



**Mbathi v Kaleve (Environment & Land Case 344 of 2017)
[2024] KEELC 4836 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4836 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 344 OF 2017**

TW MURIGI, J

JUNE 12, 2024

BETWEEN

TITUS KITILI MBATHI PLAINTIFF

AND

HISELLS MULATYA KALEVE DEFENDANT

JUDGMENT

1. By an amended Plaintiff dated 7th October, 2019 the Plaintiff prays for judgment against the Defendant for: -
 - a) Kshs. 4,760,000/=
 - b) The cost of any additional developments accruing from on L.R. No. Makueni/masongaleni/93
 - d) In the alternative to prayer (a) and (b), the Plaintiff be reimbursed all the costs of the developments accruing from on L.R. No. Makueni/masongaleni/93 under the doctrine of restitution.
 - e) Costs.
 - f) Interest.
2. The Defendant filed an amended statement of defence on 26th November, 2019 denying the Plaintiff's claim. He urged the court to dismiss the suit with costs.

The Plaintiff's Case

3. The Plaintiff, Titus Kitili Mbathi called a total of four witness in support of his case.



4. He testified as PW4 and adopted his witness statements dated 7/10/2011 and 20/2/2022 as his evidence in chief. He also produced the documents in the list of documents dated 29/12/2011 and 20/2/2022 as PEX 1 – 11 respectively. He told the court that in September 2009, he entered into an oral agreement with the Defendant for the sale of L.R. No. Makueni/Masongaleni/93 (the suit property herein), for Kshs. 1,000,000/=. That it was agreed that he would pay the entire purchase price once the Defendant acquired the title deed in respect of the suit property.
5. That after several months, the Defendant requested him to increase the purchase price to Kshs. 1,500,000/= and upon negotiations, they settled on Kshs 1,200,000/= as the purchase price. He went on to state that the Defendant authorized him to develop the suit property. That sometime in the year 2010, the Defendant demanded that he should pay Kshs. 5,000,000/= as the purchase price or lease the suit property for 200,000/= per annum. That he told the Defendant that the terms were unacceptable since he was renegeing on their earlier agreement.
6. That later on, the Defendant's Advocates wrote to him a demand letter asking him to vacate the suit property with immediate effect since he did not comply with the terms of the offer.
7. He informed the court that before filing this suit, he instructed Musyoki and Associates Valuers to value the developments made on the suit property. That in the year 2019 he instructed Munywoki and Associates Valuers to re value the investment that he had made on the suit property.
8. It was his testimony that there was an implied trust that the Defendant would sell the suit property to him after he acquired the title deed. That out of the representation made by the Defendant, he developed the suit property extensively as shown in the valuation report dated 10/7/2019. According to the Plaintiff, the bulk of the development consisted of 25,160 eucalyptus trees planted on the suit property. He urged the court to order the Defendant to reimburse him Kshs. 4,760,000/= for the developments made on the suit property.
9. On cross-examination by Ms. Koki Mbulu, he testified that he purchased the suit property even though he did not pay for it. He further testified that he neither had a written sale agreement nor any document to show that the Defendant gave him possession of the suit property. He further testified that he did not have any document to prove that he had planted 24,890 seedlings. It was his evidence that he took possession of the suit property in the year 2002.
10. He further testified that the Defendant was fully aware of his activities in the suit property notwithstanding the fact that he works and resides in Sudan. According to the Plaintiff, the Defendant's letter of offer was written long after he had taken possession and developed the suit property.
11. On re-examination by Ms. Singi, he testified that he took possession of the suit property in the year 2009 and not in the year 2002. He further testified that the Defendant did not take any action to stop him from developing the suit property.
12. PW1, James Mulinge Kyengo, adopted his witness statement dated 20/2/2022 as his evidence in chief. He testified that he was employed by the Plaintiff as his farm manager. He told the court that after the Defendant agreed to sell the suit property to the Plaintiff for Kshs. 20,000/= per acre, he contracted local laborers to clear the bushes, hired tractors to plough the suit property and supervised the planting of the green grams and eucalyptus seedlings. That all along, the Defendant did not take any action to stop the Plaintiff from carrying out the farming activities on the suit property.
13. That later on, the Defendant asked the Plaintiff to vacate the suit property. He insisted that the Plaintiff should be reimbursed the costs that he incurred in developing the suit property.



14. In cross-examination, he testified that the Plaintiff informed him that the Defendant refused to accept the purchase price that was agreed upon.
15. In re-examination, he testified that the Plaintiff and the Defendant did not record a sale agreement in respect of the suit property since the agreement was done orally.
16. PW2, Onesmus Muchiani Nzamalu, adopted his witness statement dated 8/10/2011 as his evidence in chief. He told the court that he is a retired Chief, Masongaleni Location. He testified that in September, 2009, the Plaintiff and the Defendant entered into an oral agreement for the sale of the suit property for Kshs 1,000,000/=. That the Plaintiff proposed to pay 10% of the purchase price but the Defendant requested for time to enable him to process the title deed for the suit property. It was his testimony that the Defendant gave the Plaintiff consent to utilize the suit property.
17. He further stated that the Defendant never presented any case to his office objecting to the developments being carried out on the suit property.
18. In cross-examination, he testified that parties did not record a sale when they were on the suit property. It was his testimony that the Plaintiff informed him that the Defendant reneged on their agreement from the agreed consideration of Kshs. 1,000,000/= to Kshs. 5,000,000/=. He further testified that he was aware that the Plaintiff had developed the suit property with the verbal consent of the Defendant though he was not present when the said consent was given.
19. In re-examination, he testified that the Plaintiff should be reimbursed for the costs that he incurred in developing the suit property.
20. PW3, Jimmy Rodgers Nzuve, adopted his witness statement dated 8/10/2011 as his evidence in chief. He informed the court that sometime in September 2009, the Plaintiff and the Defendant entered into an agreement for the sale of the suit property.
21. He went on to state that the Defendant declined to accept the initial deposit of Kshs. 500,000/= and insisted that he first acquires the title deed for the suit property. He further testified the Defendant gave the Plaintiff consent to develop the suit property and in that regard, the Plaintiff planted green grams and eucalyptus trees.
22. On cross-examination, he testified that he is not a registered real estate agent. He testified that he was present during the initial negotiations when the parties herein entered into an oral agreement for the sale of the suit property for Kshs. 1,000,000/=.
23. He testified that the Plaintiff does not have a title deed or a formal consent in respect of the suit property. He further testified that the Defendant had agreed to sell the suit property for Kshs. 1,000,000/= but later reneged on their agreement and demanded for Kshs. 5,000,000/=.
24. In re-examination, he testified that the Defendant did not attempt to stop the Plaintiff from carrying out the developments on the suit property. He concluded his evidence by stating that the Plaintiff was not a trespasser on the Defendant's land.
25. PW5, Mwongela Munyoki, a registered land valuer adopted his witness statement dated 8/10/2011 as his evidence in chief. It was his testimony that in the year 2011, the Plaintiff instructed him to prepare a valuation report on the suit property. That later in the year 2019, the Plaintiff instructed him to prepare another valuation report for purpose of compensation.
26. It was his testimony that the eucalyptus trees on the suit property did not grow to the required size and as such, they could only be used as fencing posts or as firewood.



27. He stated that he applied the market rate to assess the cost of one eucalyptus tree at Kshs. 100/= while the rest of the data was generated from the information received from his client.

The Defence Case

28. The Defendant Hissels Mulatya Kaleve testified as the sole witness in support of his case. He adopted his witness statement dated 19/12/2019 as his evidence in chief. He also produced the documents in the list of documents dated 16/12/2009 as DEX 1 – 4 respectively.
29. It was his testimony that in the year 2009, the Plaintiff approached him with the intention to purchase his land. That after a meeting with the Plaintiff at his office, he proposed to sell the suit property to the Plaintiff for Kshs. 1,000,000/= and it was agreed that he should first process the title deed for the suit property. He testified that he was issued with the title deed in respect of the suit property on 11/11/2009.
30. He further testified that vide the letter of offer dated 11/11/2010, he proposed to the Plaintiff that he either purchases the suit property for Kshs. 5,000,000/= or rents the same for Kshs. 200,000/= per annum but the Plaintiff did not respond to his proposal. He testified that he did not authorize the Plaintiff to enter the suit property and that he was not aware that the Plaintiff was in possession of the same since he works and resides in Sudan while his family resides in Nairobi. He further testified that vide a letter dated 13/6/2011, his Advocate cautioned the Plaintiff against developing the suit property.
31. The Defendant testified that he did not sell the suit property to the Plaintiff or authorize him to plant trees thereon. He testified that he was not aware of any investment that had been done on his land and that the photographs produced by Plaintiff were not a reflection of the suit property.
32. According to the Defendant, the Plaintiff is a trespasser and as such, he would not know why he was claiming Kshs. 4,760,000/= from him.
33. In cross-examination, he testified that he had an oral agreement with the Plaintiff in the year 2009 for the sale of the suit property for Kshs. 1,000,000/=.
34. He went on to state that after he agreed with his family not to sell the suit property for Kshs. 1,000,000/=, he wrote the letter of offer but the Plaintiff did not comply with the same.
35. He further testified that the Plaintiff entered his land without his permission and denied increasing the purchase price because the Plaintiff had developed the suit property. He stated that he did not sue the Plaintiff for vacant possession of the land and that he was not aware that the Plaintiff had planted trees on the suit property.
36. On re-examination, he testified that the Plaintiff has admitted in his Plaint that he entered the suit property and cleared the bush which explains why the Defendant's photographs of the suit property do not show eucalyptus trees. He reiterated that he was not aware whether the Plaintiff had planted eucalyptus trees on his land.
37. After the close of the hearing, the parties agreed to file and exchange their written submissions.

The Plaintiff's Submissions

38. The Plaintiff submissions were filed on 23/1/2024.
39. On his behalf, Counsel submitted that proprietary estoppel based on the facts of the case had arisen in favour of the Plaintiff. Counsel submitted that the Defendant assured the Plaintiff that he would sell



to him the suit property for Kshs. 1,000,000/=. That it was also agreed that they would enter into a written sale agreement as soon as the Defendant acquired the title deed in respect of the suit property.

40. Counsel submitted that the Plaintiff acted on the representations made by the Defendant to clear the bushes, fence off the land and planted eucalyptus trees in large scale on the suit property. Counsel submitted that the Plaintiff had acted substantially to his own detriment on the strength of the Defendant's assurance that he would sell to him the suit property. Counsel submitted that the Plaintiff suffered substantial detriment to the tune of Kshs. 4,760,000/= for which he urged the court to order restitution.
41. Counsel further submitted that the Plaintiff disclosed to the Defendant the activities that he was carrying out before he gave his assurance to sell the suit property and as such, the Defendant is estopped from alleging the contrary. Counsel submitted that the Plaintiff would not have invested heavily on the suit property if the Defendant had not given the Plaintiff an assurance that he would later become the legal owner of the suit property.
42. Concluding her submissions. Counsel submitted that the Plaintiff had proved special damages of Kshs. 4,760,000/= and is therefore entitled to the same. None of the authorities cited by Counsel in the submissions were availed for the Court's perusal.

The Defendant's Submissions

43. The Defendant's submissions were filed on 7/2/2024.
44. On his behalf, Counsel submitted that the Plaintiff did not plead proprietary estoppel, constructive trust or detrimental reliance in his plaint. Counsel further submitted that the Plaintiff entered into the suit property on an unfounded assumption that the Defendant would sell to him the suit property. Counsel submitted that the Plaintiff did not tender any evidence to prove his claim that the Defendant gave him possession of the suit property.
45. Counsel further submitted that failure by the Plaintiff to either purchase or lease the suit property in accordance with the letter of offer dated 11/11/2010 rendered his actions on the suit property as trespass to land. Counsel contended that the Defendant did not make any representations to induce the Plaintiff to invest in the suit property to his detriment.
46. Counsel submitted that the Plaintiff entered and remained on the suit property at his own peril in the perpetration of an illegality. It was further submitted that the alleged oral agreement on which the Plaintiff bases his claim ought to have been reduced into writing in accordance with Section 38 of the [Land Act, 2012](#).
47. According to Counsel, the Plaintiff did not prove his claim of Kshs. 4,760,000/=. Counsel argued that a trespasser is not entitled to compensation. Concluding her submissions Counsel submitted that the Plaintiff's suit is inconsistent with the law and urged the court to dismiss the same with costs.

Analysis And Determination

48. Having considered the pleadings, the evidence on record and the respective submissions the following issues fall determination: -
 - i. Whether there was a valid sale agreement between the Plaintiff and Defendant
 - ii. Whether the Plaintiff is entitled to the orders sought in the Plaint?
49. From the pleadings and the evidence on record, the following facts are not in dispute: -



- i. The Defendant is the registered owner of land Parcel No. Makueni/Masongaleni/93, the suit property herein.
- ii. Sometimes in or about September 2009, the Plaintiff and the Defendant orally agreed that the Defendant would sell the suit property to the Plaintiff once he was issued with a title deed in respect of the suit property.
- iii. The title deed to the suit property was issued on 11th November, 2009.
- iv. The Defendant Vide the letter of offer dated 11th November, 2010, proposed to sell the suit property to the Plaintiff for Kshs. 5,500,000/= or to lease the same for a six-year period at Kshs. 200,000/= per annum.
- v. The offer was valid up to end of the year 2010.
- vi. The offer lapsed in the absence of a response from the Plaintiff

Whether There Was A Valid Sale Agreement Between The Plaintiff And Defendant

50. It is not in dispute that sometime in September 2009, the parties herein entered into an oral agreement for the sale of the suit property at the Plaintiff's KenGen offices where it was agreed that the Defendant would sell the suit property to the Plaintiff for Kshs. 1,000,000/= once he was issued with the title deed.
51. The Plaintiff's witnesses confirmed that the Defendant agreed to sell the suit property to the Plaintiff for Kshs. 1,000,000/=. In addition, DW3 testified that the Defendant refused to accept the initial deposit Kshs 500,000/= being part payment for the suit property.
52. Section 3(3) of the Law of Contract provides as follows;-

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 by a witness who is present when the contract was signed by such party:
53. This provision is echoed in Section 38 of the Land Act, 2012 which stipulates that no interest in land can pass unless there is a valid contract of sale. It provides as follows: -
 - (1) Other than as provided by this Act or by any other written law, 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.



54. In Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR, the Court of Appeal aptly held as follows: -

“Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested.

55. It is not in dispute that the parties herein did not execute a contract for the sale of the suit property. No evidence was tendered to show that the Defendant sold, leased or in any other manner disposed of the suit property to the Plaintiff. Similarly, the Plaintiff did not adduce any evidence to show that he paid consideration for the suit property. The court is satisfied that there is no valid sale agreement for the suit property between the Plaintiff and Defendant in terms of the provisions of Section 3(3) of the Law of Contract Act which the Plaintiff can enforce against the Defendant.

Whether the plaintiff is entitled to the orders sought

56. The Plaintiff's suit is based on an oral agreement that the Defendant would sell the suit property to him for Kshs. 1,000,000/= once he was issued with the title deed. According to the Plaintiff, the Defendant expressly authorized him to utilize the suit property in the hope that once the title deed was issued he would sell the suit property to him.

57. That in order to induce the Plaintiff to develop the suit property, the Defendant promised the Plaintiff that he would sell and transfer the suit property to him for Kshs. 1,000,000/= once the registration process was complete and that the developments on the suit property would be safeguarded and protected until the property was transferred to him.

58. That arising from the representations, he developed the suit property extensively by :-

Bush clearing.....	Kshs. 452,000/= .
Land preparation.....	Kshs 333,900/=
Seedling.....	Kshs 759,050/-
Weeding.....	Kshs 192,000/=
Making bench terraces.....	Kshs. 19,950/=
Fencing.....	Kshs .104030/=
Anti-termite chemicals application.....	Kshs.180,900/-.
Security.....	Kshs.192,000/=
Eucalyptus trees.....	Kshs.2,516,000/=
Total.....	Kshs. 4,760,000/=

59. The Plaintiff is seeking to be reimbursed the costs incurred in the developments made in the suit property in the sum of Kshs 4,760,000/= To support his claim, PW5 produced the valuation report to show the expenses incurred by the Plaintiff in developing the suit property.

60. The Plaintiff and his witnesses argued that the Defendant did not raise any objection during the time when he was carrying out the developments on the suit property.

61. On his part, the Defendant denied authorizing the Plaintiff to enter into his land and termed him as a trespasser.



62. In the case of *Lucy Mirigo & 550 others v Minister for Lands & 4 others* [2014] eKLR the Court of Appeal aptly held as follows: -
- “ A promise can neither create nor convey an interest in land. The *Law of Contract Act* clearly stipulates the requirements for a valid instrument to convey an interest in land. Section 3 (3) of the *Law of Contract Act* (Cap 23 of the Laws of Kenya) stipulates that no suit shall be brought upon a contract for the disposition of an interest in land unless some memorandum or note thereof is in writing and signed by the party to be charged. (See *Morgan -v- Stubenitisky* 1977 KLR 188; *Wagichiengo -v- Gerald* (1988) KLR 406) ... It is trite law that a promise to enter into a contract is not enforceable; in other words a contract to enter into a contract is not enforceable”.
63. The Defendant testified that after he consulted his family, they agreed to sell the suit property for Kshs 5,500,000/=.
64. That consequently, vide the letter of offer dated 11/11/2010, he offered to sell or lease the suit property to the Plaintiff. According to the letter, the terms of the offer were as follows:-
- “ ... We are giving you an offer to purchase the land at Kshs five million five hundred thousand (Kshs 5,500,000/=)
- a)
- b) We are offering you to lease the land for two hundred thousand only per year (read KSHS 200,000/=) for six years but the lease will be broken into two terms renewable contract for three years (3) each term should be fully paid at the beginning of each term i.e (Kshs 600,000/=) per term.”
65. The Plaintiff testified that the Defendant reneged on their agreement for the sale of the suit property for Kshs 1,000,000/= and that he informed the Defendant that his offer was unacceptable.
66. In the absence of a valid written contract, the Defendant was at liberty to change his stance which he did vide the ensuing letter of offer dated 11/11/2010.
67. The Plaintiff did not take up the offer which as per the terms expired at the end of the year 2010.
68. It was the Plaintiff's testimony that upon entering the oral agreement, the Defendant authorized him to enter the suit property and make developments thereon. His witnesses confirmed that the Defendant gave the Plaintiff verbal consent to enter the suit property and make developments thereon.
69. Section 107 (1) of the *Evidence Act* outlines the burden of proof in the following terms:
- ‘(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.’
70. The Plaintiff did not adduce any evidence to show that there was an agreement between the parties which authorized him to utilize or take possession of the suit property. It matters not that the Plaintiff took possession of the suit property if the contract pursuant to which the plaintiff took possession was not validated in accordance with the law. The record shows that the Defendant refused to accept the initial deposit of Kshs 500,000/ from the Plaintiff because he had not been issued with a title deed. The Defendant varied his oral promise to sell the suit property vide the letter of offer dated 11/11/2010. In accordance with the provisions of Section 3(3) of the Law of Contract, the Plaintiff could not rely on the oral agreement to develop the suit property.
71. From the foregoing, I find that the Plaintiff is not entitled to the orders sought.



72. In the end, I find that the Plaintiff has not proved his case against the Defendant on a balance of probabilities as required. The upshot of the foregoing is that the Plaintiff's suit is hereby dismissed.
73. The general rule as to costs is provided in Section 27 (1) of the *Civil Procedure Act*. I have taken into consideration the circumstances of this matter and I hereby direct that each party bears its own costs.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 12TH JUNE, 2024.

IN THE PRESENCE OF

Ms. Singi for the Plaintiff

Ms. Wachira holding brief for Koki Mbulu for the Defendant.

Court Assistant Kwemboi

