



**Ndege v Munyi (Environment and Land Case Civil Suit 122 of 2016)
[2023] KEELC 16673 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16673 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND CASE CIVIL SUIT 122 OF 2016
EC CHERONO, J
MARCH 21, 2023**

BETWEEN

JOSPHAT NGARE NDEGE PLAINTIFF

AND

ELIUD WAGITI MUNYI DEFENDANT

JUDGMENT

1. The plaintiff sued the defendant vide an amended plaint dated July 8, 2019 seeking the following prayers;
 - a. An order for the refund of Kshs 525,000/= plus interest at the rate of 40% per annum from the date of the agreement dated October 14, 2009.
 - b. Costs of the suit and interest.
2. According to the plaintiff, he entered into an agreement with the defendant for the purchase of ½ an acre parcel of land to be excised from land parcel Inoi/Kamondo/2710 for a consideration of Kshs 300,000/-. The plaintiff avers that upon execution of the agreement, he paid the sum of kshs 110,000/= and the balance was to be paid in two (2) instalments of Kshs 130,000/= on or before 22/10/2009 and the sum of Kshs 60,000/- would be paid once the land control board's consent to transfer is obtained. The plaintiff states that on 15/10/2009 and in fulfilment of his obligation, he paid a further sum of Kshs 10,000/= and on October 26, 2009, he paid a further sum of Kshs. 58,000/ leaving a balance of Kshs 122,000/= .
3. It is also averred that on November 19, 2009, the parties entered into a supplementary agreement for the purchase of 1 acre instead of 0.5 acres at a consideration of Kshs 600,000/= wherein the sum of Kshs 178,000/- was paid leaving an outstanding balance of kshs 75,000/= which was to be paid after the consent to transfer is obtained. It was a further term of the said agreement that the defendant was to transfer the portion measuring 1 acre to the plaintiff free from any encumbrances as the same had



- been charged to Agricultural Finance Corporation which sum, the defendant promised to pay to have the title deed discharged.
4. It is the plaintiff's case that he took occupation of the one(1) acre of the land and made developments thereon although during the pendency of the suit, the defendant caused the subdivision of the said parcel of land into 2 portions Inoi/Kamondo/5603 and Inoi/Kamondo/5307 which were subsequently transferred to other parties thus the instant suit.
 5. The defendant duly entered appearance and filed his amended statement of defence denying the plaintiff's claim and avers that he is under no obligation to transfer any parcel to the plaintiff since no consent has been obtained and that the plaintiff has been cultivating the land and therefore benefitted from the proceeds.
 6. The plaintiff testified as PW-1 and adopted his statement dated 8/7/2017 as his evidence in chief. The same is a restatement of his case as stated in the preceding paragraphs.
 7. In cross examination, the plaintiff stated that the defendant sold the parcel while the suit was pending. He stated that he was buying 1 acre of the land at Kshs 600,000/- though they had initially agreed on ½ an acre at the price of Kshs 300,000/- and had so far paid the sum of Kshs 525,000/- leaving an outstanding balance of Kshs 75,000/=
 8. He stated that at the time he purchased the land, there was an existing loan of Kshs 180,000/- due to AFC which was to be paid using the money he was paying the defendant. He stated that they did not get the land control board consent thus the suit. That the defendant has sub-divided the land into 2 portions where he occupies one parcel and the other one has been transferred to another person.
 9. The defendant testified as DW-1 and his evidence was that as per the sale agreement dated October 14, 2009, he sold to the defendant ½ an acre parcel of land to be excised out of Inoi/Kamondo/2710 at a cost of Kshs 300,000/- though he acknowledged receipt of kshs 178,000/=. Some of the money was paid to AFC by the plaintiff to offset a loan he had earlier taken though he distanced himself from the agreement dated 19/11/2009 terming it a forgery. He denied receiving the sum of Kshs 347,000 on the said 19/11/2009 or visiting the firm of Ngigi Gichoya & Company Advocates for preparation of the sale agreement. He states that he allowed the plaintiff to cultivate 1 acre which he occupies to date and that he has not transferred the ½ acre as the plaintiff did not complete the purchase price. He accused the plaintiff of taking advantage of his illiteracy.
 10. In cross examination, he stated that the plaintiff would come with documents which they signed. He confirmed that he went with the plaintiff to the above stated firm of advocatess for the drawing up of the agreement after the advocate had explained to them the implications. He disowned the signature on the second agreement as forged though he did not report to the police.
 11. It was his testimony that at the time of entering into the agreement, the title deed for the suit property was at AFC as security for a loan he obtained and that an amount of kshs 115,000 was paid by the plaintiff. He stated that the title deed got lost after collecting it from AFC. He had allowed the plaintiff to utilize 1 acre of his land since he had paid the loan to AFC as he had agreed to sell him ½ acre and had no problem with the plaintiff's occupation. He stated that he subdivided his land in the year 2018 and the plaintiff vacated the land the same year. The defendant contends that the plaintiff is not entitled to be paid interest because he had utilized his land.
 12. At the close of both the plaintiff's and the defendant's case,the parties agreed to file and exchange their written submissions within given timelines. Both parties complied. In his submissions, the plaintiff raised the following issues;



- a. Whether the plaintiff is entitled to the refund of Kshs 525,000/- plus interest at the rate of 40% from the date of agreement.
 - b. Whether the suit is statute barred
 - c. Costs of the suit.
13. On the first issue, it is submitted that the plaintiff, having paid the purchase price and the arrears owed to AFC, the defendant still refused to transfer the one(1) acre portion of land unjustifiably and contrary to the terms and conditions of the sale agreement. That since the defendant is in breach of the agreement, he should be ordered to refund the sum paid plus interest.
 14. On the second issue and while citing section 4(1) of the *Limitation of Actions Act*, counsel contends that the cause of action arose in the year 2011 and the suit filed in the year 2016 was well within the prescribed time. In this regard, the case of *South Nyanza Sugar Company Ltd v Dickson Aoro Owuor* (2017)eKLR is cited in support.
 15. On costs, it is submitted that the same follows the event and that the plaintiff is entitled to his costs.
 16. On his part, the defendant raised the following issues;
 - a. Whether the suit is barred by the limitations of actions Act
 - b. Whether the plaintiff deserves the orders sought
 17. Regarding the first issue, counsel submits that the plaintiff should have initiated the suit by 2015 and therefore the suit having been filed in the year 2016 was late by one year. The case of *Director Ltd v Samani* (1995-1998) 1 EA 48, *Rufale vs Umon Manufacturing Co. (Ramsboltom)* (1918) 1 KB 592 and *Kenya Cargo Handling Services Limited v David Ugwang* (1985) eKLR have been cited.
 18. On the second issue, counsel contends that the land control board consent was not obtained and the entire transaction cannot therefore be enforced as required by section 7 of the *Land Control Board Act*.

Analysis and determination.

19. I have given due consideration to the pleadings herein, the oral testimony tendered in court, the rival submissions and the relevant legal principles underpinning the matter and I am of the considered view that the preliminary issue whether the suit is barred by the provisions of section 4(1) of the *Limitation of Actions Act* ought to be dealt with first as it has the effect of terminating the suit. I am also alive that the issue limitation was not raised by the parties in their pleadings before or during the hearing but only came up during submissions.
20. The defendant raised the issue stating that the cause of action springs from 2 sale agreements dated 14/10/2009 and 19/11/2009 and the period of 6 years therefore lapsed around 2015 or thereabouts. He contends therefore that by filing the suit in August, 2016 without leave of the court renders the suit fatally defective and liable for striking out.
21. On his part, the plaintiff posits that the time starts running after the plaintiff had completed payment to AFC and have the title discharged. According to him, the computation of time starts from the year 2011.
22. In determining this issue, the court has read both agreements and none of them states when the process of transfer is anticipated to have completed. Nonetheless, clause 8 of the agreement dated 19/11/2009 states that the land is sold on “as is” basis at that time of execution. By this, the court is of the view



- that the plaintiff bought the land subject to the loan due to AFC being cleared so that the title could be discharged.
23. It is freely conceded by the defendant that the plaintiff indeed cleared the loan. The title was then discharged some years down the line but the defendant changes mind and disposed the land to different individuals.
 24. The first port of call is to determine when the cause of action arose for purposes of computation of time. The land having been the subject of a charge, the same could not be legally transferred before discharge by the chargor. The last such payment as exhibited by the plaintiff shows the amount was paid on 19/7/2011 as well as a letter dated 4th October, 2011 by the plaintiff asking the chargee to release the title to the defendant.
 25. Section 4 (1) of the *Limitation of Actions Act*, puts a limit of 6 years for the institution of suits from the date the cause of action arose.
 26. In the circumstances and for the foregoing reasons I am inclined to reject this line of argument that the suit was filed out of time. To the contrary, by the time of filing this suit, the limitation period had not lapsed.
 27. The other issue is whether the plaintiff is entitled to an order for refund of monies paid to the defendant as purchase price. The parties respective case and the submissions have been captured in the preceding paragraphs which need not be repeated here.
 28. According to the plaintiff, pursuant to the agreement dated 14/10/2009, he bought ½ and acre for Kshs 300,000/- paying the sum of Kshs 110,000/- on execution. As per the acknowledgement dated 15/10/2009, he paid the sum of Kshs 10,000/-. On 26/10/2009, he paid Kshs 58,000/- leaving a balance of Kshs 122,000/=.
 29. Pursuant to the sale agreement dated November 19, 2009, it is indicated that the agreement is supplementary to the initial one. It made amendments and or insertions effectively changing the tenor and character of the initial sale agreement dated 14/10/2009 by making the area under sale 1 acre instead of the stated ½ acre. The purchase price also shot to Kshs 600,000/- for the said one (1) acre.
 30. On amendments made to payment for the parcel, paragraph 5 states that the defendant had already received the sum of kshs 525,000/- inclusive of the sums paid under the earlier agreement leaving out a balance of kshs 75,000/- which would be paid upon the consent of the land control board being obtained.
 31. The starting point herein is that the court has no business re-writing parties' contracts. The court is merely called upon to interpret the terms of the agreement to determine whether there is breach by either party. In this regard, I find guidance in the Court of Appeal decision in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR where it was stated that: -

We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.
 32. It is common ground that the parties herein entered into a contract for the sale and or purchase of a portion of the suit land. The agreement was reduced into writing and later amended to include other terms and therefore the 2 agreements have to be taken side by side. The defendant in his defence distanced himself from the second sale agreement dated 19/11/2009, terming it a forgery.



33. From my analysis the defence of forgery advanced by the defendant is an after-thought for reason being that, had he genuinely believed his signature was forged, he should have taken steps to prove that indeed the signature was not his. A simple step such as calling the attesting counsel would probably suffice. A much proactive step such as calling a document examiner would be more appropriate in the circumstances.
34. Under section 107 (1) of the *Evidence Act*, it is provided that;
- 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.
35. Similarly, section 108 of the Act provides
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
36. In the circumstances of the matter herein, the defendant's assertion that the agreement is forged is unsubstantiated and is hereby rejected.
37. The other ground of defence mounted was that the land control board's consent was not obtained. I have considered the parties' contention on the issue and I am of the view that the consent could only be obtained upon application by the defendant after having the title discharged. I find this argument to be dishonesty on the part of the defendant because along the way, he obtained consent and subdivided his land and transferred it to a third party. He cannot therefore be said to have faced difficulties while obtaining the consent.
38. Having stated as such, I therefore find that the plaintiff indeed paid to the defendant the sum of Kshs 525,000/= which should be refunded to him.
39. I also find interest awardable to the plaintiff for the reason that the defendant refused to obtain the land control board consent to effect transfer. In the upshot, I enter Judgment for the plaintiff against the defendant as follows;
- i. The plaintiff is hereby awarded the sum of Kshs 525,000/- together with interest at court rates from 19/11/2009 until payment in full.
 - ii. The costs of the suit shall be borne by the defendant.

READ, SIGNED AND DELIVERED VIRTUALLY AT BUNGOMA THIS 21ST DAY OF MARCH, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Mwangi Kinyua holding brief C.S Macharia for defendant
2. M/S Githaiga holding brief Mrs Makworo for Plaintiff
3. C/A Joy

