



REPUBLIC OF KENYA



**Gachui & 2 others v Mugo (Environment & Land Case 99 of 2019)
[2022] KEELC 4830 (KLR) (15 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4830 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 99 OF 2019**

JG KEMEI, J

SEPTEMBER 15, 2022

BETWEEN

STEPHEN WANYOIK GACHUI 1ST PLAINTIFF

JOSEPH KAHIGA GACHUI 2ND PLAINTIFF

PETER THOTHO GACHUI 3RD PLAINTIFF

AND

JOSEPH MUCHOKI MUGO PLAINTIFF

JUDGMENT

1. The Plaintiffs filed suit on the May 30, 2019 against the Defendant seeking orders as follows;
 - a. The sale agreement entered into on the December 1, 2016 between the Plaintiffs and the Defendant is legally voidable.
 - b. The refusal by the spouses of the Plaintiffs to accord spousal consent to the agreement rendered the whole transaction frustrated and the subsequent rescission by the Plaintiffs shields the Plaintiff from any breach.
 - c. Naturally the Defendant remedy is only refund of the actual monetary consideration which had been actually paid out and no more.
2. It is the Plaintiffs' case that despite the Defendant paying a deposit of Kshs 4 Million, the agreement of sale between the parties ran into headwinds arising from the refusal of their spouses from giving spousal consent to the transaction. Further that following the agreement of sale having been frustrated the Plaintiffs revoked the agreement vide a letter dated the March 19, 2018 and called on the Defendant to collect the refund.



3. *Vide* his Statement of Defence and counterclaim filed on the July 1, 2019, the Defendant partially denied. He admitted the existence of the agreement of sale and contended that in furtherance of the said agreement, he paid the sum of Kshs 4 million being the deposit in the transaction. The Defendant contends that the refusal by the Plaintiffs to complete the agreement was not in good faith and opined that the same was a scheme to renege on the agreement seeing that their debt at the bank had been paid and also the suit land had appreciated in value.
4. The Defendant sought the following orders;
 - a. The Plaintiffs suit be dismissed and judgement be entered in favour of the Defendant.
 - b. Accrued interest on the principle amount at the rate of 25% from the December 1, 2016 till payment in full.
 - c. Legal costs of the discharge of charge in the sum of Kshs 125,000/- together with legal costs of the conveyance in the sum of Kshs 250,000/-.
 - d. Costs and interest.
5. At the hearing of the suit Stephen Wanyoike Gachuhi took the stand as PW1 and testified on his behalf and that of his co-Plaintiffs. He relied on his written statement dated the May 24, 2019 which was adopted as his evidence in chief. In support of their case he produced the documents to wit; letters dated the March 19, 2018 and November 5, 2018 as well as the sale agreement dated the December 1, 2006 and marked as PEX 1-3.
6. In cross he informed the Court that he approached the Defendant and offered to sell the land whilst it was charged to Equity Bank Limited. The loan outstanding at the bank then was Kshs 3.8 Million. Though he admitted that they obtained the land control board consent to transfer the suit land to the Defendant he stated that their wives refused to give spousal consent and hence the collapse of the agreement. Shown the consent on record the witness stated that he had not seen the same until in Court. He admitted that the agreement of sale provided for the payment of the refund to the purchaser and interest at 25%. He stated that they wrote to the Defendant rescinding the agreement and called on him to collect the refund but he declined to do so hence the filing of the instant suit.
7. In conclusion he admitted that the Defendant paid off the outstanding loan at the bank as well as the legal costs for the conveyance and registration of the discharge of charge.
8. The Defendants evidence was led by Joseph Muchoki Mugo. He relied on his witness statement dated the September 9, 2020 in evidence in chief and produced the documents in the list of documents dated on even date and marked as DEX No 1-7.
9. The witness informed the Court that contrary to the averments by the Plaintiffs he has never been served with a letter revoking the agreement of sale nor one forwarding the cheques for refund. In any event he remarked that he has been ready and willing to accept the refund of the purchase price had it been offered to him. He stated that he attended the land control board meeting together with the Plaintiffs who came along with their wives and refuted the claims of the Plaintiffs that their wives were not in the picture of the transaction. He added that having been present during the land control board and gave their consent to the transaction, they could not have turned around and claim to have withheld their spousal consent.
10. At the conclusion of the hearing the parties elected to file written submissions. As at the time of writing the judgement, only the Defendant had complied.



11. The Defendant submitted that the claim of the refusal of spousal consent was untrue for the reasons that; the land control board consent could not have been issued without the presence and consent of the Plaintiffs wives who were present at the meeting; none of the wives have recorded a statement in support of the allegations that they withheld their spousal support; the claim of refusal of spousal consent is coming 15 months after the agreement of sale was executed and the property redeemed from the bank; the allegation is an excuse by the Plaintiffs to avoid their obligations under the agreement;
12. Relying on the case of *Njeri Njoroge vs Kaiyabe Njoroge* (2002) eKLR the Defendant submitted that it was the obligation of the Plaintiffs to obtain consent of the land control board and therefore they cannot rely on it to defeat the agreement. That the alleged frustration was self-inflicted and is not available to the Plaintiffs in the circumstances of this case.
13. The Defendant states that though he was ready and willing to accept the refund, the Plaintiffs never took any steps to actualize the same. That the allegations by the Plaintiff that they wrote a letter revoking the agreement and calling upon the Defendant to collect the money was never served upon the Defendant and no evidence has been led to show that the same was ever sent and or received by the Defendant. He denied knowledge of both letters dated the March 19, 2018 and November 5, 2018.
14. The Defendant further submitted that the agreement of sale provided for default and in particular if the default should be on the side of the Plaintiffs then the Defendant would be entitled to refunds with interest at the rate of 25% p.a from the date of receipt till payment in full. It was submitted that the total sum due to the Defendant.
15. It was the Defendants submissions that having reneged on the terms and conditions of the agreement of sale, it was fair that the Defendant be compensated as stipulated in the agreement of sale. The Defendants asked the Court to rely on the case of *Fina Bank Limited vs Spares & Industries Limited* CA No 51 of 2000 where the Court stated as follows;

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party of a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”
16. It was submitted that the Plaintiffs are trying to escape from their obligations under the agreement of sale by purporting to invoke the doctrine of frustration. That the Plaintiffs cannot be allowed to benefit from their own fault of failing to obtain spousal consent.
17. Having considered the pleadings the evidence adduced at the hearing, the written submissions and all the material placed before the Court, the issues for determination are whether the agreement suffered from any frustration; if yes what are the remedies available to the parties; whether the Defendant is entitled to a refund of the Purchase price and who pays the costs of the suit.
18. It is not in dispute that the parties entered into an agreement of sale on the December 1, 2016 in which the Plaintiffs being the jointly registered owners of the suit land agreed to sell the suit land to the Defendant at the consideration of Kshs 7 Million. It was a term of the agreement that; the Defendant was to pay a deposit of Kshs 4 Million to Equity Bank Limited on behalf of the Plaintiffs; the balance of the purchase price in the sum of Kshs 3,183,241/45 shall be utilized to settle the loan amounts to the credit of the Plaintiffs; upon payment of the outstanding loan the title would be discharged.
19. It is not in dispute that the Defendant complied with the agreement of sale and paid Kshs 4 Million as deposit. That the monies were utilized to settle the Plaintiff’s indebtedness with the bank. This has been acknowledged by the Plaintiffs.



Whether the agreement suffered from any frustration.

20. The Plaintiffs have averred that the agreement of sale was frustrated by their wives who refused to give spousal consent leading to their letter dated the December 1, 2016 rescinding the agreement.
21. It is the Defendant's case that the reason given by the Plaintiffs is not tenable and in all intents and purposes was meant to facilitate the Plaintiffs from escaping from their obligations as set out in the agreement of sale.
22. The existence and validity of the contract has not been assaulted. The starting point is to check whether the agreement was frustrated.
23. The doctrine of frustration has been defined in the case of *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1,8, where the Court stated as follows;

“The doctrine of frustration was evolved to mitigate the rigour of the common law’s insistence on literal performance of absolute promises ... The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances ... (2) Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended ... (3) Frustration brings the contract to an end forthwith, without more and automatically. (4) The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it ... A frustrating event must be some outside event or extraneous change of situation ... (5) A frustrating event must take place without blame or fault on the side of the party seeking to rely on it ...”

24. It is trite law that Courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of *Rufale vs Umon Manufacturing Co (Ramsboltom)* [1918] LR 1KB 592, Scrutton LJ held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract.”

25. In the case of *Attorney General of Belize et al vs Belize Telecom Ltd & Anor* (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, held as follows:

“The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable.”

26. It was a term of the agreement of sale that one of the completion documents was the spousal consent in respect of the Plaintiffs. It is a legal requirement that for any disposition such as transfer, sale, charge grant, lease or even surrender of any property deemed to be matrimonial property to be valid there must be a spousal consent. A spouse has been defined under Section 2 of the *Marriage Act* as husband or wife. This definition is in the context of a marriage/married person. Consent on the other hand



can be defined as an approval, acceptance, endorsement, permission, agreement or authorization to do something.

27. Section 2 of the *Matrimonial Property Act* provides inter alia;
- “matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;
 - “matrimonial property” has the meaning assigned to it in Section 6;
 - “spouse” means a husband or a wife.”
28. Section 12 of the *Matrimonial Property Act* provides that matrimonial property cannot be validly alienated without consent of both spouses in a monogamous marriage. The overriding interest of one spouse over matrimonial property registered in the name of the other spouse is not to be extinguished or varied unless the other spouse’s consent was obtained before the disposition was carried out.
29. The non-consenting spouse can seek the intervention of the Court to have any transaction effected without consent voided. Such a spouse will be seeking have any contract entered into without a spousal consent rescinded and if there is any transfer of ownership, cancelled. The law requires that the consent be in writing and be informed. The spouse giving the consent has a right to seek independent legal advice to help understand the nature of the transaction as well as its legal implications. Such consent should be free from any undue influence, duress misrepresentation or any other vitiating factors which would blur giving of an independent consent. Any consent obtained by duress, undue influence or misrepresentation can lead to voiding of the transaction at the instance of the innocent spouse.
30. Spousal consent is important in the disposition of matrimonial property as it gives the transaction validity. The *Land Act* under Section 79(3) provides that a charge over matrimonial property is valid only if it is signed by all spouses or there is a document evidencing assent on the part of the other spouse.
31. In this case the Defendant led uncontroverted evidence that the parties attended the land control board meeting in which they were given consent to the transaction. The Defendant was emphatic that the three wives of the Plaintiffs were present at the meeting and consented to the transaction hence the issuance of the land control board consent. It was their position that if they had objected the same would not have been issued.
32. It is to be noted that the Plaintiffs have not led evidence to show that the suit land was matrimonial property. There is nothing from the face of the title to suggest that the suit land was matrimonial property so much so that the spousal consent was a requirement. It is to be appreciated that the same was provided for as part of the completion documents. Even if it is to be taken that the suit land was indeed matrimonial property, there is no evidence that the wives objected to the transaction at all. They have the right to do so before the Land Control Board consent was issued.
33. Looked at differently it is evident that the spousal consent was a requirement for the completion of the sale. It was therefore in the knowledge of the Plaintiffs and it cannot be an intervening event. It is the view of the Court that in proceeding on the basis of lack of spousal consent, the Plaintiffs are evading their responsibilities in the contract. In my view the Plaintiffs have elected not to secure the spousal consent from their spouses. There is no evidence that the spouses refused to grant the same. They were not called to testify. There is no evidence that they filed an objection as such at the land control board meeting before the land control board consent was issued.



34. It is the conclusion of the Court that to the contrary the agreement was not frustrated. This is a case where a Plaintiffs are in breach of the contract out of choice.
35. The Plaintiffs and the Defendant are agreed that the agreement should be brought to an end and the party not in default that is the Defendant be compensated by way of refund of the sum of Kshs 4 Million paid to the bank on behalf of the Plaintiffs.
36. The Plaintiffs have attempted to show that they rescinded the agreement by writing to the Defendant informing him as such as well as calling on him to collect the cheques. The assertion was denied by the Defendant. The Plaintiff failed to proof that they served the letters upon the Defendant and secondly that there were any cheques drawn by them in favour of the Defendant. None was exhibited and the assertions by the Plaintiff were not substantiated.
37. It was a term of the agreement that any default would be remedied with refunds. Special clause No 1 states as follows;
- “If for any reason the vendors fail to facilitate the registration and or transfer of the property to the purchaser, or fails to obtain the necessary consent to facilitate the registration of the transfer, the purchaser shall have the option to cancel the sale”
38. The Plaintiff did not oppose or deny the claim of the Defendant by way of defence to counterclaim. The claim of the Defendant is therefore admitted and the Court finds no reason to hold the contrary.
39. In the end the Plaintiffs’ case succeeds partially to the extent that the Defendant is entitled to refunds of the Kshs 4 million paid to the Plaintiffs.
40. The Defendant has sought legal costs in the sum of Kshs 375,000/- being legal costs and conveyancing. This being special damages, the Defendant had the burden to proof them. He failed to do so. The claim is not supported as no receipts to support payments were exhibited. The same is declined.
41. Final orders and disposal;
- a. The Plaintiffs’ claim partially succeeds.
 - b. The counterclaim of the Defendant partially succeeds.
 - c. The Defendant is entitled to a refund of Kshs 4 million.
 - d. The Defendant is entitled to interest on principal amount at the rate of 25% p.a. until payment is fully made effective the filing of the suit.
 - e. The Defendants claim for special damages fails for want of proof.
 - f. Plaintiffs shall meet the cost of the suit and the Counterclaim
42. Orders accordingly

DELIVERED, DATED AND SIGNED AT THIKA THIS 15TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff 1, 2 and 3 – Absent but served via email



Mwangi Kigotho for Defendant
Court Assistant – Phyllis Mwangi

