



REPUBLIC OF KENYA



KENYA LAW
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**Henry v Kithinji (Environment and Land Appeal E024 of 2022)
[2024] KEELC 5637 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E024 OF 2022**

CK NZILI, J

JULY 31, 2024

BETWEEN

CONSTANT GAKURU HENRY APPELLANT

AND

KENNETH KINOTI KITHINJI RESPONDENT

*(Being an appeal from the judgment by Hon. J. Irura –
PM delivered on 28.4.2022 in PM ELC No. E012 of 2020)*

JUDGMENT

1. The appellant, as the plaintiff at the lower court, sued the respondent as the defendant by an amended plaint dated 14.1.2021, claiming that the respondent trespassed into his L.R No. Abogeta/U-Chure/3329 in August 2020 and upon demanding him to cease, discovered that the respondent had fraudulently, illegally and through misrepresentation obtained his land based on a purported sale agreement dated 17.8.2019. The appellant sought nullification of the said agreement, eviction against the respondent and a permanent injunction.
2. The respondent opposed the suit through an amended defense and counterclaim dated 18.2.2021. He insisted that the appellant lawfully and procedurally sold the suit land to him, attended a land control board meeting, obtained consent and signed a transfer whose registration was delayed for a whole year by a caution lodged by the appellant's daughter.
3. The respondent averred that he took vacant possession of the suit land in August 2019 and it was only in August 2020 that the appellant's daughter started claiming that he had stolen his father's land, yet the appellant had never made such a claim. The respondent averred that he was legally in occupation of the suit land as a bonafide purchaser for value while awaiting the process of transfer.
4. By way of a counterclaim, the respondent averred that he lawfully bought the suit land at KShs.150,000/=, and while processing the title deed, the appellant colluded with her daughter Susan K.



- Gakuru to register a caution and also lodged a criminal complaint against him with the police causing him to be arrested.
5. The respondent termed the actions of the appellant as amounting to a breach of contract. He, therefore, sought specific performance and in the alternative, liquidated damages of Kshs.300,000/= as agreed in the sale agreement, a permanent injunction stopping any eviction and lifting of the caution. There were no corresponding filing fees to the four reliefs sought in the counterclaim and a verifying affidavit both for the original and the amended defence and counterclaim.
 6. Through a reply to the defense and defense to the counterclaim dated 21.7.2021, the appellant termed the defense as raising no triable issues. As to the counterclaim, the appellant described the respondent as a crook, a conman who was out to acquire her land by taking advantage of their friendship, trust, confidence, age and ill health to acquire her land illegally.
 7. At the trial, Constant Gikuru Henry testified as PW 1, adopting the witness statement dated 26.10.2020 as his evidence in chief. PW 1 told the court that sometime in August 2020, he established that his title deed for the suit land was missing and made a report to Meru Police Station, where he obtained a police abstract only later to realize that the respondent, his long-time friend had trespassed into her land. PW 1 said that upon inquiries, the respondent told him that she had sold and transferred the land to him.
 8. Similarly, PW 1 said that after demanding that the respondent vacate his land, he declined only to write to him a demand letter dated 1.9.2020 from C.K Law Chambers, alleging that the land was sold to him by a sale agreement dated 17.8.2019, which was invalid. PW 1 said that his land was worth Kshs.800,000/= and not Kshs.150,000/= alleged in the sale agreement which he termed as a forgery.
 9. Further, PW 1 stated that it dawned on her that the respondent had a hand in the disappearance of her title deed. He relied on a copy of her I.D. card, official search, police abstract, and a letter dated 1.9.2020 as P. Exh No's. 1-4, respectively. Nonetheless, PW 1 denied attending any advocate offices with the respondent to dispose of his land or receiving Kshs.1,560,000/= for the land, attending a land control board meeting to procure a land control board consent, or signing any transfer form.
 10. In cross-examination, PW 1 told the court that though he had subdivided his land, he only allowed the respondent to utilize the land for about three years and did not sell it to him. She admitted that the signature and photo of DMF 1 & 7 were hers and could not recollect one Karambu bringing some papers for her to sign. He denied receiving any money to sell the land to the respondent other than monies paid to lease the land.
 11. Susan Karambu Gathuru testified as PW 2. Relying on her witness statement dated 14.1.2021 as her evidence in chief, she associated herself with the evidence of PW1. PW 2 told the court that after the trespass, they reported the matter to the area chief, who wrote a letter dated 19.8.2020 to facilitate the registration of caution against the title register. PW 2 said that the respondent took advantage of his friendship, trust and confidence with the appellant, who was aged 82 years, to dupe him; otherwise, her father would have confided in her about the sale.
 12. In cross-examination PW 2 told the court that the respondent used to be a farm help of her father. She produced the chief's letter as P. Exh (5). PW 2 admitted that her father had also sold other parcels of land in her absence, but the suit land was not among them since he had offered it to her.
 13. Kenneth Kinoti Kithinji testified as DW 1. Relying on his witness statement dated 14.1.2021, he told the court that in 2019, the appellant offered to sell some land to him, which he showed him and on 17.8.2019, they went to Wamache & Co. Advocates who wrote a sale agreement. He said that he paid the entire purchase price in full, following which a special land control board meeting was constituted



- and a land control board consent issued. DW 1 said that he took vacant possession of the land and lodged the transfer documents at the land's office only for PW 2 to lodge a caution claiming beneficial interest.
14. Additionally, DW 1 said that nobody had stopped his occupation of the land since 2019 until a report was made to the police by PW 2 alleging malicious damage. DW 1 said that he was among the people whom the appellant sold and transferred portions of his land. He denied entering the land sale with the appellant through coercion or undue influence. D.W. 1 termed the objections to the sale by PW 2 as actuated by greed.
 15. DW 1 relied on the sale agreement dated 17.8.2019, official search certificates dated 6.11.2019 and 27.8.2020, sketch map application for a land control board consent dated 8.10.2019 and transfer form dated 13.11.2019 as D. Exh No. 1-7.
 16. In cross-examination, DW 1 admitted that he used to be a herdsman for the appellant, whom he had known for close to 20 years. He said that the appellant had no witnesses at the time he sold the land to him. PW 1 said that he was not aware that the original title deed had gotten lost. Similarly, he denied that the market value of 1 acre in the area was not commensurate to Kshs.150,000/=. After he was arrested, DW 1 told the court that he was bailed out by the appellant, who confirmed to the police that he was aware of the transmission. DW 1 told the court that he used to assist the appellant during the land adjudication process and that he applied for a loan from Fedha Kirugo Factory, borrowed money from a friend and sold two cars to raise the purchase price.
 17. The appellant faults the trial court for:
 - i. Finding that he received Kshs.150,000/= as consideration.
 - ii. For finding that he had breached the sale agreement.
 - iii. For finding the land control board form land control consent and transfers lawful and regular.
 - iv. Following the amended defense and counterclaim
 - v. For not giving consideration to his evidence, written submissions and the law.
 - vi. Misdirecting herself on the issues before the court and the law.
 - vii. Finding his case not proved.
 - viii. Arriving at a judgment in a cursory and perfunctory manner, was unfairly biased and amounted to a miscarriage of justice.
 18. With leave of court, parties were directed to canvass the appeal through written submissions. The appellant relies on written submissions dated 26.6.2024 that the court has considered. The role of this court is to approach the whole of the evidence on record from a fresh perspective and with an open mind, analyze, evaluate, assess, interrogate, scrutinize it and arrive at independent findings as to facts and law bearing in mind that the trial court had the advantage of seeing, hearing and observing the witness. See *Fidelity Commercial Bank v Kenya Grange Vehicles Industries Ltd* [2017] eKLR.
 19. The appellant herein submitted that the trial court contradicted the pleadings and evidence tendered as to whether the appellant acknowledged or received the consideration of Kshs.150,000/= Further, the appellant submitted that clause 1 (a) of the sale agreement provided for payment in the future and not on 17.8.2019, hence the evidence of the appellant that he did not receive any consideration was not contradicted. Therefore, it was submitted that the sale agreement dated 17.8.2019 fell short of meeting the essential elements of a valid contract. Reliance was placed on *Charles Mwirigi Miriti v Thananga*



- Tea Growers Sacco Ltd & another [2014] eKLR and Samuel Kamere v Land Registrar Kajiado [2015] eKLR.
20. In the absence of a M-pesa or bank statement on the source of the money or an acknowledgment receipt, the appellant submitted that the respondents failed to demonstrate payment of any consideration for the land. Reliance was placed on Ester Kabugi Njuguna v Martha Chebet & others [2020] eKLR.
 21. As to fraud, the appellant submitted that he specifically pleaded and proved it since D. Exh No. (5) was not signed by him and minutes of the land control board meeting were not produced. Reliance was placed on Ephantus Mwangi & Another v Duncan Wambugu [1984] eKLR and Esther Kabugi Njuguna vs. Martha Chebet & others (supra) and Section 110 of the Registered Land Act (Cap 300) (retired) that without proof of payment of consideration, the transfer form and the amended registration of title in favor of the respondent could not stand.
 22. The issues calling for my determination are:
 - i. Whether the appellant pleaded and proved fraud, illegality and misrepresentation against the respondent to the required standard.
 - ii. If the respondent had a valid defense and counterclaim against the appellant.
 - iii. If the respondent proved and pleaded the validity of the sale agreement, transfers and registration as owner of the suit land to be entitled to an order of specific perform permanent injunction and lifting of the caution or general damages of Kshs.300,000/=.
 23. It is trite law that parties are bound by their pleadings, and issues for the court's determination arise from the pleadings. In this appeal, the appellant's case was that he did not sell and transfer L.R No. Abogeta/U-Chure/3329, since the sale agreement dated 7.8.2019 and through the subsequent land control board application, land control board consent and transfer forms were procured through fraud, illegalities, and misrepresentation.
 24. On the other hand, the respondent denied the alleged fraud, illegalities and misrepresentation since the appellant duly signed a sale agreement dated 17.8.2019, obtained and acknowledged full considerations handed him over vacant possession, attended a land control board meeting, obtained a land control board consent and signed the transfer forms which were lodged with the land registry, only for him to collude with his daughter PW 2 to lodge a caution. He sought for specific performance lifting of the caution, permanent injunction and general damages.
 25. It is trite law that courts do not rewrite contracts since parties have the freedom to contract. Courts can only enforce contracts within the four corners of the document unless impeached on account of coercion, illegality and misrepresentation, fraud, or undue influence. See NBK v Pipe Plastic Samkolit (K) Ltd [2002] 2 E.A 503 and Pius Kimaiyo Langat v Cooperative Bank of (K) Ltd [2017] eKLR.
 26. In this appeal, what was before the trial court was an amended plaint dated 14.1.2021, an amended defense and counterclaim filed on 18.2.2021 and a reply to the defense and defense to counterclaim dated 21.7.2021. A counterclaim is a stand-alone suit. It has to be accompanied by a verifying affidavit. Its prayers attract court filing fees just like a plaint. The initial defense and counterclaim had four prayers, but with no verifying affidavit and payments assessed for court fees were Kshs.150/=. The amended defense and counterclaim dated 18.2.2021 had no verifying affidavit. The receipt reference EXCRMXHC was for Kshs.300/=. The reliefs would have attracted over Kshs.4,500/= fees. The same was not paid. Therefore, I find the counterclaim was void ab initio.



27. As to whether the appellant proved his fraud claim based on illegality and misrepresentation must be strictly pleaded and proved on a degree higher than in ordinary suits. See *Vijay Morjaria v Madhusingh Darbar* [2000] eKLR. In this appeal, the appellant was challenging the sale agreement and the transfer process leading to the issuance of a title deed in favour of the respondent. The sale agreement dated 17.8.2019. The appellant attacked the sale agreement for failing to meet the ingredients of a valid contract as per Sections 3 (3) of the *Law of Contract Act* and Sections 38 – 40 of the *Land Act*. A contract to be valid must be in writing, with the signatures of parties, indicating subject matter, consideration and witnesses apart from the two contracting parties.
28. The sale agreement before the trial court had the names of the parties, subject matter, and considerations and had been executed by the parties. The witness to the sale agreement was not called to testify and was not indicated other than the signature and the stamp.
29. Consideration was to be paid as per clause 1, that is to say, at the, or upon signing of the transfer form but not later than September 2019. The transfer forms were signed on 13.11.2019. Evidence acknowledging payment of the consideration in the month of September 2019 or on, or upon or at the signing of the transfer forms was not availed before the trial court. It is the respondent who was alleging in paragraph 4A of the amended defense and counterclaim that he was a bonafide purchaser for value, free of any fraud, illegality, and misrepresentation and who also took vacant possession.
30. DW 1 told the court that he paid Kshs.150,000/= cash at the signing of the sale agreement to the appellant on 17.8.2019. An acknowledgment receipt for the same by the appellant was not tendered before the trial court. Evidence by a witness who saw the consideration being paid was not called to verify that indeed the appellant collected valuable consideration for his land on 17.8.2019. D. Exh No's. 1-7 did not contain any such acknowledgment of payment of consideration.
31. In *Charles Mwirigi Miriti v Thananga* (supra), the court said that an offer and acceptance supported with consideration is what constitutes a valid contract. A court of law cannot rely on parole evidence to vitiate clear terms and conditions of a contract.
32. The sale agreement was clear on when to pay the consideration. Had the parties wanted to have the consideration paid at the signing of the sale agreement they would have expressly stated so and acknowledged payment. The result of performance by payment of consideration on the part of the respondent through an acknowledgment of the same by the appellant was missing in the sale agreement.
33. It was to happen on or after an occurrence of an event which was in the month of September 2019 or at the or upon the signing of the transfer forms. Evidence to show that the respondent complied with the sale agreement as to the payment of consideration had to be tendered and witnessed by a signature of the appellant receiving the amount or whoever witnessed the signing of the transfer forms. It was the respondent who wanted the trial court to believe the existence of such facts that the appellant received valuable consideration for the land that he allegedly transferred to him. The appellant had pleaded that he had received no consideration from the respondent. The burden was upon the respondent to prove that he had paid valuable consideration and that the sale agreement was a legally binding contract, that was also finalized to be entitled to specific performance. See *RTS Flexible Systems Ltd v Mokerei Alois Muller GmbH & Co. K.G. U.K. Production* [2010] UKSC 14 (45).
34. A court of law cannot rewrite a contract for the parties but must only enforce the precise terms and conditions of the same. Consideration goes to the very center of a contract. The evidential burden was upon the respondent to prove it. See *Mbuthia Macharia vs Anna Mutua & another* [2017] eKLR. It is the respondent who was asserting payment of full consideration and obtaining the title deed after



- paying valuable consideration. See *Muriungi Kanoru Jeremiah v Stephen Uungu M'Mwarabua* [2015] eKLR and *Thomas v Ileri ELC E004 of 2022* [2024] KEELC 1588 (KLR) (March [2024] Judgment.
35. It is the respondent who insisted on the specific performance of the contract. Specific performance is an equitable remedy issued at the discretion of the court which is granted where there is a valid enforceable contract, which suffers no defect such as failure to comply with formal requirements or mistake, or illegality or fraud.
36. In *Reliable Electrical Engineers Ltd v Mantrac (K) Ltd* [2006] eKLR, the court said that even in a valid and enforceable contract, specific performance may not be granted if there was undue influence or where the party seeking it has not performed or was not willing to comply with the agreement or if it will cause hardship to the opposite party or where there is an equivalent remedy.
37. In *Muguro v Kivuva ELC Appeal 46 of 2019* [2023] KEELC 663 (KLR) (February 8, 2023) Judgment, the court observed that ownership of property must be anchored on lawful acquisition to attract legal protection. The court said that a holder of an instrument of ownership must show how she acquired the property and cannot shield herself that the registration was the first one; otherwise, such a title can be impeached under Section 26 of the *Land Registration Act* on account of fraud, misrepresentation or acquisition through illegal, unprocedural or through a corrupt scheme.
38. In this appeal, the appellant was consistent in his pleadings and evidence that his title deed got lost and that the respondent took advantage of his age, illiteracy, and friendship to misrepresent facts and take away the land that he was leasing to him and to misrepresent facts to the land control board and land registrar that he had sold the land for consideration when there was no such intention to dispose of his land.
39. Without proof of a valuable consideration the respondent cannot enjoy legal protection over, the title he holds for the suit land. When a title deed is under attack, it is not enough to waive the instrument of ownership without a paper trail to show that the acquisition was formal, procedural, legal, and free of any encumbrances. Without proof of valuable consideration paid, including how much stamp duty and registration fees were paid, the trial court found that the evidence tendered by the appellant and the circumstances obtaining were such that the respondent did not pay any consideration to be entitled to claim to hold a valid title.
40. The upshot is that I find the appeal with merits. The suit at the lower court is allowed with costs. Costs of the appeal to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 31st DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

Muthomi for the appellant

HON. C K NZILI

JUDGE

