



REPUBLIC OF KENYA



**M’Mukindia v Bundi (Environment and Land Appeal E027 of 2023)
[2024] KEELC 6896 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6896 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E027 OF 2023
CK NZILI, J
OCTOBER 16, 2024**

BETWEEN

CHARITY MWARI M’MUKINDIA APPELLANT

AND

ERIC MUGAMBI BUNDI RESPONDENT

*(Being an appeal from the judgment of Hon. S. Ndegwa- SPM
Githongo in ELC NO. 38 of 2019 delivered on 25.8.2023)*

JUDGMENT

1. Before the court is the memorandum of appeal dated September 25, 2023. The appellant who was the defendant at the lower court faults the trial court on account of:
 - i. Failing to find that the sale agreement dated April 18, 2019 was vitiated by fraudulent misrepresentation, duress, illegality and lack of capacity to deal with the property of the deceased.
 - ii. For awarding liquidated damages which were never pleaded or proved.
 - iii. Failing to find that she had not been paid any consideration by the respondent, hence no liability attached to her.
 - iv. Failing to find the claims had not been proved against them.
 - v. For reaching a judgment against the weight of the evidence tendered.
2. This being the first appellate court, its mandate is to re-hear and re-look at the record of the trial court with an independent mind and arrive at fresh findings as to facts and the law, while giving credit to the trial court which had the benefit of seeing and hearing the witness testify. The court is also guided by Section 78 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules. See also Abok James



Odera vs J. P Machira [2013] eKLR, Gitobu Imanyara vs Attorney General [2016] eKLR and Peters v Sunday Post [1958] E.A 424.

3. In Mulla, The Code of Civil Procedure 18th edition [2012] pp 3561, the scope and objection of the rule is to empower the appellate court to do complete justice between the parties. The court has to re-assess and re-analyze the extract on the record and then determine whether the conclusions reached by the learned magistrate are to stand or not and give reasons either way.
4. At the trial court the respondent had by a plaint dated 20.12.2019 averred that by a sale agreement dated 18.4.2019, the appellant as a beneficial owner had offered to sell to him ½ an acre out of L.R No. Abothuguchi/Kithirune/114 at Kshs.620,000/=, to which he paid a deposit of Kshs.134, 456/=.
5. It was averred that the appellant breached the sale agreement by:
 - a. Failing to hand over vacant possession by 1.6.2019 as agreed.
 - b. Failing to excise and subdivide the portion.
 - c. Entering into an agreement with no intention of honoring it.
 - d. Unjustly enriching herself.
6. As a result, the respondent prayed for a refund of the deposit plus liquidated damages as agreed in the sale agreement.
7. The appellant denied the claim through a statement of defence dated 16.2.2021. She denied selling or receiving Kshs.134,456/= from the respondent. On the contrary, the appellant averred that whatever was referred to as a sale agreement was brought to her by her son to sign so as to lease out the land to the respondent, which she signed without having an independent person to explain to her what it was. She therefore denied the alleged breach, otherwise there was no privity of contract between her and the respondent. Further, the appellant denied that she was liable to refund anything to the respondent without prejudice; that the respondent and her son fraudulently drew a sale agreement and brought it to her purporting it to be a lease agreement, knowing very well that she could not read English language and asked her to sign only to turn out to be a sale agreement with a view of taking her land through fraud, coercion and corrupt means.
8. The appellant termed the sale agreement as null and void as per the Land Control Act (Cap 302). Moreover, the appellant averred that to pre-empt her complaint, the respondent rushed to the police and caused her to be arrested and charged for obtaining money by false pretenses.
9. At the trial Eric Mugambi testified as PW 1. Relying on a witness statement dated 31.12.2019 as his evidence-in-chief, he told the court that by a sale agreement dated 18.4.2019, the appellant offered to sell ½ an acre of land to be excised from L.R No. Abothuguchi/Kithirune/114 at Kshs.620,000/=, to which he paid a deposit of Kshs.134,456/=, to the appellant. PW1 said that the appellant was selling part of her land as a beneficial owner of 3 acres of land vide Meru H.C Succession Case No. 75 of 2000.
10. Unfortunately, PW 1 stated that the appellant without any justification, failed to subdivide and excise the portion by the set date of 1.6.2019. He prayed for a refund of Kshs.134,456/= plus liquidated damage as agreed in the sale agreement. PW 1 relied on a sale agreement dated 18.4.2019; confirmation of grant; demand letter dated 2.10.2019 and forensic documents examiner's report dated 9.10.2020 as P. Exh No. MFI P (1), 2, 3 and 4.



11. PW 1 again added that two weeks after purchasing the portion, he found a third party constructing on the land and on enquiry from the appellant, she denied having sold any land to him, prompting a police report only for her to change her tune and claim that she had merely leased the land to him.
12. Similarly, PW 1 averred that as per the sale agreement, he was to take vacant possession with effect from 1.6.2019, but was unable to do so for someone by the name Murithi was constructing on the land. PW1 added that he never conducted an official search before signing the sale agreement since he knew that the land was in the appellant's name.
13. PW 1 also stated that the two parties were to equally cater for the land control board application charges to obtain consent which they never did for after the police report the appellant was charged in Cr. Case No. 1100 of 2019.
14. In further examination in chief following a recall PW 1 produced an original certificate of confirmation of grant dated 25.5.2016 in Meru H.C Succession Cause No. 75 of 2006 that was rectified to correct the parcel number. She said that her name was not appearing on the grant as a beneficiary or an administrator of the estate.
15. Kithinji Kirigia Advocate testified as PW 2. He confirmed that the parties alongside the son of the appellant approached him on 19.4.2019, seeking to sell a portion of a land subject to a succession cause in order to raise the decretal sum owed by her son who was facing a notice to show cause issue in Meru HC. Case No. 116 of 2006 for Kshs.114,456/=.
16. Again, PW 2 said that upon discussion with the appellant, he established that the legal administrator as per the certificate of confirmation of grant was Silas Mbaya Mukindia as per Meru H.C Succession case No. 75 of 2006 over the distribution of L.R Abothuguchi/Upper Kaaga/114, to which the appellant was entitled to 3.1 acres.
17. PW 2 said that he drew the sale agreement in the presence of the parties. Silas Mbaya and the appellant's son. Further, PW 2 stated that Kshs.134,456/= was paid to the appellant as a deposit of Kshs.114,000/= went to clear the decretal amount in Meru H.C CC 116/2006, Kshs.20,000/= was the legal fees to take over the Meru H.C Case No. 16 of 2003 from Nahashon Karuti advocate, and Kshs.114,456/= to M/s Meenye and Kirima Advocates, counsels for the respondent on behalf of Muirthi, in view of Meru CMCC No. 30 of 2008, where there had been a judgment debtor against Peter Mutwiri Mukindia. Further, that Kshs.48,554/= was to be paid to settle the decretal amount in Meru CMCC No. 530 of 2005 as the amount had not been taxed and therefore upon taking out the bill, the balance was to be paid to the vendor upon transfer. PW 2 produced the sale agreement marked as PMF 1 as P. Exh. No. (1).
18. According to PW 2, the following week after the sale agreement and settlement of Meru H.C Case No. 116/2006, the appellant's daughter and son came to his office complaining that their mother had sold the land without their consent. After informing them that the other two brothers given the family was well known to him, PW 2 told the court that the children demanded that the purchaser top the purchase price by Kshs.180,000/=. PW 2 said that he called the purchaser who is also a neighbour of the appellant and insisted on Kshs.20,000/=. PW 2 stated that a few days later, the appellants surprisingly brought a letter to his office indicating that he was not selling but leasing the land to the respondent. PW 2 said that he told the children to bring the mother along to discuss the issue which they did not.
19. In cross-examination, PW 2 told the court all the parties in the matter were from his village and only came into the matter after the respondent called him and brought along the appellant for advice. Eventually, they gave him an original title deed, a certificate of confirmed grant and a notice to show cause letter. According to PW 2, the title deed showed the registered owner as M'Mukindia



- M’Mugwika, while the certificate of the confirmed grant had listed four beneficiaries to the estate among them the appellants.
20. Additionally, PW 2 stated that he explained the details of the sale agreement to the appellants who appeared illiterate but cunning. He said her handwriting had been confirmed by the document examiner. PW 2 said that though he had not read the two judgments in Meru CMCC No. 530/2005 and H.C Case No. 116 of 2006, he was ably briefed about them by an associate from the law firm of Ms. Meenye & Kirima Advocates. PW2 also confirmed that though there was an amended certificate of confirmed grant and errors in the description of the two daughters in the sale agreements, the same did not make the sale agreement invalid. PW 2 however conceded that they made the sale agreement four months before the grant was amended.
 21. Silas Mbaya Mukindia testified as PW 3. He adopted his witness statement dated 11.6.2021 as his evidence-in-chief. PW 3 told the court that the appellants was his neighbor and a stepmother whose son Peter Mutwiri Mukindia had been sued in Meru CMCC No. 530 of 2005 and ordered to pay some money. Being aggrieved by the decree, PW 3 stated that his stepbrother filed Meru H.C Appeal No. 116 of 2006 which he equally lost and was ordered to pay the amount since the family land was still in the name of the deceased and subject in Meru H.C Succession Case No. 75 of 2000, the appellants agreed to sell to the respondent $\frac{1}{2}$ an acre of her share in the estate to settle the decretal sums on behalf of her son.
 22. Being the legal administrator in the finalized succession cause, PW 3 told the court that the appellants requested him to go with her to PW 2 who was working with Gichunge Muthuri & Co. Advocates to sign the sale agreement. He confirmed that the sale agreement was drawn and read to them and interpreted in Kimeru language, before all of them would append their signatures. PW 3 said that the appellants knew that she was selling but not leasing the land to the respondent who is also their neighbor. Equally, PW 3 confirmed that he witnessed the appellants receiving Kshs.130,000/=. He said that he was yet to sign the transfer form in favour of the respondent.
 23. Peter Mutwiri Mukindia testified as PW 4. He adopted a witness statement dated 11.6.2021 as his evidence-in-chief. PW 4 told the court that the appellants was his mother and that following a claim against him in Meru CM No. 520 of 2005 where he was ordered to pay Kshs.450,000/= and due to his unsuccessful Appeal No. Meru H.C 116 of 2006 for a sum of Kshs.114,456/=: a notice to show cause had been issued against him. Since the family land was still in the name of the appellants, she agreed to sell a portion of land measuring $\frac{1}{2}$ an acre to the respondent to raise or gather the decretal amount.
 24. Further, PW 4 stated that he, therefore, looked for the respondent to purchase the portion, agreed on the purchase price and proceeded to the office of PW 2 who drew a sale agreement which they all signed together with PW 1 and PW3 before PW 2. PW 4 also said that after the transaction they proceeded to the law firm of Meenye & Kirima Advocates, and paid the decretal sum. He insisted that his mother knew that she was selling and not leasing the land to the respondent. Otherwise, it was his sister and other brothers who thereafter implored the appellants to change her mind and deny that she was selling her land.
 25. Charity Mwari Mukindia testified as DW 1. She relied on her witness statement dated 24.2.2021 as her evidence-in-chief. DW 1 told the court that although she was a beneficial owner of L.R No. Abothuguchi/Kithirune 114, she never received Kshs.134,456/= as alleged by PW 1, from anybody. However, she confirmed that PW 4 had two cases at Meru High Court, where he had been ordered to pay some money. DW1 added that on 18.4.2019, PW 1, PW 3 and PW 4 came to the work place and asked her to sign an agreement to lease her land to PW 1, in order for PW 4 to raise money to clear the decretal sum.



26. Subsequently, DW 1 said that she was threatened that if she did not sign the document, her son would be sent to civil jail and rot there. She denied signing her part though the rest of the parties signed the agreement. DW 1 said that when she was shown where to sign, she was told it was a lease agreement.
27. Again, DW 1 said that later on, her other children informed her that she had sold her land which she denied. DW 1 stated that she went back to PW 1 accompanied by her children who were given the sale agreement and after reading and interpreting it, she learned that indeed it was not a lease agreement. DW 1 said that she rejected the same and immediately wrote a letter to cancel it. She insisted that the sale agreement was fraudulently drawn and signed by the respondent, in collusion with PW 4 to defraud her the land.
28. More to, DW 1 stated that the two took advantage of her illiteracy and misrepresented the facts to her to procure her consent. She produced the letter dated 13.5.2019 as D. Exh. No. (1) and her handwritten statement dated 24.9.2020 as D. Exh. No. (2). She however stated that PW 2 read the agreement to her in English and Kiswahili and not Kimeru, which is the language that she could easily understand.
29. In cross-examination DW1 confirmed that she appended a signature to the agreement believing that it was a lease agreement for Kshs.130,000/=, that her son had told her he needed to clear school fees for his children and not to pay for a decretal as indicated in her witness statement. DW 1 denied receiving any money from the respondent. She insisted that she was threatened in the sale agreement.
30. DW1 denied that the agreement was read to her in Kimeru language nor did she tell PW 2 that she had not understood what the document she was about to sign was for. Consequently, DW 1 said that PW 2 told him that she would be explained about the document at home. Similarly, DW 1 said that she did not know the extent of the portion she was leasing to the respondent.
31. Hellen Kagendo and Martin Muriungi testified as DW 2 and DW3. They both relied on witness statements dated 24.2.2021 as their evidence-in-chief. As a grand-daughter and son of the appellant, they told the court that DW 1 informed them of leasing her land to the respondent to secure freedom for PW 4 who had an impending notice to show cause for Kshs.114,456/= at Meru High Court, so he should not be sent to civil jail. Later on, DW 2 and DW 3 said that they heard that there was a sale as opposed to a land lease of which the appellant vehemently denied only to visit PW 2's office and establish that was the case.
32. DW 2 & 3 confirmed that DW 1 vehemently rejected the same and wrote a letter to cancel the sale agreement insisting that PW 1 and PW 4 acted fraudulently, threatened and misled her to sign a sale agreement instead of a lease agreement, taking advantage of her illiteracy, yet she received no money for it and was only fluent Kimeru.
33. DW 3 said that after rejecting the sale agreement the appellant was arrested by the police. DW 2 and 3 said that the appellant had not informed them of the sale agreement which was drawn in English language and not in Kimeru, the only language that the appellant understands.
34. After the close of the appellant's defence, the respondent suit was allowed. Through written submissions dated 30.9.2024, the appellant urges this court to find that the sale agreement was vitiated on account of fraud, misrepresentation, duress and lack of capacity to sell and transfer any land to the respondents. Reliance was placed on African Cotton Industries Ltd v Rural Development Services Ltd [2021] eKLR, Mohamed Ahmed Abdun & another v Mini Bakeries MSA Ltd [2019] eKLR and Lynch v D.P.P of Northern Ireland [1975] AC 653.

35. RTS Flexible Solutions Ltd v Molkerei Alois Muller GmbH & Co. KG (UK Production 2010) UKSC 14 (45), Alfred M.O Michira v Ms. Gesina



36. The appellant further submitted that there was no meeting of mind between the two contracting parties and upon discovery of what it was the appellant wrote the letter dated 13.5.2019, expressing her reservation and canceling the agreement. The appellant submitted that PW 2 mainly consulted PW 4 who was the one to benefit from the transaction and not the appellant.
37. Similarly, the appellant submitted that under Section 82 of the *Law of Succession Act*, it was only the personal representative who would deal with the suit land. In this case, PW 2 confirmed that when the sale took place, the confirmation execution of the estate had not been finalized and the suit property had not been transmitted to the appellant, for her to have a good title to pass to the respondent. Going by the doctrine of *nemo dat quod non habet*, the appellant termed the sale agreement an illegality as held in *Africa Cotton Industries Ltd (supra)*.
38. On the receipt of the purchase price, the appellant submitted that the benefit went to her son and not her and therefore, the respondent failed to produce any receipt to show the manner in which the entire money was utilized by her other than PW 4. In the absence of such acknowledgment receipts from her receiving any balance, the appellant relying on *Esther Kabugi Njuguna v Martha Chebet and another [2020] eKLR* urged the court to find there was no proof of payment of Kshs.485,554/=, the court should find the agreement vitiated by lack of consideration and the appellant not liable to refund any sum for she was not the benefactor of the alleged consideration.
39. The respondent relied on written submissions dated 30.9.2024. He submitted that the appeal was lodged outside 30 days contrary to Section 79G of the *Civil Procedure Act*. Reliance was placed on *Madowo v Oluja & another Civil Appeal No. E557 of 2022* (KEHC) 1205 (KLR). The respondent also submitted that the court is there to enforce a contract as it drawn and executed by the parties. In this case, the respondent submitted that Kshs.620,000/= would not have been possible for a lease of a mere 1 acre of land.
40. Further, it was submitted that their witnesses who were there during the execution of the sale agreement, were called to support the respondent's case that the appellant voluntarily signed the sale agreement after it was explained to her in Kimeru language before PW1-PW4, otherwise she was trying to short charge him.
41. As to how the money was spent, the respondent submitted that it was not his business to question why the land was being sold or how the money or going to be utilized. Reliance was placed on *Farm Hand Engineering v Kenya Industrial Estates [2005 eKLR and Housing Company of E.A Ltd v Board Trustees National Social Security Fund & other [2018] eKLR*.
42. Subsequently, the respondent submitted that in civil cases, the standard of proof is on a balance of probability and a court makes a finding based on which party's version of the story is more believable. In this case, the respondent called credible witnesses who were present at the signing of the sale agreement, unlike the appellant who had no reason to lie on oath.
43. The issues calling for my determination are:
- i. If the appeal is competent.
 - ii. If there was a sale or lease agreement between the appellant and the respondent on 18.4.2019.
 - iii. If the sale agreement dated 18.4.2019 met the test of law on land agreements.



- iv. If the respondent had pleaded and proved breach of the sale agreement and the entitled to any damages as a result of the alleged breach.
 - v. Whether the appeal has merits.
 - vi. What is the order as to cost?
44. It is trite law that parties are bound by their pleadings and the issue for the determination arises from the said pleadings. In *Caltex Oil (K) Ltd v Rono Ltd* [2016] eKLR, the court said that pleadings are a shield as well as a sword for both sides, since one hand they have the potential to inform each party what they expect in the trial before the court and that if a party wishes the court to grant a prayer, it must specifically plead and prove that fact.
 45. The court observed that pleadings are a precursor for a party to lead evidence in satisfaction of the prayers sought and where no such prayer is pleaded in a specific and particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders. In *Mohamad Ali & another v Sagoo Radiators Ltd* [2013] eKLR the court adopted *Khan v Singh* [1985] KLR 716 dicta on special damages.
 46. Computation of the thirty days within which to file an appeal is subject to Order 50 Rule 4 of the Civil Procedure Rules. In *Kenya Ports Authority vs Maur Abdalla Bwanamka* (2018) eKLR, the court observed that the computation of time must exclude Sundays and public holidays. In *Stok Contribution Ltd vs Erick Odhiambo Odoga* (2022) eKLR, the court cited Section 57 (b) of the Interpretation and General Provisional Act and Rule 2 (2) (b) of the High Court Practice and Procedure Rules made pursuant to Section 10 of the *Judicature Act* on the computation of time.
 47. In *KRA & others v Mt Kenya Bottlers & others* (application) 12 E02 of 20221 (2022) KESC 3 (KLR) (10th February 2022) (Ruling), the court found that the applicant had not only been injudicious but also brazen in flouting the direction of the registrar and un deserving of the court's exercise of discretion.
 48. In this appeal, I find that as per Order 50 Rule 2 of the Civil Procedure Rules and Section 57 (b) of the *Civil Procedure Act*, Sundays and public holidays are excluded in the computation of time. See *Longinus Oroni Murunga v David Masika Mafumbo* [2017] eKLR.
 49. In *Caltex* (supra), the court held that the plaint did not contain the prayer for specific damages and neither were they particularized. The court observed that as a general rule, a purchaser is entitled to recover damages at large where a settler refuses to implement an agreement for any reason other than a defective title and compensation contemplated in the contract or which could reasonably have been in the contemplation of the parties as the one likely to be wasted if the contract was broken.
 50. Further, the court cited *Ritho v Karithi & another* [1988] KLR 237 and *Gharib Suleman Gharib vs Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998*, that the specific performance of any contract is based on the existence of a valid and enforceable contract.
 51. It is trite law that parties have the freedom to contract to vary and re-amend the terms and conditions in the contract. Similarly, courts of law do not re-write contracts but only enforce them, unless vitiated by illegality, lack of capacity, unconscionable, illegality and undue influence. See *National Bank of Kenya v Pipe Plastic Samkolit (K) Ltd* [2002] E.A 503.
 52. In *Housing Company of Trust African Ltd* (supra), the court observed that contracts are voluntary undertaking and contracting parties are free to specify the terms and conditions of their agreement and that court cannot substitute its judgment for that of the parties, further the court held that as long



- as the contract was clear and unambiguous, the court's role is to interpret the contract as written and not to rewrite it.
53. In *RTS Flexible Systems (supra)*, the Supreme Court of UK held that, whether there was a binding contract between the parties and if so upon what terms depend upon what they agreed and not the subjective state of mind, but upon what was communicated between them by word or conduct and whether that lead objectively to a conclusion that they intended to create legal relation and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.
 54. In *Mamta Peesh Mahajan (Suing As Estate of the late Peeush Premlal Mahajan v Yashwant Kumari Mahajan (Sued personally and as Executrix of the Estate and beneficiary of late Krishan Lal Mahajan [2017] KEHC [2022] KLR)*, the court observed that once the defendant's signature is proved or admitted, the plaintiff has discharged his or her burden and the burden is on the defendant to prove fraud, illegality, duress or whatever defence he or she might have.
 55. A court of law interprets a contract with its four corners with no resort to extrinsic or parole evidence. See *Rufale v Umon Manufacturing Co. [1918] LR 1 KB 59*.
 56. In this appeal, the law governing land contract in Section 3 (3) of the *Law of Contract Act* and Section 38 of the *Land Act*, the respondent sought to enforce the sale agreement dated 18.4.2019, said to have been breached by the appellant for neglecting to subdivide, excise and transfer the land as agreed or at all, for no justification. On the other hand, the appellant terms the sale agreement as void, illegal, obtained through duress, threats, misrepresentation for no consideration and canceled by a letter dated 13.5.2019 and a statement made on 24.9.2020.
 57. The respondent appears to have filed no reply to the statement of defence dated 16.2.2024 to deny or reply to paragraphs 3 – 12 of the statement of defence.
 58. Allegations of fraud and illegality must be specifically pleaded. See *Kuria Kiarie & others vs Sammy Mogera [2018] eKLR*, *Stephen Onyango Achola & another v Edward Hongo Sule and another [2004] eKLR*.
 59. Order 2 Rule 4 (1) and (2) of the Civil Procedure Rules provides that a party shall in any pleading subsequent to a plaint, plead specifically any matter such as fraud or any fact showing illegality. As to recovery of land, a defendant has to plead every ground of his defence over and above a plea that he is in possession.
 60. In this appeal the appellant had pleaded duress or coercion. In *Jayantilala Lalji Ghandi & another v Mavji Ruda [1986] eKLR*, the court observed that duress at common law means, an act of violence or threats of violence to the person to produce fear of loss of life or bodily harm. In *John Mburu v Consolidated Bank of (K) [2018] eKLR*, the court said there would be economic duress as held in *KCC v S.K Macharia & others [2008] eKLR* adopting *PAO and others v Lau Liu & another [1979] 3 ALL ER 65*, that duress, whatever form it takes, was coercion of the will so as to vitiate consent and that in determining whether there was coercion of will such as that there was no true consent, it was immaterial to inquire whether the person alleged to have been coerced did not protest whether at the time as was allegedly coerced into making the contract, he did not have an intense course open to him and whether he was independently advised and whether after entering the court he took steps to avoid it.
 61. The sale agreement describes the appellant as the vendor, a widow of M'Mukindia Mugwika (deceased) and a beneficiary of 3.10 acres as per a confirmed grant in Meru H.C succession Cause No. 75 of 2000.



62. The amended grant relied upon by the respondent was issued and signed by the court on 14.8.2019, the initial one was issued on 8.7.2019. The grant had been issued to PW 2, Silas Mbaya Mukindia, whose capacity is not described in the sale agreement.
63. The free property of a deceased person upon death can only be dealt with after the death through the legal representative. In *Re-estate of Isaac Kaburu Marete (deceased)* [2017] eKLR, the court cited the matter of the Estate of M'Ajogi M'Ikiugu alias Ikiugu Ajogi (deceased), that a sale of estate property before confirmation of grant was contrary to Sections 55 & 82 (b) (II) of the *Law of succession Act*.
64. The appellant had no legal capacity or authority on 18.4.2019 to transact in the immovable property of the deceased before confirmation of grant after beneficial share to the estate could not have been legally tenable identified and capable of registration to be pledged as security or be sold or exchanged.
65. It is during the confirmation hearing that the probate and administration court establishes the respective identities and shares of the person beneficially entitled and thereafter the confirmed grant specifies such person and their respective shares under Section 71 of the Act.
66. Before then, the interest of the appellant remained amorphous and entangled within the large estate. As of 18.4.2019, neither the appellant, the son the stepson nor any other person had vesting orders over the estate of the deceased to deal with it otherwise until the probate and administration court had pronounced itself on who the personal representative of the beneficiaries and the respective shares.
67. In *Macfoy v United Africa Co. Ltd* [1961] 3 ALL ER 1169, Lord Denning held that if an act is void, then it is in law a nullity and requires no court order to set aside. Further, the court said that every proceeding founded on a nullity was also bad for one cannot put something on nothing and expect it to stay there without collapsing.
68. The amendment of the grant on 14.8.2019 could not act retrospectively to cure the nullities in the sale agreement. The presence of the stepson in the sale agreement even if he was the legal administrator did not make the sale agreement valid. In any event, a beneficiary to an estate cannot arrogate his powers to deal with the land in the presence of a court-appointed legal administrator. The agreement was tantamount to intermeddling with the estate of a deceased person which under Section 45 of the *Law of Succession Act* is a criminal offence.
69. In *Kamau v Kiarie & another (Legal representative of the estate of Naomi Wambui Kiarie)* [2024] KEELC 222 (KLR) (25th July 2024 (Judgment)) the court cited *Zacharia Wambugu Gathimu vs John Ndugu Maina* (2019) eKLR, on the proposition that since the vendor was neither the proprietor of the suit land nor a beneficiary to the estate, he had no interest on the land to pass.
70. The court cited *Re-estate of Muriira Karigicha (deceased)* [2018] eKLR, that even though the transaction offended Sections 45 and 82 of Cap 160, though the scheme looked honest and innocent, the true character was to defraud the objectors. The court found the person to have come to court with unclean hands hence incapable of getting the aid of the law for a court could not be hoodwinked by a dishonest litigant using it to perpetuate an illegality.
71. In *Re-estate of Ngugi Muchugu Karuu (deceased)* [2019] eKLR, the mother had sold the property for her own upkeep and maintenance with some of the beneficiaries having benefitted from the sale. The court found the sale illegal for lack of consent from all the beneficiaries or from the court.
72. The next issue raised was that the appellant was not liable to refund anything to the respondent for she never obtained any consideration for it. As indicated above, special damages must be pleaded



- specifically and proved. The respondent's complaint was silent on the particulars of loss occasioned to him and the specific figure he was claiming.
73. Additionally, the particulars of what he paid, to whom he paid and the dates of payment were not availed. Receipts for paying Kshs.620,000/=, were not filed, availed and produced as exhibits. The nexus between the payments and the appellant was not pleaded and proved. The appellant had raised doubts and specifically pleaded that the respondent and her son misled her in order to take her land. She specifically pleaded that she was not liable for any loss for she did not receive or acknowledge receipt of Kshs.134,456/= or any other amount from the appellant which she was liable to refund.
 74. In paragraph 7 of the plaint, the appellant is blamed for not handing over vacant possession by 1.6.2019; for failing to subdivide the land; entering into a sale agreement with an intention to honour it and for unjustly enriching herself. As indicated above, the appellant was not the legal administrator of the estate. It was PW 3 who should have undertaken his legal powers and duties as the legal administrator of the estate to effect the subdivision and transfer to the beneficiaries and eventually register the portions of land in the name of the appellant. It was legally and practically impossible to hand over any vacant possession of the portion by the set date when the respondent knew that there was no confirmed grant. The clause in the sale agreement was illegal and practically untenable and impossible.
 75. As a result, the respondent was unable to prove any breach on the part of the appellant, even if the court were to find that the sale agreement was signed by a competent vendor which as held above the appellant was not.
 76. Regarding paragraph 8 of the plaint as read together with prayer (a) of the plaint, special damages must be particularized and proved. The paragraph has no particulars on what was the consideration when it was paid and who was paid on behalf of the appellant or if the appellant is the one who received it, evidence of payments, receipts for the payments and lastly; payment of the filing fees of the special damages.
 77. In the demand letters dated 2.10.2019, the respondent merely demanded Kshs.134,456/= and Kshs.1,240,000/=. There was no mention of any other figures out of Kshs.620,000/=, paid by the respondent to other third parties on her behalf as part of the consideration that she drew out of selling her land.
 78. The evidence of PW 1 and PW 4 seemed to contradict how Kshs.450,000/= was said to the law firm of Meenye & Kirima Advocates. So, the question is, could the appellant be held liable for actions of commission or omission in enforcing the sale agreement where she had no role to play or had not stepped in the way of the respondent obtaining the land in exchange for the sum that he paid?
 79. The legal and procedural foundation of liability on the part of the appellant had to be pleaded and proved. The appellant had no good title to pass to the respondent on 18.4.2019 or by the filing of this suit. The residents knew that PW 3 held the confirmed letters of grant.
 80. Clauses 5 - 8 were to be undertaken jointly by the parties. Legally it is the personal representative to do it and not the appellant. There is no evidence that the respondent undertook his roles and put into motion the process of securing the land control board consent and the subdivisions which the appellant objected to. After the appellant raised the issues of capacity, illegality, duress and misrepresentation there is no evidence that the respondents mitigated his loss by seeking to amend the sale agreement and deal with the person with the capacity to sell the land and demand for his refund.
 81. There is no evidence that the respondent demanded a refund from PW 4 who was the sole beneficiary of the sale. Instead, the respondent used the police and reported that the appellant had obtained



money by pretenses. The witness statement dated 24.9.2020 by the appellant to the police lay bare the circumstances of the sale agreement.

82. Evidence that the appellant was found criminally liable for the refund was not produced. Given that, the court has found that the sale agreement was not valid in law, coupled with the fact that the respondent failed to prove breach, plead special damages, prove them by way of documents and attribute the same to the appellant, there is no basis to order any refund which in any event was not mentioned in both in body plaint and by way of reliefs.

83. The appeal is allowed costs in the lower court and for this appeal to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 16TH DAY OF OCTOBER, 2024

In presence of

C.A Kananu

Atheru for the appellant

Mugambi for respondent

HON. C K NZILI

JUDGE

