



**Kariuki v Ngugi & another (Environment & Land Case
E044 of 2021) [2022] KEELC 157 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 157 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E044 OF 2021**

BM EBOSO, J

JUNE 9, 2022

BETWEEN

TITUS RUBIA KARIUKI APPELLANT

AND

MARGARET WAMBUI NGUGI 1ST RESPONDENT

KIMURI HOUSING COMPANY 2ND RESPONDENT

*(Being an Appeal arising from the Ruling of the Chief Magistrate
Court at Thika by Hon Oscar Wanyaga, Senior Resident Magistrate,
delivered on 29/04/2021 in Thika MCE & L Case No 2 of 2020)*

JUDGMENT

Background

1. This appeal arose from a post – judgment ruling rendered by Hon Wanyaga SRM in Thika CMC E & L Case Number 2 of 2020. The appellant sued the above two respondents seeking: (i) an order directing the respondents to give vacant possession of plot numbers 13 and 14, being portions of land parcel number Thika Municipality/Block 31/251; (ii) in the alternative, an order that the said plots be valued by a professional valuer to ascertain their current market value and the respondent be ordered to re-imburse the appellant the assessed amount; (iii) costs of the suit; (iv) any other relief the trial court would deem appropriate for the end of justice to be met. The respondents entered appearance but did not file defences.
2. The appellant’s case was that, vide a sale agreement dated 15/6/2017, the respondents sold to him two plots designated as numbers 13 and 14, being portions of land parcel number Thika Municipality/Block 31/251. The agreed purchase price was Kshs 4,000,000 per plot. He paid to the respondents a sum of Kshs 7,000,000 and receipt of the said sum was acknowledged. It was a term of the agreement that upon payment of the sum of Kshs 7,000,000, the respondents would give the appellant vacant



possession of the two plots for his immediate use. Despite receiving the sum of Kshs 7,000,000, the respondents failed to deliver vacant possession, prompting the appellant to seek the above redress in the trial court.

3. Upon conducting trial, the trial magistrate rendered a judgment dated 17/11/2020, in which he held that the appellant had established that there existed a sale agreement and he had proved that he paid Kshs 7,000,000 to the respondents. The trial magistrate further held that the plea for an order of specific performance would not be possible since the plots had already been occupied by other parties. The trial magistrate noted that during trial, the appellant did not pursue the issue of valuation of the plots. The trial court proceeded to award the appellant an order for refund of the sum of Kshs 7,000,000 together with costs of the suit and interest from the date of filing the suit.
4. The appellant subsequently filed in the trial court an application dated 9/12/2020, seeking a review of the judgment of the trial court on the ground that: (i) the trial court found that there was breach of contract by the defendant; and (ii) that the defaulting defendants were, in the circumstances, required to pay the appellant liquidated damages equivalent to 30% of the purchase price in tandem with clause 7 of the sale agreement but the trial court inadvertently omitted to grant the relief of liquidated damages.
5. Upon hearing the application for review, the trial court rendered a ruling dated 29/4/2021 in which it found that although the sale agreement provided for liquidated damages at 30 % of the purchase price, the appellant never pleaded and never prayed for liquidated damages as a relief. Consequently, the trial court dismissed the application.

Appeal

6. Aggrieved by the ruling of the trial court, the appellant brought this appeal advancing the following four verbatim grounds of appeal:
 - 1) That the honourable court having found as a fact that the defendants were in breach of the sale agreement dated 15th day of June 2017 between them and the plaintiff, the learned magistrate erred in law and fact in failing to award liquidated damages as per the express terms of the agreement between the parties.
 - 2) That having found the sale agreement between the parties had a default clause providing for liquidated damages at the rate of 30% of the sale price the learned magistrate erred in law and fact in failing to award the same.
 - 3) That the learned magistrate erred in law and fact by failing to put into consideration the entire pleadings by the plaintiff.
 - 4) That the learned magistrate erred in law and in fact by failing to allow the notice of motion dated 9th day of December 2020 and review his judgment delivered on 17th day of November 2020.

Submissions

7. The appeal was canvassed through written submissions dated 17/1/2022, filed by the firm of C. Kimathi & Co Advocates. Counsel identified the following as the three issues falling for determination in the appeal; (i) Was there breach of contract between the appellant and the respondent so as to necessitate the award of damages? (ii) Whether the trial court erred in not awarding the appellant liquidated damages; and (iii) Whether the appellant is entitled to the reliefs sought.



8. Counsel for the appellant submitted that parties to this appeal had entered into a legally binding sale agreement dated 15/6/2017 and that the respondents breached the said agreement by failing to deliver vacant possession of the plots and by failing to provide titles to the plots. On whether the trial court erred in not awarding the appellant liquidated damages, counsel for the appellant submitted that during the hearing of the suit, the appellant testified that he sought a refund of Kshs 7,000,000, compensation, and damages. He added that the appellant pleaded with the court to give effect to Clause 7 of the sale agreement and award him 30% of the purchase price. Counsel urged the court to grant the reliefs sought in the appeal.
9. The respondents opposed the appeal through written submissions dated 24/2/2022, filed by the firm of J. M Njenga & Co Advocates. Counsel for the respondents identified the following as the issues falling for determination in the appeal: (i) Whether the trial court erred in not awarding the appellant liquidated damages amounting to Kshs 2,400,000 and whether this appeal has any merits; and (ii) who is to bear the costs of this appeal. Counsel cited Order 2 rule 10(a) of the Civil Procedure Rules and submitted that the claim for liquidated damages equivalent to 30% of the purchase price was not pleaded and was not prayed for, hence the trial court did not err in failing to award the appellant liquidated damages. Counsel urged the court to dismiss the appeal and award the respondents costs of the appeal.

Analysis and Determination

10. I have considered the record of appeal alongside the record of the trial court. I have also considered the parties' respective submissions; the relevant legal frameworks; and the prevailing jurisprudence on the key issue falling for determination in this appeal. This appeal arose from a ruling rendered by the trial court on a post – judgment application seeking a review of the judgment of the trial court. The appeal turns on the single question as to whether the trial magistrate erred in his finding to the effect that his failure to award the appellant liquidated damages was not an inadvertent error.
11. Because of the nature of jurisdiction which the trial magistrate was invited to exercise, it is important to outline verbatim the findings of the trial magistrate in both the impugned judgment and the impugned ruling. The trial magistrate rendered himself as follows in the Judgment that gave rise to the application that culminated in the impugned ruling:

“The court has considered the evidence presented and plaintiff’s submissions. From the evidence presented and more so the agreement dated 15/6/2017, it is clear that the parties herein entered into an agreement for sale of the two plots in question. The payment of Kshs 7 million was acknowledged in the said sale agreement. Copies of cheques used in the payment have also been exhibited. Whereas in the sale agreement, the 1st defendant is indicated as the seller, the payment was made vide cheques in the name of the 2nd defendant. There is no evidence contradicting the plaintiff’s evidence presented. Having entered appearance and even the 1st defendant filing an application, the court finds that the defendants were well aware of these proceedings but elected not to participate.”
12. The trial magistrate further rendered himself as follows in the last paragraph of the Judgement:

“In the present case, the plaintiff has proved that there existed a sale agreement. He has further proved that he paid Kshs.7 million to the defendants. The prayer for specific performance may not be possible since the plots have already been occupied by other parties. During the hearing, the plaintiff didn’t follow up on the issue of valuation. Under the circumstances,



the court finds that the plaintiff has proved his case on a balance of probabilities and issues the following orders;

1. Judgment is entered against the defendant jointly and severally for the refund of Kshs 7,000,000 to the plaintiff.
2. Plaintiff will have costs of the suit.
3. The amount in 1) above shall attract interest at court rates from date of filing of this suit till payment in full.”

13. When invited to review the judgment, the trial magistrate rendered himself as follows:

“It is clear that the plaintiff did not pray for damages for breach of contract as per the contract. As a matter of fact, the contents of clause 7 of the sale agreement were not pleaded. As a cardinal rule, parties are bound by their pleadings. See the decision in *Joseph Mbuta Nzui v Kenya Orient Insurance Company Ltd* [2015] eKLR where the court referred to the decision in *Adetoun Oladeji (Nig) Ltd v Nigeria Breweries PLC* S.C 91/2002, where Judge Pius Aderemi JSC expressed himself as follows:

‘..... It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.’”

14. Did the trial magistrate make an error in the above finding? My answer to the above question is in the negative. I say so for a number of reasons. First, the appellant did not plead the liquidated damages of 30% of the purchase price. Similarly, he did not pray for liquidated damages. He instead made a plea for valuation of plots to ascertain the current market value of the plots. During trial, he did nothing in furtherance of the plea for valuation of the plots. The trial court cannot, in the circumstances, be said to have committed an inadvertent error by failing to award the appellant a relief which the appellant neither pleaded nor prayed for.

15. Secondly, the trial court properly noted in the judgment where the purported omission is alleged to have been made that whereas the agreement was between the appellant and the 1st respondent, the payment was made to the 2nd respondent. The 2nd respondent was not a party to the agreement and could not be condemned to pay liquidated damages in relation to a contract it was not privy too.

16. Thirdly, jurisdiction to review a judgment is exercised upon well-settled principles that have been codified. For avoidance of doubt, Order 45 rule 1 of the [Civil Procedure Rules](#) contains the following framework on the circumstances under which review jurisdiction is exercised.

- “(1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any



other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

17. For the trial court to exercise review jurisdiction, the appellant was required to satisfy the review criteria set out under Order 45 rule 1 of the Civil Procedure Rules. I have looked at the written submissions which the appellant presented to the trial court in relation to the application in which the impugned ruling was rendered. The appellant did not address the matter that needed to be addressed in the application in order for the trial court to relook at its judgment. The issue that the appellant needed to address was the issue of the alleged inadvertent omission in the judgment of the trial court because that is what the appellant had raised in the application. The appellant did not demonstrate the alleged inadvertent omission but focused on the question as to whether there was need to include liquidated damages in the award as this was what was mutually agreed by the parties to the sale agreement. On his part, the trial magistrate found that failure to award liquidated damages was not an inadvertent omission but a deliberate decision based on law. He did not grant it because it was neither pleaded nor prayed for. I entirely agree with the trial magistrate. The appellant having failed to plead and pray for the relief of liquidated damages, the contention that the trial magistrate inadvertently omitted to grant him liquidated damages equivalent to 30% of the purchase price has no basis. In the circumstances, I find no basis upon which to fault the trial magistrate. The result is that I find no merit in this appeal.

Disposal Order

18. In the end, this appeal is rejected for lack of merit. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF JUNE 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Wangari for the Appellant

Mr Okeyo for the Respondent

Court Assistant: Ms Lucy Muthoni

