



**Mbeetu v Kirima (Environment and Land Appeal 116 of 2019)
[2022] KEELC 2369 (KLR) (6 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2369 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 116 OF 2019**

**CK NZILI, J
JULY 6, 2022**

BETWEEN

REUBEN KIRIMI MBEETU APPELLANT

AND

MARK MWIRIGI KIRIMA RESPONDENT

JUDGMENT

A. The pleadings

1. By a plaint dated 4.3.2002, the appellant sued the respondent in the lower court for specific performance and vacant possession of L.R No. Abothuguchi/Kariene/1815 which he had bought on May 19, 2001 but the latter declined to transfer despite full payment of the consideration.
2. The respondent by a defence and counterclaim dated April 22, 2002 opposed the claim and averred he only sold $\frac{1}{4}$ of an acre of land but the appellant 1998 fraudulently transferred to himself his entire parcel of land without his consent or approval out of his illiteracy and through coercion hence he sought for retransfer of the land to himself and subsequent rectification of the land register.
3. In reply to defence and defence to the counterclaim the appellant insisted he lawfully bought the entire parcel of land from the respondent who willingly attended the land control board meeting and effected the transfer to him. He denied the alleged fraud or collusion.

B. Testimony

4. The appellant's testimony was that he entered into a sale agreement with the respondent over parcel No. Abothuguchi/Kariene/1875 for Kshs.183,000 which he paid in instalments till May 1999 and the respondent acknowledged receipt of the purchase price. Later on, they attended the land control board and a transfer was effected in his favour. He produced a copy of the title as P. exhibit (1). He stated the respondent was to hand over vacant possession in August 2001 but declined.



5. He produced the agreement as P. exhibit 3 dated February 25, 2002 as well as MFi 4 the agreement allegedly made on a sketch piece of paper on January 7, 1990.
6. In cross examination the appellant stated initially there was an oral agreement in 1997 but was later on reduced into writing on May 19, 2001 before Evans Momanyi Advocate and other witnesses. He confirmed he paid Kshs.168,000 out of the agreed amount of Kshs.183,000. He denied forging any transfer documents in 1998 and or taking advantage of the respondent's illiteracy. PW 2 Evans Momanyi advocate produced the sale agreement as P. exh 2 confirming witnessing the sale agreement.
7. DW 1 told the court her father did not sell any land to the appellant. She testified the sale agreement was allegedly made after the transfer was effected and that it had glaring inconsistencies especially on the consideration. She insisted she was living on the suit land with her siblings. She denied coming across any land control board consent. She prayed for the title deed to be cancelled as per the counter claim.
8. In cross examination, DW 1 admitted her late father only sold ¼ of his land and not the whole land which the appellants had fraudulently transferred to himself.

C. Appeal

9. The appellant faults the trial court for dismissing his claim and allowing the counter claim which was not supported by any expert evidence; for giving a wholesale judgment yet the respondent had admitted selling and transferring ¼ an acre; for failing to find the agreement and the transfer forms had not been disapproved by any expert witness; for reversing the transfer yet no fraud had been proved against him and lastly for rendering a judgment contrary to the evidence tendered.

D. Written Submissions

10. With leave of court parties opted to canvass the appeal through written submissions dated October 21, 2021 and May 23, 2022 respectively.
11. The appellant submitted the respondent did not deny entering into and or signing the sale agreement as corroborated by his two witnesses.
12. As to the counterclaim the appellant submitted the respondent called no forensic document examiner to prove the alleged fraud and or discharge the evidentiary burden on the same in line with sections 109 and 112 of the *Evidence Act*. Reliance was placed on *Vijay Morjaria v Nansingh Madhusingh Darbar & another* (2000) eKLR, *Kinyanjui Kamau v George Kamau* 2015] eKLR, *Demutilla Nanjama Purma v Salim Mohamed Salim* [2021] eKLR.
13. On the other hand, the respondent submitted the trial court carefully thought and gave sound reasons hence the judgment was based on facts and that there was no misapprehension of the evidence calling for the appellate court's intervention.
14. On whether the appellant proved his case, it was submitted the appellant testified on three occasions each time giving contradictory evidence especially on the facts that the land in dispute was transferred and a title deed issued the same day.
15. Regarding the transfer of the land before the sale agreement was made, it was submitted that the appellant could not clarify the anomaly.
16. The respondent submitted she rebutted the appellant's testimony and pointed out that the appellant had failed to produce the land control board consent and the transfer forms duly executed by her deceased father which was fatal to the claim.



17. As to her denial into entering any sale or transfer of the land with the deceased father, the respondent submitted the onus lay on the appellant to prove the genuineness of his documents and title deed.
18. Reliance was placed on *Samuel Muigai Kariuki (Suing as the legal representative of the estate of David Kariuki Mwangi Muchoki* [2018] eKLR.
19. The respondent submitted the sale agreement showed the property had been sold at Kshs.10,000 and not Kshs.183,000 raising suspicions on the credibility of the appellant's documents as to whether he was a bonafide purchaser for value.
20. Regarding the defence and counterclaim the respondent submitted that given the glaring inconsistencies in the appellant case it did not require an expert to show there was foul play in the whole transaction more so when there was evidence the vendor was illiterate. Reliance was placed on *Kenya Airways Ltd v Satwant Singh Flora* (2013) eKLR on the doctrine that no court should enforce an illegality or fraud once brought to its attention.
21. This being a first appeal the court is mandated to rehearse, re-hear and re-appraise itself on the trial court record and come up with its own independent findings and conclusions on fact and law while at the same time mindful that the trial court had the advantage of seeing and hearing the witnesses first hand. See *Peter v Sunday post Ltd* (1958) EA 424.
22. Having reviewed the pleadings, list of documents attached, witness statements, evidence tendered, grounds of appeal and written submissions the issues for my determination are:-
 - (i) If the parties entered a valid sale agreement and transfer of the suit land.
 - (ii) If the appellant pleaded and proved the prayer for specific performance and vacant possession.
 - (iii) If the respondent pleaded and proved his claim based on fraud.
23. It is trite law parties are bound by their pleadings and issues flow from pleadings. See *IEBC & another vs Stephen Mutinda Mule & 3 others* (2014) eKLR. The appellant pleaded he bought the suit land vide a sale agreement dated May 19, 2001, paid the entire purchase price which the respondent acknowledged receipt of and transferred the land to him after attending the land control board for a consent. The appellant's testimony was corroborated by his two witnesses among them a lawyer who witnessed the sale agreement. In response the respondent admitted there was an oral agreement entered in 1990 for a share of $\frac{1}{4}$ of an acre of his land with the appellant but in 1998 the appellant fraudulently transferred the entire parcel of land without his consent by forging his signature in the transfer forms by coercing and or duping him to sign documents he could not comprehend or did not know their import.
24. Further, the respondent averred in 2001 the appellant took advantage of his illiteracy and duped him into signing documents whose content, nature and import he did not understand.
25. As regards, the sale agreement dated May 19, 2001 the respondent pleaded it was impracticable and or implausible because in 1998 the appellant had fraudulently transferred the land and could not purport to enter into a sale agreement over the same land.
26. In the counterclaim the respondent reiterated that the appellant fraudulently transferred the whole land even before he had cleared the balance for the $\frac{1}{4}$ of an acre which he had actually bought.



27. In his testimony the appellant was categorical he paid Kshs.168,000 leaving a balance of Kshs.15,000 and that they attended the land control board meeting for the requisite consent and the land was eventually transferred to him on 1.1.1998 at which time he had already paid over Kshs.100,000.
28. The appellant explained the agreement was done after the transfer had been effected since it was to complete the transaction.
29. Further the appellant said he served the respondent with a notice to vacate the land after the deadline of August 2001 had elapsed.
30. Looking at the pleadings and the appellant's testimony it is quite clear the respondent did not put any specific question to PW 1, PW 2 and PW 3 regarding any coercion, trickery, lack of understanding, impracticability or impossibility of the sale agreement dated May 19, 2001.
31. PW 3 was categorical that the respondent appeared before him and appended his signature or thumb print on the sale agreement. There were no specific questions put to him that the said witness was privy to the alleged forgery to the sale agreement, the consent and the transfer forms.
32. The appellant was categorical that they attended the offices of the said lawyer and signed various documents including the transfer forms.
33. The respondent did not deny that the signature or the thumb print appearing therein was not his and or say it was procured through threats, intimidation and or coercion.
34. Further the appellant and his witnesses were categorical that they witnessed the respondent append his thumb print on the said sale agreement and acknowledge receipt of the money. The respondent did not raise any specific queries that either the portion sold or transferred was worthy more than Kshs.183,000 or that the appellant had not paid any money at the time the property was alleged sold.
35. As regards the $\frac{1}{4}$ of an acre, the respondent admitted it was actually sold to the appellant in 1998. However the respondent did not put any specific questions and or basis why she was categorical her late father only sold $\frac{1}{4}$ of an acre of his land in 1998 and not the whole land to the appellant at the time.
36. In *Kukal properties Devt Ltd v Maloo and 3 others* the Court of Appeal held where a contract is in writing and clear and unambiguous no extrinsic evidence may be called to add or detract from it.
37. In *Reliable Electrical Engineers Ltd v Mantras (K) Ltd* [2016] eKLR the court held specific performance is based on the existence of a valid enforceable contract and will not be ordered if a contract suffers from some defect or mistake, illegality or invalidity or where there is an alternative remedy or where there was undue influence or will cause severe hardship to the other party.
38. In *Gurder Singh Birdi & another v Abubakar Mathbuti* [1997] eKLR the Court of Appeal held a party seeking specific performance must demonstrate that he has performed or is willing to perform all the terms of the agreement and that he has not acted in contravention of the essential terms of the said agreement.
39. Looking at the agreement produced as P. exhibit 2 it satisfies the requirement of section (3) (3) of the *Law of Contract Act*. Parties appended their signatures. It describes the suit premises, the terms and conditions. Kshs.163,000 is already acknowledged as paid to the vendor while vacant possession was agreed to take place undertaken by August 2001.
40. Both parties herein agreed that there was an oral agreement for sale of land in 1990. What they did not agree on was the acreage.



41. The appellant insisted it was for the entire parcel of land and that is why in 1998 the entire land was transferred to him. On the other hand, the respondent averred and testified that it was only for ¼ an acre and the entire parcel of land.
42. Section 3 (3) of the [Law of Contract Act](#) came into operation in June 1, 2003. So, at the time the oral agreement herein was made in 1990 there was no mandatory requirement for a written sale agreement.
43. Section 3 (7) thereof made exceptions to oral contracts. The only requirement in 1990 was a memorandum or note in writing signed a party to be charged or some person authorized by him to sign it.
44. A suit then could not be defeated if there was part performance by taking possession or a party had performed or was willing to perform its part of a contract. See [Peter Mbiri Michuki v Samuel Mugo Michuki](#) [2014] eKLR.
45. The respondent has not denied that her late father received Kshs.163,000 from the appellant on account of the oral agreement for the purchase of the land.
46. In my considered view therefore, the sale agreement made on May 19, 2001 satisfied the law as it was then.
47. Similarly, as at 1998 when the transfer and registration was effected and a title deed issued in favour of the appellant, there was no legal requirement that there be in existence a written sale agreement,
48. Needless to say, the onus was on the respondent in support of her defence and counterclaim to lead credible and tangible evidence of forgery, coercion, illegality and fraud in the sale agreement, land control board consent procurement, the transfer documents and the registration inline with section 107 – 112 of the [Evidence Act](#).
49. The respondent did not call any evidence from the land control board members, and the land registrar to produce any document's which showed that the signatures used to transfer and register the suit land in favour of the appellant were forgeries or procured through fraud, coercion and or misrepresentation.
50. If the respondent alleged to her later father was duped in 1990's, later coerced to transfer the land in 1998 and subsequently coerced to enter into a sale agreement on May 19, 2001 to purport to regularize the previous alleged anomalies, one would have expected at the very least a formal complaint to the land registrar, the land control board chairman and lastly criminal investigative agencies on account of forgery, coercion and fraud. In [Virjay Morjaria supra](#) the court held fraud must be specifically pleaded and proved and cannot be inferred from facts.
51. The standard of proof for fraud as held in [Kinyanjui Kamau v George Kamau](#) [2015] eKLR is higher than that required in ordinary suits but not beyond a reasonable doubt. The respondent merely made allegations that the sale agreement was made after the transfer had been effected and that the amount indicated at the land office was Kshs.10,000 and that a transfer could be done and a title deed issued on the same day.
52. In [Kuria Kiarie and 2 others v Sammy Magera](#) [2018] eKLR the Court of Appeal held the claim on fraud was still born for lack of evidence and that mere allegations of fraud and illegality did not suffice.
53. A pleader for fraud and illegality requires sufficient evidence to justify his pleadings. It is not enough to allege and or suggest fraud or illegality.
54. In [Boniface Onyango Okhango v Beatrice Anyango Ojiambo and another](#) (2019) eKLR the court held the burden to prove fraud never shifts and he who alleges must prove. Further the court held a party



who says the land consent and the transfer were fraudulent must not want the court to wish away all this and assume that no such documents were taken to the lands office.

55. In this matter it was the respondent who alleged that the land control board consent and the transfers were fraudulent, forged and was full of illegalities. She needed to avail such evidence as per section 109 and 112 of the *Evidence Act*. It was not the duty of the appellant to disapprove these allegations but the respondent to substantiate them through evidence. In absence of such evidence I am persuaded to find that the respondent's counterclaim was not proved to the required standard.
56. On the other hand, the appellant tendered evidence that there was a memorandum or note acknowledging his part performance of the oral agreement and the eventual transfer and registration for the suit land in his favour. In absence of any evidence to impeach his title deed by dint of section 26 of the *Land Registration Act* 2012, I find the appellant had proved his claim on a balance of probabilities.
57. The appeal herein is allowed. The lower court suit is allowed. The respondent is ordered to hand over vacant possession within two months from the date hereof failure of which he shall be evicted from the premises at her own costs.
58. Costs of both the appeal and the lower court to be borne by the respondent.

Ordered accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 6TH DAY OF JULY, 2022

In presence of:

C/A: Kananu

Kithinji for appellant

Masamba for respondent

HON. C.K. NZILI

ELC JUDGE

