



REPUBLIC OF KENYA



**KENYA LAW**

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**Mburu v Embakasi Ranching Company Limited (Environment and Land Case  
Civil Suit 176 of 2019) [2022] KEELC 3934 (KLR) (3 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3934 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 176 OF 2019**

**JO MBOYA, J  
AUGUST 3, 2022**

**BETWEEN**

**JOHN NJAU MBURU ..... PLAINTIFF**

**AND**

**EMBAKASI RANCHING COMPANY LIMITED ..... DEFENDANT**

**JUDGMENT**

**Introduction And Background:**

1. The Subject suit was filed and/or commenced vide Plaintiff dated the May 20, 2019, wherein the Plaintiff sought for the following Reliefs;
  - a. Payment by the Defendant to the Plaintiff of the sum of Kenya shillings Twenty Seven Million, Only (Kshs 27, 000, 000/=)
  - b. Interests on (a) above at 14% per annum from August, 2018 until payment in full.
  - c. Costs of the suit and interest thereof at court rates.
  - d. Any order the court may deem fit to grant.
2. Upon being served with the Plaintiff and Summons to enter appearance, the Defendant herein duly entered appearance on the June 11, 2019 and thereafter filed a Statement of Defense on the July 8, 2019, wherein the Defendant denied and/or disputed the claims at the foot of the Plaintiff.
3. Nevertheless, the Plaintiff herein therefore sought for and obtained Leave to amend the Plaintiff. Consequently the Plaintiff proceeded to and indeed amended the Plaintiff dated the March 17, 2021.
4. For clarity, the amended Plaintiff dated March 17, 2021, sought for the following Reliefs:



- e. Payment by the Defendant to the Plaintiff of the sum of Kenya shillings Thirty Million, Five Hundred Thousand Only (Kshs 30, 500, 000/=)
  - f. Interests on (a) above at 14% per annum from August, 2018 until payment in full.
  - g. Costs of the suit and interest thereof at court rates.
  - h. Any order the court may deem fit to grant.
5. Despite the filing and service of the amended Plaintiff, there is no evidence that the Defendant herein ever filed an amended Statement of Defense. In this regard, it must be taken that the Defendant continued to rely on the original Statement of Defense which was filed on the July 8, 2019.
  6. Premised on the foregoing, pleadings duly closed upon lapse of the statutory 14 days from the date when the amended Plaintiff was served and no response thereto was filed.

### **Evidence By The Parties:**

#### **a.Plaintiff's case**

7. The Plaintiff herein testified as PW1 and same informed the court that he bought and or purchased 12 plots from the Defendant herein and duly paid for the entire purchase price.
8. It was the witness' further evidence that after making the payment of the purchase price, the Defendant proceeded to and granted unto the Plaintiff vacant possession of the plots which were purchased and acquired by the witness.
9. On the other hand, the witness further testified that same thereafter proceeded to and commenced construction over and in respect of the 12 properties, which same had bought.
10. Further, the witness testified that while waiting to be issued with the requisite Certificate of lease, same was surprised that the Defendant herein only processed and readied only transfer instruments for three plots out of the twelve plots which had been purchased. In this regard, the witness testified that same made efforts to ascertain the basis and or reason why the Defendant was not transferring all the 12 plots unto him.
11. However, the witness testified that the Defendant became evasive and non-committal on the transfer of the remainder 9 parcels.
12. Notwithstanding the foregoing, the witness further testified that later on, same discovered that the Defendant herein had sold and transferred the remainder 9 plots to known third Parties, including Joseph Wantoro Kamau, Ann Nuna Kimuri and Jacinta Wanjiru Kimori.
13. Owing to the fact that the Defendant had sold the remainder 9 plots, the witness further testified that same was constrained to and issued a demand letter to the Defendant, seeking that the Defendant make the requisite arrangements to transfer unto him the remainder 9 plots or otherwise to pay compensation for the loss of the 9 plots.
14. Be that as it may, it was the witness' further evidence that despite the demand vide the Notice of intention to sue, the Defendant herein failed and/or neglected to comply with the demand.
15. Based on the failure and/or neglect by the Defendant to comply with and/or adhere to the Demand notice, the witness further testified that same was constrained to and indeed engaged a registered valuer to carryout and undertake valuation in respect of the 9 plots, which the Defendant had reneged on.



16. Pursuant to the foregoing, the witness stated that the valuation report was indeed prepared and same provided/ ascertained the value of the 9 plots as kes 27, 000, 000/= only.
17. Other than the foregoing, the witness further testified that after the filing of the subject suit, wherein same had laid a claim for kes 27, 000, 000/= only, the Defendant again sold and or disposed of one other plot out of the 3 which same had been given.
18. Effectively, the witness stated that out of the total of the 12 plots, the Defendant herein only transferred to and in his favor 2 plots.
19. In view of the foregoing, the witness stated that same was compelled to instruct the valuer to also carryout further valuation in respect to the additional one (1) property which had , similarly, been taken away.
20. In a nutshell, it was the witness' testimony that having lost the 10 of the 12 plots which same had purchased, same therefore formed the decision to sue the Defendant for payment of reasonable compensation following the loss of the said plot.
21. In short, the witness testified that same is thus entitled to compensation in the sum of kes 30, 500, 000/ = only, being the monetary value of the lost plots.

#### **Evidence By The Defendant:**

22. The Defendant herein had been represented by Chege Kibathi Advocates who, thereafter sought for and obtained leave to cease acting *vide* court order made on the February 14, 2022.
23. Thereafter the court ordered that service of court process be effected on the Defendant, personally. For clarity, the Plaintiff's counsel proceeded to and extracted a Hearing notice which was duly served upon the Defendant company.
24. Nevertheless despite having been duly served with the hearing notice, the Defendant herein failed to attend court on the scheduled hearing date. Consequently, the subject matter proceeded for hearing, albeit of the absence of the Defendant.
25. On the other hand, after the close of the Plaintiff's case, the Defendants case was similarly closed.
26. In a nutshell, it is expedient to state that the Defendant's case was closed without any Evidence having been tendered on behalf of the Defendant.

#### **Submissions By The Parties:**

##### **a. Plaintiff's Submissions:**

27. The Plaintiff's Counsel proceeded to and filed written submissions dated the May 31, 2022 and in respect of which Counsel for the Plaintiff has highlighted the following Issues;
28. First and foremost, Counsel for the Plaintiff submitted that the Plaintiff had lawfully acquired from the Defendant 12 plots which were carved out of a parcel of land belonging to and registered in the name of the Defendant.
29. Further, it was submitted that after the purchase of the 12 named plots, the Defendant herein prepared and issued in favor of the Plaintiff the requisite certificate, denoting that the Plaintiff was indeed entitled to ownership of the named 12 plots.



30. On the other hand, it was similarly submitted that the Defendant also allowed the Plaintiff to enter upon and commence to develop the named 12 plots, pending effective transfer and registration of same in the Plaintiff's name.
31. Based on the foregoing, it was therefore the Plaintiff's submissions that having duly entered into the Contract, the Defendant herein was bound to perform his part of the bargain, namely, executing the requisite transfer and causing the suit properties to be transferred to the Plaintiff.
32. Be that as it may, it was further submitted that despite being aware of and/or privy to the contracts, pertaining to the sale of the 12 plots, the Defendant herein only transferred two (2) out of the named plots to the plaintiff and thereafter failed to transfer the remainder properties.
33. Owing to the foregoing, counsel for the Plaintiff submitted that the failure at the instance of the Defendant to transfer the remaining 10 plot constituted a breach of the terms of the said Contract.
34. In short, it was the plaintiff's contention that the Defendant has therefore breached the terms of the contract, premised on renegeing to transfer the entire 12 plots which same had sold to the Plaintiff.
35. Secondly, counsel for the Plaintiff submitted that owing to the fact that the Defendant was unable to transfer 10 out of the 12 plots, the plaintiff was compelled to and indeed instructed a Registered valuer to undertake the valuation of the 10 plots.
36. Subsequently, counsel submitted that the appointed Valuer indeed conducted the valuation report and indeed same produced the Valuation Report, denoting the value of the said 10 plots which had not been transferred to the Plaintiff.
37. In the premises, counsel for the plaintiff therefore implored the court to find and hold that the Plaintiff was entitled to compensation for the Plots which the Plaintiff had lost, amounting to Kshs 30 500, 000/= Only.
38. In support of the foregoing submissions, Counsel for the Plaintiff invited the court to take note of various decisions, namely, *Kenya Bruweries Ltd versus Natex Distributers Ltd* (2004)eKLR, *Hadly versus Baxendal* (1854) 9 exch 341 and *Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd* (2017) eKLR.

#### **b. Submissions By The Defendant:**

39. The court had directed that upon filing the written submissions, the Plaintiff was obliged to serve same on the Defendant. In this regard, the Defendant was also granted liberty to file and serve written submission within the prescribed timeline.
40. From the record, it is evident that the Defendant was duly served with the Plaintiff's written submissions on the June 14, 2020, but same has not found it fit to file her written submissions.
41. Consequently and in the premises, the only set of written submissions on record are the written submissions filed by the Plaintiff.

#### **Issues for determination:**

42. Having reviewed the pleadings filed by and or on behalf of the Parties, the list of documents, as well as the oral testimony tendered by the Plaintiff; and upon considering the written submissions, on behalf of the Plaintiff, the following issues are pertaining and therefore germane for determination;



- a. Whether the Plaintiff has placed before the court sufficient and credible evidence to prove breach of contract by the Defendant.
- b. What reliefs ought to be granted.

**Analysis and Determination:**

**Issue Number 1: Whether the plaintiff has placed before the court sufficient and credible evidence to prove breach of contract by the defendant.**

43. The Plaintiff herein duly testified before the court and produced assorted documents, namely, exhibits P1 to P37, respectively.
44. From the testimony of the Plaintiff, it was apparent and/or evident that indeed same had entered into contractual engagement with the Defendant, who covenanted to sell to and in favor of the Plaintiff 12 named plots, carved out of the parcel of land belonging to and registered to him.
45. On the other hand, evidence was also tendered that upon receipt of the full payment over and in respect of the 12 named plots, which had been sold to the Plaintiff, the Plaintiff was indeed shown the ground location of the suit properties and hence therefore became acquainted with the identities/ ground location of the named properties.
46. Other than the foregoing, the Plaintiff also testified that same had been placed into vacant possession and thereafter the Plaintiff commenced developments over the suit property.
47. Be that as it may, the Plaintiff testified that instead of processing title over and in respect of the 12 plots, the Defendant only processed and issued titles of 2 out of the 12 named properties.
48. In the premises, it was the Plaintiff's position that the failure to process and issued titles of the outstanding 10 plots, whose purchase price had long been paid, amounted to breach of contract.
49. It is important to note that the testimony by and/or on behalf of the Plaintiff herein, including the documentary exhibit tendered, were not challenged and/or controverted.
50. Owing to the foregoing and given that the testimony by the Plaintiff was never challenged, it is safe to find and hold that indeed the Defendant herein failed to comply with and/ or perform her part of the bargain.
51. In any event, even after same was served with the Summons to Enter Appearance and Plaint, the Defendant herein was only able to file a Statement of defense but no witness statements and bundle of documents, were ever filed.
52. Consequently, I come to the conclusion that the evidence by the plaintiff was neither challenged nor controverted and same is hence credible and believable.
53. Premised on the foregoing, it is therefore my finding and holding that the Plaintiff herein has duly proved and/or established his claim as against the Defendant.
54. In any event, the evidentiary burden of proof only requires the Plaintiff to place before the court believable evidence, to warrant a finding that indeed the evidentiary burden has been discharged as to warrant a response from the adverse party.
55. However, in respect of the subject matter, the adverse party, chose not to attend court and or to adduce evidence.



56. In a nutshell, I find and hold that the Plaintiff's case has been duly proven and established, to the requisite standard in terms of the provision of Sections 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya.
57. To vindicate the foregoing observation, it is appropriate and apt to refer to the dictum in the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR, where the Court expounded on section 107 and 109 of the Evidence Act as;
- “The standard of proof is on a balance of probabilities which Lord Denning in the case of *Miller vs Minister of Pensions* (1947) explained as follows:–“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: „We think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties? explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”
58. Consequently and without belaboring the point, I therefore find and hold that the Plaintiff has indeed proved and/or established the fact that same bought and acquired 12 plots from the Defendant, before the Defendant herein failed and reneged to transfer 10 out of the 12 purchased plots, albeit without lawful cause.
59. Put differently, it is my finding that sufficient evidence has been placed before the court to authenticate that indeed the Defendant herein is guilty of breach of the contractual obligations, essentially by withholding 10 of the sold plots from the Plaintiff.

**Issue Number 2: What Reliefs ought to be granted.**

60. It was the Plaintiff's testimony that after the Defendant failed to transfer 10 out of the 12 plots unto him, same contracted and/or engaged a registered valuer to value the 10 plots and thereafter prepare a valuation report in respect thereof.
61. Further, the Plaintiff testified that indeed the valuation exercise was carried out and or undertaken and thereafter a valuation report was prepared and issued.
62. In any event, in the course of his testimony, the Plaintiff herein produced copies of the Valuation reports dated the April 15, 2019 and the October 5, 2020, respectively and same were admitted in Evidence.
63. From the two valuation reports which were duly produced before the court, the values of the 10 plots were stated to amount to an aggregate of Kshs 30, 500, 000/= only.
64. Without sounding repetitive, I beg to state that the contents of the two valuation reports, which were tendered to and produced before the court, were neither challenged, impeached nor controverted.
65. In the absence of any contrary Valuation report, relating to the suit properties, the court is free and entitled to be guided by the terms of the Expert documents filed herein.
66. In the circumstances, it is my finding and holding that the valuations alluded to and certified at the foot of the valuation report dated the April 15, 2019 and October 5, 2020, respectively, reflects the accurate value of their impugned properties.



67. To vindicate the foregoing observation, it suffices to take cognizance of the holding in the case of *Jubilee Insurance Company of Kenya Ltd v Zahir Habib Jiwan & another* [2017] eKLR, where the court observed at paragraph 16 as hereunder;

[16] We see no reason for interfering with the trial Judge’s findings regarding the credibility of the 2<sup>nd</sup> respondent, bearing in mind that it was the trial Judge who had the advantage of seeing and hearing the witness. Moreover the appellant did not call any evidence to controvert the evidence of the 2<sup>nd</sup> respondent. It therefore follows that the respondents proved on a balance of probability the items which were stolen and their value. The fact that they did not produce receipts of purchase did not water down the foregoing evidence as they told the court some of the items were purchased several decades back. The best form of evidence would obviously be in the form documentary e.g. receipts but where such evidence was not available, other form of cogent evidence may be adduced to prove ownership and the value of an item. This Court in the case of:- *Antique Auctions Ltd vs Pan African Auctions Ltd* [1993] eKLR faced with similar circumstances held:-

“This point of an acceptable evidence to prove special damages on the evidence of a witness was considered by Lutta, JA in *Kampala City Council v Nakaye S* (1972) EA 446 at page 449 letter I and said:

‘Secondly, in regard to the question of the value of the articles, household and personal of the plaintiff, the latter gave evidence as to what she paid for the articles in question and stated that the receipts in respect thereof had been removed or lost as a result of the demolition of the house, and the Judge believed her. I am satisfied that the Judge was right in accepting her evidence in this regard and I see no reason to differ ...’

68. For further emphasis, it is also expedient to take cognizance of the dictum of the Court of Appeal *vide* the case of *Moses Jomo Olengeben v Samson Masea & another* [2010] eKLR, where the court observed as hereunder;

We think the combined value of Kshs 490,000 being the value of the two respondents’ stolen cattle which figure was in turn derived from the charge sheet and the oral evidence of the two respondents; taking into account that liability had been admitted by the appellant and that no conflicting values were given by the appellant, the superior court was perfectly entitled to accept the charge sheet figures, it being borne in mind, that the standard of proof was on a balance of probabilities. Again, there was nothing on record to counter the value as accepted by the court.

As regards the value of the cattle in our view the court was perfectly entitled to accept the oral evidence of the two farmers on the value of their respective herds of cattle, because the law must accord with common sense principle that cattle owners know the value of their toil and that in real life situations, formal valuations of cattle is not a prerequisite to recovering their value in court because the court would be perfectly entitled to rely on the prevailing local value of cattle as per the evidence of the local farmers and the two respondents were such farmers. In some cases such as this, we are of the view that a court of law is entitled to have regard to the local circumstances including the local market values.

69. Premised on the foregoing corpus of case law, I have no basis to disbelieve and/or to decline the valuation report, whose values have neither been challenged nor impeached, in any manner whatsoever.



**Final Disposition:**

70. Having reviewed and evaluated the issues for determination that were outlined in the body of the Judgment herein, it is now appropriate to render the final orders.
71. Consequently and in the premises, the final orders that I make in respect of the subject matter are as hereunder;
- i. The Plaintiff be and is hereby awarded the sum of kes 30, 500, 000/= only on account of the monetary value of the 10 plots which were neither transferred nor registered in his name by the Defendant.
  - ii. The Plaintiff be and is hereby awarded interest at 14% per annum wef May 24, 2019.
  - iii. Cost of the suit be and are hereby awarded to the Plaintiff and same to be taxed and certified by the taxing officer of this court.
72. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> OF AUGUST 2022.**

**OGUTTU MBOYA**

**JUDGE**

In the presence of;

Joan court assistance

Mr. Kiama Kibathi for the Plaintiff.

N/A for the Plaintiff.

