**Mungai v Tebere Concrete Company Limited & another (Civil Appeal E089 & E091 of 2022 (Consolidated)) [2024] KECA 1549 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1549 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CIVIL APPEAL E089 & E091 OF 2022 (CONSOLIDATED)**

**W KARANJA, LK KIMARU & AO MUCHELULE, JJA**

**OCTOBER 25, 2024**

**BETWEEN**

**MOSES NDUNG''U MUNGAI ..... APPELLANT**

**AND**

**TEBERE CONCRETE COMPANY LIMITED ..... 1ST RESPONDENT**

**DICKSON MACHARIA GICHUHI ..... 2ND RESPONDENT**

***(Being an appeal from the judgment of the Environment and Land Court of Kenya at Kerugoya (Cherono, J.) dated 3rd June, 2022 in ELC No. 70 of 2017 (Formerly ELC Case No. 14 of 2016)***

## JUDGMENT

1. Tebere Concrete Company Limited, the 1st respondent herein, instituted a suit against Dickson Macharia Gichuhi, the 2nd respondent, before the Environment and Land Court at Embu, vide a plaint dated 7th March 2016. The 1st respondent averred that the 2nd respondent was the registered owner of land parcel P/No. 1617 Wachoro Adjudication Section, Mbeere South District ('suit property'). That vide an agreement dated 25th February 2012, the 2nd respondent agreed to sell the suit property to the 1st respondent, for a purchase price of Kshs. 5,000,000.00. The 1st respondent averred that he paid a deposit of sum Kshs. 1,500,000.00, and took possession of the suit property. A further payment of Kshs.400,000.00 was made on 16th May, 2014.

2. In pursuit of vacant possession of the suit property, subject to clause three (3) of the agreement, the 2nd respondent issued several eviction notices to families that were illegally occupying the suit property, and subsequently sought eviction of the said squatters vide Kerugoya ELC No. 140 of 2012. The 1st respondent pleaded that the sale of the suit property was not subject to the *Land Control Act*, and that ownership passed to the 1st respondent upon execution of the sale agreement, and part payment of the purchase price. It was the 1st respondent's case that the 2nd respondent had on several occasions

attempted to re-enter the suit property, and had unlawfully put up a barbed wire perimeter fence around the suit property.

3. The 1st respondent urged the trial court to: declare that it is the lawful owner of the suit property; direct the 2nd respondent to remove the perimeter fence erected on the suit property; issue an order of injunction against the 2nd respondent to prevent him and his agents, from interfering with the 1st respondent's quiet possession of the suit property; and general damages for trespass.

4. The 2nd respondent filed an amended statement of defence and counterclaim dated 8th October 2020. He admitted that he entered into an agreement for sale of the suit property with 1st respondent as pleaded in the plaint, and that the 1st respondent paid the stated deposit. He averred that the 1st respondent breached the terms of the contract, which led him to rescind the sale agreement and refund the amount deposited by the 1st respondent. In the counterclaim, the 2nd respondent sought against the 1st respondent mense profits of Kshs.200,000.00 per month plus interest, from 1st April, 2015 to 7th October, 2015.

5. During the pendency of the suit, the appellant, vide an application dated 18th March, 2019 sought to be joined as a party to the suit, on account that he was the registered proprietor of the suit property, having purchased the same from the 2nd respondent, vide a sale agreement dated 7th October, 2015. He was duly joined as the 2nd defendant.

6. In response to the suit filed by the 1st respondent, the appellant filed a statement of defence and counterclaim dated 29th June 2020. He made more or less similar averments as those advanced by the 1st respondent. In the counterclaim, the appellant averred that upon purchasing the suit property, he issued the 1st respondent a notice to vacate the suit property latest by 14th November, 2015. He pleaded that the 1st respondent's continued occupation of the suit property was an infringement upon his rights as the proprietor of the suit property. It was his assertion that the 1st respondent earned Kshs.2,500,000.00 per day from carrying out business on the suit property. The appellant prayed for mesne profits at the rate of Kshs.2,500,000.00 per day, to cover the period from 14th November, 2015 until such time the 1st respondent vacates the suit property.

7. The ELC heard viva voce evidence. PW2, Kavit Shah, the General Manager of the 1st respondent company, stated that the 2nd respondent agreed to sell the suit property to the 1st respondent for a consideration of Kshs. 5 million. That the 1st respondent made a deposit of Kshs. 1.5 million, and a made further payment Kshs.400,000.00, which payments were acknowledged by the 2nd respondent. That the 1st respondent took immediate possession of the suit property and has been carrying on its business, and has made extensive developments thereon. It was PW2's evidence that the 2nd respondent, sometime in 2015, rescinded the sale agreement on grounds that the 1st respondent was unable to settle the balance of the purchase consideration. PW2 testified that the 2nd respondent failed to refund the deposit that had been paid by the 1st respondent. That the 2nd respondent later sought to be joined as a party to the suit on grounds that he was the rightful owner of the suit property, having purchased the same from the 2nd respondent. PW2 testified that since then, the appellant has frustrated the 1st respondent's business operations by filing various applications before court and sending emissaries to the 1st respondent in attempted extortions. PW1, Mr. Rajesh Shah, a director at the 1st respondent's company, adduced evidence corroborating the testimony of PW2.

8. The 2nd respondent, Dickson Macharia Gichuhi, gave evidence as DW1. It was his evidence that in April 2011, he discovered that the 1st respondent had encroached onto the suit property. After confirming that the suit property was owned by the 2nd respondent, the 1st respondent approached him with an

offer to purchase the suit property. They entered into an agreement for sale on 25th February 2012. That the 1st respondent paid a deposit of Kshs.1.5 million, after which the 2nd respondent evicted the squatters who were on the suit property. The 1st respondent then took possession. That after resettling the squatters, he approached the 1st respondent for payment of the balance of the purchase consideration of Kshs.3.5 million. That the 1st respondent failed to pay the balance and only paid Kshs. 400,000.00 on 16th May 2014.

9. The 2nd respondent testified that by a letter dated 27th February 2015, he notified the 1st respondent of his intention to rescind the agreement on account of their failure to settle the balance of the purchase consideration. That he drew a Banker's cheque for the refund of the deposit that had been paid by the 1st respondent plus 30% interest, as was contained in the agreement. That the 1st respondent continued to exploit his land by extracting stones, ballast and rocks, and using the suit property for storage purposes. The 2nd respondent maintained that he subsequently entered into an agreement for the sale of the suit property with the appellant on 7th October, 2015, after which title to the suit property was transferred to the appellant on 25th January, 2019.

10. DW2, Moses Ndungu Mungai (the appellant), told the court that he purchased the suit property from the 2nd respondent on 7th October 2015. He paid the full purchase consideration. He testified that the suit property was transferred to him on 25th January, 2019, pursuant to the consent of the Land Control Board. That he issued an eviction notice to the 1st respondent on 13th October 2015. They wrote back to him claiming that they had purchased the suit property from the 2nd respondent. DW2 maintained that the said agreement was rescinded as the 1st respondent was unable to pay the full purchase consideration. He told the trial court that the 1st respondent had refused to vacate from the suit property.

11. At the conclusion of the trial, the learned trial Judge, in a judgment delivered on 3rd June, 2022, found that the 2nd respondent could not unilaterally rescind the agreement entered between him and the 1st respondent for purchase of the suit property without giving the 1st respondent a notice to complete payment of purchase consideration, as provided for under the Law Society Conditions of Sale. The learned trial Judge determined that a constructive trust was created in favour of the 1st respondent by the agreement, and consequently, the 1st respondent's suit claiming the suit property was allowed.

12. The appellant, aggrieved by the said decision, lodged Civil Appeal No. E089 of 2022 before this Court on 15th August, 2022. The 2nd respondent filed a separate appeal, Civil Appeal No. E091 of 2022, on 18th August 2022, challenging the decision of the learned trial Judge. The two appeals were consolidated and heard together as one.

13. The thrust of the appeal is that the decision of the learned trial Judge was against the weight of the evidence and the law. The appellant and the 2nd respondent faulted the learned Judge for finding that the 2nd respondent could not rescind the sale agreement between himself and the 1st respondent, and that a constructive trust had been created, this was despite the fact that the 1st respondent breached the contract by failing to pay the balance of the purchase consideration. They were aggrieved by the finding of the learned Judge, to the effect that the appellant's title was illegally and corruptly acquired, in the absence of any evidence to prove the same. They were of the view that the learned trial Judge erred in issuing an order of specific performance of a contract that had been rescinded.

14. The appeal was canvassed by way of written submissions. Mr. Okwaro, learned counsel for the appellant submitted that the orders granted by the learned Judge were a deviation from the 1st respondent's prayers in their pleadings. He submitted that the decision of the learned Judge purported

to breathe life into an agreement that had been rescinded by the 2nd respondent, and was therefore unenforceable. It was his argument that no constructive trust was created by the parties as the 1st respondent had not paid the full purchase consideration. He maintained that no evidence was tendered by the 1st respondent to establish that the appellant acquired his title fraudulently or illegally. Counsel urged that the decision of the learned Judge unlawfully deprived the appellant of his property. He submitted that the appellant, having proved that he was the rightful owner of the suit property, was entitled to mesne profits against the 1st respondent for his continuous trespass on the suit property.

15. Ms. Machasio, learned counsel for the 1st respondent submitted that the agreement between the 1st and 2nd respondents was not rescindable, by dint of an overriding interest on the suit property, through creation of a constructive trust. Counsel urged that the 1st respondent did not cash the cheques issued by the 2nd respondent purporting to refund the deposit paid with respect to the purchase of the suit property.

16. It was her submission that the agreement did not contain a clause giving a specific completion date, and that the 2nd respondent failed to establish that the 1st respondent had refused to pay the balance of the purchase consideration of Kshs.3.5 million. Counsel asserted that the 1st respondent, in reliance of the agreement between the parties, extensively developed the suit property, and that the 2nd respondent ought to be estopped from resiling from his position.

17. Ms. Machasio reiterated that the 1st respondent did not trespass on the suit property as the sale agreement allowed the 1st respondent to take immediate possession of the suit property upon execution of the said agreement. With respect to the appellant's title, counsel submitted that neither the appellant nor the 2nd respondent provided proof of payment of the full purchase consideration by the appellant as claimed. She maintained that the 2nd respondent lacked capacity to transfer title of the suit property to the appellant on account of the overriding interest created by existence of a constructive trust.

18. On his part, Mr. Muriithi, for the 2nd respondent, submitted that the 1st respondent did not plead constructive trust, fraud, specific performance of the agreement dated 25th February 2012, or even the finding that the Law Society Conditions of Sale were applicable. Counsel urged that the agreement between the 1st and 2nd respondents allowed for rescission, and provided that the 2nd respondent, in the event of breach of contract, could refund any amount deposited plus an interest rate of 30%. He stated that no evidence was led by the 1st respondent to prove that they, at any point, offered to settle the balance of the purchase consideration. He faulted the learned Judge for finding that a constructive trust existed when in actual fact the deposit paid had been refunded by the 2nd respondent. He maintained that the appellant obtained a clean title from the 2nd respondent, and that the learned trial judge erred in making an order of specific performance of an agreement that had long been rescinded.

19. We are alive to our mandate as a first appellate court to analyze and re-assess the evidence on record and reach our own conclusions, of course always bearing in mind that we did not see or hear the witnesses as they testified. In Selle v. Associated Motor Boat Co. [1968] EA 123, the duty of a first appellate court was explained as follows:

> "An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the

evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270. ”

20. It was common ground that the 1st and 2nd respondents entered into an agreement for the purchase of the suit property on 25th February, 2012, for a consideration of Kshs.5 million. The parties agreed that the 1st respondent pay a deposit of Kshs. 1.5 million upon execution of the agreement. The agreement provided that the 1st respondent was to take immediate possession of the suit land. The balance of the purchase price, Kshs. 3.5 million, was to be paid by the 1st respondent on completion of the transfer. It is also not disputed that on 16th May 2014, the 1st respondent made a further payment of sum Kshs.400,000.00. This was the final payment made by the 1st respondent.

21. It was the 2nd respondent's case that since then, he made various requests to the 1st respondent to settle the balance of the purchase price to no avail. This culminated to the 2nd respondent's decision to rescind agreement of sale of the suit property, which decision he communicated to the 1st respondent vide his letter dated 27th February 2015. In the said letter, the 2nd respondent noted that he had on several occasions requested the 1st respondent to settle the balance of the purchase consideration, but the same was not done.

22. The 1st respondent did not reply to the 2nd respondent's said letter notifying him of his decision to rescind the agreement of sale of the suit property. We also note that the 1st respondent made no offer to settle the balance of the purchase consideration. Five months later, the 2nd respondent, once again, wrote to the 1st respondent demanding that they stop utilizing his land. The 2nd respondent informed them that he would be refunding the sum deposited with him to the tune of Kshs.1.9 million, plus interest, at the rate of 30%, as was provided in the agreement.

23. The 1st respondent responded to this letter in their letter dated 13th July, 2015. The 1st respondent stated that it was the lawful owner of the suit property, having purchased the same from the 2nd respondent. The 1st respondent observed that since at the time the parties entered into the agreement for sale the suit property was still under adjudication, no further formalities were required, as the title to the land automatically passed to the 1st respondent. We note that even at this point, being well aware that no further formalities were required to transfer the suit property to themselves, the 1st respondent still did not offer to settle the balance of the purchase consideration owed to the 2nd respondent.

24. Left with no choice, the 2nd respondent wrote to the 1st respondent on 3rd August, 2015, informing them that since they were unable to settle the balance of the purchase price, they should vacate the suit property. The 2nd respondent, on 12th October 2015, refunded the sum of Kshs.1.9 million that had been deposited by the 1st respondent, together with interest at the rate of 30%, in three Banker's cheques. Five months later, the 1st respondent instituted the suit before the ELC, claiming that it was the rightful owner of the suit property.

25. From the foregoing, it is clear that we do not agree with the finding that was made by the learned trial Judge that the 2nd respondent rescinded the sale agreement without notifying the 1st respondent that they were required to complete the payment of the balance of the purchase consideration. The correspondence between the two parties relating to payment of the balance of the purchase price spanned over a period of six months, before the 2nd respondent finally refunded the deposited amount by the 1st respondent.

26. We further observe that for a period of over three years since the agreement for sale for the suit property was entered into, the 1st respondent made no effort to pay the balance of the purchase consideration

despite persistent pleas by the 2nd respondent. At no point did the 1st respondent make any offer towards payment of the balance of the purchase price. PW1, during cross-examination, admitted that the 1st respondent did not make any offer to the 2nd respondent to settle the purchase consideration owing during the correspondence period.

27. The contract entered into by the 1st and 2nd respondent allowed either party to rescind the agreement in the event either of them was unable to complete the sale. The 2nd respondent, in accordance with clause four of the agreement, duly refunded the deposit paid by the 1st respondent, together with the stipulated interest of 30%. This was after he had given the rescission notice which in our considered opinion sufficed. The 1st respondent admitted to having received the Banker's cheques from the 2nd respondent, though they stated that they did not cash the said cheques. Whether the 1st respondent cashed or failed to encash the said Banker's cheques was an issue beyond the control of the 2nd respondent.

28. It is our considered view that the introduction to the terms of the said agreement of sale made by the learned trial Judge, with respect to the Law Society of Kenya Conditions of Sale, rewrote the terms of the agreement entered into between the 1st and 2nd respondents. We are guided by the decision of this Court in National Bank Kenya Limited v. Pipeplastic Samsolit (K) Limited and Another [2002] 2. EA 503 where the Court held thus:

> " A Court of law cannot re-write 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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah, JA in the case of Fina Bank Limited Vs. Spares & Industries Limited (Civil Appeal No. 51 of 2000) (unreported):
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> 'It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain'".

29. We also find that a constructive trust did not arise in this case as there was no evidence of wrong doing or unjust enrichment on the part of the appellant or the 2nd respondent. Further, the 1st respondent failed to pay the full purchase consideration for the suit property as required in the sale agreement. The 1st respondent made no effort to settle the balance of the purchase consideration even after several demands from the 2nd respondent. The balance of the purchase consideration remained unpaid even at the time this suit was lodged before the ELC. As earlier observed, the 2nd respondent duly refunded the deposit that had been paid by the 1st respondent.

30. Accordingly, we hold that the 1st respondent made no attempt to fulfill his part of the bargain, and pay the balance of the purchase consideration, several years after the balance became due. The 1st respondent could not, at the stage when they filed suit before the ELC, seek to obtain an order for transfer of the suit property pursuant to the said contract. This was because the suit property had already been lawfully purchased by the appellant.

31. We find that the 2nd respondent had every right to rescind the sale agreement and consider other offers from third parties, such as the appellant. The 1st respondent was in breach and therefore the sale agreement was lawfully rescinded by the 2nd respondent and the deposit earlier paid lawfully refunded to 1st respondent in accordance with the terms of the sale agreement.

32. We are not persuaded that the appellant and the 1st respondent, according to their respective counter-claims, are entitled to the prayer for mesne profits, as the agreement between the 1st and 2nd respondents, prior to rescission, permitted the 1st respondent to be in possession of the suit property.

33. It is clear from the foregoing reasons that we have partially allowed the appeal, to the extent that the decision of the learned trial Judge allowing the 1st respondent's suit is hereby set aside. It is substituted by a judgment of this Court dismissing the 1st respondent's suit filed before the ELC with costs. The 1st respondent is ordered to vacate the suit property within sixty (60) days from the date of this judgment and give vacant possession to the appellant. In default, the appellant shall be at liberty to evict the 1st respondent from the suit property.

34. The costs of the appeal shall be paid by the 1st respondent to the appellant and the 2nd respondent.

35. Orders accordingly.

**DATED AND DELIVERED AT NYERI THIS 25TH DAY OF OCTOBER, 2024.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**