



**Gichui v Thuku & 6 others (Environment & Land Case
228 of 2017) [2022] KEELC 2793 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2793 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 228 OF 2017**

NA MATHEKA, J

MAY 17, 2022

BETWEEN

PETER MUCHINA GICHUI PLAINTIFF

AND

STEPHEN MAINA THUKU 1ST RESPONDENT

MICHAEL WAINANA THUKU 2ND RESPONDENT

TERESIA WANJIRU THUKU 3RD RESPONDENT

DAN KIPSANG 4TH RESPONDENT

MARGARET WANJERI GITHINJI 5TH RESPONDENT

MARGARET WANJERI MAINA 6TH RESPONDENT

DISTRICT LAND REGISTRAR KWALE 7TH RESPONDENT

JUDGMENT

1. By a plaint dated 21st May 2017 the Plaintiff states that on or about 5th January, 2013 he entered into an agreement with the 1st Defendant whereby he gave him a loan of Kshs 2,000,000.00. It was term of the said agreement that the 1st Defendant would repay the loan by transferring 0.5 acres of the land parcel known as Title Number Kwale/Diani Beach Block/194. It was a further term of the agreement that the 1st Defendant would offer a security by depositing Title Number Kwale /Tiwi/1365 with the Plaintiff and which Property was co-owned with 2nd and 3rd Defendant. The Plaintiff was to hand back the Title to the 1st Defendant immediately he got a transfer of the 0.5acres of Tide Number Kwale/Diani Beach Block/194. The 1st and 2nd Defendant and purporting to have authority of the 3rd Defendant executed even a transfer of the entire parcel Title Number Kwale/Tiwi/1365 to the Plaintiff to enhance security. The 1st Defendant has never transferred the said portion of 0.5 acres of Tide Number Kwale/Diani



Beach Block/194 and totally went underground. After several attempts to get the 1st Defendant to refund the sums granted to him or have him transfer the land, the Plaintiff discovered recently that the subject parcel which he was holding an original had since been subdivided into three portions Title Number Kwale/Tiwi/2718, Title Number Kwale/Tiwi/2719 and Title Number Kwale/Tiwi/2720 and transferred to the 4th, 5th and 6th Defendants respectively. The Plaintiff is now apprehensive that the 1st Defendant will continue to perpetuate fraud since he has no intentions of refunding the said sums. The Plaintiff avers that the sub division and transfer of Title Number Kwale/Tiwi/1365 was tainted with fraud and illegality since he is still holding the original tide deed and wonders how the 7th Defendant allowed such a sub division or transfer without proper documents. The Plaintiff prays for judgement against the Defendants jointly and severally for:-

1. Order of inhibition restraining any dealings of any nature whatsoever on Tide Number Kwale/Tiwi/2718, Title Number Kwale/Tiwi/2719 and Title Number Kwale/Tiwi/2720 without the express approval and consent of the Plaintiff.
 2. An order directed to the 7th Defendant to immediately cancel all subdivisions and entries being Title Number Kwale/Tiwi/2718, Tide Number Kwale/Tiwi/2719 and Title Number Kwale/Tiwi/2720 and any other made in respect of Title Number Kwale/Tiwi/1365 and ensure the parcel and record remains intact as Tide Number Kwale/Tiwi/1365.
 3. In the alternative to prayers a) and b) above, an order compelling the 1st Defendant to refund the sum extended to him being Kshs 2,000,000/= plus interests at 10.0% per month with effect from 5th January, 2013.
 4. Damages
 5. Costs and interest of this suit
2. The defence states that the 5th Defendant in this case is the duly sole registered owner of all that parcel of land namely Title Number Kwale/Tiwi/2719 a subdivision of Title Number Kwale/Tiwi/1365. The 4th and 6th Defendants were prospective purchasers of all those parcels of Land namely, Title Numbers Kwale/Tiwi/2718 and Kwale/Tiwi/2720 subdivisions of Title Number Kwale/Tiwi/1365. The 5th Defendant is a Kenyan citizen residing and working for gain in the Republic of Kenya however at all material times to this suit she was working for gain in Sweden. While working in Sweden the 5th Defendant being desirous of investing in Kenya through purchase of land instructed her father Mr Patrick Githinji Memia DW2 to scout for her a suitable property for investment. It was not long before the 5th Defendant's aunt who is the 6th Defendant reported that there was a parcel of land that was available for purchase in Kwale County being Title Number Kwale/Tiwi/1365 and that she was interested in the same land which could be subdivided between them, all they needed was to look for one more person and the 4th Defendant agreed to join in the purchase.
3. That towards the end of April, 2014 the 5th Defendant travelled to Kenya from Sweden and accompanied by her father and the 4th and 6th Defendants met the Agent by the name Timothy Mburu who had been commissioned the 6th Defendant to scout land for her purchase, he showed them a copy of the Title and provided them with copies of relevant documents for the said Land. On or around 2nd May, 2014 they instructed the said Agent to carry out an official land search at the Lands Registry-Kwale which he did, and upon perusal of the search, they were satisfied that the Land was free for purchase, they also did visit the land and carried out interviews with some neighbours who confirmed that indeed the Land belonged to the 1st, 2nd and 3rd Defendants. On or around 30th May, 2014 they visited the Lawyers for the 1st, 2nd and 3rd Defendants M/s Ombati, Otieno and Opondo & Company Advocates who prepared Sale Agreements. During the signing of the Sale Agreements the 1st, 2nd and



- 3rd Defendants together with their said Lawyers further guaranteed that the subject land was free for purchase. The Land was to be subdivided and the 4th, 5th and 6th Defendants were purchasing 0.36 Hectares each. The Purchase Price for 0.36 Hectares of the Land was Kenya Shillings Two Million One Hundred Thousand (Kshs. 2,100,000/=) with a deposit of ten (10%) per cent i.e. Kshs. 210,000/=. The 5th Defendant confirms that she did pay her Deposit the sum of Kenya Shillings Two Hundred and Ten Thousand (Kshs 210,000/-). Further 4th, 5th and 6th Defendants were to pay Legal Fees and Surveyor Fees amounting to the sum of Kshs. 170,000/=. On or around the 16th of June 2014 the 5th Defendant remitted a further sum of Kshs. 300,000/= towards payment of the balance of the Purchase Price.
4. On the 1st of July 2014 the 5th Defendant again remitted a further payment of through her father towards the Kshs.1, 240,000/=Purchase Price. On the 2nd of August, 2014, the 5th Defendant made the final installment of the balance of the Purchase Price and fees i.e. Kshs. 350,000/= through her father. Prior thereto on or around 12th of June, 2014, the 5th Defendant executed the Transfer forms at the Lawyer's Offices and the duly executed transfer dated 12th June, 2014 was registered and stamped on 23rd June, 2014 while she was in Sweden. On or around 8th August, 2014 the 5th Defendant through her father received the Original Title Deed from the Lawyers being Title Number Kwale / Tiwi / 2719.
 5. However for the 4th and 6th Defendants the Sale Agreements was cancelled the transaction due to failure to agree on modes of payment and flexible payments with the 1st, 2nd and 3rd Defendants. The 4th and 6th Defendants as such have no beneficial interest in the land or otherwise and the Titles should have reverted back to the 1st, 2nd and 3rd Defendants. Since the transaction was cancelled, the 4th and 6th Defendants do not understand why their names are still appearing as registered owners as they even handed back the title documents to the 1st, 2nd and 3rd Defendants' Lawyers M/s Ombati, Otieno and Opondo & Company Advocates to ensure the Titles revert back to the 1st and 2nd Defendants. The Plaintiff in this case is unknown to the 4th, 5th and 6th Defendants they have never met nor heard of him before this case. The 1st, 2nd, and 3rd Defendants are known to them because they were the registered Owners and Vendors of the Title Number Kwale/Tiwi/1365 before subdivision. At the time they carried out the search, the land had not yet been subdivided as it was actually subdivided at the time of purchase of the Land which was part of the Agreement.
 6. The 4th, 5th and 6th Defendants are unaware of any dealings and/or transactions between the Plaintiff and the 1st, 2nd and 3rd Defendants and they are total strangers to the allegations leveled against the 1st, 2nd and 3rd Defendants by the Plaintiff. The 4th, 5th, and 6th Defendants were not privy to the purported contract between the Plaintiff and the 1st, 2nd and 3rd Defendants. That the 5th Defendant avers that she is a bona fide purchaser of Number Kwale/Tiwi/2719 for value.
 7. The 5th Defendant has a legitimate expectation that this Honourable Court will uphold and protect her rights to the property as a bona fide purchaser for value and an innocent bystander. The 5th Defendant is categorical that her freedoms and guarantees under Article 40 of *the Constitution* of Kenya 2010 have also been violated. The 4th, 5th and 6th Defendants are entitled to damages for pain, loss of reputation, loss on investment, suffering and hardship. DW3, Stephen Maina Thuku gave evidence in court corroborating the 5th Defendant's evidence. He confirmed that they sold Number Kwale/Tiwi/2719 to her and she paid the purchase price in full. However, the 4th and 6th Defendant never completed payment for their parcel. The 4th, 5th and 6th Defendants pray that the Plaintiff's suit herein be dismissed with costs and the 4th, 5th and 6th Defendants counterclaim and pray that judgement be entered against the 1st, 2nd and 3rd Defendants and the Plaintiff jointly and severally for:-
 - a. An Order declaring that the 5th Defendant is the bona fide, legal and lawful registered owner and proprietor of all that parcel of land known as Title Number Kwale/Tiwi/2719.



- b. In the alternative and without prejudice to the foregoing an Order for the refund of Purchase Price being the sum of Kenya Shillings Two Million One Hundred Thousand (Kshs. 2,100,000/=) together with interest at prevailing commercial bank lending rates from the date of the Sale Agreement till payment in full plus costs and incidental expenses of the sale to be remitted to the 5th Defendant for purchase of the Property known as Title Number Kwale/Tiwi/2719.
 - c. In the further alternative and without prejudice to the foregoing damages to the 5th Defendant for loss of bargain in the Property known as Title Number Kwale/Tiwi/2719.
 - d. In further alternative and without prejudice to the foregoing compensation and/or damages to the 5th Defendant for loss of use of the suit property at the current market value of the Property known as Title Number Kwale/Tiwi/2719.
 - e. Damages for pain, suffering, loss of reputation, and hardship.
 - f. Damages to the 5th Defendant for loss of use and investment of the property known as Title Number Kwale/Tiwi/2719 from the date of filing suit until the Judgement of this Honourable Court.
 - g. Costs and Interest of this Suit and Counterclaim.
 - h. Any other Order this Honourable Court may deem fit and just to grant.
8. This court has carefully considered the evidence and the submissions therein. PW1 the Plaintiff testified that on or about 5th January, 2013 he entered into an agreement with the 1st Defendant whereby he gave him a loan of Kshs 2,000,000.00. It was term of the said agreement that the 1st Defendant would repay the loan by transferring 0.5 acres of the land parcel known as Title Number Kwale/Diani Beach Block/194. It was a further term of the agreement that the 1st Defendant would offer a security by depositing Title Number Kwale /Tiwi/1365 with the Plaintiff and which Property was co-owned with 2nd and 3rd Defendant. The Plaintiff was to hand back the Title to the 1st Defendant immediately he got a transfer of the 0.5 acres of Tide Number Kwale/Diani Beach Block/194. The 1st and 2nd Defendant and purporting to have authority of the 3rd Defendant executed even a transfer of the entire parcel Title Number Kwale/Tiwi/1365 to the Plaintiff to enhance security. This court has considered the said agreement and noted that the 1st Defendant was advanced a loan of Kshs 2,000,000.00. It was term of the said agreement that the 1st Defendant would repay the loan by transferring 0.5 acres of the land parcel known as Title Number Kwale/Diani Beach Block/194 and not Title Number Kwale /Tiwi/1365. DW3 testified that he was only advanced a loan of Kshs 500,000.00 and that the agreement was open ended and did not have a time limit. I find that the agreement is clear that he received the full amount of Kshs 2,000,000.00. The 1st Defendant's demeanor is of a person who is not being truthful at all. The court cannot rewrite contracts which parties have entered into.
9. In *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -
- A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.



10. In *Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

11. In this case all the terms of the contract were contained in the agreement produced as an exhibit which the 1st Defendant does not dispute. On the issue of the claim on Title Number Kwale/Tiwi/1365 it is clear from the Plaintiff's pleadings and the purported Agreement for loan that he was to get the 0.5 acres of Title Number Kwale/Diani Beach Block/194 which land he had agreed with the 1st and 2nd Defendants to be transferred to him as payment for the loan advanced to the 1st and 2nd Defendants and not Title Number Kwale/Tiwi/1365. In the event, if the Plaintiff intended to hold Title Number Kwale/Tiwi/1365 as security he should have registered his security or interest, if any, on the Original Title Number Kwale/Tiwi/1365, to caution unsuspecting members of the Public if indeed he had any right or interest to the Land. Secondly the 1st Defendant had no authority to issue the same as security when he was not the sole proprietor hence the Plaintiff's claim against the same is unfounded and cannot stand. Lastly, it is clear that the contract had no time limit however the same was entered into in 2013 this is 2022. The Court of Appeal in the case of *Charles Mwirigi Miriti vs Thananga Tea Growers Sacco Ltd & another* (2014) eKLR stated as follows;

“This now leads us to the issue of whether the agreement was genuinely frustrated.

12. In *Halsbury's Laws of England, Vol. 9(1), 4th Edition* at paragraph 897:-

“As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea.”



13. In the case of; - *Davis Contractors LTD -vs- Farehum U.D.C*, (1956) A.C 696, Lord Radcliffe at page. 729 held:

“...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. “Non haec in foedera veni”. It was not what I promised to do”.

14. The 1st Defendant testified that the same has not been possible as the subject suit land has a pending case in court, that is, ELC No. 14 of 2014. I find that the contract has been frustrated and the suit land is no longer available for transfer to the Plaintiff hence he is entitled to a refund of the money he loaned the 1st Defendant. I will not award any damages as the same were not proved. I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. An order compelling the 1st and 2nd Defendants to refund the sum extended to them by the Plaintiff being Kshs 2,000,000/= plus interests at court rates with effect from 5th January, 2013.
2. 1st and 2nd Defendants to pay the costs.

15. On the counterclaim, DW1 the 5th Defendant testified that she is the duly sole registered owner of all that parcel of land namely Title Number Kwale/Tiwi/2719 a subdivision of Title Number Kwale/Tiwi/1365. The 4th and 6th Defendants were prospective purchasers of all those parcels of Land namely Title Numbers Kwale/Tiwi/2718 and Kwale/Tiwi/2720 subdivisions of Title Number Kwale/Tiwi/1365. DW2 her father corroborated her evidence. The 1st Defendant confirms he sold the suit parcel of land to her and was paid the full purchase price.

16. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

17. Section 26 (1) of the [Land Registration Act](#) states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

18. This court in considering this matter referred to the case of [Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & Another](#) (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally



or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows;

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.

19. In Civil Appeal No. 246 of 2013 between Arthi Highway Developers Limited vs West End Butchery Limited and Others the Court of Appeal the Court expressly declared the indefeasibility of title except on allegation of fraud. It declared;

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

20. Consequently, I am satisfied that the 5th Defendant is a bonafide purchaser for value. On the issue of damages the same have not been proved and will not be awarded. I find that the 5th Defendant has proved her counter claim to and I grant the following orders;

1. An order declaring that the 5th Defendant is the bona fide, legal and lawful registered owner and proprietor of all that parcel of land known as Title Number Kwale/Tiwi/2719.
2. The 1st and 2nd Defendants to pay the costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF MAY 2022.

N.A. MATHEKA

JUDGE

