



**Ntoimpoi v M'AJara (Environment and Land Appeal 124 of 2019)
[2022] KEELC 2654 (KLR) (6 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2654 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 124 OF 2019**

CK NZILI, J

JULY 6, 2022

BETWEEN

CYPRIANO NTOIMPOI APPELLANT

AND

M'IMARANYI M'AJARA RESPONDENT

JUDGMENT

A. Pleadings

1. The appellant at the lower court, by a plaint dated 16.2.2016 sued the respondent for breach of a sale agreement dated 11.4.2012 where the respondent offered to sell and transfer to him 0.50 acres of L.R no. Nyaki/Munithu/1614 for Kshs.200,000, in which he paid a deposit of Kshs.100,000 and the balance was to be cleared upon the transfer.
2. The appellant averred despite clearing the balance on 16.7.2012 and taking vacant possession, the respondent failed to effect the transfer. He sought for specific performance and liquated damages.
3. The respondent filed a notice of appointment through Frank Gitonga and Associates on 23.8.2017 but failed to file a defence leading to a request for interlocutory judgment dated 22.11.2018 and filed on 29.11.2018.

B. Testimony

4. The appellant's evidence was that he bought land measuring 0.50 acres from the respondent's L.R No. Nyaki/Munithu/614 for Kshs.200,000 which he paid in two instalments and took vacant possession but the respondent failed to transfer the land to him despite living on the land since 2012.
5. He produced a sale agreement, acknowledgment receipt of payment dated 16.7.2012, letter to the land registrar, certificate of official search dated 8.10.2014, demand notices dated 1.9.2014 and 1.8.2014,



search certificate dated 1.6.2014, letter to registrar dated 22.9.2014, an agreement dated 23.2.2012, demand letters dated 15.12.2015 and 11.12.2015 as P. exh No. 1-11 respectively.

C. Appeal

6. The appellant faults the trial court's decision for making a finding that he did not perform his part of the agreement or seek the land control board consent within time or clear the balance; for finding the claim unproved; for failing to consider and apply the law of constructive trust; for entering judgment for Kshs.100,000 which had not been pleaded or prayed for; for awarding Kshs.400,000 liquidated damages and lastly for holding against the weight of evidence tendered.

D. Written submissions

7. The appellant submitted the lodging of a caution was aimed at frustrating the sale agreement and that efforts to lift it were in vain yet after the filing of the suit the same was uncontested hence the trial court should have allowed his claim.
8. The appellant also submitted the court should have found he had established a constructive trust. Reliance was placed on *Juletabi African Adventure Ltd and another vs Christopher Michael Lockley* (2017) eKLR. Peter Ndung'u (2000) eKLR, *Charles Makeketi vs Florence Mukanda Barasa* (2020) eKLR, *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri* (2014) eKLR.
9. On the other hand, the respondent submitted there was no proof of payment of Kshs.100,000; that the sale agreement had no completion date and that the trial court could not establish who among the parties had breached the agreement.
10. Further, it was submitted by the respondent that the sale agreement had not indicated who was to initiate the transfer or bear the costs thereof.
11. Further, the respondent submitted that whether or not the matter went for formal proof, the burden of proof still rested on the appellant which he had failed to discharge. Reliance was placed on *K.P.L.C vs Nathan Karanja Gachoka & another* (2016) eKLR, *Gichinga Kibuthia vs Caroline Nduku* (2018) eKLR. *Roseline Mary Kahumba vs N.B.K* (2014) eKLR.
12. As regards the consent of the land control board, the respondent submitted the appellant failed to comply with Section 6 (1) and 8 (1) of the *Land Control Act*. Reliance was placed on *Isaac Ngatia Kibagi vs Paul Kaiga Gitbui* (2017) eKLR.
13. On general damages and the refund it was submitted the holding by the trial court was proper and in line with Section 7 of the *Land Control Act* but stated the claim for Kshs.400,000 was unjustified and since the breach had not been proven, the appellant was not entitled to liquidated damages. Reliance was placed on *David Sironga Ole Tukai vs Francis Arap Muge and 2 others* (2014) eKLR on the proposition that there was no room for involving equitable remedies of constructive trust and estoppel. This being an appeal it is the duty of this court to rehearse, rehear and reappraise itself on the lower court record, come up with its independent findings as to fact and law bearing in mind the trial court had the benefit of hearing witnesses first hand.
14. Having gone through the pleadings the grounds of appeal and the written submissions the issues for my determination are:
 - a. Whether the appellant had an enforceable sale agreement with the respondent.
 - b. Whether there was breach of the sale agreement.



- c. What remedies were available to the appellant.
 - d. If the appellant was entitled to the prayer for specific performance.
15. It is trite law that parties are bound by their pleadings and issues flow from pleadings. See *IEBC vs Stephen Mutinda Mule* (2014) eKLR.
 16. In this matter the respondent did not participate in the trial court despite filing a notice of appointment.
 17. Similarly, the respondent has not filed an appeal against the decree under Order 42 Rule 32 of the [Civil Procedure Rules](#) though he has submitted that the trial court should not have awarded liquidated damages since the element of breach of contract was not established given the sale agreement lacked salient features including the completion date, the obligation of parties to initiate the transfer process and who was to pay the cost of the transfer.
 18. In *Raila Odinga and another vs IEBC and 2 others* (2017) eKLR the court held parties are not permitted to travel beyond their pleadings, since they form the legal foundation of their case.
 19. In this appeal the respondent has neither applied for the setting aside nor appealed against the lower court judgment.
 20. Be that as it may the respondent was duly served with the appeal and applied to participate in the proceedings.
 21. Section 3(3) of the [Law of Contract Act](#) as read together with Section 38 to 42 of the [Land Act](#) and the [Land Registration Act](#) sets out the key ingredients of a land sale agreement among them to be in writing, signed by all the parties and a signature of each party signing to be attested by a witness when the contract is signed.
 22. A contract of a sale of land may be vitiated on account of mistake duress, misrepresentation, undue influence, illegality, unconsciousness, fraud, insanity and or lack of capacity.
 23. Further as regards parole evidence courts have held oral evidence may not be used to add, vary or contradict what was reduced into writing for parties have the freedom to contract. See *Muthuri vs National Industrial Credit Bank Ltd* (2003) eKLR.
 24. As regards specific performance, the law is that a party who has fulfilled his obligations under a contract should benefit from the contract without impediment.
 25. In *Kukal Properties Development Ltd vs Tafazzab H. Maloo and 2 others* (1993) eKLR, the court of appeal held where a contract is in writing and its terms are clear and unambiguous no extrinsic evidence maybe called to add or vary or retract from it.
 26. Similarly in [Amina Abdul Kadir Hawa vs Rabiunder Natho and another](#) (2012) eKLR, the court set the guiding principles to be met for a prayer for specific performance as satisfying the court it is equitable in the interest of both parties to grant the prayer; damages are not likely to be adequate compensation; it will not be granted if it is likely to cause hardship to the other party and that an applicant must demonstrate he has fulfilled his obligations under the terms of the contract or in the alternative willing to fulfil the same.
 27. Applying the above principles to the instant case the agreement dated 11.4.2012 sets out the names of the parties, the subject matter, consideration, deadlines and is duly signed and witnessed.



28. Further P. exh 2 is duly signed and witnessed acknowledging the final payment of the balance as at 16.7.2012. Thereafter it appears the appellant sought for the removal of the caution placed on the property by the respondent in vain so as to effect the subdivision and the transfers.
29. The certificate of search dated 1.6.2014 shows the caution was placed on 17.9.2012 after the final payment had been made by the appellant. See *Felix Kipchoge Limo Langat vs Robinson Kiplagat Tuwei* (2018) eKLR.
30. Efforts to have it removed fell on deaf ears of the respondent going by the correspondence produced by the appellant in support of his claim and which was not controverted by way of a defence and testimony in court. The respondents' letter dated 15.12.2015 admitted the contents of the sale agreement but raised the issue of non-payment the balance of the purchase price. The said letter did not however address itself to the acknowledgment receipt of payment dated 16.7.2012.
31. In my considered view therefore, the appellant had already fulfilled his terms and conditions of the sale agreement.
32. Despite the fact that the transfer had not been effected, the respondent nevertheless accepted the balance of Kshs.100,000 before he had even subdivided and or transferred the suit land to the appellant. The respondent could not therefore turn around and lay blame on the appellant for taking up vacant possession, especially after realizing that the respondent had without justification placed a caution on the suit land.
33. In *Willy Kimutai Kitilit vs Michael Kibet* (2018) eKLR the court held the doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the *Land Control Act* and that the lack of the consent of the land control board did not preclude the court from giving effect to established principles to do justice to the parties.
34. In this matter the respondent took the full purchase price and also handed over vacant possession to the appellant.
35. The respondent did not give any justifiable reasons why after receiving the purchase price in 2012, he failed to transfer the land by 2016 when the suit was filed.
36. The respondent did not challenge the suit or raise any issues in the nature of prejudice or undue hardship if the court was to grant the order for specific performance.
37. The appellant took vacant possession. There was no counter claim made against him that the land is not available for transfer and or an offer for a refund thereof. Parties as stated above are bound by their pleadings.
38. The appellant did not plead any particulars of breach of constructive trust under Order 2 Rule 10 Civil Procedure Rules. The only pleading and prayer was based on specific performance. Written submissions however powerful cannot replace pleadings and or evidence. See *Daniel Toroitich Moi vs Murithi vs Mwangi Stephen Murithi & another* (2014) eKLR.
39. In *Juletabi African Adventure Ltd and another vs Christopher Michael Lockley* (2017) eKLR, evidence had been led by the witnesses over a resulting trust. In this appeal, no pleading or evidence was made or tendered with regard to constructive trust. The trial court cannot be faulted on that account.
40. Similarly, before this court the appellant did not seek leave to raise such a ground notwithstanding that it was not canvassed before the trial court.



41. In the premises and for the reason aforesaid, I allow the appeal and substitute the lower court prayer for payment of Kshs.100,000 with an order for specific performance compelling the respondent to transfer 0.50 acres from parcel no. Nyaki/Munithu/614 within 6 months from the date hereof. Leave is hereby extended to seek for a land control board consent within 6 months from the date hereof in order to effect the subdivision and the transfer.
42. Costs for the subdivision and transfer shall be met by the appellant. In default by the respondent the Deputy Registrar of the court to effect the transfers. Costs of the suit and the appeal to the appellant.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 6TH DAY OF JULY, 2022

In presence of:

C/A: Kananu

Muthomi for appellant

Kiyuki for respondent

HON. C.K. NZILI

ELC JUDGE

