**Ngeiyo v Mutenyo (Environment and Land Appeal 4 of 2023)**
**[2024] KEELC 4786 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4786 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ENVIRONMENT AND LAND APPEAL 4 OF 2023**

**EC CHERONO, J**

**JUNE 6, 2024**

**BETWEEN**

**KENNEDY NGEIYO ..... APPELLANT**

**AND**

**BEATRICE KUBOI MUTENYO ..... RESPONDENT**

***(Being an appeal arising from the judgment and decree of Hon.R.K LANGAT (PM) delivered on 12{{^th}} July, 2023 in Sirisia PM ELC Case no.E007 of 2022)b.)***

**JUDGMENT**

1. This appeal arises from the judgment of the Senior Principal Magistrate Hon. Hon. R.K. Langat delivered on 12th July, 2023 in Sirisia Principal Magistrate Court ELC Case No. E007 OF 2023.

2. The brief background of this case is that through a plaint filed before the trial court dated 2nd December, 2022 one Beatrice Kuboi Mutenyo (the respondent/plaintiff) sought judgment against Kennedy Ngeiyo (the appellant/defendant) for;

    a. A refund of Kshs. 147,000/=

    b. Costs and interests of the suit at court rates.

    c. Any further relief.

3. It was the plaintiff/Respondent's case that on 3rd May, 2022 she entered into an agreement with the appellant for the purchase of a ¼ acre of land for a consideration of Kshs. 120,000/=. The plaintiff/respondent averred that the appellant refunded the consideration despite her having occupied the land, planted trees and other agricultural crops which he (the appellant) uprooted. It was her contention that the terms of the agreement were that the defaulting party was to refund twice the consideration

amount. It was her argument that the appellants actions were in breach of their agreement entered on 3rd May, 2022 and that the appellant ought to refund her the sum of Kshs. 147,000/=.

4. I have perused the court record and can't find that the appellants statement of defence and pre-trial documents. However, I note from the impugned Judgment that the trial court had observed that the said documents were on record.

5. Upon hearing the parties and their witnesses to conclusion, the trial court allowed the plaintiff/ appellant's claim plus costs in the sum of kshs.121,100/=. Being aggrieved by the court's decision, the defendant/appellant herein preferred this appeal vide a memorandum of appeal dated 31st July, 2023 on the following grounds;

    a. That the learned trial magistrate erred in law and fact when he allowed the plaintiffs claim that was not proved or legally available under the law.

    b. That the learned trial magistrate erred in law and fact when he deliberately failed/overlooked or legitimized a victorious agreement that was not binding, enforceable, contractually executed, void and invalid.

    c. That the learned trial magistrate erred in law and fact when he awarded commission or punitive percentage for a void, unenforceable and invalid agreement.

    d. That the learned trial magistrate erred in law and fact when he failed to consider that the refund agreement supersedes the sale contract agreement/invalid and the same was terminated by performance.

    e. That the learned trial magistrate erred in law and fact when he failed to realize that at the time of interpartes hearing there was no privity contract for trial.

    f. That the learned trial magistrate erred in law and fact when he failed to give the defence appropriate time to respond and give evident proof on the purported allegation.

    g. That the learned trial magistrate erred in law and fact when he failed to analyze the mischief on agreement whereby the respondent gave various identity card numbers on each agreement.

    h. The entire judgment evasive on the weighty raised by the defence and at variance with the entire evidence on record by shifting the burden of proof to the appellant contrary to well-known tenets of the law.

6. In this appeal, the appellant seeks to have the judgment of the trial court and all subsequent orders set aside and substitute it with an order dismissing the same with costs and the costs of this appeal.

7. I must state that the grounds of appeal as framed are so poor and incapable of being discerned. The said grounds are not spelt out clearly as required under the law and this court strained to identify any single ground capable of being submitted on as a proper ground of appeal.

8. Having strenuously identified and considered the grounds of appeal and the extract of the record, I am reminded that

    My mandate as the first appellate Court is to analyze and evaluate the evidence on record afresh and to reach my own independent decision. In doing so, I must bear in mind that the trial Court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that. This duty was well stated in *Selle & Another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123.

9. It is also settled law that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held:-

> " An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."

10. The appellant in this appeal contends that he refunded the consideration of Kshs. 120,000/= in two installments to the respondent and as such, he is owed nothing and that therefore the primary suit was overtaken by events. The respondent on the other hand contends that it was a term of the sale agreement between the two that the defaulting party would refund twice as damages for breach and since the appellant had only paid the consideration, damages for breach of contract in the same amount plus costs remained outstanding. During the hearing, the appellant and the respondent called three witnesses each in support of their respective positions who acknowledged that the appellant did refund a total of Kshs.120,000/= which amount was acknowledged. From the testimony of the parties and their witnesses, it is clear that there was a breach on the part of the appellant who, despite having been paid the full consideration as contemplated in the agreement for sale, opted to retake possession of the land and only refund the consideration without damages as agreed.

11. Secondly, I have looked at P-Exhibit 1 which is a sale agreement dated 03/05/2022 between the parties herein and note that the same stipulates in part as follows;

> " ...Mapatano kati ya Kennedy Ngeiyo na Beatrice Kuboi Mutenyo kuhusu kununua shamba kiasi cha robo ekari kwa bei ya shilingi elfu mia moja ishirini (120000) na iwopo kuna malalamishi ni shilingi kwa shilingi..."

12. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite contracts for parties. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 EA 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

> A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

13. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

> We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.

14. My understanding of the agreement between the parties is that any in breach/default of the sale agreement was required to pay twice the consideration. Having established that the appellant was in breach, it follows therefore that he was liable to pay the refund plus damages of the same amount making a total of Kshs. 240,000/as stipulated in the agreement. Having therefore refunded the sum

of Kshs.120,000/=, I agree with the trial court that there was an outstanding amount owed by the appellant to the Respondent of Kshs. 120,000/=.

15. The plaintiff/respondent in her plaint also averred that the defendant/appellant damaged her trees and crops and in support of this claim referred to an assessment report dated 14th October, 2022 produced as P-Exhibit 3. I have examined the said assessment report and note that the agricultural officer was of the view that Kshs. 1,100/= would suffice as compensation. The appellant did not present a contradicting report.

16. The upshot of my analysis is that this appeal is devoid of merit and the same is hereby dismissed with costs to the Respondent.

17. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 06TH DAY OF JUNE, 2024.**

**HON.E.C CHERONO**

**.....**

**ELC JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

In the presence of;

Mr. Olonyi H/B Mr. Sichangi for Appellant

Respondent in person-present.

Bett C/A