



REPUBLIC OF KENYA



**Mulwa v Kilonzo & 3 others (Environment and Land Appeal  
39 of 2021) [2022] KEELC 2230 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2230 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 39 OF 2021  
CA OCHIENG, J  
JUNE 23, 2022**

**BETWEEN**

**PATRICK MASILA MULWA ..... APPELLANT**

**AND**

**DOUGLAS MUTINDA KILONZO ..... 1<sup>ST</sup> RESPONDENT**

**CAXTON MUTUA MWANZA ..... 2<sup>ND</sup> RESPONDENT**

**LABAN MBUVO NZAU ..... 3<sup>RD</sup> RESPONDENT**

**EMMANUEL GOD WITH US SELF HELP GROUP ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Appeal arising from the Judgment of Hon. Ann Nyoike delivered  
on the 26th August, 2021 in Machakos CMCC No. E 52 of 2020- Patrick  
Masila Mulwa Vs Douglas Mutinda Kilonzo, Caxton Mutua Mwanza,  
Laban Mbuvo Nzau and Emmanuel God with usSelf Help Group)*

**JUDGMENT**

**Introduction**

1. By a Memorandum of Appeal dated the 2<sup>nd</sup> September, 2021 the Appellant appeals against the whole of the Judgment delivered by Hon. Ann Nyoike Principal Magistrate at the Machakos Chief Magistrates' Court on the 26<sup>th</sup> August, 2021. The genesis of this Appeal is the Judgment of the Principal Magistrate Hon. Ann Nyoike in Machakos CMCC No. E 52 of 2020, where the trial court proceeded to dismiss the Plaintiff (Appellant)'s suit with costs to the Defendants (Respondents).
2. The Appellant being dissatisfied by the whole Judgement filed an appeal at the Machakos Environment and Land Court on 2<sup>nd</sup> September, 2021.
3. The Memorandum of Appeal contains the following grounds:



1. That the learned trial Magistrate erred in law and in fact by dismissing the Appellant's suit while the evidence on record pointed to a breach of contract by the Respondents.
2. That the learned trial Magistrate erred in law and in fact by not considering the Appellant's submissions on record.
3. That the learned trial Magistrate erred in law and in fact by holding that the Respondents were in the process of issuing title and 77 out of 80 titles had been issued while the Respondents had not tendered any evidence to this effect.
4. That the learned trial Magistrate erred in law and in fact by taking into account irrelevant factors and thus arriving at a decision that was wholly erroneous.
5. That the learned trial Magistrate erred in law and in fact by failing to take into account relevant factors and applying wrong principles in reaching her decision.

Reasons Whereof the Appellant prays for Orders:

- a) That this Appeal be allowed.
- b) That the judgement delivered on 26<sup>th</sup> August, 2021 in Machakos CMCC No. E52 of 2020 be set aside and or substituted with an appropriate order.
- c) That costs of this Appeal be borne by the Respondents.

The Appeal was canvassed by way of written submissions.

## Submissions

### Appellant's Submissions

4. The Appellant in his submissions contended that there was breach of contract on the part of the Respondents as he paid the full purchase price way back in 2017, although the Agreement was reduced in writing in 2019. He reiterates that despite paying the full purchase price in 2017, no title had been issued to him. He disputed the evidence of the Respondents where they confirmed issuing 77 titles and insists no title was produced in court to prove that the Respondents had processed any title in favour of any of the purchasers. Further, that the Respondents' Defense filed in the lower court is full of denials and they did not aver that they had issued any titles. He insists parties are bound by their pleadings. He argues that the lack of a clause in the agreement stating timelines did not mean that time was not of essence. He explains that it is the Respondents' advocates who drafted the Sale Agreement on behalf of both parties and that there is clearly a conflict of interests. Further, that the trial court should have therefore considered his predicament and found a clear case of breach of contract and abuse of his rights. To support his arguments, he relied on the following decisions: *Daniel Otieno Migire v South Nyanza Sugar Co. Ltd* [2018] eKLR; *William Muthei Muthami vs Bank of Baroda* [2014] eKLR; *Rose & Frank vs Crompton and Bros Ltd* quoted with approval in *Stancom Sacco Society Ltd v Alliance one Tobacco* [2018] eKLR.

### Respondents' Submissions

5. The Respondents in their submissions provided a background of this matter. They aver that in conformity to Clauses 5, 6 and 7, they had been in constant communication with the Appellant up to the last minute. They insist that parties are bound by the terms of contract or agreement where the parties executed the said agreement willingly and without undue influence. They deny breaching the terms of the Agreement dated the 18<sup>th</sup> September 2017. Further, that they acquired the completion



documents on behalf of the Appellant, upon his payment of transfer fee in February, 2020 to allow completion but he refused to consent to the transfer. They reiterate that they had always given the Appellant vacant possession of the land which created constructive trust between both parties. Further, that there was no express stipulation nor any indication in the agreement that time was of the essence in the Agreement and the same was beyond their control owing to the challenges experienced in registration of titles. They insist that the Appellant has no right to rescind the agreement. Further, that this court cannot re-write a contract between the parties. They further submit that the general rule is that general damages cannot be claimed for breach of contract hence there is a need for proof of actual damages. To buttress their averments, they relied on the following decisions: *Nelson Kivuvani v Yuda Komora & Another*, Nairobi HCCC No.956 of 1991; *Shah v Guilders International Bank Ltd* [2003]KLR; *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another*, Civil Appeal No.95 of 1999 [2001] KLR 112 [2002] EA 503; *Attorney General of Belize et al v Belize Telecom Ltd & Another* [2009], 1WLR 1980 at page 1993, citing Lord Person in *Trollope Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 609; *Curtis v Chemical Cleaning & Dyeing Co. Ltd* [1951], ALL ER 631; *Steadman v Steadman* [1976] AC 540; *Eldo City Ltd v Corn Products Kenya Ltd & Another* (2013) eKLR; *Kenya Reinsurance Corporation v V E Muguku T/A M/S v E Muguku Muriu & Company* Civil Appeal No. 48 of 1994 [1995-1998] 1 EA 107, *Kenya Breweries Ltd v Kiambu General Transport Agency Ltd*. Civil Appeal No. 9 of 2000 [2000] 2 EA 398, *Joseph Ung'adi Kedera v Ebby Kangisha Kavai* Civil Appeal No 239 of 1997, *Johnson Joshua Kinyanjui & Another v Rachel Wabito Thande & Another* Civil Appeal No. 284 of 1997 [1995-1998] 2 EA 159 and *Provincial Insurance Company of East Africa Ltd v Mordekai Mwangi Nandwa* Civil Appeal No. 179 of 1995 [1995-1998] 2 EA 289 and *Bonham Carter v Hyde Park Hotel Ltd* [1948] 64 TR 177.

6. The Appellant filed supplementary submissions reiterating his averments and contending that the Respondents cannot be allowed to hide behind an allegation that the Mukaa Land Control Board was not constituted for all that period of time. He reaffirms that in any event during that time, property in the location was the subject of Makueni Land Control Board which was operational. Furthermore, the property in question are commercial plots for which the consent of land control boards is not a legal requirement.

### **Analysis and Determination**

7. Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and the rivaling submissions, I have summarized the following issues for determination: Whether the Respondents breached the terms of the Sale Agreement dated 18th September, 2017. Whether the Appellant is entitled to rescind the Sale Agreement dated the 18th September, 2017. Whether the Appeal is merited. Who should bear the costs of the Appeal.
8. Before I proceed to deal with all the aforementioned issues jointly, I wish to provide a background of this matter. Vide a Plaint dated the 25<sup>th</sup> September, 2020, the Appellant (Plaintiff) sought for the following orders against the Respondents (Defendants):
  - i. Payment of Kshs. 825,000.
  - ii. General damages for breach of contract.
  - iii. Interest on (a), (b) and (c) above at court rates; and
  - iv. Any other or further relief as this Honourable Court may deem fit and just to grant.



9. The trial Magistrate after considering the evidence presented by the Appellant and the Respondents, delivered a judgement on the 26<sup>th</sup> August, 2021 and dismissed the Appellant's suit with costs.
10. The Appellant being aggrieved by the said Judgment filed the instant Appeal. It is not in dispute that there was a Sale Agreement dated 18<sup>th</sup> September, 2017 between the Appellant and the Respondents. Further, that the Appellant had paid the full purchase price as well as processing fees to the Respondents for the transfer of plot Nos. 39, 40 and 61 to be sub-divided from LR No. Konza South/ Konza South Block 5 (Konza) 2790 to him. The Appellant filed the suit in the lower court contending that despite paying the full purchase price in 2017, the Respondents had failed to process the titles for the three plots to him, which fact the Respondents dispute and insist there was delay in processing the titles which was beyond their control. Further, that the Appellant declined to grant them consent to transfer the three plots when they sought for it. The Respondents further contend that they had granted the Appellant vacant possession of the three plots and hence an element of constructive trust was created.
11. For the avoidance of doubt, I will proceed to reproduce an excerpt of the Sale Agreement dated 18<sup>th</sup> September, 2017 between the Appellant and Respondents which forms the fulcrum of the dispute herein:
  - “ 5. The vendor will give immediately vacant possession to the purchaser and an irrevocable authority to commence development either personally or by their assignees once the purchase price is paid in full as shown in Clause 1.
  6. The vendor hereby undertakes and promises that he will sign all the necessary documents towards effecting the transfer of the plots to the purchaser or to his nominee.
  7. That the vendor undertakes and agrees to cooperate with the purchaser and/or any other person to ensure that the terms of this agreement are effected and/or implemented and in particular as regards the transfer thereof to the purchaser or his nominee and has in particular authorized any surveyor engaged by the purchaser to excise the plots and transfer it to the purchaser.
  8. If for any breach whatsoever caused by the default of the purchaser the latter shall have right to repudiate/rescind this agreement and withhold 20% of the deposit paid and subsequently repay the balance thereof to the purchasers.
  9. If for any breach whatsoever caused by the default of the vendor, the purchasers shall have a right to repudiate /rescind this agreement and the vendor shall refund all the deposit paid together with an additional 20% of the deposit.”
12. On the issue whether the Respondents breached terms of the Sale Agreement dated 18<sup>th</sup> September, 2017.
13. *Black's Law Dictionary*, 9<sup>th</sup> Edition, page 213 defines a breach of Contract as;
  - “A violation of a contractual obligation by failing to perform one's own promised, by repudiating, or by interfering with another parties performance. A breach may be one by non-performance or by repudiation or 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 unable to show such loss with sufficient certainty he has at least a claim for nominal damages.”

14. From the proceedings in the lower court, it emerged that the Respondents were yet to effect transfer of the three aforementioned plots to the Appellant. The Respondents admitted that the Appellant had paid the full purchase price and processing fees but blame the delay of the process on circumstances beyond their control, as well as constitution of the Mukaa Land Control Board. On a keen perusal of the Sale Agreement whose excerpts I have reproduced above, I note the Appellant actually performed his obligations under the said Sale Agreement. The Respondents insist they updated the Appellant of the progress and were not to blame for the delay. Further, that there were no timelines in the said Agreement.
15. I wish to refer to various decisions made in respect to specific performance.
16. In the case of *Gurdev Singh Birdi & Marinder Singh Ghatora vs. Abubakar Madhubuti*, the Court of Appeal in Civil Appeal No. 165 of 1996, held that the underlying principle in granting the equitable relief of specific performance is that:

“The Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.” emphasis mine
17. While in the case of *Thrift Homes Ltd v Kenya Investment Ltd* 2015 eKLR, the court stated that:

“Specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction.”
18. In *Steadman v Steadman* [1976] AC 536, 540\*, it was observed that:

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.”
19. See also the case of *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited* (2006) eKLR.
20. Insofar as the Respondents allowed the Appellant to take vacant possession of the Plots and there were no timelines in the Sale Agreement, I however find that failure by the Respondents to issue the Appellant with the three titles for the plots he had fully paid for, amounted to a breach of contract as envisaged in Clause 9 of the said Sale Agreement. It is my considered view that they could hence escape blame in the delay in the processing of the titles and claim this was beyond their control. Based on the facts as presented while associating myself with these decisions and applying them to the circumstances at hand, I find that the Respondents owed the Appellant a duty of care to confirm to him the exact period they would present him with the titles for the three parcels of land. It seems in the lower court, they shifted their role in acquiring the title to the Appellant. I note in the lower court there was no documentary evidence tendered on the issuance of the 77 titles to third parties, as claimed by the Respondents.



21. It is against the foregoing that I find the Appellant having fulfilled his part of the contract was indeed entitled to specific performance from the Respondents.
22. From my analysis above, I find that learned trial Magistrate erred in law and in fact by dismissing the Appellant's suit while the evidence on record clearly pointed to a breach of contract by the Respondents. I further find that the learned trial Magistrate erred in law and in fact by holding that the Respondents were in the process of issuing 77 out of 80 titles as there was no documentary evidence tendered to that effect. Further, that she relied on extraneous factors which were not pleaded by the parties to arrive at her decision.
23. In the circumstance, I find the Appeal merited and will allow it.
24. I will proceed to set aside the Judgment delivered on 26<sup>th</sup> August, 2021 in Machakos CMCC No. E52 of 2020 and substitute it with the following orders:
  - a) That the Respondents be and are hereby directed to effect transfer of Plot Nos. 39, 40 and 61 to be sub-divided from LR No. Konza South/Konza South Block 5 (Konza) 2790 to the Appellant within ninety (90) days from the date hereof; failure of which the Appellant will grant them vacant possession and obtain refund of Kshs. 825,000 being the purchase price that was paid.
  - b) The amount of Kshs. 825,000 to attract interest at court rates from the date of payment, until final settlement.
  - c) That costs of this Appeal be borne by the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF JUNE, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

