



**Ndubi v Gituma (Sued as the Legal Representative of the Estate of
Jenny Mwhaki Gituma - Deceased) (Environment and Land Appeal
E005 of 2023) [2024] KEELC 4322 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

CK NZILI, J

MAY 22, 2024

BETWEEN

TIMOTHY KINYUA NDUBI APPELLANT

AND

**ERIC MWARANIA GITUMA (SUED AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF JENNY MWHAKI GITUMA - DECEASED) RESPONDENT**

*(An appeal against the judgment of Honorable S. Ndegwa – SPM Meru in the Principal
Magistrate Court of Kenya at Githongo dated 21.6.2023 Civil Suit No.28 of 2019)*

JUDGMENT

1. The respondent as the plaintiff sued the appellant as the defendant at the lower court through a plaint dated 26.11.2019, for breach of a sale agreement entered between the respondent's mother and the appellant over a portion of LR No. Abothuguchi/Gaitu/2234 at a consideration of Kshs 450,000/=.
2. It was averred that despite obtaining a deposit of Kshs 170,000/=, the appellant refused or declined to transfer the portion. Therefore, the respondent prayed for a refund of Kshs 170,000/= plus liquidated damages agreed at Kshs 900,000/= for breach of the sale agreement.
3. The appellant denied the claim through a statement of defense dated 4.3.2022. He blamed the respondent's mother for failing to clear the balance of the purchase price. Further, the appellant denied being served with a notice to complete the agreement or for its breach. He termed the sale agreement null and void for lack of a land control board consent. Lastly, the appellant averred that the respondent could not file the suit.
4. By a reply to the defense dated 23.9.2022, the respondent averred that clause 2 of the sale agreement provided that the balance be paid after the appellant had executed the transfer form, which he never



did but instead refused to transfer the land. The respondent averred that the deposit under the law had become recoverable as a debt.

5. At the trial, Eric Mwarania Gituma testified as PW 1. He said his late mother entered into a sale agreement dated 7.4.2015 to buy 40ft by 80 ft from the appellants LR No. Abothuguchi/Gaitu/2234 for Kshs 450,000/=. PW 1 said that Kshs 170,000/= was paid to the appellant, who acknowledged receipt on 23.7.2015. He said the appellant refused to transfer the land and, hence, was entitled to a refund and liquidated damages. The respondent produced the sale agreement, an acknowledgment receipt, and a grant of letter of administration as P. Exh No. (1), (2) & 3 PW 1 said his late mother had fulfilled the terms of the sale agreement and was therefore entitled to a refund as per Section 7 of the Land Control Act. He denied that the sale agreement became null and void for lack of land control board consent.
6. In cross-examination PW 1 told the court the appellant was to effect the transfer before the balance could be paid but declined despite requests made by his mother. PW 1 said that though no demand letter was sent to the appellant, a report was made to the area chief, who wrote him a letter. He denied any breach of the sale agreement on the part of his late mother before she passed on in 2018. PW 1 said that he also accompanied his late mother to the house of the appellants, but again, he refused to effect the transfer.
7. Timothy Kinyua Ndubi testified as DW 1. He told the court that on 7.4.2015, he entered into a sale agreement with the respondent's mother for a sale of a portion of his land measuring 40ft by 80 ft out of LR No. Abothuguchi/Gaitu/2234. He said that the purchaser paid Kshs 20,000/= at the execution of the sale agreement and later on 150,000. DW 1 said that the purchaser refused or neglected to clear the balance; hence, he could not transfer the land for lack of clearance of the purchase price, the transfer fees and its related expenses.
8. Similarly, DW 1 said that he pursued the purchaser to complete the transaction in vain until the sale agreement became void for lack of consent from the land control board. He denied receiving any notice to either complete the sale agreement or for breach of the same. The appellant blamed the respondent's mother for defaulting to clear the purchase price.
9. In cross-examination, DW 1 said that the balance was to be paid after he had executed the transfer forms which he never signed. Further, DW 1 said that though, as per clause 4 of the sale agreement, he was the one to cater for survey and subdivision costs. He said he paid none for the purchaser passed on before he could pay. Further, DW 1 said that after he subdivided his land in 2017, he called and wrote to the respondent's mother to clear the balance, but she said she had no money. The alleged letter written to the respondent was not produced in court. As to the refund of Kshs 170,000/=: DW1 said that he was never notified of the breach or asked for a refund by the respondent's mother since he was always willing to transfer the land as long as his balance was cleared.
10. Jane Makena, a wife to the appellant, testified as DW 2. She confirmed the contents of the sale agreement save that the respondent's mother failed to clear the balance, hence frustrating it. In cross-examination DW 2 clarified that she separated from the appellant after he sold the land, hence the reason she was not a party to the sale agreement.
11. The appellant was found liable by the trial court and has, through a memorandum of appeal dated 12.6.2023, complained through eight grounds of appeal that;- the trial court was wrong to find that he was in breach of the contract; it failed to find the sale agreement null and void for lack of consent from the land control board; for awarding liquidated damages; for awarding general damages which were not proved and are not awardable in law; for disregarding his evidence and issues of law raised; for



- failing to analyze the evidence properly hence reached a wrong finding; for shifting the burden of proof to him contrary to the law of evidence and for reaching a holding against the evidence and the law.
12. As a first appeal, the court is duty bound to make a re-appraisal, rehearsal and re-analyze of the entire record and come up with independent findings as to facts and the law, while giving credit to the trial court, which had an opportunity to see and hear the witnesses first hand. See *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) E.A 123 and *Abok v Gitobu Imanyara & another v A.G & others* (2016) eKLR.
 13. At the trial court, the respondent brought the suit as a legal representative of the late Jeremy Mwihaki Gituma, pursuant to a limited grant produced as D. Exh No. (3). He sought to enforce the sale agreement dated 7.4.2015 and produced as P. Exh No. (2). The complaint was on breach and non-completion of the sale agreement. On the other hand, the appellant, while acknowledging the contents of the sale agreement and receipt of a deposit, heaped blame for the breach on the purchaser, who failed to honor her terms by clearing the purchase price.
 14. It is trite law that parties have the freedom to enter into a sale agreement or a contract in law, whose terms are binding. The cardinal rule is that courts do not rewrite contracts and enforce the same so long as they do not suffer from some defect such as mistake, illegality, or voidability. Section 3 (3) of the Law of the Contract Act provides that all transactions for disposition of land must be in writing, be duly signed by all the parties and attested to by a witness who was present during the transaction. See *Rufale v Umon Manufacturing Co.* (1918) LR. 1 KB 592.
 15. As to breach of contract in *Mwangi v Kiiru* (1987) eKLR, the court cited Lord Diplock that every failure to perform primary obligations was a breach of contract and attracted a secondary obligation on the part of the party in breach to pay monetary compensation for the loss sustained by him in consequence of the breach.
 16. In *Collins v Ogango* (Civil Appeal No. 427 of 2018 (2024) KECA 19 (KLR) 25.1.2024 (Judgment), liquidated damages of 10% of the purchase price had been awarded to the respondent; specific performance was granted against a 2nd defendant to transfer the land. The court cited Black's Law Dictionary 9th Edition page 213 that breach of contract refers to a violation of a contractual obligation by failing to perform one's promise by repudiating it or by interfering with another party's performance, which gives rise to a claim for damages.
 17. The court cited with approval *Delilal Kerubo Otiso v Ramesh Chander Ndingra* (2018) eKLR, that where the conduct of the appellant is oppressive, highhanded outrageous, callous, underhand, and bordered on fraud with no intention of honoring the agreement, general damage would be tenable. The court further adopted the Supreme Court Practice (1985) Vol. 1 page 33, that a liquidated demand is in the nature of a debt due and payable or by virtue of a contract and if ascertained or specified, requires investigation beyond mere calculation. The court said that the award was founded correctly and soundly as an appropriate sanction for unbridled mischief in the circumstances.
 18. Further, the court said that as a general rule, a purchaser is entitled to recover damages at large where a seller refuses to implement an agreement for any reason other than a defective title and compensation contemplated by the contract or which would reasonably have been in the contemplation of the parties as likely to be wasted if the contract is broken. See *Openda v Ann* (1984) KLR 208.
 19. The court cited *Ritho v Karithi & another* (1988) KLR 237 that it is lawful in breach of any covenant to award damages to the party injured either in addition to or in substitution for an injunction or specific performance.



20. Similarly, the court further cited *Hadley v Baxendale* (154) 9 Exh 214 that where two parties have made a contract in which one of them has broken, the damage which the other ought to receive, should be such as may fairly and reasonably be considered either as arising naturally from the breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made a contract as the probate result of its breach. The court said that since the liquidated damages had been expressly provided for in the agreement of sale, the court was in order to award them on top of specific its performance.
21. In this appeal, the sale agreement dated 7.4.2015 was admitted by both parties as binding to them. It was lawfully and willingly executed and attested to front of the parties. Clause 2 provided that the balance of Kshs 430,000/= was to be paid upon execution of a transfer. The vendor was to pay the ground survey subdivision fees and any other fees to process new titles. The purchaser was to take vacant possession upon execution of the sale agreement. The purchaser was also to cater for the transfer fees and other incidentals to it. Clause 7 was a penalty clause in the event of a breach of the terms and conditions to the innocent party, termed as liquidated damages, double the amount of the consideration, plus a refund of all expenses and costs accrued for the breach.
22. The respondent produced P. Exh No. 2, showing that his late mother paid Kshs 150,000/= as of 23.7.2015, which the appellant acknowledged receipt of as part payment. From the sale agreement, there is no indication of the timelines during which the appellant was to obtain the land control board's consent, sign the transfer forms, or procure or undertake the ground survey and the subdivisions. Additionally, there was no indication in the sale agreement on the manner of communicating any breach or rescinding the sale agreement.
23. That notwithstanding, it is apparent that by paying Kshs 150,000/= instead of Kshs 20,000/= before the execution of the transfer, the respondent, therefore did more than was agreed in the sale agreement. The appellant accepted more monies than what they had agreed before executing the transfer and or making efforts to procure the land control board consent for the subdivisions and transfers. The appellant instead pleaded that the sale agreement became null and void for lack of a control board consent, yet he was the one to undertake the process of the subdivisions, procurement of requisite consents and to sign the transfer.
24. In *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (2014) eKLR, the court held that equity should suffer no wrong without a remedy, no man shall benefit from his wrongdoing, and equity detests unjust enrichments. The appellant knew that he had obtained more money and was supposed to facilitate the documentation.
25. In *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR, the court observed that Section 3 (3) of the *Law of Contract Act*, Section 38 (2) of the *Land Act* as amended, and the *Land Control Act* do not affect the creation or operation of a resulting, implied or constructive trust or proprietary estoppel for equity to provide reliefs against unconscionable conduct.
26. In this appeal, the appellant did not plead that the penalty clause was punitive, unconscionable, oppressive, and or illegal. The appellant did not deny that he obtained more money despite clause No. (2), before he signed the transfer forms. In my considered view, it was the appellant who violated the terms and conditions of the sale agreement by not undertaking or honoring his promise or obligations on time or at all as regards consents, subdivisions and transfer forms. Even though during his testimony, D.W. 1 told the trial court that he had subdivided the land and had asked the respondent to honor his part of the bargain, no documents such as the land control board application forms, the land control board consent for subdivisions, the land control board consent for transfer, and a mutation form were produced showing the efforts that the appellant had made towards honoring the agreement.



27. The respondent came to court on 26.11.2019. The suit was filed close to four years after the sale agreement was entered into. Even after the appellant was sued, he did not plead that he had substantially complied with clauses 2, 4 & 6 of the sale agreement. Instead, he pleaded that the sale agreement became null and void for lack of consent from the land control board. Further, he pleaded that he had not been served with a notice of breach of the sale agreement or notice to complete the same.
28. Clearly, the appellant was out to take advantage of his own mistakes or unconscionable conduct. Additionally, he raised the issue of capacity to sue, yet the respondent had displayed limited letters of grant. The burden of proof rests on he who wants the court to believe the existence of specific facts. It was upon the appellant to prove that he was not the one in breach of the sale agreement by producing documentation that was required for the completion of the sale agreement. The respondent had facilitated him with more than Kshs 20,000/= with the sole intention of completing the sale agreement.
29. In *Sisto Wambugu v Kamau Njuguna* (1983) eKLR, the court observed that the law is that the right to rescind contracts if the purchase does not pay or the appointed date applies where time is of essence or if not after the other party who is not at fault gives a reasonable notice making time of the essence. In this appeal, the appellant, after obtaining Kshs 170,000/=, did nothing to ensure the requisite consents and transfers were obtained and signed to complete the sale agreement. The sale agreement did not invoke the Law Society of Kenya (2015) terms and conditions of sale. The appellant did not plead that time was of the essence at the trial court.
30. On the other hand the appellant did not plead that he notified the respondent that the contract of sale had become void or null for lack of a land control board consent after six months. Additionally, the appellant did not plead that all the respondent was entitled to a refund and not liquidated damages. The caselaw of *Mithika M'Inoti v Eusabia Nkuene Juliuss* (2013) eKLR is distinguishable from the instant appeal for parties had agreed on the liquidated damages in the event of a default.
31. The appellant faults the trial court for not considering written submissions. It is a trite law that parties are bound by their pleadings. Written submissions cannot replace evidence or pleadings. The appellant failed to substantiate through evidence efforts that he had made to comply with clauses 2, 4 & 6 of the sale agreement. Parole evidence under Section 98 of the *Evidence Act* cannot be used to challenge the contents of a sale agreement. Parties are bound by the terms and conditions of their contract unless coercion, fraud, or undue influence is pleaded and proved. See *National Bank Kenya v Pipeplastic Samkolit (K) Ltd* C.A No. 95 of 1999.
32. In *Kinyanjui & another v Thande & another* (1995-1998) E. A 159, the court said that an agreement that is in writing cannot be varied or amended by oral representations. See also *Deposit Protection Fund Board v Sunbeam Supermarket Ltd & another* (2004) 1 KLR 37.
33. Having reviewed the pleadings, evidence tendered, and the law, my findings are that the trial court cannot be faulted for the findings and the prayers made. The grounds of appeal are hereby found lacking merits. The appeal is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 22ND DAY OF MAY, 2024

HON. C K NZILI

.....

JUDGE



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In presence of

C.A Kananu

Gachohi for applicant

Muthomi for the respondent

