



REPUBLIC OF KENYA



**Lewa (Suing As Legal Representative Of Tsuma Walewa Musolo) v Mwangi (Environment and Land Case Civil Suit 124 of 2015) [2024] KEELC 3855 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3855 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 124 OF 2015**

**EK MAKORI, J**

**APRIL 24, 2024**

**BETWEEN**

**JONATHAN TSUMA LEWA ..... PLAINTIFF**

**SUING AS LEGAL REPRESENTATIVE OF TSUMA WALEWA MUSOLO**

**AND**

**ANTHONY MWANGI ..... DEFENDANT**

**JUDGMENT**

1. By a suit commenced vide plaint dated 28<sup>th</sup> April 2014 as amended on 18<sup>th</sup> March 2021, the plaintiff sought a declaration that the agreement of sale- dated 24<sup>th</sup> February 2009 between him and the defendant in respect of one (1) acre of land to be curved out of Kilifi/Mtwapa/1709 and now known and registered - as Kilifi/Mtwapa/3135 has been effectively terminated, an order compelling the defendants to unconditionally surrender and handover all the original completion documents submitted and or provided by the plaintiff and in particular the title deed in respect of Kilifi/Mtwapa/3135, a permanent injunction restraining the defendant by himself or those claiming under his name from undertaking or continuing any developments, constructions and erecting any structures on the suit property and occupying or remaining in occupation and undertaking any takeover of the same, and Kshs. 366,000/ being the balance of the purchase price due from the defendant for the sale and transfer of Kilifi/Mtwapa/1608 and 1609.
2. The defendant filed his defence dated 2<sup>nd</sup> September 2015 denying the totality of the plaintiff's averments.
3. In his testimony in this Court and relying on the witness statement dated 28<sup>th</sup> April 2014 and filed documents on the even date, and the supplementary copy of the documents dated 7<sup>th</sup> of March 2022 the plaintiff testified that by an agreement dated 24<sup>th</sup> February 2009, he sold the defendant a one-acre piece of land to be curved from Kilifi/Mtwapa/3135, the plaintiff handed over the title



- documents to the defendant with all the completion documents, the defendant had only paid a sum of Kshs. 100,000/- and failed to pay the remaining balance of the purchase price thus necessitating the rescinding of the sale agreement. That well after the cancellation of the sale and a refund duly forwarded to him, the defendant failed to return and hand over the completion of sale documents hence this suit.
4. The plaintiff further avers that in another agreement dated 17<sup>th</sup> August 2011. The defendant purchased from the plaintiff land parcels Kilifi/Mtwapa/ 1608 and 1609 the properties were duly transferred to the defendant despite remaining with a balance of Kshs. 366,000/-, which the plaintiff now demands.
  5. Having entered an appearance, filed a defence, witness statements, and a list of documents, the defendant did not appear in Court to testify as the record will show. Instead, it was left for his counsel to submit on his behalf.
  6. Mr. Onyango for the plaintiff submitted before this Court that all completion documents were handed over to the defendant's advocate as of 18<sup>th</sup> April 2011. Rather than pay the balance, the defendant induced the plaintiff to have the property charged to raise the purchase price. This position persisted by 16<sup>th</sup> March 2014, the defendant had not complied with payment of the remaining balance of the purchase price, hence the issuance of notice to rescind the agreement and a refund of Kshs 100,000/- a refund of the initial purchase deposit via a cheque forwarded to his advocate.
  7. Mr. Onyango further stated that the defendant despite entering an appearance, filing a defence, witness statements, and a list of documents, did not avail himself in Court to controvert the assertions by the plaintiff to that extent the plaintiff's case remained unanswered, and that the averments by the defendants amounted to nothing as held in *Nkuene Daily Farmers Co-op Society Limited & Another v Ngacha Ndeiya* [2010]eKLR as buttressed in *CopyCat Limited v Mumias Sugar Limited*[2019]eKLR and *Gateway Insurance Co Limited v Jamila Suleiman & Another* [2018]eKLR.
  8. For parcel No. Kilifi/Mtwapa/1608 and 1609 the plaintiff provided the green cards showing he was the original owner, the land was later transferred to the defendant, and since 27<sup>th</sup> February 2008 a balance of Kshs. 366,000/- remains unpaid. The plaintiff seeks the sum together with interest from 19<sup>th</sup> March 2021 till payment in full.
  9. Mr. Ole Kina for the defendant submitted that it is the plaintiff who has been in breach of the terms of the agreement. He further stated that it is not the work of the Courts to mend contracts entered into by two mature consenting parties citing the case of *Curtis v Cleaning & Dyeing Co. Ltd* [1951] ALL ER 631 and *RTS Flexible Systems Ltd v Milkorei Alis Muller GmbH & Co. KG (UK) Production* [2010] UKSC14.
  10. The defendant further avows that it is not the work of the Courts to rewrite and ameliorate bad bargains by parties quoting the case of the *County Government of Migori v Hope Self Help Group* [2020] eKLR. The terms of clauses 7 and 8 provided that the plaintiff was to cater for survey and subdivision, he failed to do so and the defendant took it upon himself to do the same. The plaintiff failed and neglected to execute for transfer and take the purchase money from the defendant's advocate albeit notified to do so. The execution date was 24<sup>th</sup> February 2014 and therefore the completion date was 24<sup>th</sup> May 2014.
  11. The defendant avers that there was no clause as to when the time would stop running for purposes of the payment of the balance and hence the Law Society Conditions which provides for 42 days set in. Under clause 4(7) of the LSK Conditions of Sale, a vendor who is ready, able, and willing to complete the sale and is aggrieved by the purchaser's defaults to complete the contract within the completion period is required to issue 21- days notice requiring the purchaser to complete the contract. The defendant states that such notice was never issued hence the contract still stands. The Court therefore



should be guided by the conduct of the parties. The plaintiff refused to take the purchase price despite being notified to do so. On that issue, the Court was referred to the cases of *Stickney v Keeble* 1915 AC 356, *Housing Company of Kenya Ltd v Board of Trustees National Social Security Fund & 2 Others* [2018] eKLR and *Njamunyu v Nyaga* [1983] KLR 282.

12. Mr. Ole Kina for the defendant is of the view that in this matter time was not of the essence and that the vendor had not provided the necessary notice of repudiation of the agreement hence the plaintiff's case should fail.
13. From the materials, and submissions before me, the issues that fall for the determination of this Court is whether the agreement of sale dated 24<sup>th</sup> February 2009 between the plaintiff and the defendant in respect of one(1) acre of land to be carved out of Kilifi/Mtwapa/1709 and now known and registered- as Kilifi/Mtwapa/3135 has been effectively terminated, whether an order should issue compelling the defendants to unconditionally surrender and handover all the original completion documents submitted and or provided by the plaintiff and in particular the title deed in respect of Kilifi/Mtwapa/3135, whether a permanent injunction should issue restraining the defendant by himself or those claiming under his name from undertaking or continuing any developments, constructions and erecting any structures on the suit property and occupying or remaining in occupation and undertaking any seizure of the same, whether to order for payment to the plaintiff against the defendants a sum of Kshs. 366,000/ being the balance of the purchase price due from the defendant for the sale and transfer of Kilifi/Mtwapa/1608 and 1609. And who should bear the costs of this suit?
14. It is not in dispute that the plaintiff and the defendants entered a sale of land agreement for a 1 (one)acre of land on 24<sup>th</sup> February 2009 to have been carved out of land parcel Kilifi/Mtwapa/1709 and now known and registered - as Kilifi/Mtwapa/3135. The purchase price was Kshs. 630,000/- a sum of Kshs 100,000/- was paid to the vendor and acknowledged. The defendant took possession and has been on the suit property and developing the same to date.
15. Since then, a balance of Kshs. 530,000/- remains unpaid. This balance and the disagreement between the parties regarding the manner and mode of completion necessitated the current suit.
16. From the submission by the parties, it will seem what remains for the decision of this Court is how to construe the parties' intention on the discharge and completion of the said agreement.
17. As correctly submitted and shown by the authorities cited by the parties, it is not the work of the Courts to mend and breathe new life into agreements entered by consenting parties who had arrived at the meeting of minds (*consensus ad idem*), Courts will also not mend otherwise bad bargains as enunciated in the case of *Mark Otanga Otiende v Dennis Oduor Aduol* [2021] eKLR:

“Firstly, the position in law with regard to the binding nature of a contract executed willingly by the parties is now well settled. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another* [2001] eKLR, the Court of Appeal stated that:

“It was clear beyond para adventure 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.

28. More recently, the Court of Appeal in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, after reviewing case law on the subject reiterated that it was



“alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties as the said parties were bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”

18. In a case where the parties seek to alter the terms and conditions of an earlier agreement, the same has to be done with the concurrence and meeting of the mind of the parties as held in the County Government of Migori v Hope Self Help Group [2020] eKLR:

“The author of Hudson’s Building and Engineering Contracts, 10th Edition, on page 22 postulates: -

“A simple contract can be validly varied by the subsequent agreement of the parties, so long as there is consideration to support the variation agreement. If at the time when the variation agreement is made, obligations remain partly unperformed under the original contract by both parties, there will usually be consideration for the new agreement. If, however, one party to the contract has wholly performed his obligations, and therefore agrees without advantage to himself or detriment to the other party to forgo some part of the performance of the outstanding obligations of the other party, there will be no consideration to support his agreement to do so. The variation agreement will therefore be unenforceable if not under seal and the original contract requiring full performance will remain.....”.

In Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999, it was held:

“...Courts are not for as where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with the meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent, or otherwise of the other and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract.”

19. From the agreement there seems to have been a concurrence under the special conditions that time was to be of the essence in meeting the obligations entrusted to the parties to the agreement. The plaintiff testified that the defendant breached the agreement by failing to pay the remaining balance of the purchase price. On time. The Law Society Conditions of Sale (1989 edition) were therefore to apply (see clause- 9)
20. The plaintiff accuses the defendant of failure to pay the balance of the purchase price, after all completion documents had been handed to the defendant’s advocate and after issuing of demand to do so. The defendant on the other hand accuses the plaintiff of failure to meet his obligation for the survey and signing of the transfer documents. The defendant also accuses the plaintiff of failure to pick up the balance of the purchase money well after being notified.
21. The plaintiff produced various documents and correspondences to show he had met his obligations – plaintiff exhibits 3,5 and 17 to show completion of the subdivision on 12<sup>th</sup> April 2011, letter dated 16<sup>th</sup> of March 2014 to show all completion documents had been forwarded to the defendant’s advocate on 18<sup>th</sup> April 2011. After such failure to comply a letter rescinding the agreement was issued on 16<sup>th</sup> March 2014 pursuant to condition 11 of the LSK conditions, and a cheque for the initial sum received as purchase price was forwarded to the defendant’s advocate.



22. The defendant in the document attached to the defence filed letters to indicate that as early as 2012, he was ready and willing to complete his bargain and had requested through several correspondences for the plaintiff to pick the balance of the purchase money from his advocate and the plaintiff declined.
23. In this matter the plaintiff gave testimony and produced documents to support his case. When it came to the turn for the defendant to testify, he could not attend Court to controvert the allegations that he was the one who breached the side of the bargain. What we have are submissions by his counsel Mr. Ole Kina based on a statement and exhibits from the defendant that were not subjected to cross-examination and documents were filed but not produced and marked as exhibits.
24. Where a party does not attend Court to tender evidence as in this case and where the incident of the burden of proof shifted to the defendant to negative evidence by the plaintiff that it is he who breached the agreement, authorities show that such evidence counts as nothing, I am persuaded for example by the decision in the case of *Nkuene Daily Farmers Co-op Society Limited & Another v Ngacha Ndeiya* [2010] eKLR where the Court held:

“The appellants did not call any evidence in support of their case. As stated earlier they filed a written statement of defence denying liability and blamed the respondent’s driver for the accident. However, since they did not call any evidence either to prove their averments or to rebut the evidence the respondent adduced to establish his claim, a bare assertion that the respondent did not adduce sufficient evidence to prove his case will not do.”

25. This was also the holding in the case of *Gateway Insurance Co Limited v Jamila Suleiman & Another* [2018] eKLR:

“What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani)* HCCC No. 834 of 2002, Lesiit, J citing the case of *Autar Singh Bahra And Another vs. Raju Govindji*, HCCC No. 548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.

55. Again in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani)* HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

56. In the case of *Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri* HCCC No. 95 of 1988, Makhandia, J (as he then was) held that:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained



unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.

57. In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence, the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

58. Similarly in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. This is my understanding of the holding of Rajah, JA in Bristone Pte Ltd vs Smith & Associates Far East Ltd [2007] 4 SLR (R.) 855 at 59 that:

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

26. Based on the above authorities which I am swayed to follow, the allegations as stated in the defence and the filed statement stand as mere averments. The same was not tested on oath and through cross-examination. The documents filed stand unmarked and unproduced as exhibits the assertions by the plaintiff in this matter stand uncontroverted and therefore his claim concerning the agreement entered between him and the defendant concerning one (1) acre of land to be curved out of Kilifi/Mtwapa/1709 and now known and registered- as Kilifi/Mtwapa/3135 stand proved on a balance of probabilities.
27. The agreement of sale - dated 24<sup>th</sup> February 2009 between the plaintiff and the defendant in respect of one (1) acre of land to be curved out of Kilifi/Mtwapa/1709 and now known and registered- as Kilifi/Mtwapa/3135 has been effectively terminated.
28. The amended plaintiff introduced a claim for Kshs 366,000/- being the balance for the sale and transfer of land parcel No. Kilifi/Mtwapa/1608 and 1609. The plaintiff produced an agreement dated 27<sup>th</sup> February 2008 showing there was a sale but the balance is still owed. This claim was allowed by dint of the leave of the Court issued on 6<sup>th</sup> May 2020. The defendant did not controvert this claim at all. It also goes hand in hand with the original claim that the defendant did not attend Court to counter the claim. It stands as a liquidated claim proved by the plaintiff against the defendant.
29. The upshot is that the plaintiff has proved his case against the defendant and I will proceed to issue the following final orders:
- a. The agreement of sale - dated 24<sup>th</sup> February 2009 between the plaintiff and the defendant in respect of one (1) acre of land to be curved out of Kilifi/Mtwapa/1709 and now known and registered- as Kilifi/Mtwapa/3135 has been effectively terminated.



- b. That an order does and is hereby issued compelling the defendants to unconditionally surrender and hand over all the original completion documents submitted and or provided by the plaintiff and in particular the title deed in respect of Kilifi/Mtwapa/3135
- c. A permanent injunction is hereby issued restraining the defendant by himself or those claiming under his name from undertaking or continuing any developments, constructions, and erecting any structures on the suit property and occupying or remaining in occupation and undertaking any takeover of the same.
- d. Judgment be and is hereby entered for the plaintiff against the defendant for a liquidated sum of Kshs. 366,000/- interest to be reckoned from 19<sup>th</sup> March 2021.
- e. The plaintiff will also be entitled to costs with interest at Court rates.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

**Ms. Githinji holding brief for Onyango for the Plaintiff.**

**Court Clerk. Happy.**

**In The Absence of:**

**Mr. Ole Kina for the Defendant**

