



REPUBLIC OF KENYA



KENYA LAW
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**Rufus v Maina (Environment and Land Appeal E022 of 2023)
[2024] KEELC 5039 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 5039 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E022 OF 2023**

**CK NZILI, J
JUNE 26, 2024**

BETWEEN

STANLEY KIMATHI RUFUS APPELLANT

AND

MARYANN MUTHONI MAINA RESPONDENT

*(Being an appeal from the judgment of Hon. T.M Mwangi -
SPM delivered on 3.8.2023 in Meru CM ELC No. 149 of 2018)*

JUDGMENT

1. The appellant, who was the 1st defendant, had been sued by the respondent as the plaintiff at the lower court by an amended plaint dated 13.5.2021 for breach of a land sale agreement, failing to hand over vacant possession or refund of the deposit paid to him. The respondent, therefore, prayed for specific performance to compel the 2nd defendants to comply with the contract obligations and damages for breach of contract.
2. The appellant was duly served with summons to enter an appearance on 7.6.2021 and an affidavit of service sworn by Joseph Kithinji M'Kiambati filed on 4.8.2021, accompanied by a request for interlocutory judgment.
3. An interlocutory judgment was later entered on 9.8.2021, and a hearing date was taken for 7.10.2021, which was later set aside through a ruling dated 6.10.2022.
4. At the hearing, Mary Ann Muthoni Maina testified as PW 1. She adopted as evidence in chief her husband's witness statement dated and filed on 30.3.2017. She said that Mwangi Waititu entered into a sale agreement over L.R No. Kirimara/Kithithina/Block 1/281 measuring 1.18 ha, where the appellant was the beneficial owner, then owned by Silas Ntarangwi Nchebere, the 3rd defendant to the suit.



5. PW 1 said that at the time there was a pending case in which the appellant was to pay the registered owner all the monies so that he could acquire vacant possession and transfer of the land
6. Again, PW 1 said that in order for the appellant to meet the obligations described above, her husband entered into a sale agreement dated 6.7.2009, of which the appellant was paid Kshs.500,000/= and the balance of Kshs.25,000/= was to be paid upon successful transfer of the land to the purchaser.
7. PW 1 said that the appellant neglected to give vacant possession or comply with the orders made in CMCC No. 4 of 2001 or transfer the land to her husband despite receiving the initial deposit, hence occasioning his husband's loss and damage. She relied on a copy of an official search, sale agreement dated 6.7.2009 and 7.8.2015, demand letter, copies of consents dated 7.8.2015 and 1.12.2014 as P. Exh No. 1 – 4. PW 1 added that her late husband was never given vacant possession nor refunded the money.
8. In cross-examination, PW 1 told the court that her late husband was unaware of the pending case when they entered into the sale agreement, which she was a witness to and only disclosed after signing P. Exh No. (2). Further, PW 1 said her late husband was present when the sale agreement dated 1.12.2014 was made, but could not confirm if the purchase price was refunded. PW 1 testified that her husband passed away on 8.10.2018 but never disclosed to her about any refund. Otherwise, he filed the suit before he passed on due to non-compliance with the sale agreement. The respondent abandoned the claim against the 2nd defendant on 9.3.2023.
9. The appellant testified as DW 1 and adopted his witness statement dated 13.10.2022 as his evidence in chief. He told the court that he entered into a sale agreement with the late Mwangi Waititu over land that belonged to Nchebere Silas and was due to be transferred to him. DW 1 said that the failure to transfer the land to him, the deceased demanded a refund of the deposit paid and a rescission agreement was made, namely; P. Exh No. (3). Further, DW 1 said that after the deceased became adamant, they made another agreement, P. Exh No. (4). He said that he eventually refunded Kshs.750,000/=, to the deceased as per DMF "1," which was an acknowledgment note dated 10.8.2015.
10. In cross-examination DW 1 insisted that he refunded the money to the deceased three days after signing P. Exh No. (3) & (4) that is 10.8.2015. Though, the deceased brother Peter Kamau Waititu had witnessed P. Exh No. (2) (3) & (4), DW 1 confirmed that he was not a party to DMF No. (1) since, at the time, he was unwell. Again DW 1 said that one Geoffrey Kiathe M'Nderi witnessed DMFI (1) but passed on in 2023.
11. After the close of the defense case, the trial court rendered its judgment on 3.8.2023.
12. The appellant faults the trial court for:-
 - i. Failing to find that the suit was about enforcing a contractual agreement in which the claim was time-barred.
 - ii. For not finding that the respondent had not proved a refund of Kshs.750,000/= to the required standard.
 - iii. For disregarding his evidence.
 - iv. For considering contradictory evidence of the respondent.
 - v. For finding that the acknowledgment receipt in question was questionable.
 - vi. For shifting the burden of proof to him on the authenticity of the acknowledgment note, instead of the respondent to discharge it.



- vii. For considering extraneous matters
 - viii. For being biased.
 - ix. For reaching an insupportable finding in law since they were based on no evidence.
13. With leave of court, parties were directed to canvass the appeal through written submissions to be filed by 16.6.2024. The role of an appellate court of the first instance is to re-analyze and review the record of the court below it and come up with independent findings as to facts and the law while giving credit to the lower court that had the opportunity of seeing and hearing the witnesses testify. See *Selle v Associated Motor Boat & Co. Ltd* (1968) E.A 123.
 14. Having gone through the lower court record, the grounds of appeal, written submissions, and the law, the issues calling for my determination are:
 - i. Whether the respondent pleaded and proved entry into and breach of any sale agreement by the appellant
 - ii. If the appeal has merits.
 15. The respondent's claim before the trial court was that the appellant failed to honor the terms and conditions in the sale agreements dated 6.7.2009 and 1.12.2014. While acknowledging the existence of the two agreements, the respondent, in a statement of defense dated 13.10.2022, averred that he settled the debt of Kshs.750,000/=, according to the 2nd sale agreement; hence, he owed no money to the respondent.
 16. In support of his defense, the appellant relied on DMF 1, an acknowledgment note dated 10.8.2015. The note was reportedly made and witnessed by Elijah Ogoti & Co. Advocates in the presence of Geoffrey Kiathe M'Nderi. None of the two witnesses were called to testify or produce the document. Documents marked for identification are not exhibits before a court of law.
 17. In *Kenneth Nyaga Mwige v Austin Kiguta & others* (2015) eKLR, the Court of Appeal observed that a document marked for identification is neither formally produced in evidence nor marked as an exhibit as remains to be formally proved. The court said a document becomes part of the judicial record after going through three stages namely; filing, admission, or production as an exhibit, and lastly, when the court applies its mind to determine the relevance and veracity of its contents.
 18. In this appeal, the evidential burden was upon the appellant to prove, as a matter of fact, the existence, veracity, and authenticity of DMF (1). The appellant failed to surmount the three stages alluded to above regarding evidence and left the document unproduced as an exhibit. The burden of proof is on he who wants the court to believe or disbelieve the existence of specific facts. The appellant is the one who was claiming that he made a total refund of Kshs.750,000/= through DMF (1) and before two witnesses.
 19. The deceased had, before his demise, signed a witness statement filed on 30.3.2017, which PW 1 adopted as her evidence in chief. He was categorical that the appellant had neglected to make the refund or hand over vacant possession. In cross-examination, DW 1 appeared shaky, evasive, and incoherent on when, where, and how he made the refund; without production of the DMF (1), followed by independent witnesses to the acknowledgment note, the appellant was unable to prove the contents, state or physical appearance of the acknowledgment note. See *Lwanga v Ndote* ELC case No. 79 of (2010) (2021) KEELC 2 (KLR) 10th November 2021 (Ruling).



20. The appellant abandoned his document, and therefore, the trial court was not at liberty to apply its mind on an unproduced exhibit. DW 1 never brought himself, within the exception of Section 35 of the *Evidence Act*, to call anyone familiar with the handwriting of the deceased or who was present when the deceased appended his signature to the document. The respondent had objected to the document. Once it was objected to and marked for identification, the onus was on the appellant to call its maker or witnesses to the same.
21. The respondent had discharged both the legal and evidentiary burden by adopting the witness statement by the deceased together with the exhibits. There was evidence that the appellant had reportedly obtained Kshs.500,000/= as a consideration but was unable to hand over vacant possession or transfer the suit land to the respondent. The appellant also admitted the inability to honor the 1st agreement in the 2nd agreement for a refund, which he also failed to honor by the deadline of 20.12.2014. DMF 1 was not subjected to any forensic report to show that the signature appearing there belonged to the deceased. Without such evidence to rebut non-payment or of delivery of vacant possession, I find that the respondent had proved her claim to the required standard, contrary to grounds numbers (2) (3) (4) (5) & (9) of the memorandum of appeal dated 4.9.2023.
22. Regarding ground number (1) parties are bound by their pleadings, and issues flow from such pleadings. The appellant had not pleaded that the claim was statute-barred. In any event, a claim for recovery of land or a debt became time-barred after six years by dint of Sections 4 & 7 of *Cap 22*. The appellant had admitted that the agreement for a refund of the consideration was made on 1.12.2014, rescinding the earlier one of 2009. The suit was, therefore, not time-barred.
23. As to grounds No (7) & (8), there is no evidence that the trial court considered extraneous matters or was biased against the appellant. The test of bias is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor unduly sensitive or suspicious. See *Philip K. Tonni & another v. TSC & another* (2016) eKLR.
24. A party should prepare its case on the basis of the law and evidence. It should not blame the court if the court applies its mind to the law and the case does not succeed only to turn fingers at the court that there was bias or apprehension of bias. See *Trust Bank Ltd v Shab & others* (Civil Suit No. 73 of 2001) (2024) KEHC (2676) (KLR) Commercial & Tax) (15th March 2024) Ruling.
25. The upshot is that I find no merits in the appeal. The same is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 26TH DAY OF JUNE, 2024

In presence of

C.A Kananu/Mukami

Karatu for appellant

Mwiti for respondent

HON. C K NZILI

JUDGE

