=** upon signing of the agreement and a balance of **Kshs. 200,000/=** was to be paid on 1.9.2012 which date she was also to take possession and start using the premises.

27. In her pleadings particularly paragraph 6 of the plaint, she averred that she took vacant possession immediately and commenced developments thereon. Further, it was pleaded that on 8.11.2016, the 1<sup>st</sup> respondent fraudulently, unlawfully, illegally and in breach of the **P exh (1)** sold and transferred the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who took vacant possession and violently and or unlawfully caused damage and loss to her developments which she urged the court to find them liable.

28. In response to the claim as framed, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents averred the 1<sup>st</sup> respondent was in possession of the suit land until he ceded the same to them on the day they took vacant possession, hence denied the alleged destruction of any developments belonging to the appellant as at the time of taking over vacant possession.

29. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents pleaded they were lawful purchasers for value without notice and that there were no orders stopping any sale and or transfer hence they held a valid title.

30. In a reply, the appellant insisted upon execution of **P exh (1)** agreement, she immediately took vacant possession and started developments thereon and that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had failed to undertake any due diligence otherwise they would have known or established her occupation of the land. She pleaded that their title deed was invalidly, fraudulently and illegally procured.

31. The law governing to contracts on sale of interests and rights to interests in land is to be found in **Section (3) of Law of Contract Act and Sections 38, 39, 40, 41 and 42 of the Land Act 2012.**

32. In expounding the implications of a sale agreement, the Court of Appeal in **Prudential Assurance Company of Kenya Limited –vs-**

*Sukhwinder Singh Jutley & Another [2007] eKLR* held that, where the intentions of parties has been reduced into writing, it was generally not permissible to adduce extrinsic evidence whether oral or written either to show the intention of the parties or to contradict or vary or add to the terms of the documents including implied terms.

33. It went on to say that courts adopt the objective theory of contract intervention and profess to have the overriding aim of giving effect to the intentions of the parties when construing a contract otherwise known as the principle of the four corners of an instrument, which insists that a document's meaning should be derived from the document itself without reference, to anything outside the document, such as the circumstances and history surrounding the parties signing it.

34. Further, in *Fidelity Commercial Bank Limited –vs- Kenya Grange Vehicle Industries Limited [2017] eKLR*, the court held the doctrine is aimed at guarding the notion of freedoms on contract which is central to the law of contract. Therefore, court cannot rewrite a contract which parties have by consensus chosen for themselves.

35. Given the above principles, the duty of this court is to interpret the terms of the sale agreement as they are. The parties are bound by what they stated in the agreement unless there was evidence of coercion, fraud and undue influence as held in *Pius Kimaiyo Langat –vs- Co-operative Bank of Kenya Limited [2017] eKLR and Attorney General of Belize –vs- Belize Telecom Ltd [2009] 1 WLR 1980* as cited with approval by *Matheka K. J in Josephine Nyevu Mwadziwe & Another –vs- Francis Mujumba Aluha & Another [2022] eKLR*.

36. In this suit, the balance of the purchase price was to be paid on 1.9.2014. The handing over of vacant possession and the commencement to utilize the land was to take place after the balance was cleared. In breach of the agreement, parties had agreed on a default clause of payment of Kshs. 1,000,000/= as liquidated damages.

37. The sale agreement was duly executed and witnessed by parties. Similarly, the 1<sup>st</sup> respondent as the vendor acknowledged receipt of the deposit.

38. In my view therefore, I find the agreement valid in law as provided under **Section 3 (3) of the Law of Contract Act and Section 38 of the Land Act**.

39. Therefore, given the sale agreement was clear, unambiguous, lawful and there being no pleading by the appellant and the 1<sup>st</sup> respondent that it was illegal, or executed under coercion or undue influence, I find no need to import any parole evidence to contradict its terms and conditions especially on who received the money or not.

40. Having said that, the appellant alleged there was breach on the part of the 1<sup>st</sup> respondent whereas the 2<sup>nd</sup> and 3<sup>rd</sup> respondents counter accused the appellant for the breach. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were not parties to the sale agreement. They did not demonstrate any authority to plead and or speak for and on behalf of the 1<sup>st</sup> respondent who failed to defend the suit despite service of summons and a default judgment entered against him.

41. The appellant had the onus to demonstrate through evidence, that the default was on the part of the 1<sup>st</sup> respondent regardless of whether the matter was coming for formal proof as against the 1<sup>st</sup> respondent or not. **Clause 1 (b) of P exh 1** required the appellant to clear the purchase price by 1.9.2014.

42. It was upon clearance of the balance that the appellant was to take vacant possession and commence to utilize the suit premises. She could not therefore take or purport to take vacant possession earlier than 1.9.2014 and or contrary to what parties had validly consented to at the execution of the sale agreement.

43. Similarly, she could not unilaterally take vacant possession and commence any developments without honouring her obligations. To do otherwise would have amounted to a breach of the sale agreement. Any developments thereon without clearance of the consideration would in my view be illegal and against the terms and conditions of the sale agreement. Further, the appellant did not offer any evidence and or demonstrate any efforts including a notice to the 1<sup>st</sup> respondent to come and collect the balance at the place the sale agreement was executed.

44. In absence of any such evidence to the contrary, my finding is that the appellant breached the sale agreement on 1.9.2014 when she failed to honour its clear terms, entered into the suit premises and or commenced developments on the land without the consent or approval.

45. Turning to the fourth issue as indicated above, the 1<sup>st</sup> respondent did not oppose the suit or challenge the appellant's evidence. That notwithstanding, **P Exh 1** was silent on the manner in which any breach was to be communicated to the offending party.

46. **Section 41 of the Land Act** provides that an offending party to be notified of the nature and extent of the breach by the vendor through a thirty days' notice whereas under **Section 42**, the purchaser may, if the vendor has regained possession, file a suit before court for reliefs.

47. In this suit, there was no evidence tendered on whether the 1<sup>st</sup> respondent gave a completion notice in line with the law before purporting to rescind the sale agreement either in October 2014. The appellant produced **P exh 6** a charge sheet in **Githongo SRM CR Case No. 1137 of 2017** where the 1<sup>st</sup> respondent was charged for the offence of cheating and found guilty for offering to sell her suit land which he knew was false contrary to **Section 315 of the Penal Code**. Even though it is submitted the exhibit was not produced. The lower court file has the said exhibit.

48. On the other hand also, there was no evidence from the appellant that she agitated for her rights to take up vacant possession and or was desirous to honour the agreement within reasonable time. More importantly that when she failed to meet the deadline of 1.9.2014, she did not tender evidence sought for and was granted an extension of time to meet her obligations in order to keep the sale agreement alive and or

enforceable.

49. Between 2014 and 2016 when the appellant alleged the 1<sup>st</sup> respondents breached the sale agreement and or purported to illegally sell and transfer the suit land, clearly the sale agreement was already frustrated by the conduct of the parties. None of them was making efforts to validate the sale agreement and or revive it by complying with its terms and conditions even if there had been inordinate delay in complying.

50. If then the appellant had without informing the 1<sup>st</sup> respondent unilaterally taken vacant possession and or started developments on the suit land, she was a trespasser as per **Section 3 of the Trespass Act Cap 294** since the 1<sup>st</sup> respondent had not consented to her entry into the suit premises.

51. Similarly, the appellant had not met her obligations with the 1<sup>st</sup> respondent so as to fully enjoy the rights and privileges of a purchaser and or have superior rights above those of the 2<sup>nd</sup> respondent had already acquired an absolute title over the suit land with effect from 10.11.2016.

52. In *J.T.M. Construction & Equipment Ltd –vs- Circle B. Farms Ltd, claim Number 2007 Hcr 05110*, the court held it was a settled principle that when time was of essence, there was no leeway for the delay and completion had to be on the date specified failure of which a notice of breach of contract took place and that a court would not assist a party who when served with a notice had failed to complete within the time specified. Further, the court held that once there was non-completion, remedies became available to the aggrieved party including rescission.

53. In my view, a delay of up to 2016 was unreasonable and inordinate on the part of the appellant to complete the payments.

54. In *Housing Company of East Africa Ltd & 2 Others –vs- Board of Trustees of NSSF & Another [2018] eKLR*, the Court of Appeal held where there was such a delay, the claimant as a matter of fact should have expected that some pressure would be brought to bear on it to complete after so many years and after so many opportunities.

55. The court further held it was good law that where a purchaser had dragged his feet and was guilty of unnecessary delay, the vendor was in order to serve a notice upon whose expiry he could treat the contract as having come to an end.

56. In this suit, there was no completion notice issued. Similarly, there was no notice to seek for the extension of time to comply by the appellant. There was also no formal handing over of vacant possession as well as a notice of rescission of the sale agreement.

57. The 1<sup>st</sup> respondent failed to inform the 2<sup>nd</sup> respondent of a previous land sale with the appellant even though technically, the sale agreement had become voidable and or inoperational for non-compliance with its term.

58. Therefore, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had all the rights and obligations to deal with the suit land as it pleased them after the handover of vacant possession in terms of clauses 3 and 4 of the sale agreement dated 8.11.2014.

59. Even though after 1.9.2014, the sale agreement between the 1<sup>st</sup> respondent and the appellant had been breach by the appellant, she was still in law entitled to a 30 days' notice which would have been up to 1.10.2014. The 1<sup>st</sup> respondent resold the land to the 2<sup>nd</sup> respondent on 8.11.2014. This was slightly less than 1 month after the expected completion period of the earlier agreement.

60. Given therefore the appellant had failed to comply with the deadline and had allegedly moved into the suit premises without the 1<sup>st</sup> respondent's consent, my finding is that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were not liable for the alleged loss and damage since she was a trespasser to the land.

61. As to the last issue and given the circumstances, the only remedy available to the appellant remained the refund of her deposit as provided under **Section 40 of the Land Act**. There was also evidence of a conviction in a criminal case which the 1<sup>st</sup> respondent has not challenged.

62. In the premises, I allow the appeal. The appellant's claim in the lower court against the 1<sup>st</sup> respondent is allowed only in terms of prayer (1) for a refund of **Kshs. 290,000/=** with interest with effect from 8.11.2014 when he resold the land without notice until payment in full at court rates.

63. Given the findings, prayers for general and special damages and permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are dismissed.

64. Costs of the appeal and the suit to be met by the 1<sup>st</sup> respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 23<sup>RD</sup> DAY OF MARCH, 2022**

**In presence of:**

Gichunge for 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Kaimenyi – present

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**