



**Mwambiri v Thube (Civil Case 708 of 2009) [2024] KEHC 13777 (KLR)
(Commercial and Tax) (4 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13777 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 708 OF 2009
JWW MONG'ARE, J
NOVEMBER 4, 2024**

BETWEEN

EDWARD GICHUNJI MWAMBIRI PLAINTIFF

AND

HANNAH NJERI THUBE DEFENDANT

JUDGMENT

1. By a plaint dated 25th September 2009 and amended on 18th May 2018 the Plaintiff prays for judgment against the Defendant for:
 - i. A permanent injunction restraining the Defendant whether by herself or her servants and/ or agents from charging, selling, alienating or in any way whatsoever interfering with L. R. No. Dagoretti/Riruta/5311 until the hearing and determination of this suit.
 - ii. An order that Defendant do transfer the parcel of land L.R. No. Dagoretti/Riruta/5311 to the Plaintiff.
 - iii. An eviction order to remove the Defendant her employees, servants, agents and anyone claiming through her from the L.R. No. Dagoretti/Riruta/5311.
 - iv. General and exemplary damages for unjust enrichment
 - v. Costs of this suit with interest at the court rates.
 - vi. Any other relief that this honourable court will deem fit.
2. The Plaintiff's case is that by an agreement dated 1/07/2005, he agreed to sell the Defendant a portion of land measuring 0.05ha to be exercised from a parcel known as L.R. No. Dagoretti/Riruta/5311 at



the price of Kshs. 2,000,000/= out of which the Defendant paid Kshs. 200,000/= leaving a balance of Kshs. 1,800,000/= which amount remains unpaid to date. The completion date was 90 days.

3. By a further agreement dated 14/12/2006 the Plaintiff agreed to transfer the whole portion measuring 0.07ha to the Defendant. The Plaintiff was to ensure the erection of beacons on the suit property and cause subdivision where the Plaintiff would retain a portion of 0.02ha, the Defendant would retain 0.05ha. That the 0.02ha would be re-transferred back to Plaintiff upon sub-division of the property. According to the Plaintiff, the Defendant failed/refused to repay the purchase price balance after collecting the title deed to the suit property from their then advocate.
4. The Plaintiff states that as a result of the Defendant's action he has suffered loss and damages in that he is unable to utilize his portion of land and /or seek financial accommodation from the bank using the title to the parcel of land. The Plaintiff holds the Defendant liable for the loss and damages suffered.
5. The Defendant filed the defence that was amended on 15/05/2022. In her statement of defence the Defendant admitted the descriptive parts of the Plaintiff and denied the other content of the Plaintiff. She averred that she paid balance of the purchase price in two instalments of Kshs. 300,000/= and Kshs. 1,500,000/= by cheque to the then advocate and the Plaintiff has failed to pick the cheque from the advocate to date.
6. The Defendant further stated that she suffered loss or damage since the Plaintiff refused to vacate the premises and remove the caution to allow subdivision of the property to excise her portion as agreed. She denied receiving any notice of intention to sue from the Plaintiff.
7. Both parties admitted and acknowledged that the court had the requisite jurisdiction to determine the case before it.
8. In her statement of defence the Defendant urged the court to dismiss the suit and prayed for a permanent order restraining the Plaintiff and his family from verbally physically and emotionally harassing her and also urged the court to restrain the Plaintiff permanently and with his servants and/or agents from transferring/ selling/charging/advertising or in any other way interfering with Defendant's right to use quiet possession, and also prayed for an order of permanent removal of the caveat on the title to the suit premises that was registered by the Plaintiff.
9. At the trial, the Plaintiff and the Defendant each called one witness to testify in support of their various arguments.
10. Pw1 Edward Gichunji Wambiri adopted his witness statement, the bundle of documents dated 19/09/2019, and the supplementary list dated 17/11/2021. He prayed to be granted orders as set forth in the amended plaintiff.
11. On cross-examination he confirmed the signatures appearing on the sale agreement dated 1/7/2005, further mutual agreement dated 14/12/2006 were his and that he understood the contents of the agreement before appending his signatures.
12. He confirmed at paragraph 5 of the agreement dated 1/7/2005 that the property was sold with vacant possession and freed from all encumbrances. He further testified that he was not staying on the property at the time of sale to the Defendant. The sale was finalized through the Plaintiff's advocate, Mr. Kiboi Advocate and the Defendant acquired the title to the property. He told the court he instructed their mutual advocate to write to the Defendant and demand the payment of the balance of the purchase price but confirmed that he did not follow up on the same as he trusted the advocate would deliver.



13. He further testified he had never received the balance of the purchase price paid to the advocate vide the cheque issued for Kshs 1.5M, he disputed signing on the back page of the cheque.
14. On re-examination by Mr. Gathaara he denied signing on the back of the cheque and denied receiving any cheque.
15. He stated he applied to the Land control board on 14/12/2004 for sub-division and he fulfilled his part as per the contract. He confirmed he had not been paid the balance of the purchase price despite the Defendant utilizing the property. He told the court he was in possession of 0.02 ha which he has constructed shop on it.
16. The Defendant called one witness, DW1 Hannah Njeri Thube who adopted her witness statement filed on 15/5/2022 and produced the Defendant's bundle of documents dated 28/4/2022 as her evidence in chief
17. On cross-examination by Mr. Gathaara Advocate for the Plaintiff, the Defendant stated that she signed the further mutual agreement on 14/12/2004 and confirmed the signature as hers. It was her testimony that she bought 0.05 ha while the Plaintiff retained 0.02 ha. She stated that the Plaintiff had blocked access to her portion and was only able to access the same after the court issued a ruling on 10/3/2010 ordering him to do so.
18. She testified that the City Council of Nairobi failed to approve the subdivision. She testified on the strength of the further agreement entered in the year 2006 the whole portion was transferred to her as she had paid a deposit of Kshs. 200,000/=. She stated that she had paid the entire purchase price with the last instalment being the cheque of 1.5M paid to Kiboi advocates.
19. On re-examination by Ms. Angiela, Advocate for the Defendant, she confirmed that the case was filed on 21/9/2009 while the cheque was forwarded on 24/2/2009.
20. During confirmation by the Court, she confirmed she paid for the land 31/2 years from the date of the agreement and occupied the same in April 2010.
21. At the close of the hearing, the parties were directed to file written submission which they did with the Plaintiff's submissions being filed on 5th July 2024 while Defendant's submissions were filed on 1st July, 2024.
22. The Plaintiff in its submission submits the cause of action arose due to the breach of the Sale Agreement dated 01/07/2005 and a further Mutual agreement dated 14/12/2006 by the Defendant's failure to pay the balance of the purchase price in the sum of Kshs. 1,800,000/= which culminated to rescinding of both contracts, waive the repayment of the deposit paid and filing the instant suit. He submitted that no evidence had been adduce to demonstrate the balance was paid and neither was the subdivision done in accordance with the two agreements. He pleaded with the court to award general and exemplary damages for unjust enrichment by the Defendant in the form of restitution as the Defendant had already constructed buildings and other permanent structures on the suit premises and continued to benefit from the land at the expense of the Plaintiff.
23. In her submissions the Defendant faulted the Plaintiff for the delay in securing the necessary consents and approvals to subdivide and secure the road access to the Defendant's parcel of land. She stated that the Plaintiff actions had caused her significant loss from the numerous bank facilities she had obtained to develop the land. The Defendant submitted that she had obtained the title deed on 17/12/2007 and she instructed a surveyor to conduct the Subdivision but the effort to do so had been thwarted by the Plaintiff's failure to demolish the illegal structures to pave way for the erection of the beacons.



Analysis and Determination.

24. I have carefully considered all the evidence adduced in this case by both sides including the witness statements and bundle and list of documents. I have similarly considered the testimony adduced at the trial by the witnesses called by both parties and their rival submissions filed thereafter. To my mind, the only issue for determination that arises for this court to determine is “whether the Plaintiff is entitled to the reliefs sought by the Plaintiff”.
25. From the record I note that the Plaintiff is seeking a permanent injunction to restrain the Defendant from charging, selling, alienating or interfering with the suit property being L.R. No. Dagoretti/ Riruta/5311 and an order that the Defendant do re-transfer the property back to the plaintiff and also for an eviction order against the Defendant from the suit property.
26. My analysis of the totality of the evidence presented to the court confirms that the instant claim over the suit property is anchored on the undisputed sale agreement dated 1/7/2005, and further mutual agreement dated 14/12/2006 for the sale of L. R. No. Dagoretti/ Riruta/5311. It is the Plaintiff’s position that the entire purchase price is yet to be paid as there remains a balance due and owing of the sum of Kshs. 1,800,000/= by the Defendant. The Plaintiff confirmed that the suit property was currently registered in the name of the Defendant following the execution of the further mutual agreement.
27. Section 3(3) of the Law of Contract provides as follows; -
No suit shall be brought upon a contract for the disposition of an interest in land unless—
- a. the contract upon which the suit is founded
 - i. is in writing;
 - ii. is signed by all the parties thereto; and
 - b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
28. It is a trite law that all transactions relating to transactions on land must be in writing. The parties have adduced the sale agreements which are not contested. The court notes that by the sale agreement dated 1/7/2005, Plaintiff agreed to sell a portion measuring 0.05 ha to Defendant which was to be exercised from L. R. No. Dagoretti/ Riruta/5311. From the evidence placed before me I note that the parties freely entered into the sale agreements and thus the Agreements are enforceable by the parties.
29. In my view I am satisfied that the two sets of agreements being the Sale agreement and the mutual agreements meet all the requirements set out in the Law of Contracts Act, in that it is clear that between the Plaintiff and the Defendant, they expressed the intention of the parties in the transaction. The Plaintiff however faulted the Defendant for the violation of the agreement and accused her for the failure to pay the entire purchase price. It is trite that parties are bound by the agreements they enter into freely.
30. The Defendant’s position is that the remaining unpaid balance of the purchase price was paid through cheque to the then mutual advocate. The Defendant faulted the Plaintiff for failing to comply with the terms of the agreement and accused him of the delay in causing the suit property to be subdivided by his failure to avail the necessary consents.
31. The Plaintiff testified that despite transferring the suit property, Defendant breached the agreements and has failed to pay the balance of the purchase price. According to the Plaintiff the balance due is



Kshs. 1,800,000/=. The Plaintiff complained that as a result of Defendant's action he has suffered loss and damages in that it is unable to utilize its portion of land and /or seek financial accommodation from the bank using the title to the parcel of land. He holds the Defendant liable for the loss and damages suffered.

32. Section 26(1) of the *Land Registration Act* provides:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, ... and the title of that proprietor shall not be subject to challenge, except-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

33. The above provision stipulates that the Plaintiff can challenge the Defendant's title to the suit property to have been acquired through fraud, misrepresentation and or acquired illegally through corrupt schemes. In the instant case, the Plaintiff took out the Land Control Board consents and initiated the transfer of the suit property to the Defendant; the Defendant was to re-transfer the suit property as per the addendum agreement referred to as the mutual agreement on 14/12/2006, it provided that the Plaintiff would transfer the entire parcel of land to the Defendant, and the Defendant would re-transfer 0.02ha back to the Plaintiff upon successful subdivision. The Plaintiff was tasked with subdivision of the suit property into 0.05ha and 0.02 ha respectively.

34. From the record, Plaintiff has established that had he obtained consent from the Land Control Board, the suit property was transferred to Defendant and a title deed was issued on 30th June 2008. I note that the Plaintiff willingly submitted all the transfer documents and allowed for the smooth transfer of the property to the Defendant. It follows therefore that the Plaintiff has failed to demonstrate that the transfer was fraudulent, illegal and or a forgery.

35. It was a condition of the transfer that the suit property would be retransferred to the Plaintiff upon the Plaintiff conducting a sub-division of the suit property. The Plaintiff has not yet complied; therefore, he cannot fault the Defendant for his misfortunes. It is trite that he who comes to equity must come with clean hands. The Plaintiff seeks equity but has dirty hands. The Plaintiff ought to fulfil his obligation under the agreement to allow the intervention of this court. In the circumstances

36. From the record, it is evident that Defendant paid the purchase price of the suit property vide the bank cheque dated 24.2.2009 drawn in favour of the Plaintiff for the sum of Kshs. 1,500,000/= There are other cheques one drawn on 24/3/09 in favour of the Plaintiff for the sum of Kshs. 150,000/=. The Defendant having demonstrated she paid the balance of the purchase price it was upon the Plaintiff to adduce evidence to the contrary, in the absence of such evidence by the Plaintiff I find and hold that the Plaintiff has failed to prove on a balance of probability that it is owed by the Defendant.

37. Therefore, following the finding that the Defendant herein acquired the suit property in accordance to the law, I decline to grant a permanent injunction restraining the Defendant whether by herself or her servants and/ or agents from charging, selling, alienating or in any way whatsoever interfering with L. R. No. Dagoretti/ Riruta/5311. The other prayers sought in the plaint must also fail since I am not persuaded that the Plaintiff has proved its case against the Defendant herein to the required standard by law.



38. In conclusion I find and hold that the Plaintiff has failed to prove his case against the Defendant on a balance of probabilities and on the preponderance of evidence. The result is that the Plaintiff having failed to establish a case against the Defendant as pleaded in Plaintiff filed herein, the suit against the Defendant is hereby dismissed in its entirety with costs to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF NOVEMBER 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Irura holding brief for Mr. Gathara for the Plaintiff.
2. Ms. Angiela holding brief for Mr. Okatch for the Defendant.
3. Amos - Court Assistant

