



**Mbijiwe v Muthuri (Environment and Land Appeal E088 of 2022)
[2023] KEELC 21515 (KLR) (8 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21515 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E088 OF 2022
CK NZILI, J
NOVEMBER 8, 2023**

BETWEEN

HARUN MUTHAMIA MBIJIWE APPELLANT

AND

DAVID MUTHURI RESPONDENT

*(Being an appeal from the judgment of the Principal Magistrate
Githongo E.W Ndegwa in ELC No. 40 of 2021 delivered on 2.12.2022)*

JUDGMENT

1. Before the court is a memorandum of appeal dated 22.12.2022 in which the appellant faults the judgment by the trial court for;- awarding liquidated damages to the respondent contrary to the law; not considering the provisions of the Law of the Contract Act, failing to hold the respondent had breached the sale agreement, and deciding the case against the weight of evidence tendered contrary to the law.
2. As a first appeal, this court is mandated to re-hear, rehearse, and re-appraise the lower court record to come up with independent findings on fact and the law while mindful that the trial court had the opportunity to see and hear the witnesses firsthand. See *Selle v Associated motor Boat Company Limited* (1968) E.A 123 & *Peters v Sunday post Limited* (1958) E.A 42A
3. At the lower court, the respondent, as the plaintiff, had, by a plaint dated 20.8.2021, sued the appellant as the defendant for repayment of Kshs.580,000/=, plus liquidated damages, following an aborted refund agreement dated 9.10.2019. The plaint was accompanied by a witness statement and a list of documents dated 20.8.2021.
4. The appellant denied the contents of the plaint by his statement of defense dated 22.11.2021. The defense was accompanied by a witness statement dated 6.5.2021 in which the appellant admitted that the initial sale agreement was mutually revoked by a written agreement dated 13.12.2019, where he



had agreed to refund the amount on or before March 2020. He pleaded with the court to allow him to clear the sum within 24 months.

5. Before the trial court, the respondent was the first witness. He adopted his witness statement dated 20.8.2020 as his evidence in chief. PW1 told the court that on 9.10.2019, he entered into a sale agreement with the appellant, a neighbor, half an acre of his land, namely LR No. Abothuguchi/Katheri/1730 at Kshs. 1,300,000/= million and received a deposit of Kshs. 580,000/=. The respondent averred that by an addendum dated 13.12.2019, the appellant had committed to refund Kshs. 580,000/= by March 2020, following a revocation of the sale agreement. The respondents said the appellant failed to clear the amount and the agreed liquidated damages on its due date. He produced a copy of the addendum to acknowledge indebtedness dated 13.12.2019 and an identification as P. Exh No's. 1 & 2, respectively.
6. The respondent further told the court that the appellant had taken the money to clear a loan with Capital Sacco, only to come back to him and report that he had been offered a better purchase price than his offer. He said the appellant resold the land at Kshs. 900,000/=. He, therefore, urged the court to order a refund of Kshs. 580,000/= and damages of Kshs. 1, 150,000/=. In cross-examination, PW 1 told the court that the agreed purchase price was Kshs. 1,300,000/=. He said he could not clear the whole amount since the land had to be subdivided to give off his portion. He said he was entitled to the deposit and the agreed damages since the appellant breached the sale agreement. PW 1 acknowledged placing a caution against the title to safeguard his rights.
7. The appellant testified as DW 1. His evidence was that he had offered a portion of LR No. Abothuguchi/Katheri/1730 measuring ½ acre to the respondent who paid a deposit of Kshs. 580,000/= out of Kshs. 1,300,000/=. DW 1, stated that the appellant did not clear the balance on time or at all after his daughter allegedly fell ill and requested a refund of his deposit. DW 1 admitted signing P. Exh No. 1, a penalty clause for payment of liquidated damages, which he was not agreeable to. In cross-examination, DW 1 acknowledged signing the sale agreement dated 9.10.2019 requiring the repayment by November 2019, which they eventually revised to enable him to clear the amount by March 2020. The appellant acknowledged that the agreement had a default clause to the effect that if he failed to pay on time, the amount would attract an equivalent amount. Further, DW1 said he voluntarily signed the clause despite not agreeing to the penalty sum. With the preceding evidence, the trial court allowed the respondent's claim, which is now challenged in this appeal.
8. With the court's leave, parties opted to canvass the appeal through written submissions. The appellant, by submissions dated 16.10.2023, urges the court to find that in the agreement appearing on pages 6-7 of the record of appeal, there was no express term for the payment of liquidated damages and therefore, the Kshs. 1,600,000/= awarded by the trial court was not specifically pleaded.
9. On ground number 2, the appellant submitted that the sale agreement was subject to the [Land Control Act](#). Therefore, without a land control board's consent, the sale agreement was void; hence, the trial court should not have adjudicated upon a breach of a void agreement.
10. The appellant submitted that since the initial agreement was void after six months, the resultant acknowledgment agreement was also void, the implication in law being that the respondent was only entitled to Kshs. 580,000/= given, the [Land Control Act](#) has no provision to recover liquidated damages. Reliance was placed on [Margaret Apiyo v Jotham Chemwa Matayo](#) (1992) eKLR.
11. On who among the parties breached the sale agreement, the appellant submitted that he should not have been held liable since the respondent at the trial admitted that he was the one who failed to pay the entire purchase price. Therefore, the appellant submitted that despite the evidence tendered at the



- trial pointing at the respondent as having breached the sale agreement, the trial court failed to consider it and reached a wrong decision. The appellant urged the court to allow the appeal.
12. By written submissions dated 16.10.2023, the respondent urged the court to find that liquidated damages were pleaded and proved by producing an addendum agreement, which exhibit was not challenged or objected to by the appellant or through rival evidence. Reliance was placed on [*Mawji v Kaldedina Hajee Essak Ltd*](#) (1992) KLR 429.
 13. As to the appellant's submissions, the respondent submitted that it was not the court's business to rewrite contracts and that parties must abide by the terms of their contracts. Reliance was placed on [*Pius Kimaiyo Langat v Cooperative Bank of Kenya Ltd*](#) (2017) eKLR.
 14. The issues calling for the court's determination are:
 - i. What was the respondent's claim in his plaint?
 - ii. What was the appellants' defense in the lower court?
 - iii. If the respondent was entitled to the claim for Kshs.580,000/= and Kshs.1,150,000/=.
 - iv. If the appeal has merits.
 - v. What is the order as to costs?
 15. The law is that parties are bound by their pleadings, and issues for the court's determination flow from them. In [*Raila Odinga and others v IEBC*](#) (2017) eKLR, the court observed that in an adversarial system, the parties set the agenda for trial through pleadings. See [*IEBC v Stephen Mutinda Mule*](#) (2014) eKLR. In the case of *Galaxy Paints Co. Ltd v Falcon Guards Ltd C. A No. 219 of 1998*, the court observed that unless pleadings were amended, the trial court may only pronounce judgment on the issues arising from the pleadings as framed by parties for the court's determination.
 16. In [*Eslon Plastics of \(K\) Ltd v National Water Conservation & Pipeline Corp*](#) (2014) eKLR, [*Gatobu M'Buntu Karatho v Christopher Murithi Kubai*](#) (2014) eKLR [*National Bank of Kenya Ltd v Pipe Plastic Samkolit \(K\) Ltd and another*](#) (2002) E. A 503, the court observed that it could not rewrite a contract between the parties and that the terms of their contract bound them unless coercion, fraud, or undue influence was pleaded and proved.
 17. The primary pleadings before the trial court were the plaint dated 24.8.2021 and the defense dated 22.11.2021. In paragraph 4 of the plaint, the respondent pleaded that the parties had entered into a land sale agreement dated 9.10.2019, after which he paid the appellant a deposit of Kshs.580,000. Further, the respondent had pleaded that the parties eventually revoked the sale agreement through an agreement dated 13.12.2019, where the appellant committed to refund him Kshs.580,000/= by March 2020, which he again failed to comply with. The respondent averred that the appellant breached the 2nd agreement without justification and declined to repay the amount causing him damages. In paragraph 8 of the plaint, the respondent had pleaded a claim for repayment of the agreed sum of Kshs.580,000/= plus liquidated damages. In the relief sought, the respondent prayed for Kshs.580,000/= plus liquidated damages as agreed upon by the parties.
 18. In his defense, the appellant denied the contents of paragraphs 4, 5, 6, 7, 8, and 9 of the plaint and urged the court to dismiss the suit. In support of his plaint, the respondent produced an addendum agreement to acknowledge indebtedness and undertaking to repay dated 13.12.2019. The said agreement referred to an earlier revocation agreement dated 9.10.2019 and the appellant's



acknowledgment receipt from the respondent of Kshs.580,000/=. The contents thereof indicated that the appellant had failed to honor the agreement dated 9.10.2019. Clause 3 indicated that parties had agreed to be bound by the agreement, while clause 6 stated that any defaulting party would pay Kshs.1,160,000/= for breach of the contract. The agreement was signed and witnessed by Ms/ Kiamenyi Kithinji Advocates.

19. In his defense, the appellant did not deny the existence or challenge the legality of the two agreements. The appellant did not plead that the two agreements were unenforceable, void, or procured from him through fraud, coercion, misrepresentation, or illegality. Courts of law, as held in *Pius Kimaiyo Langat (supra)*, do not rewrite contracts between parties since contractual terms bind the parties unless coercion, fraud, or undue influence is pleaded and proved. The appellant willingly and consciously bound himself in writing to the terms and conditions of the addendum agreement dated 13.12.2019. He appended his signature to it before an advocate as a witness. After the respondent sued him in enforcing the addendum agreement, the appellant did not plead that the agreement was fraudulent, procured through coercion, or was unenforceable and or illegal. The appellant made a mere denial. In his evidence, the appellant admitted that he was aware of clause 6 & 8 of the addendum agreement. Even though the appellant said in cross-examination that he disagreed with the clauses, there was no evidence that he protested its inclusion then or soon after that, he notified the respondent that such a clause did not bind him.
20. In *Anthony Francis Wareham and others v Kenya Post Office Savings Bank* CACA No. 51 & 48 of 2012, the court said submissions do not constitute evidence and a court of law should not make findings on matters not pleaded. The respondent had pleaded breach of an agreement dated 13.12.2019. The appellant failed to tender evidence to counter the allegations that he was bound by or privy to the addendum agreement. In *Kenneth Nyaga Mwige v Austin Kiguta and others* (2015) eKLR, the court said evidence not adduced and proved before the court cannot form a basis for a judgment. The two agreements placed in the plaint were inter-dependent contracts. The non-performance of one led to the execution of the other. The appellant acknowledged them in his witness statement and testimony before the trial court. The appellant made a mere denial of the suit. He did not plead that the respondent had frustrated or fundamentally breached the sale agreement. There was no specific pleading that the land sale agreement was void for non-compliance with the *Land Control Act*.
21. The law of contract recognizes and respects the freedom of parties to enter into agreements, setting out the parameters within which they are to be governed. In *Patel & another v MSC and another* (suing as the guardian of PJP) C. A 182 of 2019 (2022) KECA 364 (KLR) 4th February 2022 (judgment), the court cited with approval *Abdul Jalil Yafai v Farid Jalil Mohamed* (2015) eKLR, that the law places a high value on ensuring parties have genuinely consented to the terms that bind them. In *Shah v Shah* (1988) KLR, the court observed that it must give effect only to the parties' intention. In *Attorney General of Belize v Belize Telecom Ltd* (2009), the court observed that in every case in which it is said that some provisions ought to be implied in an instrument, the question for the court is whether such a provision spelt out in express words what the instruments as read against the relevant background, would reasonably be understood to mean.
22. In *Registrar of Burchway v Bwogi* (1980 – 1989) E. A 487, the court observed that special damages cannot be recovered unless specifically pleaded and specifically proved. The addendum agreement was produced as an exhibit with no objection by the appellant before the trial court. The suit was based on the enforcement of the said addendum agreement. The appellant knew the consequences of signing the agreement and its default. He made an admission in his written witness statement as well as in his testimony before the trial court.



23. In *Securicor Courier (K) Ltd v Benson David Onyango & another* (2008) eKLR, the court observed that when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he had read the document or not. The court further observed that a party's signature is irrefragable evidence of his assent to the whole contract, including the exemption clauses, unless the signature was shown to be obtained by fraud or misrepresentation.
24. In *Hadley v Baxendale* (1984) G Ex 341, the court observed that damages which a party ought to receive in respect of breach of contract should be such as may fairly and reasonably be considered, either arising naturally or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract at the probable result of the breach. See *Cypriano Kimathi Mwongo v Cypriano M'Rarama Mikua* (2012) eKLR.
25. In *Richard Mugaa v Cyrus Muthui Mwaura* (2021) eKLR, the court observed that since parties had expressly provided for liquidated damages in case of breach, the trial court had correctly determined the enforcement of the consequences of the breach. The court cited with approval *Capital Fish (K) Ltd v Kenya Power and Lighting Company & Co.* as quoted in *Delilah Kerubo Otiso v Ramesh Chander Ndingra* (2018) eKLR, that whereas the general rule is that courts do not typically award damages for breach of a contract there was an exception such as when the conduct of the respondent was shown to be oppressive, high handed, outrageous, insolent, vindictive callous, underhand or bordered on fraud, with no slight intention of honoring the agreement.
26. In this appeal, the appellant had defaulted twice in honoring his agreement to refund the Kshs.580,000/=. Even after he was sued, the appellant denied the claim. He did not offer to refund the amount through a statement of admission. He did not offer to liquidate it in installments. There was no offer to consent before the suit was set down for hearing.
27. The liquidated sum was not attacked as unreasonable or unconscionable in the circumstances. The respondent duly pleaded, prayed for, and tendered evidence for his claim through a valid refund agreement. The trial court was correct in finding the suit proved. I find no reason to fault the said findings save to add that the respondent shall pay the additional court fees for the entire claim based on Kshs.580,000/= and Kshs.1,160,000/= totaling Kshs.1,740,000/=
28. The upshot is that the appeal is dismissed with costs.

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

ON THIS 8TH DAY OF NOVEMBER 2023

In presence of

C.A Kananu/Mukami

Nyaga for Kimathi for appellant

Mwenda Kinyua for the respondent

HON. CK NZILI

ELC JUDGE

