



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELCA NO. E12 OF 2020**

**JULIA KAINDA M'MBIJIWE.....APPELLANT**

**VERSUS**

**LUKE MURIUNGI MAKATHIMO.....RESPONDENT**

*(Being an appeal from the Judgment of Hon. T.M. Mwangi (S.P.M.)*

*delivered on 18th October, 2020, in Meru C.M.'S ELC No. 79 OF 2019)*

**JUDGMENT**

**A. PLEADINGS**

1. The appellant had been sued for breach of a sale agreement dated 29.9.2018 in which she had sold an acre from her **L.R No. Kibirichia/Kibirichia/1839** for **Kshs.1 million**.
2. The respondent had sought for specific performance, liquidated and general damages for the breach and in the alternative, a refund of **Kshs. 700,000/=**.
3. In her defence, the appellant averred it was the respondent who had breached the sale agreement by subdividing the land without her consent or approval, sold the subdivided portions before title the passed to him and allegedly started construction on the sold the portions hence making the contract unenforceable.
4. In the counterclaim, the appellant sought for the declaration that the respondent had breached the agreement, making it impossible to enforce it, eviction from the suit land, general damages for breach plus costs and interests.
5. In a reply to defence and defence to the counterclaim, the respondent averred he had made efforts to book for the land control board but the appellant failed to attend. Further, the respondent pleaded it was the appellant who despite subdivision and intervention by the local chief who frustrated the efforts to transfer the land in readiness for the payment of the balance.
6. As regards subdivision, resale and the alleged permanent construction without approval or consent, the respondent averred that the appellant knew he operated a real estate business, that after he was given vacant possession it meant that the respondent had a contractual rights to exclusively use of the suit property, both physically and legally and was further certain that the appellant was not going to breach any terms of the sale agreement, and had used the property for the purpose it was intended for .

7. In defence to the counterclaim the respondent averred he only put construction materials on the suit land in readiness for the construction since it was an express term in clause (2) of the sale agreement to the completion date to be by the end of March 2019, which became impossible due to the appellant's failure to attend the land control board. Further, the respondent averred it was the appellant who caused the respondent's construction materials to be stolen and inconvenienced the contractor who was begin the construction by April 2019.

8. Lastly, the respondent averred vacant possession was handed over immediately hence the occupation was in line with the sale agreement.

## **B. TESTIMONY**

9. The respondent adopted his witness statement dated 9.7.2019. He testified that the appellant and her daughter Eunice Karimi Mbijiwe approached him on 24.4.2018 and offered to sell to him the suit land. He stated they wrote a sale agreement dated 29.9.2018 to purchase one acre out of **L.R Kibirichia/Kibirichia/1839** for **Kshs.1 million** payable as per clauses 1 (a) and (b) of the sale agreement with the last payment due at completion date which was at the end of March 2019.

10. He told the court he facilitated the subdivision of the land, the portion he had bought was excised and subdivided into 6 portions. Upon taking possession on the signing of the sale agreement, the respondent testified he started looking for potential buyers for the plots given he was engaged in real estate business.

11. The respondent went on to state that he booked the land control board meeting for 14.5.2019, 12.6.2019 and 10.7.2019 all in vain following which he received a letter dated 25.3.2015 from the appellant's lawyer accusing him of breach of the sale agreement to which he responded vide his letter dated 28.3.2019, expressing his willingness to honor the terms of the agreement by paying the balance once the appellant attended the land control board meeting.

12. He produced the authority to sell dated 24.4.2018, sale agreement dated 29.9.2018, acknowledgement receipt dated 22.11.2018, a letter from the appellant dated 25.3.2019, his letter dated 28.3.2019, a mutation form, demand letter dated 14.5.2019 and a requisition to compel attendance on 1.7.2019 as **P exhs 1 – 13 (a) (b) and (c)** respectively.

13. In cross examination, the respondent admitted the sale agreement was explicit that no permanent developments could take place before the completion date, that he could not transfer what was not belonging to him though he had resold the land to five purchasers, that he had reported the appellant to the police for refusal to transfer the land and lastly, out of the consideration he had only paid **Kshs. 750,000/=**.

14. Regarding **P exh 12 (a)**, the respondent admitted that they were filed by the petitioner's daughter at the land's office. He insisted that the appellant was the one who had refused to attend the land control board for consents and transfer after which he would have cleared the balance of **Kshs. 400,000/=**.

15. Further, the respondent insisted the sale agreement indicated that upon signing the agreement, he was entitled to vacant possession immediately. On the issue of completion date of March 2019, the respondent admitted the construction had started in April, 2019 since the transfer ought to have occurred on 13.3.2019 and after the appellant failed to attend the land control board she was summoned by the appellant before the chief on 14.3.2019 whereof he made it clear to her that once the land control board consents were issued, he was willing to clear the balance.

16. Further, the respondent testified the demand letter by the appellant was silent on the refund nor did it state if the sale agreement stood cancelled or not.

17. PW2 adopted his witness statement dated 9.10.2019 confirming that on 24.9.2018, he attended the offices of PW1 where he witnessed **Kshs. 300,000/=** being paid to the appellant and her daughter Eunice Karimi subsequent to which they all appeared at the chief's office on 14.3.2019.

18. PW3 adopted her witness statement dated 24.10.2019 and testified he had entered into a sale agreement for 50ft by 100 ft plot

for **Kshs.400,000/=** with PW1 took over possession in April 2019 but could not pay the balance since the appellant had declined to attend the land control board. He confirmed there was a permanent building on the land belonging to the respondent.

19. DW1 adopted her witness statement dated 12.10.2019 and told the court that, following a conversation on an offer to sell an acre for **Kshs. 1,100,000/=** to the respondent, he gave them **Kshs. 25,000/=** as a commitment and intention to purchase the land following which a sale agreement was entered into on 29.9.2018, a surveyor was sought to subdivide the land into six plots but proceeded to create a road reserve without their knowledge or approval.

20. DW1 testified eventually, the respondent brought in potential buyers to the land before he had cleared the balance but instead started threatening or intimidating her to complete the sale agreement. As a result, she told the court she was no longer interested in going ahead with the sale agreement save to refund the deposit so that the respondent could vacate the land. She produced the authority to sell as **D exh (1)**, a sale agreement as **D exh (2)**, an acknowledgement receipt as **D exh (3)**, demand letter as **D exh (5)**, police summons as **D exh (6)**, requisition form from police as **D exh (7)**, and photographs as **D exh (8)** respectively.

21. In cross examination, DW1 admitted giving the respondent the authority to dispose of the land for the 2 acres which she never revoked and secondly acknowledged receiving **Kshs. 700,000/=** as deposit from the respondent with the balance being payable after the transfer.

22. DW1 admitted that at the time she was demanding for the balance; land control board had not been sought for and obtained nor had she given the respondent any completion documents.

23. Further, DW1 told the court the demand for the balance arose after the respondent had allegedly started construction on the suit land though he was given vacant possession upon signing the sale agreement which in her view did not amount to consent from her to any developments before the completion date.

24. On the issue of the land surveyor, DW1 admitted her own surveyor had subdivided the land subject to the agreement but the respondent had allegedly contracted another surveyor to subdivide 2 acres which was not part of the sale agreement. She could not however tell which consent was used by the two surveyors to subdivide the land.

25. The appellant testified that paragraph (3) of the sale agreement was clear that no permanent developments could not be undertaken before the completion date and that any potential buyer had to be introduced to her by the respondent.

26. DW2 adopted her witness statement dated 12.10.2019. She testified she owned **Land Registration No. Kibirichia/Kibirichia 1839**, which she had admitted her daughter DW1 was to offer for sale and later sold one acre of it for **Kshs.1,100,000/=** to the respondent vide a sale agreement dated 29.9.2018. She stated after the agreement, the respondent brought a surveyor who subdivided the land in order to excise the one acre.

27. Contrary to the sale agreement, DW2 told the court that the respondent started bringing potential buyer to the land and erected a permanent building on the portion before he cleared the balance of **Kshs.400,000/=**. She told the court she confronted the respondent over the aforesaid resale but instead he started sending authorities and third parties to intimidate and or force her to transfer the land including placing her behind police cells, for obtaining money through false pretenses. Given bad blood she told the court that she had lost interest in the transaction and was only willing to refund the deposit.

### **C. GROUNDS OF APPEAL**

28. The appellant complaints against the verdict of the trial court were that; the court had failed to appreciate the facts, evidence issues, submissions and the law as presented by her; erroneously made a finding on when the construction on the plot started despite the demand letter dated 25.3.2019; exonerated the respondent from the breach of clause (3) of the sale agreement and lastly erroneously found **Kshs.2,200,000/=** was payable yet it was the respondent who had substantially breached the sale agreement; trivialized the action by the respondent to enter into sale agreements with third parties before the property could pass to him yet it was a fundamental breach of the sale agreement; erroneously awarded interest; dismissed her claim and failed to award her general damages or interests on costs yet the court awarded interest on costs to the respondent after erroneously holding his case had wholly succeeded but her claim only succeeded partially when in fact the court should have dismissed the respondent's case and proceeded

to allow her claim

29. This being a first appeal this court is enjoined by law to rehearse re-hear and re-evaluate the entire record and come up with its independent findings and conclusions while bearing in mind that the trial court had the benefit of hearing and observing the parties and their witnesses. See Jackson Kaiga Kivindu -vs- Penina Wanjiru Mathere (201) eKLR.

#### **E. ISSUES FOR DETERMINATION**

30. The issues commending themselves for this court's determination are:

**(i) If there was a valid sale agreement between the parties herein.**

**(ii) If there was breach of the sale agreement by the parties.**

**(iii) What were the remedies available to the parties upon breach"**

**(iv) If the trial court applied the correct law on the pleadings, facts, evidence issues and submissions presented by the parties.**

31. It is trite law that parties are bound by their pleadings and issues flow from pleadings. See IEBC & another -vs- Stephen Mutinda Mule & 3 Others (2014).

32. In line with **Order 42 Rule 16 Civil Procedure Rules**, parties filed written submissions dated 12.10.2021 and 15.10.2021 respectively.

33. The appellant submitted that clause 3 of the sale agreement was clear that no permanent constructions could occur before the transfer documents were signed and the balance paid by 31.3.2019 hence trial court was in error on facts and law.

34. On the liquidated damages awarded, the appellant submitted the respondent having been the one in breach the court was wrong to award him damages since he did not deserve them going by the holding in Surya Holding Ltd and 2 others -vs- CFC Stanbic Bank Ltd (2014) eKLR citing an approval Alghussein establishment -vs- Eton college (1991) 1 Aller 267 Cheall -vs- Association of Profession to Executive Clerical and Computer Staff (1983) 1All Er Mwangi -vs- Kiiru (1987) eKLR, Hassan Zubeidi -vs- Patrick Mwangangi Kibaiya and another (2019) eKLR.

35. As to resale of the land before the completion date the appellant submitted the respondent could not pass title to third parties what he did not own in the first instance before he had met his obligations with the appellant and that the land control board form at page 87 and 90 of the record of appeal demonstrated the respondent was seeking direct transfer which was illegal and a breach hence urged the court to invoke the principle of *nemo dat quod non habet* which could not be trivialized.

36. On the question of interest on costs, it was submitted it was not pleaded and went contrary to **Section 27 Civil Procedure Act** for lack of justification. Reliance was placed on Jane Wanjiku Wambu -vs- Anthony Kigamba Hato and 3 others (2018) eKLR.

37. Lastly, the appellant urged the court to find it was the respondent who breached the sale by erecting building whereof she rescinded the agreement which had become voidable and in so doing, she gave the notice of breach before the completion date hence was entitled to damages for the breach whereas the respondent was only entitled to a refund and that a party in breach could not benefit from his wrong doing and enforce the agreement.

38. On the other hand, the respondent submitted that the trial court was right in enforcing the agreement as it was guided by the holding that courts did not rewrite agreements as held in Pius Kimaiyo Lagat -vs- Cooperative Bank of Kenya Ltd (2017) eKLR.

39. The respondent submitted that the trial court was right in finding the appellant had breached the sale agreement as at 11.3.2019 when she failed to attend the land control board meeting so the demand letter dated 25.3.2019 was coming only 6 days before the completion date after the fundamental breach afore stated hence, the applicant was seeking justice with unclean hands and could not therefore be entitled to the reliefs sought.

40. On the mode of payment, the respondent submitted **Pexh4** indicated **Kshs.700,000/=** had been paid by 22.11.2018 and in line with paragraph 1 (a) as read together with 1 (a) and (b) of the sale agreement, **Kshs.300,000/=** was to be paid after the subdivisions had occurred hence the respondent had not breached any clause since **Kshs.400,000/=** was to be payable after at the signing of the transfer forms hence **Pexh5** contradicted the sale agreement.

41. The law governing land sale agreement in Kenya is the **Law of Contract Act and Sections 38-42 of the Land Act**. It is a general principle of law that parole evidence should not be used to contradict that which parties reduced into a contract and courts shall enforce contracts unless they are illegal or procured through fraud or coercion. See *Muthuri -vs- NIC Bank Ltd (2003) KLR 145, Caroline Cherono Kirui -vs- Liner Cherono Towett (2018) eKLR, Fidelity Commercial Bank Ltd -vs- Kenya Grange Vehicles Industries Ltd (2017) eKLR.*

42. In this case, parties signed a sale agreement dated 29.9.2018 where the appellant was selling and transferring one acre of her land from **L.R No. Kibirichia/Kibirichia/1839** to the respondent for **Kshs.1,100,000/=** payable at **Kshs.300,000/=** during the signing to the agreement **Kshs.100,000/=** by 6.16.2018 and **Kshs.300,000/=** after subdivision of the parent parcel number and **Kshs.400,000/=** at the signing of the transfer forms in favor of the respondent.

43. The appellant undertook to apply for and obtain the requisite consent from the land control board before the completion date of end of March 2019. Clause 3 of the sale agreement provided that vacant possession was to take place after the signing of the agreement provided that no permanent developments were to be erected before the signing of the transfer forms in favour of the respondent. Further, the sale agreement and indicated that the date of the transfer was to coincide with the date of clearance of the balance of the consideration.

44. The respondent claim was that the appellant had breached the sale agreement by failing to attend to the land control board meeting in order to affect the transfers. On the other hand, the appellant was counter accusing the respondent for breach of the sale agreement by causing subdivisions to the land without her consent or approval, selling some portions to third parties before the property had passed to him, starting permanent construction on the land, making false claims against her and hence rendering the contract unenforceable.

45. Looking at the sale agreement, there is no doubt that **Kshs.300,000/=** was paid at the signing of the agreement whereas **Kshs.300,000/=** was paid on 22.11.2018 in line with clause 1 (c) of the sale agreement. This was after the subdivision had been affected as per the mutation form serial no. 04406002. One of the terms of the sale agreement was that there was going to be excision of the one acre in favor of the respondent. It cannot therefore be true that the appellant did not consent or approve the subdivisions given the sale agreement and the acknowledgement of **Kshs.300,000/=** after the mutation form was signed.

46. Once the subdivisions were made and payments to that effect paid the next step was for the appellant to book the land control board for the transfer in order to beat completion date of end of March 2019.

47. The point of departure by the two parties are set out in **Pexhs 5, 6, 8, and 12 a-c.**

48. It was the duty of the appellant under clause 2 of the sale agreement to apply for and obtain the requisite consent of the land control board to expeditiously ensure the transaction was finalized by the completion date. It was also the duty of the respondent to ensure that he did not undertake any permanent developments on the suit land before title passed to him under clause 3. Clause 4 provided that the appellant was to bear the cost of the land control board consents and transfer.

49. Looking at the pleadings and evidence tendered it is apparent the parties after the payment of **Kshs.300,000/=** on 22.11.2018 took no action towards facilitating the process of land control board and transfer until the appellant wrote **Pexh 5** where she demanded for the balance and damages as per clause 5 of the sale agreement after the respondent had allegedly erected permanent structures on the suit land which was contrary to clause (3).

50. Even though the respondent alleged in **Pexh6** he had sent **Kshs.6,000/=** to the appellant on 26<sup>th</sup> February 2019 for the land control board scheduled for 11<sup>th</sup> March, 2019 and hence maintained she was the one who had breached clause 1 (2) and 2 of the sale agreements, he did not deny or admit the issue of putting up permanent structures on the suit land which was also a fundamental breach of the sale agreement.

51. Further, in **Pexh8** the respondent tried to bring in other terms to the sale agreement which did not form part of it such as on the handover of completion documents to enable him process the title in exchange of the balance and that he was in real estate business dealing with the buying and selling of properties.

52. In my considered view the sale agreement was between the appellant and the respondent. Solution properties and agency as indicated in **Pexh1** was not a party to the sale agreement. There was nothing indicating the sale agreement that the respondent was a real estate businessman who could offer for sale and transfer the suit premises before the completion date.

53. The sale agreement was clear on the completion date and the obligation of each party. In **Pexh5** the appellant sought for her balance before the completion date. There is nothing to indicate that respondent took any remedial measures to complete the sale agreement before the deadline especially when the appellant had expressed willingness to complete the sale agreement in spite raising a fundamental breach of permanent constructions on her land before completion date.

54. The fact that the respondent was handed vacant possession at the signing of the sale agreement did not include the consent to offer for sale properties to third parties and authority to commence permanent developments. There was no evidence produced by the respondent to show whether he notified the appellant over his intentions to offer the portions for sale to third parties and erect permanent buildings before the completion date.

55. In line with **Section 41 of the Land Act 2012**, the appellant gave the respondent a notice to remedy the breach but he did not do so.

56. The appellant pleaded and gave evidence in support of the claim for rescission of the sale agreement. In the notice dated 25.3.2019, she was still of the view that despite the breach by the respondent the agreement was still enforceable. **Section 41 of the Land Act** required her to give the mandatory statutory notice of 30 days. The notice given was for less than 6 days towards the completion date. Evidence was also tendered that monies were sent to her to book the land control board by 26.2.2019 and that when she failed to attend the land control board meeting on 11.3.2019 the local chief was notified to intervene. This means that the appellant also contributed to the non-completion of the sale agreement.

57. Similarly, evidence was also tendered that she was facilitated and or was privy to some transactions involving the respondent with third parties who were seeking to buy the land. It cannot therefore be true the appellant was not aware of the developments which had occurred on her land prior to the completion date. This may be the reason perhaps in her notification notice, she still thought the sale agreement could be completed despite the alleged breach on the party of the respondent.

58. Due to the foregoing my findings are that there was in existence a valid sale agreement which both parties breached and made it impossible to complete before the set deadline. They did not also make any concerned efforts to remedy the situation before and soon after the aforesaid deadline.

59. As to the remedies available, the respondent claim was for specific performance and liquidated damages in the alternative a refund of Kshs.700,000/= whereas the appellant claimed for a declaration that the respondent had breached the sale agreement, eviction and general damages for breach.

60. Time was of essence in this case. Parties knew the deadline of end of March 2019 was approaching. See *Njamunya -vs-Nyaga (1983) KLR 282*. Instead both parties contributed to the gridlock and started blaming each other for the breach. None sought for the extension of the completion date and or variation of the sale agreement.

61. In *Rioki Estate Co. (1970) Ltd -vs- Kinuthia Njoroge (1977) Kenya LR 146, EACA* the court held, it could not award remedies on the basis that the transaction contemplated in the sale agreement did take place or did not achieve the intended result due to frustration and was nullified by the acts of the respondent.

62. In *Housing Company of East Africa Limited V Board of Trustees National Social Security Fund & 2 Others [2018] eKLR*, the court held that contracts were voluntary undertakings and parties to them were free to specify the terms and conditions of their agreement.

63. The sale agreement was clear and unambiguous as to the consequences of breach. The court has no right to rewrite the contract but to interpret the same the way it is. Parties knew what they were signing for and the consequences of breach.

64. Given that the applicant consented to vacant possession and the subdivisions but failed to effect the land control board consent to transfer the land on time or at all, coupled with the fact that the respondent had also breached the sale agreement by commencing permanent developments thereon and the fact that the respondent had indicated both in the **Pexhs 7-8**, the pleadings as well as evidence that he was willing to complete the sale agreement, my finding is that the appellant had no right to purport to rescind the sale agreement so as to avoid her contractual obligations. See *Manzoor -vs- Baram [2003] 2 E.A 580*.

65. As regards the appellant and given the respondent took advantage of the sale agreement and proceeded to dispose portions to third parties and or erect permanent buildings, I find the appellant entitled to half of the special damages as agreed in clause 5 of the sale agreement.

66. In the premises, I find the appeal merited. The respondent's suit in the lower court is allowed in terms of the prayer for specific performance whereas the counterclaim by the appellant is allowed in terms of a declaration that the respondent had breached the sale agreement to the extent of erecting permanent structures on the suit premises before the completion date, hence the appellant is entitled to half of liquidated damages as per clause (5) of the sale agreement.

67. Costs to the appellant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF MARCH, 2022**

**In presence of:**

Munene for appellant

**HON. C.K. NZILI**

**ELC JUDGE**



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