



**Gacheri v Gatobu (Environment and Land Appeal E041 of 2023)
[2024] KEELC 5547 (KLR) (17 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5547 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E041 OF 2023**

**CK NZILI, J
JULY 17, 2024**

BETWEEN

JOYCE GACHERI APPELLANT

AND

STANLEY GATOBU RESPONDENT

*(Being an appeal from the judgment of the CM's ELC No. 121
of 2019 delivered on 31.5.2023 by Hon. L.N Juma – P.M)*

JUDGMENT

1. The appellant sued the respondent as the 1st defendant, Erastus Mbaabu Nteere & James Muthuri M'Mungania as the 2nd & 3rd defendants at the lower court by an amended plaint dated 30.10.2019 regarding a sale agreement dated 9.8.2010 in which she bought and was put into possession of a portion measuring 0.50 acres out of L.R No. Nyaki/Kithoka/Mwanika/73, that was a share of the defendants out of his inheritance in the estate of the late Nathan M'Imanyara M'Iringo, represented by the 2nd and 3rd respondents.
2. The appellant averred that out of the representations by the respondent, that upon successful distribution of his father's estate, he would effect the transfer of the share, she paid Kshs.350,000/= as a deposit to facilitate the issuance of letters of administration and embarked on extensive developments of the land. However, unfortunately, the respondents reneged on the promise as per the sale agreement.
3. The appellant averred that the respondents were bound by the doctrine of acquiescence and proprietary estoppel to deny her the right to land and or interfere with her occupation. The appellant prayed for specific performance to have the respondents transfer the share or in the alternative a refund of Kshs.350,000/= with interests and or total compensation for the developments on the suit land.



4. The respondents opposed the suit by a statement of defense dated 22.12.2020. While admitting that they were the legal administrators of the estate of M'Imanyara M'Iringo, they denied knowledge of the sale agreement between the 1st respondents and the appellant and averred that if any was in existence, the respondent had no land to dispose at the time, the same was stale and or illegal and was not binding on them. They termed the suit as bad in law, incompetent and disclosing no cause of action against them.
5. From the record, it appears that parties filed a consent dated 9.11.2021, lifting an earlier issued inhibition order. The implication was to allow subdivisions of the suit land pursuant to the certificate of confirmation of grant dated 1.11.2018 and to transfer 1 acre of land to the respondent, which was to remain restricted until the suit was determined. The respondent was to be restrained from interfering with the appellant's occupation and use of an already developed fenced-off portion. An order to that effect was issued for implementation dated 14.1.2022.
6. At the trial, Joyce Gacheri Gatobu testified as PW 1 and adopted witness statements dated 6.12.2022 & 25.10.2019 as her evidence in chief. Her evidence was that in 2008, the respondent's mother approached her, offering to sell land at Kithoka to raise legal fees to file letters of administration for her deceased husband's estate.
7. PW 1 told the trial court that a meeting had taken place in the presence of all the deceased's children and their mother, and an agreement was arrived at to the effect that the respondent disposes of his share of the suit land measuring 0.5 acres to her for Kshs.430,000/=. PW1 said that she paid a deposit of Kshs.330,000/= after signing a sale agreement before Muia Mwanzia & Co. Advocates on 9.8.2010. She said that the balance was to be paid after the transfer. PW 1 said that all the eight beneficiaries of the estate were signatories to the sale agreement. PW 1 said that after the agreement, she was taken to the land, a land surveyor came and excised 0.50 acres, took vacant possession, and started developing the portion by fencing it, erecting permanent and semi-permanent houses, and planting some trees. Further, PW 1 said that her money was used to file and acquire a confirmed grant to the 2nd and 3rd defendants, giving the 1st respondent a share of 1.0 acres, who has now declined to transfer it. Similarly, PW 1 relied on the sale agreement dated 9.8.2010, confirmed grant and chief and a valuation report letter produced as P. Exh No. (1) (2), (3) & (4) respectively.
8. In cross-examination, PW 1 said that the title deed at the sale was in the name of the defendants late father, and letters of administration had not been sought or obtained. She confirmed that the 2nd and 3rd respondents were not witnesses to the sale agreement. PW 1 said that the property was valued at Kshs.6,400,000/= as per P. Exh No. (4).
9. Again, PW 1 said that the parties never attended a land control board meeting. She denied breaching the sale agreement and received a letter to go and collect the refund dated 24.3.2015. PW 1 said that her five rental houses were fully occupied. After taking vacant possession, PW 1 said she fenced the portion and embarked on developing it while awaiting a transfer. She denied receiving a letter dated 19.1.2020, alleging a breach of the sale agreement on her part from M/s Gatari Ringera & Co. Advocates or Muia Mwanzia & Co. Advocates.
10. Stanley Gatobu testified as DW 1. Relying on a witness statement dated 3.11.2020 as his evidence in chief and testifying on behalf of the 2nd & 3rd defendants, D.W. 1 told the court that he entered into a sale agreement dated 9.7.2008 with the appellant who paid Kshs.80,000/= and later on paid Kshs.270,000/= to him. He said that he was incapable of selling the land in the absence of letters of administration for the estate of his late father. DW 1 said that the appellant breached the sale agreement by erecting permanent buildings on it, yet it was still undergoing succession proceedings.



11. DW 1 said that he surrendered Kshs.330,000/= to his advocate Muia Mwanzia to refund the appellant, and a letter was written to that effect. Further, DW 1 said that the appellant caused him to be arrested twice by the police for failure to transfer the land. DW 1 admitted showing the portion to the appellant after the sale agreement. He said that land control board consent was not sought or obtained. D.W. 1 said the letter on breach was responded to by Charles Kariuki and Ringera Advocates on behalf of the appellant. In addition, DW 1 said that he even mentioned the refund before the probate court.
12. Even though he acquired 3 acres, namely L.R No, Kithoka/Mwanika/529, out of a succession cause, DW 1 said that he was not willing to surrender the land but was willing to refund the purchase price. DW 1 relied on a copy of the grant, sale agreement, letters dated 19.1.2010, 11.1.2010, 24.3.2015, 24.6.2016, and a certificate of official search as D. Exh No's. 1-7, respectively. He admitted that the appellant had developed her land currently with wooden houses, semi-permanent houses, food crops and a permanent gate.
13. In cross-examination, DW 1 said that in P. Exh No. (1) he was selling a portion of his land measuring $\frac{1}{2}$ an acre for Kshs.430,000/= but only received Kshs.330,000/=. He said that he showed the appellant the portion to cultivate only but not to erect any buildings. Further, DW 1 said that it was the beneficiaries of the estate who stopped him from selling the land. According to him, the land had appreciated to approximately Kshs.4,000,000/=. D.W. 1 said that he relied on the said portion to sustain his four sons and daughter.
14. The appellant before the court relied on a memorandum of appeal dated 21.6.2023. She complains that the trial court erred in law and in fact, in:
 1. Dismissing her case.
 2. Disregarding the sale agreement
 3. Failing to a ward interest on the principal.
 4. Placing more weight on assumptions rather than facts
 5. Not appreciating her case.
15. Parties herein have canvassed the appeal by written submissions. The role of an appellate court is defined by Section 78 of the *Civil Procedure Act*. It has to rehearse or re-appraise the lower court record and come up with independent findings on facts and law while giving credit to the trial court that saw and heard the witnesses firsthand. See *Selle & another vs Associated Motor Boat Company Limited & other* (1968) EA 123, *Abok James Odera t/a A.J Odera & Company Advocates vs. J.P Machira t/a Machira & Co. Advocates* (2013) eKLR, *Gitobu Imanyara & others vs A.G. & others* (2016) eKLR.
16. Having reviewed the entire lower court file, record of appeal, grounds of appeal, written submissions and the law, what commends for determination as issues are:
 - i. If there was a breach of the sale agreement or its performance.
 - ii. If the respondent is estopped from renegeing on the sale agreement.
 - iii. If the appellant was entitled to specific performance.
 - iv. Whether the appellant took vacant possession.
 - v. Whether the appeal has merits.



17. There is no dispute that the appellant and the 1st respondent entered into a sale agreement dated 9.8.2020. The terms were for the appellant to purchase ½ an acre out of L.R No. Nyaki/Kithoka/Mwanika/73 due for succession, to excise the portion belonging to the 1st respondent. The consideration was Kshs.430,000/=, to which Kshs.330,000/= was paid at the signing of the sale agreement. Clause number (3) allowed the appellant to take vacant possession upon signing the sale agreement. Clause (5) stated that the property was sold with the consent of all the beneficiaries of the estate. A previous sale agreement before Gitari & co. Advocates dated 9.7.2008, was revoked as per clause no. (6).
18. Any breach thereof was to attract liquidated damages as per clause number 7. Justin Mwenda Manyara, Samuel Koome, Samuel Murithi, Catherine Mbijiwe, Benson Kinyua and Rebecca Nathan Manyara witnessed the sale agreement. In their defense dated 23.12.2020, other than stating that the 1st respondent had no land to sell, the 2nd and 3rd respondents did not plead illegality, misrepresentation and lack of capacity to enter the sale agreement.
19. It is trite law that courts do not re-write contracts, for parties do enjoy the freedom to contract. Courts can only enforce contracts for parties unless the same is attacked on account of illegality, irregularity, misrepresentation, unconscionability, undue influence, or voidability.
20. The sale agreement that was before the trial court had complied with Section 3 (3) of the [Law of Contract Act](#) and Sections 38 – 40 of the [Land Act](#). It had all the features required of a sale agreement. See *Broadspect Investment Ltd vs Francis Njoroge Mwangi* (2017) eKLR. The appellant had performed all her terms and conditions of the sale agreement. The law is that extrinsic or parole evidence may not replace clear terms and conditions in a contract. A court of law looks into a contract within its four corners. Parties are expected to have reduced all the essential terms and conditions in a sale agreement. See *Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited* (2017) eKLR.
21. The 1st respondent has submitted that it was the appellant who went against the sale agreement. Unfortunately, the breach on the part of the appellant had not been specifically pleaded in the respondent's statement of defense. Parties are bound by their pleadings and issues of determination flow from the pleadings. The appellant had pleaded the doctrine of proprietary estoppel, constructive trust, and acquiescence. The statement of defense was silent on those pleaded doctrines. The appellant had explicitly pleaded that the respondents as a family were privy to the sale agreement, the taking over of vacant possession, the handing over the money to facilitate the issuance of letters of administration and the hiving off the portion on the ground by a land surveyor in the presence of the beneficiaries to facilitate the taking over of vacant possession. The 2nd & 3rd defendants were not called to testify and advance their defense that as legal administrators, they were not consulted or aware of the manner in which the appellant paid Kshs.350,000/= came into possession of the portion and extensively developed it.
22. The 2nd and the 3rd defendants consented to an order made to lift the inhibition for the confirmed certificate of grant to be effected. They also consented that the area occupied by the appellant be preserved for her. That means the 2nd & 3rd defendants were aware of the presence of the appellant on the land on account of purchaser's rights. The respondents did not tender evidence to the contrary that the appellant had been intermeddling with the estate of the deceased.
23. Valuable consideration had been paid to the respondent to facilitate the issuance of letters of administration to benefit not only the 1st respondent but also the 2nd and 3rd defendants, and the rest of the eight beneficiaries of the estate. This was not challenged at the trial. The burden was on the



- respondents to lead evidence that the doctrine of acquiescence, proprietary estoppel and constructive trust were not applicable. The respondent led the appellant to extensively develop the suit land, believing that the respondent would perform his part of the bargain.
24. The developments and the taking valid possession of the suit land by the appellant was in line with clauses 3, 5, 6 & 7 of the sale agreement. The matriarch of the family was not called to deny the sale agreement.
 25. The relief of specific performance seeks to decree and enforce the due completion of a contract in its proper form. It is an equitable remedy governed by Article 10 of *the Constitution* of Kenya and Section 3 of the *Judicature Act*. It is granted where a party has performed its part of the bargain and where any enforcement will not cause great hardship to the opposite party. In this appeal, the confirmed grant indicates L.R No. 73 was inherited by the respondent and his mother, who were signatories to the sale agreement.
 26. The 1st respondent's share of the estate that he was disposing of was not in doubt when the sale agreement was entered into and at the hearing of the suit. Already, it had been identified by the probate court. The appellant was put into possession and paid a substantial sum to acquire the portions and, believing the words of the 1st respondent his mother and the siblings went on to extensively develop it. All that remained was to discharge the obligations of the parties in the formal transfer. See *Oscar Ochieng & another vs Prilscot Co. Ltd (2018) eKLR*.
 27. The 1st respondent admitted at the trial that the suit land has appreciated to Kshs.4,000,000/= . P. Exh No. (40 shows the market value is Kshs.6.4 million. The respondent testified that he surrendered the money to the lawyer to be transmitted to the appellant. The lawyer was not called to testify and confirmed that fact. The statement of defense did not indicate or plead that fact. The statement of defense was a mere denial. An offer for a refund was not made in the statement of defense. No offer to surrender the deposit was made at the entry of appearance by the respondents or during the hearing. A court of law cannot sanction unjust enrichment or allow a party to derive benefit from an illegal transaction.
 28. In this appeal, the appellant took vacant possession and extensively developed the land and was not stopped from taking vacant possession or developing it by the respondents.
 29. The facts on hardship or impossibility to transfer the land were not pleaded or evidence offered. There was no justification tendered or entered to support alternative reliefs by the respondents. In the absence of such the appellant is entitled to specific performance being the only reasonable relief in the circumstance obtaining. Attack of the sale agreement on lack of a land control board consent or due to invalidity was not advanced by the respondents.
 30. I find the appeal with merits. See *Willy Kimutai Kitit vs Michael Kibet (2018) eKLR & Munyu Maina vs Hiram Gathiha (2013) eKLR*. The 1st respondent is directed to transfer 0.50 acres out of L.R No. Nyaki/Kithoka/Mwanika/524 to the appellant within 30 days from the date hereof. The inhibition issued on 14.2.2024 is lifted to facilitate the process. In default, the Deputy Registrar of this court shall execute the transfers. Costs of the appeal to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 17TH DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

Parties



Kirimi for the appellant

Mokua for the respondent

HON. C K NZILI

JUDGE

