



**Mjengo Limited v Njowabu (Kenya) Limited (Environment and Land Case
Civil Suit 1055 of 2015) [2022] KEELC 2849 (KLR) (7 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2849 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1055 OF 2015**

JA MOGENI, J

JUNE 7, 2022

BETWEEN

MJENGO LIMITED PLAINTIFF

AND

NJOWABU (KENYA) LIMITED DEFENDANT

JUDGMENT

1. By a plaint dated October 23, 2015, the plaintiff herein sought for judgment against the defendant for the following orders: -
 - a) A permanent injunction restraining the defendant from alienating, selling or in any other manner disposing of the proprietary interest in LR No 4953/4349 otherwise than in accordance with the sale agreement made on February 20, 2013 between the plaintiff and the defendant.
 - b) An order for specific performance against the defendant for compliance with the terms of sale of the agreement made on February 20, 2013 specifically accepting the balance of the purchase price Kshs 30,005,000/- and conveying LR No 4953/4349 situate in Thika municipality to the plaintiff.
 - c) An order directed to the defendant to issue to the plaintiff all the completion documents per clause 7 of the agreement made on February 20, 2013 for land LR No 4953/4349 situate in Thika Municipality within 14 days.
 - d) That in default the Registrar of the court be authorized to execute a transfer of LR No 4953/4349 situate in Thika municipality in favour of the plaintiff.
 - e) Costs of this suit and interest thereon at court rates.



2. The suit is opposed. The defendant entered appearance on May 24, 2019 and filed a defence and counterclaim dated August 18, 2020. The plaintiff (by way of counterclaim) prays for judgment against the defendant for:-
 1. A declaration that the agreement dated 20 February, 2013 stands rescinded thus unenforceable
 2. A mandatory injunction compelling the release the original grant to land reference number 4953/4349 by the defendant's advocate to the plaintiff.
 3. Mesne profits plus interest
 4. Costs of this suit.
3. The suit proceeded by way of *viva voce* evidence. The plaintiff called one witness and the defendant called two witnesses. Both parties testified on 4/11/2021.

Plaintiff's Case

4. It was the plaintiff's contention that he entered into a sale agreement with respect to land known as LR No 4953/4349 situate in Thika municipality, Thika district measuring 2.707 hectares at an agreed purchase price of Kshs 40,005,000.00.
5. The plaintiff avers that the fundamental terms of the agreement was completion date of 90 days as from February 20, 2013 and construction of the perimeter wall around the property, delivery to the plaintiff of all documents to effect transfer, deposit by vendor of the original grant with the plaintiff's lawyer by the defendant, approval obtained by defendant for construction of the wall and that since the property was sold with vacant possession the defendant would ensure there are no squatters on the land.
6. Further the plaintiff was to meet the cost of construction of the perimeter wall at Kshs 7.5 million and he paid Kshs 4 million in advance. That the defendant has willfully failed to perform its obligation under the sale agreement and failed to convey the property as the per the sale agreement dated February 23, 2013.
7. The plaintiff avers that LR No. 4953/4349 situate in Thika municipality is unique and irreplaceable and therefore he seeks due performance.

Evidence By The Plaintiff

8. PW1 – Raj Malde testified that he is the managing director of the plaintiff company. He adopted his witness statement dated October 12, 2021 and relied on list and bundle of documents dated October 12, 2021 as his evidence in the court (exhibit 1-10). He also relied on the plaintiff's certificate of electronic evidence dated October 12, 2021 as evidence before this court.
9. During cross examination, it was his testimony that he executed a sale agreement dated February 20, 2013 between himself and the defendant. He indicated that paragraph 6 of the agreement provided that the completion date was in ninety (90) days, which meant that the sale was to be completed by May 20, 2013. It was his case that within 3 months, the property had not been transferred to him because the defendant had not completed construction of the perimeter wall. One of the conditions was that the defendant constructs the wall but this was not the condition of the agreement. The defendant had already started construction of the wall.



10. He testified that paragraph 9 of the sale agreement also provided for the construction of the perimeter wall. It required the plaintiff to deliver a drawing. He added that on March 27, 2013, there was an agreement between the defendant and the plaintiff. He admitted that he did not deliver the drawing plans within 7 days as per the requirements of paragraph 10. He admitted that he did not deliver the plans within 14 days.
11. PW1 averred that there were squatters on the parcel of land at the time of purchase. The defendant tried to remove the squatters, but the plaintiff was not aware of the outcome. He contends that the perimeter wall was halfway built by the time the plaintiff went to see it.
12. PW1 averred that he had seen the letter addressed to the plaintiff's advocates. He referred to the exhibit at page 5 of the bundle. The letter alleges that the council has revoked the approvals. The letter is dated March 19, 2014. It also states that the defendant's workers were assaulted when they tried to build the wall. He referred to exhibit no 6 which was a letter informing the plaintiff that the transaction could not proceed. The letter dated June 18, 2014 (exhibit no 7) sought to have the plaintiff's bank details to have the monies refunded. Exhibit 8, was a letter dated April 28, 2015 whereby the defendant insisted that the contract between the plaintiff and the defendant is rescinded. He averred that the letter's subject was about a deed of variation, and it also asked for the plaintiff's bank account. Exhibit no 9 was also from the advocate whereby he indicated that the agreement has been rescinded. He contends that he did not give them his bank details. He avers that the letter dated 9/09/2015 is also on the issue of the agreement being rescinded.
13. It was his case that he wanted the agreement to be adhered to because according to exhibit no 17, the vendor came up with a new sale agreement and it is a deed of variation, and the purchase price is Kshs 66,000,000.00. He also avers that it is not signed by any party. The first page of the deed of variation shows Kshs 40,000,000.00. According to paragraph 15, it was a condition that the purchaser was to remove the squatters and the plaintiff had to get the property when it was vacant. As at May 20, 2013, the property was not vacant. Regarding squatters, he avers that the vendor took responsibility to evict them and not the plaintiff.
14. It was the plaintiff's contention that page 5 of the sale agreement indicated that time shall be deemed to be of essence.
15. During re-examination, the plaintiff contended that he had visited the property and there was a perimeter and a warehouse. The completion date was pegged on the perimeter wall construction. It was his case that the vendor took on the responsibility for construction of the wall the total cost was Kshs 7.5 million. The plaintiff averred that he paid Kshs 4 million and that the vendor has not yet refunded the same. He contends that the defendant never asked him for the plans. The revocation letter by the council was never shared with the plaintiff. He avers that paragraph 13 of the agreement contains the special conditions of the agreement and No B of the agreement states that in the event of the breach by the vendor, it was plaintiff to issue a rescission notice. Contrary to paragraph 7, the defendants never informed the plaintiff that they were denied land rates or copies of the land rates. He added that the issue of variation came about because the vendor kept coming for more money this was the frustration that was coming about so in the plaintiff's opinion, they felt that they had no capacity.
16. He avers that the defendant changed the construction to Kshs 15 million yet they had agreed to Kshs 7,000,000. The special conditions under paragraph B provides that one of the parties can issue a rescission notice. The discretion is on the purchaser. There is no provision giving the vendor powers to rescind. Paragraph h of the agreement for sale gave a waiver. The letter under exhibit 8 dated April 28, 2015 talks about variation of terms. Despite the alleged problem of squatters, the other problem is that the defendant wanted to sell the land at a higher price.



17. With that evidence, the Plaintiff closed its case.

Defendants' Case

18. The defendants entered appearance on May 24, 2019 and filed a defence and counterclaim dated December 20, 2019. The plaintiff (by way of counter claim) filed defence and counterclaim and denied every allegation and averred that through their advocates they duly notified the plaintiff *vide* a letter dated March 19, 2019 that the agreement dated February 20, 2013 had become frustrated for reasons that the suit parcel of land LR 4953/4349 had become subject to political interference. Further that the defendant was unable to fulfil its obligations as the consent granted by the council for construction of the perimeter wall had been revoked.
19. Further that there were subsequent notices to rescind the agreement dated February 20, 2014 which the plaintiff chose to ignore. The defendant therefore avers that the sale agreement has become void on account of being frustrated and lack of consent from the commissioner of lands and the local authority. The defendant has always been willing to refund the plaintiff the monies paid the subject parcel of land.
20. The Plaintiff (by way of counter claim) has also filed a counter claim in which he reiterates that the agreement dated February 20, 2013 in respect to the sale of land reference number LR 4953/4349 was unenforceable due to lack of consents and approvals by the Council for construction and political interference.
21. Further he avers that clause 13 special condition B and E (viii) of the agreement of sale dated February 20, 2013 provided *inter alia*:
- a) If construction of the perimeter wall should be delayed, inhibited or stopped for any reason then such delay stood to be treated as a breach by the vendor for its obligation.
 - b) If the vendor failed to comply with its obligation, then the purchaser had the discretion of rescinding the agreement.
 - c) That the vendor would immediately disclose any event or circumstances that would constitute a breach of the warranties in the agreement.
22. The defendant contends that despite giving notices via various correspondences to the defendant (by way of counter claim) dated March 19, 2014, June 18, 2014, and August 18, 2015 through its advocates, of intention to rescind the agreement dated February 20, 2013 and refund a deposit of Kshs 10,000,000 million paid, the defendant ignored the said notices and continued to unlawfully withhold the grant to the suit property.
23. The plaintiff (by way of counterclaim) avers that as a result of the defendant's unwarranted decision to ignore its notices to terminate the agreement dated February 20, 2013 and continued withholding of the original grant, to land reference number 4953/4349 has resulted in loss of Kshs 9,522,000 being opportunity cost for lack of use of the suit land in addition to the fundamental breach of the plaintiff's right to ownership of property.
24. The plaintiff's (by way of counterclaim) claim against the defendant is for the suit herein be dismissed, and that the plaintiff be condemned to bear the costs of the same as well as the release of the original grant to land reference number 4953/4349 and mesne profits plus interests.



Evidence By The Defendant

25. DW1 – John Mburu Mwaura testified that he is the managing director of the defendant company. he adopted his witness statement dated December 20, 2019 and relied on list and bundle of documents dated October 26, 2021 as his evidence in the court.
26. DW1 testified that agreement was rescinded because with goodwill they had moved out the squatters and the plaintiff contracted them to construct the wall but they needed the drawings. He avers that they attempted to construct the wall but there was political interference, and they informed the plaintiff and also asked to refund his money, but this never happened. DW1 contends that they managed to do a wall in January 2020. He avers that they also did a shell of a go down and could not continue because there was an injunction.
27. It is his case that two things were against them; political interference and squatters and grant transfer could not be given on approval without the drawings. He avers that they had moved the squatters out within the 90 days.
28. He contended that the agreement is rescinded because the council also rescinded the approvals. He informed the court that he had filed a counterclaim against the plaintiff because they have been holding the title and they have denied them the opportunity to do business. He contended that they could also not some approvals because the title was being held by the plaintiff for almost 10 years in view of the contact Liam the defendant requested the court to grant them the request for Kshs 9,522,000.00 per annum.
29. During cross-examination, DW1 testified that he entered into a sale agreement with a completion date of 90 days. He averred that the wall has been constructed and that he was the contractor. He confirmed that he got the drawings. He contended that he never complained about receiving the drawings out of time. He added that consent to build the perimeter wall was revoked but there is a letter filed in court. It is his evidence that there is no report or P3 showing that his workers were assaulted. The purchaser never gave me any notice to rescind as per special condition no B.
30. He averred that he had an advocate who prepared the agreement. He contends that there was no exit clause, but it was obvious that he attempted to apply for a loan. The letter dated April 28, 2015 stated that he had agreed do you have a variation of the agreement. The perimeter wall has not been demolished. It is the defendant's case that they have constructed a wall and a go down yet there is an injunction which has been there for a year. He avers that they guard the wall and the go down day and night. He avers that he executed the agreement of sale and was paid Kshs 10,000,000.00. He added that he applied to the commissioner of lands but there is no letter before the court. There are approvals for the go down.
31. During re-examination, DW1 testified that his understanding was that they had to do it within 90 days otherwise the agreement stands cancelled. After 90 days there was no extension. The letters for revocation are in their files. The numerous letters were the defendant's intention to rescind the agreement because of breach. The plaintiff never provided the plans for walls and the go downs. He added that they could not control their events, that is the political interference he was able to construct last year. As a contractor, you either deposit a title to get a guarantee from the bank or to have the good downs up and running so you get the monies. It was not possible to do variations due to the circumstances. According to page 9 paragraph 10 – special conditions no 2, the approval needed to have been acquired and so at that time I could not transfer the property.



32. DW2 – Kennedy Ochieng testified that he is a quantity surveyor. He was tasked to carry out a valuation report of the suit property in terms of opportunity cost. He averred that he visited the plot on 2/08/2021. He did a visual inspection. It is located near Garissa road. It is bordered by facilities that are of similar nature. He contends that he saw a perimeter wall was done. It appeared that it had some patchwork. He testified that there is a warehouse framework which is not completed. He added that he got the plan and looked at the construction cost of the go down which could be Kshs 1.3 billion and with the valuation of land at Kshs 75 million and other auxiliary works of Kshs 65 million together with other works of Kshs 91 million. It was his evidence that the total estimated construction costs would be Kshs 1.8 billion.
33. According to DW2, if the warehouse was leased for 36 months, the cost per square meter could be Kshs 135psqm with 50% occupancy and could earn Kshs 1.6 million per month translated to Kshs 58 million per year.
34. He averred that he prepared a report on September 27, 2021 and relied on the same. He adopted the report as his evidence.
35. During cross- examination, he contended that the plan was never presented for registration to the county office. When he visited on 2/08/2021, he did not see any EIA obtained by the defendant. The construction was projected to take two years. He has not presented any assumptions to show that the projections took this into consideration. He contended that he saw the go downs but there is information in the report to show occupancy in the other go downs. There is no assumption stated concerning the 50% occupancy. The external drainage would cost approximately Kshs 5 million. 20% is yet to be completed. There is no industry standards presented. There is no physical document attached about them going to rent in the area. They have projected lease to start in January 2019 but there is no letter inquiring about taking up space before 2019. He avers that he considered the issue of squatters and projected that the occupation was to start in 2017. The assumption is not listed in my report.
36. During re-examination, he contended that he is not required to have a stamp on his report. It is not part of the working standards to factor in the finer details. He added that special conditions paragraph 5 confirms that the report is for the go downs. He avers that the prevailing conditions of COVID-19 informed DW2 to report on 50% occupancy. He contends that he did an inquiry in the vicinity.
37. With that evidence, the defendant closed its case.

Plaintiff's Reply To Defence And Statement Of Defence To The Counterclaim

38. The plaintiff reiterates contents of the plaint filed. He avers that he is a stranger to the defendant's allegation that the agreement of sale dated February 20, 2013 is frustrated due to political violence. He adds that he is also a stranger to the allegations that the defendant is unable to fulfill its obligations under the agreement due to the revocation of the consent granted for the construction of the perimeter wall.
39. The plaintiff denies receiving any notice from the defendant rescinding the agreement and avers that the letter dated March 19, 2014 does not constitute the rescission notice contemplated by the parties under the agreement.
40. Regarding the counterclaim, they maintain that they are a stranger to the allegations that the agreement is unenforceable due to lack of consents and approvals by the council of construction and political interference. It is their case that the delay to complete construction of the perimeter wall is deliberate and intentionally calculated to frustrate performance of the agreement and cause them to rescind the agreement.



41. They reiterate that the plaintiff (by way of counterclaim) did not issue any notice to rescind the agreement.
42. The plaintiff avers that it has a meritorious claim against the defendant and prays that the statement of defence and counterclaim filed ought to be struck out with costs and judgment be entered as prayed for in the plaint.

Submissions

43. Both the plaintiff and defendant filed submissions that I have considered.

Analysis And Determination

44. I have considered the pleadings filed in this matter and the evidence which was adduced in court by both parties as well as submissions by counsel and the cited authorities. It is not in dispute that the parties entered into an agreement for sale with respect to the suit property and the plaintiff paid a deposit of Kshs 10,000,000.00 in accordance with the terms of the agreement. The same has been produced in court by the plaintiff as exhibit 1. It emerged from the evidence of the plaintiff that the plaintiff also remitted Kshs 4,060,000.00 on account of the construction of the perimeter wall. The dispute is on whether the said agreement was rescinded by the defendant.
45. The agreement shows that the parties entered into an agreement for the sale of the suit property for Kshs 40,005,000.00 paid in accordance with the terms set out therein. The defendant alleges that the said agreement is rescinded by virtue of several letters dated March 19, 2014, June 18, 2014, and August 18, 2015 sent to the plaintiff through its advocates, of their intention to rescind the agreement dated February 20, 2013 and refund a deposit of Kshs 10,000,000 million paid. They purport that the said notices to rescind the agreement were ignored by the plaintiff. They alleged that the contract was frustrated due to approvals being revoked, political interference and squatters.
46. I agree with the plaintiff's submission that the defendant did not attach any documents to prove that the approvals had been revoked or the existence or nature of political interference. The *Evidence Act* section 107 clearly provides that he who alleges must prove their allegations and therefore the burden is squarely on the defendant to show proof of the revocations and the said political interferences.
47. For frustration to be held to exist, there are certain factors that require to be taken into consideration. One factor is whether the frustration was caused by the default of the parties. It is trite that the frustrating event cannot arise from default of the parties. In *Davis Contractors Ltd v Fareham UDC* (supra), it was stated thus,

“The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self-induced .”
48. This court is reminded that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract, and the parties can be restored to their former position. This position of law is provided in *Halsbury's Law of England* Volume 42, 4th Edition at paragraph 242.
49. In this case, the grounds for rescission are due to a fault admitted by the defendant himself. I have perused the agreement of sale entered into by the plaintiff and the defendant dated February 20, 2013.



- Clause Special conditions 'c' provides grounds for rescission on the part of the defendant. The contract did not provide for rescission due to a party's own breach like is the case herein and neither does the Law Society Conditions of Sale (1989 Edition).
50. Seeing that the remedy of rescission as provided for in the Law Society Conditions of Sale (1989 Edition) is not available to the defendant, as it could only arise upon objection or requisition by the plaintiff, the defendant could therefore not use rescission to cover up for his own breach.
51. It is trite law that a court of law cannot purport to rewrite a contract between the parties, neither can they imply terms that were not part of the contract. In the case of *Rufale v Umon Manufacturing Co (Ramsboltom)* [1918] LR 1KB 592, Scrutton LJ held as follows:
- “The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”
52. The defendant is bound by the terms of the agreement. Clause 15 provided that the defendant would sell the property with vacant possession and that they shall procure that the squatters on the suit property are evicted prior to the completion date. This means that the defendant undertook to remove the squatters. He cannot therefore claim this to be the reason why the contract is frustrated.
53. In the case of *Attorney General of Belize et al v Belize Telecom Ltd & Another* (2009), 1WLR 1980 at page 1993, Lord Person in *Trollope Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] I WLR 601 at 609, held as follows:
- “The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”
54. The importance of interpreting contracts strictly was further reiterated in the case of *Curtis v Chemical Cleaning & Dyeing Co Ltd* [1951], ALL ER 631 in which 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.”
55. Furthermore, the defendant is bound by the terms of the agreement and could only rescind the same in accordance with provisions of special condition c of the agreement. Rescission should only have deemed as having occurred after due consideration of the whether the procedure of terminating the contract had been complied with. This procedure is the issuance of a notice of termination of contract or notice to complete. These should have been served upon the plaintiff.
56. A look at the letters dated March 19, 2014, June 18, 2014, and August 18, 2015 sent to the plaintiff through its advocates do not appear to expressly cite any intention to rescind the agreement of sale dated February 20, 2013.
57. Having not provided any documents to prove that the contract was frustrated by the approvals had been revoked or the existence or nature of political interference, the court is not satisfied that the defendant rescinded the sale in the manner prescribed in the agreement. Evidence was not given of



how the notice was served on the plaintiff. This court therefore finds that the agreement of sale was not validly rescinded by the defendant for the foregoing reasons.

58. The second issue for determination is on specific performance. The plaintiff has demonstrated that he was ready and able to complete the sale transaction, but the defendant purported to terminate the contract due to a breach of their own. The plaintiff also alluded to the fact that the defendant wanted to increase the purchase price to Kshs 66,000,000.00, which the defendant did not dispute in his evidence. There is a valid and enforceable contract which the court found as not rescinded. The defendant failed to prove that the contract had been rescinded.
59. The counterclaim was for mesne profits among other orders. What is not in doubt is that that counterclaim was premised upon the fact that the defendant had rescinded the agreement of sale through the various letters sent to the plaintiff. According to them, the plaintiff ignored their various letters and yet they wanted to give them a refund of the monies paid and subsequently get the original grant to the suit property in exchange. Having found that the agreement of sale dated February 20, 2013 had not been rescinded, the counterclaim is hereby dismissed with costs to the plaintiff.
60. Having now carefully considered the available evidence, the court finds that the plaintiff has proved on the required standard of balance of probabilities that they did pay Kshs 10,000,000.00 to the defendant for the purchase of the suit property together with Kshs 4,060,000.00 for the construction of the perimeter wall. Evidence in court also showed that the perimeter wall was complete. The court is satisfied that an order of specific performance is a proper remedy to be granted.
61. On the issue of costs, I find that since the plaintiff has been inconvenienced, he is entitled to costs of the suit.
62. In the circumstances, I find that the plaintiff has proved his case on a balance of probability and proceed to make the following order: -
- a) A permanent injunction is hereby issued restraining the defendant from alienating, selling or in any other manner disposing of the proprietary interest in LR No 4953/4349 otherwise than in accordance with the sale agreement made on February 20, 2013 between the plaintiff and the defendant.
 - b) An order of specific performance is hereby issued directing the defendant to comply with the terms of sale of agreement made on February 20, 2013 specifically accepting the balance of the purchase price Kshs 30,005,000/- and conveying LR No 4953/4349 situate in Thika municipality to the plaintiff.
 - c) An order is hereby issued directing the defendant to issue to the plaintiff all the completion documents per clause 7 of the agreement made on February 20, 2013 for land LR No. 4953/4349 situate in Thika municipality within 30 days.
 - d) In default the Registrar of the court is hereby authorized to execute a transfer of LR No 4953/4349 situate in Thika municipality in favour of the plaintiff.
 - e) The costs of the suit are awarded to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF JUNE 2022

.....

MOGENI J.

JUDGE

In the presence of



..... for the Plaintiff

..... for the Defendant

Vincent Owuor Court Assistant

