



**Musyoki v Musyoki & 2 others (Environment & Land Case 282 of 2017)
[2022] KEELC 15504 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15504 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 282 OF 2017
CG MBOGO, J
DECEMBER 20, 2022**

BETWEEN

JULIUS KYALO MUSYOKI PLAINTIFF

AND

JOSEPH MUSAU MUSYOKI 1ST DEFENDANT

ROSE NDUKU KILAVI 2ND DEFENDANT

NOEL MULWA 3RD DEFENDANT

JUDGMENT

1. Vide the plaint dated January 9, 2017, the plaintiff sought the following orders against the defendants: -
 - a) A permanent injunction do issue restraining the defendants either by themselves or through their agents, servants, proxies or anyone acting on their behalf from encroaching, invading, trespassing or in any other way interfering with the plaintiff's possession and ownership of all or part of that parcel of land known as Makueni/Kiou/16XX.
 - b) The defendants be ordered to give the plaintiff vacant possession of all or any part of that parcel of land known as Makueni/Kiou/16XX which they may have occupied within a specified period failure to which they be forcefully evicted.
 - c) Mesne profits from September 2014 to the date the defendants shall vacate the suit land.
 - d) Costs of this suit.
2. The plaintiff's suit is opposed by the defendants vide the statement of defence dated June 25, 2018. It is prayed that the suit be dismissed with costs. The plaintiff did not file a reply to the statement of defence.
3. The only witness for the plaintiff, Julius Kyalo Musyoki, adopted his statement dated January 9, 2017 as his sworn evidence in chief. He stated that the suit property, parcel number Makueni/Kiou/16XX



- is his land. He stated that the suit property is registered in his name and he produced the title deed thereof as PEX No 1. He also produced his bundle of documents dated January 9, 2017 marked as PEX Nos 1-9 respectively in support of his evidence. He added that he purchased the land from one George Muia Kiamba and one Emolo Kiamba sometimes between August 2005 and October 2005.
4. The plaintiff went on to state that he knew the defendants as officials of Ukweli Self-Help Group wherein he too is a member. That in 2008, the defendants approached him asking to purchase a 50 feet by 100 feet portion of land so that they could drill for water. That the agreement was that incase they failed to strike water, they would vacate the land. That they did not manage to drill even after bringing a drilling machine on site. The defendants later shifted to Gricory Musau's land who is the 1st defendant's brother. The plaintiff added that he continued to make use of the land.
 5. The plaintiff stated that in the year 2014, he received a report from the area chief that the defendants had written to him with a request that he should visit the suit property to witness the defendants fencing the land. That plaintiff complained to the chief, and the defendants did not fence the land. However, they entered the land and planted maize and pigeon peas. That the defendants are in occupation of the suit property contrary to the agreement since they did not get water. He prayed for judgment as per the plaint.
 6. In cross-examination, the plaintiff stated that he bought Plot No 2 Kiu Adjudication Section from one Emolo Kiamba. That the land is over 2.5 acres. That Ukweli Self-Help Group entered into a written agreement with him for the suit property. Despite that, the agreement does not reveal the portion of his land the Self-Help Group was purchasing. That he did not have a report to support his assertion that the Self-Help Group did not strike water in the suit property. That he had no document showing that the Self-Help Group was to drill for water failure of which the land would revert to him.
 7. The defence called two witnesses. Joseph Musau Musyoki (1st defendant), adopted his statement dated January 31, 2019 as his sworn evidence in chief. He also produced the list of documents dated June 25, 2018 in support of his evidence. He stated that when the defendants bought the suit property from the plaintiff, the land did not have a parcel number. That they discovered that the plaintiff had obtained a title deed nine years thereafter. He added that the plaintiff did not transfer ownership of the portion of land they had purchased. That his prayer was for the plaintiff's suit to be dismissed.
 8. In cross-examination, the 1st defendant stated that the sale agreement with the plaintiff was produced as DEX No 2 and it bears his signature. That the Self-Help Group purchased land from the plaintiff in order to drill a borehole. That indeed, they drilled at the suit property but when they encountered a rock during the drilling process, they relocated to another piece of land until they could get another powerful drilling machine. That the Self-Help Group spent over Kshs 1.3 million for the work.
 9. The 1st defendant added that the Self-Help Group resolved to fence their portion of the suit property. That despite notifying the plaintiff, he declined to attend the meeting. That the suit property is still theirs. He further confirmed that the Self-Help Group brought criminal proceedings against the plaintiff after he uprooted sisal plants and after barring the group from fencing. Again, he confirmed that he was the group's treasurer when they purchased the suit property and that the group did not deviate from the sale agreement.
 10. Noel Wambua Mulwa (3rd defendant) adopted his statement dated January 31, 2019 as his sworn evidence in chief. He stated that they bought the suit property from the plaintiff when the land was not titled. That he later came to learn that the plaintiff had acquired a title deed.
 11. In cross-examination, he stated that the plaintiff entered into a sale agreement with the Ukweli Self-Help Group so that the group could utilize the land for drilling water.



12. After the parties had duly closed their respective cases, the plaintiff filed his submissions on August 26, 2021. Counsel for the plaintiff argued that he had demonstrated that he is the registered owner of the suit property when he produced the title deed for Parcel No Makueni/Kiou/16XX. He further argued that the defendants did not plead or demonstrate fraud on his part in the acquisition of the title deed. That as such, section 26 of the [Land Registration Act, 2012](#) protects his title to the suit property.
13. The plaintiff added that there was no intention of passing absolute ownership of the suit property to the defendants. That the sale was conditional to the suit property yielding water after sinking the borehole. That the suit property being agricultural land, the sale is void due to the lack of the consent of the Land Control Board. He relied on the following authorities in support of his claim: -
 - i) [Gichinga Kibutha v Caroline Nduku \[2018\] eKLR](#);
 - ii) [Isaac Ngatia Kihagi v Paul Kaiga Githui \[2017\] eKLR](#);
 - iii) [Willy Kiplagat Kirui v Kipkoech Arap Mate \[2018\] eKLR](#);
 - iv) [Rosebella Iranmwenya Mirieh v Mwangi Ngugi \[2017\] eKLR](#)
14. The defendants filed their submissions on September 10, 2021. It was argued that the sale agreement was not conditional to the extent that ownership of the suit property would pass only if the borehole struck water. That the rule of parole evidence prevents parties from departing from express terms of a contract in writing through extrinsic evidence. The defendants further submitted that the $\frac{1}{8}$ acre purchased out of the suit property was being held by the plaintiff in constructive trust for the Self-Help Group. That trusts are recognized as overriding interests in law under section 28 of the [Land Registration Act](#).
15. In addition, the defendants submitted that this court has the discretion to compel the plaintiff to transfer the $\frac{1}{8}$ acre suit property from LR No Makueni/Kiou/16XX in order to do substantive justice to the parties. To buttress their submissions, the defendants relied on the following authorities:-
 - i) [Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited \[2017\] eKLR](#);
 - ii) [Willy Kimutai Kitilit v Michael Kibet \[2018\] eKLR](#);
 - iii) [Joseph Kuyo Legei v Kuntai Ole Ntusero \[2019\] eKLR](#);
 - iv) [Chevron \(K\) Ltd v Harrison Charo Wa Shutu \[2016\] eKLR](#)
16. From my disposition of the salient issues in this case, the undisputed facts are as follows: -
 - i) The suit property measures one eighth ($\frac{1}{8}$) of an acre and is part of Title No Makueni/Kiou/16XX which is registered in the name of the plaintiff;
 - ii) The title deed for Title No Makueni/Kiou/16XX was issued to the plaintiff on December 1, 2016;
 - iii) That the plaintiff and the defendants entered into a sale agreement for the suit property on May 7, 2008; and
 - iv) The agreed purchase price was Kshs 8,750/= and the same was duly acknowledged by the plaintiff as the vendor;
17. I have isolated the only issues for determination as follows: -
 - i. Whether the sale agreement dated May 7, 2008 was a conditional, contract; and



- ii) Who ought to bear costs of the suit.
18. Firstly, an agreement for the disposition of an interest in land must be confined within the scope of section 3(3) of the [Law of Contract Act](#). The said provision outlines as follows: -
- No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: ...
19. On the facts of the case before me, the sale agreement which was produced as DEX No 1, readily conforms to the above statutory requirement. All the parties herein duly signed the sale agreement and it was properly witnessed by Daniel Mativo and the Assistant Chief M Kitavi. It is hence legally binding on the parties.
20. The plaintiff did not contest that Kshs 8,750/= was paid as consideration. He also alluded to the fact that the defendants purchased a plot measuring 50 feet by 100 feet which translated to approximately one eighth ($\frac{1}{8}$) of an acre in his evidence in chief which in fact corresponds with the sale agreement.
21. Turning to the question whether the sale agreement constitutes a conditional contract, the [Black's Law Dictionary](#) 9th Edn Page 367 defines a conditional contract as follows: -
- “An agreement that is enforceable only if another agreement is performed or if another particular prerequisite or condition is satisfied. Also termed hypothetical contract.”
22. I have read and reread the land sale agreement dated May 7, 2008 and produced as DEX No 1 I will reproduce an abstract of the sale agreement: -
- “I Julius Kyalo Munyoki have received Kshs 8,750 (Eight Thousand Seven Hundred and Fifty Only) for the sale of $\frac{1}{8}$ acre piece of land on my Plot situated at Kwangoto village at Muani Sublocation, Kiou Location, Kasikeu Division on which the Group borehole has been sighted by the Kibwezi Water Management Board.”
23. The parties herein did not attach conditions precedent to the performance of the sale of the suit property in their agreement. Nothing in the sale agreement would remotely suggest that the sale of the suit property was subject to the successful production of water from a borehole that was to be dug by the defendants. I am thus disinclined to agree with the plaintiff's submission.
24. In *Aberfoyle Plantations Ltd v Cheng* [1959] 3 All ER 914, Lord Jenkins observed as follows: -
- “Before parting with these two authorities, their lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that, until the condition is fulfilled, there is no contract of sale to be completed, and, accordingly, that, by fixing a date for completion, the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest.”



25. The above decision by Lord Jenkins was endorsed by the Court of Appeal in *Kukal Properties Development Ltd v Tafazzal H Maloo & 3 others [1993] eKLR* where the court held as follows: -

“Special condition No 7 rendered the said agreement conditional agreement in so far as it stipulated that the agreement was subject to the happening of the future events namely the production of the financial offer as well as compliance with the completion date. It is trite law that where the contract is subject to a future event, there is no binding contract until and unless that condition subsequent is fulfilled.”

26. Accordingly, I am of the view that the defendants have a valid and enforceable contract of sale upon which they would be entitled to an order of specific performance.

27. In respect to the last issue for determination, section 27(1) of the *Civil Procedure Act* vests discretion to award costs on the court and at any rate, it is provided that costs of the action shall follow the event. The plaintiff has failed to prove his claim against the defendants on a balance of probabilities and as such I am of the view that this is one such case where the awarding of costs is paramount

28. The upshot is that the plaintiff's suit is devoid of merit and is hereby dismissed with costs to the defendants.

SIGNED, DATED AND DELIVERED AT NAROK VIRTUALLY THIS 20TH DAY OF DECEMBER, 2022.

MBOGO C G

JUDGE

20/12/2022

Court Assistant: CA:Chuma

