



REPUBLIC OF KENYA



KENYA LAW
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**Kitheka v Njenga (Land Case Appeal E009 of 2023)
[2024] KEELC 7378 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7378 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
LAND CASE APPEAL E009 OF 2023
CA OCHIENG, J
NOVEMBER 6, 2024**

BETWEEN

MARY MUTINDA KITHEKA APPELLANT

AND

JAMES KARIUKI NJENGA RESPONDENT

(Being an Appeal against the judgment of the Chief Magistrate's Court at Kangundo in Civil Case No. 24 of 2018 by Chief Magistrate Ole Keiwua D.K dated and delivered on 27th July, 2023)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the 8th August, 2023 the Appellant appealed against the Judgement delivered by Hon. Daniel Ole Keiwua (CM). The genesis of this appeal is the Judgement of the Chief Magistrate's Court at Kangundo in Civil Suit No. 24 of 2018 by the Hon. Daniel Ole Keiwua, CM delivered on 27th July, 2023, where the trial court proceeded to enter Judgement in favour of the Respondent.
2. The Appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the 8th August, 2023 which contains the following grounds: -
 1. The learned trial Magistrate erred in fact and law by failing to determine whether the defendant was in breach of the agreement for sale of Land dated 13th December 2011.
 2. The learned trial Magistrate erred in law and fact by failing to appreciate that the law Society Conditions of sale (1989) had been incorporated in the agreement and rescission of the same ought to have done as per the agreement.



3. The learned trial Magistrate erred in failing to appreciate that time was not of essence in the agreement for sale dated 13th December 2011 and the same could only have been made of essence through a completion notice.
4. The learned trial magistrate erred in awarding interest from date of contract which was neither pleaded nor justified.
5. The learned trial Magistrate erred in ignoring the defense by the defendant by failing to take into account that both parties had entered into agreement aware the property in question was subject to succession.
6. The learned trial Magistrate erred in law and fact in relying on conjuncture, supposition and on extraneous matters.

Reasons wherefore the appellant prays that;

1. The decision of the subordinate court be set aside and vacated.
 2. Such other Just relief as this Honourable court may deem fit.
 4. Costs of the lower court and appeal be awarded to the appellant.
3. The appeal was canvassed by way of written submissions.

Submissions

Appellant's Submissions

4. The Appellant in her submissions provided a background of the dispute herein and argued that she was not in breach of the Sale Agreement dated the 13th December, 2011. She insisted that the courts cannot re write contracts for parties as the Sale Agreement had both the express and implied terms therein. She further submitted that the Sale Agreement records that the purchaser, who is the Respondent herein, had verified prior to purchasing the land, the location and ownership details and was willing to proceed and purchase from her, the said land. Further, that the succession proceedings in respect to the estate of KAKUA KIOKO from whom she purchased the land, she was selling, was yet to be concluded and she could not transfer the suit land to the Respondent, without the Grant being confirmed. She argued that the Sale Agreement did not provide for express measures, should a party default on the terms, but included the Law Society of Kenya Conditions of Sale, which in her view, was to mitigate the terms that were not relied upon. Further, that there was nothing in the Agreement to state that time was of essence and there was no evidence adduced in respect to completion notice or demand letter. She disputed the costs awarded. To support her arguments, she relied on the following decisions: *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123; *Attorney General of Belize Telecom Ltd & Another* (2009), 1 WLR 1980 at Page 1993, citing Lord Person in *Trollope Cells Ltd. Vs North West Metropolitan Regional Hospital Board* (1973) 1 WLR 601 at 609; *Curtis V Chemical Cleaning & Dyeing Co. Ltd* (1951) ALL ER 631; *Amos Odhiambo Olang & 2 others v Joseph Otiende Othula & 6 others* [2017] eKLR; *Jackline Njeri Kariuki v Moses Njung'e Njau* [2021] eKLR; *Njamunyu v Nyaga* [1983] KLR 282, *Anne Murambi v John Munyao Nyamu & another* [2018] eKLR; *Societe Internationale De Telecommunication Aeronautiques vs. Twiga Properties and Kenya Commercial Bank Ltd vs. Thomas Wandera Oyalo* [2005] eKLR.



Respondent's submissions

5. The Respondent in his submissions argued that the Appeal was baseless and a hopeless attempt by the Appellant to not only deny him the fruits of the judgment but was also geared towards causing havoc and confusion. He submitted that documentary evidence was adduced to prove his claim. Further, that the Appellant conceded that she entered into a Sale Agreement dated the 13th December, 2011 with him and received most of the purchase price, but twelve years later, she was yet to procure the consent of the land control board as agreed. Further, that the suit land was to be transferred to him upon completion of succession proceedings in respect to estate of the registered owner of the property, from which the suit land was to be excised from. However, it emerged that the Appellant failed to transfer the suit land to him, despite the conclusion of the succession proceedings. He contended that he is entitled to a refund of the purchase price paid and interest for the amount paid from the date of the Agreement being the 13th December, 2011. He reiterated that even if the Sale Agreement was silent on time being of the essence, this did not mean that the Appellant could drag fulfilling her obligations under the agreement for eternity. Further, that two years after completion of the succession proceedings stated herein was more than enough time for her, to fulfil her obligations under the contract. He further submitted that the Appellant is therefore estopped from hiding behind the Law Society Conditions of Sale (1989) to cover for her failure to fulfil her obligations under the agreement dated the 13th December, 2011. He reaffirmed that he is entitled to the costs of the Appeal. To support his averments, he relied on the following decisions: *Selle & Another V. Associated Motor Boat Co.* [1968] E.A. 123 cited in approval in *Barnabas Biwott v Thomas Kipkorir Bundotich [2018] eKLR Civil Appeal No. 36 of 2013*; *Jackline Njeri Kariuki v Moses Njung'e Njau [2021] eKLR Civil Appeal No E040 of 2020*; *Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua [2001] eKLR Civil Application Nai. 367 of 2001* (194/2001 UR); *Joyce Rasugu & another v Dolphine Kemunto Duke [2020] eKLR Claim 13 of 2019*; *Nguruman Limited v Shompole Group Ranch & Another [2014] eKLR Civil Application 90 of 2013* (Ur 60/2013) and *Lakhamshi Brothers Limited v. R. RaJa & Sons* [1966] EA313.

Analysis and Determination

6. Upon consideration of the Memorandum of Appeal, Record of Appeal and rivalling submissions, the following are the issues for determination: Whether the Appellant breached the terms of the Sale Agreement dated the 13th December, 2011. Whether time was of essence in the Sale Agreement dated the 13th December, 2011. Whether the Appeal is merited. Who should bear the costs of the Appeal.

I will deal with the issues jointly.

7. This being a first appeal, as a court, I am expected to evaluate the evidence presented in the trial court without having seen the witnesses testify and arrive at my own conclusion. See the case of *Selle & Another v Associated Motor Boat Company Ltd. & Others* [1968] EA 123.
8. This Appeal emanated from Kangundo Chief Magistrate's Court Civil Case No. 24 of 2018. Vide a Plaint dated the 22nd February, 2018, the Respondent (Plaintiff) sought for the following Orders:
- Defendant to refund Kshs. 2,725,000/= to the Plaintiff.
 - Aggravated damage included in general damages for the fraudulent actions for the Defendant against the Plaintiff.
 - Exemplary damages to vindicate the strength of law.



- d. Costs of the suit, interest at court rates and any other further relief, the court may deem fit to grant.
9. The Appellant (Defendant) filed a Defence denying the averments in the Plaint except the descriptive and jurisdiction of the court. She denied engaging in fraudulent activities nor defrauding the Plaintiff of any monies. She insisted that the transfer of the suit land was subject to succession proceedings. She argued that the Plaintiff had never discussed with her, the issues raised in the Plaint. The matter proceeded for hearing where each party called one witness.
10. After considering the testimonies of the witnesses including the exhibits presented, the trial Magistrate proceeded to enter judgment in favour of the Plaintiff (Respondent) for a total sum of Kshs. 2,725,000/= plus costs of the suit and interest from 13th December, 2011.
11. As to whether the Appellant breached the terms of the Sale Agreement dated the 13th December, 2011 and if time was of essence in the said Agreement. It is not in dispute that there was a Sale Agreement between the Appellant and the Respondent dated the 13th December, 2011 in respect to sale of five (5) acres of land to be excised from LR No. Donyo Sabuk/komarock Block 1/356. Further, it is not in dispute that, at the point of execution of the Sale Agreement, the suit land was registered in the name of Kakua Kioko (deceased).
12. The Appellant insists that she did not breach the terms of the impugned Sale Agreement since the transaction was subject to succession proceedings and there was no indication if time was of essence in the Contract, which fact is opposed by the Respondent.
13. I wish to reproduce an excerpt from the Sale Agreement which forms the fulcrum of the dispute herein:
- ‘1. The vendor has agreed to sell and transfer to the purchaser the said property at a consideration price of Kshs. 3,000,000/= (three million shillings only).
 2. That the Vendor has today acknowledged receipt of Kshs. 2,000,000/= (two million only) being deposit of the purchase price whereof the Vendor doth hereby acknowledge receipt.....
 - That balance of Kshs. 1,000,000/= (one million only) shall be paid upon delivering a valid land control board consent from the relevant land control board to the Purchaser.Either party being and able to complete shall be entitled to terminate this agreement on breach and default of the other party in complying with or performing its/their obligations in accordance with this sale agreement and the Law Society Conditions applicable to the same.’
14. PW1 who was the Respondent testified that he first paid Kshs. 2,000,000 upon execution of the Sale Agreement and Kshs. 725,000/= of the remaining Kshs. 1, 000,000. Further, that the Appellant failed to secure the consent of the land control board as had been agreed to enable him obtain transfer of the five (5) acres into his name and it was more than 12 years, since execution of the said agreement.
15. The Appellant as DW1 denied any wrong doing, insisted that the transaction was subject to succession proceedings, and that there was no indication of completion. Further, that time was not of essence. PW1 further testified that the succession proceedings in respect to the deceased estate was determined



in 2016 and later upon undertaking a search on 26th July, 2017, he discovered that on 31st March 2017, the land had been registered in the name of Johnson Kitheka Kamui who was the Appellant's husband.

16. The Black's Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as;

“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

17. In the case of *Jackline Njeri Kariuki v Moses Njung'e Njau* [2021] eKLR it was held as follows:

“In my understanding, a breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing.”

18. Further, in the case of *Curtis V Chemical Cleaning & Dyeing Co. Ltd* (1951) ALL ER 631 Lord Denning held as follows:

“If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation.”

19. In the evidence before the trial court, I note the Appellant never furnished court with the pending succession proceedings. Further she failed to rebut the fact that her husband was registered as proprietor of the suit land, after conclusion of the succession proceedings. It emerged that the Respondent proceeded to rescind the contract and demanded for the refund of the purchase price already paid together with interest, which fact is disputed by the Appellant.

20. The Appellant has argued that the Sale Agreement did not expressly stipulate that time was of the essence. It seems to me, the Appellant despite receiving most of the purchase price, sought to take her time, before adhering to the terms of the said Sale Agreement. I opine that the Appellant was not being candid when she sought to rely on the Law Society Conditions of Sale (1989) to delay the completion of the contract and this was not a sign of good faith. The Respondent claimed that he verbally notified the Appellant of her breach of contract and asked her to fulfil her obligations under the impugned agreement but she persisted in her breach, which culminated in his reporting the matter to KBC-POLICE STATION vide OB Number 11/27/7/2017 and the matter was later referred to CID Kangundo.

21. It was the Respondent's contention that two years after completion of the succession proceedings stated herein, was more than enough time for the Appellant to fulfil her obligations under the contract and she is estopped from hiding behind the Law Society Conditions of Sale (1989) to cover for her failure to fulfil her obligations under the said agreement. To my mind, the said conditions of sale does not validate a breach of contract.

22. Based on the facts before me, I find that since the Appellant received most of the purchase price being Kshs. 2,725,000/= and failed to procure consent of the land control board after the conclusion of the



succession proceedings as had been agreed, she was indeed in breach of the contract of sale and cannot turn around to blame the Respondent.

23. In the foregoing I find that the learned trial Magistrate did not err in fact and law by determining that the Appellant was in breach of the Agreement for Sale of Land dated the 13th December 2011. Further, I find that the Learned trial Magistrate did not err in law and fact by appreciating that the Law Society Conditions of sale (1989) had been incorporated in the agreement and rescission was properly done. It was hence proper for the Learned Trial Magistrate to award interest from the date of the contract since the Appellant had received the monies. In my view, the learned trial magistrate considered the Defence by the Appellant.
24. In the circumstances, I find that the Respondent was indeed entitled to a refund of Kshs. 2,725,000/ = being monies he had paid to the Appellant for the suit land, with interest from the date of the Sale Agreement.
25. In the foregoing, I find that this Appeal is not merited and will proceed to dismiss it with costs to the Respondent.

DATED SIGNED DELIVERED VIRTUALLY AT MACHAKOS THIS 6TH DAY OF NOVEMBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Musya holding brief for Munguti for Appellant

Kaburu for Respondent

Court assistant – Simon/Ashley

