



**Mwarania v M'kiambati (Environment and Land Appeal
E049 of 2022) [2024] KEELC 4557 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4557 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E049 OF 2022**

CK NZILI, J

JUNE 5, 2024

BETWEEN

JOSECK MUTHURI MWARANIA APPELLANT

AND

M'MURITHI M'KIAMBATI RESPONDENT

*(Being an appeal from the judgment of Hon. S. Abuya – SRM
delivered on 30.9.2019 in Meru CMCC ELC No. 197 of 2018)*

JUDGMENT

1. The appellant, who was the plaintiff at the lower court, had, through a plaint dated 19.6.2018, sued the respondent as the defendant for a refund of Kshs.600,000/= for an alleged breach of a sale agreement dated 12.8.2016. The appellant averred that the respondent neglected to make the refund as agreed, transfer the subject land to the buyer, or, at all honour the sale agreement.
2. The respondent opposed the suit through a statement of defence dated 4.9.2018. The respondent admitted that the appellant had earlier sold 1 acre of land to Nancy Nkuene Joseph, which did not belong to him, and he approached her to replace it on his behalf with her 1 acre. She denied any alleged breach of the said agreement as alleged by the appellant or at all.
3. In a reply to the defence dated 24.9.2018, the appellant denied that the land sold by the respondent 1 acre was in the process of being transferred to Nancy Nkuene Joseph or at all.
4. At the trial, the appellant, relying on his witness statement dated 19.6.2018, told the court that by an agreement dated 12.8.2016, he was offered land for sale by the respondent for Kshs.600,000/= which he paid by a banker's cheque number 05680 dated 11.8.2016, which the respondent was to reply to Nancy Nkuene Joseph, with whom he had earlier on offered the land for sale in 2013. Further, the appellant said he paid another Kshs.10,000/= to the respondent on 12.9.2016, in the presence of the



land surveyor. The appellant produced copies of the sale agreement, banker's cheque and demand letter as P. Exh No. 1 - 3.

5. In cross-examination, PW 1 told the court that the sale agreement was signed between the respondent, Nancy Nkuene Joseph and himself, for which the respondent was to give 1 acre of land to Nancy Nkuene Joseph, to whom he had earlier on sold to her 1 acre. He said that he was paying the money on behalf of the said Nancy Nkuene Joseph, as a replacement for the land he had sold to her earlier on had been affected by a public road of access by virtue of a sale agreement dated 11.11.2013.
6. PW 1 said that he wanted his refund for the respondent subdivided the land in 2014 and that the parcel, which was to be transferred to Nancy Nkuene Joseph, came out in the respondent's name instead. PW 1 said that the respondent had yet to give him the land so that he could pass it over to clear his obligation with her, even though such documentation did not feature in P. Exh No. (1) PW 1 said that it was Nancy Nkuene Joseph who had informed him that she was yet to acquire the land as agreed.
7. M'Murithi M'Kiambati testified as DW 1 and adopted his witness statement dated as his evidence in chief. He said that one neighbour, Nancy Nkuene, came to him seeking one acre of land from his L.R No. Ntiriti Settlement Scheme/2044, whose purchase price was agreed as Kshs.600,000/=, which was to be paid by the appellant after a previous sale agreement between them had aborted.
8. DW 1 said that after entering into a sale agreement, PW 1 paid him Kshs.600,000/= through a banker's cheque and later on transferred the land to the purchaser after visiting the land control board meeting for a land control board consent. Further, DW 1 said that they lived peacefully after that, only for the appellant to come calling in for assistance to recover Kshs.54,000/= allegedly owed to him by Nancy Nkuene Joseph. D.W. 1 told the court that he advised the appellant to amicably settle the issue with his neighbour, only for the appellant to turn around and demand ½ an acre of the land that he had transferred to Nancy Nkuene Joseph, failure of which he would use all means to acquire the portion. He insisted that he transferred the land to Nancy Nkuene Joseph through a title deed that was yet to be issued. DW 1 insisted that he had not breached any terms or conditions of the sale agreement for the appellant to sue him for any refund.
9. Nancy Nkuene Joseph testified as DW 1 and adopted her witness statement dated 3.4.2018 as her evidence in chief. She told the court that the appellant sold her and her late husband's land on 11.11.2013, took possession and developed it only for them to establish from a land surveyor that the land belonged to someone else other than the appellant. As a result, DW 2 told the court that the appellant amicably agreed to buy for them another parcel of land as compensation. DW 2 said that the appellant approached the respondent, a neighbour who agreed to sell to her 1 acre, which she agreed to, and they signed a sale agreement to that effect.
10. D.W. 2 said that the appellant paid Kshs.600,000/= by a banker's cheque parties went before the land control board, and eventually, she was transferred the portion. In addition, DW 2 said that after a year, DW 1 came to her demanding half an acre of her land or else he would take the whole land. She said that the appellant wrote to her a demand letter dated 20.3.2018 demanding Kshs.54,000 from her to which she sought the assistance of the area assistant chief and chief.
11. DW 2 told the court that she was still waiting for a title deed. She said the land is already developed with a permanent homestead and her husband was buried on it in 2016. Moreso, DW 2 produced letters dated 15.11.2017 and 20.3.2018 as D. Exh No. (1) & (2) and said that there was nothing that the appellant should be claiming from her, nor was she claiming anything from the appellant or the respondent.



12. Phineas Bundi M'Inoti and Festus Mukiri Kanyai testified as DW 3 & DW 4, respectively. Relying on their witness statements dated 3.4.2019 as their evidence in chief confirmed that the appellant had initially sold a portion of land to DW 2, which was not his, but out of mutual agreement with the respondent, the appellant paid Kshs.600,000/= to the respondent who offered and transferred 1 acre of his land to the DW 2.
13. They said that the land initially sold by the appellant to DW 2 belonged to the PEP company. DW 4 told the court that he was a signatory to the initial agreement between the appellant and was paid Kshs.280,000/=. He said there was no claim against the appellant by DW 2, since she has already been compensated with an alternative land as she awaits issuance of a sale agreement.
14. The appellant, after his suit was dismissed, through a memorandum of appeal dated 29.8.2022, faults the trial court, saying it did not consider his evidence, reached the wrong conclusion, failed to note that the sale agreement was fraught with illegalities and erred in allowing for the production of new evidence after he had closed his case without being given an opportunity to be heard.
15. A court of appeal of the first instance has the mandate to re-analyze and rehearse the entire record of the trial court and come up with independent findings on both facts and law while giving credit to the lower court for it had an opportunity to see and hear the witnesses first-hand. See *Gitobu Imanyara v A.G. & others* and Section 78 of the *Civil Procedure Act, Selle & another v Associated Motor Boat Co. Ltd & others* [1968] E.A 123.
16. The major complaint by the appellant at the lower court was with regard to the breach of a sale agreement dated 12.8.16. He produced the sale agreement, copy of the cheque and the demand letters as P. Exh No's. (1), (2) & (3). The respondent denied any alleged breach of any sale agreement to be liable to refund Kshs.600,000/= to the appellant. She filed a statement of defence accompanied by witness statements of DW 2, 3 & 4 and a list of documents dated 3.4.2019. The said documents were eventually produced as D. Exh No. (1), (2) & (3) through DW 2 without any objection from the appellant.
17. It is trite law that courts do not rewrite contracts for parties since they have the freedom to contract. Similarly, parole evidence may not be introduced to contradict what has been reduced into a contract. Courts ordinarily adopt the objective theory of contract interpretations in order to give effect to the expressed intention of the parties. In *Fidelity Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* [2017] eKLR, the court said that by applying the four corners of an instrument principle, the meaning of a document should be derived from the document itself without reference to anything outside the document such as the circumstances surrounding its writing or the history of the parties signing it.
18. In *HFCK vs Gilbert Kibe Njuguna* Nairobi C.A No 1601 of 1999, the court said that contracts belong to the parties who are at liberty to negotiate and even vary the terms of their contract. See also *Pius Kimatyo Langat v Coop Bank of (K) Ltd* [2017] eKLR.
19. In this appeal, the appellant relied on P. Exh No. (1) claiming that it was breached by the respondent, who failed to offer or deliver the subject matter to the purchaser in exchange for Kshs.600,000/=. DW 1 denied that he had breached the sale agreements and failed to transfer the land to the purchaser. DW 1 called DW 2, 3 & 4. The star witness was DW 2. She told the trial court that she was satisfied with the compensation of an alternative land by the appellant through the respondent, who had honoured the terms and conditions in the sale agreement dated 12.8.2016. She said that she had no complaint either against the respondent or the appellant regarding the sale agreement.



20. As a beneficiary of the sale agreement, DW 2 told the trial court that it was the appellant who came demanding for Kshs.54,000/= through D. Exh no. (2) & (3). In the two letters, the appellant was the one claiming that the alternative land was more expensive by Kshs.54,000/= than the land the appellant had initially offered in 2013, to DW 2.
21. The burden of proof is on he who avers. It was the appellant who was averring that the respondent had breached the sale agreement and failed to deliver the subject land to the purchaser.
22. Evidence from the beneficiary of the sale agreement and the respondent's witnesses made it clear that the parties had met all the terms and conditions of the sale agreement. The appellant in D. Exh No's. (2) & (3) were trying to introduce parole evidence as a variation of the sale agreement. Similarly, in his witness statement and oral evidence, the appellant tried to introduce extrinsic evidence to vary the terms and conditions of the sale agreement.
23. The appellant did not plead that the sale agreement was void on account of illegality, fraud or was procured through duress. Parties are bound by their pleadings. Parties may also not, without leave of court, introduce new issues at the appellate stage that were not pleaded and evidence tendered before the trial court. The parties were given adequate time to comply with Order 11 of the Civil Procedure Rules before the trial court. Pleadings must also be accompanied by a list of witnesses' statements and documents in line with Orders 4 & 7 of the Civil Procedure Rules.
24. In this appeal the respondent had accompanied his statement of defence with a list of documents and witness statements. D. Exh No. (1), (2) & (3) were all written by the appellant before the suit was filed to DW 1. They cannot, therefore, be termed as new evidence which DW 1 introduced at the defence stage. The exhibits were available for the appellant to comment on during the prosecution of his claim. The same were also relevant to the claim since the appellant was seeking the enforcement of rights out of the sale agreement contrary to the reality on the ground that the respondent had fully complied with the terms and conditions of the sale agreement.
25. Looking at the pleadings, evidence tendered, and the law, the findings both on facts and the law by the trial court, cannot be faulted. The conclusion was also in line with the law. The upshot is that I find the appeal lacking merits. It is dismissed with costs.

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

In presence of

C.A Kananu

Joseck

Mrs. Kaume for the respondent

HON. C K NZILI

JUDGE

