



**Neptune Credit Management Limited & another v Jani & another (Civil Appeal 201 of 2019) [2022] KECA 619 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KECA 619 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 201 OF 2019  
RN NAMBUYE, W KARANJA & PO KIAGE, JJA  
MAY 13, 2022**

**BETWEEN**

**NEPTUNE CREDIT MANAGEMENT LIMITED ..... 1<sup>ST</sup> APPLICANT**

**BRIAN YONGO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JIGISHA P. JANI ..... 1<sup>ST</sup> RESPONDENT**

**JAYA SAILESH JANI ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the judgment and decree of the Environment and Land Court at Nairobi (Bor, J.) dated 18th March, 2019 in ELC No. 13 of 2009)*

**JUDGMENT**

1. By this appeal, the 2nd appellant, Brian Yongo, who is a director of the 1st appellant company, Neptune Credit Management Limited, seeks to overturn the verdict of the Environment and Land Court at Nairobi (Bor, J.) dated 18th March, 2019 by which the court entered judgment for the respondents. That judgment and decree directed the ejection and eviction of the appellants from the suit property, L.R No. 7741/269, Kitisuru.
2. The brief facts of the case are that, the appellants leased the suit property from the respondents for a period of two (2) years by a tenancy agreement dated 12th February, 2008. Thereafter, the respondents on two occasions offered to sell the property to the appellants. The first offer for sale was made on 13th February, 2008 at the sale price of Ksh. 45,000,000, 10% of which was payable on or before 15th March, 2008 and the balance payable within 90 days thereof or before 15th June, 2008. It was also a condition of the offer that the tenancy agreement would be binding until the sale was finalized.
3. The second offer was made on 23rd June, 2008, for the same price as proposed in the first offer with 10% of the money payable before 30th June, 2008 and the balance payable within 90 days thereof or



- before 30th September, 2008, subject to the appellants paying all the rents and utility bills till the sale was finalised. Following the two offers, on 26th June, 2008, the 2nd appellant and the 1st Respondent signed an agreement for sale of the property.
4. In due course of time, however, the respondents alleged that the appellants were guilty of various breaches of the lease including, late or non-payment of the monthly rent, failure to pay utility bills and making unauthorised alterations to the suit property. Consequently, the respondents terminated the lease and required vacant possession of the property. However, the appellants failed to vacate the property causing the respondents to levy distress. Aggrieved by these actions, the appellants sued the respondents seeking among other reliefs; an injunction restraining the respondents from distressing or evicting them from the suit property, a declaration that the sale agreement executed between the parties on 26th June, 2008 was binding upon them, and an order of specific performance compelling the 2nd respondent to execute the agreement. The learned Judge dismissed the appellants' claims with costs to the respondents.
  5. Aggrieved by that decision, the appellants filed the instant appeal containing a prolix twenty (20) grounds which they thankfully consolidated in their written submissions dated 13th July, 2020 into three (3) issues sufficiently determinative of the appeal as follows; Whether there was a valid contract for the sale of the suit property. Whether the learned trial judge erred in dismissing the appellant's claim for special damages. Whether the learned trial judge erred in awarding mesne profits.
  6. In the end the appellants prayed that the appeal be allowed with costs, and the judgment and decree of the trial court be set aside.
  7. During the hearing of the appeal, learned Counsel Mr. Wakhisi, holding brief for Mr. Ondieki, appeared for the 1st appellant, while learned Counsel Mr. Sarvia appeared for the respondents. The 2nd appellant, Mr. Yongo represented himself. Parties had filed written submissions which were highlighted.
  8. Mr. Wakhisi faulted the learned Judge for holding that there was no valid contract of sale, despite the appellants' being in possession of the property, and a letter of offer and an agreement for sale being in place. Counsel contended that the 2nd appellant executed the agreement on behalf of the 1st appellant and the only missing signature was that of the 2nd respondent. Responding to a question by the Court on whether non-execution by one party invalidates the agreement, Mr. Wakhisi asserted that the conduct of the parties herein demonstrated that there was a valid agreement of sale. Counsel further posited, with surprising boldness, that "want of execution does not extinguish the execution by the other". Called upon to cite any authority to support so novel a claim, Counsel's response was that he did not have anything specific for the point.
  9. Mr. Wakhisi cited *Mamta Peeush Mabajan [suing on behalf of the estate of the late Peeush Prem Lal Mabajan] vs. Yashwant Kumari Mabajan [sued personally and as Executrix of the estate and beneficiary of the estate of the late Krisban Lal Mabajan]* [2017] eKLR, for the contention that an offer in a draft contract may be accepted even when not signed, maintaining that notwithstanding the absence of the 2nd respondent's signature, the conduct of the parties was determinative.
  10. Mr. Wakhisi next reproached the learned Judge for failing to award the appellants special damages in the sum of Ksh. 11,836,095 as the value of goods which were distrained by the firm of Nathan Muhatia Pala t/a Muhatia Pala Auctioneers, acting under the instructions of the respondents. According to Counsel, the claim for special damages should have succeeded especially because it had been specifically pleaded and strictly proven. He called in aid the decision in *Capital Fish Kenya Limited -vs- The Kenya Power & Lighting Company Limited* [2016] eKLR.



11. Learned counsel then faulted the trial court’s award of mesne profits to the respondents for the reasons that the respondents did not; demonstrate any loss suffered on their part while the appellants were in possession and occupation of the suit property, nor provide justification for the value of the assessed mesne profits. Counsel further argued that the respondents did not demonstrate the benefit that they would have ordinarily received from the suit property had the appellants not been in occupation and possession thereof.
12. Counsel conceded that the price of the property was never settled, notwithstanding that consideration goes to the core of any agreement especially for sale of land.
13. The 2nd appellant’s filed submissions vide which they presented the same position as that of the 1st appellant.
14. In opposing the appeal, Mr. Sarvia disputed the validity of the contract for sale of the suit property arguing that, in addition to the 2nd respondent’s not signing it, even the purported purchaser, the 1st appellant, did not execute the same, neither does it bear the company seal of the 1st appellant. There was no evidence that the 2nd appellant had a power of attorney to execute the same agreement on behalf of the 1st appellant. There was also no attestation by witnesses, as required by the provisions of sections 3(3) and 3(6) of the *Law of Contract Act*, Chapter 23 of the Laws of Kenya. He drew our attention to the said provisions which provides as follows;

Section 3(3);

“ 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
- (iii) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: ...

Section 3(6);

“ ...“sign”, in relation to a contract, includes making one’s mark or writing one’s name or initial physically or by means of an advanced electronic signature on the instrument as an indication that one intends to bind himself to the contents of the instrument and in relation to a body corporate includes—

- (a) signature by an attorney of the body corporate duly appointed by a power of attorney registered under the *Registration of Documents Act* (Cap. 285);
- (b) the affixing of the common seal of the body corporate in accordance with the constitution or the articles of association of the body corporate, as the case may be, in which case no further attestation shall be required.”



15. Mr. Sarvia further submitted that as no consideration was paid towards the purchase of the property, the sale agreement was unenforceable. Moreover, he contended, possession of the suit property by the appellants was pursuant to the tenancy agreement, and not the sale agreement. Counsel rebutted the appellants' reliance on the decision in *Mamta Peeush Mahajan (supra)* for the contention that a valid sale agreement can be implied from the parties' conduct, submitting that the cited case was dealing with an agreement for sale of shares and not one for the sale of land as in the instant appeal, which is governed by specific statutory requirements.
16. Regarding special damages, Mr. Sarvia rejected the appellants' claim that the distress for rent was unlawful. To the contrary, it was lawful pursuant to a court order dated 14th December, 2011 which authorised the respondents to undertake distress in the event that the appellants continued to default in rent payments, as they did.  
  
Moreover, the respondents could not be held liable as, pursuant to section 26 of the [Auctioneers Act](#) No. 5 of 1996, a person who suffers special or general damages by unlawful or improper exercise of power by an auctioneer is entitled to recover any damages directly from him. At any rate, the appellants never proved the quantum of the alleged damage.
17. On the question of mesne profits, Mr. Sarvia submitted that the respondents were entitled to the award of mesne profits based on the consent order dated 19th April, 2010 by which the appellants were ordered to pay a monthly rent of Ksh. 181, 500 by the 15th day of every month until the suit was heard and determined but they failed to pay the said rent.
18. In reply, Mr. Wakhisi submitted that the Auctioneers Licensing Board determined that the distress was illegal and that execution of the sale agreement by the 2nd respondent should be effected.
19. Both counsel drew our attention to various decided cases cited in their written submissions to which we have given due consideration alongside the rival arguments and the entire record, consistent with our duty as a first appellate court to proceed by way of a re-hearing and to subject the evidence to a fresh and exhaustive re-evaluation before arriving at our own inferences of fact on the issues in controversy as between the respective parties herein. We are aware that, unlike the trial court, we have not had the benefit of hearing and observing the witnesses testify in court and will make due allowance for it. See Rule 29(1)(c) of the [Court of Appeal Rules](#); *Peter -vs- Sunday Post Limited* [1958] EA 424, *Selle -vs- associated Motor Boat Company Limited* [1968] EA 123.
20. Starting with the sale agreement, the appellants maintain that it was valid and enforceable relying on the decision in *Mamta Peeush Mahajan (supra)*. The respondents are of a contrary view, charging that the foregoing decision is not applicable to the instant appeal. Indeed, the Court in that case observed that certain contracts had to be in writing by dint of the clear provisions of the [Law of contract Act](#). The respondents further argue that since the 1st appellant and the 2nd respondent never executed the agreement, the signatures on it were not attested and consideration was not paid. The contract was therefore invalid and unenforceable.
21. We have no difficulty agreeing with the respondents that section 3(3) of the [Law Contract Act](#) is couched in mandatory terms, requiring contracts for a disposition of interest in land to be in writing, signed by all parties to the transaction and the signatures attested in relevant part. The 2nd appellant having conceded that the 1st appellant and the 2nd respondent did not execute the agreement, and neither was the agreement attested, then the said agreement cannot possibly be said to be valid and enforceable. It is as good as non-existent. Moreover, by his own admission, the 2nd appellant confirmed that consideration for the sale of the suit property was not settled, acknowledging a basic and fundamental tenet of contract law that, "Consideration goes to the core of any agreement, especially for sale of land".



The significance of consideration in a contract is too plain for argument. *Halsbury's Laws of England* Volume 22(2019) paragraph 109 states;

“Ordinarily, consideration is one of the three essential elements of a valid contract. Thus, a promise which is made without consideration may not be sued upon in the law of contract, for it is merely a bare promise on which no such action will lie. In the case of a contract which is divisible into two parts, for only one of which there is valuable consideration, that part only gives rise to a cause of action”. Emphasis mine.

22. We concur with the holding of the trial court that the apparent sale agreement was neither valid nor enforceable.

23. Regarding the learned Judge’s dismissal of the appellant’s claim for special damages arising from the distress by the auctioneers, the learned Judge resolved the rival contentions on this issue as follows;

“The Court has looked at the auctioneers’ letter dated 6/7/2015 stating that the Plaintiff’s goods were released when the former Senator of Nairobi intervened while he was levying distress for rent. The 2nd Plaintiff does not deny that there was such intervention, he only disputes the number of people hired by the auctioneer in that exercise. No inventory was produced to show the goods carried away by the auctioneer and those returned after the intervention by the politician. In the circumstances it is difficult to ascertain if some of the Plaintiff’s goods were not returned as the Plaintiff’s allege”. Emphasis mine

24. Whereas the appellants contend that the learned Judge should not have relied on the letter of the Auctioneer because it does not set out the events that occurred in the distress the appellants did not contest the intervention by the politician in the distress proceedings. We think that on the facts the learned Judge correctly concluded that the appellants had failed to prove the nature and magnitude of damage to be borne by the appellants, if any, and it was inevitable that the unproven claim failed.

25. Turning to the award of mesne profits to the respondents, the appellants complained that the respondents were not entitled to it, and cited the decision in *Embakasi Properties Limited & Another -vs- Commissioner of Lands & Another* [2019] eKLR in this regard. Having read that decision, we find this excerpt therefrom to be specifically instructive on this issue;

“We turn finally to consider Embakasi Properties’ claim of mesne profits. Mesne is a French word for intermediate. Therefore, plainly speaking mesne profits are financial gains or benefits which have accrued while there is a dispute over ownership of land. If it is found that the party using the land did not have legal ownership, the true owner can sue for some or all the profits made in the interim by the person in unlawful occupation.”

26. The appellants did not controvert the respondents’ claim that they owed them rent on failing to render the purchase price for the suit property, having occupied it even after the expiry of the tenancy agreement. It is undeniable then that some financial gain or benefit had accrued in favour of the respondents, to which the appellants had to settle. We are in full agreement with the trial court that the claim for mesne profits was properly proved.

27. In the result, we see no reason and no basis has been established to justify any departure from the conclusions and holdings of the learned Judge. We find this appeal to be bereft of merit and dismiss it with costs.

**DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.**



**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

