



**Mathu & 3 others v Stuart (Enviromental and Land Originating Summons
E009 of 2023) [2024] KEELC 5629 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5629 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2023**

AE DENA, J

JULY 22, 2024

BETWEEN

**KARIUKI MATHU 1ST APPLICANT
NJERI MATHU 2ND APPLICANT
NGUGI MATHU 3RD APPLICANT
NJANJA MATHU 4TH APPLICANT**

AND

COLIN STUART RESPONDENT

JUDGMENT

1. The originating summons coming up for determination has been brought before court pursuant to the provisions of Sections 1[A],1[B] and 3A of the *Civil Procedure Act*, Order 37 rule 3 of the Civil Procedure Rules 2020 and all the other enabling provisions of the law. The Applicants seek for the following orders; -
 - a. That the Respondent be compelled to release the title deed and all the completion documents for parcel of land known as title number Kwale/Michingirini/381.
 - b. That the Respondents be compelled to sign and/or execute the transfer forms and all other necessary documents and/or instruments and surrender the completion documents for the transfer of the parcel of land registered at the Lands Registry in Kwale as title number Kwale/Michingirini/379, Kwale/Michingirini/380 and Kwale/Michingirini/381 in favour of the Applicants.
 - c. That in default and/or in the alternative, the honourable court directs that the Deputy Registrar of this honourable court do execute the transfer forms and all the necessary documents for the transfer of the parcels of land known as Kwale/Michingirini/379, Kwale/



Michingirini/380 and Kwale/Michingirini/381 in place of the Respondent and in favour of the Applicants and register the aforesaid transfer in the names of the applicants respectively.

- d. Any other order that this court may deem just and fit to grant.
 - e. That costs of this application be provided for.
2. The originating summons is premised upon grounds on its face and the supporting affidavit sworn by Kariuki Mathu the 1st Applicant. It is averred that the Respondent is the absolute proprietor of Kwale/Michingirini/379, Kwale/Michingirini/380 and Kwale/Michingirini/381 herein after referred to as the suit properties. That title no's Kwale/Michingirini/379, and Kwale/Michingirini/380 were previously charged to equity bank limited to a tune of Kshs 9.1 million vide a charge dated 31/12/2015 while the other third parcel was not encumbered. That the Respondent was not able to settle the loan amount and the bank proceeded to advertise the encumbered parcels for sale. The Respondent approached one Lilian Mathu the mother to the Applicant and an individual who was an agent for the Applicants too.
 3. That the agent informed the Applicants who are a family about the offer and they were interested in purchase of the properties at Kshs 15 million. A search was conducted and due diligence where it was confirmed that two of the properties were encumbered. That before the bank sold the properties, the Respondent entered into separate land sale agreements all dated 7/8/2023 with the 2nd, 3rd and 4th Applicants for the sale of the two encumbered properties and the remaining plot that was not encumbered. That equity bank was to disencumber the two encumbered properties upon the obligations secured by the charge. That the Respondent requested to be paid Kshs 1.5 million as down payment which was paid to him and vide a professional undertaking dated 10/8/2023 by the Applicants Advocate it was agreed that the balance of Kshs 13.5 million was to be released to the Respondent upon discharge of charge of by equity bank on the encumbered properties. That the Respondent was to further release all the transfer documents upon discharge.
 4. The Applicants aver that together with the Respondent they approached Equity Bank in relation to the sale of the encumbered properties and agreed to a redemption loan advanced to the Respondent to be secured by the encumbered properties. That the bank agreed to release the titles vide a letter dated 4/9/2023 and the discharge of charge upon confirmation of payment of the redemption amount. At paragraph 15 the deponent states that the Applicants requested for transfer of funds but missed on one digit which caused delay in transferring the amount but later the same was paid and the amount disbursed to the Respondent through his Equity Bank account. That the Respondent informed the Applicants that the encumbered titles had been discharged a position that was not true.
 5. The Applicants state that on 14/10/2023 Equity Bank released the original title documents for the two encumbered titles to the Applicants Advocates. That the Respondent was expected to release the original title to the remaining property being Kwale/Michingirini/381 which was in his physical possession but has to date failed to do so. It is stated that the Respondent received the purchase price for all the suit properties but has blatantly refused to release the title and to vacate the same hence the instant application.

Response

6. In opposing the application, the Respondent filed a replying affidavit before court on 12/2/2024 and admits that he is the registered proprietor of the suit properties mentioned herein. He informs the court that the deponent to the affidavit supporting the application has no written authority from the rest of the Applicants to represent them. The Respondent denied having ever communicated with the Applicants on the issue of discharge of the charges but admits that the sale agreements alluded to were



entered into by him and the Applicants. That he only became aware of the release of the titles to the Applicants by Equity Bank after such release.

7. It is averred that the Applicants failed to honour the completion date of the agreement as stipulated in the same and as a result breached the said agreement. That clearing the loan amount does not warrant the Applicants into blatantly breaching the terms of the agreement as they have. The Respondent further states that he is in occupation of the suit property as it is his home and any attempt to remove him thereon will render him destitute and homeless. The Respondent states that the agreement dated 7/8/2023 be rendered nugatory and the Applicants be compelled to release the titles to the two suit properties to the Respondent. The court is urged to disallow the application.

Further Affidavits

8. The Applicants filed a further affidavit sworn by the 1st Applicant. The same was filed before court electronically. The deponent refers to the letter of authority by the rest of the Applicants through which he swears the affidavit on their behalf. It is averred that it is not in contention that the Respondent is the registered proprietor of all the suit properties. That the Respondent has admitted that by the time he was being approached by Lilian Mathu with an offer to purchase the properties they had already been advertised for sale and hence he was willing to dispose of the same. That the agent who had publicised the sale had approached Lilian Mathu and upon carrying out due diligence it was established that two of the same had encumbrances a fact that had not been disclosed by the Respondent.
9. The Deponent admits that indeed the completion date for the sale agreement was 1/9/2023 but there was a slight delay in transferring funds due to bank errors and the delay was promptly communicated. That the agreement provides that the property in dispute be sold with vacant possession upon payment of the entire purchase price. That the Applicants must therefore be allowed the sue of the suit property as they have completed payment. It is stated that the Respondent had the knowledge of release of the two titles to the Applicants by the bank and is being untruthful in stating otherwise. It is stated that it is in the interest of justice that the application be allowed as prayed.

Submissions

10. On 12/3/2024, the court ordered for the application to be dispensed off with by written submissions. The Applicants written submissions were filed before court electronically. They filed further submissions and a list of authorities which the court has duly considered. On 29/4/2024 Counsel for the Respondent intimated to court that he was yet to file his submissions, the court enlarged time for compliance. The Respondent filed the same on 6/5/2024 electronically, the court has also considered the contents thereof.

Determination

11. This court has carefully considered the application, the affidavit in support and in opposition of the same and the submissions on record as well as the law and the case law cited. The issues for determination are compressed into one;

a. Whether the Applicants are entitled to the orders sought.

12. It is not in contention that the Respondent herein is the registered proprietor of the suit properties Kwale/Michingirini/379, Kwale/Michingirini/380 and Kwale/Michingirini/381. It is further not in dispute that the title deeds to parcels Kwale/Michingirini/379, Kwale/Michingirini/380 were released to the Applicants by Equity Bank Limited after the loan procured by the Respondent was settled by



the Applicants. What is in contention is the title deed for parcel no. Kwale/Michingirini/381 which is in possession of the Respondent and who has refused to release the same as evidenced by the affidavits sworn herein for and against the originating summons and the refusal to sign the transfer forms of the suit properties to the Applicants.

13. The issue that arises at this juncture is whether there exist any contractual obligations from the transaction between the parties herein. My attention has been drawn to the agreement for sale dated 7/8/2023 between the 1st Applicant herein and the Respondent. The said agreement is over the purchase of the suit properties Kwale/Michingirini/379, Kwale/Michingirini/380 and Kwale/Michingirini/381 as indicated in the same. Does the agreement meet the criteria as to what constitutes a valid contract? Section 3 of the Law of Contract Act Chapter 23 of the Laws of Kenya outlines the elements of a valid contract. Section 3(3) states; -

3.Certain contracts to be in writing (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a)The contract upon which the suit is founded—

(i)Is in writing;

(ii)Is signed by all the parties thereto; and

(b)The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

14. The essential components of a contract as was observed by Harris JA in *Garvey v Richards* [2011] JMCA 16 ought to ordinarily reflect the following principles:

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

15. I have reviewed the contract referred to by both parties herein, the same is in writing and was prepared by the firm of Nzavi & Company Advocates. The parties herein have both appended their signatures thereto in confirmation of being in harmony with the terms and conditions set therein. It is this court’s finding that there exists a valid contract between the Applicants and the Respondent herein. The court is tasked with determining whether the contract between the parties is enforceable. According to the Respondent, the Applicants failed to honour the completion date of 1/9/2023 as provided for in the agreement of 7/8/2023. That as a result of this breach the Respondent effected the termination clause in the agreement and wrote to the advocate handling the transaction requesting refund of the purchase price. The Respondent states that the Applicants breach of the contract leaves him with no recourse but to terminate the entire agreement and for the parties to be restituted to their initial position.

16. The Applicants on the other hand admit that the purchase price was indeed not paid on 1/9/2023 as had been agreed. They however state that the delay was occasioned by a delay in transferring funds to the charging bank due to errors in the account number and which error were communicated to the bank hence the reason they accepted the amount after the completion date. From the evidence on record, the purchase price of the suit parcels being Kshs 13,500,000/- was released to the parties advocate through his account at Absa Bank. The said Advocate Mulandi Kisabit & Associates later



released the funds to Equity Bank Limited as evidenced by the banks release of the original title documents to the Advocate.

17. The funds were redemption fees over the loan procured by the Respondent and which he had defaulted in repayment and which are also the purchase price for the suit properties. Infact the properties were due for auction and it is the Applicants who stepped in and offered to pay the sum directly to the bank. The bank in receiving the funds waived the stipulated time that had been set and within which the Applicants were to pay the amount. The bank not only received the redemption amount but further released the titles to the suit properties Kwale/Michingirini/379, Kwale/Michingirini/380.
18. The Applicants have further stated that the delay occasioned in remitting the funds was not on purpose, the same had been communicated to the bank. The Respondent has not tendered any evidence before court in terms of a notice where he asked the bank to turn down the funds and reimburse them. The court cannot make the assumption that his intention was to rescind the agreement after default on the part of the Applicants as he has not tendered any evidence of having had the intention to do so. The Ugandan case of *Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v Adam Vassiliadis* [1986] UG CA 6 is referred to by this court and is where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in *Jones v National Coal Board* [1957]2 QB 55 that;

“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

19. Paragraph 10 of the agreement provides the clause for failure to complete, the vendor was expected to issue the purchaser at least 21 days’ notice in writing confirming that the vendor is ready to complete the sale. That in the event that the purchaser did not respond to the notice, the vendor had the discretion to rescind the agreement and resell the property. The vendor and who is the Respondent herein did not give any notice as seen from the pleadings.
20. It is this court belief that in receiving the funds, the bank waived the condition for rescission of the agreement. I am guided by an excerpt from *George Boniface Mbugua vs. Mohammed jawayd Lqbal* where the court held that: -

“Time may cease to be of essence where a party waives the benefit of such a provision in the contract by words or conduct. Waiver may occur where negotiations occur after the time of completion. The defendant engaged in further negotiations and accepted payments from the plaintiff after the dates indicated for completion in Mr. Khans letter.”

21. As has been stated in various authorities, it is never the business of the court to rewrite contracts for parties. Parties in a contract are bound by the terms and conditions stipulated therein. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* [2002] 2 E.A. 503, [2011] eKLR the Court of Appeal at page 507 stated as follows: -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”



22. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR the Court of Appeal further stated that: -

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

23. As has been stated above, there is no legal basis under which this court will rescind the contract between the parties herein. It has been proved that there existed a valid contract between the parties herein and which ought to be enforced. The Applicants have proved meeting their end of bargain. It is imperative of the Respondent to also fulfil his legal obligations as was agreed in the agreement between him and the Applicants herein. Before penning off, I wish to address an issue raised by the Respondent herein with regard to his occupation of the suit property. The Respondent at paragraph 35 of his replying affidavit states that in the event the originating summons is allowed he will be rendered homeless and destitute with his family.

24. The pleadings in this suit attest to the Respondent having been in a fix before the purchase of the property by the Applicants. This explains the reason why the purchase price was paid directly to the bank in the form of redemption fees and not to the Respondent. If anything, one of the conditions set out in the agreement is that the properties were being sold with vacant possession upon payment of the entire purchase price. It is further stated under the said clause that the vendor may be permitted limited access of the suit properties for defined purposes on terms mutually agreed in writing. While an agreement was presented, the same is not executed and therefore it is not of any consequence. In any case it is trite law that parties are bound by their pleadings. On this I am guided by the holding in *Galaxy Paints Company Limited v Falcon Guards Limited Court of Appeal Case Number 219 of 1998*, where the Court of Appeal stated that: -

“Issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination.”

25. Before this court pens off its final orders in this matter, I find it pertinent to explain the delay in delivery of the judgement herein. This judgement was slated to be delivered on 20/6/24. However the court on 13/6/24 lost its laptop containing data of all rulings/judgements scheduled before this date. The court had to embark on rewriting the same as they had not been backed up. This had a ripple effect of creating a backlog and delay of the subsequent rulings/judgements. The court appreciates the indulgence and patience of counsel.

26. Consequently, it is this courts findings that the Applicants have proved their case on a balance of probabilities. The originating summons dated 20/12/2023 is hereby allowed as follows;

- a. That the Respondent be and is hereby compelled to release the title deed and all the completion documents for parcel of land known as title number Kwale/Michingirini/381.
- b. That the Respondents be and is hereby compelled to sign and/or execute the transfer forms and all other necessary documents and/or instruments and surrender the completion documents for the transfer of the parcel of land registered at the Lands Registry in Kwale as title number Kwale/Michingirini/379, Kwale/Michingirini/380 and Kwale/Michingirini/381 in favour of the Applicants.



- c. In the alternative and in default of [a] and [b] above herein, the Deputy Registrar Kwale Environment & Land Court do execute the transfer forms and all the necessary documents for the transfer of the parcels of land known as Kwale/Michingirini/379, Kwale/Michingirini/380 and Kwale/Michingirini/381 in place of the Respondent and in favour of the applicants and register the aforesaid transfer in the names of the applicants respectively.
- d. The Applicants are hereby awarded costs of the suit.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 22ND DAY OF JULY 2024.

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A.E DENA

JUDGE

Ms. Mwangi Holding brief for Mr. Nzavi for the Applicant

No Appearance for the Respondent

Mr. Daniel Disii – Court Assistant

