



**Mwiko v Kimaru (Environment and Land Appeal 25B of 2021)
[2024] KEELC 5643 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5643 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 25B OF 2021
A OMBWAYO, J
JULY 31, 2024
(FORMERLY NAKURU HCCA NO 114 OF 2018)**

BETWEEN

PETER NJOROGE MWIKO APPELLANT

AND

EUNICE WANGECHI KIMARU RESPONDENT

(Being and appeal against the judgment of the Chief Magistrate's Court at Nakuru delivered by Hon. J. M Njoroge (C.M) on 16th July, 2018 in Nakuru CMCC NO 1357 OF 2010)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 15th August, 2018 the Appellant appeals against the judgment of Hon. J. M Njoroge which was delivered on 16th July, 2018 in Nakuru CMCC NO 1357 OF 2010.
2. The grounds of appeal are as follows:
 1. That the learned Magistrate erred in law and in fact by not considering the facts of the case as per the evidence.
 2. That the learned Magistrate erred in fact and in law by holding the Plaintiffs/Applicant responsible for breach of the sale agreement.
 3. That the learned Magistrate erred in law and in fact by concluding that the Plaintiffs had spent Kshs 800,000 on behalf of the Defendant and on her direction.
 4. That the learned Magistrate erred in law and in fact by holding in favour of the Defendant and upholding the counter claim which there was no evidence to support the claim.



5. That the learned Magistrate erred in law and in fact by denying the Plaintiff costs of the suit.
3. The Appellant prays for the appeal to be allowed and the Plaintiff be awarded to pay the expenses and payments amounting to Kshs 1,000,000/= (One Million Shillings) plus costs and interests.

Factual Background

4. The suit before the subordinate court was commenced vide a Plaint dated 26th November, 2010. The Plaintiff (now Appellant) averred that at all material times to this suit, the Respondent was and still is the registered owner of all that piece of land known as BAHATI/KABATINI/ BLOCK 1/2172. The Appellant averred that on 16th April, 2009, the Appellant and the Respondent entered into an agreement for sale and purchase of one (1) acre of the suit property BAHATI/KABATINI/BLOCK 1/2172 for the sum of Ksh 1,600,000/=.
5. The Appellant averred that it was a term of the agreement that the purchase price shall be payable as follows:
 - i. Ksh 300,000/= on execution of the agreement. (Ksh 100,000/= in cash and Kshs 200,000/= by cheque)
 - ii. Kshs 400,000/= upon the vendor securing the original title from A.F.C
 - iii. Ksh 900,000/= upon transfer of title to the Purchasers names.
6. The Appellant further averred that the performance of clause 2 (b) of the sale agreement was subject to performance of Clause 3 which dictated that the Respondent was to clear all rates and get consents of the Land Control Board as well as a grant of representation for her co-owner of the property which the Respondent failed to do.
7. The Appellant averred that upon the Respondent failing to perform her part of the agreement, she demanded payment from the Appellant before fulfillment of her bargain forcing the Respondent to withdraw the amounts of Ksh 400,000/= deposited with the parties advocates.
8. The Appellant averred that as a result of the Respondent signing the agreement, the Appellant engaged a surveyor in sub-division of one acre into plots at a cost of Ksh 30,000/= which amounts were duly paid with the knowledge of the Respondent. The Appellant also averred that he paid Ksh 9,000/= for the sale agreement. The Appellant's claim against the Respondent was for Kshs 339,000/= plus 10% of the total purchase price being Ksh 160,000/= making a total of Ksh 499,000/=
9. The Appellant prayed for judgment against the Respondent for:
 - a. Payment of Kshs 499,000/= with interest.
 - b. Costs of this suit.
10. The Defendant (now Respondent) filed a Defence and Counter-claim dated 4th February, 2011. The Respondent stated that clause 2(b) of the sale agreement was independent from clause 3. The Respondent stated that clearing of rates, getting consents of the Land Control Board as well as grant of representation for her co-owner was to be done after the performance of clause 2 (b) but before the transfer of title to the purchaser's name.
11. The Respondent stated that her demands of Ksh 400,000/= were justified as she had performed her part of the agreement namely depositing of original title with the Appellant's advocates. The Respondent denies that she withdrew Ksh 400,000/= deposited with the Appellant's advocates. The



Respondent stated that if at all the Appellants engaged a surveyor in subdivision of the one acre into plots and paid the monies as alleged, then she was not aware of the same. The Respondent stated that even if she was aware, she had no business bothering with the sub-division as she had already sold the one acre and it was upto the Appellant's to deal with it as he wished.

12. The Respondent stated that there was an agreement that the costs of the sale agreement were to be met by the Appellant.
13. In the counterclaim, the Respondent listed the particulars of breach of the agreement by the Appellant as:
 - a. Failing to release Ksh 400,000/= to the Respondent after the Respondent deposited original title to the suit land with the Appellant's advocates.
 - b. Terminating the agreement without notice.
 - c. Holding both the original title deed and Ksh 400,000/=
 - d. Accusing the defendant of failing to perform her part of bargain.
14. The Respondent prayed that the Appellant's suit against her be dismissed with costs and judgement entered in her favour against the Appellant jointly and severally for:
 - a. An order compelling the plaintiffs to release the title to the land BAHATI/KABATINI BLOCK 1/2172 to the defendant.
 - b. A sum of Ksh 160,000/= being penalty for breach of contract.
 - c. Costs of this suit.
 - d. Any other relief that this court may deem fit to grant.
15. The hearing commenced on 21st November, 2011 and the Learned Trial Magistrate delivered judgment dated 5th July, 2018 in the following terms:
16. The court having found that the sale agreement was void ab initio the next point is to treat the same as though it never existed in the first place and to take the parties to the same position that they were before they entered into the contact.
17. I shall allow the plaintiff suit and the defendants counterclaim in the following terms:
 - a. The defendant shall refund Kshs 325, 500/= to the Plaintiffs with interest.
 - b. The plaintiffs shall release the title to land BAHATI/KABATINI BLOCK 1/2172 to the defendant.
 - c. Each party shall bear their own costs.

Submissions

18. The Appellant filed submissions on 27th October, 2022. The Appellant submitted that the title to this land was a joint ownership title in the name of the respondent and her deceased husband, a fact that had been taken care of in the agreement. He submitted that this effectively meant that the respondent had capacity to enter into a sale agreement though she needed a grant of representation to transfer the property. He submitted that the learned magistrate was wrong to make such a conclusion and he urged this court to find that the respondent had capacity to sell and she produced a confirmed grant in court showing she had capacity to deal with her deceased husband share.



19. The Appellant relied on the case of Geoffrey M'itumbiri vs Cathrine Kiende [2016] eKLR. The Appellant submitted that the Respondent had capacity to sell and deliberately breached the agreement. The Appellant further submitted that the vendor surrendered the original title to the parties advocate and cleared the payment of Ksh 400,000/= as per clause 2 (b), however the advocate did not release the money due to the persons of clause 3 of the agreement which required fulfilment of clause 8 and 12 and as such the advocate could not release the money.
20. The Appellant submitted that the advocate attended court and testified on the contents of the agreement and who breached the sale agreement. He submitted that the vendor in her testimony was not able to counter the evidence of the advocate as she based her testimony on the release 2 (b) in isolation. The Appellant submitted that clause 2 (b) of the agreement could not be interpreted in isolation and required the provision of clause 3 to be confirmed which the vendor failed to do.
21. The Appellant submitted that consequently failing to abide by clause 3, the vendor was in breach of the sale agreement and the agreement required payment of a breach clause of 10% of the purchase price. The Appellant submitted that it is clear that the court erred in law and in fact on the validity of the agreement and failed to determine the issue of breach thereby denying the Appellants the days suffered for breach and the costs of the suit. The Appellant prayed that the appeal succeeds and costs be allowed.
22. The Respondent filed submissions on 29th March, 2022. She relied on the cases of Hassan Farid & Another vs Sataiya EneMepukori & 6 others [2018] eKLR and Selle vs Assorted Motor Boat Company 1968 E.A 1968. She submitted that whoever lays a claim before the court against another has the burden to prove it. Reliance is placed on Sections 107 and 109 of the *Evidence Act* and the case of Susan Mumbi vs Kefala Grebedhin (Nairobi HCCC No 332 of 1993). The Respondent submitted that it is the Appellants averment that the court erred by holding them responsible for being in breach of the contract however no proof of this has been furnished to support the same. The Respondent submitted that the learned Magistrate considered all facts of the case as per evidence adduced before the trial court in tandem to the prayers sought and resultantly delivered a sound judgment. The Respondent relied on the case of Mbogo v Shah [1968] EA The Respondent submitted that the Appellant cannot claim to enforce the terms of a contract that the trial court found to be void ab-initio. The Respondent further submitted that the Honourable Court came to the apt conclusion that neither party was at fault, having found that neither of the parties had the intent to fraud the other. The Respondent submitted that the court found that an impasse was reached due to the contradictions within the clauses of the agreement which set unclear conditions as to when the Ksh 400,000/= was to be paid to the Respondent herein, coupled with a clear lack of consensus between the two parties.
23. The Respondent submitted that the trial court found it best in the mitigating circumstances to return both parties to a position that they were before the contract. The Respondent submitted that the Appellant has in crafting and drafting of his grounds implied that her counterclaim was allowed as prayed, in order to mislead this court however the same could not be further from the truth. The Respondent submitted that the honourable court in alignment with interests of justice only granted prayers sought in both the counterclaim and plaint necessary to return the parties herein to the positions prior to the agreement. The Respondent submitted that the prayers granted being that she refunds the Appellant herein the sums of Ksh 325,500/= and the Appellant to release the title to the suit parcel of land BAHATI/KABATINI BLOCK 1/2172 to the Respondent.
24. The Respondent submitted that based on the evidence on record, the Appellants have substantially failed to prove their case against the Respondent and that their claim is furthermore unsupported by the Appellants' adduced evidence and witnesses. The Respondent urged the court to form its own opinion after going through the evidence on record as required in law to make a finding in her favor.



The Respondent submitted that in the event the court is inclined to make a finding that the Appellant have not proved their case on the balance of probability, she urges the court to dismiss the appeal with costs.

Analysis And Determination

25. Although the Appellant raised five grounds of appeal, he argued them together. The issue for determination is whether the appeal is merited. The court notes that the learned Trial Magistrate pronounced himself as follows in the appealed judgment:

The court has further noted that the land was jointly registered in the names of the defendant, and a deceased person, one Leonard Wandeto Kimaru. The court takes view that the land was part of a deceased's property, and ordinarily ought to revert to his estate upon his death. The defendant therefore lacks the capacity to deal with, sell, or transfer the parcel of land or any portion thereof, without the property having undergone succession proceedings. In other words, this renders the sale agreement void-ab initio. The court having found that the sale agreement was void, ab initio the next point is to treat the same as though it never existed in the first place and to take the parties to the same position that they were before they entered into the contract."

26. It is the Appellant's submission that the title to this land was a joint ownership title in the name of the respondent and her deceased husband, a fact that had been taken care of in the agreement and this effectively meant that the Respondent had capacity to enter into a sale agreement though she needed a grant of representation to transfer the property. The sale agreement dated 16th April, 2010 States as follows at clause 3:

The Vendor shall sell as the beneficial owner of the aforesaid property and payment in 2(b) above shall be paid to the parties advocates herein who shall hold the same as stakeholders until the vendor complies with clause No. 8 and 12 herein after."

27. Clause 8 states that: "The Vendor shall clear all the outstanding Rates with the Nakuru County Council if any and obtain a clearance Certificate, Land Rent if any and Consent to subdivide, sell and transfer if applicable."
28. Clause 12 states: "The Vendor further undertakes to obtain Grant of representation of the state of the Leonard Wandeto Kamau (deceased) in order to facilitate the transfer of the portion of one (1) acre to the purchasers."
29. This court finds that at the time the Sale Agreement in issue was entered, the suit property was not registered in the name of the Respondent herein. The sale agreement was rendered void ab initio as the suit property was not registered in the name of the Vendor. A Vendor can only sell what is rightfully owned by him/her.
30. This court relies on the case of Delphis Bank...Vs...Sanyu Int. Ltd, Nairobi HCCC No.714 of 1995, where the Court held that: -

A contract is illegal as formed if its very formation is prohibited and is void ab initio if it is a nullity".



31. This court also relies on the case of Charles Wambicho Kinuthia v Planchem Limited [2018] eKLR where the court pronounced itself as follows:

Evidence of ownership of land is through registration documents such as certificate of title. A Vendor can only sell what is rightfully owned by him/her. By the time the Sale Agreement was entered, the suit property was not registered in the name of the Vendor and this Court cannot hold and find that the Vendor then legally owned the suit property and did enter into a valid Sale Agreement. Therefore, for the fact that the suit property was not in the name of the alleged Vendor (Planchem Ltd), the Defendant herein, then the Court finds that the said Sale Agreement was null and void ab initio”. [Emphasis mine].

Disposition

32. In the result, I find that the Trial Magistrate’s judgment delivered on 16th July, 2018 to be well reasoned and I see no reason to depart from it. Consequently, the appeal is hereby dismissed with costs. It is so ordered.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 31ST DAY OF JULY, 2024

A.O. OMBWAYO

JUDGE

