



Kiige v Mwangi & another (Environment and Land Appeal 3 of 2019 & 12 of 2017 (Consolidated)) [2022] KEELC 4780 (KLR) (15 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4780 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 3 OF 2019 & 12 OF 2017 (CONSOLIDATED)**

JG KEMEI, J

SEPTEMBER 15, 2022

BETWEEN

PETER MAGOTHE KIIGE APPELLANT

AND

PATRICK WAWERU MWANGI 1ST RESPONDENT

LUCY NUNGARI WAWERU 2ND RESPONDENT

JUDGMENT

ELCA 12 OF 2017

1. The appellant was the defendant in the lower Court. He is also the appellant in both appeals; ELCA 3/2019 and ELCA 12/2017. According to the record both appeals were consolidated on the 21/6/2019.
2. The plaintiff filed suit against the defendant in the lower court on the 8/5/2017 and contemporaneously filed a notice of motion in which he sought orders *interalia* restraining the defendant from building constructing erecting a fence or in any way refusing and or denying the plaintiffs their employees access road serving the rear end of the ¼ acre in the property Ikinu/ Githunguri/3860 pending the hearing and determination of the suit. Further that the defendant be restrained from interfering with the plaintiffs right of access and quiet enjoyment of the access road on the rear and of ¼ acre plot in the suit land.
3. On the 29/6/17 the Hon Magistrate rendered his ruling and allowed the application barring the appellant (defendant then) *interalia* from interfering with the access to the plaintiffs (now respondents) and the defendant was also ordered to remove the barriers earlier erected to allow access to the respondents.



4. Aggrieved by the said ruling the appellant filed a memorandum of appeal in the this court on the 25/7/2017 challenging the said ruling on the grounds that there was no contract between the parties; conclusive findings were made at interlocutory stage thus granting mandatory orders without being supported by any exceptional circumstances;
5. Simultaneously with filing memorandum of appeal, the appellant sought stay of execution of the orders of the 29/6/17 *vide* the notice of motion filed on the 25/7/17. This court heard the application and the same was allowed on the 17/5/2019.
6. It is borne of the record that the judgement in this suit was delivered on the December 20, 2018. The restraining orders of 29/6/17 were to be in force pending the hearing and determination of the suit. They therefore lapsed on December 20, 2018 upon the pronouncement of the judgement by the trial Court. So by the 17/5/2019 the orders being sought to be stayed had lapsed. The same position obtained when the two appeals were consolidated on the 21/6/19.
7. It is my view that the appeal ELCA 12 of 2017 is spent and the pending appeal now remains the ELCA 3 of 2019. In my view it will not serve any purpose to determine ELCA 12 of 2017 on account that it is spent.

ELCA 3 OF 2019

8. The plaintiffs (respondents on appeal) sued the defendant (now appellant) *vide* plaint filed on 8/5/2017.
9. The defendant is the registered owner of the suit land measuring 0.2023 hectares or 0.5 acres. It is averred by the plaintiff that the parties entered into an agreement on the 6/8/2016 for sale of ¼ acre of suit land at the consideration of Kshs 2 Million which was paid in full. The respondents were put in possession in October 2016 and developed the land as a playground/recreation facility. It is averred that the defendant agreed to provide an access road to the ¼ acre. That the defendant on 4/5/17 demolished the fence and erected along the suit land and blocked the access road to the suit land by erecting his own fence thus denying the plaintiffs access to the property. In addition, the plaintiffs aver that the defendant has refused to transfer the suit land to the plaintiffs despite payment in full. The plaintiff sought the following orders;
 - a. A permanent injunction restraining the defendant, his agents, servants and/or any one acting through his authority from building, constructing barricading, obstructing, erecting a fence on the access road serving the rear end of ¼ and acre in all property known as IKinu/Githunguri/3860.
 - b. An order directing the defendant to remove the barriers, fence and/or gate erected on the road of access of ¼ an acre in all property known as Ikinu/Githunguri/3860.
 - c. A declaration order declaring that the plaintiffs are the rightful and absolute owners of ¼ an acre of land out of land parcel No Ikinu/Githunguri/3860.
 - d. A mandatory order for specific performance compelling the defendant to forthwith transfer and do all acts and fulfil all conditions required to affect transfer of ownership of ¼ an acre of land out of land parcel No Ikinu/Githunguri/3860 into the names of the plaintiffs and in default the executive officer of the honourable court be empowered to do so.
 - e. General damages.
 - f. Costs of the suit.



- g. Any other relief / remedy that the court may deem fit to grant.
10. The defendant denied the plaintiffs claim and termed the suit incompetent fatally defective and sought to raise a preliminary objection to have it struck out on want of the court's jurisdiction to entertain the suit. He denied that the plaintiff owns the suit land. He contends that he offered to sell the suit land to the plaintiffs vide a letter dated 6/8/2016. That no agreement of sale was arrived at because the plaintiff pulled out of the contract. He refuted the letter of offer presented to the court by the plaintiffs and put the plaintiffs to strict proof of the same. Further that it is the plaintiffs who refused to enter into a binding agreement and failed to pay the balance of the purchase price and instead used threats against the defendant to force them to surrender his land. That there is no valid agreement between the parties.
 11. On a without prejudice the defendant averred that he is willing to refund to the plaintiff the deposit paid and the additional sums paid towards restoration of the suit premises and the land back to its former premises. Further and in the alternative the defendant be ordered to pay the balance of the purchase price being Kshs 1,000,000/- and interest for the quarter acre to be transferred to them.
 12. At the hearing the plaintiffs evidence was led by Patrick Waweru Mwangi who relied on his statement dated the 8/5/17 and produced the list of documents thereon marked *PEX* NO 1-3.
 13. In brief he stated that they purchased $\frac{1}{4}$ acre of the land from the defendant at the sum of Kshs 2.0 Million. Kshs 300,000/- was paid on the 6/8/17 on signing the sale agreement. Kshs 700,000/- later. In the month of January 2017 the final installment of Kshs 1.0 Million was paid to the defendant. They were put in possession after paying the 1st Kshs 1.0 Million as per the agreement dated the 6/8/16 and started developing the land into a children's playground/recreational facility. The access of the property was through a 6-meter road as provided in the agreement. Trouble started on the 4/5/17 when the defendant demolished the fence and blocked the access to the suit land by erecting his own fence completely making it inaccessible.
 14. At the hearing the defendant and his counsel were absent and therefore the suit was heard *exparte*.
 15. The defendant subsequently filed an application on the 25/2/2018 and sought the proceedings of the 25/1/2018 to be set aside. After hearing the parties, the court not being satisfied of the reasons advanced by the defendant for not attending court dismissed the application. Thereafter directions as to filing of the written submissions were issued.
 16. It is to be noted that this ruling has never been appealed, set aside and or vacated.
 17. Judgement was finally delivered on the December 20, 2018 in which the plaintiffs claim was allowed as follows; the defendant was ordered to refrain from barring access to the suit land; to remove the barrier / fence earlier erected to give access to the plaintiffs; the plaintiffs were adjudged to be the rightful owner of the $\frac{1}{4}$ acre, suit land; specific performance was decreed.
 18. It is this decision that provoked this appeal.
 19. Aggrieved with the decision the appellant filed the instant appeal and framed 6 grounds namely;
 - a. The learned Magistrate failed to accord the appellant a fair trial contrary to the law;
 - b. The learned Magistrate erred in law in disregarding and or failing to appreciate or properly evaluate the totality of the evidence on record and find there was no land board;
 - c. The learned Magistrate erred in failing to appreciate that there was no contract between the parties herein for failure to comply with the provisions of section 3(3) of the *Contract Act* and



had no jurisdiction to entertain the matter and or make any orders as the alleged contract was unenforceable in law;

- d. The learned Magistrate Failing to find that the suit premises known as Ikinu/Githunguri/3860 has been subdivided into different parcels of land and has since been sold and that the decree issued has been overtaken by events;
 - e. The learned Magistrate erred in law in disregarding and or failing to appreciate that the appellant had lodged an appeal in the ELC No 39 of 2017 which is still pending and therefore made wrong conclusions and findings;
 - f. The learned Magistrate erred in law and failing to consider all the materials that were placed before him in the case proceedings thus violating the appellants;
20. The appellant sought orders as follows;
- a. The appeal be allowed
 - b. The judgement dated the December 20, 2018 be set aside
 - c. Costs of the appeal and the case in the lower court be awarded to the appellant.
21. In exercise of my duty as the first appellate court I shall now determine the grounds as set out above.
22. It was submitted on behalf of the appellant that though the case proceeded *ex parte* there was sufficient material on record to sustain the appellants case. The respondents think otherwise.
23. I have perused the record and find that on the 8/12/17 the plaintiff advocates representative fixed the hearing date for 25/1/18 in the registry in the absence of the appellant. I have seen the affidavit of service sworn by one Joel Ndunda Mutala on the December 21, 2017 together with a hearing notice addressed to the firm of Macharia Kahonge & Co Advocates notifying the said advocate of the hearing fixed for the 25/1/2018. The said notice is acknowledged by the said firm as received on the 20/12/17 at 2.34 pm. I therefore find that the appellant was duly served.
24. The hon Magistrate found the reasons advanced by the appellant unconvincing and dismissed the application to set aside. I find no grounds brought before this court to warrant the setting aside of the discretion exercised by the hon Magistrate. The appellant and his advocate were dilatory in attending court and i find the hon Magistrate exercise his discretion judiciously. I find that the appellant squandered his right to be heard and has himself to blame.
25. Ground 2 – is there an enforceable contract between the parties? The appellant submits that there is no dispute that the appellant and the 1st respondent entered into a transaction with the intention of selling and buying $\frac{1}{4}$ of an acre. The intention is contained in a commitment letter dated the 6/8/2016. It is his case that there was no contract between the parties on account that the commitment letter fell short of a contract as contemplated under section 3(3) of the *Contract Act* because of want of a witness. He also raises the issue of two commitment letters dated the same date and contends that the letter exhibited by the respondents was not authentic. He relied on the case of *Daudi Ledama Morintat Vs Mary Christine Karie & 2 Others* (2017) eKLR; *Maisha Investment Limited Vs Mohamed Hassanali Alimohamed Janmohammed & Anor* (2019) eKLR; *John Michael Wanjao Vs Alubala Abenayo Andambi* (2011) eKLR.
26. The respondents on the other hand, submitted in the positive and stated that a contract should have 3 elements; an offer, acceptance and consideration. The respondents state that the appellant made an offer; the offer was accepted and paid in full in the sum of Kshs 2 million as follows;



- a. 6/8/2016 – Kshs 300,000/-
 - b. October 22, 2016 - Kshs 700,000/-
 - c. 4/11/2016 - Kshs 500,000/-
 - d. 22/3/17 - Kshs 500,000/-
- Total Kshs 2,000,000/-
27. In addition the respondent submitted that both parties executed the commitment letter; the appellant by accepting the purchase price and putting the respondents in possession; the respondents by paying the consideration. The respondents have urged the court to hold that there was a valid agreement between the parties and that the doctrine of constructive trust and proprietary estoppel is applicable.
28. The hon Magistrate found that there indeed was valid contract based on the uncontroverted evidence laid before him.
29. I have perused the evidence on record and find that indeed there is a letter dated 6/8/2016 which states as follows;

“ Peter Magothe Kiige

PO Box xxxx-00900

KIAMBU.

Tel: 0723 xxxxxx

Email: [Particulars Withheld]

August 6, 2016

Patrick Waweru Mwangi

PO Box xxxx -00900 KIAMBU

Tel: 0722 776xxxx

Email: Mwangipatrick7xx@gmail.com

RE: COMMITMENT FOR THE SALE OF ¼ OF AN ACRE OF PARCEL NO. IKINU/GITHUNGURI/3860

I Peter Magothe Kiige Of Po Box xxxx-00900 KIAMBU ID NO. 2284xxxxx and a resident of Githaithi Village, Kiambu County do admit that today 6th Aug 2016 have received Kshs 300,000/- (Three Hundred Thousand) from Mr Patrick Waweru Mwangi Of Po Box xxxx -00900 KIAMBU ID NO. 877xxxx the being a deposit for the slae of ¼ (quarter) of an acre from parcel no Ikinu/Githunguri/3860.

The total sale consideration is Kshs 2,000,000/- (ie two million shilling) and the balance will be paid as per the sale agreement to be drafted later.

The land is being sold with the following considerations.

1. Mr Patrick Waweru Mwanig can access and utilize the said piece of land after paying Kshs 1,000,000/- (one million) being part of the cost of the land.
2. Access road of 6m (i.e six meters) to be provided by the seller Mr Peter Magothe Kiige.



3. The area occupied by the Great North Road which passes through Parcel No Ikinu/Githunguri/1461 is part of the consideration while providing access road to the parcel being hived off from Parcel No Ikinu/Githunguri/3860.

4. Road and riparian reserves are not part of the title as per the Land Act.

Seller: Peter Magothe Kiige Purchaser: Patrick Waweru Mwangi

ID NO 22841xxxx ID NO 8779xxxx

Sign: Sign:

30. The second letter of even date stated as follows;

“PETER MAGOTHE KIIGE

PO Box xxxx -00900

KIAMBU.

Tel: 0723 xxxxxx

Email: [Particulars Withheld]

August 6, 2016

Patrick Waweru Mwangi

PO Box xxxx -00900 KIAMBU

Tel: 0722 77xxxx

Email: [Particulars Withheld]

RE: Commitment For The Sale Of Land Located Next To St Teresia Preparatory School Ngemwa

I hereby admit having received deposit Kshs 300,000/- (Three Hundred Thousand) on August 6, 2016 from Patrick Waweru Mwangi towards the sale of land located next to the school. The balance Kshs 1,700,000/- to be cleared as per the sale agreement to be drafted later after this commitment.

The land is being sold (measuring quarter of an Acre inclusive of riparian) as per the beacons on the ground and the mutation to be provided to Patrick Waweru Mwangi. The buyer will occupy the land as per the sale agreement.

The land is registered in the name of the seller Peter Magothe Kiige ID No 228xxxx.

Seller: Peter Magothe Kiige Purchaser: Patrick Waweru Mwangi

ID NO 22841xxx ID NO 8779xxxx

Sign: Sign:

31. At para 5 of the defendant states that “and avers that he only offered through an offer letter dated the 6/8/2016 to sell a quarter acre of the suit Property.” This is the letter placed before the hon court. This letter was not expressed to be subject to contract. The appellant states in para 6 of the defence that he had agreed to enter into a binding agreement with the respondents but they pulled out of the contract. The conduct of the parties shows otherwise. There is no evidence that the respondents pulled out. The



- offer was not an idle offer. It was accepted and acted upon by both parties. I find that there was the meeting of minds of the parties as to their intention. Their intention being to sell and buy the suit land.
32. How then does the appellant explain the receipt of Kshs 2 Million? Para 20 of the defense contains an admission of the deposit and the further sums paid towards the restoration of the suit premises. This shows that the appellant received monies from the respondents. In para 21 he is offering to refund some of the monies.
 33. The court finds that the respondents have demonstrated that they paid the full purchase price for the land; were put in possession; have developed the land and what they are waiting for is the transfer of the same by the appellant.
 34. As to whether the trial had been overtaken by events, there was no evidence placed before the trial court that the suit land had been subdivided and sold. The hon court cannot be faulted in making the finding that it did in that regard.
 35. It is also evident from the record that there was an injunction barring the appellant from disposing the suit land pending the hearing and determination of the suit. If it will be found to be true then the doctrine of *lis pendens* will be applicable. I do not wish to say more.
 36. The claim by the appellant that there was no land control board in my view is mischievous. He was equally obligated to seek and obtain the Land control board consent but now he wishes to benefit from the same to evade his obligations from the contract.
 37. With respect to the two commitment letters above stated, I find that the appellant has not proved any fraud on the part of the respondents as to the alleged forgery if any. Both letters were executed by both parties and no expert evidence was led to show the court which of the letters dated the same date is a forgery and which one is genuine.
 38. In the end I find that arising from the totality of the evidence laid before the court, this appeal is not merited. I find no grounds to disturb the judgment of the lower court.
 39. I order the appellant to pay costs of this appeal as well as the suit in the lower Court.
 40. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 15TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Macharia for appellant

Kangogo for 1st and 2nd respondents

Court Assistant – Phyllis Mwangi

