



Magu v Ambient Development Limited & another (Environment & Land Case 373 of 2018) [2022] KEELC 15095 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15095 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 373 OF 2018
EK WABWOTO, J
NOVEMBER 24, 2022**

BETWEEN

RACHAEL WANGUI MAGU PLAINTIFF

AND

AMBIENT DEVELOPMENT LIMITED 1ST DEFENDANT

HFC LIMITED (FORMERLY HOUSING FINANCE COMPANY OF KENYA LIMITED) 2ND DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit *vide* a plaint dated August 27, 2018 seeking for the following orders: -
 - a. An order for rescission of the joint venture agreement made on June 23, 2014 between the plaintiff and the 1st defendant on account of the 1st defendant's breach.
 - b. An order of cancellation, in the proprietorship section of the Register of Property Number Dagoretti/Riruta/5381, entries nos 4 and 5 in respect of the registration of transfer and issuance of title deed, respectively, made on October 15, 2014 in favour of Ambient Magu Development Company Limited.
 - c. An order of cancellation in the encumbrance section of the Register of Property Number Dagoretti/Riruta/5381 entries nos 1 and 2 in respect of the registration of charge made in favour of the 2nd defendant reservation of rights respectively, made on July 8, 2015.
 - d. An order directed to the 2nd defendant for delivery and release to the plaintiff of the original title deed held in the name of Ambient Magu Development Company Limited.
 - e. An order be made directing the Land Registrar, Nairobi District Land Registry to effect orders above and issue title deed in the name of the plaintiff.



- f. Loss of projected rental income in the sum of Kshs 420,000.00 per month from February, 2016 from the 1st defendant until payment thereof in full.
 - g. General damages.
 - h. Costs of the suit be borne by the 1st defendant.
 - i. Any other relief that court deems fit and just.
2. The suit was opposed. The 2nd defendant filed a statement of defence dated October 9, 2018.

The Plaintiff's Case

3. The plaintiff averred that she as the registered owner of property known as Dagoretti/Riruta/5381 measuring 0.100 hectares entered into a joint venture agreement with Ambient Development Limited the 1st defendant herein on June 23, 2014. It was also her averment that she entered into the said agreement upon representation made through one Jeffrey Ngare Murigu that the 1st defendant had the technical expertise and financial capacity to design finance and undertake construction of residential apartments for the commercial benefits of the parties.
4. It was pleaded that subsequent to the execution of the said agreement, she procured the transfer and registration of the suit property in favour of the project company wherein the suit property was charged as security in favour of the 2nd defendant to secure a facility of Kshs 67,000,000/-
5. It was also the plaintiff's case that in spite of having met all her obligations under the agreement, the 1st defendant breached the provisions of the agreement particulars of which were highlighted in the plaint.
6. During the hearing of the suit on April 28, 2022, the plaintiff testified as the sole witness in support of her case. She adopted her witness statement dated August 27, 2018 as her evidence in chief. She also produced list of documents dated August 27, 2018 as follows: -
 1. Joint venture agreement dated June 23, 2014 as exhibit P1.
 2. A copy of the title deed and official search certificate for Dagoretti/Riruta/5381 as exhibit P2.
 3. Offer letter from Housing Finance as exhibit P3.
 4. Letter of approval from City Council of Nairobi dated March 26, 2016 as exhibit P4.
 5. Paramount Project Consultants report as exhibit P5.
 6. Copies of the cheques to Robinson Haris & Co Advocates as exhibit P6.
 7. CR 12 dated September 29, 2016 as exhibit P7.
 8. Letter dated 22nd november 2016 to the 1st defendant as exhibit P8.
 9. Copies of demand letters as exhibit P9.
 10. Property appraisal report from Seven Degrees North Limited as exhibit P10.
7. On cross-examination, she stated that she is a director and shareholder of Ambient Magu Development Limited as per CR 12 that was produced and she further stated that she holds 250 shares.
8. On further cross-examination, she also stated that the property was changed to the 2nd defendant for Kshs 67,000,000/-. She also stated that she had not sued Mr Ngare and the company that was to undertake the development.



9. In re-examination, she stated that her initial agreement was between Ambient Development Limited and herself.
10. She also stated that she never received the money.

The Case of the 1st Defendant.

11. The first defendant did not call any witness during trial neither did they file any defence. However, they filed written submissions dated August 26, 2022 which will be considered at a later part of this judgment.

The Case of the 2nd Defendant.

12. The 2nd defendant filed its defence dated October 9, 2008 which it denied the plaintiff's claim and prayed for dismissal of the suit with costs.
13. During hearing, Caroline Muthoni Ngotho testified as the sole witness for the 2nd defendant. She adopted her witness statement dated November 11, 2020 and produced the letter of offer and charge document by the 2nd defendant as 2nd defendant's exhibit 1 and 2 respectively.
14. It was her testimony that the plaintiff was not a customer at the bank neither was the 1st defendant. According to her only Ambient Magu Development Limited was its customer.
15. She further stated that the bank had charged the property and they were yet to receive any request in respect to discharging the same.
16. On cross-examination, she stated that, the bank ordinarily does due diligence before advancing a loan. She however conceded that in the instant case no search history of the suit property was undertaken. She also confirmed that the Kshs 67,000,000/- was never disbursed.
17. On re-examination, she stated that Ambient Magu Development Limited which was a customer at the bank did not give an equity projection, architectural certificate among other documents. She also stated that the bank incurred costs in preparation and registration of the charge. The said costs were yet to be paid by the borrower.

The Plaintiff's Submissions.

18. Upon close of the parties respective cases, all the parties herein were directed to file and exchange their written submissions. The plaintiff filed her written submissions dated June 14, 2022 through the law firm of Lesinko Njoroge & Gathogo Advocates. Counsel submitted on the following three issues: -
 - i. Whether the plaintiff had the *locus standi* to file suit.
 - ii. Whether interlocutory judgment ought to have been entered against the 1st defendant.
 - iii. Whether the instruments of transfer ought to be cancelled due to the fundamental breach of the terms and conditions of the joint venture agreement.
19. The plaintiff submitted that by virtue of the joint venture agreement dated June 23, 2014 which was produced as plaintiff exhibit 1 and being the registered owner of the suit property, she had the locus to file the suit. The plaintiff cited the case of [*Daykio Plantations Limited –vs- National Bank of Kenya Limited & 2 others*](#) (2019) eKLR in support of this case.
20. The plaintiff submitted that interlocutory judgment ought to be entered against the 1st defendant since an application for summary judgment had been filed and no opposition to the same had been made



by the 1st defendant neither had they filed any defence nor taken steps to oppose the same. The case of *Teresia Wanjiru Gichare -vs- David Muigai & Another* (2017) eKLR was cited in support of this position.

21. It was further submitted that the substratum of the agreement fell apart and the intents and purpose of the agreement could not be realized either within the timelines contemplated under the agreement or at all and the plaintiff was entitled in law to exercise her right of rescission. In support of her submissions, the plaintiff cited the case of *Hassan Zubeidi -vs- Patrick Mwangangi Kibaira & Another* (2014) eKLR. It was also submitted that by a letter dated November 22, 2016, the plaintiff terminated the agreement after a delay of almost two (2) and a half (1/2) years and invited the 1st defendant for the taking of accounts of any preliminary work that had been done. It was further submitted that the joint venture agreement could also be deemed as terminated by effluxion of time. It was also submitted that the orders in respect to the cancellation of instruments of transfer registered against the title to the suit property in favour of the joint venture company, Ambient Magu Development Company Limited on October 15, 2014 and a charge registered in favour of the 2nd defendant on July 8, 2015 will be in the interest of justice if granted.
22. On the costs incurred for preparation of the change and its subsequent registration, plaintiff submitted that the 2nd defendant did not file a counterclaim in respect to the same and if indeed any were incurred then the same ought to be paid by the 1st defendant.
23. In conclusion, the plaintiff urged the court to make a finding that the plaintiff had proved her case against the defendants on a balance of probabilities and to enter judgment in her favour as prayed in her plaint dated August 27, 2018.

The Submissions by the 1st Defendant.

24. The 1st defendant filed its submissions dated August 26, 2022. The 1st defendant submitted that there were only two issues for determination. These were whether the 1st defendant was properly enjoined in this suit and whether the 1st defendant is liable. It was submitted that Ambient Magu Development Limited entered into an agreement with the 1st defendant to borrow a loan facility of Kshs 67,000,000 which was to be used for development of apartments on Dagoretti/Riruta/5381 which due to purported failure by 1st defendant to remit a sum of Kshs 5,800,000/- which was not advanced.
25. The 1st defendant maintained that it cannot perform any functions which ought to have been taken by Ambient Magu Development Limited who was not a party to the suit and that the plaintiff was in breach of the doctrine of privity of contract which states that only parties to a contract can enforce or be bound by its terms. Reliance was placed on the cases of *Saving & Loan (K) Limited -vs- Kanyenga karangaita Gakombe & Another* (2015) eKLR, *Agricultural Finance Co-operation -vs- Lengetia Limited & Jack Mwangi* (1985) eKLR in support of this position.
26. With regard to the issue of liability of the 1st defendant, it was submitted that the proceedings of the 1st defendant are frivolous and unsubstantiated and do not deserve audience by this court. The 1st defendant concluded its submissions by urging the court to dismiss the plaintiff suit against it with costs.



The Submissions by the 2nd Defendant.

27. The 2nd defendant filed submissions dated June 22, 2022. The 2nd defendant gave a summary of each party's case and evidence tendered during trial. The 2nd defendant also framed six issues for determination by the court. The issues were: -
- i. Whether the plaintiff can maintain the suit against the 2nd defendant.
 - ii. Whether this court can make a determination on the suit property without hearing the charger who is the register owner?
 - iii. Whether our land laws contemplate a conditional transfer of land.
 - iv. Whether the 2nd defendant is entitled to costs incurred in perfecting the legal charge over the suit property and the commitment fees between it and its customer, the chargor.
 - v. Whether the plaintiff as a director/shareholder of the chargor can sue the 2nd defendant for discharge of the suit property.
 - vi. Who should pay costs of the suit.
28. On the first issue, the 2nd defendant submitted that the suit property is currently registered in the names of the chargor and charged to the 2nd defendant and hence therefore the plaintiff has no *locus standi* to contest the title held by the chargor or legal charge held by the 2nd defendant. Reliance was placed on sections 3 and 24 of the [Land Registration Act](#) together with the case of [Paul Ngashema Kamau -vs- Halima Said](#) (2020) eKLR.
29. On its second issue, the 2nd defendant submitted that section 44 of the [Land Act](#) provides that transfer of land shall not be expressed to take effect upon the occurrence of any event or on the fulfilment of any condition or at any future time. It takes effect immediately. Further pursuant to section 27(1) of the [Land Registration Act](#), a transfer once registered has the same effect as a transfer for a valuable consideration and it does not matter whether the same was made without consideration.
30. On the issue of costs and fees for the charge, it was submitted that the costs were to be paid by the chargor as per the letter of offer which was produced as D exhibit No 1 and the plaintiff cannot purport to seek to discharge without payment of the costs and fees incurred.
31. On the fourth issue, it was submitted that the chargor is a limited liability company duly incorporated in Kenya which can sue and be sued in its own name and no authority was given to the plaintiff to bring suit on behalf of the chargor.
32. On whether the court should cancel the transfer, it was submitted that the plaintiff did not sue the chargor and hence orders cannot be issued against a party not before court. The case of [James Kanyita Nderitu & Another -vs- Marios Philotas Ghikas & Another](#) (2016) eKLR was cited in support. The 2nd defendant concluded that it was entitled to costs of the suit upon dismissal of the suit.

Analysis of the Issues Arising and Determination.

33. I have considered the pleadings, the evidence adduced by the parties in support of their cases and the submissions filed by the advocates for the parties. As I have earlier stated, each party framed its own issues. From the pleadings, it is my humble view that the following issues arises for determination: -
- i. Whether the plaintiff has *locus standi* to institute the suit.



- ii. Whether the plaintiff has proved her case to the required standard.
 - iii. Whether the plaintiff is entitled to the reliefs sought in the plaint.
 - iv. Whether the 2nd defendant is entitled to the costs incurred in preparation and registration of the legal charge.
 - v. What orders should issue as to costs.
34. The preliminary issue for consideration is whether indeed the plaintiff has the *locus standi* to institute the instant suit. The 2nd defendant pleaded in its defence and submitted that the plaintiff has no capacity to bring the suit against them. The 1st defendant also submitted on the same and equally stated that the suit cannot be sustained as against them as filed by the plaintiff. On this issue, the 2nd defendant specifically submitted that;
- “...the plaintiff is not a party to the charge or loan facility and cannot challenge the rights of the 2nd defendant under the said contracts. The plaintiff has no *locus standi* to contest the title held by the charger or legal charge held by the 2nd defendant in the suit property.”
35. The plaintiff in defending this position submitted that by virtue of the joint venture agreement dated June 23, 2014 and being the initial registered owner of the suit property, she had the locus to file the suit.
36. In the case of *Law Society of Kenya vs Commissioner of Lands & Others*, Nakuru High Court Civil Case No 464 of 2000, the court held as follows:-
- “Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in court of law”. Further in the case of *Alfred Njau and Others - vs- City Council of Nairobi* [1982] KAR 229, the court also held that:-
- “the term *locus standi* means a right to appear in court and conversely to say that a person has no locus Standi means that he has no right to appear or be heard in such and such proceedings”.
37. Therefore, *locus standi* means the right to appear before and be heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard because of that. Locus standi is so important that in its absence, party has no basis to claim anything before the court.
38. I have looked at the plaint in the present suit together with the documents that were produced by the plaintiff in support of her case and it is clear that the plaintiff entered into an agreement with the 1st defendant on June 23, 2014 subsequent to which the said agreement was breached by the 1st defendant and on the basis of which the suit was instituted. It therefore follows that the plaintiff being an aggrieved party as the initial registered owner of the suit property before the same was transferred to the 1st defendant subsequently upon which the same was charged by the 2nd defendant, has the locus to institute the suit herein and her suit is properly before this court.
39. On whether or not the plaintiff has proved her case to the required standard, the plaintiff testified that as the registered owner of property known as Dagoretti/Riruta/5381 measuring 0.100 hectares she entered into a joint venture agreement with Ambient Development Limited the 1st defendant herein on June 23, 2014. It was also her testimony that she entered into an agreement in reliance and upon representation made through one Jeffrey Ngare Murigu that it had the technical expertise and financial



capacity to design finance and undertake construction of residential apartments for the commercial benefits of the parties.

40. Under clause 9 of the said agreement, the 1st defendant was to make cash contribution and organize financing of the said agreement. However, during trial, she confirmed that the property was transferred to Ambient Magu Development Limited which she was a director together with her husband and other two directors.
41. It was also established that the property was charged by the 2nd defendant but no funds were disbursed. The request for the facility subsequent to the charge was made by Ambient Magu Development Limited who were not parties to this suit.
42. It is trite law that he who alleges must prove. This is set out under section 107(1)(2) of the [Evidence Act](#), which provides as follows:
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Sections 109 and 112 of the same act states;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

43. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in [Mumbi M’Nabea vs David M Wachira](#) [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the [Evidence Act](#), (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the court to believe in its existence.”

44. With respect to the burden of proof, the learned Judges of Appeal in the case of [Palace Investments Limited vs Geoffrey Kariuki Mwenda & another](#) [2015] eKLR, posited thus:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say; -



“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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden 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...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

45. The court will be guided by the foregoing. In the present case it was evident that neither party to the case is the current owner of the suit property. The property currently belongs to Ambient Magu Development Company Limited who is not a party to the suit. The suit property was charged to the 2nd defendant and there was no connection between the plaintiff and the 2nd defendant. Having carefully considered the evidence on record it is the finding of this court that the plaintiff’s claim can only be deemed to have been proven as against the 1st defendant.
46. The plaintiff sought for several reliefs as against the defendants. Some of the reliefs sought were also in respect to the cancellation of the title which is held in the name of Ambient Magu Development Company Limited who are not a party to the suit. However, having held that the plaintiff’s claim has only been proven as against the 1st defendant, the said reliefs sought can only be granted as they have been sort and apply to the 1st defendant.
47. In view of the foregoing, this court can only grant the reliefs sought in so far as they apply to the 1st defendant herein since court orders cannot be issued in vain and no party ought to be condemned unheard.
48. On whether or not the 2nd defendant is entitled to the costs of processing and registering the legal charge, it is trite law that parties are bound by their pleadings. I have perused the defence filed by the 2nd defendant and noted that no counterclaim was raised in respect to the same neither was the refund of the cost and fees of the legal charge pleaded by way special damages. Curious to note, the 2nd defendant pleaded at paragraph 5 of its defence that the Ambient Magu Development Company Limited is indebted to the 2nd defendant in fees and costs relating to the preparation and perfection of the charge. Ambient Magu Development Limited are not parties to the suit neither were they joined to these proceedings. In the circumstances the said claim fails. The 2nd defendant’s recourse lies in pursuing its claim against the chargor.
49. On the issue of costs, section 27 of the [Civil Procedure Act](#) gives the court the discretion to grant costs. Ordinarily, costs usually follow the event, unless special circumstances are presented to the court. In the instant case the plaintiff claim has partially succeeded as against the 1st defendant and in the circumstances, I will direct the 1st defendant to meet the plaintiff’s costs of the suit.

Final Orders

50. The upshot of the foregoing is that the plaintiff’s suit partially succeeds and the court makes the following orders: -
 - a. An order be and is hereby made rescinding the joint venture agreement dated June 23, 2014 between the plaintiff and the 1st defendant.
 - b. The 1st defendant shall bear the plaintiff’s costs of the suit.
 - c. The reliefs not expressly granted are deemed as declined.



Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF
NOVEMBER 2022**

E.K. WABWOTO

JUDGE

In the Presence of: -

Mr. Botany for the Plaintiff.

Mr. Nydoma h/b for Mr. Ojiambo for the 2nd Defendant.

Ms. Kihara for the 1st Defendant.

Court Assistant; Caroline Nafuna.

