



**Malii v Mukonzi (Environment & Land Case 87 of 2018)
[2023] KEELC 45 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 45 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 87 OF 2018
CG MBOGO, J
JANUARY 19, 2023**

BETWEEN

BERNARD NGOVI MALII PLAINTIFF

AND

STEPHEN MUTUNGA MUKONZI DEFENDANT

JUDGMENT

1. Vide the plaint dated August 30, 2018, the plaintiff prays for the following reliefs against the defendant:
 - a) A declaration that Plot No 18 Nthongoni Market is the sole property of the plaintiff.
 - b) An order directing the defendant to pay kshs 215,000/= together with mesne profits or monthly rent of kshs 15,000/= from April 4, 2012 till payment in full or in the alternative, an order evicting the defendant from the plaintiff's plot.
 - c) Costs and interest of the suit.
 - d) Any other relief that this honourable court deems fit to grant.
2. The defendant filed a statement of defence on November 22, 2018 and denied each and every allegation of fact in the plaint.
3. The plaintiff, Bernard Ngovi Malii adopted his statement dated August 30, 2018 as his sworn evidence in chief. In support of his evidence, the plaintiff produced the list and bundle of documents dated August 30, 2018 which was marked as P EX Nos 1 -11. He averred that on November 21, 2009, he entered into a sale agreement with the defendant for the sale of plot no 18 Nthongoni Market (the suit property) at a consideration of Kshs 560,000/=. That in the suit property, there were permanent and temporary structures which were valued at Kshs 460,000/= and which he also charged for making a total of Kshs 1,028,000/=.



4. The plaintiff averred that the defendant paid him Kshs 198,000/= only. That through his advocate, his current demand and claim was for Kshs 2,160,000/=. That the defendant is still in occupation of the suit property. That the county government of Makueni wrote to the defendant complaining of irregular registration of the suit property. He prayed for judgment in accordance with the plaint.
5. In cross-examination, the plaintiff stated that after the defendant failed to pay the purchase price, they agreed that the defendant would pay him Kshs 15,000/= per month. He confirmed that in the sale agreement produced as PEX No 1, clause 4 (a) thereof indicated that the seller would not continue to have any interest in the suit property after signing the agreement. That under clause 4 (b) it is indicated that the seller cannot claim back his land as the same has been converted into money. The plaintiff added that he signed a second agreement with the defendant where in clause 4 it is shown that he had received the full purchase price of the land and that he had given his consent to transfer the land.
6. Upon further cross-examination, the plaintiff stated that he had added more information by hand in the sale agreement produced as PEX No 1. That the said information was added after the sale agreement was executed. That the demand notice sent to the defendant by his advocate did not indicate the amount that was outstanding. That the irregularity appearing on the receipt issued to the defendant by the County Government of Makueni was in the area of the suit property. That the receipt indicated 105 x 100 ft instead of 140 x 150 ft. That after the defendant failed to pay the balance of the purchase price, Kshs 198,000/= was forfeited to the plaintiff. He went on to state that even though the sale agreement was witnessed, he did not call any witnesses to court.
7. In re-examination, the plaintiff reiterated that the plot that was registered to the defendant is unknown to him and that the handwriting in the sale agreement is by the defendant's hand.
8. The defence called four witnesses. Stephen Mutunga Mukonzi (DW1) adopted his statement dated 5th April, 2019 as his sworn evidence in chief. He also produced the list and bundle of documents of even date in support of his evidence. The said documents were marked as D EX Nos 1 – 4 and 6 – 13 respectively. He urged the court to dismiss the plaintiff's case with costs.
9. In cross-examination, DW1 stated that he purchased the suit property from the plaintiff and that he lives in it. That he has a registration document from the County Government. He stated that the date of the sale agreement was 21st November, 2009. That the purchase price was Kshs 210,000/=. DW1 further stated that the agreement presented by the plaintiff in court was a forged document. That the purchase price for the suit property was not Kshs 560,000/=. That even though his signature appears in the sale agreement presented by the plaintiff to court, the purchase price was altered.
10. DW1 stated that he did not agree to pay monthly rent of Kshs 15,000/= to the plaintiff. That he did not agree with the sum of Kshs 460,000/= in page 2 of PEX No 1.
11. Peter Mutua Kithome, Mbithi Mutinda and Jones Kakunde appearing as DW2, DW3 and DW4 respectively adopted their statements dated April 5, 2019 as their sworn evidence in chief. There was no cross-examination on their part.
12. After closing their respective cases, the parties elected to file written submissions. The plaintiff filed his written submissions on May 25, 2021 while the defendant filed his on May 24, 2021.
13. The counsel for the plaintiff submitted that the sale agreement dated November 21, 2009 was duly signed by the plaintiff and the defendant and thus, it is legally binding. The plaintiff urged this court to enter judgment against the defendant in the tune of Kshs 2,587,000/=.



14. The counsel for the defendant submitted that the plaintiff solely made alterations to the sale agreement dated November 21, 2009 so that the purchase price read Kshs 560,000/=. That the said fact was conceded at the hearing. That the plaintiff executed the agreement dated March 14, 2010 and under Clause 4 thereof, the plaintiff admitted to receiving the full purchase price of the suit property which was Kshs 210,000/=. That the doctrine of estoppel precluded the plaintiff from denying that the purchase price for the suit property was Kshs 210,000/=. It was also submitted that the sale agreement dated March 14, 2010 met the threshold under section 3 (3) of the Law of Contract Act.
15. It was further submitted that the incomplete structure on the suit property and other assorted valuables were acquired through a harambee and therefore not the private property of the plaintiff. It was thus argued that the plaintiff was not entitled to compensation for the said items. Lastly, it was submitted that the plaintiff had failed to prove his case on a balance of probabilities and his claim ought to be dismissed with costs.
16. This is an ownership dispute for the suit property known as Plot No 18 Nthongoni Market. The undisputed facts of this case are as follows:-
 - i) On or about November 21, 2009, the parties herein entered into a sale agreement for the suit property.
 - ii) On or about March 14, 2010, the parties herein entered into a further sale agreement for the suit property.
17. The only apparent issue for determination is whether or not the suit property belongs to the plaintiff.
18. Both parties in this suit produced their version of a sale agreement dated November 21, 2009 (P EX No 1 and DEX No 1). The only disparity was in Clause 3 which was the purchase price of the suit property. Nonetheless, in cross-examination, the plaintiff admitted to having inserted the figure of Kshs 560,000/= under clause 3 after they had signed the agreement with the defendant.
19. Upon further cross-examination, the plaintiff admitted to having freely executed the sale agreement dated March 14, 2010. Under clause 4 thereof, the plaintiff acknowledged that he received the full purchase price and that he had consented to the transfer of the suit property to the defendant. The said agreement was produced by both parties as PEX No 4 and DEX No 2 respectively.
20. Subsequently, it is clear from DEX No 13 that the defendant applied for registration of the suit property in his name. That vide receipt produced as DEX No 3, the defendant paid the requisite registration fees. Both the application and the receipt are dated July 15, 2010. *Vide* the County Government of Makueni demand notice dated December 31, 2013 and produced as DEX No 4, the suit property reflected the name of the defendant as the proprietor of the suit property.
21. Needless to state, it is manifestly clear that the defendant procedurally obtained registration of the suit property in his name. I have no reason to doubt the plaintiff was paid the full purchase price for the property as Clause 4 of PEX No 4 indeed confirms. The plaintiff is further estopped under section 120 of the Evidence Act from denying his declaration under clause 4 which was duly attested before three other competent witnesses one of whom was DW2.
22. As a result, the parties herein are bound by their contract and this court cannot have a hand in the plaintiff's bargain with the defendant. In National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR, the Court of Appeal aptly observed as follows: -

“ 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.



There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of Fina Bank Limited v Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

23. Accordingly, the plaintiff has not demonstrated on a balance of probabilities that the defendant failed to pay the full purchase price of the suit property. The evidence conclusively suggests that the suit property validly belongs to the defendant.

24. The upshot is that the is suit herein is devoid of merit and is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED AT NAROK VIRTUALLY THIS 19TH DAY OF JANUARY, 2023.

MBOGO C.G.

JUDGE

19/1/2023

Court Assistant: Mr.T.Chuma

