



**Mulwa v Wainaina & another (Environment & Land Case
76 of 2016) [2023] KEELC 17300 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17300 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 76 OF 2016**

TW MURIGI, J

MAY 3, 2023

BETWEEN

BENARD MUENDO MULWA PLAINTIFF

AND

JOHN KAMAU WAINAINA 1ST DEFENDANT

ALICE NDETI KAMAU 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a Complaint dated May 9, 2016 and sought the following orders:-
 - a) A declaration that the Defendants are in breach of the agreement for sale in respect of Plot No. 729, 1268 and 1272 Ngai Ndethia Settlement Scheme and that the Plaintiff is entitled to possession of the said properties.
 - b) A mandatory injunction order directed to the Defendants to vacate the parcel of land plot numbers 729, 1268 and 1272 failure to which an eviction order to issue.
 - c) Costs of the suit plus interest.
2. The Defendants opposed the suit vide a Statement of Defence and Counter Claim dated December 18, 2019. In the Counter Claim, the Defendants sought the following orders:-
 - i. The Plaintiff's suit herein be dismissed.
 - ii. The Plaintiff be ordered to transfer the suit property to the Defendants.
 - iii. The Plaintiff refunds the sum of Kshs 562,500/= to the Defendants being the equivalent value of fifteen (15) acres of the suit property.
 - iv. Costs of this suit.



- v. Interest on prayers iii.
3. The Plaintiff filed a reply to the Defence and Defence to Counter Claim dated November 13, 2019. He urged the Court to dismiss the Defendants Counter Claim with costs.

The plaintiff's case

4. At the hearing, the Plaintiff testified as the sole witness in support of his claim. He adopted his statement and produced the documents in the list of documents dated October 18, 2019. The Plaintiff testified that on October 24, 2008 he entered into an agreement for sale with the Defendants for the sale of Plot numbers 729, 1268 and 1272 Ngai Ndeithia Settlement Scheme for a consideration of Kshs 3 Million. It was his testimony that the Defendants breached the sale agreement by failing to pay the balance of the purchase price on June 30, 2009.
5. That as a consequence of the breach, he issued a completion notice to the Defendants demanding that they complete the transaction within 21 days. That after failing to comply with the Notice, he repudiated the agreement for sale and notified the Defendants Advocate that he would take possession of the property and refund back the purchase price. He further stated that the Defendants declined to give him possession of the suit property.
6. He further testified that he had sold the property to a third party and would use part of the proceeds to refund the Defendants the sums paid less the amount due under the contract.
7. In cross examination, he testified that he participated in the agreement for sale for plot numbers 1268, 1272 and 729 whose completion date was on June 30, 2009. It was his testimony that the Defendants paid a deposit of Kshs 1 Million for Plot No 729 and a further Kshs 275,000/- was paid on January 8, 2009. It was his testimony that he did not hand over possession of the suit property to the Defendants as they had not completed paying the purchase price.
8. He testified that although he handed over his passport photograph, pin certificate, identification card and a passbook which represented the documents of title for Plot No 729, he could not recall an email where he handed over vacant possession to the Defendants. It was his testimony that vide the sale agreement dated January 24, 2015, he sold Plot No 729 to Vincent Ikovo Ngundi as he had vacated the sale agreement with the Defendants vide the letter dated January 24, 2015 and December 20, 2013.
9. On re-examination he testified that according to the payment receipt, the deposit of Kshs 1 Million was paid with regards to the three parcels of land and not for Plot No 729. He stated that they did not execute a separate sale agreement with regards to Plot No 729. He testified that the Defendants were not in possession of the property before making the full payment of the purchase price. He went on to state that the sub chief ejected an imposter from the suit property because the Defendants had not completed paying the balance of the purchase price.
10. He further testified that his Advocate repudiated the agreement for sale because of the frustration he had encountered from the Defendants. That after he sold and transferred Plot No 729 to Vincent Ikovo Ngundi, the Defendants lodged a complaint and the land reverted back to his name.

The defendants case

11. At the trial, the 1st Defendant John Kamau Wainana testified as the sole witness for the Defence. He adopted his statement dated October 18, 2019 as his evidence in chief and produced the documents in the list of documents dated October 18, 2019.



12. It was his testimony that on October 24, 2008, they entered into an agreement for sale and transfer of Plot No 729, 1268 and 1272 situated in Ngai Ndeithia Settlement Scheme with the Plaintiff for a consideration of Kshs. 3 Million. That upon execution of the agreement they paid Kshs 900,000/- by cheque through the firm of Ogolla Okello & Co Advocates while Kshs 100,000/- was paid to the Plaintiff by the 2nd Defendant's aunt.
13. That shortly thereafter, they discovered that the Plaintiff was not the registered owner of Plot No 1268 and 1272. That upon confronting him, they agreed to revise the agreement for sale of plot numbers 1268, 1272 and 729 to the sale of Plot No 729 only.
14. He further testified that since they had already paid a deposit of Kshs 1 Million towards the purchase of Plot No 729, they paid the outstanding balance of Kshs 275,000/- which the Plaintiff acknowledged receipt and invited them to take possession of the property as they were the owners of the same.
15. It was his further evidence that shortly after they paid the outstanding balance, the Plaintiff started demanding that they complete the agreement for sale dated October 24, 2008 in its initial form. That through their Advocate, they wrote to the Plaintiff on January 7, 2014 and informed him that they had entirely abandoned their interests in Parcels No 1268 and 1272. It was his testimony that the agreement for sale was mutually revised.
16. He further testified that through their interactions with the Land Adjudication Officer, they discovered that the Plaintiff had sold Plot No 729 to Vincent Ikovo Ngundi without their knowledge or engagement. He contended that the Plaintiff breached the agreement and took advantage of their absence to fraudulently sell Plot No 729 to Vincent Ikovo Ngundi. He Urged the court to dismiss the Plaintiff's suit with costs and allow their Counter Claim.
17. In cross examination he stated that the agreement for sale was for three parcels of land. He went on to state that he paid a deposit of Kshs 1 Million towards the purchase of Plot No 729 though the full purchase price was not indicated.
18. He admitted that the payment receipts do not indicate that the deposit of Kshs 1 Million was made with respect to Plot No 729. He stated that they did not execute the draft agreement for sale dated January 13, 2012.
19. In re-examination he testified that the deposit of Kshs. 1 Million was part payment for the purchase of Plot No 729.

The plaintiff's submissions

20. The Plaintiff's submissions were filed on October 7, 2022.
21. In addition to reiterating the evidence on record, Counsel for the Plaintiff submitted that the Defendants are in breach of the agreement for sale as they failed to pay the outstanding balance of Kshs 1,725,000/-. Counsel urged the Court to grant the prayers sought in the Plaint.
22. To buttress his submissions Counsel relied on the following authorities:-
 1. [*Kinuba Holdings Limited v Charo Karisa Ngulu*](#) (2021) eKLR.
 2. [*Leo Investment Ltd v Estuarine Estate Ltd Ltd*](#) (2017) eKLR.

The defendants submissions

23. The Defendants submissions were filed on October 6, 2022.



24. Counsel for the defendant identified the following issues for the court's determination: -
- i. Whether there was any breach of the sale agreement by the Defendants.
 - ii. Whether there was any review of the agreement for sale dated October 24, 2008.
 - iii. Whether there was any breach of the sale agreement by the Plaintiff.
 - iv. Whether the Defendants prayers in the Counter Claim should issue.
 - v. Whether the Plaintiff suit is merited.
 - vi. Whether the Defendants Counter Claim is merited.
25. In his submission, Counsel reiterated the 1st Defendant's evidence and urged the court to dismiss the Plaintiff's suit and to allow the Defendant's counter claim with costs.
26. To buttress his submission counsel relied on the bundle of authorities filed on October 6, 2022.

Analysis and Determination

27. Having considered the pleadings, the evidence on record and the submissions by the parties, the following issues arise for determination: -
- i. Whether the Defendants are in breach of the agreement for sale dated October 24, 2008.
 - ii. Whether the Plaintiff is entitled to the orders sought.
 - iii. Whether the Defendants are entitled to the orders sought in the Counter Claim.

Whether the defendants are in breach of the agreement for sale dated October 24, 2008

28. As to whether the Defendants breached the agreement for sale, *Black's Law Dictionary* 9th Edition defines a breach of contract as follows:-

“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.”

29. It is not in dispute that on October 24, 2008, the Plaintiff and the Defendants entered into an agreement for the sale of Plot Numbers 729, 1268 and 1272 Ngai Ndeithia Settlement Scheme.
30. It is also not in dispute that the consideration for the sale was Kshs. 3 Million.
31. The Plaintiff testified that the Defendants are in breach of the agreement for sale as they failed to pay the balance of the purchase price on June 30, 2009. Both parties produced the agreement for sale dated October 24, 2008 in support of their case.
32. Clause No 3(a) of the agreement for sale states as follows:-

The purchase price is Kenya Shillings Thirty Seven Thousand Five hundred (Kshs 37, 500/-) per acre totalling to Kshs 3 Million of which the purchaser shall pay the vendor Kshs One Million (Kshs 1,000,000/) on or before the execution of the agreement being the deposit to



be applied as the part payment of Plot No 729 which is already registered in the vendor's name (receipt whereof the vendor hereby acknowledges).

33. Clause No. 3(b) states as follows:-

The balance of the purchase price in the sum of Kenya Shillings Two Million (Kshs 2,000,000) being payments for Plots numbers 1268 and 1272 which are yet to be registered in the vendors name shall be paid by the purchasers as follows:-

- i. Kshs 500,000/ on or before 31st December r2008
- ii. Kshs 750,000/-on or before march 2009.
- iii. Kshs 750,000/- on before June 2009.

34. Clause 5 states that;

The completion date shall be on or before June 30, 2009, or such other dates as the parties shall mutually agree.

35. The 1st Defendant on the other hand testified that shortly after executing the agreement, they discovered that plot number 1268 and 1272 were not registered in the Plaintiff name.

36. It was his testimony that they decided to revise the agreement for sale after they discovered that Plot No. 1268 and 1272 were not registered in the Plaintiff's name. It was the Defendants evidence that they mutually agreed to revise the agreement for sale for only Plot No 729 which was registered in the Plaintiff's name. In this regard he produced an extract of the Plaintiff's email dated January 5, 2012 addressed to him (PEX10) which states as follows;

“.....the purchase of 79 acres was not completed. That your interest is limited to what you paid ie 34 acres for plot 729. That plot 1268 and 1272 comprising total of 45 acres is not paid for and you have no interest thereof. That the sale agreement of 79 acres is consequently varied to the sale for 34 acres of plot 729. Kindly revert with your confirmation so that I may proceed to deal on plot 1268 and 1272.”

37. Vide a letter dated January 1, 2009(DEX5), the 1st Defendant stated that he had no objection to the Plaintiff's request to vary the existing contract from 80 acres to 34 acres comprised in plot No 729 and would immediately pay the outstanding balance of Kshs 275,000/- through his Advocate. From the extract of the Plaintiff's email (PEX 10) and the 1st Defendant's letter (PEX 5), it is crystal clear that the parties mutually varied the sale agreement of 79 acres comprised in plot no 1268, 1272 and 729 to the sale of 34 acres comprised in Plot No 729.

38. That after they mutually agreed to revise the agreement, the 1st Defendant paid Kshs 275,000/- being the outstanding balance for Plot No 729. The 1st Defendant produced a copy of the bankers cheque dated January 6, 2009 (DEX 4), copy of acknowledgement by the Plaintiff dated January 8, 2009(PEX 6) and an email (PEX 7) acknowledging the same.

39. In the extract of the email by the Plaintiff to the 1st Defendant dated January 12, 2009(PEX 7) the Plaintiff acknowledged receipt of the cheque of Kshs 275,000/- and stated as follows:-

“.....I met Dan and we clarified the issues. He gave me the cheque of Kshs 275,000/ The portion of 34 acres land now is yours....advise how you are taking possession and when.”



40. The subject matter in the extract of the email by Plaintiff dated January 13, 2012 to the 1st Defendant (PEX7) is revision of sale agreement. The Plaintiff forwarded to the 1st Defendant a draft of the sale agreement for his approval. The Defendant produced the draft agreement for sale (DEX11). It is clear that the agreement was not executed by the parties thereto.
41. It is not in dispute that the sale and purchase of the properties was subject to the LSK conditions. The Plaintiff testified that he issued to the Defendants a notice to comply with the terms of the sale agreement within 21 days. In this regard the Plaintiff produced the notice dated December 20, 2013 directing the Defendants to complete the transaction in 21 days failure to which the transaction shall fall through with the attendant legal consequences (PEX5). The Plaintiff testified that through his Advocate, he informed the Defendants through their Advocate that he had repudiated his contract for the sale of 79 acres of land in Kathekani location. In this regard, he produced the letter dated January 24, 2014 (PEX7).
42. The Defendant testified that after they varied the terms of the agreement for sale, he paid the outstanding balance of Kshs 275,000/ as he had already paid a deposit of Kshs 1 Million towards the purchase of Plot No 729 which was already registered in the Plaintiff's name. It was his evidence that after he paid the outstanding balance, they became the owners of Plot No 729.
43. From the reading of Clause No 3(a) of the agreement for sale, it is clear that the deposit of Kshs One Million was part payment for the purchase of Plot No 729 which is registered in the vendor's name. The Defendant testified that after he paid the outstanding balance, the Plaintiff started demanding that they complete the agreement for sale in its initial form.
44. It is evident that the parties to the agreement had by implication rescinded the agreement for sale dated October 24, 2008. It is evident from the extract of the email by the Plaintiff (PEX 10) and the letter by the 1st Defendant (DEX 5) that the parties varied the sale agreement dated October 24, 2008 for the sale of plot numbers 1268, 1272 and 729 to the sale of Plot 729 comprised of 34 acres. It is crystal clear that the parties to the agreement had abandoned the sale with regards to Plot No 1268 and 1272 comprising of 45 acres.
45. Having found that the parties to the agreement had varied their agreement and having found that the Defendants paid the entire purchase price for plot no 729, I find that the Defendants are not in breach of the agreement for sale.

Whether the plaintiff is entitled to the orders sought

46. The Plaintiff has sought for a mandatory injunction against the Defendants to vacate Plot No 729, 1268 and 1272 failure to which an eviction order to issue. The circumstances under which a Court may grant a mandatory injunction was stated by the Court of Appeal in the case of *Maher Unissa Karim v Edward Oluoch Odumbe* [2015] eKLR, as follows: -

“The test for granting a mandatory injunction is different from that enunciated in the *Giella v Cassman Brown* case which is the locus classicus case of prohibitory injunctions. The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions and the court of appeal in the case of *Kenya Breweries Ltd v Washington Okeyo* (2002) EA 109 had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction



was correctly stated in VOL 24 of Halsbury's Laws of England 4th Edition paragraph 948 which states as follows;

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

47. The issue for determination is whether the Plaintiff has satisfied the principles for the grant of a mandatory injunction. It is evident from the emails by the Plaintiff and the letter by the 1st Defendant that the parties had varied the agreement for sale in its initial form to the sale of plot number 729.
48. It is also evident that the Defendants abandoned their interest in plot number 1268 and 1272 as confirmed by the extract of the email by the Plaintiff to the 1st Defendant and the letter by the 1st Defendant to the Plaintiff. It was the testimony of the Plaintiff that the Defendants are not in possession of the suit property as the sub chief ejected an imposter on the grounds that the Defendants had not completed paying the purchase price.
49. Having confirmed that the Defendants are not in possession of the suit properties, I find that the Plaintiff is not entitled to an order of Mandatory injunction. Accordingly, this Court finds and holds that a mandatory order cannot issue as prayed.

Whether the defendants are entitled to the orders sought

50. In their Counter Claim, the Defendants sought for an order directing the Plaintiff to transfer to them the suit property.
51. According to the agreement for sale, the Defendants paid a deposit of Kshs. 1 Million for plot no 729 which was registered in the name of the Plaintiff. Thereafter the parties varied their agreement to the sale of plot no 729 only. It is evident from the evidence on record that the Defendants paid Kshs 275,000/- being the balance of the purchase price for plot no 729. The Plaintiff confirmed as much in his email dated January 12, 2009 and confirmed that the plot belongs to the Defendants.
52. Having acknowledged receipt of the purchase price it is clear that the Defendants complied with the terms of the agreement and paid the full purchase price for plot no 729. It is not in dispute that the Plaintiff sold the suit property to Vincent Ikovo Ngovi.
53. It is also not in dispute that after the Defendants complained to the Land Adjudication and Settlement office Kibwezi, the suit property reverted back to the Plaintiff. I find that the Defendants have proved on a balance of probabilities that they purchased plot no 729 from the Plaintiff and are therefore entitled to the same. The Defendants sought for a refund of Kshs 562,500/- being the equivalent value of fifteen acres of the suit property.
54. The 1st Defendant testified that with the help of a registered Government surveyor they established that plot no 729 measures 19 acres and not 34 acres that they had paid for. It was his evidence that they purchased 34 acres comprised in plot No 729 and not 19 acres.
55. In Civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the [Evidence Act](#) 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.

56. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.
57. The Defendants are demanding a refund of Kshs. 562,500/- from the Plaintiff being the equivalent of fifteen acres. From the extract of the email by the Plaintiff to the 1st Defendant dated January 5, 2012 (DEX 10) it is clear that plot no 729 measures 34 acres while plot 1268 and 1272 measure 45 acres.
58. The Defendant did not call any evidence to demonstrate that Plot no 729 measures 19 as opposed to 34 acres. The Defendants did not discharge the burden of proving that plot 729 is 19 and not 34 acres.
59. In light of the foregoing I find that the Plaintiff has failed to prove his case on a balance of probabilities.
60. Accordingly, the Plaintiff suit is dismissed with costs to the Defendants. The Defendant Counter Claim is allowed in the following terms:-
 1. The Plaintiff is hereby ordered to transfer plot no 729 to the Defendants herein.
 2. The Defendants are awarded costs of the suit.

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HON. T. MURIGI

JUDGE

JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 3RD DAY OF MAY, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Ms Muluvi for the Plaintiff

Thuku for the Defendants.

