



Kahindi (As the Administratrix of the Estate of Kahindi David Kuria) v Wanderi (Civil Appeal E028 of 2022) [2024] KEELC 721 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEELC 721 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
CIVIL APPEAL E028 OF 2022
LA OMOLLO, J
FEBRUARY 15, 2024**

BETWEEN

RAHAB WAITHERA KAHINDI (AS THE ADMINISTRATRIX OF THE ESTATE OF KAHINDI DAVID KURIA) APPELLANT

AND

LAWRENCE MWANGI WANDERI RESPONDENT

(Being an appeal against the Judgment of the Honorable Ruth Kefa (PM) delivered on the 6th July, 2022 in M. CL & E CASE NO 386 OF 2011)

JUDGMENT

Introduction.

1. By Memorandum of Appeal dated 3rd August, 2022, the Appellant appeals against the judgment of Hon Ruth Kefa (PM) delivered on 6th July, 2022 in Civil Suit No 386 of 2011.
2. The grounds of Appeal are as follows:
 - a. The Learned Principle Magistrate erred in law and fact by finding that rescission of the contract by the Plaintiff was invalid and did not take effect which was misdirection on her part and thus arrived at the wrong conclusion to the Appellant's Prejudice.
 - b. The Learned Principle Magistrate erred in law and fact by finding that the Sale Agreements dated 8th December, 2010 and 22nd December, 2010 were valid and did take effect which was misdirection on her part and thus arrived at the wrong conclusion to the Appellant's Prejudice.
 - c. The Learned Principal Magistrate erred in law and fact by finding that the Respondent is entitled to remain in the suit land while the Plaintiff revoked the Sale Agreement and further went ahead to refund the purchase price of the suit land amounting to Kshs. 300,000/= which finding was founded on the wrong considerations to the Appellant's prejudice.



- d. The Learned Principal Magistrate erred in law and in fact by finding that the Respondent's counterclaim had a prima facie case and that the Plaintiff should be compelled to execute and surrender to the Defendant all transfer documents of 0.041HA out of plot NO 85/3 which finding was misdirection on her part and thus arrived at the wrong conclusion to the Appellant's prejudice.
 - e. The Learned Principal Magistrate erred in law and fact by failing to appreciate that granting an injunction against the Appellant from taking possession of the suit property amounted to depriving the Appellant her legal rights as a proprietor of the said suit property.
 - f. The Learned Principal Magistrate erred in law and fact by failing to exercise her discretion judiciously by granting the injunction restraining the Plaintiff by herself, agents, servants and/or employees from interfering with the Defendant's quiet enjoyment of 0.041HA out of plot NO 85/3 as prayed by the Respondent.
 - g. The Learned Principal Magistrate erred in law and fact by finding that since the Respondent had paid for the Purchase Price of the suit land, the Appellant was not entitled to issue a letter revoking the Sale Agreement upon survey that would force the Appellant to demolish part of her house and further on inviting the Respondent to re-negotiate the sale agreement or to quit and deliver up vacant possession of the said land upon refund, which was a clear misdirection on her part and arrived at an erroneous conclusion to the Appellant's prejudice.
3. The Appellant seeks orders that:
- a. The Appeal be allowed with costs
 - b. The Judgement of the Principal Magistrate Ruth Kefa (Mrs.) made on 6th July, 2022 be set aside.
 - c. Such other Orders as this Honourable Court may deem fit to make.

Factual Background.

4. The suit before the subordinate court was commenced vide a Plaint dated 12th May, 2011.
5. In the plaint, the Plaintiff (now Appellant) averred that at all material times to the suit, he was the lawful owner of plot No 85/3 measuring ¼ acre having bought the same from one Mburu Mbugua Kabiru in 1988. He averred that on or about 8th December, 2010, the Defendant (now Respondent) offered to buy 1/8 of the plot from him at a cost of Kshs. 420,000 which was fully paid.
6. He also averred that when the parties herein visited the plot in issue, it was found that the land on the ground was not exactly 1/8 of an acre as provided in the Sale Agreement dated 8th December, 2010.
7. He averred that on 18th February, 2011, the Plaintiff (now Appellant) wrote to the Defendant and offered to sell to the Defendant (now Respondent) what was actually comprised in the suit parcel but the Defendant declined to respond to the said letter.
8. The Plaintiff (now Appellant) averred that on 8th March, 2011 he revoked the Sale Agreement executed on 8th December, 2010 and offered to refund the purchase price to the Defendant (now Respondent).
9. He averred that on 18th March, 2011, he forwarded to the Defendant (now Respondent) a banker's cheque for Kshs. 300,000/= leaving a balance of Ksh 120,000/= which sum, he averred, was in the process of being paid to the Defendant (Now Respondent).



10. He averred that the Defendant (now Respondent) had threatened to occupy his plot No 85/3 by force notwithstanding the revocation of the sale agreement.
11. The Plaintiff (now Appellant) sought orders of injunction to restrain the Defendant (now Respondent) from entering and or dealing with plot No 85/3 in any manner whatsoever.
12. The Plaintiff (now Appellant) prayed that judgment be entered against the Defendant (now Respondent) for:
 - a. Permanent and or temporary injunction to restrain the Defendant by himself his agents and or servants from trespassing, entering, developing, interfering and or dealing with plot No. 85/3 in any manner whatsoever.
 - b. Cost and interest of this suit.
 - c. Any further relief this Honourable court may deem appropriate.
13. The Defendant (now Respondent) filed a Statement of Defence and Counterclaim on 8th August, 2011.
14. The Defendant (now Respondent) denied the averments in the Plaint and stated that he legally purchased from the Plaintiff (now Appellant) half portion of the said plot hence both Plaintiff and Defendant lawful co-owners of the said plot.
15. The Defendant (now Respondent) stated that though he admits receipt of the letter by the Plaintiff (now Appellant), the Defendant stated that prior to the letter by the Plaintiff (Now Appellant) parties herein had deliberated and orally agreed over the issue of measurement of the portion sold to the Defendant and the Defendant took actual possession of 1/8 of an acre out of plot No 85/3.
16. The Defendant (now Respondent) stated that he acknowledged the purported revocation of the sale agreement by the Plaintiff (now Appellant) but to the contrary he averred that the Plaintiff had no locus standi to revoke the agreement nor refund the purchase price as ownership of 1/8 of an acre out of plot No 85/3 had already passed to the Defendant.
17. The Defendant (now Respondent) stated that the Plaintiff (now Appellant) attempted to coerce him into receiving the banker's cheque through an emissary which emissary forcefully left the said banker's cheque on the Defendants table.
18. The Defendant (now Respondent) stated that he categorically denies having threatened to occupy by force Plot No 85/3 and to the contrary, averred that he had already legally taken possession of half of plot No 85/3 as per clause 6 of the sale agreement entered on 8th December, 2010.
19. The Defendant (now Respondent) stated that the Plaintiff's (now Appellant's) claim has been overtaken by events and is a non-starter and hence cannot be granted by the court as the Defendant cannot be restrained to deal with a property which legally belongs to him.
20. The Defendant (now Respondent) stated that there was no infringement of the Plaintiff's (Appellant's) rights by him to warrant a demand notice to be issued against him hence the said demand notice was of no legal consequence.
21. In the counterclaim dated 2nd August 2011, the Defendant (now Respondent) averred that having purchased and taken possession of half of plot No 85/3 (hereinafter referred to as the said portion) from the Plaintiff (now Appellant), he is the lawful owner of the same and has all rights over the said portion and is entitled to enjoy peaceful possession of the same.



22. The Defendant (now Respondent) averred that the Plaintiff (now Appellant) has no mandate and or locus standi to purport to revoke the sale agreement entered into between parties herein on 8th December, 2011 as the Defendant has possession of the said portion.
23. He averred that notwithstanding the sale agreement entered by parties hereto on 8th December, 2011 and the further agreement entered into on 22nd December, 2010, the Plaintiff (now Appellant) has failed to execute all transfer documents for the said portion.
24. The Defendant (now Respondent) averred that his claim against the Plaintiff (now Appellant) is for a mandatory injunction restraining the Plaintiff (now Appellant) from interfering with his quiet enjoyment of the said portion and further that the Plaintiff (Now Appellant) be compelled to execute and surrender to him all the transfer documents for the said portion.
25. The Defendant (now Respondent) prayed for judgment against the Plaintiff (now Appellant) for:
 - a. A mandatory injunction restraining the Plaintiff (now Appellant) by himself, his agents, servants and/or employees from interfering with the Defendant's (now Respondent) quiet enjoyment of 1/8 of an acre out of Plot No 85/3.
 - b. An order compelling the Plaintiff (now Appellant) to execute and surrender to the Defendant (now Respondent) all transfer documents for the 1/8 of an acre out of plot no 85/3.
26. The Hearing commenced on 26th June, 2015 and The Learned Trial Magistrate delivered judgement on 6th July, 2022 in the following terms:

“...Consequently, I find the Plaintiff has failed to prove her case on a balance of probabilities and the suit is dismissed. The counter claim succeeds and I hereby issue the following orders:

 - a. A mandatory injunction is hereby issued restraining the Plaintiff by herself, agents, servants and/or employees from interfering with the Defendant's quiet enjoyment of 0.041 HA out of plot NO. 85/3.
 - b. The Plaintiff is hereby ordered to execute and surrender to the Defendant all transfer documents for 0.041HA out of plot NO. 85/3.
 - c. The Defendant is awarded costs of the suit plus interest at court rates from the time of delivery of judgement until payment in full.
 - d. Stay of execution 30 days.”
27. On 15th March, 2023 the appeal was admitted to hearing and directions given that the appeal shall be heard by way of written submissions. The Appeal was scheduled for mention on 17th May, 2023 to confirm filing of submissions.
28. On 17th May, 2023, neither the Appellant nor the Respondent had filed their submissions. The matter was rescheduled to the 19th June, 2023 to confirm filing of submissions and again rescheduled to 18th July for submissions for reasons that the Appellant's submissions were not ready and directions taken were that the Appellant files and serves her submissions first to enable the Respondent to respond to them.
29. On 18th July, 2023, both counsels confirmed having files their respective submissions and the appeal was then reserved for judgement.



Submissions.

30. The Appellant filed her submissions on 19th June, 2023. She relies on the judicial decision of *Selle & Another vs Associated Motor Boat Company Ltd & others* [1968] EA 123 and Section 3 (3) of the [Law of Contract Act](#).
31. She submits that on grounds 1, 2 and 3 and states that she was able to prove her case against the Respondent. She submits that from the evidence adduced, it is clear that the formal requirements for a disposition in land and more specifically plot No 85/3, were met and the same were not in contention.
32. She submits that the said sale agreement contained ambiguous terms to the effect that in the description of the property, it was described that the entire parcel was a quarter of an acre and that the portion to be sold was an eighth of an acre.
33. She submits that under the same agreement under clause 7, it was a term of the contract that the property was being bought on 'as is where is' basis. She submits that from the evidence adduced, it was not in contention that the portion from which an eighth was to be hived had substantial developments which were not part of the sale.
34. She submits that it was thus proper to deduce that the parcel being sold was unsurveyed thus the portion available could not be ascertained to amount to an eighth of an acre. She submits that further it is in evidence that it was the Plaintiff, the Appellant's late husband, who brought the surveyor to ascertain the acreage and once he realized it would not amount to the acreage that the Respondent was now insisting on, he took the necessary steps to set aside and/or rescind the sale and refund the consideration paid by the Respondent.
35. She submits that from the agreement, a clear ambiguity arises on whether what was being sold was the portion that was vacant and available or an eighth of an acre.
36. She submits that the Respondent in his testimony admitted that he was purchasing the portion that was vacant and available and not the developments thereon.
37. She submits that it was the Respondent's advocate who drafted the sale agreement thus the principles of the contra preferentem rule apply ["The doctrine that, in interpreting documents, ambiguities are to be construed unfavourably to the drafter": Black's Law Dictionary, 8th ed.p 352].
38. On grounds 4, 5, 6 and 7, the Appellant submits that the Trial Magistrate's decision amounts to the court delving into the realm of re-negotiating the agreement between the parties and validating a process that was flawed ab initio.
39. She submits that an analysis of the evidence on record clearly points to an agreement that is utterly impossible to enforce. She submits that this is because first, even in admission in the testimony of the Respondent, he admits that what was subject of the purchase was the vacant portion of plot No. 85/3, he makes no mention of the developments thereon being part of the negotiations.
40. She submits that further, the fact that a surveyor was not involved from the onset to ascertain the acreage of the vacant parcel, clearly boils down lack of due diligence on the part of the Respondent.
41. She submits that by the court pronouncing itself and ordering that the Respondent be entitled to 0.041Ha out of the subject parcel results to unjust enrichment of the Respondent since that would include either the developments thereon, which were not negotiated in the consideration or the Appellant having to demolish part of her house to accommodate the order.



42. The Appellant submits that the fact that the estate of the registered was never included in the negotiations is also another matter that renders the sale null. She submits that the Respondent was fully aware that the land was not in the names of the Plaintiff but chose not involve the representatives of the estate of the registered owner to be able to give effect, if the Plaintiff had not rescinded, to the transfer (sic). She submits that this then begs the question as to whether had capacity to contract when in essence he was just a beneficial owner and not the registered owner of plot No. 85/3 (sic).
43. She submits that from the foregoing, she urges the court to employ the principle of equity, 'equity looks at intent and not form'. She submits that the intention of the parties was sale of the vacant portion but since the same could not amount to a registrable acreage hence the Plaintiff's move to have the sale set aside.
44. She relies on the judicial decision of Eric v J. Makokha & 4 others v Lawrence Sagini & 2 others [1994] eKLR and submits that a court cannot issue orders that are not enforceable. She submits that this judgment does not bind this court and urges the court to consider her submissions and set aside the judgment.
45. The Respondent filed submissions on 17th July 2023 and he identified the following issues for determination:
- a. Whether the sale agreements entered into by the Deceased and the Respondent on 8th December, 2010 and 22nd December, 2010 were valid and if they took effect and if the Appellant had capacity to revoke the same?
 - b. Whether the Appellant could be restrained from interfering with the Respondent's quiet enjoyment of the suit plot?
 - c. Whether the Appellant could be compelled to execute and surrender transfer documents in favour of the Respondent for the suit plot?
46. He submits that the deceased prior to his death had issued various correspondence to the Respondent to have him revoke the agreement on the ground that at the time the Appellant was selling the suit Plot, the acreage had not been ascertained hence the need for revocation.
47. He submits that in contracts for sale of land, a purchaser is duty bound to exercise due diligence while purchasing a property and equip himself with the necessary information concerning the relevant property one sought to purchase.
48. He submits that in the case herein, the Deceased prior to his death had sought to revoke the Sale Agreement on the ground that at the time of sale the plot being sold to the Respondent was not in actual acreage and as at the time of sale the Respondent arguably had not undertaken survey work.
49. He submits that clause 7 of the Sale Agreement (PEXH1) entered by parties on 8th December, 2010 clearly states as follows:
- “The buyer hereby confirms that he has seen and is satisfied with the location of the aforesaid parcel which is being sold on the basis of as is and where is and has conducted an official search in respect of the said parcel.”
50. He submits that upon being shown the portion that the Deceased was selling, he was satisfied with the same and he purchased it being satisfied that the same was sold as it was in its current state. She submits that, importantly, survey work was done as it was clearly captured in the Deceased evidence on 22nd June, 2015 at page 052 to 053 and also as per the Respondent's evidence at page 068 to 070.



51. He submits that going by clause 7 of the Sale Agreement, it is therefore illogical for the Appellant then to turn around and seek to have the agreement revoked on the basis of acreage and/or measurements of the Plot. The Respondent submits that he is and was satisfied with the suit plot as it was sold and it is trite that parties are bound by their agreements and courts cannot re-write parties agreements. He relies on the judicial authorities of *Ngere Tea Factory Company Ltd v Alice Wambui Ndome* [2018] eKLR and *Shah vs Guilders International Bank Ltd* [2003] KLR.
52. The Respondent submits that with respect to the said sale, there was no clause with regards to revocation of an agreement and/or revocation thereof save that in the event a party was in breach of the said Sale Agreement then one would be liable to pay the other party a penalty of 10% of the purchase price.
53. He submits that in the absence of a termination clause, parties are then guided by Law Society of Kenya conditions of sale as it was held in the judicial decision of *Anne Murambi v John Munyao Nyamu & another* [2018] eKLR. The Respondent submits that in the present case, he did not breach any terms of the agreement to warrant revocation and in any event the Respondent was shown the suit Plot and upon inspection of the same, he was satisfied with the Plot and paid full consideration for it.
54. The Respondent submits that he has no claim as regards the acreage of the suit plot and is satisfied with the same as it is. He further submits that having taken actual possession of the suit plot, the Appellant has no capacity to revoke the Sale Agreement. He submits that there is no prayer by the Appellant for eviction hence the suit by the Appellant is defective as the Appellant cannot be granted that which he never sought.
55. The Respondent submits that ownership of an 1/8 of an acre out of plot No 85/3 passed to the Respondent on 8th December, 2010 when the Respondent took actual possession in line with clause 6 of the Sale Agreement hence the Appellant lacks capacity to revoke the sale agreement.
56. He submits that it is only fair in the circumstance that the Respondent be allowed to continue with quiet occupation of the portion which he lawfully purchased from the Deceased.
57. The Respondent submits that another issue for consideration is whether the suit plot is matrimonial property to warrant invalidating the Sale Contract. He submits that upon the Appellant being substituted as the Plaintiff in the lower court, it was her evidence that indeed the Respondent did purchase 1/8 of an acre which was excised from Plot No 85/3. He submits that however, the Appellant stated that her consent for sale of the suit plot was never obtained prior to sale despite the suit plot being matrimonial property.
58. The Respondent submits that it is trite law that a party is bound by their pleadings and the Respondent (sic) did not amend the Plaint to include the allegation that the suit plot was matrimonial property and as such, the claim that the suit plot was matrimonial property could not hold.
59. He further submits that if a party wishes the court to determine or to grant a prayer, it must be specifically pleaded and prove (sic). He submits that in the present case it was not pleaded that the suit plot was matrimonial property and he urges the honorable court to disregard the evidence by the Appellant. He relies on the judicial authority of *Kinangop Farmers Self Help Group v Nicholas Wachira Mutungi & 4 others* [2020] eKLR.
60. The Respondent submits that the issue as to whether the suit plot is a matrimonial property can only be dealt with by a family court. He submits that this court lacks jurisdiction to determine a claim of this nature. He submits that the same can only be dealt with by the high court for the court to ascertain and/or determine whether indeed the Plot No 85/3 is matrimonial property.



61. He submits that the law requiring obtaining spousal consent in sale transactions came into force on 2nd May, 2012 and as such laws do not apply retrospectively. He submits that the Appellant in her submissions has claimed beneficial interest of the said plot under the guise that the same is matrimonial property but the court cannot rely upon as the said prayer was not specifically pleaded in their pleadings thus the same cannot be granted on the ground of overriding interest against a title which even though they do not appear on a registered title the same is binding on the registered proprietor and a person who acquires an interest in the property.
62. The Respondent relies on the judicial authority of *Rose Chepkirui Mibei v Jared Mokuia Nyariki & 2 others* [2015] eKLR and submits that the Appellant having failed to establish her claim under this limb it is only fair and just that the court does not grant the orders sought. The Respondent submits that he lawfully and legally purchased 1/8 of an acre which was to be excised from Plot No 85/3 and has been occupying the said Plot since its purchase. He submits that it is only just that he be allowed to enjoy his property peacefully without any interruption from anyone.
63. He further submits that the court having established that ownership of the suit plot had passed to the Respondent and that the Appellant had no capacity to revoke the Sale Agreement the prayer for injunction as against the Respondent can therefore not issue but to the contrary, the Appellant should be restrained from interfering with the Respondent's quiet possession of the suit plot.
64. The Respondent submits that the Appellant's prayer is that the court issues a permanent and/or temporary injunction restraining the Respondent from trespassing with Plot No. 85/3 and from the Respondent's pleadings and from the evidence of both the Appellant and the Respondent it is clear that the Respondent took actual possession of the suit plot on 8th December, 2010.
65. He submits that currently, the Respondent is in occupation of the suit plot and the court therefore has no capacity to restrain the Respondent from entering and/or dealing with the suit plot and the respondent is already in occupation of the suit plot.
66. He submits that the evidence adduced by the Appellant amounted to a prayer for eviction however, it is worth to note that a prayer for eviction was not sought in the plaint and a party cannot be granted that which has not been sought.
67. The Respondent submits that the court having established that he is the owner of an 1/8 acre out of plot No 85/3, then he is entitled to quiet and peaceful enjoyment of the same. He submits that he is currently in occupation of the suit plot and it is now only fair and just for the court to restrain the Appellant from interfering with the suit plot (sic).
68. He submits that the court ought to give effect of parties intention to a Sale Agreement. He submits that it was the intention of the Deceased to sell an 1/8 acre out of plot No 85/3. He submits that clause 5 of the sale agreement entered on 8th December, 2010 and clause 2 of the further agreement entered on 22nd December, 2010 was to the effect that the seller would surrender all the facilitating documents and execute the transfer instruments in favour of the buyer.
69. He submits that in order to actualize the intentions of parties to the agreement, it was just for the court to order the Appellant to execute and facilitate transfer of the suit plot into the Respondent's name. He relies on the judicial decision of *Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan]* [2017] eKLR. He prays that the Appellants appeal be dismissed with costs to the Respondents.



Analysis and Determination.

70. The Appellant raised seven grounds of appeal. He urged ground 1,2 & 3 and ground 4,6 & 7 and urged them together.
71. This appeal is founded on the decision by the trial magistrate. The said decision revolves around the validity of contract for the sale of land and whether the purported revocation of the said contract by the Appellant was legal.
72. Having reviewed the grounds of appeal and the final orders issued by the Magistrate, my view is that the single issue for determination, as read from ground (a) and (b) of the memorandum of appeal is;
- Whether the learned Trial Magistrate erred in finding that the Sale Agreements dated 8th December, 2010 and 22nd December 2010 were valid and had taken effect and that, therefore, the purported rescission by the Appellant was therefore invalid.
73. The other grounds of appeal pertain to orders issued by the Trial Magistrate which orders result from the finding that the contract was valid and had taken effect. These are orders, by way of example, of injunction issued against the Appellant restraining her from interference with the Respondents occupation and also orders requiring the Appellant to execute transfer document in favour of the Respondent and surrender them to the Appellant.
74. It is the Appellant's case that she sought to revoke the Sale Agreement entered into with the Respondent because the parcel that was available did not meet the minimum registrable acreage as per the law and enforcement of the said agreement would result in the Appellant losing out on part of her house and unjust enrichment and/or benefit to the Respondent.
75. The Appellant in her submissions states that at the time of the sale, neither party engaged a surveyor to confirm the exact acreage of the vacant parcel that was between his rental units and where the Appellant had built his home.
76. The Appellant points out that the relevant law is Section 3 (3) of the Contract Act. It provides:
- 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:
- Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.
77. It is the Respondent's case that sale of the suit plot was completed and that he took actual possession of the same hence the contract could not be revoked.



78. The Appellant submits that the Sale Agreement contained ambiguous terms to the effect that in the description of the property, it was described that the entire piece was a quarter of an acre and the portion to be sold was an eighth of an acre.
79. The Respondent on the other hand submits that the deceased prior to his death had sought to revoke the Sale Agreement on the ground that at the time of sale the size of the parcel being sold to the Respondent was less than what was intended and blames this on the fact that survey had not been undertaken.
80. It is the Respondent's case that upon being shown the portion that the Deceased was selling, he was satisfied with it and his purchase was based on him being satisfied. The Respondent further submits that the same was sold as it was in its current state. It was his submission that the survey work was done.
81. The Respondents relied on clause 7 of the Sale Agreement (Exhibit P1) entered into by parties on 8th December, 2010 which is drafted in the following terms;
- “The buyer hereby confirms that he has seen and is satisfied with the location of the aforesaid parcel which is being sold on the basis of as is and where is and has conducted an official search in respect of the said parcel.”
82. The Appellant's appeal is premised on ambiguity of the Sale Agreement dated 8th December, 2010. Further the Appellant attempted to rescind the agreement and followed those attempts with filing of the suit in the subordinate court. The Respondent defended the suit and filed a counterclaim which the subordinate court found meritorious.
83. The Court of Appeal in the judicial decision of *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR on whether or not a court can rewrite a contract held as follows at paragraphs 35 and 36: -
- “It is not for the court to rewrite a contract for the parties. As this Court held in *National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd*. Civil Appeal No. 95 of 1999 “a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”
- Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.”
84. The Court notes that the Appellant in urging her appeal states that the subject of the sale was the vacant portion of plot No.85/3. The Appellant also relies on clause 7 of the Sale Agreement to indicate that what was being sold was on as is where basis.
85. In *Kanyango vs KCB Ltd & another* (2004) 1 KLR 126, the court held it was not the duty of courts to make contracts but to construe any such contracts and arbitrate on them.
86. It must not be forgotten that the primary function of the law of contract is to ensure that whatever promises that parties make to each other under a contract shall come to pass.



87. The Learned Magistrate at page 138 of the judgment rightly observed as follows;
- “The Plaintiff and the Defendant entered into a Sale Agreement on 8th December 2010 for the sale of an 1/8 of an acre to be excised out of plot number 85/3 at a purchase price of Kshs. 420,000. The Sale Agreement contains the names of the parties, the description of the property, the purchase price and conditions thereto and was executed by both parties.”
88. The Learned Magistrate went on to quote the provisions of section 3 (3) of the [law of Contract Act](#) and continued at page 139 as follows
- “Relying on the facts presented and the above cited legal provision I find that there is a valid contract between the Plaintiff and the Defendant.”
89. This court has looked at the Sale Agreement dated 8th December, 2010 and 22nd December, 2010 and finds that there is no ambiguity. It clearly states that “the seller is the beneficial owner plot No. 85/3 containing by measurement quarter ¼ an acre. AND WHEREAS the seller is desirous of selling and the buyer is desirous of buying an eighth 1/8 of an acre to be excised from the aforesaid parcel at an agreed consideration of Kenya Shillings Four Hundred and Twenty Thousand (Kshs. 420,000/=) only.
90. There are several conditions attached to the sale. I am particularly drawn to clause 6 and 7. They are reproduced as hereunder
- Clause 6;
- a. The buyer shall be entitled to take immediate possession.
- Clause 7;
- b. The buyer hereby confirms that he has seen and is satisfied with the location of the aforesaid parcel which is being sold on the basis of ‘as is and where is’ and has conducted an official search in respect of the said parcel.
91. The Respondents submits that he took possession and has no complaints in respect of the size of parcel he bought. He further submits that he was shown the suit Plot and upon inspection of the same, he was satisfied with the Plot and paid full consideration for it.
92. On the question of invalidity of the Sale Agreement for want of spousal consent, the Learned Magistrate rightly observed that the agreement was executed on 12th December, 2010 and that the law requiring a vendor to obtain consent of his/her spouse came into force on 2nd May, 2012 and that it was therefore not necessary for the seller to obtain it.
93. The question of revocation of the Sale Agreement is one of the grounds of appeal. The Appellant states that the Learned Magistrate erred in finding that the rescission of the contract by the Plaintiff was invalid.
94. In the plaint, the Appellant pleaded that on 8th March, 2011 he revoked the Sale Agreement executed on 8th December, 2010 and offered to refund the purchase price to the Defendant. The question that follows is how are contracts rescinded and/or what are the grounds?
95. I have interrogated the letter dated 18th February, 2011 erroneously described as bearing a date 18th March, 2011 (Exhibit P2). It is written by the Plaintiff’s advocate and it is reproduced in part as follows;
- “...Before the agreement was drawn survey work had not been undertaken.



It has now turned out that the actual area on the ground may not be exactly 1/8 of an acre as earlier thought.

Our client offers to sell to you what is actually available to him.

The alternative is to revoke the entire agreement and have your money refunded to you.

Let us have your views...”

96. Some of the grounds of rescinding a contract are breach, misrepresentation, fraud, mistake, coercion. Bearing these grounds in mind, it is not clear which one the Plaintiff invoked. Further the letter relied on only offers revocation as an alternative to selling the land “actually available” to the Plaintiff. He did not revoke the agreement. Revocation must be communicated to the other party. He/she /it may accept the revocation in which case it is termed as revocation by consent. If the other party objects to the said revocation, the law must be set in motion by way of filing a suit to obtain orders of revocation. If revocation of a contract was to be left to the whims of a party to a contract then anarchy would prevail.
97. It is also important to mention that the evidence presented before the trial court is that the Respondent completed the agreement as had been agreed. There was no breach on his part.
98. Taking the pleadings, evidence tendered and documents produced into consideration, I find that the Learned Magistrate correctly issued a mandatory injunction restraining the Plaintiff (now Appellant) by herself, agents, servants and/or employees from interfering with the Defendant’s (now Respondent) quiet enjoyment of the portion of land occupied by him. My point of departure is that I have not seen a survey report which report would have been necessary to shed light on the size/ measurement acreage of the portion of the suit parcel that is in possession and/or occupation of the Respondent.
99. The Learned Magistrate correctly ordered the Plaintiff (now Appellant) to execute and surrender to the Defendant (now Respondent) all transfer documents in relation to the portion of the suit parcel occupied by him. My only point of departure is that the portion actually occupied by the Respondent needed to be established without making an assumption as to its size.
100. In essence, the Learned Trial Magistrate correctly found that the Plaintiff (now Appellant) failed to prove his case on a balance of probabilities and in turn dismissed his suit.
101. The Learned trial Magistrate correctly found that the counterclaim succeeded.

Disposition.

102. In the result, the appeal is hereby dismissed. Judgment is entered in favour of the Respondent in the following terms:
 - a. An order of permanent injunction is hereby issued restraining the Plaintiff (now Appellant) by himself, legal representatives, agents and/or servants from trespassing, entering, developing, interfering and/or dealing with that portion of plot No. 85/3 in occupation and use by the Defendant (now Respondent) in any manner whatsoever.
 - b. The Plaintiff (now Appellant) and the Defendant (now Respondent) shall within 30 days of the date hereof carry out a joint survey to determine the extent of that portion of plot No. 85/3 in occupation and use by the Defendant (now Respondent). The cost of the survey shall be shared between both parties.
 - c. An order is hereby issued that the Plaintiff (now Appellant) by himself, legal representatives, agents and/or servants shall execute and surrender to the Defendant (now Respondent) all



necessary transfer documents in respect of that portion of plot No. 85/3, determined by the process in (b) above, to be in occupation and use by the Defendant (now Respondent).

- d. The Defendant (now Respondent) shall have costs of the suit.
- e. The Defendant (now Respondent) shall have costs of the appeal.

103. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 15th DAY OF FEBRUARY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Mwangiki for Njeri Njagua for Respondent

Mr. Imbwaga for Appellants.

Court Assistant; Ms. Monica Wanjohi.

