REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 26 OF 2017

(FORMER MERU HCCA. 1 OF 2014)

JOSHUA KATHAWE M'THIRUAINE.....APPELLANT

VERSUS

JEREMIAH KAILEMIA MIRITHU.....RESPONDENT

(Being an appeal arising from the judgment and decree of

Hon. J.W. Gichimu, Acting Principal Magistrate in Meru

CMCC No. 105 of 2011 delivered on 3/12/2013)

BETWEEN

JEREMIAH KAILEMIA MIRITHU.....PLAINTIFF

AND

JOSHUA KATHAWE M'THIRUAINE.....DEFENDANT

JUDGMENT

1. The appellant and the respondent were parties in **Tigania PMCC No 105 of 2011**. In that case the respondent herein was the plaintiff and the appellant was the defendant. The plaintiff in that case claimed for the following orders:

a. Refund of consideration of Ksh 75,000/= in respect of the land sale agreement dated 29/12/2008;

b. Payment of the mutually covenanted liquidated damages of Ksh 150,000/= in the land sale agreement.

c. Costs of the suit; and

d. Interest on (a) and (b) above at the prevailing commercial rates of Ksh 18% per annum from the date of filing suit and on (c.) at court rates from the date of assessment till payment in full.

2. The plaintiff's case was that vide the stated agreement the defendant sold the plaintiff land at **Ksh 75,000/=**which he paid in full. He then wrote a transfer of the suit to the plaintiff but as at date of the suit he had not shown the land or given vacant possession of the same to the plaintiff and was thus in breach. The plaintiff pleaded as part of the particulars of breach that the defendant had shown the plaintiff someone else's parcel of land.

3. The defendant denied the claim and in a defence dated 5th December 2011, he admitted having sold the land but averred that he had pointed out the land to the plaintiff and that the plaintiff is in occupation and use of the same.

4. In a reply to defence the plaintiff stated that the land that the defendant showed the plaintiff belonged to one Mitheu as his share of family ancestral land and that it did not belong to the defendant. Each of the parties called three witnesses at the hearing and the court issued a

judgment on the **3rd December 2013.**

5. The trial court found that the plaintiff had proved his case on a balance of probability and entered judgment in his favour against the defendant for **Ksh 75,000/=** being the refund of the consideration and a further sum of **Ksh 150,000/=**being the agreed liquidated damages for breach of contract. The defendant in that suit, now the appellant in this appeal, has now appealed against the trial court's decision.

The Appellant's Case

6. The appellant filed a Memorandum Of Appeal dated **21/12/2013** in which he raised the following grounds:-

> **1. The learned Ag. Principal Magistrate erred in failing to find that the Appellant performed his part of contract by transferring the suit land ATHINGA/ATHANJA/3243 to the respondent in accordance with the terms and conditions of the contract thereof.**
>
> **2. The learned Ag. Principal Magistrate erred in law and in fact in totally disregarding the expert evidence of DW3 the Land Demarcation Officer of ATHINGA/ATHANJA ADJ. SECTION who confirmed the fact of transfer of the suit land to the respondent and its location on the ground.**
>
> **3. The learned trial magistrate failed in his duty to properly analyze the evidence adduced in the trial which in fact showed the respondent admitted that the appellant had transferred the land to him.**
>
> **4. The learned trial magistrate erred in law and facts in failing to find it would be unconscionable and an act of unjust enrichment to have the respondent keep the land already transferred to him by the appellant and also be awarded colossal amounts of money.**
>
> **5. The learned trial magistrate erred in law when he awarded Kshs.150,000/= as damages when the respondent had not laid a proper basis for award of what was essentially a penalty as opposed to damages at large.**

7. The appellant prayed for the appeal to be allowed and the entire judgment and all consequential orders of the subordinate court be set aside and be substituted with an order that the lower court's suit against the respondent be dismissed with costs of this Court and the Subordinate Court.

8. This is a first appeal and the evidence of the parties in ***Tigania Senior Principal Magistrate's Court Civil Case No. 105 of 2011*** should be reviewed by this court in arriving at its decision in the appeal.

9. I will address **grounds 1, 2**, and **3** together as hereunder.

10. The respondent's evidence in the trial court was that on the **13th April 2010** the appellant transferred the suit land to him. He exhibited the letter of transfer. He also admitted that he was shown the land before they concluded the deal and that he knows where the land is situated. Without stating his source, he stated that he later learnt that the appellant does not own land in the area. In cross-examination the respondent agrees that the Land Adjudication Officer registered the land in his name but on the ground the land that he was shown by the appellant was occupied and was being cultivated by one **Peter Kaberia** who inherited the same from his father. He later learnt that Peter is the appellant's nephew. According to his evidence, he has never attempted to fence the land. In re-examination he stated that he "*only has the number in his name and not the land on the ground.*" This evidence of the respondent is contradicted in part by **PW2** in that case who stated as follows:-

> **"The defendant however did not give vacant possession since the land belonged to Mutheu. On the date the defendant was to give vacant possession Mutheu stopped him claiming the land belonged to him."**

11. Ordinarily, if I were to weigh as to what evidence to believe, I would believe the evidence of the respondent rather than that of **PW2** as he can be deemed to know his case better. However, in the circumstances of this case, I do not find the evidence of these two witnesses to be credible. It is inconsistent. **PW3** on his part stated as follows:

> **"We did visit the land office at Muriri and confirmed the land was registered in the name of the defendant."**

12. Evidence that the defendant was registered as the owner of the land was therefore corroborated.

13. Whereas the defendant does not give the dates on which he paid the consideration sum, the plaintiff stated that the money was not paid in time as agreed. He stated that he was paid **Ksh 36000** and the balance was to be paid in two instalments: **Ksh 20,000/=** on **15/1/2009** and **Ksh 19000** on **15/2/2009**. However the respondent paid **Ksh 7000** on **15/1/2009**, **Ksh 20,000/=** on **1/3/2009** and **Ksh 8500** on **13/4/2009** and on that last date, the appellant wrote a transfer in his favour and transfer was effected at the Lands Office. The appellant's view was that he had shown the respondent the land but it was the respondent's duty to go to the Lands Office and ascertain that the land belonged to the appellant and the acreage.

14. DW3 was the Land Demarcation Officer working within the land adjudication office, Muthara in charge of the Athinga Athanja Adjudication Section. He testified that the land is registered in the respondent's name, but that it used to be the appellant's. He stated that the parties had visited the Lands Office and agreed on the sale of the land. He produced the record of existing rights. It showed the current registered owner as the respondent and that before him the owner was the appellant. According to that record the land had been sold to the

appellant by one **Atanasio Tumatia** in the year **2006**. He also confirmed that Peter Kaberia does not appear anywhere as having been the owner of the land at any time. The witness was the one who filled in the boundaries of the parcel in the presence of the neighbours to the parcel, which he gave as parcels numbers **4918** and **4996.** He also confirmed that after the transfer the former owner ceased to have any claim over the land and only the registered owner is recognized by the Lands Office.

15. There is therefore agreement between evidence of the two parties that the appellant showed the respondent the suit land before the agreement was executed; that the agreement was executed on the basis that the land existed; that the consideration was not paid as scheduled; that the appellant transferred the suit land to the respondent; that the respondent has been registered in the Lands Office as the owner in the record of existing rights and that he is the person recognized as owner by the Lands Office. That evidence has not been shaken. Besides, the respondent has not availed the trial court any evidence that Peter Kaberia's claim to the land was based on any record of existing rights on his part.

16. The trial court observed that according to **paragraph 3** of the agreement the respondent was to take possession of the suit land with effect from **28/2/2009.** After resorting to the Black's Law Dictionary for the definition of "*occupy*" the court concluded that the respondent could not have taken possession of the suit land unless and until the property was handed over to him and that he could not have done so because the land was in the possession of another person. However the trial magistrate took note of the fact that at the time the parties went to view the land together the land was vacant and the person who was in possession entered the land after that event. The magistrate went ahead to state as follows:-

> **"The defendant can not ask the plaintiff to evict the said Kaberia because he was required to hand over land that was vacant to the plaintiff. He was required to put the plaintiff into actual and physical possession. After that the plaintiff would be duty bound to remove any trespasser."**

17. The court accordingly found that by failing to put the plaintiff into physical possession, the defendant breached the terms of the agreement.

18. In my view this position is incorrect. First, the agreement dated **29/12/2008** was a simple agreement of seven (7) paragraphs in which the issue of taking possession was addressed as follows:

> **"3. That the purchaser shall take actual occupation of the land effective 28/2/2008.**
>
> **4. That the said land is sold free of all encumbrances."**

19. The appellant did not by himself or by agent occupy the suit land. The person that the respondent found in occupation of the suit land was not an agent of the appellant and entered into possession after the agreement had been executed and purchase price paid. It would have been meet for the respondent to state clearly the date of entry of the said Peter Kaberia on the suit land as dates appear to have been important in the agreement. However, though the dates appeared to matter, the appellant appeared not to have minded the failure of the respondent to fulfil his obligations as stipulated under the agreement.

20. In my view **clause 3** of the agreement is not clear enough and it requires to be given an interpretation by the court. The trial court accorded it the interpretation that the appellant was obligated to remove any trespasser from the land so that the respondent take possession.

21. It is to be recalled that the parties visited the land when it was vacant. The agreement was executed on the basis that the land was vacant. The respondent believed that the land would be vacant for his taking up of possession after payment. That explains the absence of any special condition specifically requiring the appellant to put the respondent into vacant possession. As far as the appellant was concerned the land, being vacant was open for the respondent to occupy as soon as he completed payments. The parties were transacting over land that they had jointly viewed before the transaction.

22. It is trite that a court of law can not rewrite an agreement for the parties. Parties must be bound by the terms of their agreement. In **Kisumu Civil Appeal 152 of 2006 Savings and Loan Kenya Limited and Mayfair Holdings Limited,** the Court Of Appeal stated as follows:

> **"The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement. In Ford vs Beech (1848) 11 QB 852 at 866:**
>
> **"The common and universal principle ought to be applied: namely that (a contract) ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties to be collected from the whole agreement, and that greater regard is to be had to the clear intention of parties than to any particular words which they may have used in the expression of their intent.""**

23. In the instant case the role of the appellant, who was not resident on the suit land, and who had no agent on the suit land as at the time of the execution of the agreement, was merely to ensure that the land existed and that it was transferred to the respondent which he did after he received the purchase price.

24. His evidence through the Demarcation Officer proved sufficiently that the land was in existence and that it had been transferred to the respondent.

25. From the contents of the agreement, apparent intent of the parties was that upon payment the respondent was to just walk into the land he

had viewed.

26. The magistrate erred in failing to accord the evidence of the Demarcation Officer the appropriate weight it deserved. Besides, transfer of the land having been admitted by the respondent, no act on the part of a third party whose trespass had not been anticipated by both parties could affect the transfer, unless the respondent or such a trespassing party presented evidence of their claim to the land which could jeopardize the appellant's claim to ownership and hence threaten contractual relations between the parties to the extent that the contract could be deemed as frustrated. The mere presence of a trespasser on the land was in my view insufficient cause on which to base allegations of breach.

27. In my further view, unless the respondent can demonstrate by way of evidence that the appellant put any person in possession after the agreement was executed his claim of breach by the appellant is not valid.

28. The court in **Eunice Nyambura Irungu Vs Libey Njoki Munene and 4 Others Nairobi Milimani ELC 664 of 2009** dealt with the issue of possession where the defendants averred that the suit land was open land and therefore the plaintiff did not require them to take her to the land and put her into possession. The relevant clause in the parties' sale agreement simply read that *"The purchaser shall take possession immediately."* The plaintiff was however able to demonstrate that there were residential dwellings on the land and the agent of the defendants who was in possession had denied her possession. The court in that case upheld her claim of breach against the defendants on that basis. It is my view that the holding of the court may have been different had the plaintiff failed to prove that the defendant's agents were in possession.

29. In comparison this is what the respondent in this case failed to do at the trial stage and **clause 3** of the agreement cannot be interpreted so as to foist the liability of evicting a trespasser whose presence on the land was unforeseen as at the time of the execution of the agreement.

30. If it were not so, the agreement would have, as many do, specifically obligated the appellant to put the respondent in possession, or alternatively, required the appellant specifically to evict or remove a specific person from the premises so that the respondent may occupy the land. In my view the magistrate erred in holding as he did. I would uphold the first three grounds of appeal.

31. Regarding **ground 4** of the memorandum of appeal, the observation of this court is that it appears that it did not occur to the Trial Magistrate that upon the issuance of the orders that he gave the appellant would be left with a heavy penalty to pay for the alleged breach and also be left without the land.

32. This court has already found the registration of the land in the respondent's name was effected. The only problem that the respondent encountered was that there was a trespasser on the suit land. He never demonstrated that he had ever asked the trespasser to leave, or taken any legal action against him. The respondent did not demonstrate at the trial that the trespasser had any rights reflected in the Register of existing rights over the said land. Ordering a refund of the purchase price and failing to address the issue of what would happen to the land was not proper. The plaint in that suit and the evidence of the prosecution was silent on the issue of the return of the land to the appellant. It appears a simple issue, one that may be brushed aside with the conclusion that the land would revert back to the appellant. However, in my view, it is not proper for any court of law to leave the parties to conjecture as to their rights at the end of a trial. Yet the court below left them uncertain in respect of the rights of ownership of the land after the judgment it gave. The appellant's apprehension that the respondent would be unjustly enriched at the end of the execution of that judgment is genuine.

33. Ground 4 in the Memorandum Of Appeal is stated as follows:

> **"That the learned trial magistrate erred in law when he awarded Ksh 150,000/= as damages when the respondent had not laid a proper basis for award of what was essentially a penalty as opposed to damages at large."**

34. In my view the magistrate expressed himself clearly on this issue, albeit his decision on the infliction of the penalty on the appellant was based on the wrong finding. His finding that the parties should be held to the terms of their agreement was proper, but his holding that the appellant had breached the agreement was, as this court has found, not correct. If the intention of the parties was that the party in breach was to pay, he had to pay, but he had to be established to be in breach first. The trial magistrate could not deviate from the penalty stipulated by the parties in the agreement. If his conclusion that the appellant was in breach had been correct nothing could have prevented him from ordering the implementation of the terms of the agreement as framed by the parties, for that was their intention from the beginning.

35. The upshot of the above discussion is that the appellant's appeal has merit and it therefore succeeds. I therefore enter judgment in favour of the appellant and allow the appeal and issue the following orders:

> **a. The entire judgment and all consequential orders of the trial magistrate in Tigania PMCC No 105 of 2011 are hereby set aside and substituted with an order that the said suit Tigania PMCC No 105 of 2011 is hereby dismissed.**
>
> **b. The respondent shall bear the costs of both this appeal and the trial in the Tigania PMCC No 105 of 2011**

It is so ordered.

Dated, and signed at Kitale on this **1st** day of **August 2018.**

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 29th day of August , 2018 in open court in the presence of:

C.P Mbaabu for respondent

Mr. Mutunga holding brief for Ms. Nyamu for appellant

Respondent present in person

C/A Mutua

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE.