



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kihika v Kanyiri (Environment and Land Appeal E005 of 2023)
[2024] KEELC 1042 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1042 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E005 OF 2023
MAO ODENY, J
FEBRUARY 28, 2024**

BETWEEN

VIOLET WANJIRU KHIKA APPELLANT

AND

ANTHONY KANYIRI RESPONDENT

(Being an appeal from the judgment delivered by Hon. R Kefa Principal Magistrate on 22nd February, 2023 in Nakuru CM ELC No. 302 of 2018)

JUDGMENT

1. This appeal arises from a judgment delivered on 22nd February, 2023 in Nakuru CM ELC No. 302 of 2018. The Appellant being aggrieved by the said judgment lodged a Memorandum of Appeal dated 1st March, 2023 and listed the following grounds:
 1. That the learned trial Magistrate erred in law and in fact in formulating issues which never arose from the pleadings and making a finding on those issues.
 2. That the trial Magistrate erred in law and in fact in entertaining evidence on matters which were not pleaded and making a finding on evidence tendered on unpleaded issues.
 3. That the trial Magistrate erred in law and in fact in failing to make a determination on issues which were specifically pleaded and submitted on:
 - a. The appellant pleaded and led evidence to prove payment of consideration based on a written agreement.
 - b. The appellant led evidence to prove occupation and use of land for seven years after the agreement as proof of a remedial constructive trust.



- c. Based on the pleadings and the evidence, the appellant submitted extensively on constructive trust as sufficient basis for a finding in her favor.
 - d. The trial Magistrate side-stepped all the issues of evidence, pleading and submissions and made a finding which was inconsistent with the law.
 4. That trial Magistrate erred in law in finding that beneficial interest in property is incapable of being conveyed as a contingent right.
 5. That the trial Magistrate erred in law, fact and evidence in finding that the respondent was not the owner of the parcel of land when evidence demonstrated that the respondent was the beneficial owner of the land and he had executed a sale agreement for the sale of his beneficial interest.
 6. That the trial Magistrate erred in law in wrongly interpreting and applying the provisions of section 119 of the Land Act which had no application to the dispute at hand.
 7. That the trial Magistrate erred in law and in fact and in exercise of discretion in awarding costs to a party who had acted inequitably and/or fraudulently.
 8. That the trial Magistrate erred in law, fact and evidence in delivering a judgment and issuing a decree which effectively vested in the disputed land in the respondent who had also retained the consideration paid for the same land.
 9. That the trial Magistrate erred in law and in fact in making a finding whose effect was to unjustly enrich the respondent.
2. A brief background to this appeal is that the Appellant filed a suit against the Respondent in the lower court seeking the following orders:
- a. A permanent injunction restraining the defendant whether acting in person, through its servants or agents from executing any transfer of the parcel of land known as LR No. 9714/1 Rift Valley New Farm, Plot No. 66.
 - b. An order for specific performance directing the defendant to deliver to the plaintiff all the completion documents as set out under clause 5 of the sale agreement dated 22nd February, 2011.
 - c. Costs of the suit.
3. The Respondent in his defence averred that there was no application or approval for the sale and transfer from the Land Control Board and therefore the sale agreements dated 22nd February, 2011 and 10th March, 2011 were void and unenforceable.
4. The suit was heard and the trial Magistrate in her judgment dated 22nd February, 2023 dismissed the Appellant's suit with costs necessitating the filing of this Appeal.

Appellant's Submissions

5. Counsel for the Appellant gave a brief background to the case and stated that the appellant entered into an agreement with the respondent for the sale of parcel of land known as Plot No 66 curved out of L.R. 9714/1(New Rift Valley Farm at a consideration of Kshs.460,000/=.
6. Counsel further stated that it was a term of the agreement that the Respondent was the beneficial owner of the suit parcel and undertook to deliver the completion documents which he never did for



- a period of seven years. Counsel submitted that on the seventh year, the respondent wrote to the appellant and informed her that the parcel of land was not his property and that he would refund the consideration paid.
7. Counsel condensed the 9 grounds of appeal and submitted that the trial Magistrate erred in law and in fact by basing her judgment on unpleaded issues. Mr. Githui further submitted that the finding by the trial court that the Respondent was not the owner of the land was contrary to the express terms of the sale agreement.
 8. Mr. Githui submitted that the exchange of consideration and occupation of the suit land for a period of seven years prior to filing of the case created a constructive trust therefore the Appellant had a right to claim for specific performance as a term of the contract.
 9. It was counsel's submission that pleadings are central to the determination of disputes and in an adversarial system, the court cannot frame issues outside what has been pleaded by the party; similarly, a party cannot expand the scope of its case by way of submissions or tender evidence which is contrary to pleadings. Counsel relied on the case of *Levi Simiyu Makali v Koyi John Waluke & 2 others* [2018] e-KLR.
 10. Counsel further submitted that similarly courts have a duty to remain loyal to the pleaded matters and to pronounce itself on the matters as pleaded hence the introduction of matters outside the scope of pleadings exposes the court as being an active participant in the contested issues and relied on the case of *Pacific Frontier Seas Ltd v Kyengo & another* (Civil Appeal 32 of 2018) [2022] KECA 396 (KLR).
 11. On the issues that were before the trial court, counsel submitted that it was not disputed that the appellant and the respondent had a contract for the sale of parcel of land known as plot number 66 curved out of L.R. 9714/1(New Rift Valley Farm). That it is on record that the respondent did not deny the existence of the contract save that the same was unenforceable due to lack of a Land Control Board consent
 12. It was counsel's submission that this was the first issue that the court was invited to consider but the court never made any finding on this issue. That the trial Magistrate identified three issues for determination but pronounced herself on none of them.
 13. Mr. Githui stated that trial Magistrate found that the certificate of title for the parcel of land was never produced to demonstrate that the respondent had the capacity to sell the land and proceeded to blame the appellant for failure to conduct due diligence to establish whether the respondent had the capacity to sell and found in favour of the respondent.
 14. Counsel further submitted that the trial court was wrong in this respect as the issue of capacity of the respondent to sell his beneficial interest in the parcel of land did not arise from the pleadings and that it was not one of the issues that the court had framed for determination. Further that the finding by the court that the respondent was not the owner of the land is contrary to the express terms of the sale agreement.
 15. On the issue of trust counsel submitted that it was a term of the agreement that the appellant would take possession immediately after payment of consideration of which the appellant took possession after payment of the purchase price. Mr. Githui stated that the occupation by the appellant for a period of seven years prior to the filing of the case created a constructive trust and a right to the appellant to specific performance of the contract and relied on the cases of *Ruth Ndume Mwangangi v Joseph Mbithi Nthenge & another* [2022] e-KLR, *Virginia Ciamati Murage & another V Stanley Advane Kirimi* [2021] eKLR and the Court of Appeal case of *Willy Kimutai Kitilit V Michael Kibet* [2018]



eKLR and submitted that the trial court had the obligation to pronounce itself on all matters presented by the parties.

16. Counsel therefore urged the court to allow the appeal and set aside the judgment of the trial court and enter judgment in favour of the Appellant with costs.

Respondent's Submissions

17. Counsel for the Respondent submitted that the trial magistrate was well within the law in finding that the Appellant failed to prove that the Respondent was the absolute owner of the suit land and relied on the case of *National Land Commission V Afrison Export Import Ltd & 10 others* [2019] eKLR.
18. Counsel further submitted that the trial court acted within the ambits of the law and of the pleadings in finding that the Appellant had failed to prove that the Respondent had capacity to engage in the sale and transfer the suit land.
19. Ms. Mugweru relied on the Court of Appeal case of *Ann Wairimu Wanjobi V James Wambiru Mukabi* [2021] eKLR where the court held that in limited circumstances where an unpleaded issue is crucial to the matter in issue, the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions and left the matter for the determination of the court. It was counsel's further submission that points of law need not be pleaded by parties for the court to address them.
20. Counsel submitted that despite the Appellant's suit being totally defective, the trial Magistrate addressed all the issues as raised in the pleadings and cited the case of *David Sironga Ole Tukai V Francis Arap Muge & 2 Others* [2014] eKLR.
21. It was counsel's submission that the Appellant could not rely on the doctrines of constructive trust and proprietary estoppel because she is not in actual possession of the suit property and has also been refunded the purchase price.
22. On grounds 4, 5 and 6 of the grounds of appeal, counsel for the Respondent relied on Sections 79 and 80 of the *Succession Act* and Section 26 (1) of the *Land Registration Act* and submitted that the Appellant never led any evidence to prove beneficial interest upon the Respondent and whether the same was capable of being registered or transferred.
23. On grounds 7, 8 and 9 the Respondent submitted that the trial magistrate did not vest any land or consideration upon him and added that the onus was upon the Appellant to prove her case on a balance of probabilities, which she failed, and the trial court exercised her discretion in dismissing her case.

Analysis And Determination

24. The sole issue for determination is whether the Appeal has merit on the grounds listed in the Memorandum of Appeal.
25. In the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, the court held as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”



26. The court is reminded of its duty as the first appellate court to re- evaluate, re-assess and reanalyze the record and determine whether the conclusions arrived at by the trial court should stand or reviewed with reasons to boot. This is because the appellate court may not have benefited from the demeanor of the witnesses during the trial and the first hand testimonies and evidence.
27. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that:
- “Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”
28. In the present case it is on record that the Appellant and the respondent entered into a sale agreement for the sale of parcel of land known as plot number 66 curved out of L.R. 9714/1(New Rift Valley Farm) This was not disputed by the respondent save for the fact that he claimed that the sale was unenforceable due to lack of a land Control Board consent.
29. It is also not in dispute that the Appellant and Respondent entered into a sale agreement for purchase of the suit property at a consideration of Kshs.460,000/ which was paid in full to the respondent who acknowledged the same. This is evident from the fact that the respondent attempted to rescind the contract by refunding Kshs.460,000/ to the appellant who rejected the payment.
30. From the evidence on record and the analysis of the trail Magistrate, it is clear that the contract for the sale of land between the parties was unambiguous, the terms were clear, the purchase price was paid, the appellant took possession as per the terms of the agreement, but the Respondent did not honour his part of the agreement to give the completion documents to the Appellant.
31. The court’s duty is to give effect to the terms of a contract between parties if it satisfies the provisions of the law of contract and does not suffer from any illegality. The court cannot jump into the arena of conflict or rewrite agreements for parties as was held in the case of *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR. The Court of Appeal at page 507 stated as follows:
- “A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
32. Similarly, in the case of *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that:
- “We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”
33. The court was to give effect to the agreement between the Appellant and the Respondent and not to fish and frame issues that were neither pleaded nor raised by the parties. The court cannot interfere even when an agreement between the parties is skewed to benefit another as parties enter into agreements willingly, with sound minds and with their eyes wide open. It is not the duty of the court to sympathize with any party who has the short end of the stick.



34. From the record, the Respondent entered into the sale agreement with the appellant and the terms and conditions of the agreement were meant to be complied with. The respondent cannot be heard 7 years after entering into the agreement that he was not the beneficial owner of the suit land. This was not an issue raised for determination. The respondent admitted that he entered into the agreement but only faulted the lack of a land Control Board consent. Parties are bound by their pleadings and cannot be allowed to depart from them unless they amend them.
35. The Respondent having received the purchase price in full; having allowed the Appellant to take possession upon payment of such purchase price was under a duty to provide the completion documents to enable a transfer to the appellant and that is why the Appellant had sued for specific performance.
36. The Issue of lack of Land Control Board consent where purchase price was paid in full and a party was allowed to take possession was elaborately discussed in the case of *Ruth Ndume Mwangangi v Joseph Mbiti Nthenge & another* [2022] e-KLR and found as follows:
- “Based on my analysis above while relying on the three Court of Appeal decisions, I find that since the Respondents’ father had received the purchase price from the Appellant’s late husband, allowed them to take possession of the two acres after which they constructed thereon.
- Further, since even the deceased purchaser was buried on the suit lands and the Respondents having not denied the Appellant and her family have been on the suit lands for more than twenty-five (25) years, it is my view that insofar as there was no consent of the Land Control Board, an element of trust was created when the Appellant and her deceased husband took occupation of the portion they purchased. Further, the said trust became an overriding interest over the suit lands and the deceased vendor was now merely holding the said portion in trust for the Appellant and her family.”
37. Similarly, in the Court of Appeal case of *Willy Kimutai Kitilit v Michael Kibet* [2018] e-KLR where the court considered the concept of constructive trust and stated as follows:
- “There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the *Land Control Act*. By Article 10(2) (b) of the *Constitution* of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)). Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the *Constitution*.
- Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to the *Constitution*, the *Land Control Act* should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the *Constitution*.”
38. The respondent cannot be allowed to run away from the obligations under the contract and claim unenforceability having received the money and given the appellant possession. Seven years down the line in possession created a constructive trust on behalf of the appellant. The Respondent is therefore estopped from denying the appellant the land as the doctrine of constructive trust has kicked in.



39. In the case of *Macharia Mwangi Maina & 87 others -vs- David son Mwangi Kagiri* [2014] eKLR the Court of Appeal held as follows:

“This court is a court of equity; equity shall suffer no wrong without remedy. No man shall benefit from his own wrong doing, and equity detests unjust enrichments. This court is bound to deliver substantive rather than technical and procedural justice.”

40. As earlier stated the contract between the Appellant was a valid contract which did not suffer from any illegality. In the case of *Reliable Electrical Engineers V/S Mantrac Kenya Limited* (2006) eKLR wherein Justice Maraga (as he then was) stated:

“The jurisdiction of Specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. In this respect damages are considered to be an adequate alternative remedy...”

41. The court has treaded with caution as per the case of *Peters v Sunday Post Ltd* [1958] EA 424 and will not hesitate to review this case and set aside the judgment of the trial court and substitute it with one in favour of the Appellant as per the Plaintiff in the Trial Court as follows:

- a. A permanent injunction is hereby issued restraining the defendant whether acting in person, through its servants or agents from executing any transfer of the parcel of land known as LR No. 9714/1 Rift Valley New Farm, Plot No. 66.
- b. An order for specific performance is hereby issued directing the defendant to deliver to the plaintiff all the completion documents as set out under clause 5 of the sale agreement dated 22nd February, 2011.
- c. Costs of the suit.

42. The Appeal therefore succeeds with costs to the Appellant

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF FEBRUARY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

