



**Kabugi v Mwaura & 2 others (Environment & Land Case
E144 of 2022) [2024] KEELC 3544 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E144 OF 2022**

**MD MWANGI, J
APRIL 30, 2024**

BETWEEN

ROBERT KAREKO KABUGI PLAINTIFF

AND

JAMES KIONGI MWAURA 1ST DEFENDANT

JEREMY KIONGI MWAURA 2ND DEFENDANT

GODFREY KIONGI MWAURA 3RD DEFENDANT

JUDGMENT

Background

1. The Plaintiff in this case entered into an agreement for sale of Land dated 17th February, 2012 with the Defendants whereby the three Defendants agreed to sell the Plaintiff 5 acres of Land which was to be carved out of the property known as L.R. No. 9363/25. The agreed purchase price was Kshs 13,500,00/= . The Plaintiff made a deposit of Kshs 4,050,000/= at the time of execution of the agreement which amount was duly acknowledged by the Defendants. The Plaintiff subsequently, paid a further sum of Kshs 7,900,000.00 to the Defendants remaining with a balance of Kshs 1,550,000/-= only which he asserts that he is ready, able and willing to pay.
2. The Plaintiff in his Plaint avers that the Defendants were jointly, the personal representatives of the estate of Erastus Mwaura Kiongi (deceased) who was the registered proprietor of the parcel of land known as L.R. No. 9363/25. The grant of letters of administration was issued on the 13th May, 2011 in High Court Succession Cause No. 2354 of 2010.
3. The Plaintiff states that the Defendants subdivided the Land (L.R. No. 9363/25) into various parcels and obtained individual titles including the designated portion of 5 acres that was to be sold to him. They however failed, refused and or neglected to obtain and deliver the completion document to the



Plaintiff. The Plaintiff alleges that he has learnt that the Defendants are in the process of selling the suit land to a third party contrary to and in breach of the agreement with the Plaintiff.

4. The Plaintiff has pleaded the particulars of breach of the terms of the agreement at paragraph 13 of the Plaintiff. He prays for an order of specific performance of the agreement dated 17th February 2012 to compel the Defendants to transfer to him the 5 acres carved out of the L.R. No. 9363/25 and an order of permanent injunction restraining the Defendants from offering for sale or transferring the 5 acres to any other person other than the Plaintiff.
5. The Plaintiff has an alternative prayer seeking that the Defendants pay him loss of bargain in the sum of Kshs 128,050,000/= . The 2nd alternative is that the Defendants refund him the sum of Kshs 11,950,000/= paid to them pursuant to the impugned agreement, special damages for the cost of the valuation and costs and interest of the suit.
6. Despite service, the Defendants did not enter appearance and or file a statement of Defence.

Evidence Adduced

7. The case proceeded to hearing by way of formal proof. Only the Plaintiff testified as a witness in his case. He adopted his witness statement dated 19th April, 2022 which had been filed alongside his plaint, as his evidence in chief. He further produced as exhibits, the documents listed on his bundle of documents of even date and the one document in the further bundle of documents. He reiterated the averments in his plaint praying that the Court grants him the orders sought thereunder.

Court's directions

8. At the close of the Plaintiff's case, the Court directed the Plaintiff to file written submissions in 14 days. The Plaintiff did not however file submissions within the timeline of 14 days.

Issues for Determination

9. Having considered the pleadings filed in this case and the evidence adduced at the hearing, 3 key issues present themselves for determination, namely:
 - A. Whether the agreement between the Plaintiff and the Defendants was valid and enforceable.
 - B. Whether the remedy of Specific performance is available to the Plaintiff against the Defendants.
 - C. Dependent on the findings in (A) & (B), above, whether the other and the alternative orders sought by the Plaintiff are available to him.
 - D. What orders should issue in regard to the costs of the suit?

Analysis and Determination

A. Whether the Agreement between the Plaintiff and the Defendants was valid and enforceable?

10. The agreement exhibited by the Plaintiff herein is dated 17th February, 2011. It is between Plaintiff, Dr. Robert Kareko Kabugi as the Purchaser and Dr. Godfrey Kiongi Mwaura, Jeremy Kiongi Mwaura and James Kiongi Mwaura as Vendors.
11. The recital of the agreement describes the 3 vendors as the personal representatives of the Estate of Erastus Mwaura Kiongi – deceased, pursuant to a grant of Letters of Administration issued on the 13th Day of May, 2011 in the High Court Succession Cause No. 2354 of 2016. The deceased was the registered proprietor of all that parcel of Land known as L.R. NO. 9363/25 measuring 15.64 hectares.



The Vendors were desirous of subdividing the said parcel and had agreed to sell the portion marked B on the Sketch Plan, measuring 5 acres to the Plaintiff.

12. As noted earlier, the agreed purchase price was Kshs 13,500,000/=. The mode of payment was stipulated in the agreement. The money was to be specifically paid to Dr. Godfrey Kiongi Mwaura on behalf of the beneficiaries of that portion of the deceased's estate.
13. The Completion date was to take place within 90 days from the date of the agreement or within 14 days from the date of successful registration of the transfer in favour of the Purchaser whichever was earlier.
14. The capacity of the Defendants to enter into the agreement as they purported to on behalf of the Estate of Erastus Mwaura Kimingoi – deceased is doubtful. As at the date of the agreement, the Defendants were merely holding a grant which had not been confirmed.
15. From the mother title exhibited by the Plaintiff, the whole parcel of Land L.R. No. 9363/25 is now registered in the names of James Kiongi Mwaura, Jeremy Kiongi and Godfrey Kiongi Mwaura, to hold in trust for the whole family members/beneficiaries. The registration was on 19th February, 2014. Prior to the registration, the title was in the name of Erastus Mwaura Kiongi.
16. In the case of “In the Estate of Isaac Kaburu Marete (deceased) 2017 eKLR,” Gikonyo, J, restated his earlier holding in the case of in the matter of the Estate of M’Ajogi M’Ikingu alias Kiungu Ajogi (deceased) as follows:

“ Courts have said time and again and I will not be tired of stating it again – that Under Section 82 (b) (ii) of the Law of Succession Act, Sale of Immovable property of the Estate before Confirmation of Grant is Prohibited. Again, Under Section 55 of the Law of Succession Act, the Law has placed restriction of any Capital Assets of the Estate before Confirmation of Grant is prohibited. Again, under Section 55 of the Law of Succession Act, the Law has placed restriction of any capital assets of the Estate before confirmation of the grant. Therefore, no person shall have any Power or Legal Authority or Capacity to Sell immovable property of the deceased Before Confirmation of Grant. As such, any such attempted Sale of immovable property of the Estate Before Confirmation of Grant shall be null and void for all purposes and intents.”

17. Odunga, J (as he then was) in the case of “In the Estate of Reuben Mutuku Kiva (deceased) [2021] eKLR, cited with approval the decision in the case of ‘MKM & 3 others -vs- BNM [2016] eKLR”, where the Court in summarizing the duties of the Administrator Stated that:

“ The Respondent, as trustee, was to hold the Estate for the Applicants and beneficiaries. She was supposed to deal with the property in the Estate for the benefit of the Applicants. This was not her property which she could deal with as she wished.”

18. I fully agree with the above decision which directly answer into the issue before the Court. The Defendants, at the time when they entered into the agreement with the Plaintiff did not have the Capacity to sell the Land which formed part of the Estate of Erastus Mwaura Kiongi. The said agreement is therefore vitiated in Law and is consequentially null and void.
19. Lord Denning M.R. in the famous case of Macfoy -vs- United Africa Company Ltd (1961) 3ALL ER 1169 at P. 1172 explained the meaning of the term ‘Void’ in the following words:

“ If an act is void, then it is in Law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set aside. It is automatically null and void without



more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to Stay there. it will collapse”.

20. I need not say more on this first issue. It has been sufficiently answered.

B. Whether the remedy of specific performance is available to the Plaintiff against the Defendant.

21. On this 2nd issue, the holding by Maraga, J (as he then was) in the case of Reliance Electrical Engineers Ltd –vs- Mantrac Kenya Ltd, directly addresses it. The Learned Judge stated that:

“The jurisdiction of Specific Performance is based on the existence of a valid enforceable contract. It is not to 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 unenforceable.”

22. My finding is that the contract between the Plaintiff and the Defendants was not valid as already stated. The remedy of Specific Performance is therefore not available to the Plaintiff.

C. Whether the other orders and the alternative orders sought by the Plaintiff are available

23. As analyzed in paragraph 5 above, the Plaintiff has 2 alternative prayers. the 1st prayer is for loss of bargain in the sum of Kshs 128,050,000/= while the second one is for refund of the sum of Kshs 11,950,000/= paid to the Defendants and the costs of the valuation fees.

24. In respect to the prayer for loss of bargain, the same cannot hold in view of the finding that the parties had not entered into a valid legal enforceable agreement. What is available to the Plaintiff is the claim for refund of the monies paid to the Defendants. The Plaintiff has proved that he paid a sum of Kshs 11,950,000 to the Defendants, particularly to the 3rd Defendant who is his colleague, medical doctor, yet they did not deliver the Land that was the subject matter of the agreement between them.

25. The 2nd reason why the Defendants must refund the amounts paid by the Plaintiff is to guard against unjust enrichment. Madan J (as he then was) in the case of Chase International Investment Corporation and another -vs- Laxman Keshra & others [1978] KLR 143 at P. 154, held that in Kenya, a claim may be properly founded for restitution where it would be unjust to allow a party to retain the benefits of an unjust enrichment.

26. Kuloba, J (as he then was) in the case of Samuel Kamau Macharia -vs- Kenya Commercial Bank Ltd, Kenya Commercial Finance Company Ltd [2003] eKLR, in his characteristic style, summarized the law on unjust enrichment in the following words:

“The law on unjust enrichment or unjust benefit is aimed at preventing a person from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. From these sources, it is possible to highlight, albeit in summary for in this space of a judgment, some of the common unjust factors which the law recognizes as calling for restitution. You may call them grounds which form the basis of a restitutionary claim.

At the moment I sample the following:

- i. Non-voluntary conferment of a benefit, such as through mistake or on account of compulsion, necessity, or in ignorance, or due to an unequal condition between the payer and payee,



- ii. Voluntary conferment of benefit for total failure of consideration,
 - iii. Benefit conferred in consequence of a wrongful act, such as where a trustee benefits from a breach of trust,
 - iv. Ultra vires demand,
 - v. Abuse of a power entrusted to the Defendant by Parliament or by a contractual instrument such as a debenture or other agreement,
 - vi. Illegitimate use of self-help sanctions,
 - vii. Vindication of equitable title to property."
27. Allowing the Defendants to retain the monies paid to them by the Plaintiff pursuant to an invalid agreement would be unjustly enriching them at the expense of the Plaintiff. They must refund the said monies. Therefore, the Court enters judgment in favour of the Plaintiff against the Defendants jointly and severally for the sum of Kshs 11,950,000/= with interest at Court rates from the date of filing suit until payment in full. The judgment is against the three (3) Defendants individually and not against the Estate they were purportedly representing in the agreement. As I have stated already, they lacked the capacity to sell the land which was part of the estate as administrators/personal representatives of the estate. They must therefore bear the liability personally, jointly and severally.
28. The Plaintiff further sought an order for special damages for the cost of the valuation fees. The amount is not specified. The Plaintiff failed in both aspects – pleading and proof. The claim therefore fails.
29. The prayer for a permanent injunction in view of the findings of the court cannot be granted.
30. Finally, on the issue of costs, the legal position is that costs follow the event as a general rule. I see no reason to deviate from the general rule. I award the Plaintiff the costs of the suit against the Defendants personally, jointly and severally with interest at Court rates from the date of assessment until payment in full.

Conclusion

31. The Conclusion is that Judgment is entered in favour of the Plaintiff against the Defendants, personally, jointly and severally for: -
- a. Kshs 11,950,000/= with interest at Court rates from the date of filing of this suit until payment in full.
 - b. Costs of the suit with interest at Court rates from the date of assessment until payment in full.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF APRIL, 2024.

M.D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Osoro for the Plaintiff

No appearance for the Defendants



Yvette: Court Assistant

