



REPUBLIC OF KENYA



**Mugambi v M'ikiara (Civil Case E008 of 2022)  
[2024] KEMC 105 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEMC 105 (KLR)

**REPUBLIC OF KENYA  
IN THE GITHONGO LAW COURTS  
CIVIL CASE E008 OF 2022  
AT SITATI, SPM  
JUNE 28, 2024**

**BETWEEN**

**JAMES KIMATHI MUGAMBI ..... PLAINTIFF**

**AND**

**DOUGLAS MWORIA M'IKIARA ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated 21<sup>st</sup> April, 2022 verified by an affidavit of similar date, the plaintiff prayed for the following reliefs:
  - a. An order of specific performance directing the Defendant to attend to Land Control Board and cause sub-division of the subject matter and the subsequent transfer to the Defendant if his entitlement as per the sale agreement.
  - b. An order to the Executive Officer Githongo Law Courts to execute all the requisite documents in case the Defendant fails to comply with Order A above.
  - c. An order of permanent injunction barring the Defendant, his agents, family members or anyone claiming on his behest from entering or in any way disrobing the plaintiff exclusive utilization and occupation of the one-quarter parcel he had purchased from the Defendant.
  - d. In the alternative to prayer A above, the Defendant to refund the purchase price with interest from the date of payment until payment in full.
  - e. Damages for breach of contract envisaged in clause 7 of the agreement dated 12<sup>th</sup> March, 2020.
  - f. Costs of the suit and interest.
  - g. Any other or better relief that this Honourable Court may deem fit and just to order.
2. Accompanying the plaint were the following:



- i. Written witness statement of the plaintiff dated 21<sup>st</sup> April, 2022.
  - ii. List and bundle of documents containing sale agreement dated 12/3/2020, certificate of official search dated 03/11/2021 and demand letter to the defendant.
3. The firm of Munene Kirimi & Company Advocates represented the plaintiff. The defendant failed to appear and file defence and the matter went for formal proof hearing.

### **The Plaintiff's Case**

4. PW1 James Kimathi Mugambi adopted his witness statement and produced the 3 listed documents as his exhibits. In summary, he told the court that he recorded a sale agreement dated 12/3/2020 and paid the agreed consideration of the sum of Kshs 400, 000 and the balance of Kshs 100, 000/= payable upon transfer of the title deed but the vendor failed to appear before the Land Control Board to obtain the consent to transfer. Instead, the defendant engaged other potential buyers to the detriment of the plaintiff. That a demand was made but the defendant failed to comply hence this suit. The plaintiff closed their case at that stage.

### **Issue For Determination**

5. The only issue for determination is whether or not the plaintiff has proved his case on a balance of probabilities.

### **Determination**

6. The transaction at hand was a sale of agricultural land which fell for consideration under section 6 of the [Land Control Act](#) which provides:

6. Transactions affecting agricultural land –

1. Each of the following transactions, that is to say—
  - a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;  
....is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

7. In the present case, the plaintiff did not obtain the Land Control Board consent within 6 months of the recording of the sale agreement and thus rendered the sale agreement null and void. The effect of the nullity was that the purchaser would recover the purchase price under section 7 of the [Land Control Act](#):

7. Recovery of consideration

If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.

8. The plaintiff laments that the defendant has refused to give him possession and has refused to apply for the land control board consent for transfer. In the court's view, the [Land Control Act](#) leaves it open for either the plaintiff and the defendant to apply for the consent. In this case, the plaintiff made no



effort himself to apply for the consent. This amounted to indolence. Furthermore, having not attained possession of undertaken developments on the land, he could not seek the invocation of constructive trust in his favour for the purposes of specific performance in favour of the plaintiff as was discussed by the Court of Appeal in *Aliaza v Saul (Civil Appeal 134 of 2017)* [2022] KECA 583 (KLR) (24 June 2022) (Judgment) K M'Inoti, PO Kiage & M Ngugi, JJA held as follows:

- 47 It seems ill that the respondent, having freely sold his land to the appellant, and having received full payment therefor, and put the appellant in possession where the latter proceeded to carry out developments, should now argue before a court of law and, emboldened by a statutory provision, confidently assert a right to resile from his contractual obligations on the spurious reason that no consent to the transaction was given by the Land Control Board. Under that statute, it is required that both the vendor and the purchaser must sign the relevant application for consent. The appellant made no effort to obtain that consent. He basically tries to benefit from his own default to defeat the appellant's rights and escape from his contractual obligations. And that is how a once well-intentioned provision of law as set out by my sister Judge, now gets twisted, taken advantage of, and abused to divest a seller of his duty under contract. That is using the statute as a cloak and an alibi for fraud and dishonesty. It flies in the face of all that is right and just and honourable. And courts which are just and honourable, should put the matter right by requiring him to meet his just obligations and denying him the benefits of default and deceit.
48. Thus, whether on the basis of constructive trust or to avoid unjust enrichment as an equitable estoppel, the respondent's attempt to hide under the *Land Control Act* in the circumstances of this case must be named for what they are and rebuffed. And the appellant should succeed.”
9. The more equitable relief for the plaintiff would be, in addition to the refund of the purchase price, the payment of the penalty clause as reflected in clause number 7 of the sale contract which expressly stated:
- “7. If any party breaches the terms and conditions of this agreement, the party in default shall be liable to pay the innocent party double the amount of money paid as purchase price which is sum of Kshs 1, 000, 000/= (One Million Shillings Only) as liquidated damages for breach of contract.”
10. On this question of penalty clauses, the Court of Appeal had this to say in *Samuel Ngige Kiarie v Njowamu Construction Company Limited & another* [2019] eKLR E. M. Githinji, Asike-makhandia & P. Kiage, JJ.A)

Looking at the literal interpretation of clause 3 it is clear that the parties had intent to impose a penalty of KShs. 25,000 on the 1st respondent in the event of a delay in the payment of the two instalments of the balance of the purchase price. Like many other contracts that foresee certain contingencies that may come up during the pendency of the agreement that may force a purchaser to delay in remitting the funds on time, such a clause is put in order to safeguard the vendor from losses incurred as a result of the delay. It also serves as a deterrent to the purchaser not to inordinately delay in remitting the required payments.”

11. The learned Judges went to hold that:

It is trite law that parties to a contract are bound by the terms and conditions stipulated therein. That is the case in the instant appeal since the facts confirm that the parties acknowledged having entered into the agreement for the sale of the suit land. None complained of fraud or coercion and they are accordingly bound by its terms. This what this



Court had in mind in National Bank Of Kenya V Pipeplastic Samkolit (k) Ltd & Another [2001] eKLR;

“The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

12. In the result, this Honourable Court enters judgement in favour of the plaintiff against the defendant in the following terms:
- a. The prayer of specific performance is dismissed.
  - b. The prayer an order to the Executive Officer Githongo Law Courts to execute all the requisite documents in case the Defendant fails to comply with Order A above is dismissed.
  - c. The prayer of an order of permanent injunction barring the Defendant, his agents, family members or anyone claiming on his behest from entering or in any way disrobing the plaintiff exclusive utilization and occupation of the one-quarter parcel he had purchased from the Defendant is also dismissed.
  - d. The Defendant/Vendor is hereby to forthwith refund the purchase price which was actually paid in the amount of Kshs 400, 000/=.
  - e. The court enters judgement for the penalty amount of Kshs 800, 000 as the contract penalty for breach of contract envisaged in clause 7 of the agreement dated 12<sup>th</sup> March, 2020 being double the amount paid as purchase price.
  - f. Costs of the suit.
  - g. Interest at 14% from the date of filing the suit until payment SUBPARA in full.

Right of appeal is 30 days.

**DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 28<sup>TH</sup> DAY OF JUNE, 2024**

**HON.T.A. SITATI**

**SENIOR PRINCIPAL MAGISTRATE**

**GITHONGO LAW COURTS**

