



**REPUBLIC OF KENYA**  
**IN THE ENVIROMENT AND LAND COURT**  
**AT MERU**

**ELC APPEAL NO. 22 OF 2020**

**DAVID NTIRIKA M'BARACHA .....APPELLANT**

**VERSUS**

**MUTUERANDU MUNGATIA TIMOTHY ....RESPONDENT**

(Being an appeal from the Judgment of Hon. S. Abuya (S.P.M.) delivered on 29<sup>th</sup> September, 2020, in Meru CMCC No. 248 of 2016)

**JUDGMENT**

**A. PLEADINGS**

1. The appellant was sued in the lower court by the respondent for breach of a sale agreement dated 4.5.2015. The respondent's claim was that he was shown **L.R No. Kiamuri A/128** on the ground in Kiamuri area, and paid the entire purchase price of **Kshs. 1,875,000/=**. Subsequently, the parties commenced the process of transfer and when he collected the title deed he found out the parcel as shown on the ground was on the survey map was different locality.
2. The respondent averred the appellant had falsely pretended and or misrepresented the true facts to him before he entered into the sale agreement and during the transfer with the sole aim and intention of defrauding and succeed in stealing and or obtaining from him the purchase price.
3. As a consequence, the respondent averred the appellant breached the sale agreement since he did not pass to him vacant possession of the property which he had shown and sold to him. He sought for general damages for the breach of the contract of sale plus costs and interests.
4. The appellant denied the claim vide defence dated 7.4.2017 on the reasons that: he did not enter any sale agreement with the respondent but one Jasper Muthomi Mutuerandu, a brother to the respondent: he had shown to them and they ascertained the existence of the land and its conditions before executing the agreement and the alleged claim was an afterthought.
5. Further, the appellant denied any fraud or misrepresentation and averred if there was any, it must have been the respondent's proxy or agent one Jasper Muthomi Mutuerandu who committed it.
6. Additionally, the appellant averred he only met the respondent after the transfer had been effected. He insisted the land he transferred was the same one he had shown the respondent through his agent or proxy who knew the condition of the land but withheld vital information from the plaintiff.
7. The appellant denied any breach of the sale agreement since he willingly attended the land control board, delivered the title deed and that the respondent got the land he had purchased. In sum, the appellant maintained the suit was bad in law, lacked merits and disclosed no known cause of action.

**B. TESTIMONY**

8. The respondent adopted his witness statement filed on 20.9.2016. He stated he was introduced to the appellant by his brother one Jasper Muthomi Mutuerandu. The appellant offered to sell to him **Parcel No. Kaimuri A/128**. That they visited the land which was pointed out to him by the appellant. Having liked the property shown to him, the respondent testified that they proceeded to write an agreement dated 4.5.2015. He stated he paid a deposit of **Kshs. 650,000/=** at the signing of the agreement and the balance was to be paid in two equal instalments.
9. Upon clearance of the purchase price, the respondent testified the appellant transferred the land to him and once he got the title deed, he

proceeded fence only to be chased away by people who threatened to kill him.

10. He testified it was at that juncture that he realized the appellant had offered for sale the wrong land but transferred a different one with an intention of defrauding him.

11. Further, the respondent told the court his efforts to locate the correct parcel of land bearing the number in his title deed established the parcel was far away from the place he had been shown by the appellant before they embarked on the sale agreement and the eventual transfer to his name.

12. Additionally, the respondent testified the locality of the suit land was at a place with a lot of hostility and even a visit to the land was impossible let alone living there. The respondent produced the sale agreement, acknowledgment receipts of payments by the appellant dated 6.6.2015, 25.8.2015, a green card for the suit land, copy of the title deed, map sheet No. 29 and 32 as **P exh 1 -7** respectively.

13. The respondent explained the land he was shown had crops on it and that the appellant had requested he be allowed to harvest them before he could fence the place but eventually the appellant changed the story and told him that he would show him the land he had bought since it was not the one with crops on it.

14. The respondent testified he took a private land surveyor to go and fence the land but once more the appellant told him the land was not the one he had transferred to him and he should go to the other one. The private surveyor told him the land he was shown was L.R No. 128 but the one he had bought was L.R No. A/128.

15. The respondent insisted there was a breach of the sale agreement as the land he got on paper was not the one he was offered for sale on the ground hence the invocation of cause 6 of the sale agreement plus costs and interests.

16. In cross-examination, PW1 insisted he was shown a different land from what was in the sale agreement and was certain about it since he even took photographs the first time he was at the land. Further, the respondent stated he knew the appellant before the sale agreement was written, admitted the sale agreement was signed by his brother Jasper Muthomi Muteurandu and that he was certain he paid a total of **Kshs. 1,875,000/=** before the land was transferred to him.

17. In his view, the respondent insisted the appellant was in breach of the sale agreement since he transferred to him a different parcel of land from what he had been offered for sale before the agreement was drawn and hence he made him pay for a land which he knew he did not own in the first instance.

18. As regards the claim by the appellant that he only got **Kshs. 880,000/=** as opposed to **Kshs. 1,875,000/=**, the respondent insisted the appellant had not complained to him about the same since he signed all the acknowledgment receipts before the court.

19. Additionally, the respondent told the court that had he been given the land he was shown and which he intended to buy, he would have no dispute with the appellant.

### **C. SCENE VISIT REPORT**

20. Parties by consent agreed for the land registrar and the land surveyor to visit the scene and furnish the court with a report. The report dated 28.8.2019 was filed before the court in which the County surveyor's findings and observations were that the parcel of land pointed out by the respondent claiming to have been shown by the appellant was Parcel No. 29443 and registered in the name of Cosmas Miriti John, while the suit land **L.R. Kiamuri A/128** was almost a kilometer from **Parcel No. 2944** as per the RIM map and that it was impossible at the time of the ground verification to visit the exact location due to insecurity around the area.

21. As regards the scene visit report by the court executive officer dated 6.8.2019, the observations are the appellant denied the land in Kiamuri area alleged by the respondent was his or that he had shown it to him as the one he was selling.

22. Further, the appellant told the scene visit team his land was across the valley into the hills and which he had offered for sale to the respondent through his brother.

23. Regarding the report by the area chief, he told the team the land across the valley was occupied by many squatters and that there was need for an elaborate security before the scene could be visited.

### **D. DEFENCE TESTIMONY**

24. The appellant testified he did not know the respondent and that he only sold the land to his brother one Jasper Muthomi Muteurandu who was also the one he showed the land before the sale agreement. Similarly, he told the court it was the said Jasper Muthomi who paid him the purchase amount which was at the rate of **Kshs. 80,000/= per acre**. He insisted he did not transact with the respondent hence wondered why he had been sued by him.

25. In cross-examination, the appellant admitted the sale agreement was done before the advocate on record for the respondent and further stated he would acknowledge receipt in writing of any payments made to him for the purchase amount before the said advocate. Likewise, the appellant insisted it was the said Jasper Muthomi who was in possession of the consent from the land control board. He told the court the respondent was not present when **P exh 1** was executed before his lawyers.

26. The appellant acknowledged only receiving **Kshs. 880,000/=** and not **Kshs. 1,875,000/=**.

27. As regards the title deed, the appellant told the court the respondent was present at the land control board meeting and that the land he sold was the one he had shown the buyer (Jasper Muthomi). He denied ever breaching the sale agreement. He claimed he did not see the respondent at the time he was being paid the purchase amount though he only signed the acknowledgment letter dated 6.6.2015 indicates otherwise. He denied ever meeting him at the advocate's offices since all the transactions were handled by Jasper Muthomi.

28. Concerning the correct acreage, the appellant insisted he was only paid for 11 acres, the extra two being a compensation for expenses to be incurred in evicting the person who was on the land at the time, by the name Thiga.

29. In his view, the appellant stated he only saw the respondent after the title deed came out and when he took him to the land where they found the said squatter. The appellant stated he was not conversant with English, the advocate did not explain the contents of the sale agreement and he would not know where the rest of the money went since he was only paid **Kshs. 880,000/=**.

30. DW2 testified he was aware of **P exh 1** and that he was involved in the sale and transfer of the suit land alongside his father DW1 together with DW3 before the advocate. He however denied meeting the respondent when **P exh 1** was being executed as well as at the time they acknowledged receipt of monies on 6.6.2015.

31. On the issue of **Kshs. 1,875,000/=**, DW2 admitted he agreement involved 13 acres. Even though **P exh 1** indicates all the parties and witnesses including himself were present, DW2 admitted his father was illiterate, though on his part he was educated beyond form 4.

32. DW2 however admitted receiving all the monies on behalf of his father as per **P exh 2 and 3** though in reality they only received **Kshs. 880,000/=**. He stated they were not demanding the balance of **Kshs. 1,005,000/=**.

33. After the close of the testimony, parties made written submissions after which the trial court by a judgment dated 10.2.2020 allowed the claim with costs and interests necessitating the current appeal.

#### **E. GROUNDS OF APPEAL**

34. The appellant by an amended memorandum of appeal dated 28.4.2021 faults the trial court for:-

**1. Dismissing the defence despite the evidence tendered.**

**2. Relying on extraneous factors hence arriving at a wrong decision.**

**3. Misapprehending the evidence on record and the applicable law.**

**4. Acting on a disjointed and uncorroborated evidence by the respondent.**

**5. Failing to address all the emerging issues.**

**6. Failing to find the respondent dealt directly with the respondent's brother who was his agent or proxy.**

**7. Failing to find the respondent had failed to undertake due diligence before buying the land but left that responsibility to an agent who misled him.**

**8. Failing to find it was the agent who misled the respondent as to the physical location of the suit land.**

**9. Failing to apply the correct law and principles governing the execution rule and failing to find that the respondent did not execute all vital land sale documents but left it to his agent.**

**10. Filing to find the appellant had not met the respondent.**

**11. Being biased and taking into account personal opinions and extremes and irrelevant matters.**

35. This being a first appeal the court is required to re-assess, rehear and re-appraise itself on the lower court record and come up with its own findings and conclusions. *See **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123.***

#### **F. WRITTEN SUBMISSIONS**

36. With leave of court, parties opted to dispose of the appeal through written submissions dated 22.10.2021 and 11.11.2021 respectively in line with **Order 42 Rule 16 Civil Procedure Rules**.

37. At the very outset, it is trite law that parties are bound by their pleadings and issues flow from pleadings, see ***IEBC & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR.***

38. The appellant submitted the sale agreement had several contradictions and omissions which were raised both in testimony and in submissions yet the trial court failed to determine them hence falling into error.

39. Secondly, it was submitted the respondent dealt with the appellant through an agent hence he was bound by the agreement and the land as it was. Reliance was made on **South African Railways [1903] TS 571 and an extract from Bowstead and Reynolds on Agency Seventeen Edition Sweets Maxwell Page 1 – 001.**

40. Thirdly, it was submitted the court failed to address the emerging issues namely: - the exact consideration and how much the appellant was paid; whether the appellant ever met the respondent; the failure to call Jasper Muthomi as a witness yet he was adversely mentioned and consequently reaching a finding which was oppressive to him.

41. Fourthly, it was submitted the appellant dealt with the respondent's brother throughout the transaction hence if there was any lapse or material breach as alleged, the blame fell under the said agent and not the appellant, otherwise the appellant was all along honest in dealing with the respondent's agents and that the suit was an afterthought after the transaction was completed.

42. Fifth, it was submitted the respondent could not blame the appellant since the duty to undertake due diligence and ascertain on the suitability of the land he intended to purchase fell with him and his agent and that if he was misled by the agent the appellant could be held liable. Reliance was placed on *Alice Wambui Ndome –vs- Muiru Property Investment Ltd. [2014] eKLR* and **Halsbury's Laws of England, Fourth Edition, Volume 42 Paragraph 51.**

43. The respondent submitted the appeal lacks merits and should be dismissed. He relied on *Jackson Kaio Kivuva –vs- Penina Wanjiru, Kajiado Law Courts High Court Appeal No. 15 of 2015.*

#### **G. ISSUES FOR DETERMINATION**

44. The issues commenting themselves for determination are in line with **Section 78 of Civil Procedure Act:-**

**1. If the respondent proved breach of the sale agreement to the required standards based on facts, evidence and legal principles applicable to the cause of action.**

**2. If the respondent was entitled to the prayers sought.**

**3. If the appeal has merits.**

45. As a starting point, the appellant has not attach the decree appealed against in line with **Order 42 Rule 2 of the Civil Procedure Rules.**

46. In *Bwana Mohamed Bwana –vs- Silvano Buko Bonaya & 2 Others [2015] eKLR*, the Court held the failure to attached the decree from which an appeal is preferred goes to the root of the appeal, hence it was a fatal defect while in *Ndegwa Kamau T/A Sideview Garage – vs- Fredrick Isika Kalumbo [2017] eKLR* the court held without a decree appealed against, no appeal existed.

47. In *Nyota Tissue Prodcuts –vs- Charles Wanga & 4 Others [2020] eKLR*, the court took a different view that it was not a mandatory requirement in view of the word “or” used in **Order 42 Rule 13 (f) Civil Procedure Rules** and the definition of a decree under **Section 2 of the Civil Procedure Act.**

48. Guided by **Article 50 and 159 of the Constitution** as read together with **Sections 3, 4 and 13 of the Environment and Land Court Act**, I shall proceed to determine the appeal on merits rather than on technicalities since no one has claimed any prejudice. See *Peter Obwogo O & 2 others –vs- H O Suing as Next Friend of P O (Minor) & another [2017] eKLR.*

49. The respondent's case at the trial court as per the pleadings was that what he was offered for sale and he accepted to purchase was what he was eventually transferred and offered to take possession of was different and that the appellant knew the land offered and shown to him was not his or available for sale and or could not possibly be sold for the amount paid hence he falsely pretended and or misrepresented the facts with the sole aim of defrauding him of his money.

50. Further, the respondent pleaded upon obtaining the entire sum and effecting the transfer, the appellant sought to give vacant possession of a different parcel of land and which was also not available given the hostility and other frustrating circumstances hence prayed for general damages for breach of contract.

51. On the other hand, the appellant's defence was that he did not enter any sale agreement as alleged with the respondent. On the contrary, he stated he transacted with one Jasper Muthomi Mutruerandu who he showed the land and its conditions after which they entered into an agreement and that if there was any alleged fraud or misrepresentation, the guilty person must have been the said Jasper Muthomi Mutruerandu who as an agent or proxy of the respondent misled him as to material facts and that the issues the respondent was raising were an afterthought. He insisted hence there was no breach as alleged or at all since he delivered and honoured his part of the agreement.

52. At page 86 of the record of appeal, the appellant drew out the issues for determination as to the validity of the agreement; dishonouring of the land by the respondent; if the appellant had any role to play in the alleged fraud and if the plaint disclose a known cause of action for the grant of the reliefs sought.

53. The appellant pleaded the person he entered into a sale agreement with and who is alleged to have misled and or bought the land was

Jasper Mutuerandu Muthomi.

54. Under **Order 1 Rule 15 of the Civil Procedure Rules**, the appellant had the right and obligation to bring the agent to the suit by issuing a third party notice. There was no such application made before, during and after the trial if at all the appellant was of the considered view as expressed in grounds No. 6,7,8,9 and 10 of the appeal. He cannot therefore in my respectful view purport to blame it on the respondent for the failure to seek for joinder and or issuance of a third party notice in line with the law.

55. Further under **Order 7 Rule 9 of Civil Procedure Rules**, the appellant had a duty to serve the defence upon the said Jasper Muthomi Mutuerandu and seek that he be added as a party and plead the particulars of fraud or misrepresentation. He did not do so on time or at all.

56. Under **Order 16 Rule 1 Civil Procedure Rules**, the appellant had also a right to seek for the attendance of the said Jasper Muthomi Mutuerandu to testify as his witness.

57. Coming to the appeal stage, the appellant had also a right to seek under **Order 42 Rule 22** for the said party to be enjoined as an interested party to this appeal.

58. The appellant did not exploit all those opportunities and hence my finding is that the aforesaid grounds of appeal are an afterthought and are hereby rejected under **Order 42 Rule 4 of the Civil Procedure Rules**.

59. Secondly, the appellant submits the sale agreement had contradictions and omissions. There is no dispute the agreement and acknowledgement receipts were all drawn and executed before the firm of M/s A.G Riungu Advocates who has all along been representing the respondent up to this appeal.

60. The appellant did not call any representative of that office as an independent witness. He did not also object to the participation of M/s Riungu Advocates as an advocate representing the respondent. He did not raise any issue of conflict of interest. See **Isaac Ngatia Kihagi – vs- Paul Kaiga Githui [2017] eKLR**.

61. It is the appellant who should have called the said law firm to shed light on the authenticity or correctness of the issues he was alleging were unclear such as the subject land, its size and the consideration. He had before him the lawyer in court and he did not complain on any impropriety and or collusion on the part of the said law firm. He is therefore estopped from denying the facts.

62. Further, there was no pleading in the defence that the signature of the respondent was forged and or superimposed and secondly that the respondent was not the one purchasing the property.

63. During the trial, the appellant did not seek for any forensic investigation over the authenticity of the sale agreement and the acknowledgment receipts if at all he was doubting the signatures of the respondent and or his claim was that the respondent was an imposter.

64. The burden was on the appellant to bring enough evidence to impeach the sale agreement as pleaded in his defence in line with **Sections 107 and 109 of the Evidence Act**.

65. In **Edward Wafula Tuchi –vs- Reuben Simiyu Wasike [2016] eKLR**, the Court of Appeal while determining the issue of setting aside of a consent agreement on the basis of forgery, held the person who asserts has the burden of proof. The court found that failure to call the advocate to prove the agreement as authentic and to shed light on the sum paid and further in absence of a handwriting expert was vital in unraveling the issues.

66. In the instant case, the appellant neither lodged a complaint against the law firm witnessing the agreement nor called the person alleged to have been representing the respondent in the transaction. See **Kanini Kitili Mwangi –vs- Paul Mulwa Lungui [2018] eKLR**.

67. In **Tom Kuseinya & others –vs- Kenya Railways Corporation & others [2013] eKLR**, the court held under **Rule 9 of the Advocates Practice rules**, an advocate likely to be called as a witness is forbidden from appearing in such a matter.

68. In **Delphis Bank Limited (Now Oriental Commercial Bank Limited –vs- Channan Singh Chatthe & 5 others [2014] eKLR** the court held a party has a Constitutional right to legal representation of advocate of an his choice but nevertheless there was no general rule that an advocate could not act for one party in a matter and then act for the other party in a subsequent litigation.

69. In this case as stated above, the appellant did not raise any objection and seek the firm of M/s A.G Riungu advocate to disqualify itself for drawing or attesting P exh 1, 2 and 3. See **Serve in Love Africa (Sila) Trust –vs- David Kipsang Kipyego & 7 others (2017) eKLR**.

70. The above notwithstanding, the appellant did not plead any illegality, forgery, misrepresentation and or unlawfulness of the agreement so as to make a finding it was not enforceable.

71. Turning to the issue of misrepresenting the locality and particulars of the subject land to the agreement and transfer, the appellant denied this and instead blamed the respondent for lack of due diligence on the part of his agent based on the legal principle of **caveat emptor** or buyer **beware**.

72. There was no evidence produced that the respondent conducted any official search over the land prior to the signing of the sale agreement. Similarly, there was no evidence produced if the respondent visited the land he was buying prior to the signing of the sale agreement with was surveyor to ascertain the facts on the ground and at the office of the land registrar.

73. Further, there was no evidence that the respondent sought for and was granted any copies of the title deed and or maps so as to authenticate the same. The said agreement is also silent on whether the respondent had visited the suit land, viewed it and confirmed its status, suitability, quality and physical location. The exact particulars of the suit land are also missing in the sale agreement.

74. In essence therefore and given the evidence tendered by both parties, it is apparent there was no meeting of minds. See **National Bank of Kenya Ltd –vs- Pipeplastic Samkolit (K) Ltd & another [2002] E.A 203.**

75. In absence of any evidence of what exact information, details, particulars and circumstances under which the respondent alleged misrepresentation of facts and information touching on the suit land, complied with missing information on vital particulars of the suit land in the sale agreement, my finding is that the respondent did not prove any misrepresentation of facts and or false information on the part of the appellant.

76. On the issue of fraud, the law is that fraud must not only be specifically pleaded but must also be proved above a balance of probabilities as held in **Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar. (2000) eKLR.**

77. In the instant case, the plaint did not contain particulars of fraud, misrepresentation and or illegality. The respondent did not call evidence to back his claim that the appellant was engaged in a fraudulent endeavor with the aim of misrepresenting facts and information to him. He did not call any other witness to lead credence to his allegation including calling the surveyor and the persons who witnessed **P exh 1, 2 and 3.**

78. Similarly, he did not produce any evidence he ever undertook due diligence prior to entering the sale agreement, paying the purchase amount and subsequently attending the land control board for consent to transfer. See **Ngere Tea Factory Co; Ltd –vs- Alice Wambui Ndome [2018] eKLR.**

79. In my view, the evidence he produced fell short in proving either fraud, misrepresentation and or mistake. See **Vijay Morjaria (Supra).**

80. The appellant was under no obligation to do more than give particulars of the parcel and show the same to the respondent who eventually should have taken it upon himself to ascertain the facts both on the ground and at the land office prior to signing the agreement and the subsequent transfer. He had more than enough time to do so and has not explained what prevented him from not doing so once material facts were disposed to him as held by the court in **Sachin Shaha –vs- Jagat Mahendra Kumar Shah & Another [2020] eKLR.**

81. Having found there was no meeting of minds between the parties herein, the next question is the implication of the same in law and hence the rights of the parties to the agreement.

82. The sale agreement did not include any timelines on the completion date. The appellant however sold the property free of encumbrances and assured the respondent of immediate vacant possession from himself and third parties claiming under his name.

83. The next clause was a penalty clause for breach of the agreement. There is no indication in the agreement of any notice period for material breach. Both parties agree in their evidence that the respondent was unable to take vacant possession out of issues beyond them and which are bordering on squatters, insecurity and threats.

84. The appellant in the circumstances cannot therefore deliver on his part as per the sale agreement though the respondent is now possessed with a title deed. In essence, the agreement is now frustrated and impossible to perform having found the reasons for the non-delivery of vacant possession are beyond the powers of the appellant. See **Kihuba Holdings Limited –vs- Charo Karisa Ngulu [2021] eKLR.**

85. The respondent sought for general damages for breach of the contract. In **Atieno –vs- Louis Onyango Otieno [2013] eKLR** the Court of Appeal held where a vendor wrongfully refuses to complete the measure of damages by the purchaser as the natural and direct result of the repudiation of the contract by the vendor and that these damages include the return of the deposit paid by the purchaser with interest and expenses incurred in investigating the title and other expenses in the contempt of the parties.

86. In **Kenya Tourism Development Cooperation –vs- Sundowner Lodge Ltd [2018] eKLR** the Court of Appeal held as a general rule, general damages are not recoverable in cases of alleged breach of contract. This was the same position in **KCB Ltd –vs- Stephen Mukiri Ndegwa & Another [2014] eKLR.**

87. The respondent did not plead and seek for the refund. See **Zacharia Waweru Thumbi –vs- Samuel Njoroge Thuku [2006] eKLR.**

88. Given that, I have found the respondent is not entitled to general damages the only issue is whether he is entitled to a refund of what he paid. **P exh 1, 2 and 3** indicate the amount paid as **Kshs. 1,875,000/=.**

89. That, evidence for reasons above given has not been challenged. My finding therefore is the respondent only entitled to a refund of **Kshs. 1,875,000/=** plus costs and interests. The respondent did not tender evidence for any other expenses reasonably incurred towards the follow up of his title deed.

90. Guided by **Section 78 of the Civil Procedure Act and Order 42 Rule 25 of the Civil Procedure Rules**, the appeal herein is dismissed with costs. The lower court decision is set aside with an order that judgment be and is hereby entered for the respondent against the appellant for a refund of **Kshs. 1,875,000/=** plus costs and interests from the date of filing the suit.

91. Costs of the appeal to the respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2022**

**In presence of:**

Mr. Riungu for respondent

Nyamu for appellants

**HON. C.K. NZILI**

**ELC JUDGE**