



**Kihiko v Waiganjo (Environment and Land Appeal E031 of 2023)
[2024] KEELC 4407 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4407 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E031 OF 2023**

JG KEMEI, J

MAY 23, 2024

BETWEEN

ROSELEAH NJERI KIHICO APPELLANT

AND

GERALD MAINA WAIGANJO RESPONDENT

*(Being an appeal against the Judgment of the Hon C Mburu
PM in CMELC No. 6 of 2021, KIKUYU delivered on 5/4/23)*

JUDGMENT

1. In the Trial Court, the Respondent averred that he purchased a portion of 0.1 ha of parcel No Dagoretti/Kinoo/6317 (suit land) vide an agreement of sale dated the 19/8/2020 (the agreement). That out of the total purchase price of Kshs 4.1 M he paid the sum of Kshs 3.7M leaving an outstanding balance of Kshs 400,000/-. He averred that sometime in 2021 the Appellant changed her mind and stated that she was selling 0.5 Ha instead of 0.1 Ha and that if he wanted the whole of 0.1 Ha., he should be prepared to add more money. He sought the following orders;
 - a. A permanent injunction to restrain the Defendants, their servants or agents from residing, renting out, cultivating or carrying out any activities whatsoever on the suit property measuring 0.1Ha exercised from land known as Dagoretti/Kinoo/6317 measuring approximately 0.3966Ha.
 - b. An order compelling the Defendant to sign relevant consent to transfer; endorse transfer forms and issue her PIN and passport photographs to the Plaintiff to facilitate transfer of the suit property measuring 0.1Ha exercised from land known as Dagoretti/Kinoo/6317 measuring approximately 0.3966Ha once she is paid the purchase price balance of Kshs. 400,000/-.
 - c. Costs of this suit and interest thereon; and



- d. Any other or further relief as this Court may deem fit.
2. Denying the claim of the Respondent, the Appellant stated that the size of the land she sold the Respondent was 50ft by 100ft and not 0.1Ha. (100ft by 100ft) as claimed by the Respondent. For that reason she contended that she was ready to refund the purchase price. In addition, that the suit land does not exist because the land has been fully subdivided and new titles issued. The Court was urged to dismiss the case of the Respondent.
3. Upon hearing the case, the trial Court pronounced its Judgment on 5/4/23 in favour of the Respondent as follows;
- “The Plaintiff succeeds in his claim. The Defendant and his agents /servants are restrained from residing renting out cultivating or carrying out any activities on the property measuring 0.1 Ha excised from Dagoreti/Kinoo/6317 measuring 0.3966 ha. Once the Plaintiff pays the balance the Defendant shall effect transfer of the land to the Plaintiff by following the necessary procedure of executing the measuring documents for the said transfer. The Plaintiff shall be awarded the costs of the suit together with interest at Court rates from the date of judgment until payment in full.”
4. Aggrieved by the above judgment the Appellant proffered the instant appeal on the following grounds;
- a. The Learned Magistrate erred in facts and in law by making a determination which was against the weight of the evidence adduced in Court.
- b. The Learned Magistrate erred in law and fact by failing to consider that the subject matter of the suit did not exist.
- c. The Learned Magistrate erred in law by relying solely on a land sale agreement dated 19th August 2020 that had been vitiated by mistake and failing to consider all circumstances revolving around the said land sale agreement.
- d. The Learned Magistrate erred in fact and law by failing to interrogate the entire context of the land sale agreement dated 19th August 2020.
- e. The Learned Magistrate erred in facts and in law failing to consider and take account of the contradicting evidence of the Respondent who called the maker of the sale agreement whereof the said Advocate denied having drafted or signed the said land sale agreement.
- f. The Learned Magistrate erred in fact by erroneously finding facts which were not captured in the Defendant’s witness statements nor presented during the oral hearing of the Appellant’s case.
- g. The Learned Magistrate erred in facts and in law by delivering a Judgement enforcing specific performance against the Appellant where the conditions for an award of specific performance had not been met by the Respondent.
- h. The Learned Magistrate erred in facts and in law in failing to consider the submissions presented by the Appellant.
- i. The Learned Magistrate erred in facts and in law in failing to determine the issues that had been raised for determination by the Appellant.
- j. The Learned Magistrate erred in facts and in law in upholding that the Respondent had a balance of Kshs. 400,000/- owed to the Appellant which was not proved by the Respondent.



5. The Appellant sought the following orders;
 - a. The Appeal is allowed.
 - b. The Judgment delivered on 5th day of April 2023 by the Hon. C. Mburu Principal Magistrate be set aside.
 - c. Any other or further orders that this Honourable Court may deem fit and just in the circumstances of the case.
 - d. The cost of this Appeal be provided for.
6. The Appellant's submissions were filed by the firm of C M Nderitu & Company Advocates while that of the Respondent were filed by the firm of Chwero & Company Advocates.
7. The Appellant framed 2 issues for determination; whether the trial Court failed to correctly determine the issues raised by the Appellant for determination; whether the conditions for an award of specific performance had been met.
8. On the first issue, the Appellant argued that the suit land did not exist by the time of filing of the suit on 26/3/2021 and therefore the Court ought to have excused the Appellant from further performance of the contract on the basis that it was frustrated. The Appellant relied on the case of Mwariki Farm Limited v. Land Registrar Nakuru & 2 Others (2018)eKLR where the Court held that the orders sought by the Plaintiff in view that the land had been subdivided were futile.
9. In addition, it was submitted that the Appellant led evidence that she was selling 50ft by 100ft which is 0.05 Ha and that the Respondent was aware of the boundaries. The Respondent was faulted for filing the suit land after the mother title had been rendered nonexistent on account of subdivision into three titles. That the sale agreement had been vitiated by mistake. That the sale agreement therefore was rendered null and void and ought to have been declared as such by the Court. That the absence of consensus ad idem between the parties undermined the agreement of sale beyond performance. That the state of affairs was such that the circumstances surrounding the process of transacting vitiated the agreement.
10. In addition, the Appellant submitted that the agreement should be nullified because it was drawn by an unqualified person contrary to Section 34 of the Advocate's Act. Further, the Appellant argued that there was a misrepresentation in the recital of the agreement which indicated the size of the land being sold as 0.1 Ha or 100 by 100 ft. She contended that the recitals do not contain the substantive operative provisions. The trial Court was faulted for failing to determine whether the recital in the agreement was legally binding.
11. It was further submitted that the Respondent took advantage of the conceived mistake in the agreement while he had knowledge that he was purchasing a portion of 50ft by 100ft all along.
12. The Court was faulted for not considering the evidence of the Appellant that she was unable to read the agreement; her age at 65 years diminished her understanding; disregarded the evidence of the surveyor who stated that he left the parties to attend to their business at the Lawyer's office; the agreement was vitiated by mistake; the Court erred in determining the glaring ambiguities in the contract; the balance of the purchase price is Kshs. 626,000/- and not Kshs. 400,000/-
13. The Appellant submitted that she was ready and willing to refund the monies save for lack of the Respondent's bank account details given that the monies were paid to her account through various channels.



14. The trial Court was further faulted for allowing specific performance in the face of an invalid agreement that suffered from breach; balance of the purchase price was not paid in 90 days as agreed in the agreement. Citing the case of *Amina Abdul Kadir Hawa v. Rabinder Nath Anand & Anor* (2012)eKLR the Appellant submitted that specific performance may not be allowed if the remedy may cause undue hardship on the Defendant.
15. In rebuttal and as to whether the sale agreement was valid and binding on the parties, the Respondent submitted that there was a valid agreement save that the Appellant changed her mind midway and alleged mistake on the description of the acreage under consideration. That the Appellant's action was an afterthought aimed at frustrating the contract.
16. It was further submitted that the trial Court considered all the pleadings evidence and the submissions by the parties and arrived at a proper finding.

Analysis and Determination.

17. Having considered the record of appeal, the rival submissions and all the material placed before me I find the key issues for determination are;
 - a. Whether the parties were clear on the size of the land, the subject of the transaction.
 - b. Whether the agreement was vitiated by a mistake
 - c. Whether the trial Court erred in allowing specific performance
 - d. Costs
18. It is not disputed that the parties entered into a sale agreement on the 19/8/2020. It is also not in dispute that the Appellant was the registered owner of parcel Number Dagoretti/Kinoo/6317 issued on the 4/2/2016. The said parcel has since been subdivided into three parcels namely Dagoretti/Kinoo/7068, 7069 and 7070.
19. For avoidance of doubt I shall reproduce the agreement in parts as follows; the size of the land being sold was 0.1 ha (also known as 100 ft by 100ft); purchase price is Ksh 4.1 Million; sold with vacant possession; the Appellant and the Respondent shared one Advocate – Waweru Nyambura & Co Advocates.
20. Further the parties covenanted to special conditions which are also reproduced as follows;

“Special Conditions

 - a. The property is currently registered under the name of the Vendor.
 - b. The Original Title Deed is in custody of Earthscope Survey Services Kiambu for the purpose of subdivision.
 - c. The Vendor upon obtaining the relevant consent to transfer, will endorse the transfer form, and issue her PIN and passport photographs to the Purchaser to facilitate the transfer of the land.
 - d. The Purchaser will enter into possession of the sold property immediately.
 - e. Subdivision is being done by surveyor.
 - f. The Purchaser will bear the costs of stamp duty, valuation fee and registration fee on his land to the relevant office.



- g. The Vendor will ensure that all the rates, bills e.t.c if any will be settled.
- h. The Vendor will point out the beacons and replace any that may be missing at his own cost.
- i. The Vendor will cover the surveyor's costs as regards subdivision.
- j. There are no boundary disputes relating to or regarding to the property.
- k. All covenants, restrictions, stipulations, conditions and other encumbrances affecting the property have been strictly observed and performed.
- l. The Vendor is the registered legal owner of the sold property and has the requisite authority to sell the same on the terms and conditions set out in this agreement.
- m. The property is not subject to any overriding or other interests or equities in favour of a third party which grant the said third party any interest or right in the property.
- n. If for any reason whatsoever the Vendor shall fail to complete the Sale and Purchase, as herein stipulated the Vendor shall refund to the Purchaser the deposit paid plus 10% of the purchase price as penalty for the breach upon receipt of a demand notice of twenty one (21) days And such payments shall be effected not later than seven (7) days from the date of demand.
- o. If the Purchaser shall fail to comply with any of the conditions hereof subject to this sale the Vendor shall give to the Purchaser at least Twenty One (21) days' notice in writing confirming the Vendor'S readiness to complete the sale in all respect and specifying the default and requiring the Purchaser remedying the same before the expiration of such notice and the Purchaser shall fail to comply such notice the Vendor shall rescind this agreement, retain 20% of the purchase price and be at liberty to resell the property."

21. Section 38 of the [Land Act](#) provides as follows;

- “(1) 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
 - (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
- (2) Subsection (1) shall not apply to –
- (a) a contract made in the course of a public auction.
 - (b) the creation or operation of a resulting, implied or a constructive trust; or



- (c) any agreement or contract made or entered into before the commencement of this Act, provided that-
 - (i) the verbal contracts shall be reduced to writing within two years from the date of the enactment of this Act; and
 - (ii) the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing in a newspaper of nationwide circulation.”

22. Having carefully perused the agreement of sale aforesaid, the Court finds that when taken against the provisions of the law the same passes muster as a valid agreement. It is in writing, executed by the parties and witnessed accordingly.
23. PW1 led evidence and stated that he purchased 0.1 Ha from the Appellant vide the agreement of sale dated the 19/8/2020. That the surveyor subdivided the land and showed him the beacons of the portion that he was buying. Thereafter they proceeded to the Appellant’s Advocates firm where the agreement was drafted and executed and paid a deposit of Kshs. 100,000/- and thereafter paid in installments totaling Kshs. 3.7 Million. That the surveyor also confirmed to the Advocate the size of the land being sold.
24. PW2 – the land broker stated that he introduced the parties to each other and that the size of the land sold was 0.1Ha. and not 50ft by 100 ft.
25. PW3 stated that he is an Advocate of the High Court practicing as Waweru Nyambura & Co. Advocates. He confirmed that the agreement was drafted in his office by one of his Advocates.
26. The Appellant’s case is hinged on mistake. It is her argument that she did not contract to sell 0.1Ha of the land but 50ft by 100ft which is 0.05Ha. She led evidence that she was introduced to the Respondent by a land broker in August 2020 whereupon they negotiated and agreed at the piece of Kshs 4.1 Million. The land was to be carved out of the mother title. A surveyor was called onto the land and in the presence of the contracting parties subdivided the land into three portions. That they proceeded to the Advocate’s office where the agreement was drafted and executed the same day. She states that she informed the Advocate that she was selling 50ft by 100ft. That since it was getting dark she signed the agreement in a hurry without reading. That her daughter in law witnessed the said agreement. That the following day she discovered the mistake and wants the agreement invalidated.
27. Vitiating factors in a contract are those factors the existence of (any of) which will cripple or invalidate the contract. Examples are; mistake, duress, misrepresentation, undue influence, illegality, unconscionable contracts, fraud, insanity, a party being a minor and void agreements.
28. Vitiating factors may infect a contract either at its formation or at the performance of the contract. In this case the Appellant alleges the contract is vitiated both at formation performance and therefore should be invalidated.
29. It has been argued by the Appellant that she sold 50ft by 100ft of land and not 100ft by 100ft. PW1 and PW2 led evidence that the land that was sold was 0.1 Ha equivalent to 100 ft by 100ft. The agreement is clear that the size of the land sold is 100ft by 100ft. The agreement is duly executed by the parties. It was admitted in evidence that the Appellant is a retired nurse running a clinic and therefore an educated woman by any standards. She admitted having transacted in another land sale before and that this was not her first time and therefore she was not a greenhorn in such transactions.



30. In the case of *Gami Properties Limited v National Social Security Fund Board of Trustees & Chief Land Registrar* [2021] eKLR the Court had to say the following on the question of mistake;

“ 38. Based on the foregoing it cannot be said that the parties to the agreement for sale shared any misapprehension of fact. It was appreciated by both parties, and provision was made in the agreement for verification of the acreage. In the case of *Kiplangat Arap Biator v. Esther Tala Cheyegon* [2016] eKLR, this Court noted that in order to justify setting aside a contract on grounds of mistake, it should appear to the Court that there has been a mistake common to both the contracting parties, and that the agreement purports to have been expressed in a deed or instrument in a manner contrary to the intention of both. The Court affirmed the English decision in *Moynes v. Cooper* [1956] 1 ALL ER. 450, where it was held that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental, or if one party knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out the mistake; that a contract is also liable to be set aside in equity if the parties were under common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.”

31. The Appellant led evidence that she discovered the mistake the following day. There is however no evidence of any action that she took to rectify the mistake. In her reexamination she informed the Court that she saw the 0.1Ha. in the agreement but did not understand what it meant. *inter alia* in the same breadth she stated that;

“I later learnt that the agreement had an error that they wrote 0.1 ha instead of 50ft by 100 ft. I learnt when the Advocate served me with a letter.”

32. PW1 led evidence that all was well until he sent his wife to fence the land when the Appellant in the presence of some people stopped them from doing it claiming that they had come to grab the land.
33. If indeed the Appellant discovered the mistake the day following the execution of the said agreement, the question is what action did she take to rectify the mistake. The Court finds that there is no evidence of any action taken by the Appellant to rectify the mistake if indeed there was any mistake. She did not rescind the agreement nor stop receiving the purchase price which was paid variously through her account from the 20/8/2020 to 1/1/2021. It is only on the 12/2/2021 that she turned around and reneged on the agreement on the ground that she sold 50ft by 100ft.
34. Evidence was led by the surveyor that he subdivided the land into three portions. 2 portions measured 100 ft by 100 ft while one measuring 0.2750 ha. The Court finds that the manner in which the subdivisions were carried out shows that the intention of the Appellant was to excise a portion of 100ft by 100ft *inter alia* for purposes of transfer to the Respondent. The Court therefore finds that the decision reached by the trial Court was proper. The Court further finds that there was no mistake in the contract but a change of heart by the Appellant to comply with her obligations in the agreement.
35. Guided by the case of *Gami (supra)*, the Court finds that there was no common mistake between the parties, no evidence that the contract of sale of the suit land was contrary to the intentions of the parties



meaning that there was no ambiguity on the part of the seller and the buyer on the size of the land being sold. In addition, the Court did not find any evidence of material misrepresentation by the Respondent as to the covenants and obligations the parties were assuming.

36. With respect to issues (a) and (b) the Court found that the parties were clear on the size of the land being sold and that the agreement did not suffer from any mistake.
37. Having made the above findings, I find no fault on the part of the trial Court when it allowed the equitable relief of specific performance. I say so because the contract having not been invalidated the Court was right to enforce performance.
38. On the question of the balance of the purchase price, it was the case of the Respondent that he paid the sum of Kshs. 3.7M however the Appellant confirmed receipt of Kshs. 3,574,000/- I have perused the record and agree with the Appellant to the extent that the balance outstanding is Kshs. 526,000/- and not Kshs. 400,000/- as averred by the Respondent.
39. The totality of the evaluation of the appeal is that there is no ground to fault the trial Court in its determination save for the outstanding sum of Kshs. 526,000/- being the balance of the purchase price. In the overall appeal is bereft of merit and it is dismissed with costs to the Respondent.
40. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23RD DAY OF MAY, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of:-

Ms. Nderitu for the Appellant

Ms. Njenga for the Respondent

Court Assistants – Phyllis & Oliver

