



REPUBLIC OF KENYA



**KENYA LAW**  
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**Theuri v Kaniaru & another (Civil Appeal 410 of 2017)  
[2023] KECA 542 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 542 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 410 OF 2017  
DK MUSINGA, S OLE KANTAI & HA OMONDI, JJA  
MAY 12, 2023**

**BETWEEN**

**SAMUEL KIMONDO THEURI ..... APPELLANT**

**AND**

**JOSEPH KAHURA KANIARU ..... 1<sup>ST</sup> RESPONDENT**

**KMR BALLAST LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (Obaga, J.) dated 27th September 2017 in ELC Case No. 996 of 2014)*

**JUDGMENT**

1. In determination of civil disputes, courts must endeavour to respect and give effect to parties' freedom of contract by, *inter alia*, scrutinizing every contract; relevant documents; actions; conduct and/or deeds of the parties that may reveal the true intent of parties. This is the cardinal principle that guides courts in arriving at fair and equitable determination of such disputes.
2. We have before us an appeal against the judgment and decree of Obaga, J. dated September 27, 2017 in ELC No 996 of 2014.  
The dispute that gave rise to the appeal revolves around the subdivision of a parcel of land known as LR No 8914/2A now LR No 8914/6, ('the suit property').
3. A brief background of the case is that the Appellant was the registered owner of 50 acres of land comprised in title no 8914/12 within Ngelani Ranching Unity. On or about September 21, 2011, the Appellant and the 2<sup>nd</sup> Respondent entered into a sale agreement for the entire parcel of land for Kshs 47,500,00. Upon payment of the full purchase price the Respondents were to take full possession of the land. The agreement was executed by the 1<sup>st</sup> Respondent and one George Muigai Gitungo as directors of the 2<sup>nd</sup> Respondent.



4. On February 27, 2012 the parties executed a deed of variation of the sale agreement, whereby they reduced the acreage to be sold to 25 acres at a consideration of Kshs 23,750,000.00, which the 2<sup>nd</sup> Respondent paid in full. Subsequently, the 50 acres was subdivided by a surveyor under the instructions of the Appellant, and the Respondents took possession and occupied the specific part of the land they had purchased and placed beacons to mark it. That part of the land has a quarry on it.
5. On or about July 2, 2014, the 1<sup>st</sup> Respondent found people digging trenches right across their parcel of land in readiness to erect a fence, which would have had the effect of altering the original proposed subdivision plan effected by the surveyor. He further learnt that the Appellant had processed a certificate of title in both his name and that of the 1<sup>st</sup> Respondent for the entire parcel of 50 acres as tenants in common.
6. Consequently, the Respondents instituted suit against the Appellant via a plaint dated July 28, 2014 that was later amended on October 15, 2014 seeking, *inter alia*, a permanent injunction to restrain the Appellant, his servants or agents or those claiming under him from interfering with the original subdivision plan to the suit property effected on or around March 2012 and/or to replace it with any subsequent ones; an order for specific performance directing the Appellant to transfer 25 acres of the suit property to the Respondents based on the earlier proposed subdivision plan and/or agreement without alterations; and costs of the suit.
7. In response, the Appellant filed defence and counterclaim which were later amended accordingly. The Appellant denied every accusation as raised by the Respondents and argued that he was, together with the 1<sup>st</sup> Respondent, registered as tenants in common over the 50 acres parcel of land, and that no partition has ever been effected pursuant to the provisions of section 94 of the Land Registration Act, 2012.
8. The Appellant further argued that if at all the 2<sup>nd</sup> Respondent took possession and occupation of any part of the property, such possession and /or occupation was wrongful in so far as it was done without due regard to the intention of the parties. He stated that the partition ought to have been effected in such a manner as would vest part of the quarry area to both parties in such proportions as would be fair and reasonable; that any agreement made in respect of the suit property culminated in the registration of LR No 8914/6, (the suit property), into the names of the 1<sup>st</sup> Respondent and the Appellant as tenants in common, and such registration superseded the agreement; that the 2<sup>nd</sup> Respondent breached the provisions of the initial agreement dated September 27, 2011 which resulted to a deed of variation dated February 27, 2012, and as per clause 4 thereof, the Appellant was to transfer 25 acres to the 2<sup>nd</sup> Respondent; that the site was not defined, but that was to be done in accordance with the provisions of section 94 of the Land Registration Act, 2012.
9. The Appellant in his counterclaim stated the Respondents had wrongfully purported to take possession of a portion of the land without due regard to the requirements set out in section 94 of the Land Registration Act, 2012. He sought several orders including: an order directing the 1<sup>st</sup> Respondent to join him in complying with section 94 of the act so as to effect the partition in accordance with the law; an order of injunction against the Respondents jointly and/or severally to permanently restrain them from unilaterally laying their claims over the Appellant's share of the land, or in any other manner howsoever from interfering with his peaceful occupation and use of his share of the land.
10. In reply, the Respondents maintained that their portion had already been identified, surveyed and set apart way back in 2012, and it would be falsehood for the Appellant to allege otherwise; that they had lawfully taken possession of their portion of the land and had every right to secure the same from



alienation by the Appellant and those claiming under him, having lawfully purchased the same and completed their part of the bargain.

11. In the impugned judgment, the trial court found that the Respondents had proved their case on a balance of probabilities and allowed their prayers as sought and dismissed the Appellant's counterclaim with costs to the Respondents. The court held that the intention of the parties was not to own the 50 acres jointly as tenants in common; that their clear intention as reflected in the deed of variation was to transfer 25 acres to the 2<sup>nd</sup> Respondent; and that the Appellant could not therefore invoke the provisions of section 94 of the Land Registration Act, 2012.
12. Aggrieved by the entire judgment, the Appellant preferred an appeal to this court. In his memorandum of appeal, the Appellant faulted the learned judge on seven (7) grounds which we may summarise as follows: misdirecting himself by putting reliance on matters that were not discernible in the parties' contract; basing his decision on the surveyor's proposed subdivision which was never approved by the Appellant and which was always a proposal; failure to appreciate and hold that the agreement between the parties did not define which of the two portions of the land each party was to own; holding that the intention of the Respondents was to mine stones although such an intention was not reflected in any of the agreements; holding that the registration by the Appellant of the entire land in the joint names of the 1<sup>st</sup> Respondent and himself was a breach of the agreement; and for holding that section 94 of the Land Registration Act, 2012 was not applicable in the circumstances of the matter.
13. The Appellant urged us to allow the appeal, set aside the trial court's judgment, allow his counterclaim as prayed, and award him costs of the appeal and of the court below.
14. On May 18, 2022 the Respondents filed an affidavit indicating that the appeal was spent, as the decree appealed from had been fully executed, and the 50 acres had been subdivided in terms of the decree. In the circumstances, it was contended that the appeal was pointless and a waste of the court's valuable time. The Respondents attached to the affidavit orders by Angote, J. issued on November 22, 2021 to that effect.
15. The appeal was canvassed by way of written submissions and oral highlighting of the same by the parties' respective counsel.  
  
By consent, parties agreed to have the supplementary record of appeal dated May 27, 2022 filed by the Appellant's counsel admitted as duly filed.
16. In his written submissions, the Appellant maintained that he, together with the 1<sup>st</sup> Respondent, are tenants in common on the land by virtue of registration through a certificate of title issued on March 27, 2014; that the certificate in issue was never contested at the trial court, and the same continues to attract all the privileges and appurtenances belonging thereto in accordance with the provisions of section 25 and 26 of the Land Registration Act.
17. The Appellant argued that the agreement for sale dated September 21, 2011 and the deed of variation dated February 27, 2012 did not make any inference, expressly or impliedly, to the purpose for which the land was being sold and or purchased, and neither did such purpose constitute any contractual term. Therefore, the learned judge fell into error in his finding that the purpose for the purchase was clear from the agreement without any such contractual term.
18. The Appellant further submitted that the intention to have the portion of land to be initially sold and the price therefore reduced by half was that each party would get an equal share of the same, both in size and value. Therefore, both parties were entitled to equal portions of the land, in value and size.



19. The Appellant challenged the surveyor's proposed subdivision and argued that he never approved it; that clause 8 of the agreement dated September 21, 2011 expressly stated that the vendor shall point out the beacons to the purchaser and shall replace at the vendor's own expense any that may be missing on or before completion of the transaction. Citing *Savings and Loan Kenya Limited v Mayfair Holdings Limited* [2012] eKLR, the Appellant expressed that the words used in the agreement were clear and ought to have been construed in their ordinary meaning to establish the intention of the parties.
20. Relying on *Ford vs. Beech* [1848] 11 QB 852 at 866, the Appellant submitted that as a general rule, the intention of the parties to an agreement should be ascertained from the contract document as it is deemed that what the parties intended is what was stated in the agreement. The Appellant maintained that the surveyor had no legal and/or contractual mandate to allocate what portion of land each party to the conveyance was to get; that his scope of work was solely to propose a subdivision sketch and avail it to the Appellant, who under clause 8 was bestowed with the mandate of pointing out the beacons of the property to the Respondents.
21. The Appellant also maintained that section 94 of the Land Registration Act, 2012 was applicable in the circumstances, and that the learned judge clearly erred in holding otherwise;  
that under the said section, the power to partition land held in common tenancy is vested in the registrar appointed under section 12 and 13 of the Land Registration Act, and therefore, the trial court could not grant such orders in respect to LR No 8914/6 as the same amounts to ignoring the law.
22. The Appellant further submitted that section 94(5) of the Land Registration Act makes provision for a review of the registrar's decision by the court when a co-tenant has been aggrieved. The Appellant relied on the Supreme court decision in *Albert Chaurembo Mumba & 7 Others vs. Maurice Munyao & 148 Others* [2019] eKLR, among other decisions, for the proposition that it was not open for the learned judge to bypass the procedure therein and proceed to award equitable remedies to the Respondents.
23. Responding to the contents of the Respondents' affidavit filed on May 18, 2022 to the effect that the Appellant's appeal had been overtaken by events since the decree had been fully executed, Mr Kariuki, the Appellant's learned counsel, submitted that no evidence had been adduced to show that the required documents had been lodged at the lands registry, and neither was there any proof of payment to confirm the same.
24. The Respondents' written submissions were highlighted by their learned counsel, Mr Muchangi. The Respondents submitted that the intentions of the parties to the contract were very clear, therefore the learned judge was correct in his findings; that the learned judge did not exclusively base his decision on the surveyor's proposed subdivision but rather on all the evidence tendered by all the parties during the trial.
25. With regard to the subdivision of the land, it was submitted that the agreement may not have defined which portion was to go to which party, but it was clear that the 2<sup>nd</sup> Respondent was to take possession of the portion pointed to him and marked on the sub division scheme upon payment of the purchase price, and the conduct of all the parties, including the Appellant, clearly showed that the land was subdivided and portions for each party identified before the impugned joint title was erroneously issued.
26. The Respondents further maintained that their intention of ballast harvesting may not have been expressly captured in the agreement, but insisted as the 2<sup>nd</sup> Respondent's name, (KMR Ballast Limited) reflects, it is clear that the company is involved in ballast mining. It was submitted that the Appellant knew this all along and changing goal posts indicated that he was doing so for his own selfish gains.



27. Regarding registration of the title in the joint names of the Appellant and the 1<sup>st</sup> Respondent, the Respondents submitted that the same was contrary to the agreement as the reason for the subdivision was sufficient proof that each of the parties was to get individual title. It follows, therefore, that section 94 of the *Land Registration Act* was not applicable in the circumstances.
28. On the issue of interpretation of a contract, the Respondents cited *Kairu vs. Shaw & 3 Others* [1985] eKLR, where this court held that in interpreting a contract, the court ought to give effect to the intention of the parties as far as possible, and avoid deviating interpretations, however easy or possible they may appear to be.
29. Finally, Mr Muchangi submitted that execution of the impugned judgment had already been performed, thus the Appellant's appeal as a whole is spent and urged this court to so find and dismiss the appeal in its entirety.
30. We have considered the record of appeal before us, the rival written and oral submissions by the learned counsel together with the legal authorities relied upon by the counsel. As the first appellate court, our mandate is to analyze and evaluate afresh all the evidence that was adduced before the trial court and arrive at our own conclusion, bearing in mind that we neither had the benefit of hearing nor observing the demeanor of the witnesses as they gave their evidence. The court can only interfere with the findings of the trial court if it is satisfied that the decision reached was based on no evidence, or on a misapprehension of evidence on record, or that the learned judge evidently acted on wrong principles. See *Selle vs. Associated Motorboat Company Limited* [1968] EA 123.
31. In view of the fact that we were urged by the Respondents to find that the substratum of the appeal has dissipated because the decree appealed from has been fully executed, we must start by making a finding on that issue.

From the record before this court, Obaga, J. in his judgment dated September 27, 2017 allowed the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' claim in terms of payers (b) and (c) which stated as follows:

- b) "A permanent injunction to restrain the Appellant, his servants or agents or those claiming under him from interfering with the original subdivision plan to LR No 8914/2A now 8914/6 effected and done on or around March 2012 and/or to replace it with any subsequent ones.
    - i. An order for specific performance directing the Appellant to transfer 25 acres of LR No 8914/6 to the Respondents based on the earlier proposed subdivision plan and/or agreement without alterations.
  - c) Costs of this suit with interest at court's rate."
32. It is not in contention that there exists a court order issued on November 22, 2021 authorizing the execution of the impugned judgment. By the said order, Angote, J. authorized the deputy registrar of the High court to execute all the necessary documents pertaining to the subdivision of LR No 8914/2A on behalf of the Appellant to enable implementation of the decree issued on January 11, 2017.
  33. From a cursory perusal of the record, we note that there is no order from either the trial court or this court for stay of execution of the judgment and decree. The Respondents were, therefore, at liberty to proceed to seek execution of the decree, which they did.

We do not agree with the Appellant's counsel that no execution has taken place. What is not clear is how far the process has gone. However, we disagree with the Respondents' contention that the appeal has been overtaken by events. There are still matters of law relating to the suit land that require our



determination. If the court is satisfied that the appeal is merited, it can still reverse the findings of the trial court, even if the decree has been fully executed.

34. The central issue for our determination in this appeal is what the intention of the parties was in executing the sale agreement of September 21, 2011 and the subsequent deed of variation thereof on February 27, 2012. Did they intend to create a tenancy in common of the 50 acres parcel of land, or was their intention to have the Respondents exclusively acquire title for the 25 acres? Section 91 of Land Registration Act, 2012 provides for meaning and incidents of co-tenancies. Section 91 (1) provides that:

“In this act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.”

35. Section 91 (2) states:

“Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.”

36. Section 91 (5) states that:

“If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased’s share shall be treated as part of their estate.”

37. In this case, there is no dispute that there was a sale agreement entered between the Appellant and the 2<sup>nd</sup> Respondent on September 21, 2011 over a parcel of land measuring 50 acres, LR No 8914/6. There is also no contention that there was a variation made on February 27, 2012 reducing the acreage into half, that is, 25 acres, and that the 2<sup>nd</sup> Respondent paid the purchase price in full. It was also agreed that the Appellant was to transfer the 25 acres to the 2<sup>nd</sup> Respondent.

38. There is a certificate of title issued in the names of the Appellant and the 1<sup>st</sup> Respondent as tenants in common on 27<sup>th</sup> March 2014 over LR No 8914/6. However, the same is disputed by the Respondents, who contend that they had no intention of being registered as tenants in common, and that the Appellant’s action of applying for such a title was in breach of the agreement.

39. The Appellant argued that the intention to have the portion of land initially sold, and later for the purchase price to be reduced by half was that each party would get an equal share of the land, both in size and value. On the other hand, the Respondents have argued that the intention of the parties to the contract was very clear, that upon payment of the full purchase price the buyer was to take possession of the 25 acres and be registered as the sole proprietor thereof.

40. To resolve this issue, it is imperative that we examine the relevant contents of the two agreements. As earlier stated, the duty of the court is to breathe life to what the parties had agreed between themselves, without re-writing the terms of their agreement. In *National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd and Another* [2001] KLR 112, this court held as follows:

“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...”

41. In the first sale agreement, the Appellant agreed to sell, and the 2<sup>nd</sup> Respondent agreed to purchase the 50 acres of land at Kshs 47, 500,000.00. Under clause 3 of the agreement, it was agreed that that



the purchaser shall on or before the signing of the document pay a deposit of Kshs 20,000,000.00 to be deposited with the vendor's advocate for onward transmission to the vendor, and on completion date, the purchaser shall pay the balance of Kshs 27, 500,000.00 to the vendor's advocate to be held by him for onward transmission to the vendor upon transfer of the property. Upon payment of the full purchase price the 2<sup>nd</sup> Respondent was to be the sole proprietor of the land.

42. In the deed of variation, the parties agreed to reduce the acreage sold to 25 acres. Under paragraph 3, it was agreed that Kshs 23,750,000.00 which was the purchase price for 25 acres of land had been paid in full. Further, under paragraph 4 it was agreed that the vendor shall transfer 25 acres to the buyer. None of the two agreements, expressly or impliedly, suggests that there was any intention to create any form of tenancy in common. The Appellant sold to the 2<sup>nd</sup> Respondent 25 acres and authorized subdivision of the 50 acres, having received the full purchase price thereof. The Respondents took possession of the suit land and placed beacons thereon. No reasonable person purchases a piece of land before inspecting it to determine its suitability for its intended purpose. Whereas the purpose of the land was not stated in the two agreements, we agree with the learned judge that the Respondents intended, and the Appellant knew or ought to have known that the purchaser was to use the suit land for extraction of ballast. The Respondents took possession of the 25 acres that had a quarry. The Appellant admitted that before execution of the first agreement he had shown the land to the 1<sup>st</sup> Respondent . From February 2012 when the deed of variation was executed until July 2014 the Appellant did not interfere with the suit land.
43. We agree with the Respondent that the Appellant acted in breach of contract when he proceeded to register himself and 1<sup>st</sup> Respondent as tenants in common of the entire 50 acres when there was no such an agreement between the parties. That registration was not lawfully done and cannot stand in law. Section 26 of the [Land Registration Act](#) provides that:

- “(1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except-
- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - b. where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.”

44. Having established that the true intention of the parties was for each of them to hold separate title for their respective 25 acres and not to create a tenancy in common over the entire 50 acres, this appeal is without any merit. We hereby dismiss it with costs to the Respondents .

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY MAY, 2023.**

**D. K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**S. ole KANTAI**



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**JUDGE OF APPEAL**  
**H. A. OMONDI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

