



**Muturi v Gathara & another (Commercial Appeal E197 of 2023)
[2024] KEHC 9114 (KLR) (Commercial and Tax) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E197 OF 2023
JWW MONG'ARE, J
JULY 25, 2024**

BETWEEN

GLADYS NJERI MUTURI APPELLANT

AND

SAMUEL GITAHU GATHARA 1ST RESPONDENT

JOSEPH KAHUHO 2ND RESPONDENT

(Being an appeal from the Judgement of Hon .G. M. Gitonga, SPM dated 4th August 2023 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 2289 of 2020)

JUDGMENT

Introduction And Background

1. This is an appeal by the Appellant against the judgment of the subordinate court dated 4th August 2023 where the said court dismissed the Appellant's suit and allowed the Respondents' counterclaim by inter alia awarding them general damages for breach of contract at a global sum of Kshs. 500,000.00/=.
2. The facts and background leading to the Appellant filing suit in the subordinate court are largely common cause and can be gleaned from the record of appeal as follows. At the material time, the Appellant was the registered/legal owner of the property known as Plot No.H31 measuring 0.2.Ha. and situated at Dandora Light Industrial Area (Block G) together with improvements thereon ("the Plot").
3. The Appellant stated that she inherited the Plot from her father's estate pursuant to a Certificate of Confirmation of Grant issued on 13th July 2005 in Milimani High Court Succession Cause No. 2485 of 2003 and she offered and the Defendants accepted to purchase the Plot as per the agreement dated 19th June 2014("the Sale Agreement") and for a consideration of Kshs.1,750,000.00/=.



4. Some of the salient terms of the Sale Agreement were that the Respondents were to pay a deposit of Kshs.1,000,000.00/= and the balance of Kshs.750,000.00/= was to be paid within 90 days from 19th June 2014 and that in the event of default by either party, the innocent party was entitled to rescind the Sale Agreement and claim damages equivalent of the value of the purchase price being a sum of Kshs.1,750,000.00/=.
5. The Respondents paid the deposit but failed to pay the balance of the purchase price which prompted the Appellant to file suit in the subordinate court and she accused the Appellant of breach of contract, loss and damages for their failure to complete the transaction.
6. The Appellant sought inter alia a declaration that the Sale Agreement had been rescinded by the Appellant on account of breach by the Respondents, an order evicting the Respondents, their agents, representatives or whoever acting on their behalf from the Plot, a sum of Kshs.1,750,000.00/= as damages for breach of contract, Rent arrears at Kshs.720,000.00/= (Kshs.10,000.00/=) per month *72 months as at June, 2020 from 19th June, 2014) and Mesne profits.
7. In response, the Respondents stated that they agreed to purchase the Plot as they had knowledge that the Appellant had acquired the same through transmission as per the certificate of confirmation of grant issued on 13th July 2005 and that they were not aware of the revocation of confirmation of grant as at the time of the said purchase. They stated that they were ready and willing to pay the balance of the purchase price but they became hesitant when they learnt of the pending revocation of the grant.
8. The Respondents asserted that it was the Appellant who was in breach of the Sale Agreement as she did not possess title to the Plot until the revocation of grant proceedings were determined which as at the date of the filing the defence, was still pending determination. They accused the Appellant of acting fraudulently by concealing relevant information from them and selling the Plot whose ownership was disputed and which matter she was well aware was pending determination in court.
9. The Respondents contended that in as much as the parties had a landlord-tenant relationship, the same came to an end when the parties entered into the Sale Agreement and as such, the Appellant could not claim any rent from them. The Respondents thus sought a declaration the Plaintiff was in breach of the Sale Agreement, an order of specific performance directing her to perform and fulfil her obligations as per the terms of the Sale Agreement, a declaration that the Respondents are bonafide purchasers for value of the Plot and the possession be given to them, General damages for breach of contract and refund of all money paid to the Appellant.
10. The matter was set down for hearing where the Appellant testified on her own behalf (PW 1) and called the caretaker of the Plot, John Mugu Sei (PW 2) whereas the Respondents testified on their own behalf as DW 1 and DW 2 respectively.
11. At the conclusion of the hearing, the parties were directed to file written submissions and thereafter, the learned magistrate rendered the judgment. He identified three issues for determination; whether the Sale Agreement was valid and enforceable, whether the Appellant was entitled to the reliefs sought and whether the Respondents' counterclaim was statute barred and whether they were entitled to the reliefs sought in the said counterclaim.
12. The subordinate court's view in light of the pending succession case was that the Appellant ought to have waited for its determination which would have defined the status of the Appellant as an Objector in relation to the Plot. That the Appellant could not propose to rescind the Sale Agreement knowing fully well that Plot was not sold and that the Respondents were hesitant to pay the balance of the purchase price in light of the objection lodged in this court in the succession cause.



13. The subordinate court stated that it was fully aware that the Appellant's evidence during the hearing thereof was that the Plot was sold on a "as where is" basis but that she did not give evidence that the Respondents were aware of anything attaching to the Plot. That in the absence of such evidence, the logical reason was that they were not aware that the Appellant had not passed title to them upon completion and that no wonder they declined to pay the balance of the purchase price on this realization.
14. On this account, the subordinate court found that the Appellant had not had significant evidence to demonstrate that she was deserving of the reliefs sought, particularly when the succession case was still pending. The subordinate court thus dismissed the Appellant's suit and found in favour of the Respondents' counterclaim as the Appellant had breached the terms of the Sale Agreement and they were entitled to decline to remit the final purchase price of Kshs.750,000.00/=.
15. The Respondents were thus awarded the refund of the purchase price paid and general damages of Kshs.500,000.00/=. However, the learned Magistrate disclaimed that since the Respondents had been occupying the Plot without paying rent, the awarded sum was to be paid to them less the accumulated unpaid rent.
16. As stated, it is the above findings by the subordinate court that has precipitated the instant appeal that is grounded in the Appellant's memorandum of appeal dated 25th August 2023. The appeal has been canvassed by way of written submissions with the parties advancing their respective positions I have already highlighted above but which I will make relevant references to in my analysis and determination below.

Analysis And Determination

17. As submitted by the Appellant, as a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand (See *Selle v. Associated Motor Boat Co.* [1968] EA 123). The Appellant has condensed the 12 grounds of appeal to six issues for determination in its submissions as follows which I will deal with sequentially:-
 - a. Whether the learned magistrate erred in law and in facts by failing to find that the Respondents had breached the terms of the agreement for sale of land dated 19th June 2014?
 - b. Whether learned magistrate erred in law by failing to find that the Respondents' counter-claim dated 1st October 2020 and filed in Court on 2nd October 2020 was bad in law, incompetent, non-starter and statute barred
 - c. Whether the learned magistrate erred in law by basing his judgment on a succession dispute pending before the High Court?
 - d. Whether the learned magistrate erred in law by awarding an award for general damages for breach of contract to the Respondents?
 - e. If the answer to (a) above is in the affirmative, what reliefs is the Appellant entitled to?
 - f. Who should bear costs of this appeal and costs before the lower Court?



Whether the learned magistrate erred in law and in facts by failing to find that the Respondents had breached the terms of the agreement for sale of land dated 19th June 2014?

18. The Appellant submits that the Respondents breached the terms of the Sale Agreement by not paying the balance of the purchase price within 90 days of the date of the Agreement. However, the subordinate court held that it was the Appellant who breached the Sale Agreement by failing to inform the Respondents that the Plot was encumbered by the succession proceedings and that the Respondents were entitled to hesitate making payment of the final purchase price as it was not clear whether the Appellant could have passed title to them upon completion.
19. I have gone through the record and note that indeed as per the Sale Agreement, the Respondents were supposed to pay the balance of the purchase price of Kshs.750,000.00/=. This, they did not do, citing inter alia non-disclosure by the Appellant of the pending revocation proceedings in the succession court and fraud.
20. Whereas the Respondents state that they were unaware of the revocation/objection proceedings at the succession court, I note that the Appellant produced affidavits from the said court sworn by the Respondents and in respect of what looks like responses to the revocation/objection proceedings. I am therefore not convinced that the Respondents were unaware of the revocation proceedings or that they were so blindsided about the happenings of the succession proceedings as they claim.
21. In any case, assuming that they were unaware, it is a fundamental principle that the effect of such misrepresentation is to make a contract voidable and not void. This means that the contract is valid unless it is set aside by the representee. Upon discovering the misrepresentation, the representee may elect to affirm or rescind the contract (see *Cheshire, Fifoot & Furmston's Law of Contract*, 14th Edition at page 311). In its counterclaim, the Respondents sought to affirm rather than rescind the Sale Agreement which fortifies the position that they were always aware of the position of the Plot in respect of the succession proceedings.
22. It was also not correct for the Respondents to state that the Appellant had no title to the Plot at the time the parties entered into the Sale Agreement. Until the succession court held otherwise, the Appellant remained the registered and legal owner of the Plot as was also admitted by the Respondents in their defence she therefore had the proprietary rights to transfer the title to the Respondents at the time of the parties entering into the Sale Agreement.
23. It is therefore my finding that in so far as the Respondents admittedly failed to pay the balance of the purchase price within the 90 days as provided for in the Sale Agreement, they were in obvious breach. There was no evidence presented of misrepresentation or material non-disclosure of the succession proceedings. If anything, the Appellant produced evidence that the Respondents knew and were active participants in the said proceedings and they were thus not entitled to rescind the Sale Agreement. This ground of appeal by the Appellant succeeds.

Whether learned magistrate erred in law by failing to find that the Respondents' counter-claim dated 1st October 2020 and filed in Court on 2nd October 2020 was bad in law, incompetent, non-starter and statute barred

24. The Appellant submits that the learned magistrate erred in failing to find that the Respondents' counter-claim dated 1st October 2020 was statute barred for being filed on 2nd October 2020 without leave of Court.



25. That the cause of action having arisen on 19th June 2014, both the Plaintiff and counter-claim ought to have been filed within a period of six (6) years i.e on or before 19th June 2020. Therefore, she submits that the trial Court erred in law by failing to find the Respondents' claim could not be sustained in law for being filed after the expiry of six years. In response, the Respondents submit that this issue was never raised by the Appellant in their pleadings and was only raised in their submissions.
26. Going through the record I am in agreement that the Appellant indeed never raised the issue in its defence to the counterclaim or list of issues and the same was only raised in her submissions. It is trite law that parties are bound by their pleadings, and issues flow from them (see *IEBC vs Stephen Mutinda Mule & 3 others* (2014) eKLR, *Raila Odinga vs IEBC & 2 others* (2017) eKLR). Order 2 Rule 4 of the *Civil Procedure Rules*, 2010 further provides as follows:-

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- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of Limitation or any fact showing illegality –
- (a) which he alleges makes any claim or defence of the opposite party not maintainable;
 - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
 - (c) which raised issues of fact not arising out of the preceding pleading.
27. From the above, it is clear that a party relying on limitation should specifically plead it. The Appellant, having failed to raise the same in her pleadings ambushed the Respondents as they were denied an opportunity to present their position or plead such facts as are necessary to bring their claim within the exception of section 27 of the *Limitation of Actions Act*. As correctly stated by Gikonyo J. which position I also hold, in the case of *Kenya Orient Insurance Limited v Oraro & Company Advocates* ML HC Misc. Cause No. 701 of 2012 [2014] eKLR), the issue of Limitations is both a matter of law and fact and cannot be determined in limine or as a preliminary objection.
28. Parties must be heard; evidence must be adduced; the court has to evaluate the entire circumstances of the case and make a decision. It is a matter for the trial (see This is not what happened in this case and I find that the Appellant was estopped from raising the issue in its submissions and before this court. In any event, I am in agreement with the Respondents submissions that the issue of limitations in respect of issues of recovery of land is 12 years as per section 7 of the *Limitation of Actions Act* and not 6 years as contended by the Appellant. This ground of appeal fails.

Whether the learned magistrate erred in law by basing his judgment on a succession dispute pending before the High Court?

29. The Appellant submits that the learned magistrate erred in law in failing to find that the dispute before him was purely a civil/commercial dispute and not a family law dispute. That the dispute was purely on enforceability of the Sale Agreement and not an invitation to consider a pending family court dispute. She submits that the learned magistrate failed to appreciate that the dispute before him was a commercial in nature and thus the family aspect pending before the High Court had no relevance or bearing to interpretation and enforcement of the terms of the contract.



30. The Respondents do not agree with this argument for the reason that the subject matter is part of the properties disputed by the Objector in the succession case and that in the event the succession court decides to re-distribute the properties of the deceased and allocates the Plot to the Objector and her children because she resides in the said premises, they would not have capacity to transfer the Plot to herself or 3rd parties.
31. I am inclined to agree with the Appellant that the dispute before the subordinate court was a commercial/civil in nature and not a probate or land issue. This explains why the parties did not submit themselves to the jurisdiction of the Land court or the succession proceedings.
32. I agree with the Appellant that in urging her to await the determination of the succession proceedings before filing the suit, the learned magistrate was engaging in extraneous matters pending before a different court leading to a conclusion that was biased, speculative and erroneous. The subordinate court ought to have dealt with the issues that were before him based on the position of the parties at the time.
33. There was a valid Sale Agreement that the Appellant sought to enforce and it did not matter that there was a pending succession case on the subject property and the subordinate court did not have to await its outcome for it to make a decision on whether the Appellant was entitled to the reliefs sought.
34. Indeed, it was not proper for the trial magistrate to base his judgment on a pending succession while adjudicating a contractual dispute between the parties. I find therefore that the trial magistrate erred and failed to appreciate that the contractual dispute before him was distinct, separate and interdependent from the dispute pending at the succession court. This ground of appeal succeeds.

Whether the learned magistrate erred in law by awarding an award for general damages for breach of contract to the Respondents?

35. As stated in the introductory part, the subordinate court found that the Appellant had breached the Sale Agreement and thus awarded the Respondents general damages in the global sum of Kshs.500,000.00/=. The Appellant submits that it is trite law and indeed a well-established principle of law that general damages cannot be awarded for breach of contract and therefore, the learned magistrate erred in law and went beyond his jurisdiction by awarding the Respondents a sum of Kshs.500,000.00/= as general damages for breach of contract contrary to well settled legal principle on the same. I agree with this position.
36. Indeed, it is now settled that general damages are not awardable for breach of contract. (See *Provincial Insurance Co. EA Ltd v Mordechai Mwangi Nandwa*, (KSM Civil Appeal No 179 of 1995, *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR). The Court of Appeal and this court has always maintained that what is suffered or is believed to have been suffered, the damage that is to be compensated by way of damages, can only be known by the party and it is claimed in specific terms which has to be proved. Flowing from the above principles of law, the Respondents were not entitled to damages for breach of contractual obligations, having raised a specific claim for refund of all money paid to the Appellant. The trial court thus fell into error in awarding general damages to the Respondents and this award ought to be set aside.

If the answer to (a) above is in the affirmative, what reliefs is the Appellant entitled to?

37. Having established that the learned magistrate ought to have held the Respondents liable for breach of the Sale Agreement, I am in agreement with the Appellant's submission that she is entitled to the reliefs sought in her Complaint dated 15th June 2020, to the extent that a declaration ought to be issued that



the Sale Agreement had been rescinded by the Appellant on account of breach by the Respondents, that an order do issue to evict the Respondents, their agents, representatives or whoever acting on their behalf from the Plot, that a sum of Kshs.1,750,000.00/= as damages for breach of contract be awarded as provided for by Clause 8 of the Sale Agreement and that the Respondents pay rent arrears of Kshs.720,000.00/= (Kshs.10,000.00/=) per month x 72 months as at June, 2020 from 19th June, 2014.

38. However, I am satisfied that the prayer for mesne profits should not be allowed as it was not proved. Since the Appellant is largely successful in her appeal, I find that she also ought to be awarded costs of the both the suit and this appeal.

Conclusion And Disposition

39. To this end, I find that the decision of the subordinate court was in my view not well founded and order that the same is hereby set aside in its entirety and substituted with a decision of this court allowing the Appellant's suit to the extent shown above. The order granting for the Respondents' counterclaim in the said subordinate's court judgment is set aside.
40. The costs of this appeal are awarded to the Appellant.
41. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Njuguna for the Appellant.
2. Ms. Ndirangu for the Respondent.
3. Amos - Court Assistant

