



**Njau v Olewe & another (Environment & Land Case E199 of 2021)  
[2023] KEELC 15690 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15690 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E199 OF 2021  
EK WABWOTO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**SAMUEL KENNEDY NJAU ..... PLAINTIFF**

**AND**

**JANET AKECH OLEWE ..... 1<sup>ST</sup> DEFENDANT**

**EDGAR MARVIN OCHIENG' ONDURU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated June 7, 2021, the plaintiff herein filed a suit seeking for the following orders against the defendants;
  - i. A declaration that the Transfer of the suit property, Flat No. B8 on Block 2 erected on Land Reference No. 18591/9 situated in Langata Garden Estate, Nairobi to the Plaintiff is illegal, unlawful, null and void ab initio.
  - ii. A declaration that the Legal Change registered against the suit property Flat No. B8 on Block 2 erected on Land Reference No. 18591/9 situated in Langata Garden Estate, Nairobi in favour of NCBA Bank Kenya PLC is illegal, unlawful, null and void ab initio.
  - iii. An order for cancellation of the entry No. 5 and entry No. 6 in the original lease of flat No. B8 on Block 2 erected on Land Reference No. 18591/9 situated in Langata Garden Estate, Nairobi dated November 4, 2010.
  - iv. Costs of the suit.
2. The defendants upon being served with the summons and pleadings filed a statement of defence and counterclaim dated July 5, 2021. The counter claim by the defendants is against the plaintiff, Samuel Kennedy Njau as the 1<sup>st</sup> defendant and CFL Advocates as the 2<sup>nd</sup> defendant and seek the following orders: -



- a. Specific performance of payment of the purchase price pursuant to the sale agreement dated November 1, 2019 within 7 days from the judgment hereof.
  - b. General damages on lost opportunities.
  - c. Alternatively, an order compelling the 2<sup>nd</sup> defendant to honour the professional undertaking dated January 8, 2020 within 7 days from the judgment hereof.
  - d. In the alternative and without prejudice to the above prayers, an order compelling the 1<sup>st</sup> defendant to pay to the plaintiffs the contractual liquidated damages together with costs, fees and expenses incurred in pursuance of the sale agreement dated November 1, 2019 within 7 days from the judgment hereof.
  - e. Costs.
  - f. Interest at court rates on (a) (b), (d) and (e).
3. Pursuant to the court's directions issued on February 15, 2022, the matter was set for hearing on May 16, 2022 and also July 28, 2022. The plaintiff and the 1<sup>st</sup> defendant testified as witnesses in their respective cases.

**The Plaintiff's case.**

4. It was the plaintiff's case that he entered into a sale agreement dated November 1, 2019 with the 1<sup>st</sup> and 2<sup>nd</sup> defendants for sale of the apartment known as Flat No. B8 on Block 2 erected on Land Reference No. 18591/9 situated in Langata Garden Estate, Nairobi. He sought a facility from NCBA Bank Kenya PLC for Kshs 15,000,000/- to enable him purchase the property.
5. According to the plaintiff, on January 8, 2020, the financier through its advocates issued a professional undertaking to the 1<sup>st</sup> and 2<sup>nd</sup> defendants advocates requesting to be issued with completion documents in respect of the suit property to facilitate the simultaneous registration of a transfer in favour of the plaintiff and legal charge in favour of the financier.
6. It was averred that on or about June 2, 2020, the cabinet secretary, Ministry of Environment and Forestry issued pronouncements declaring various estates in Langata Constituency including Langata Garden where the suit property is located as part of the Ngong Forest. The said pronouncement rendered the sale agreement illegal and unsustainable consequences of which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants demanded for their completion documents and a refund of costs and expenses incurred.
7. It was also the plaintiff's case that he was unable to comply with the 1<sup>st</sup> and 2<sup>nd</sup> defendant's demand as the professional undertaking dated January 8, 2020 required the completion documents to be returned in the condition they were received subject to the cancellation of any entries that may have been made on the completion documents by the Land's registry.
8. It was averred that the transfer and legal charge registered in the original lease of the suit property dated November 4, 2010 were made under the mistake that the tenure of the suit property is private land particulars of the mistake being pleaded at paragraph 20 of the plaint.
9. During trial, he relied on his witness statement dated June 7, 2021 and also the bundle of documents dated June 7, 2021 and the supplementary bundle dated January 8, 2022 which were adopted as his evidence in chief.
10. In cross-examination, he stated that the agreement was between him and the 1<sup>st</sup> and 2<sup>nd</sup> defendants. He also stated that the same was registered by the parties and voluntarily executed. He also stated that he



did due diligence and that the property is registered in his name. The registration was done on April 24, 2020.

11. He further stated that the defendants met all their obligations and that the agreement was not subject to any financing. He also stated that no notice had been issued of his intention to cancel the transaction.
12. He further stated that he had not paid the purchase price but he seeks to return the title since he would not be proceeding further with the transaction.
13. He refuted claims that he is the one to be blamed for failing to complete the transaction. He also stated that the pronouncement by the Cabinet Secretary is a matter of public knowledge.
14. He also stated that he was aware that the transaction was to be completed within 90 days from the 1<sup>st</sup> November 2019.
15. When re-examined, he stated that the professional undertaking was issued through his Advocates and the financier did not avail funds due to the pronouncements by the Cabinet Secretary that affected the suit property. He also stated that he was not aware of that fact when signing the agreement and that the position relating to the suit property has not been regularized to date.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants case.**

16. The defendants case is for alleged breach of contract by the plaintiff. The defendants averred that the professional undertaking that was issued by the plaintiff's advocates herein, CFL Advocates dated January 8, 2020 for the payment of the purchase price in full was not honoured and has not been honoured to date.
17. It was also averred that the professional undertaking provided that time shall be of essence in respect to all the parties obligations and that completion documents would be returned if within 45 working days from the date of forwarding the completion documents payments of the amounts with respect to the suit property were not made or the registration and transfer of the charge was not successfully effected.
18. It was further averred that it was an express term of the professional undertaking that in the event of the occurrence of the eventualities aforesaid, the costs of rectifying and cancelling any entries made on any of the originals forwarded shall be borne by the plaintiff on a full indemnity basis.
19. It was also stated that the plaintiff by a letter dated March 8, 2021 fundamentally breached the sale agreement dated November 1, 2019 by refusing to pay the purchase price and purporting that he would not be proceeding with a transaction which was in fact complete.
20. The defendants contended that as a result of the breach, by a letter dated May 21, 2021 they wrote to the plaintiff requesting for the release of the completion documents as delivered together with a cheque for refund of costs and expenses incurred by the defendants plus a sum equivalent to 10% of the purchase price being the agreed liquidated damages. It was further contended that the plaintiff's action was in bad faith, illegal, unlawful and carried out in express breach of fundamental terms of the contract particulars of which were pleaded at paragraph 14 of the defendants statement of defence.
21. During hearing, Janet Akech Olewe, the 1<sup>st</sup> defendant testified as the sole defendants' witness. She adopted her witness statement dated July 5, 2021 and also relied on her bundle of documents dated the July 5, 2021.
22. It was her testimony that the defendant's entered into a sale agreement with the Plaintiff, which sale agreement had specific terms one of them being payment of liquidated damages of 10% of purchase price should there be any breach by the Plaintiff. There was also a professional undertaking done and



the completion documents were presented to the Plaintiff's Advocates upon which the property was transferred to the names of the plaintiff on April 24, 2020.

23. She also added that there was no communication from the plaintiff in respect to the transfer made. Later they were informed that the bank would not be proceeding with the transaction owing to the information received that the suit property was on forest land. A position which prompted them to respond and inform the Plaintiff to meet their contractual obligations which required them to return the completion documents together with liquidated damages for breach of contract.
24. It was also the testimony of the 1<sup>st</sup> defendant that they had tried to amicable resolve the issue but the same was not successful since the plaintiff declined to pay their damages. She urged the court to dismiss her suit and award her prayers sought in the defendants counterclaim.
25. When cross-examined, she stated that the lost opportunities were encountered when they were not able to transact on the property. She also stated that clause 8. 1 of the agreement required the payment of damages.
26. When referred to clause 8.5 of the same agreement she conceded that parties were required to bear own costs.
27. On further cross-examination, she stated that the defendants were not a party to the charge neither did they engage the financier. She also stated that they took possession of the property sometimes after September 9, 2019 and they are still in physical possession to date.
28. She further stated that the plaintiff's payment in respect to the purchase price was to be made by the financier as per the professional undertaking.
29. It was also stated that at the time of the agreement, there were no claims of the property being on Ngong Forest Reserve since they also had done due diligence and the title had no defect. The alleged defects of title arose after the transfer had been done.
30. When re-examined, she stated that the lease was in respect to an apartment since there was several apartments on the property and that when they were doing the agreement, they never anticipated any litigation since completion date was to be within 90 days.

#### **The Plaintiff's submissions.**

31. The plaintiff filed his written submissions dated August 19, 2022 and also filed supplementary written submissions dated December 16, 2022 through the firm of CFL Advocates. In his submissions, five issues were outlined for determination: -
  - i. Whether the plaintiff has established the existence of mistake at the time of entering the sale agreement.
  - ii. Whether the plaintiff is entitled to cancellation of entries made pursuant to the mistake.
  - iii. Whether the defendants have established a case for specific performance.
  - iv. Whether the defendants are entitled to general damages for alleged lost opportunities, liquidated damages together with costs, fees and expenses allegedly incurred in pursuing the sale agreement.
  - v. Whether the defendants have established a breach of the professional undertaking dated January 8, 2020.



32. On whether the plaintiff has established a mistake at the time of entering the sale agreement, it was submitted that at the time of entering the agreement, the plaintiff bargained on the assumption that the suit property is private land and that the defendants had a clean title over the suit property which is not the case. Further the Plaintiff was not privy to the mistake at the time of entering the agreement. The plaintiff submitted at length and made reference to the report dated November 2020 prepared by the Departmental Committee and Environment and Natural Resources which confirmed that the suit property was part of Ngong Road Forest Reserve that was not excised from the Ngong Road Forest Reserve in accordance with section 4 of the forest Act.

### **Issues for determination.**

33. The court has considered the cases put forward by the plaintiff, the defendants, the submissions of the parties and authorities cited together with the evidence adduced herein and is of the view that the following are the main issues for determination:
- i. Whether the plaintiff has established the existence of a mistake at the time of entering the sale agreement.
  - ii. Whether the plaintiff has proven his case to warrant the issuance of the prayers sought in the plaint.
  - iii. Whether the defendants has proved their claim in the counter claim to warrant the orders sought in their counterclaim.
  - iv. What orders should issue as to costs.
34. I shall now proceed to analyze all the issues sequentially.

### **Analysis and determination**

35. It was the plaintiff's case that at the time of entering the sale agreement, he was under the assumption that the suit property is private land. The plaintiff submitted that the assumption that the suit property is private land did correspond with the fact that the suit property was exercised from Ngong Road Forest Reserve. According to the plaintiff, the defendants were not capable of transferring any interests on the suit property and did not have a clean title and that he as the plaintiff was not privy to the said mistake.
36. On this issue the defendants submitted that the alleged mistake cannot offer the plaintiff any cover for the reasons that the report of the National Assembly made on November 12, 2020 and the declarations made by the Cabinet Secretary in charge of Environment and Forestry are neither binding nor impeaching the defendants title as they were made way after the completion of the subject transaction. The defendants argued that a party cannot lawfully enter into a contract, breach the same then scout for some distant none binding reasons outside the contract period as a justification for his breach and a ground to repudiate his contract. The defendants contended that just like the plaintiff they too carried out due diligence before purchase of the suit property. It was also submitted by the defendant that no competent court with the requisite jurisdiction like the Environment and Land Court has ever made a determination that the suit property is public land, neither has any government agency not the government itself initiated any proceedings before this court or any court within the Country.
37. A mistake can only vitiate a contract if it is on the part of either or both parties in respect of either the subject matter or some fundamental term that goes to the root of the contract.



38. The Black Law Dictionary defines “subject matter” as “the issue presented for consideration; the thing in which a right or duty has been asserted; the thing in dispute”. The same dictionary also defines “material facts” as “a fact that is significant or essential to the issue or matter at hand”.
39. The plaintiff in his submissions referred to the Court of Appeal case of *Tropical Food Products International Limited v Eastern and Southern African Trade and Development Bank* [2007] eKLR where the court was of the considered view that mistake entitles a party to a declaration that the contract is void regardless of whether the mistake was common, mutual, or unilateral.
40. In the instant case, it is evident that the information to the effect that the suit property was not lawfully exercised from the Ngong Road Forest Reserve which was also indicated in the report of the National Assembly Committee was a mistake which was only brought to the attention of the plaintiff after the agreement had been executed by the parties. While I would agree with the submissions made by the defendants that no court of law with the requisite jurisdiction is yet to pronounce itself on the matter, it affected the transaction herein to the extent that the plaintiff was unable to obtain a facility from the bank which would have been part of the purchase price toward the acquisition of the suit property. In view of the foregoing, it is the finding of this court that indeed the Plaintiff has established the existence of such mistake which affected the agreement between the parties.
41. On whether the plaintiff has proven his case to warrant the issuance of the prayers sought in the Plaintiff, 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.”
42. 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.”
43. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea v 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.”

44. 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 v 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.”

45. The court will be guided by the foregoing. in the present case, the plaintiff was able to demonstrate from his oral testimony together with the documentary evidence that was produced in evidence that indeed there existed a mistake which affected the transaction and this court having found that the plaintiff has established the existence of a mistake which affected the completion of the transaction, it is the finding of this court that indeed the plaintiff has been able to prove his case on a balance of probability to warrant the grant of some of the reliefs sought in the Plaintiff.
46. In the counterclaim, The defendants had sought for several orders. The 1<sup>st</sup> defendant adduced evidence in support of the counterclaim. It was her testimony that the defendants entered into a sale agreement with the plaintiff, which sale agreement had specific terms one of them being payment of liquidated damages of 10% of purchase price should there be any breach by the plaintiff. There was also a professional undertaking done and the completion documents were presented to the plaintiff's Advocates upon which the property was transferred to the names of the plaintiff on April 24, 2020. On cross examination she conceded that despite the breach of the agreement, the defendants took possession of the property sometimes after September 9, 2019 and they are still in physical possession. Having carefully considered and analyzed the evidence adduced by the parties and further having earlier held that there existed a mistake which affected the transaction, it is the finding of this court that the defendants counterclaim has not been proved to the required standard to warrant grant of the prayers sought. Further in view of the fact that the defendants have already retaken possession of the suit property and have been in occupation since September 2019 the prayers sought cannot be granted as pleaded in the counterclaim.
47. On the issue of costs, although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap. 21). However, considering the circumstances of this case, I direct that each party bears own costs of these proceedings.

### **Final orders**

48. In the end, the suit by the Plaintiff and the Counterclaim by the 1<sup>st</sup> and 2<sup>nd</sup> defendants are disposed as follows: -



- a. An order is hereby issued for cancellation of the entry No 5 and entry No. 6 in the original lease of flat No. B8 on Block 2 erected on Land Reference No. 18591/9 situated in Langata Garden Estate, Nairobi dated November 4, 2010.
- b. The counter claim by the 1<sup>st</sup> and 2<sup>nd</sup> defendants is dismissed.
- c. Each party to bear own costs of the suit.

Judgment accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

**E.K. WABWOTO**

**JUDGE**

In the presence of:

Ms. Achola h/b for Mr. Wesonga Plaintiff.

Mr. Kimathi h/b for Mr. Agwara for 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Court Assistants: Caroline Nafuna and Philomena Mwangi.

