



REPUBLIC OF KENYA



KENYA LAW
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**Kibera v Mbaka (Civil Appeal E075 of 2024)
[2025] KEHC 322 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E075 OF 2024
EM MURIITHI, J
JANUARY 23, 2025**

BETWEEN

SILAS MURIUNGI KIBERA APPELLANT

AND

IGNATIUS GITONGA MBAKA RESPONDENT

*(Being an appeal from the Judgment of Hon. Habrovinah Nyamweya
(RM) delivered on 9/5/2024 at Meru SCCCOM/ E120 of 2024)*

JUDGMENT

Introduction

1. By a statement of claim dated 7/3/2024, the Appellant herein, the Claimant in the trial court, sued the Respondent herein seeking the sum of Ksh.750,000, being refund of the deposit for the purchase of L.R No. Nkuene/Mitunguu/2437 measuring 60 ft by 80 ft.
2. The Respondent, in his undated response to the claim averred that the transfer of the land was frustrated by the Appellant's failure to clear the loan.
3. Upon full hearing of the claim, the trial court delivered judgment as follows:

“The Respondent counter claims for 1.5 million as the Claimant breached the agreement by not paying the full amount of Ksh 650,000/=. This court after perusing the evidence produced finds that the amount paid to Times U Sacco by the Claimant to be 635,165.35/=. The Claimant argued that the Respondent was not the owner of the land title no Nkuene/Mitunguu/2437. The Respondent has proved through a search dated 24th April 2024 that the said land is in the ownership of Ignatius Gitonga Mbaka who is the Respondent herein...In few of the agreement dated 20th December 2016 the Claimant breached the agreement by not making the full payment of Kshs.650,000/=. This court therefore finds



that the Claimant did not fully comply with the agreement dated 20th December 2016. Consequently, the court orders as follows:

1. That this claim is dismissed
2. That the counter-claim by the Respondent is valid and the Claimant is to pay Kshs 1,000,000 as liquidated damages to the Respondent as per the agreement dated 20th December 2016.
3. The Claimant is granted 30 days stay of execution.”

The Appeal

4. On appeal, the Appellant filed his memorandum of appeal dated 6/6/2024 raising 7 grounds as follows:
 1. The learned magistrate erred on a point of law in making a finding that the Appellant paid the respondent kshs 636,165.35 out of the purchase price of kshs 750,000 through the Sacco account.
 2. The learned magistrate erred on a point of law and fact by making a finding that the appellant breached the sale agreement by not paying the whole purchase price and further erred in failing to test as to whether the respondent performed his obligations as were set in the sale agreement.
 3. The learned magistrate erred on a point of law and fact by relying in her judgment on issues raised by the respondent in his application filed in court on 25th April 2024 and after the court had given a date for judgment and without giving the appellant an opportunity to respond to the said application and without according him an opportunity to address the said issues.
 4. The learned magistrate erred on a point of law by awarding liquidated damages for breach of contract when no evidence was availed for such breach and when no claim was specifically pleaded in the counterclaim by the respondent for such an award or at all.
 5. That the judgment of the honourable magistrate was against the weight of the evidence that was placed before her.
 6. The learned magistrate erred in dismissing the appellants claim and further failed to take into account the appellants evidence and documents.
 7. That without prejudice, the learned magistrate failed to take into account that the appellant had in performance of the agreement paid over Kshs 750,000 for Land Parcel Number Nkuene/Mitunguu/2437 which was not transferred to him as per the sale agreement yet the court awarded the respondent a sum of Kshs 1,000,000 as damages which award was without prejudice unconscionable and unmerited.

Duty of the Court

5. This being the first appellate court, it has duty to reevaluate the evidence and come up with its own independent finding bearing in mind that unlike the trial Court it did not have the benefit of taking evidence firsthand and observing the demeanor of the witnesses. The principles governing the first appellate court were set out *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the Court stated as follows:

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court



must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

Evidence

6. The Appellant herein testified that, “I live in Nkubu. I am a businessman. Ignatius has been a friend. The land that he was to transfer to me was sold to another person. I wish to adopt all the documents that I have filed.”
7. The witness was not cross examined.
8. The Respondent testified that, “He has paid me 635,162 and cash amount he has given me is 100,000/=. I live in the land.”
9. On re-examination, he stated that, “I confirm that I have been paid Ksh. 735,162/=. I have not sold the land. No I am not aware of the sale of the land to another person. I am not aware that the land was advertised to sale in the newspaper.”

Submissions

10. The Appellant faults the trial court for admitting and relying on an official search which was filed after the case had been closed and after a judgment date had been given to the parties. He urges that since the Respondent sold the land on 28/2/2017, on the date when he was supposed to fully perform his obligation on the sale agreement, the trial court’s finding that he breached the agreement was erroneous. He faults the trial court for awarding Ksh. 1,000,000 as liquidated damages yet the Respondent did not prove that he had performed his part of the agreement. He urges that he proved his claim against the Respondent and prays for the appeal to be allowed with costs.
11. The Respondent insists that the transfer failed because of the Appellant’s breach of the agreement.

Analysis and Determination

12. The gist of this appeal, as can be deciphered from the 7 grounds of appeal is whether the Appellant proved his case on a balance of probabilities.
13. Clauses 2, 3, 4 and 8 of the sale agreement dated 20/12/2016, the subject of this case, provide that:
14. “The parties have mutually agreed at a consideration of Kshs. 750,000/= (Seven Hundred And Fifty Thousand Shillings Only) which amount shall be paid as hereinunder:-
 1. Kshs. 100,000/= (One Hundred Thousand Shillings) shall be paid on execution of this agreement which amount the vendor acknowledges receipt.
 2. The remaining balance of Kshs. 650,000/= (Six Hundred And Fifty Thousand Shillings) shall be paid directly to Times U Sacco Society Ltd to liquidate a pending loan over the property before 28-2-2017.
 3. The vendor has already excised the sold portion from the parent land and the purchaser is at liberty to take up vacant possession immediately on execution of this agreement.
 4. The vendor shall ensure that all the Times-U-Loan is cleared by 28-2-2017 to have this transaction completed.



5. Any party that breaches any term and/or clause of this agreement shall pay the innocent party Kshs. 1,500,000/= (One Million Five Hundred Thousand Shillings) as liquidated damages.”
15. The Appellant in his testimony accused the Respondent of selling the land in question to another person, which accusation the Respondent vehemently refuted.
16. The parties herein are in agreement that the total sum of money paid by the Appellant to the Respondent was Ksh. 735,162. The Respondent admitted in his testimony that, “He has paid me 635,162 and cash amount he has given me is 100,000/=.” He reiterated on re-examination that; “I confirm that I have been paid Ksh. 735,162/=. No I am not aware of the sale of the land to another person.”
17. The record is clear that the Appellant paid to the Respondent Ksh. 100,000 in cash and deposited Ksh. 635,165.35 to the Respondent’s Times U account bringing the aggregate amount paid to Ksh. 735,165.35. According to the bank statements produced by the Appellant, the last payment of Ksh. 23,879 was made to Times U Sacco Society Limited on 20/9/2017, whereas the sale agreement provided in express terms that the loan was to be cleared on or before 28/2/2017. The transfer of the land to the Appellant was intertwined with his fulfillment of obligation under the agreement. The Appellant has unsuccessfully tried to blame his non-compliance with the agreement to the Respondent’s alleged sale of the land to another person. The Appellant faults the trial court for admitting and relying on an official search produced by the Respondent showing that the land in question was indeed his, without producing any evidence to the contrary. The Appellant is not per se challenging the authenticity of the official search, and therefore its late production in court is immaterial.
18. The court finds that the Appellant’s blatant failure to perform his part of the bargain on an alleged sale of the land to a 3rd party, was breach of the contract. Even if the Respondent had indeed sold the land to another party on 28/2/2017 as alluded to by the Appellant, the Appellant would have been expected to faithfully make payments as agreed under the agreement and then, thereafter, come to court, with clean hands, to pursue damages.
19. This court finds that the Appellant indeed breached the agreement when he made belated payments to the Sacco in clear contravention of the terms of the agreement. As the party in breach who frustrated the performance of the contract by the Respondent, he was mandated to pay the Respondent the agreed liquidated damages of Ksh.1,500,000 for breach of contract.
20. This court finds that the Appellant did not prove his case against the Respondent on a balance of probabilities, and the subsequent dismissal thereof was warranted and supported by the evidence on record.
21. This court does not find any misapprehension of the evidence on record by the trial court to warrant its interference.

Orders

22. Accordingly, for the reasons set out above, this court finds the appeal is without merit and it is dismissed.
23. The appellant shall pay to the Respondents the costs of the appeal.
Orders accordingly.

DATED AND DELIVERED THIS 23RD DAY OF JANUARY 2025.



EDWARD M. MURIITHI

JUDGE

Appearances:

Mrs. Ntaragwi Advocate for the Appellant.

Ignatius Gitonga Mbaka – Respondent.

