



REPUBLIC OF KENYA



**KENYA LAW**

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**Mureri v Maroo & another (Environment and Land Appeal  
E033 of 2022) [2024] KEELC 4595 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4595 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E033 OF 2022**

**CK NZILI, J**

**JUNE 5, 2024**

**BETWEEN**

**BENEDICT MUTHURI MURERI ..... APPELLANT**

**AND**

**JOSEPH GITONGA MAROO ..... 1<sup>ST</sup> RESPONDENT**

**ROBERT MWITI MUNGANIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. E.M Ayuka –  
SRM in Nkubu PMC ELCC NO. 145 of 2018 delivered on 26.5.2022)*

**JUDGMENT**

1. The appellant, as the defendant, had been sued at the lower court, by the respondents as the plaintiffs, through a plaint dated 14.11.2018, for breach of a sale agreement dated 6.2.2017, where he offered to sell to them L.R No. Nkuene/Nkumari/1954 for Kshs.1,800,000/=.
2. It was averred that the appellant received a deposit of Kshs.1,000,000/= million but refused to collect the balance to secure the requisite land control board consents, misrepresenting that he had the original title mortgaged to a third party.
3. The respondents had prayed for a refund of the deposit and the liquidated sum of Kshs.3,600,000. The appellant opposed the claim through a statement of defense dated 12.2.2019. He blamed the respondents for not honoring their obligations to pay a deposit of Kshs.1,300,000/= million to offset a debt so as to clear the charge against the title in favor of Progressive Credit Ltd, which was still in existence, or clear the balance by 27.2.2017.
4. The appellant averred that the essence of the sale was to clear the existing mortgage which was within the knowledge of the respondents. While admitting that there was a clause on default, he averred that it was the respondents who had breached the terms and conditions of the sale agreement and, therefore,



he was the one entitled to the agreed liquidated damages of Kshs.3,600,000/= for they failed to pay even a single cent towards clearing the purchase price. In response to the defense dated 6.5.2019, the respondents denied that the appellant had disclosed to them a pending charge against the title to a third party. The respondents averred that it was the appellant who failed to avail the original title deed or put them into vacant possession and thus could not, therefore, pay the balance due on 27.2.2017. The respondents termed the appellant as a person consistent with lies and fraud and as a serial debtor to financial institutions.

5. At the trial, Joseph Gitonga Maroo testified as PW 1 and adopted his witness statement and a supplementary statement dated 14.11.2018 and 5.2.2021 as his evidence in chief. Further, PW 1 produced a sale agreement dated 6.2.2017, a search certificate, a demand letter certificate of registration, a search certificate before the purchase, a copy of a title deed, and a transfer form as P. Exh No. 1 – 7.
6. PW 1 told the court that the title was charged with the bank close to six months before the sale agreement on 6.2.2017. He said there was no official search certificate by the extension of the sale agreement, following which the appellant received and acknowledged the deposit before their lawyers.
7. Additionally, PW 1 said that he did not comply with clause number (6) of the sale agreement since the appellant stopped picking up their calls, and they could, therefore, not locate him to collect the balance.
8. PW 1 said that the appellant signed P. Exh No. 7, which could not be processed by the land registrar or by the land control board committee, given that the appellant went into hiding or began dodging them. The witness said that though the sale agreement had no time frames, it was the appellant who breached the sale agreement; otherwise, they did not give him the balance. PW 1 said that a copy of the title deed had been availed to them at the signing of the sale agreement but was unavailable to collect the balance as well as comply with the terms of the sale agreement.
9. Bernard Muthuri Murithi testified as D.W. 1 and adopted his witness statement dated 18.1.2021 as his evidence in chief. He told the court that the respondents were to pay him Kshs. 1,300,000/= as agreed to offset a loan of Kshs.1,500,000/= in favor of Progressive Credit Ltd made on 15.9.2016 so that a discharge of charge could be issued. DW 1 said that after the respondents failed to clear the deposit, the title continued to be held by the bank, and therefore, the sale agreement was not consummated.
10. D.W. 1 said that the respondent failed to clear the balance of Kshs. 500,000 on its due date, 27.2.2017. Further, D.W. 1 said it was not possible to hand over vacant possession of the land on 6.2.2018 since the respondents had failed to adhere to all prior conditions in the sale agreement, including clause (b). He insisted that the respondents were out to fleece him of Kshs.4,900,000/= without any basis.
11. D.W. 1 admitted that he willingly signed the sale agreement as the vendor. He denied collecting any deposit as indicated in the sale agreement. He said that there was no receipt issued to show that the respondent paid him any monies. Again, DW 1 said that he never went to their advocates to collect the balance on 27.2.2017, for he had assumed that the respondent had lost interest in the transaction.
12. Similarly, DW 1 admitted that contrary to clause 1 of the sale agreement, the title to the land was not free of encumbrances when he signed the sale agreement, for he had already charged the same on account of a loan. D.W. 1 said he intended to sell the land to offset the loan though he never disclosed the fact in the sale agreement.
13. DW 1 said the land was leased to someone else, and that is why vacant possession was to take place after a year, as per clause 6 of the sale agreement. DW 1 also stated that he supplied a copy of the title deed to the respondents in 2016, whereas he took the loan on 15.9.2016. He admitted that he never disclosed the loan to the respondents at the time the sale agreement was signed.



14. Nevertheless, DW 1 said that the property was sold free of any encumbrances and that he was to sue the purchase price to offset the loan at his own cost since the respondents were not going to take any liabilities over the title. DW 1 said that he never disclosed any encumbrance against the title in the sale agreement.
15. The appellant faults the judgment delivered 26.5.2022 by a memorandum of appeal dated 23.6.2022 on ten grounds. The complaints by the appellant are that the trial court held that there was a breach of the sale agreement without proof made a finding that he obtained a deposit while there was no acknowledgment of the same, improperly imputed a duty on him contrary to Section 29 of the [Land Registration Act](#); misconstrued the contents of the demand letter dated 12.4.2018 for not finding the failure to collect the balance as an afterthought on the part of the respondents since it was not captured in the referenced demand letter; for not finding that he had signed the land control board applications unlike the respondents, therefore, he was not at fault; for awarding a sum higher than what parties had agreed as a remedy for breach; for being biased in its findings and award; for not finding the sale agreement invalid for lack of any consideration and lastly; acting against the land and the evidence availed. The appellant relies on written submissions dated 13.5.2024, while the respondents rely on written submissions dated 13.5.2024.
16. An appellate of the first instance has to rehearse, re-analyze, and re-appraise the entire lower court record to come up with independent findings to facts and the law while giving credit to the lower court, which had the opportunity to meet the parties and hear their testimony first hand. See [Abok James Odera t/a A.J Odera & Co. Advocates v John Patrick Machira t/a Machira & Co. Advocates](#) (2003) eKLR and [Selle & another v Associated Motor Boat Co. Ltd](#) (1968) E.A 123.
17. The appellant submitted that three essential components of a contract, namely, offer, acceptance, and consideration, must be present for a contract to be valid. In this instance, the appellant submitted evidence of payment and acknowledgment that Kshs.1,300,000/= was missing. Reliance was placed [don Stanley Makira Kagungo v Isaack Kibiru Kabutbia](#) (2022) eKLR.
18. The appellant submitted, relying on Black's Law Dictionary 7<sup>th</sup> Edition, that a breach of contract is a violation of a contractual obligation either by failing to perform one's promise or by interfering with another party's performance.
19. In this instance, the appellant submitted that it was the respondents who failed to pay the deposit of Kshs.1,300,000/= even after he had signed the application of the land control board consent. The appellant submitted that his intention that his intention to honor the sale agreement remained, but the respondents failed on their part hence frustrating it.
20. Further, on the issue of the encumbrance, the appellant submitted that as per Section 29 of the [Land Registration Act](#), the duty was on the respondent to be aware of the encumbrance by carrying out due diligence before purchasing the land. In this case, the appellant submitted that the respondents were privy to the status of the title; hence, the money was to offset the loan, but they were now on a fishing expedition to enrich themselves and had failed to honour their obligations unjustly.
21. The respondents, on the other hand, submitted that they discharged the burden of proof on the breach of a binding sale agreement. Reliance was placed on [Joseph Kangethe Irungu v Peter Nganga Muchoki](#) (2018) eKLR, [Millicent Perpetua Atieno Wandiga & another v John Chege](#) (2013) eKLR, [Curtis v Chemical Cleaning & Dyeing Co. Ltd](#) (1951) ALL ER 631.
22. The suit before the trial court revolved around the construction and interpretation of the sale agreement dated 6.2.2017. Indeed, courts do not rewrite contracts but apply the principle of looking at a contract within its four corners for parties have the freedom to vary and review its terms and



- conditions. Further, it is trite law that extrinsic evidence cannot be used to vary, review, or change the terms and conditions of a contract. See *NBK v Pipe Plastic Samkolit (K) Ltd* (2011) 2 E.A 503 and [Pius Kimaiyo Langat v Cooperative Bank of Kenya Ltd](#) (2017) eKLR.
23. In this appeal, the appellant admitted that he willingly signed the sale agreement and understood all his terms and conditions. In his statement of defense dated 12.2.2019, the appellant blamed the respondents for not paying the considerations as agreed or at all. He stated that he had disclosed the title to the land as encumbered before the date of the sale agreement. Clause number 1 of the sale agreement indicated that the vendor was selling the land free from any encumbrances and any adverse claims against the vendor.
  24. There was no indication that the appellant was going to offset any loan, charge, or liability against the title. There was no indication that Progressive Credit Ltd held up the original title deed. The appellant did not disclose all these facts, yet they were material or fundamental facts to the substratum of the sale agreement.
  25. The appellant, through his statement of defense and testimony was introducing parol evidence to a sale agreement and blaming the respondents for the alleged breach of paying Kshs.1,300,000/= indicated as payable instantly at the signing of the sale agreement. At the bottom of the recital, it is indicated that the vendor shall acknowledge instantly the receipt of the deposit. True to the clause, the signature of the appellant is immediately apprehended below the line and witnessed by a stamp of Mr. Ondari advocate. On page two the sale agreement, parties also signed the sale agreement that Leonard K. Ondari advocates equally witnessed. The appellant did not object to the production of the sale agreement or call the advocates who prepared and witnessed it to confirm that no deposit was paid and acknowledged by him on 6.2.2017.
  26. The respondents, in a reply dated 6.5.2019 to the statement of defense, pleaded that there was non-disclosure of the charge or the fact that the original title deed was encumbered and was only realized after the sale agreement. The respondents pleaded that the deposit was paid and acknowledged receipt or otherwise; the appellant was a liar, fraudster, and serial defaulter. In his defense and testimony before the trial court, the appellant never raised the issue as to his signature acknowledging receipt of the deposit.
  27. There was no need for a separate acknowledgment note in law since the same was incorporated in the body of the sale agreement. There was no need for a receipt if the appellant separately appended his signature for the same on page (1) and later on page (2) of the sale agreement. Everything in the sale agreement was in black and white, and therefore, the appellant cannot fault the trial court in interpreting and construing the sale agreement as written by the parties in plain english. The timelines were indicated in the sale agreement. The appellant did not challenge the default or penalty clause as punitive, unconscionable, illegal, exaggerated, an unfair bargain, or made under undue influence. See *Margaret Njeri Muiruri v Bank of Baroda (K) Ltd* (2014) eKLR.
  28. The burden of proof was on the appellant to prove the invalidity of the sale agreement or breach on the part of the respondents as provided under Sections 107 – 111 of the [Evidence Act](#).
  29. A court of law has to interpret and construe a contract the way parties reduced it into writing as to the terms and conditions, unless it is challenged on account of illegality or fraud. In *Curtis v Cleaning & Dyeing Co. Ltd* (supra) and *RTS Flexible Systems Ltd v Molkerel Alois Muller GmbH & Co. KG (U.K. Production)* (2010) UKSC14, the court said that in construing a contract, it depends not on the subjective state of the parties but upon consideration of what was communicated between them by words or conduct and whether that lead objectively to a conclusion that they intended to create legal relations.



30. The appellant cannot run away from what he contracted for in clear and precise terms. The appellant made an admission in his statement that the title that he offered for sale was encumbered but failed to disclose it in the sale agreement. Instead, the appellant invoked the principle of a buyer being aware under Section 29 of the [Land Registration Act](#) before this court. It is trite law that parties are bound by their pleadings, and a party cannot rely on new issues on appeal without leave, that were not pleaded at the lower court.
31. Whereas a vendor must undertake due diligence before purchasing land, in this appeal, the appellant misrepresented the facts and said that the title was free of encumbrances, yet he knew the fact was not valid. He made a false statement while knowing the truth to induce the respondents to the sale agreement when he had no intention of clearing the loan for a discharge of charge to be effected.
32. At the filing of his statement of defense the appellant admitted that the title was still charged with Progressive Credit Limited. Therefore, it is the appellant who violated or made it impossible for the land control board application for consent to go through on account of the encumbrance. It is the appellant who should have cleared the loan with the money he was paid as a deposit by the respondents. It is the appellant who should have disclosed the difficulty or the impediments to honoring his part of the bargain. At the hearing, the appellant was unable to account for Kshs.1,300,000/= to reduce the loan so as to free the title deed to conclude the transfer. See *Gurdev Singh Birdi & another v Abubakar Madhubuti* C.A No. 166 of 1996.
33. The appellant faulted the trial court for giving damages more than what parties were entitled to as legal remedies on account of default. Kshs.3,600,000/= was explicitly pleaded and proved as liquidated damages. See *Haba v Singh* (1985) KLR 716. It was incorporated as part of the sale agreement, as a consequence of acts that would produce the damage. See *Ratcliffe v Evans* (1892) 2 QB 524, [Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa](#) (2004) 2 KLR.
34. The appellant defaulted in the sale agreement. He was unable to offer the original title deed free of encumbrances to enable the transfer to be effected. The duty to do so was not shared with the respondents. The appellant admitted in cross-examination that he never went to collect the balance on its due date. The explanation that he gave was that he had thought that the respondents had abandoned the transaction.
35. PW 1 was categorical in his evidence that the appellant went underground and was not picking up their calls or willing to facilitate the completion of the transaction. PW 1 also told the trial court that the balance was always available, and was willing to complete the transaction until he established the encumbrance. The appellant did not offer to refund the deposit of Kshs.1,300,000/= or complete the transaction.
36. Instead, he not only denied receipt of the deposit but also blamed the respondents for the breach when it was apparent that he had failed to disclose material facts at the signing of the sale agreement, or at all use the deposit to offset the loan.
37. The court finds nothing illegal in the trial court enforcing the rights of the respondents for the legal consequences of the default on the offending party to the sale agreement.
38. The upshot is that I find no merits in the appeal. It is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 5<sup>TH</sup> DAY OF JUNE, 2024**

**In presence of**



C.A Kananu

Nyenyire for Ondari for the respondent

Kajuju for Mwarania for appellant

**HON. C K NZILI**

**JUDGE**

