



Eastern Bypass Estate Limited v Nyongesa & another (Environment and Land Appeal E87 of 2022) [2024] KEELC 3586 (KLR) (9 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3586 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E87 OF 2022**

**JG KEMEI, J
APRIL 9, 2024**

BETWEEN

EASTERN BYPASS ESTATE LIMITED APPELLANT

AND

EDWIN WACIKA NYONGESA 1ST RESPONDENT

MARY WAMBUI MURAGU 2ND RESPONDENT

(Being an Appeal against the Judgment of Hon J. A. Agonda, PM delivered in SPM ELC NO. E123 of 2021 at Ruiru on the 8/9/2022)

JUDGMENT

1. Vide a Memorandum of Appeal filed on 11/10/2022 the Appellant filed the Appeal against the Respondents on the following grounds: -
 - a. That the Learned Magistrate erred in fact and in law by finding that the agreements relied on by the Plaintiff had the 2nd Defendant's Letter Head and they were valid agreements capable of being enforced by the parties.
 - b. That the Learned Magistrate erred in law and fact by finding that the Sale Agreements were binding upon the 2nd Defendant who was not a party to any of the said Agreements.
 - c. That the Learned Magistrate erred in law and fact by finding that because the Sale Agreements were executed in the offices of the 2nd Defendant and witnessed by its employees, it could not dispute the said Agreements.
 - d. That the Learned Magistrate erred in law and fact by finding that the Plaintiff had paid the sum of Kshs. 50,000/- as alleged transfer fees to the 2nd Defendant when he did not – a fact that he testified to during the hearing.



- e. That the Learned Magistrate erred in law and fact by finding that no requisite land documents were availed to the Honourable Court while the 2nd Defendant had produced copies of Title Deeds for parcels of land known as Title Numbers 30393/1404 and 30393/568.
 - f. That the Learned Magistrate erred in law and fact by finding that the Plaintiff wrote to the 2nd Defendant on the Completion Date when no mention of the Completion Date was made in the pleadings filed or even in the evidence produced before the Court.
 - g. That the Learned Magistrate erred in law and fact by finding that the Plaintiff had upheld his part of the sales agreement by paying of the transfer fees to the 2nd Defendant when he had not.
 - h. That the Learned Magistrate erred in law and fact by finding that the Plaintiff did not have to follow the 1st Defendant for proof of ownership despite the 2nd Defendant having requested for the same.
 - i. That the Learned Magistrate erred in law and fact by finding that the 1st Defendant was the registered proprietor of the suit properties when no evidence was produced to prove that.
 - j. That the Learned Magistrate erred in law and fact by finding that the Plaintiff was in possession of the suit properties since 2016.
 - k. That the Learned Magistrate erred in law and fact by finding that the 2nd Defendant should be compelled to surrender the 2 suit plots described by the Plaintiff, which plots do not exist.
 - l. That the Learned Magistrate erred in law and fact by finding that the Plaintiff had proven specific performance in a contract the 2nd Defendant was not a party to.
 - m. That the Learned Magistrate erred in law and fact by failing to consider the 2nd Defendant's pleadings and evidence in its entirety.
 - n. That the Learned Magistrate erred in law and fact by failing to find the 1st Defendant having been paid by the Plaintiff should have been held liable for specific performance of the agreements between her and the Plaintiff.
 - o. That the Learned Magistrate was wrong in finding and entering Judgment for the Plaintiff as against the 2nd Defendant.
2. The Appellant sought the following reliefs on Appeal:-
- a. That this Appeal be allowed with costs.
 - b. That the Judgment and Decree made on 8th September 2022 be set aside and there be substituted an order entering Judgment for the Appellant dismissing with costs the 1st Respondent's case in the Subordinate Court.
 - c. That the Respondents do pay the Appellant's costs of this Appeal and the costs of the suit in the Subordinate Court.
3. The background of the case is that in the trial Court the Plaintiff (1st Respondent) sued the 2nd Respondent and the Appellant (being 1st and 2nd Defendants respectively) seeking the following orders:-
- a. A declaration that the Plaintiff is the rightful owner of Plot No. 1652 on LR. No. 303/568 and Plot No. 832 on LR. No. 30393/1404 previously owned by Eastern By-Pass Estate Limited.



- b. An order compelling the 2nd Defendant Eastern By-Pass Limited to surrender to the Plaintiff Plot No. 1652 on LR. No. 303/568 and Plot No. 832 on LR. No. 30393/1404 and all documents pertaining to the said property.
 - c. In the alternative to pray 1 and 2 above the 1st and 2nd Defendant do compensate the Plaintiff with the equivalent of the current market value of Plot No. 1652 on LR. No. 303/568 and Plot No. 832 on LR. No. 30393/1404.
 - d. Costs of the suit as well as interest.
4. Upon hearing and determining the suit the trial Court pronounced Judgment in favour of the Plaintiff as follows:-
 - a. A declaration that the Plaintiff is the rightful owner of Plot 1652 on LR. No. 303/568 and Plot 832 on LR. No. 30393/1404 previously owned by Eastern By-Pass Estate Limited.
 - b. An order compelling 2nd Defendant to surrender to the Plaintiff Plot 1652 on LR. No. 303/568 and Plot 832 on LR. No. 30393/1404 and all documents pertaining to the suit properties.
 - c. The 2nd Defendant is condemned to pay the costs of the suit to the Plaintiff.
5. It is this Judgment that has provoked this Appeal.
6. On 18/10/2023 the Court directed parties to file written submissions by 20/12/2023. By the time of writing this Judgment none of the parties have complied with these directions. The Court observes that the Record of Appeal that was placed before the Court calls upon the Court to determine the matter based on what is before it.
7. The key issue is whether the Appeal has merit.
8. The 1st Respondent averred that the Appellant was the registered owner of the two plots namely parcel No 568 and 1404 along the Eastern Bypass in Kiambu County. That the Appellant subdivided the land into smaller plots and offered the same to the members of the public for purchase. That he visited the offices of the Appellant in search for land to purchase and he was informed by the Appellant's staff that there was a buyer who had two plots and was willing to sell to him. That on 30/3/2016 he again went to the Appellant's offices whereupon he entered into an agreement for sale with the 2nd Respondent over the suit plots witnessed by the representatives of the Appellant. That on confirmation that the 2nd Respondent owned the plots, he paid the full purchase price to the 2nd Respondents account. However, when he visited the offices of the Appellant to check on the progress of his titles he was informed that his titles had issues and therefore he could not be issued with the same.
9. It is not in dispute that despite service of Summons the 1st Defendant failed to enter appearance nor file a defence. The suit of the Plaintiff as against the 1st Defendant was therefore uncontroverted/undefended.
10. The Appellant filed a defence in which it denied the claim of the Plaintiff. It admitted having been the original owner of the suit lands. It stated that the 1st and 2nd Respondents were strangers to it and denied selling them any plots nor that it had issued any allotment letters to any one of them. It also denied any knowledge of the purported agreement for sale between the two parties nor that the transaction took place in its offices.



11. The onus of proof rests on the person who asserts. Section 107 - 109 of the [Evidence Act](#), Chapter 80 of the Laws of Kenya which state as follows:-

“ 107. Burden of proof

- (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.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

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.”

12. On ground Nos. 1, 2 & 3 of the Appeal the Judgement of the trial Court has been assailed on the grounds of error amongst them that the agreement relied on by the 1st Respondent was on the Appellants letter head; sale agreement bound the Appellant and that since the agreement was executed at the Appellants offices and witnessed by the Appellants staff, it was undisputable. A review of the evidence led in the trial Court shows that the 1st and 2nd Respondents entered into a agreement of sale dated the 31/3/2016 and agreed to sell to each other plots Nos 1652 and 832 . The agreement disclosed that the 2nd Respondent had purchased the plots on 23/3/2011 from the Appellant. The agreement is executed by the parties and witnessed by an advocate by the name James N. Kariuki on the 31/3/2016. There is no evidence led to support the evidence that the 2nd Respondent had entered into a sale agreement with the Appellant over the suit plots on 23/3/2011. I have seen a letter of allotment on the letter head of the Appellant dated the 23/3/2011 for the two plots. A letter of allotment cannot take the place of an agreement of sale. Furthermore, the agreement of sale between the Respondents was not on the letter head of the Appellant. I find that there having been no agreement of sale between the Appellant and the 2nd Respondent, there is no privity of contract and the Appellant was not bound by a contract that was only known to the Respondents. I say so because the 1st Respondent admitted as much and that he paid the 2nd Respondent directly into her account. I find that the trial Court erred in holding that the Appellant was bound by the contract entered into by the Respondents.
13. The Appellant led unchallenged evidence that the two plots parcel 1404 and 568 were too small to be subdivided further and produced copies of titles in the name of the Appellant. This evidence was not controverted by the 1st Respondent who had the onus to proof the existence of parcel Nos 832 and 1652. The Court received evidence that the Appellant was the duly registered owner of parcel Nos. 1404 and 568 and therefore the Court erred in holding that it had no titles.
14. With respect to ground No 4 and 7 of the Appeal, the 1st Respondent claimed to have paid Kshs 50,000/- to the Appellant, a claim that was not substantiated. There was no evidence led to show that the 2nd Respondent held any interested in the alleged suit plots. The Court finds that this is a case where the 1st Respondent seems to have been conned by the 2nd Respondent who misrepresented to him that she owned two parcels of land forming the suit plots. The 1st Respondent is however without



a remedy as he can pursue for refunds from the 2nd Respondent. The Court is not persuaded that the 1st Respondent acquired any interest in the suit lands; carried out due diligence as to whether or not the alleged parcels exist and whether or not the 2nd Respondent held any interest title in the suit lands.

15. In the end, I find that this is an Appeal the instance in which this Court is entitled to interfere with the decision of the trial Court. The Appeal is merited and it is allowed in the following terms;
- a. That this Appeal be and is hereby allowed.
 - b. That the Judgment and Decree made on 8th September 2022 be set aside and there be substituted an order dismissing with costs the 1st Respondent's case in the Subordinate Court.
 - c. That the 1st Respondent do pay the Appellant's costs of this Appeal and the costs of the suit in the trial Court.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 9TH DAY OF APRIL, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kabuthu for the Appellant

Ms. Waitere for the 1st Respondent

2nd Respondent - Absent

Court Assistants – Phyllis / Oliver

