



REPUBLIC OF KENYA



**Ngugi (Suing as the Legal and Personal Administrator to Ngugi Njogu) v Muriithi (Environment & Land Case E159 of 2021) [2022] KEELC 2860 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2860 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E159 OF 2021**

**JA MOGENI, J**

**MAY 19, 2022**

**BETWEEN**

**NJOKI NGUGI (SUING AS THE LEGAL AND PERSONAL ADMINISTRATOR  
TO NGUGI NJOGU) ..... PLAINTIFF**

**AND**

**ERASTUS WARURU MURIITHI ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff's deceased husband and the plaintiff entered into an agreement dated 29/03/2007 with the defendant for sale for a portion of Nairobi Block 126/381 (Ngondu) measuring approximately  $\frac{1}{4}$  of an acre or thereabout situated in Kamuru Area of Nairobi for a sum of Kshs. 130,000. By a Plaint dated 29/04/2021, the Plaintiff herein brought a suit against the defendant and sought for the following orders;
  - a. A declaration that the agreement dated 29/03/2007 between the plaintiff deceased husband and others and the defendant has since abated, expired and of no legal consequence by operation of the law.
  - b. That the defendant by himself or family or anybody claiming through him be evicted and all structures therein having been put by him on  $\frac{1}{4}$  acre of land parcel Nairobi Block 126/381 be demolished at the defendant's cost.
  - c. Cost and interest of the suit.
2. The plaintiff avers that the transaction of the sale of land never materialized since 2007 the plaintiff husband Ngugi Njogu died in 2009. Further the plaintiff avers that in late 2020 the defendant took over possession of the  $\frac{1}{4}$  acre of the suit property, fenced it off and started constructing on it. That the plaintiff states that he summoned the defendant to the local administration but the defendant never honored the summons.



3. Further the plaintiff avers that the defendant's entry onto the land and construction is an act of fraud. She particularized fraud by the defendant as;
  - i. Entering into the land in 2020 whilst relying on an expired or statured barned agreement dated 29/03/2007 which is over 13 years old
  - ii. Failing to fulfill the terms of the agreement dated 29/03/2007 by paying the balance of the purchase price which in any case has already appreciated due to the value of the land
  - iii. Failing to engage the plaintiff and the entire family on the way forward and forcefully taking over the land subject to an expired agreement
  - iv. Acting ignorantly and negligently in the circumstances.
4. The suit is contested and the defendant filed a statement of defence on 20/05/2021. In the statement of defence, the defendant avers that he entered into a sale agreement dated 29/03/2007 for purchase of a ¼, a quarter an acre at a price of Kshs. 130,000 and he paid a deposit of Kshs. 50,000 and a balance of Kshs. 80,000 which was to be paid upon completion and transfer of the title to the defendant which was a provision in the agreement that the vendors shall be paid balance upon the subdivision of parcel number Nairobi Block 126/381 and registration shall be in favour of the purchaser.
5. The defendant contends that the balance has not become due to date because the transfer and registration has not been executed. Further the defendant contends that he took possession of the suit property in 2007 and has fenced, constructed and planted food crops on the suit property and been in quiet possession for 14 years. The defendant further denies any acts of fraud as alleged by the plaintiff. He contends that it is the plaintiff who has failed to comply with the terms of the Sale Agreement dated 27/03/2007 and is therefore not entitled to prayers sought.

#### **Plaintiff's Case**

6. The suit was heard on 28/02/2022 when the plaintiff and the defendant each testified on behalf of their cases and closed their respective cases. Njoki Ngugi PW1 gave her evidence she adopted her witness statement filed in court on 29/04/2021 as part of her evidence in chief and produced the plaintiff's bundle of documents dated 29/04/2021 as plaintiff's Exh.1-5. In her witness statement, PW1 stated that she is the plaintiff by virtue of being the legal and personal administrator to Ngugi Njogu- deceased vide Ad Litem in Nairobi HCP&A No E1314 of 2020. She stated that on or about 29/03/2007, plaintiff Njoki Ngugi and Stephen Njogu Ngugi sold ¼ acre to the defendant which was to be excised from the suitland for valuable consideration of Kshs. 130,000/= which the defendant paid Kshs. 50,000 at execution of the agreement. The plaintiff contends that the plaintiff tried to summon the defendant to the local administration but the defendant never honored the summons and therefore the defendant's entry into the land and construction thereon is fraudulent. The plaintiff testified that their claim against the defendant is an eviction order of all structures.
7. She stated that it was an express term of the said agreement that the defendant would pay a deposit of Kshs 50,000/- on or before the execution of the agreement and that the balance of the purchase price of Kshs. 80,000 was payable on completion. PW1 contended that despite several requests made to the defendant to pay the balance of the purchase price in exchange for the completion documents, the defendant failed, refused and or neglected to do so. She stated that through her advocates, the plaintiff sent a demand letter dated 13/08/2020 to the defendant alleging trespass and malicious damage to property. He averred that the defendant refused to deliver possession of the suit property and was still in occupation.



8. In cross-examination, PW1 stated that the sale agreement dated 29/03/2007 was written before an advocate. That the agreement had three parties who are the plaintiff, the plaintiff's husband and the son Mr. Stephen Ngugi. She testified that in the sale agreement at Clause 2 it showed that the defendant has paid Kshs. 50,000 and there was a balance of Kshs. 80,000 which the plaintiff stated would be paid by the defendant not a long time later. The plaintiff noted that what was written at paragraph 2 in terms of completion is not what was agreed upon by the parties.
9. The plaintiff further stated that she could not transfer the land to the purchaser because she had not yet paid the balance. She testified that they had a meeting before entering into the agreement. She also stated that the subdivision has commenced and demarcation has been done and the suit property is plot No. 15. The plaintiff testified that there was no express agreement but that years have gone by and now the defendant has encroached on the land and built on the land five years after the agreement. Further that they had paid Kshs. 50,000/- as a deposit and the balance of the purchase price was to be paid after completion and registration of the transfer of the property in favor of the defendant. The plaintiff testified that the land was commercial and not agricultural land. Further the plaintiff in cross-examination stated that the defendant has put a stone-building which is a permanent structure which was put up in 2007 and plaintiff only came to court in 2021.
10. In re-examination the plaintiff stated that the land belonged to her husband and Muriithi. She stated that her husband was deceased and as the vendor he could not complete the process of sub-division because he got sickly and struggled with disease for eight years then he died. Plaintiff testified that they started process of succession, she called the defendant to clear payment but he always said that the plaintiff should complete the sub-division before he pays the balance.
11. The defendant, Erastus Waruru Muriithi, DW1 adopted his witness statement dated 07/10/2021 as part of his evidence in chief. He also produced a bundle of documents six in total marked as DWExh 1-6 dated 12/10/2021. He testified that the sale agreement is signed by both the plaintiff and the advocate. He stated that he lived in Ruai, he reiterated that the parties to the agreement are Mr Ngugi Njogu, Stephen Njogu Ngugi and Mrs Njoki Ngugi, the latter being the plaintiff. He stated that apart from the three he also involved the other members of the plaintiff's family who signed a consent document. He testified that he was to pay Kshs. 50,000 upfront and he did pay the cash and it was acknowledged. He attached an acknowledgment to the payment as DwExh 5.
12. He testified that he did not pay the balance because they parties to the agreement agreed that he will clear the balance after the subdivision and the transfer to the defendant as per clause 2 of the agreement. He stated that to date there has been no document of title. He testified that he is ready to pay the cash. He stated that he took possession immediately because he fenced and developed the suit property in 2007/8. He testified that he has annexed the photographs showing the permanent structures he had put up where his son was staying. He urged the court to dismiss the case.
13. In cross-examination, DW1 stated that he did not pay the balance because the agreement is clear. He testified that S.Juma & Sayeni & Co. Advocates is the advocate they approached as vendor and purchaser. He stated that he is the one who introduced the plaintiff to the advocate. He stated that he was not aware if the agreement had an expiry date further that the agreement does not show when he was to take possession. He testified that the value of the property is not the same from 2007 and that he has not paid the balance.
14. In his further testimony in re-examination, DW1 told the court that the vendor is the defaulting party because they have not transferred the land as they had agreed. He also testified that the issue of price increase are not issues before the court and neither were they issues in the pleadings. He further stated he had not paid until he receives the title since this was a key provision in the agreement of sale. DW1



reiterated that he was to pay the balance of the purchase price in exchange with the title for the suit property in his name. He stated that it was the plaintiff who had frustrated the agreement between them. The defendant also produced a letter in his bundle of documents DW1 Exh-10 from his lawyer Wambugu Muriithi Advocates to the Plaintiff's advocate C. Kimathi & Co Advocates alleging trespass from the plaintiff on the suit property and informing the plaintiff that the alleged trespass was reported to Kamulu Police Station vide OB No. 23/25/7/2020.

15. The defendant then closed his case.

### **Analysis and Determination**

16. After the close of evidence, the parties made closing submissions in writing. I have considered the pleadings, submissions and evidence adduced in court. I find that there are three issues for consideration namely:

- a. Whether the agreement between the Plaintiff and the defendant is still valid or it has abated by operation of law
- b. Whether the Plaintiff is entitled to the remedies she is asking.
- c. Costs of the suit

17. It is important that before I begin to address each of the issues I have identified that I address myself to the issue of fraud raised by the plaintiff. Now, the plaintiff submitted that the payment of Kshs. 50,000 by the defendant was proof that the defendant did not pay the sum of Kshs.130,000 that was required as purchase price of the suit property.

18. The plaintiff alleged fraud on the part of the defendant on the purchase of the suit property. It is important to consider whether fraud was properly particularized and proved. Under Order 2 rule 4 of the *Civil Procedure Rules* it was incumbent upon the plaintiff to plead fraud specifically. The order succinctly provides as follows: -

19. 4.

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

- (a) which he alleges makes any claim or Defence of the opposite party not maintainable;
- (b) which, if not specifically pleaded, might take the opposite party by surprise; or
- (c) which raises issues of fact not arising out of the preceding pleading.

(2) ....

In the case of *Koinange & 13 Others v. Charles Karuga Koinange* 1986 KLR at page 23 Justice Amin citing the case of *Ratilal Patel Makanji* (1957) EA 314 observed as follows:

“When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required”



20. Furthermore, in *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis ours)

21. It is clear that the plaintiff did not give particulars of fraud and during the hearing the plaintiff failed to prove the allegations of fraud. Ultimately, I do find that the pleadings on fraud are insufficient and the evidence did not depict any fraud.

22. Whether the sale agreement between the plaintiff and the defendant abated by operation of the law? The basis of the claim herein revolves entirely on the terms and conditions of the sale agreement dated 29/03/2007. There is no dispute Kshs. 50,000/= was paid in respect of Nairobi Block 126/381 and the balance of Kshs. 80,000/= was to be paid upon the vendor completing the process of sub division of parce of Nairobi Block 126/381, transfer and registration of the title in favour of the purchaser.

23. The agreement placed the burden of subdividing the mother title on the plaintiff subsequent to which he was to sign and transfer the land to the purchaser. On the other hand, the burden of clearing the purchase price was placed on the defendant without a due date but to be done after transfer and registration in their favour.

24. The plaintiff pleaded and testified that the defendant took possession of the suit property in late 2020 and fenced it off and that he did this without paying the balance that he was supposed to have paid which was the second step in facilitating the transfer of the suit property.

25. My reading of the sale agreement shows that it had no timelines on the transfer but placed the burden on both parties to do certain activities to enable the securing of the title to the sub-divided suit property in favour of the defendant.

26. At paragraph 7 of the plaint, the plaintiff averred that he tried to summon the defendant to the local administration to no avail and the defendant continued to construct on the suit property even before paying the balance that was required of Kshs. 80,000 that had been agreed to officially transfer L.R No. Nairobi Block 126/381 to him.

27. Now the question is if the plaintiff had taken all the necessary steps this far, could she be said to have breached the sale agreement, whereas the defendant had failed to pay Kshs. 80,000/= to facilitate sub-division and transfer? The answer can only be no.

28. DW 1 Exh 6 and 7 clearly indicates that the sub-division was done and mutation form was filled in 2006. This means that the agreement was ready for finalization by that time, the plaintiff had failed to honour his obligation by not paying the balance of the purchase price. The sale agreement was however explicit on when the balance was to be paid, “..... upon completion of the process of subdivision.... transfer and registration in favour of the purchaser”.

29. The sale agreement was written and witnessed by the firm of S. Juma Saenyi & Co. Advocates, the sale agreement remained and remains valid until the transfer is executed, it has neither abated nor ceased to exist by operation of any law.



30. On the 13/08/2020 the Defendant instructed his lawyers Wambugu Muriithi & Co Advocates to write to the plaintiff's advocate a demand against the trespass on the suit property by hooligans allegedly doing so on behalf of the plaintiff. The Court of Appeal in *Njamunyu vs Nyaga* (1983) KLR 282 held that where completion has not taken place as intended by the parties the issue between them is when thereafter. Before the agreement is rescinded the party in default should be notified of the default and given reasonable time within which to rectify.
31. From the documents on record, there is none that shows that the plaintiff sent any notice to the defendant with a view of rescinding the sale agreement. Rescission arises where one party in a contract is in default. The party which is not in default gives notice to the party in default to perform the contract. On the failure to perform the contract is then rescinded. In this case for the plaintiff to rescind this contract she must show that the defendant was in default. Secondly, that she gave notice of default and the defendant were unable to remedy the default by performing their part of their contract. In the contract the defendant's obligation was to pay the purchase price. The plaintiff did not place any evidence on record that the defendants defaulted in that obligation since the sale agreement clearly stipulated that the balance of the purchase price would be paid upon transfer. If anything the evidence is that the defendants is waiting for the transfer to be done before paying the outstanding balance.
32. In the case of *Sisto Wambugu v Kamau Njuguna* [1983]eKLR it was held that the vendor's right to rescind an agreement for sale for nonpayment on the appointed time is only exercisable where time is of essence or where the innocent party has issued a notice to the defaulting party making time of essence. Further, if a contract for sale contains a condition entitling the vendor to rescind the contract on the happening of certain events and those events happen, the vendor may proceed with rescission. In his submission, the defendant reiterated that under clause 2 of the agreement for sale, he was required to pay the balance of the purchase price after the transfer and registration of the suit property in his name.
33. The plaintiff's case as pleaded in the plaint is that the defendant fraudulently entered into the suit property and constructed thereon based on a transaction which according to the plaintiff the transaction has never materialized since 2007. I have referred to the salient terms of the agreement for sale between the plaintiff and the defendant. There is no doubt upon reading clause 2 of the agreement for sale that the balance of the purchase price was payable once the suit property had been transferred to the defendant. The plaintiff's demand for the payment of the balance of the purchase price before the suit property was transferred to the defendant was therefore contrary to the terms of the agreement for sale. The same applies to the plaintiff's failure to release the completion documents to the defendant's advocates until the defendant had paid the balance of the purchase price. In *Margaret Njeri Muiruri -v- Bank of Baroda (Kenya) Limited* (2014) eKLR it was stated:-
- “It is not for the Court to rewrite a contract for the parties. As this Court held in *National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd*. Civil Appeal No. 95 of 1999 “a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”
34. Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.”



35. In the present case, there was no evidence that the deceased or the plaintiff signed the agreement as a result of fraud, coercion or undue influence nor was it pleaded. In light of the above principles, it is my finding that the contract executed by the parties was lawful and binding upon them.
36. On the issue as to whether the Plaintiff breached the agreement of refund, Black's Law Dictionary 9<sup>th</sup> Edition defines a breach of contract as;

“a violation of a contractual obligation by failing to perform one's own promise, repudiating it or by interfering with another party's performance. A breach may be one by non-performance or repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”
37. It is not in dispute that the outstanding balance of the purchase price was to be paid upon the plaintiff transferring the suit property to the defendant. The Plaintiff admitted that the outstanding balance was not paid. The terms of the payment of the balance were very clear. Having failed to execute the transfer so as to enable the defendant to pay the outstanding balance as agreed, I find that the Plaintiff breached the agreement of sale.
38. Due to the foregoing, it is my finding that it is the plaintiff who needs to perform their part of the contract by releasing the completion documents to the defendant in order to allow for facilitation through payment of the balance of the purchase price. It is true that the cost of the land has certainly changed. This is a claim that the plaintiff can bring before the court to claim interest through a different case and not the current suit.
39. The reliefs sought by the plaintiff against the defendant have not been proved on a balance of probability and therefore the plaintiff is not entitled to any of the reliefs sought in the plaint. The defendant has in his evidence stated his willingness to complete the agreement so the plaintiff needs to do what the agreement requires of her.
40. On the matter of costs of the suit, this follows the event unless for special reason the court orders otherwise. Since I am not persuaded that there is any special reason I will award costs of the suit to the defendant.

The upshot of the case is that, I make the following orders:

1. The plaintiff's suit is dismissed.
2. The plaintiff shall furnish the defendant with the completion documents which shall include a duly executed and registrable instrument of transfer of L.R No. Nairobi Block 126/381 in favour of the defendant within thirty (30) days from the date hereof.
3. The defendant shall pay to the plaintiff a sum of Kshs. 80,000/- on the date of registration of the transfer in his favour.
4. Each party to bear its own cost.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON 19<sup>TH</sup> DAY OF MAY 2022.**

.....  
**MOGENI J**  
**JUDGE**



**Judgment read in virtual court in the presence of:**

..... for the Plaintiff

..... for the Defendant

Vincent Owuor -Court Assistant

