



**Kaittany v Mwangi (Environment & Land Case 431 of 2017)
[2021] KEELRC 2333 (KLR) (21 May 2021) (Judgment)**

Mary Wamaita Kaittany v Joseph Muturi Mwangi [2021] eKLR

Neutral citation: [2021] KEELRC 2333 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 431 OF 2017**

OA ANGOTE, J

MAY 21, 2021

BETWEEN

MARY WAMAITHA KAITTANY PLAINTIFF

AND

JOSEPH MUTURI MWANGI DEFENDANT

JUDGMENT

1. In the Complaint dated 23rd October, 2017, the Plaintiff averred that the Defendant entered into a loan agreement on 17th November, 2016 with him in which the Defendant advanced him Kshs. 8,000,000 to jump start a business that had stalled.
2. According to the Plaintiff, he was to repay the advanced amount by 25th November, 2016; that Clause 1(c) provides that in case of default, the interest rate shall be varied upwards to 30% per annum until payment in full while Clause 2 provides that the Plaintiff is to execute the transfer of the title document of land known as Mavoko Town Block 3/1183 (the suit property) in case of default.
3. The Plaintiff averred in the Complaint that his business did not go as planned and was unable to pay the principal amount of Kshs. 8,000,000 with interest amounting to Kshs. 9,600,000 within the stipulated time and that the Defendant opted to apply default Clause 2 of the agreement and proceeded to register the suit property in his name.
4. It has been averred that the Defendant is aware that the Plaintiff provided a title document in the mistaken belief that it was the undeveloped property on the ground, being Mavoko Town Block 3/1213 and that the Defendant has declined to give him more time to repay the borrowed amount.
5. In the prayers, the Plaintiff is seeking for the following orders:



- a. A declaration that property known as Mavoko Town Block 3/1183 was wrongfully transferred to the Defendant;
 - b. An order that the Defendant does execute a transfer in favour of the Plaintiff in regard to property known as Mavoko Town Block 3/1183;
 - c. The court be pleased to grant a permanent injunction restraining the Defendant/Respondent whether by himself, his agents and/or servants from dealing, interfering, alienating or otherwise disposing of property known as Mavoko Town Block 3/1183;
 - d. The court does conditionally or unconditionally extend the repayment period of the monies advanced to the Plaintiff.
 - e. General damages.
 - f. Costs of this suit.
 - g. Any other relief the court deems fit to ward.
6. In his Statement of Defence and Counter-claim, the Defendant averred that at no time did the Plaintiff raise any objection in regard to Clauses 1(c) and 2 of the Loan Agreement that they signed; that the Plaintiff is bound by the terms of the Agreement and that even after breaching the terms of the Agreement, he extended time within which the Plaintiff was to pay the borrowed money.
 7. The Defendant averred in his Defence that the allegations by the Plaintiff that the Title Deed in respect of Mavoko Town Block 3/1183 was erroneously surrendered as security of the loan instead of land parcel number Mavoko Town Block 3/1213 is an afterthought, fraudulent and mischievous.
 8. In the Counter-claim, the Defendant averred that the sum of Kshs. 9,600,000 that the Defendant was to pay him was due on or before 25th November, 2016; that on 17th November, 2016, the Plaintiff surrendered to him the original Title Deed in respect of the suit property as security for the advanced amount and that he invoked Clause 2 of the Loan Agreement and had the suit property registered in his name.
 9. The Defendant has prayed for the following prayers in his Counter-claim:
 - i. A declaration that the Plaintiff is in breach of the loan agreement dated 17th November, 2016 and that the Defendant was entitled to cause transfer of land parcel known as Mavoko Town Block 3/1183 in his favour.
 - ii. An order directing the Plaintiff to refund the sum of Kenya shillings nine million six hundred thousand (9,600,000).
 - iii. Special damages in the sum of Kshs. 230,000 as particularized in paragraph 26 above.
 - iv. Costs of this suit.
 - v. Interest on (ii) and (iv) above at court rates.
 10. In her evidence, the Plaintiff, PW1, stated that the Defendant was known to her in the year 2013 and that the Defendant gave her a friendly loan of Kshs. 8,000,000 whereupon they signed an Agreement dated 17th December, 2016.
 11. It was the evidence of PW1 that pursuant to the loan agreement, she handed to their common advocate the original Title Deed for land known as Mavoko Town Block 3/1183 (the suit property) and that



in addition, she handed to the advocate the duly signed Transfer and the Application for the consent of the Land Control Board.

12. According to PW1, she handed to the advocate the original Title Deed for the suit property by error; that she intended to give the advocate the Title Deed for Mavoko Town Block 3/1213 and that she has never attended the Land Control Board sessions.
13. It was the evidence of PW1 that she was willing to give to the Plaintiff parcels number 1213 or 1214; that she has put up her house on parcel number 1183 (the suit property) and that the suit property is valued at Kshs. 30,000,000.
14. On his part, the Defendant, DW1, stated that he loaned to the Plaintiff Kshs. 8,000,000 after signing the loan agreement and that as security, the Plaintiff handed in the original Title Deed, a duly signed Transfer document and a signed application for the consent of the Board.
15. It was the evidence of DW1 that Clause 2 of the Agreement provided that in the event the Plaintiff defaulted in repaying the loan, he would proceed and cause the transfer of the suit property in his name; that the Plaintiff understood the terms of the agreement and that he had the suit property transferred in his name as per the Agreement.
16. In his submissions, the Plaintiff's advocate submitted that in her emails, the Plaintiff tried to make the Defendant understand that there was a mistake in the drafting of the contract; that the Plaintiff's intention was to give the Defendant the undeveloped property and not the suit property and that the Defendant is willing to give the Plaintiff the adjacent properties.
17. Counsel submitted that the rectification of the error in the Agreement will not occasion injustice to the Defendant because the Plaintiff has always been ready to transfer the undeveloped plots. Counsel relied on the case of *Kiplangat Arap Biator vs. Esther Tala Cheyegon (2016) eKLR*.
18. On his part, the Defendant's advocate submitted that parties are bound by the terms of their contract; that the Agreement was made by parties without any coercion, undue influence or fraud and that it was the Defendant's advocate who prepared the Agreement.
19. Counsel submitted that pursuant to Section 17 of the Land Control Act, it is not mandatory for a party to attend and seek the consent of the Board; that the issue of the Plaintiff not presenting herself before the Board was not pleaded in the Plaintiff and that the suit lacks merit.
20. It is not in dispute that on 17th November, 2016, the Plaintiff entered into a "Loan Agreement" (the Agreement) with the Defendant. The Agreement shows that the Plaintiff borrowed Kshs. 8,000,000 from the Defendant. The Agreement provided as follows:

" 1.

- (a) The Repayment amount shall be the sum of Kenya Shillings 9,600,000 taking into account the aspect of interest.
- (b) The Repayment Amount shall be credited to the Lender on or before 25th day of November, 2016.
- (c) The Borrower covenants with the Lender that should she default in payment of the principal amount together with the interest stated (Repayment Amount) herein, the interest rate shall be varied upwards to 30% per year until payment is made in full."



21. The Agreement of 17th November, 2016 further provides that the borrower has deposited the original Title number Mavoko Town Block 3/1183 to hold as security for the loan advanced to her.
22. The Agreement further provided that in case of default of payment of the principal amount together with interest, the borrower shall execute the transfer of the property in the Lender's name and the Lender shall sell the property and recover the amount equal to the repayment amount and the surplus thereof shall be transferred to the Borrower.
23. The Plaintiff signed the Agreement of 17th November, 2016, the Transfer document and the Application for the consent of the Land Control Board consent voluntarily.
24. Indeed, the Plaintiff informed this court that she was engaged in the business of selling land. The Plaintiff therefore was aware about the Title Deed that she handed over to the Plaintiff, which title was to be held as security, while signing the Agreement. The issue of having handed in the Title Deed for Mavoko Town Block 3/1183 in error does not arise.
25. Furthermore, the Plaintiff voluntarily signed the Application for the consent of the Land Control Board. Having signed the said Application form, the consent of the Board could still be issued her absence notwithstanding. The reading of Section 17 of the Land Control Board shows that unless the Board requires one's attendance, the consent of the Board may be given in the absence of the Transferor.
26. It is trite law that courts cannot re-write contracts. As was held in the case of *Eslon Plastics (K) Limited vs. National Water Conservation and Pipeline Corporation (2014) eKLR*, it is not the function of the court to re-write contracts for the parties. Parties are bound by and should be committed to the terms of their contract.
27. This is the same position that the Court of Appeal took in the case of *National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another (2001) eKLR* where it was held as follows:

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved...”
28. The Plaintiff did not plead or prove fraud, coercion or undue influence in the signing of the Loan Agreement. Indeed, the Plaintiff did not convince this court that he handed in the Title Deed for the suit property in error, and that the said Title Deed should be substituted by some other Title Deeds.
29. In any event, why would the Plaintiff hand over to the Defendant Title Deeds in respect of parcels of land which were not subject of the Agreement? And would it not have been legal, nay easier, for the Plaintiff to sell the said properties and hand over to the Defendant the money that is due and owing?
30. Considering that the suit property was lawfully transferred to the Defendant, the Defendant is entitled to sell the suit property to third parties and recover his money. That is what was agreed upon as between the parties. This court can do nothing other than enforcing the terms of the said Agreement.
31. For those reasons, I find that the Plaintiff has not proved her case on a balance of probabilities. Considering that the suit property is already registered in the name of the Defendant, I shall not grant the prayers sought in the Counter-claim, save to reiterate that the Defendant is at liberty to sell the suit property with a view of recovering the principal amount and interest. The Plaintiff is at liberty to purchase the said land.
32. Consequently, this court makes the following orders:



- a. The Plaintiff's suit is dismissed with costs.
- b. The prayers in the Counter-claim are declined with no order as to costs.
- c. The Defendant is at liberty to sell parcel of land known as Mavoko Town Block 3/1183 and recover the money that is due and owing to him and refund the balance thereof to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 21ST DAY OF MAY, 2021.

O. A. ANGOTE

JUDGE

