



**Michieka & another v Makone (Environment & Land Case 44 of 2020)
[2022] KEELC 13293 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13293 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 44 OF 2020
MD MWANGI, J
SEPTEMBER 27, 2022**

BETWEEN

BRENDA MICHIEKA 1ST PLAINTIFF

STANLEY MICHIEKA 2ND PLAINTIFF

AND

HELLEN MAKONE DEFENDANT

RULING

Background

1. The plaintiffs herein were at the material time wife and husband respectively, whereas the defendant is a blood sister of the 1st plaintiff. The Plaintiffs' case is that sometimes in the year 1993, the plaintiffs, who were then residing in the USA made an arrangement with the defendant whereby the defendant agreed to help them acquire a half (1/2) acre plot at Runda in Nairobi at a discounted rate.
2. The plaintiffs in their further amended plaint amended on July 20, 2018 aver that they sent the defendant a total of USD 5,700- between the year 1993 & 1995 towards the purchase of the plot. The said amount according to the plaintiffs was the full purchase price for the plot. The plaintiffs further allege that all along, the defendant fraudulently misrepresented to them that she had actually purchased the 1/2 acre plot at Runda on their behalf and that she was in the process of transferring it to their names which representation did not materialize.
3. The plaintiffs therefore affirm that the defendant fraudulently obtained their money and converted the property that was intended to be theirs to be her own. The plaintiffs particularize the allegations of fraud, misrepresentation and conversion at paragraph 10 of the amended plaint. They aver that the defendant purchased the parcel of land, LR No 7785/649, registered it in her name and failed to transfer it to the plaintiffs, contrary to their agreement. The particulars thereof are:-



- i. The defendant purchased parcel of land LR No 7785/649 on behalf of the plaintiffs but which she registered in her name and has failed, ignored and refused to transfer it in favour of the Plaintiff.
- ii. The defendant advised the plaintiffs that Hon Njenga Karume was to subdivide a parcel of land in Runda which parcel of land would be transferred in favour of the plaintiffs. Hon Njenga Karume has failed to do so.
- iii. The defendant has on several occasions pointed out to the plaintiffs different parcels of land allegedly being the parcel she bought on behalf of the plaintiffs.
- iv. The defendant has taken advantage of her familial ties with the plaintiffs and their absence from Kenya to deny them their entitlement to the parcel of land.
- v. The defendant indicated that she had identified a parcel of land which was being sold by M/s Standard Chartered Bank, where she worked as a manager, under statutory power of sale and that the said land was in Runda.

4. The plaintiffs therefore pray for judgment against the defendant for: -

- a. An order of specific performance be and is hereby issued requiring the defendant within 30 days from the date of judgment to execute all the necessary documents to effect the transfer of LR No 7785/649 Runda, Nairobi and in default, the Deputy Registrar of the court to execute all such documents in place of the defendant.
- b. In the alternative, the defendant is hereby directed within 30 days from the date of judgment to pay the plaintiffs a sum of money equivalent to the current market value of the $\frac{1}{2}$ acre property at Runda Estate Nairobi.
- c. Exemplary/punitive damages.
- d. Restitution damages.
- e. Cost of the suit plus interest from the date of filing suit.
- f. Interest on (b) above at market rate from the date of default till payment in full.

Response by the Defendant.

5. The defendant in her amended statement of defence dated September 17, 2018 denied the plaintiffs' claim in its entirety. The defendant admitted receiving the sum of USD 5,700- on diverse dates between the year 1993 and 1995 which amount she was 'to hold for the plaintiffs as they had intended to buy land'. The defendant however states that she advised the 1st Plaintiff (her sister) that the amount of money sent was insufficient to secure a plot. She avers that she is still holding the money sent and she has always been ready to refund the same.
6. The defendant vehemently denied the plaintiffs' claim that she converted any property belonging to the plaintiffs to her own use as alleged. Further the defendant denies any oral agreement with the plaintiffs as alleged to purchase $\frac{1}{2}$ acre plot in Runda and subsequently transfer it to the plaintiffs.
7. The defendant reiterates that the money sent to her by the Plaintiffs was insufficient to purchase a plot in Runda and no contract was ever signed for the purchase of any property. She denies the allegations of fraud attributed to her by the plaintiffs.



8. The defendant vehemently denies that her property LR No 7785/649 in Runda, Nairobi (which the plaintiffs claim) was bought using the plaintiffs' money. She terms the plaintiffs' allegations as grossly scandalous, malicious and an affront to her integrity. She prays for the dismissal of the plaintiffs' suit.

Evidence Adduced.

9. This matter proceeded to full hearing. Each of the parties testified as a witness in their respective cases.
10. The 2nd plaintiff Mr Stanley Michieka testified as 'PW1'.
11. The 2nd plaintiff testified that at the material time, the year 1993, he was residing in the USA. The defendant who was his sister-in-law informed him about land that was being sold by Standard Chartered Bank where she was a manager. There was a negotiated rate for Standard Chartered Bank employees. The defendant had allegedly been allocated 3 plots. She offered one to her sister, the 1st Plaintiff. The estimated value of the plot was Kshs 600,000/- then.
12. The 1st plaintiff, according to PW1 accepted the proposal from her sister, the defendant and thereafter the plaintiffs jointly sent to the defendant a total of USD 5700- in 3 installments between the year 1993 and 1995. It was the 2nd Plaintiff's testimony that in 1995, the defendant informed them that the plots had actually been valued at Kshs 250,000/- and that what they had sent to her therefore was adequate to purchase the plot. That is why, according to the 2nd Plaintiff, they did not send any more money to the defendant.
13. The 2nd plaintiff testified that when he visited Kenya in sometimes in 1995, the defendant took him to Runda accompanied with his mother-in-law to see the land. He stated that he was shown the 3 plots, one of which was supposedly his, though it didn't have a plot number or a title at the time.
14. By the year 2009, the 2nd Plaintiff got concerned as the Plot had not yet materialized. When he called the defendant, she told him to come to Kenya to pick the title for the plot. She further informed him that she would transfer the title to his name at her own costs. According to the 2nd plaintiff, the title that was to be transferred to him was LR No 7785/69.
15. When the 2nd plaintiff eventually met the defendant, she didn't transfer the plot to him as she had promised to do, but instead offered him a house at 'mawiwa'. The 2nd plaintiff allegedly out-rightly declined the offer by the defendant. From that point henceforth, the 2nd plaintiff averred that the conversation with the defendant changed completely. It was at that point that the defendant disclosed to him that the original plan where the Bank's employees had been offered special rates had not worked out as the land that had been offered to them had instead been sold to Kenya Power & Lighting Company.
16. Later, the defendant informed the 2nd Plaintiff that Hon Njenga Karume had offered her a different 1/4 acre plot at Runda East. The 2nd plaintiff however, after visiting the said plot declined it after finding out that the plot was on swampy land and unsuitable for his purposes. The 2nd plaintiff from that point henceforth got fed up and instructed his wife, the 1st plaintiff to deal with the defendant, – her sister. When it became apparent that the plot wouldn't materialize, the 1st plaintiff filed this suit in the year 2011.
17. The 2nd plaintiff's case was that the subject plot is now valued at Kshs 18.5 million.
18. In cross-examination by the advocate for the 1st plaintiff, the 2nd plaintiff denied that the defendant stopped them from making further payments as a result of delays in subdivision of the land that was on offer. The defendant had according to the 2nd Plaintiff indicated to him that the land that was on



offer was owned by Standard Chartered Bank and not Hon Njenga Karume. The name of Hon Njenga Karume had not featured in their earlier discussions. The name was only mentioned in the year 2010.

19. The 2nd plaintiff further denied that the proposed value of the plot was Kshs 800,000/- as indicated by the defendant in her witness statement.
20. The 2nd plaintiff expressed his position that he believed that the money they had sent to the defendant is what she had used to buy the plot at Runda referred to as LR No 7785/69, which they are now claiming in this case.
21. In cross-examination by the advocate for the defendant, the 2nd plaintiff stated that the defendant had told him that the bank's employees were getting plots at a discounted rate. The vendor, he confirmed was Hon Njenga Karume as he had stated in his witness statement which he adopted as his evidence in chief in this case.
22. The 2nd plaintiff confirmed that they had not signed any agreement with the defendant in respect of the plot they intended to buy.
23. The 2nd plaintiff alleged that he was not aware that the arrangement with Hon Njenga Karume had not materialized. He was however aware that his wife, the 1st plaintiff met Hon Njenga Karume at a point. By the year 2009, the 2nd plaintiff was aware that the defendant was still pursuing the plot as communicated via emails produced in evidence.
24. The 2nd Plaintiff confirmed that the title to the defendant's plot number LR 7785/649 indicated that it was purchased on July 29, 1993, with a mortgage facility from Standard Chartered Bank before they had even sent any money to the defendant.
25. The 2nd Plaintiff confirmed that the defendant had severally indicated her willingness to refund them the money sent to her i.e USD 5700.-
26. The 1st plaintiff on her part testified as 'PW2'. She testified that the defendant, her own sister offered to help her and the 2nd plaintiff acquire a plot of land at Runda at a discounted rate. Since the offer was for Standard Chartered Bank employees, they could only acquire the plot through the defendant, who was at that time a Manager with the said bank. The price of the plot would range from Kshs 600,000/- – 800,000/-.
27. The 1st plaintiff testified that later on, the defendant informed them that the actual price for the purchase of the plot would be Kshs 250,000/-. That meant that the money they had already sent to the defendant was therefore adequate to purchase the plot. The 1st Plaintiff's testimony was that the plot they were to purchase was across the street opposite the defendant's plot at Runda.
28. The 1st plaintiff testified that sometimes in the year 1995, the defendant informed them that they needed to wait a little longer for the subdivision of the land. The next time they discussed the issue with the defendant was in the year 2010. She confirmed meeting Hon Njenga Karume in 2011 after she had personally requested for a meeting with him. She stated that Hon Njenga Karume assured her that he would provide alternative land in Iambus, owned by the Koinanges'. The alternative offer was because the original land that he had offered to sell to the bank's employees was no longer available since he had sold it to Kenya Power & Lighting Company.
29. The 1st plaintiff testified that her in-laws had put her under a lot of pressure accusing her of colluding with her sister to steal from her own husband. She therefore decided to file the suit since no one in her family was believing her explanations.



30. The 1st plaintiff was categorical that she was not aware of any communication between the estate of Hon Njenga Karume and the defendant in regard to the subject plot.
31. In cross-examination by the advocate for the 2nd Plaintiff, the 1st plaintiff confirmed that the money sent to the defendant was to be part of the purchase price for the proposed plot. The plot she had been shown by the defendant was a vacant parcel of land with no developments.
32. In cross-examination by the advocate for the defendant, the 1st Plaintiff confirmed that the initial discussion about purchasing the plot LR No 7785/69 with the defendant. The 1st Plaintiff confirmed that the documents produced in court indicated that the defendant already had her land LR No 7785/645 by that time.
33. The 1st plaintiff reiterated that she organized the meeting with Hon Njenga Karume in order to seek clarification and establish the truth of the matter. Hon Njenga Karume assured her that she would get land no matter how long it took.
34. It was the 1st plaintiff's testimony that the defendant had severally indicated willingness to refund the money sent to her if the plaintiffs were not willing to wait for the completion of the processes. The defendant had even expressed her readiness to give a title deed to one of her properties to the 1st plaintiff to hold as a security awaiting the completion of the processes.

Evidence Adduced on behalf of the Defendant

35. The defendant testified as a witness in her case. She testified that the 1st plaintiff is her sister while the 2nd plaintiff was her brother-in-law.
36. The defendant explained that in the year 1993, while she was working as a manager in Standard Chartered Bank, Moi Avenue Branch, the late Hon Njenga Karume made an offer to the bank for sale of half (1/2) acre plots at his land at Mimosa. The offer was for the employees of the bank to buy the plots at the discounted rate of Kshs 600,000/- per plot.
37. At the same time, the plaintiffs had sent her some money to clear on their behalf a mortgage facility they had with HFCK. In the course of their conversations, the defendant disclosed to the plaintiffs about the offer made by Hon Njenga Karume. The plaintiffs expressed interest and she offered to help them acquire a plot using her name since the offer was only for staff members of the bank. They therefore agreed that the money that had been sent for purposes of payment of the mortgage facility with HFCK was to instead be held by the defendant as a deposit for purposes of the purchase of that plot. They thereafter sent additional monies. In total the defendant received a total of USD 5700-.
38. As fate would have it, Hon Njenga Karume sold the land he had offered to sell to the employees of Standard Chartered Bank to Kenya Power & Lighting Company. Hon Njenga Karume however personally assured the defendant that he would still get her an alternative plot to give to her sister at the same price as the original offer. This had not happened by the time Hon Njenga Karume passed on. The administrators of his estate however confirmed to the defendant that they were aware of the arrangement and committed to fulfil the wishes of Hon Njenga Karume.
39. The defendant consistently communicated all the information to the plaintiffs about the progress by email messages and telephone conversations.
40. The defendant's testimony was that at one time when Hon Njenga Karume was alive, the 1st Plaintiff organized a meeting with him and they both attended. Hon Njenga Karume confirmed the information that the defendant had all through communicated to the plaintiffs but more importantly



re-assured the 1st Plaintiff that he was committed to ensure she got a plot at the same price as the original offer.

41. The defendant was categorical that she acquired her land LR No 7785/69 even before the plaintiffs had sent her money. She was still holding the money they had sent to her.
42. In cross-examination, the defendant clarified that she instructed the plaintiffs to stop sending her any more money because of the delays in the subdivision of the land; not because they had sent enough, as they had falsely testified. The offer for the plot at Runda did not materialize. This position was confirmed by Hon Njenga Karume to the 1st Plaintiff in person. She therefore denied misrepresenting to the plaintiffs or any wrong- doing for that matter as alleged by the plaintiffs.

Issues for determination

43. I have carefully considered the pleadings filed by the parties herein, the evidence adduced and the submissions by each of the parties. As I frame the issues for determination in this matter, I am alive to the holding in the case of the *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & 3 others* (2014) eKLR to the effect that parties in litigation are bound by their pleadings.
44. The court in the case cited with approval the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* (1998) MWSC 3, where the court quoted an article by sir Jacob entitled “The present importance of pleadings” published in 1960 where the author had stated that

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any other business” in the sense that points other than those specific may be raised without notice.”
45. The Supreme Court of Nigeria on the other hand in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002 re-emphasized the principle that parties are bound by their pleadings and further stated that,

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enable parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation.”



46. In the case of *Raila Odinga & Another v IEBC & 2 others* (2017) eKLR, the Supreme Court of Kenya pronounced the essence of pleadings and stated that

“It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

47. With this background in mind, I now proceed to frame the issues for determination in this matter. In my opinion the issues for determination in this case are: -

- a. Whether the plaintiffs are entitled to an order of specific performance requiring the defendant to transfer LR No 7785/649 Runda to themselves.
- b. Whether the plaintiffs are entitled to the alternative prayer for a sum of money equivalent to the current market value of a half (1/2) acre property at Runda Estate in Nairobi.
- c. Whether the plaintiffs are entitled to damages.
- d. Who should pay the costs of this suit?

Analysis and Determination.

A. Whether the Plaintiffs have made a case for the grant of an order of specific performance requiring the Defendant to transfer LR No 7785/649 Runda to themselves.

48. In the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Ltd* (2006) eKLR, Justice Maraga (as he then was) stated that:

“Specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid down principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy.”

49. The question then that I must pose at this point in time is whether in this case there was a valid enforceable contract between the parties.

50. The answer to this question is rather straight forward. The defendant explicitly stated that there was no formal contract between the parties. The plaintiffs too in their testimonies expressly confirmed that there was no valid written contract between them and the defendant. I therefore make a finding that there was no valid enforceable contract between the parties. As at the time money is said to have exchanged hands between the parties – (the year 1993 – 1995), the *law of contract Act* required that contracts for sale or purchase of land be evidenced in writing. No such evidence has been tabled before the court.



51. Conscious of this shortfall, the plaintiffs in their submissions introduced the aspect of a trust, which they had not however pleaded in their plaint. I will nonetheless consider their submissions on this aspect.

52. At the first instance, the plaintiffs argue that the conduct and words of the defendant created an express trust that she had acquired a $\frac{1}{2}$ acre plot in Runda on their behalf. In the alternative the plaintiffs argue that there was a resulting trust. They relied on the case of *Twalib Hatayan Twalib & Another v Said Saggar Ahmed Al- Heidy & others*, where the court held that, a resulting trust ‘is a remedy imposed by equity’ where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee.

The court stated that,

“the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money.”

53. The plaintiffs argument is that they paid the purchase money requested by the defendant, after having been shown the parcel of land; therefore, a resulting trust was created.

54. The plaintiffs further cited the case by the House of Lords, *Gissing v Gissing*, where the court held that:

“A resulting trust is created when a property is purchased by one party and the purchase price is paid in whole or in part, by another person on the understanding that the person paying the money will receive an interest in the property. The paper title is held by one party with a trust that “results” back to the person who provided the money.”

55. It is the plaintiffs’ case that the defendant utilized the money they sent her to purchase the suit property, LR No 7785/69 Runda, Nairobi.

56. In her defence, the defendant demonstrated with documentary evidence that she acquired the suit property LR No 7785/69 before the plaintiffs had sent her any money. She bought the said property using a mortgage facility advanced to her by Standard Chartered Bank Limited.

57. The plaintiffs’ case that the defendant purchased the suit property using the monies they sent her therefore does not hold water. It was a mere allegation that was not substantiated.

58. The law is clear that the burden of proof is upon the one who alleges. The plaintiffs in this instance have not proved their allegations. The defendant on her part was able to demonstrate with documentary evidence that she had already acquired the suit property before she received the money from the plaintiffs. She too was able to demonstrate the source of the money that she used to purchase the said property. The court’s finding therefore is that no trust can be inferred in favour of the Plaintiffs in the circumstances of this matter. The Plaintiffs have surely not made a case for the grant of the order of specific performance. Their prayer therefore fails.

B. Whether the Plaintiffs would be entitled to the Alternative prayer for the money equivalent of a plot in Runda.

59. The defendant in her testimony maintained that she had offered the plaintiffs the opportunity to purchase a plot that was on offer to the staff of the bank where she was working, at a discounted price using her name since the special offer was only available to employees of the bank. She did this on the basis of sisterhood; the 1st Plaintiff being her younger sister. Unfortunately, the deal did not work out as expected after the late Hon Njenga Karume sold the land that he had offered to the bank to



Kenya Power & Lighting Company. The defendant pleaded that it was not her fault that the original plan failed. She was determined to ensure that her sister and husband got an alternative plot she had promised them. That is why she continued following up with the late Hon Njenga Karume and upon his demise, with the representatives of his estate to the extent of paying 1 million shillings to expedite the subdivision of land and hasten the process.

60. The 1st plaintiff on the other hand in person sought a meeting with the late Hon Njenga Karume who, in the 1st plaintiff's own words, 'confirmed his commitment to secure a plot for her at the same price as had been earmarked for the plots in Runda'. The meeting between the 1st plaintiff and the late Hon Njenga Karume validated what the defendant had all through told the plaintiffs. The defendant had been truthful all along and was genuinely following up to ensure the plaintiffs got an alternative plot, though not at Runda. With no valid and enforceable contract, and the defendant having provided a plausible explanation, I don't find any legal or factual basis for the grant of the alternative prayer by the plaintiffs for the money worth of a plot in Runda.

C.Whether the Plaintiffs are entitled to the damages sought.

61. The plaintiffs have not made a case either of misrepresentation, conversion or fraud against the defendant. It is trite law that fraud must be specifically pleaded and proved. That was not done in this case. I therefore find no basis for the grant of an order for damages under any of the headings as sought by the plaintiffs. I dismiss the Plaintiffs claim for damages as well.
62. I started by stating that parties are bound by their pleadings. The court too is bound by the pleadings of parties and cannot grant an order or relief not sought by the parties. The court therefore dismisses the plaintiffs' case in its entirety.

Costs

63. Considering the nature of the relationship between the parties and the circumstances of this case, the court's order on the issue of costs is that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27ND DAY OF SEPTEMBER, 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence: -

Mr. Abidha for the 1st Plaintiff also h/b for Mr. Tony Odera for the 2nd Plaintiff

Mr. Ongoto for the Defendant

Court Assistant: Hilda

M.D. MWANGI

JUDGE

