



Imbaya & another v Odabo & another (Environment and Land Case 733 of 2017) [2024] KEELC 5756 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5756 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE 733 OF 2017
LC KOMINGOI, J
JULY 25, 2024**

BETWEEN

CHRISTOPHER LUMULI IMBAYA 1ST PLAINTIFF

RUTH MUKUBILANI IMBAYA 2ND PLAINTIFF

AND

RICHARD MATAGARO ODABO 1ST DEFENDANT

KAJIADO COUNTY GOVERNMENT 2ND DEFENDANT

JUDGMENT

1. By the Plaint dated 22nd May 2017, the Plaintiffs aver that on 24th May 2011 they entered into a sale agreement with the 1st Defendant for the purchase of a residential property on land Ngong/ Ngong/51953. They paid a deposit of Kshs. 560,000 and on 16th June 2011 they took a Kshs. 4,000,000 loan facility from Standard Chartered Bank to finance the property. This was done in good faith believing that the 1st Defendant had acquired relevant approvals to put up the building. Unfortunately, after moving into the house they realised that the river in front of the house would burst its banks every time it rained, flooding their house and they were forced to move out due to the risks. They thus claim that the contract should be rescinded and purchase price together with interest of Kshs. 7,513,432 be refunded due to non-disclosure of material facts.
2. They also claimed that the 1st Defendant was negligent in constructing a property on a flood plain, failing to mitigate effects of flooding while constructing the property, failing to disclose that information, endangering their lives and failing to act in good faith. And the 2nd Defendant was negligent due to: approving construction of a building on a flood plain and failing to inspect and stop construction of building on riparian land.
3. They thus prayed for the following orders against the Defendants jointly and severally for;



- a. An order rescinding the agreement for sale dated 24th May 2011 and ordering a full refund of Kshs. 5,600,000 being the purchase price of the suit property together with interest thereon at commercial bank rates from 24th May 2011 currently standing at Kshs. 1,913,432 as at April 2017 until payment in full.
 - b. In the alternative, special damages of Kshs. 7,513,432.
 - c. General damages.
 - d. Costs and interest on a and b until payment in full.
 - e. Any other or further relief that the court may deem just and fit to award in the circumstances.
4. The 1st Defendant neither filed a defence nor entered appearance.
 5. The 2nd Defendant entered appearance and was present at the hearing but did not file a defence.

Evidence of the Plaintiffs.

6. PW1, Ruth Mukabilani Imbaya (the 2nd Plaintiff herein) adopted her witness statement dated 17th May 2017 as part of her evidence in chief.
7. PW2 Christopher Lumuli Imbaya, the 1st Plaintiff also adopted his witness statement as part of his evidence in chief. He told the court that they entered into a sale agreement with the 1st Defendant for sale of a residential house built on land parcel known as Ngong/Ngong/51593 in Merisho area Ongata Rongai for Kshs.5.6 million.
8. He further stated that in order to raise the purchase price they took a mortgage loan from the Standard Chartered Bank of Kenya of Kshs.4,000,000/=. He also stated that they would experience floods during the rainy season. This would make the house uninhabitable, something the 1st Defendant had not disclosed.
9. He pointed out the occasions they would experience floods between 2012 and 2016. They decided to move to a rented house as they could no longer occupy the house.
10. It is his case that the 2nd Defendant should not have authorised the construction of the said house as it was on a river bed. He produced the documents in his bundle as exhibits P1 to P7. He urges that the prayers in the plaint be allowed.
11. PW2, PW4 and PW7 who are neighbours of the Plaintiffs confirmed what PW2 told the court. Each of them adopted his/her witness statement as part of their evidence tendered in this court.
12. PW5 Aggrey Maganga, an architect stated that he visited the suit property and prepared a report which he produced as P. Exhibit 6. On cross examination he stated that he was informed by the Plaintiffs that the 1st Defendant had building approvals from the 2nd Defendant. On re-examination he stated the purchaser's duty was to ensure that the building plans were approved. It was the developer's duty to ensure that they adhered to set standards. Further that the 2nd Defendant had an obligation to ensure that building plans were duly approved.
13. PW6 Evans Mairura Omwenga an engineer, physical planner and a trained Environmental Impact Assessment (EIA) expert produced his report as P. Exhibit 7. On cross examination he stated that although the Plaintiffs never showed him subdivision plans of the suit property the building did not meet the *Physical Planning Act* regulations since it was constructed within a riparian area. He confirmed that the said river was a seasonal one and at the time of his visit to the suit property, the level



of the water in the river was very low. On re-examination he re-stated that there was evidence that the building did not conform with the planning Act of 1996 which was the statute applicable in 2017.

14. PW7 Shadrack Kipkoech Cheruiyot an artist stated that in 2017 the Plaintiffs were his neighbours. He adopted his witness statement as part of his evidence in chief. During cross examination he stated he was aware that the Plaintiffs houses flooded although he did not have evidence to show that the 2nd Defendant did not approve the building plans. On re-examination he confirmed that he witnessed the floods which affected the said house.

Evidence of the Defendant

15. The 2nd Defendant closed its case without calling any witnesses.
16. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiffs' Submissions

17. Counsel submitted that although the Plaintiffs carried out due diligence by visiting the suit property prior to purchasing it, the fact that it was constructed on a flood plain could only have been within the knowledge of the owner. He therefore had a duty of care to disclose that information to the buyers. And non-disclosure was breach of duty. Counsel also argued that the 2nd Defendant was negligent in not carrying out his responsibility of ensuring the building was constructed within the set parameters because it would have been discovered that the house was on riparian land. As such, they were entitled to the prayers sought.

The 2nd Defendant's submissions

18. On whether the 2nd defendant acted negligently, counsel submitted that the 2nd Defendant approves building plans on various zoned areas of the County and no area is zoned as a flood plain, adding that flooding is an act of God and the blame cannot be apportioned to the Defendant. Counsel added that the Plaintiffs did not approach the 2nd Defendant to inspect the building before purchasing it and the issue of challenging approval plans after the fact was improper. In any case, any complaint about approvals should be filed with the County Physical Planning Liaison Committee as per Section 76 and 78 of the *Physical Land Use and Planning Act*.
19. Counsel added that the 2nd Defendant was not party to the sale agreement dated 24th May 2011 and should not be condemned to refund money to a contract it was not party to citing *Savings & Loan (K) Limited vs Kanyenje Karangaita Gakombe & another* [2015] eKLR. The suit should therefore be dismissed with costs to the 2nd Defendant.

Analysis and Determination

20. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:
 - i. Whether the sale agreement entered on 24th May 2017 should be rescinded;
 - ii. Whether the Plaintiffs are entitled to the reliefs sought.
 - iii. Who should bear costs of the suit?
21. The Plaintiffs seek that the sale agreement for property Ngong/Ngong/51953, entered into on 24th May 2017, be rescinded and the purchase price refunded. They assert that they purchased the property in good faith, only to later discover that it was situated on a riparian reserve. The Plaintiffs claim that



the 1st Defendant, as the seller, had a duty of care to inform them of the property's susceptibility to flooding. They further contend that the 2nd Defendant was negligent in its duties by approving the construction of a house on a riparian area.

22. Rescission of a contract is an equitable remedy that annuls a contract and restores the parties to their pre-contractual positions. Rescission may be sought on grounds such as misrepresentation, non-disclosure of material facts, or fraud. It is also established that due diligence is of utmost importance when purchasing property.
23. I agree with the Plaintiff's submissions that the 1st Defendant had a duty to inform the Plaintiffs that property was on riparian reserve and that they stood the risk of experiencing floods as it was a common occurrence. This failure resulted in a breach of duty.
24. The Plaintiffs' evidence has not been controverted as the 1st Defendant neither entered appearance nor filed a defence.
25. I also agree with the Plaintiffs' submissions that the 2nd Defendant's duty was to ensure that every construction being put up was with its approval. Secondly, it was to ensure that there was no construction on the riparian reserve.
26. The 2nd Defendant was negligent in that it allowed the construction to go on. There is evidence on record that building approvals were sought and were granted. The 2nd Defendant did not tender any evidence to controvert that of the Plaintiffs.

In the case of *Milimani Splendour Management Limited Vs. National Environment Authority & 4 Others* (2019) eKLR it was held;

“Construction of buildings on a riparian reserve would have a deleterious effect on the flow of the river with serious consequences for the ecology and the court is enjoined to apply the preventing principle in preventing activities that may cause damage or harm to River Kirichwa.”

27. I disagree with the 2nd Defendants submission that the Plaintiffs ought to have challenged the building approvals in the Physical Planning Liason committee. How could they have challenged, when they were purchasing a complete house?
28. I find that the 2nd Defendant was negligent for allowing construction on the riparian reserve.
29. The upshot of the matter is that the Plaintiffs have proved their case as against the Defendants in a balance of probabilities.
30. Accordingly Judgement is entered for the Plaintiffs as against the Defendants as follows;
 - a. That an order is hereby issued rescinding the agreement of sale dated 24th May 2011.
 - b. That the 1st Defendant do refund to the Plaintiffs Kshs.5,600,000/= being the purchase price of the suit property together with interest therein at court rates from the date of filing this suit.
 - c. General damages as against the 1st Defendant Kshs.500,000/=
 - d. General damages as against the 2nd Defendant Kshs.500,000/=
 - e. Costs of the suit and interest.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF JULY 2024.



L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Osiemo for the Plaintiff.

N/A for the 1st Defendant.

Ms. Mwalagi for Mr. Turunga for the 2nd Defendant.

Court Assistant – Mutisya.

