



Adam alias Fatuma Mohamed Haji Adam Fatuma Mohamed (Suing as the Personal Representative of the Late Haji Mohamed Adam Pursuant to Letters of Administrative Issued on 24th June 1997) v Ibrahim (Environment and Planning Civil Case 1 of 2023) [2024] KEELC 13998 (KLR) (Environment and Land) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13998 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND PLANNING CIVIL CASE 1 OF 2023
EK WABWOTO, J
DECEMBER 19, 2024

BETWEEN

FATUMA HAJI ADAM ALIAS FATUMA MOHAMED HAJI ADAM FATUMA MOHAMED PLAINTIFF

SUING AS THE PERSONAL REPRESENTATIVE OF THE LATE HAJI MOHAMED ADAM PURSUANT TO LETTERS OF ADMINISTRATIVE ISSUED ON 24TH JUNE 1997

AND

MOHAMED HURI IBRAHIM DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 1st September 2020 seeking the following reliefs:
 - a. A declaration that the defendant had violated the terms of the transfer of mining agreement.
 - b. An order for revocation and/or cancellation of the transfer of mining agreement between the plaintiff and defendant entered on the.
 - c. A permanent injunction be issued against the defendant together with his workers, agents and servants from entering and doing mining activities under PL/2018/0199 at Wananchi Ranch.
 - d. Damages for unlawful excavation and prospecting of mines under plaintiffs License PL/2018/0199.
 - e. Cost of this suit.



- f. Any other relief that this court deem fit to grant.
2. The suit was contested by the defendant who filled a Statement of Defence dated 12th April 2021 seeking dismissal for dismissal of the plaintiff's suit.

The Plaintiff's case.

3. The plaintiff averred that she entered into a transfer of mining agreement with the defendant at Wananchi Ranch under License PL/2018/0199. It was averred that during the discussions to the signing of the agreement, the plaintiff and the defendant agreed that after the defendant complies with the terms of the agreement, he will be given his own mining location. It was further averred that the defendant then took possession of the mining location and promised to honor the terms of the agreement while doing mining and prospecting activities.
4. It was contended that the defendant continued to do mining activities but failed and or neglected to honor the terms of the agreement. It was further contended that the defendant had intruded into the plaintiff's mining location and space despite violating the terms of the agreement and the actions of the defendant amounted to frustrating the agreement and the agreement qualified to be cancelled and or revoked.
5. During trial, the plaintiff testified as the plaintiff's sole witness in the matter. She adopted and relied on her witness statement dated 1st September 2020 and bundle of documents of even date together with a further bundle dated 19th March 2023. It was her testimony that the defendant was shown his place to undertake the mining activities and was to pay Kshs 500,000. He paid some money vide Mpesa. He was to pay a total of Kshs 10,000,000 within a period of 5 years and he encroached on her land when her husband passed away in 2019.
6. It was also her testimony that when she started demanding her money from the defendant, the defendant instead of paying the money offered to give her land which was never transferred. She also stated that the defendant in the course of undertaking the mining activities, encroached on the underground and on the surface. The defendant never honored the terms of the agreement.
7. When cross examined, she stated that there was a written agreement which allowed the defendant to go to the land. His activities were unlawful because he was doing it in the wrong place. There was no plot number but there was a License number.
8. On further cross examination, she stated that clause No.1 of the agreement showed the size and place of the mine. She also stated that in mining they often refer to claims and not kilometers and that the part referring to kilometers is an error and dispute that error the defendant is to be blamed.
9. When asked as to whether she received the money, she stated that while the agreement had stated that she acknowledged receiving Kshs 500,000, she was not paid the said sum on that day. The defendant was to pay her Kshs 300,000 monthly which was not done. She also acknowledged signing the agreement in the presence of some people. She has not been given any plot yet the agreement was time bound and it was to expire after 5 years. She denied ever being paid Kshs 500,000 and stated that the defendant damaged some parts of her property and she had produced photos demonstrating the same.
10. When re-examined she stated that the defendant had been allowed to mine within the ranch. She reiterated that the reference to kilometers was in error. The sale agreement refers to claims and that the money that was to be paid was to assist in the medical costs of her late husband.



The Defendant's case

11. The defendant's case is contained in his statement of defence dated 12th April 2021, witness statement dated 17th October 2022, bundle of documents dated 17th October 2022 and the defendant's testimony tendered in court.
12. In his statement of defence the defendant denied the averments made in the plaint and averred that he has complied with the terms of the agreement he entered into with the plaintiff. He also denied any breach of the particulars of the agreement as pleaded by the plaintiff and further stated that he has not frustrated the plaintiff in any way. He further denied interfering with the plaintiff's peaceful use and enjoyment of the plaintiff's mining rights as alleged.
13. During trial, the defendant testified as the sole defence witness and testified that as per the said agreement it was the plaintiff who invited him to come to the land and engage in mining activities. He was given 5 years to pay the sum of Kshs 10,000,000 and Advocate Onesmus Mwinzi acted for both parties in the agreement. He also stated that while he signed the agreement, he paid the plaintiff a sum of Kshs 500,000 and that he is still ready and willing to give the plot. He denied causing any destruction on the land.
14. On cross examination, he confirmed that the agreement was signed before Advocate Onesmus Mwinzi. He denied breaching the agreement and further stated that he paid the plaintiff a sum of Kshs 500,000 on the day of execution of the agreement and she was to follow up on the transfer of the plot to her name and she never made any effort.
15. On re-examination he stated that the agreement dated 2nd November 2019 was signed by the plaintiff's brother and son. The said agreement was signed committing to give the defendant peace and avoid destruction of the property again.

The testimony of Onesmus Mwinzi Advocate

16. During the hearing of the suit, none of the parties called any witness to support their respective cases. This prompted the court under Sections 22 (b) and 23 of the *Civil Procedure Act* to issue summons to the Onesmus Mwinzi Advocate who had acted for both parties by preparing the agreement dated 7th September 2018. This court was also guided by Section 173 of the *Evidence Act* which empowers a Judge or a Magistrate in order to obtain proper evidence to ask any question in any form at any time of any witness or to the parties about any fact and to order the production of any document or thing. This discretion must be exercised only in exceptional circumstances and with great caution and this court considered this as an exceptional case that justifies the exercise of the said court's discretion in order to do justice between the parties and determine the dispute with finality.
17. It was his testimony that he was called by the defendant to meet him and when he proceeded to the venue, he found him with the plaintiff. The defendant then instructed him to do an agreement on access to the mining area. As per the said agreement, the amount to be paid was Kshs 10,000,000 wherein a deposit of Kshs 500,000 was to be made upon execution of the said agreement. He also stated that the defendant was also to give out some land to the plaintiff together with the deposit.
18. He also stated that upon receipt of the instructions, he prepared the agreement on the next day and a sum of Kshs 100,000 was paid to the plaintiff. He also stated that the particulars of the land was not brought to his attention but that notwithstanding the parties proceeded to execute the agreement. He further stated that according to him, the plaintiff accepted to execute the agreement because she had been paid the money.



19. It was also his testimony that 2 to 3 years after execution of the agreement he was instructed to do a letter seeking for its enforcement but was not certain if the same was done.
20. On cross examination by counsel for the plaintiff he stated that it was the defendant who contacted him first and both parties had agreed that the he acts for them in preparing the said agreement. He also stated that the parties knew exactly where the mining site was located. The parties accepted the agreement as it was. The agreement was signed in his office the next day.
21. He also stated that the plaintiff received a sum of Kshs 100,000 and the next day she signed the agreement on the strength of having been paid the balance. The mode of payment had not been stipulated. He also stated that the plot had not been transferred to the plaintiff.
22. On cross examination by counsel for the defendant, he confirmed acting for both the plaintiff and the defendant in the matter. The land was measuring 1km by 2km and he had captured that in the agreement and the same could not have been a mistake. He also stated that at the time of signing the agreement, the plaintiff acknowledged payment.

The Plaintiff's submissions

23. The plaintiff filed written submissions written 20th October 2024. Counsel Submitted on the following issues;
 - i. Whether the defendant had violated the terms of the agreement.
 - ii. Whether the plaintiff is entitled to the reliefs sought.
 - iii. Costs.
24. It was agreed that it was not in dispute that parties entered into an agreement which had some gaps owing to some information that was to be provided later. The agreement had clear conditions for the defendant to comply. The defendant never presented any evidence to confirm payment of Kshs 500,000. It was the plaintiff's testimony that she only received Kshs 325,000 and the plot that was to be transferred to the plaintiff was never transferred as agreed. It was also submitted that the sum of Kshs 10,000,000 was never paid despite the defendant taking possession of the site and undertaking massive destruction which prompted the plaintiff to seek relief before this court. The cases of *Brogden -vs- Metropolitan Ply (1876 – 77) L.R App CAS 66* and *National Bank Kenya Limited -vs- Pipe Plastic Samkolit (K) Ltd (2011) eKLR* were cited in support.
25. It was further submitted that the agreement was to last for 5 years and considering that the suit had been pending for over 5 years, the same had died a natural death and lapsed. Counsel urged the court to grant the other reliefs of permanent injunction and damages. The court was urged to grant a sum of Kshs 3,000,000 being general damages for unlawful extraction and prospecting of minerals and the case of *Willesden Investment Limited -vs- Kenya Hotel Properties Limited NBI H.C.C No. 367 of 2000* and *Philip Ayaya Aluchio -vs- Crispins Ngayo (2014) eKLR* were cited in support. The plaintiff also urged the court to grant the costs of the suit.

The Defendant's submissions

26. The defendant filed written submissions dated 13th December 2024. Counsel submitted that the agreement dated 7th September 2018 was entered into by the plaintiff in her individual capacity and not in a representative capacity. The plaintiff did not sign the said agreement as administered of the estate of Haji Mohamed Adam and there is no privity of contract between the defendant and the estate of Haji Mohamed Adam and hence the suit is bad in law which ought to be dismissed.



27. It was also submitted that the plaintiff had failed to prove that the defendant breached the agreement on the following aspects; -
- a. The allegation that the defendant failed to pay the agreed deposit of Kshs 500,000 falls flat on its face.
 - b. The plaintiff confirmed giving the site upon payment of Kshs 500,000.
 - c. The defendant did release the plot but the plaintiff declined to accept it and have it transferred to her name.
 - d. The plaintiff transferred a portion covering 1km and 2km and the defendant could only be regarded as an intruder if he went beyond the said area.
 - e. In respect to the sum of 8,500,000, the same could only have been paid after expiry of 5 years yet the suit herein was filed proactively after 2 years.
28. The defendant concluded his submission by stating that the plaintiff had not produced any evidence that the defendant had breached the terms of the agreement, there are no grounds to revoke or cancel the agreement. There is no remedy known in law for revocation or cancellation of an agreement by the court, the claim for injunction has no basis since the plaintiff had already transferred the mining rights to the defendant. It was also submitted that the claim for damages for unlawful excavation and prospecting of mines and doing mining activities under PL/2018/01999 cannot be granted since it is the plaintiff who went ahead and showed the defendant the site. The court was urged to dismiss the plaintiff's suit with costs.

Analysis and Determination

29. This court after considering the pleadings filed by the parties, the oral and documentary evidence adduced during trial and written submissions filed by the parties proceeds to determine the suit on the following issues; -
- i. Whether there was breach of the agreement herein.
 - ii. Whether the plaintiff is entitled to the reliefs sought in the plaint.
30. Before this court proceeds to address itself on the two issues, it is necessary to pronounce itself on a preliminary issue which was raised by the defendant in his submissions. The Defendant in his submissions dated 13th December 2024 attacked the suit on the basis that the suit having been filed by the plaintiff in her capacity as the personal representative of Haji Mohamed Adam is bad in law and should be dismissed because the plaintiff entered into the agreement dated 7th September 2018 in her individual capacity and not in a representative capacity. The court notes that this issue was never pleaded in the Statement of Defence and was only raised in the defendant's submissions and as such the plaintiff did not have an opportunity to address the court on the same. Consequently, this court shall not consider the same since it would amount to trial by ambush.

Issue No. i Whether there was breach of agreement herein

31. Breach of agreement is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the agreement, or performs defectively, or incapacitates himself from performing.
32. In the instant case, it was evident that parties entered into an agreement dated 7th September 2018 which was entered into by the plaintiff and the defendant. It was the plaintiff's case that the defendant



breached the terms of the said agreement by failing to pay her Kshs 500,000 at the execution of the agreement upon which the plaintiff was to show the defendant the mining location and further the defendant agreed to release a plot situated in Voi measuring 50 feet by 100 feet valued at Kshs 1,000,000 and the balance of 8,500,000 payable within the expiry of 5 years from the date of signing the agreement.

33. From the evidence that was tendered herein during trial, the plaintiff denied receiving Kshs 500,000 but only acknowledged receiving Kshs 325,000 which was paid to her. The defendant on the other hand maintained that he paid the entire sum of Ksh 500,000. Owing to this uncertainty, the court summoned Advocate Onesmus Mwinzi who acted for both parties to shed light on the aspect of the payment and other terms of the agreement. However, Advocate Mwinzi in his testimony could not confirm if indeed the sum of Kshs 500,000 had been paid save for saying that when the plaintiff executed the said agreement in his presence, the same was done on the strength that the payment of Kshs 500,000 had been made.
34. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the [Evidence Act](#), which provides as follows:

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Sections 109 and 112 of the same Act states;

- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

35. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the [Evidence Act](#), (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”



36. With respect to the burden of proof, the learned Judges of Appeal in the case of Palace Investments Limited vs Geoffrey Kariuki Mwenda & another [2015] eKLR, posited thus:

“Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

37. The Court will be guided by the foregoing. The agreement in question did not provide the mode of payment of the said sum of Kshs 500,000 and in the circumstances the plaintiff has been unable to discharge her burden to the required standard that indeed she had not been paid the sum of Kshs 500,000, Moreso after she had executed an agreement acknowledging that at the signing of the agreement the defendant had made make a deposit of Kshs 500,000 which she acknowledged receipt.

38. Parties should always be aware of the consequences and repercussions before entering into any agreement since a Court of law cannot re-write 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. See the case of National Bank of Kenya Ltd vs. Pipeplastic Samkolit & another (supra).

39. As to whether or not the defendant breached the agreement by failing to transfer the plot to the defendant, it is evident that from the evidence on record that the defendant was always ready and willing to transfer the same and had even engaged the plaintiff on the issue, however the plaintiff declined the same and never gave any valid reasons as to why, and in the circumstances this court can't fault the defendant on the stalled transfer of the plot to the plaintiff.

40. In respect to the payment of the sum of Kshs 10,000,000 and as to whether or not the defendant breached the agreement by failing to pay the same, it was evident that the said agreement provided payment of Kshs 500,000 at the time of execution of the agreement and the transfer of the plot was to cover a sum of Kshs 1,000,000 and as such the remaining balance was Kshs 8,500,000.

41. Clause 4 of the same agreement provided that; -

“That the balance of Kshs 8,500,000 shall be paid by the transfer within the expiry of 5 years from the date of the agreement.”

42. From the reading of this clause, it is clear that the same was to be made within the expiry of 5 years from the 7th September 2018 when the agreement was executed and in the circumstances, the defendant could not have been in breach of the same as at the time the suit was filed on the 9th September 2020 which was only 2 years after the agreement had been executed.

43. As to whether or not the defendant breached the agreement by taking possession of the mining area without complying with the terms and conditions of the said agreement. The evidence that was adduced herein demonstrated that the plaintiff is the one who showed the defendant the mining site after the execution of the said agreement and as such the defendant did not breach the terms of the agreement by proceeding to the site and commencing the mining activities.



44. Having now carefully considered the available evidence, the court finds that the plaintiff has not discharged her burden that indeed the defendant breached the terms of the agreement as at the time this suit was filed in court.

Issue No. ii Whether the Plaintiff is entitled to the reliefs sought in the plaint.

45. The plaintiff sought for various reliefs in her plaint. The plaintiff in her submissions urged the court to cancel the agreement but at the same time submitted that the agreement had died a natural death since 5 years had lapsed after the filing of the suit. The plaintiff also urged the court to grant the sum of Kshs 3,000,000 as damages for trespass to the mining site and causing massive destruction.

46. From the evidence that was tendered herein, it was evident that the defendant has not breached the terms of the agreement and as such it is the finding of this court that the plaintiff's suit has not been proved to the required standard and as such the reliefs sought are not for granting.

47. In respect to the costs of the suit, it is the law that that costs follow the event unless otherwise stated by the court. In this instant case, the court has considered the long and cordial relationship that existed between the plaintiff and the defendant as was demonstrated during trial and in the circumstances, the court directs each party to bear own costs of the suit.

Final Orders

48. Ultimately therefore and having considered the evidence herein, the final orders from the court are as follows;

- i. The Plaintiff's suit is hereby dismissed.
- ii. Each party to bear own costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 19TH DAY OF DECEMBER 2024.

E.K. WABWOTO

JUDGE

In the presence of: -

Mr. Mwazighe for the Plaintiff.

N/A for the Defendant.

Court Assistant; Mary Ngoira.

