M'Mukiri v Mwongera & another (Environment and Land Appeal 10 of 2023) [2025] KEELC 1050 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELC 1050 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL 10 OF 2023

JO MBOYA, J

FEBRUARY 13, 2025

BETWEEN

PETER M'MUKIRI ..... APPELLANT

AND

MOSES KITHINJI MWONGERA ..... 1ST RESPONDENT

WEATHERFORD MWIRIGI MURUNGI ..... 2ND RESPONDENT

(Being an Appeal against the Judgment delivered on 17th October 2023 by Hon. E. Tsimonjero (SRM) in the Chief Magistrate's court at Isiolo in CM ELC Case No. 24 of 2016)

JUDGMENT

1. The Appellant herein [was the Plaintiff in the subordinate court] filed the Plaint dated 9th of May 2016; and wherein the Appellant sought the following reliefs:
    a. Kshs.2million only.
    b. General damages for breach of contract.
    c. Special damages for the demolished houses at Kshs.165,000/=.
    d. Costs of the suit and interests.
    e. Any other relief that this Honourable court may deem fit to grant.
2. Upon being served with the Plaint and summons and plaint to enter appearance [details in terms of the preceding paragraphs], the Respondent herein failed to enter appearance and or filed a statement of defence. In this regard, the Appellant proceeded to and procured a default Judgment as against the Appellant. Nevertheless, the default Judgment was subsequently set aside and the Respondent was granted leave to enter an appearance and to file a statement of defence.

3. Suffice it to point out that the Respondents duly filed a statement of Defence dated 26th May 2020; and wherein the Respondents disputed the claim by and on behalf of the Appellant. Furthermore, the Respondents contended that even though the same [Respondents] and the Appellant had entered into the agreement dated 9th November 2014, the said agreement was subsequently rescinded by the parties.

4. The suit before the subordinate court was heard and disposed of vide Judgment rendered on 17th October 2023 and whereupon the learned trial magistrate found and held that the Appellant had failed to prove his claim to the requisite standard. In this regard, the Appellant's suit was dismissed. However, each party was ordered to bear own costs of the suit.

5. Aggrieved by and dissatisfied with the Judgment under reference, the Appellant herein approached the court vide Memorandum of Appeal dated 15th November 2023; and wherein the Appellant has highlighted the following grounds:

    i. That the learned trial magistrate erred in fact and in law in finding that the sale agreement of 9th November 2014 was unenforceable against the defendants/respondents despite the same having been entered into voluntarily by the parties and duly executed in accordance with the law.

    ii. That the learned trial magistrate erred in fact and in law in finding that the plaintiff misrepresented facts in the sale agreement of 19th November 2014.

    iii. That the learned trial magistrate erred in fact and in law in finding that the plaintiff was not the registered owner of the suit property known as Meru central/Ruiri Rwarera/5593 (which was previously known as Ruiri/Rwarera Adjudication Section P/no. 5593) at the time when sale agreement of 9th November 2014 was executed by the parties despite there being evidence to the contrary.

    iv. That the learned trial magistrate erred inf act and in law in finding that the plaintiff had not performed his part of the sale agreement of 9th November 2014 by transferring the suit property known as Meru central/Ruiri Rwarera/5593 (which was previously known as Ruiri/Rwarera Adjudication section P/No 5593) to defendants when in fact it was the defendants who breached the said sale agreement by failing to pay the purchase price of Kshs.2,000,000 by 10th December 2014.

    v. That the learned trial magistrate erred in law and when he tried to re-write the sale agreement of 9th November 2014 between the parties by suggesting that the plaintiff should have transferred the suit property known as Meru central/Ruiri rwarera/5593 (which was previously known as Ruiri/Rwarera adjudication section P/No.5593) to defendants prior to payment of the purchase price.

    vi. That the learned trial magistrate erred inf act in finding that the plaintiff was not entitled to any of the prayers sought in the plaintiff.

    vii. That the learned trial magistrate erred in law and fact in finding that the plaintiff/appellant had failed to prove his case on a balance of probabilities despite there being overwhelming evidence to the contrary.

    viii. That the whole of the Judgment of the trial court went against the weight of the evidence and the testimony by parties at trial.

6. The appeal came up for directions on the 22nd of April 2024, before Honourable Justice Muchoki Njoroge, Judge [now retired] whereupon the parties covenanted to canvass and dispose of the appeal by way of written submissions. To this end, the Judge proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

7. Suffice it to state that the Appellant filed written submissions dated 18th September 2024; whereas the Respondents filed written submissions dated 22nd May 2024. Notably, the written submissions by the Respondents preceded the ones by/on behalf of the Appellant.

8. Be that as it may, the Judgment in respect of the instant matter was neither crafted nor delivered by the Judge who gave directions for the filing and exchange of written submissions. Moreover, the submissions in respect of the instant matter stayed on the file until 22nd January 2025; when further directions were issued as pertaining the crafting of the Judgment.

9. Nevertheless, it is imperative to state that the written submissions by and on behalf of the parties are on record and I have read, appraised and appreciated same.

10. The Appellant herein filed written submissions dated 18th September 2024 and wherein the Appellant has canvassed and raised four [4] salient issues for consideration and determination by the court. The issues raised/highlighted by the appellant include, that the learned magistrate failed to appreciate that the sale agreement entered into and executed by the parties on the 9th November 2014 was enforceable; erred in law in finding that the Appellant was guilty of misrepresentation of facts; erred in law in finding and holding that the Appellant was not the registered owner of the suit property; and finally erred in law in finding that the Appellant had not proved his claim to the requisite standard.

11. Regarding the first issue, learned counsel for the Appellant has submitted that the Appellant and the Respondent entered into and executed the sale agreement dated 9th November 2024, voluntarily and out of their own volition. In this regard, it was submitted that by the time the parties entered into and executed the said sale agreement, both parties were privy to and conversant with the status of the land in question.

12. Moreover, it was submitted that at the time when the sale agreement was entered into and executed, the land in question [suit property] was registered in the name of the Appellant in accordance with the adjudication records. For good measure, learned counsel for the Appellant has submitted that the facts pertaining to the registration of the suit property in the name of the Appellant were known to and within the knowledge of the Respondent[s].

13. To the extent that the parties were privy to and knowledgeable of the facts pertaining to the suit property, it has been contended that the learned trial magistrate committed an error of fact and law when same [trial court] came to the conclusion that the sale agreement/contract was unenforceable.

14. Regarding the second issue, learned counsel for the Appellant has submitted that by the time the Respondent[s] agreed to purchase the suit property and by extension executed the sale agreement, the Respondent[s] had not only confirmed the ownership documents but had also undertaken physical search by visiting the locus in quo.

15. Arising from the foregoing, it has been submitted that the learned magistrate erred in fact and law in finding and holding that the Appellant was guilty of misrepresentation of facts. On the contrary, it has been submitted that the facts pertaining to the suit property including the status [details] of the adjudication process were well known to the Respondents.

16. Regarding the third issue, learned counsel for the Appellant has submitted that it was also erroneous for the learned trial magistrate to find and hold that same [Appellant] was not the registered owner of the suit property. To this end, it was submitted that the documentation which were availed to the Respondent[s] confirmed that though the land was still under adjudication, the same [land] belonged to the Appellant and not otherwise.

17. Finally, learned counsel for the Appellant has submitted that the learned trial magistrate also erred in law in finding and holding that the Appellant had not proved his case/claim to the requisite standard. In this regard, it was submitted that the Appellant placed before the court a copy of the sale agreement dated 9th November 2014, whose terms were clear and devoid of ambiguity. In any event, it was contended that the evidence that the Respondents had not complied with the terms of the sale agreement was not controverted.

18. In the premises, learned counsel for the Appellant has submitted that the finding that the Appellant had not proved his case to the requisite standard was not only erroneous but contrary to the weight of evidence on record. To this end, learned counsel for the Appellant has implored the court to find and hold that the Judgment and consequential decree of the trial court, are legally untenable and thus ought to be set aside.

19. The Respondents on their part filed written submissions dated 22nd May 2024; and wherein the same [Respondents] have highlighted three [3] salient issues for consideration. The issues that have been raised by the Respondents include; that the Appellant was guilty of misrepresentation of facts; that the contract and sale agreement were unenforceable, thirdly that the sale agreement dated 9th of November 2014; was lawfully rescinded by the parties.

20. Regarding the first issue, learned counsel for the Respondents has submitted that the Appellant herein posited and covenanted that the same [Appellant] was the registered owner of the suit property at the time of entering into the sale agreement. Furthermore, it has been submitted that the Appellant even undertook to transfer the suit property to the Respondents immediately upon the payment of the purchase price/consideration.

21. Nevertheless, learned counsel for the Respondent[s] has submitted that the fact that the Appellant was not the registered owner of the suit property arose when the Appellant failed to avail the ownership documents to the Respondents.

22. Arising from the foregoing, learned counsel for the Respondent[s] has submitted that the Appellants were therefore guilty of misrepresentation of facts. In any event, it has been submitted that the copy of the title deed that was tendered and produced by the Appellant before the court was dated 24th May 2017; and thus confirming the fact that the Appellant was never the registered owner of the land as at the time of executing the sale agreement.

23. In respect of the second issue, learned counsel for the Respondents has submitted that owing to the fact that the Appellant herein was not the registered owner of the suit property as at the time of execution of the sale agreement, same Appellant was therefore incapable of executing the necessary transfer instruments to facilitate the transfer and registration of the suit property in the name of the Respondents.

24. On this account, Learned counsel for the Respondents, has submitted that the contract was therefore unenforceable. In this regard, it has been submitted that the learned magistrate came to the correct position in finding and holding that the contract [sale agreement] was unenforceable.

25. In respect of the third issue, learned counsel for the Respondent[s] has submitted that arising from the failure by the Appellant to avail the ownership documents in respect of the suit property, the parties [Appellants] and the Respondents entered into and executed a further agreement dated 6th January 2015 and wherein the parties revoked/rescinded the previous sale agreement namely; the sale agreement dated 9th November 2014.

26. In the premises, it has been submitted that the learned trial magistrate was therefore right in finding and holding that the Appellant herein had not proved and or established his case to the requisite standard. Furthermore, it was also posited that the Appellant had also not demonstrated the loss, if any, that same suffered/accrued as a result of [sic] the purported breach of the sale agreement.

27. In the circumstances, learned counsel for the Respondent[s] has implored the court to find and hold that the appeal beforehand is devoid of merits. Consequently, the court has been invited to dismiss the appeal with costs to the Respondents.

28. Having reviewed the pleadings that were filed before the subordinate court; the evidence tendered [both oral and documentary]; the record of appeal and upon consideration of the written submissions filed by and on behalf of the parties, the determination of the instant appeal turns on three [3] pertinent issues, namely; whether the sale agreement entered into by the parties was lawful and legally binding or otherwise; whether the agreement was vitiated by misrepresentation; and whether the appellant duly proved his case in accordance with the law.

29. Regarding the first issue, it is important to state that whenever parties are entering into and executing a contract, whether for the sale of movable or immovable properties [whichever is the case] it is incumbent upon the parties to ensure that there is in place an offer, acceptance and most importantly, that the consideration has moved between the parties. In any event, it is common knowledge that the movement of consideration solemnizes the contract/sale agreement.

30. Moreover, there is no gainsaying that consideration must not be adequate. It suffices that the consideration is sufficient. Nevertheless, the consideration must be present and not futuristic in nature. To this end, it is the clear position of the law that a future consideration [like futuristic payment], does not suffice to create a lawful, enforceable and binding agreement.

31. The necessity to have all the three [3] essential ingredients before speaking to the existence of a lawful, binding and enforceable agreement/contract, was amplified and highlighted by the Supreme Court of Kenya [the apex court] in the case of Moi University v Zaippeline & another (Petition 43 of 2018) [2022] KESC 29 (KLR) (17 June 2022) (Judgment); where the Court stated thus:

> It is trite that for any contract to be valid at law, it must meet certain elements commencing with order and acceptance. The essential components of a contract as was observed by Harris JA in Garvey v Richards [2011] JMCA Civ 16 ought to ordinarily reflect the following principles:
>
> (10) 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, all 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.

32. Back to the instant matter. It is worthy to recall that the sale agreement was entered into and executed on the 9th November, 2014. Nevertheless, the agreement under reference did not speak to any consideration moving between the Respondent[s] and the Appellant as at the time of the entry into and execution of the sale agreement. Simply put, no purchase price not even a portion thereof, was paid to and in favour of the Appellants.

33. On the contrary, the impugned sale agreement alluded to the fact that the consideration/purchase price of Kshs. 2,000,000 Only; was to be paid on or before the 10th of December 2014. Suffice it to underscore that the sale agreement was referencing a future date as the date for payment of the consideration.

34. To my mind, the payment of the consideration could not be postponed to the future. Pertinently, it behooved the parties to ensure that a portion or installment thereof was paid either prior to or on the due date of execution. It is only upon the payment of the consideration, [irrespective of whether same is adequate or otherwise] that a binding contract does arise.

35. In the circumstances, I am afraid that the sale agreement which underpins the instant appeal, was not only invalid but unenforceable in the eyes of the law. In this regard, the sale agreement that was being enforced by the Appellant before the subordinate court was incapable of underpinning the suit. To this end, I come to the same conclusion as the Learned trial Magistrate that the impugned sale agreement [Contract] was unenforceable.

36. In respect of the second issue, it is evident that the Appellant herein held himself out as the registered owner of the suit property. For good measure, the preamble of the sale agreement posited/ reflected that the Appellant was the owner of the registered land, namely, the suit property.

37. Nevertheless, there is no gainsaying that by the time the Appellant herein was entering into and executing the sale agreement and in particular, contending to be the registered owner, the land in question had not been duly registered in accordance with the *Land Registration Act* 2012; or such other registration regime, if any; envisaged under the law.

38. Notwithstanding the foregoing, it is also worthy to recall that the Appellant herein had covenanted to transfer the land in question upon payment of the purchase price. For the sake of the arguments only, it is apparent that the purchase price was to be paid on the 10th of December 2024. In this regard, the necessary deduction would thus mean that immediately upon the payment of [sic] the consideration, the Appellant was to transfer the land.

39. Be that as it may, it is not lost on the court that even though the Appellant was purporting to be the registered owner of the suit property, the Appellant was not the registered owner thereof. For coherence, the certificate of title which the Appellant tendered and produced before the court showed that the suit property was [sic] registered in the name of the Appellant on the 5th of December 2017. In this regard, it is crystal clear that as at the 9th of November 2014, the appellant was not the registered owner of the land.

40. It is instructive to point out that the Appellant ought to have brought the correct facts, [if at], all to the table. To this end, it was not enough for the Appellant to purport to be the owner of the registered land with a view to attracting payments, yet the appellant knew that same [appellant] did not have the title.

41. In my humble, albeit considered view, the Appellant herein did not make full disclosure as pertains to the status of the land. Quite clearly, the appellant misrepresented the facts of the case to the Respondents and in this regard, I find and hold that the learned trial magistrate was right [correct] in finding and holding that the Appellant was guilty of misrepresentation.

42. Turning to the last issue, namely; whether the appellant proved his case to the requisite standard or otherwise. To start with, it is the Appellant who contended that the Respondents had breached the sale agreement/contract entered into on the 9th November 2014. In this regard, it was therefore incumbent upon the appellant to place before the court evidence pertaining to breach of the contract. However, there is no gainsaying that no evidence pertaining to breach of contract was tendered by the Appellant.

43. The second perspective pertaining to proof of the case beforehand, touches on and concerns whether the claim for breach of contract was properly pleaded. In this respect, it is apposite to underscore that whosoever seeks to implead a claim for breach of contract, the appellant herein not excepted, is called upon to plead and thereafter particularize, breach of contract.

44. As pertains to the necessity to provide the particulars of breach of contract, it is imperative to take cognizance of provisions of Order 2 rule 10 of the Civil Procedure Rules 2010.

45. The said provisions [supra] stipulate as hereunder:

> Particulars of pleading [Order 2, rule 10.]
>
> (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

46. It is the appellant who was contending that the Respondents had breached the sale agreement by willfully defaulting in the payments of the consideration. In this regard, it behooved the Appellant to avail particulars of breach of contract and willful default. However, there is no gainsaying that no such particulars were supplied and or pleaded.

47. On the basis of failure and or neglect to implead particulars of breach of contract and willful default, I hold the opinion that the Appellant's suit and by extension the appeal beforehand were/are legally deficient and thus invalid. [see Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd [2004] eKLR.

48. The third perspective that touches on proof of the appellant's case turns on the question as to whether there was any contract [sic] capable of breach or otherwise. While discussing issue number one [1], this court found and held that in the absence of consideration, the impugned contract was invalid and thus unenforceable.

49. In the absence of a valid and enforceable contract capable of being enforced, the question that does arise is whether the contract under reference was capable of being breached either as alleged or at all. Nevertheless, my answer to the question herein is in the negative.

50. The last [final] perspective that also touches on proof of the claim by the Appellant relates to whether or not the Appellant proved the special damages in the sum of Kshs.165,000/= only; on the basis of [sic] the demolished houses, that were said to have been standing on the suit property. Firstly,

evidence abound that the houses, if any; that were standing on the suit property were demolished by the Appellant himself and not otherwise [see the demand letters dated 10th February 2015 and 27th January 2016].

51. The other aspect touching on special damages, relates to whether same was specifically/strictly proved. It is not lost on the court that the appellant herein merely threw the sum of Kshs.165,000 only, on the face of the trial court without endeavoring to prove same. In my humble view, the learned magistrate was right in finding and holding that the claim for special damages had not been duly proven in accordance with the law. [see Superior Homes PLC vs Water Resource Authority and others (2024) KECA; where the court of appeal reiterated the need not only to plead but strictly prove claims of special damages.]

52. In a nutshell and duly guided by the principles espoused vide Peters vs Sunday Post Ltd (1958) E.A; SElle vs Associated Motorboat Ltd (1968) E.A; Abok James Odera T/A A.J Odera & Co. Advocates vs Machira (2013) eKLR and Gitobu Imanyara vs AG (2016) eKLR, respectively; I come to the conclusion that the learned trial magistrate duly evaluated and analyzed the evidence tendered by both parties and thereafter arrived at the correct conclusion.

53. Consequently, and in this regard, I find no basis whatsoever to warrant interference with the Judgment of the Learned trial magistrate.

Final Disposition:

54. Flowing from the analysis, [details highlighted in the body of the judgment] it must have become evident and apparent that the appeal beforehand, is not only misconceived but devoid of merits. In any event, it suffices to reiterate that the learned trial magistrate arrived at and came to the correct conclusion, after taking into account the facts and the applicable law.

55. In the premises, the final orders that commend themselves to the court are as hereunder;

    i. The Appeal be and is hereby dismissed.

    ii. Costs of the Appeal be and are hereby awarded to the Respondents.

    iii. The Costs in terms of clause [ii] above shall be taxed by the Deputy Registrar in the conventional manner.

    iv. The Judgment of the Learned trial magistrate be and is hereby affirmed.

56. It is so ordered.

DATED SIGNED AND DELIVERED ON THE 13TH DAY OF FEBRUARY, 2025.

OGUTTU MBOYA,

JUDGE

In the presence of

Mr. Mutuma – Court Assistant.

Miss Githinji for the Appellant.

Miss Ngumato holding brief for Mr. Murango Mwenda for the Respondents.