



**Lubanga v Agalo (Environment and Land Appeal 17 of 2021)
[2023] KEELC 17552 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17552 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL 17 OF 2021**

MN MWANYALE, J

MAY 25, 2023

BETWEEN

MARY MUHONJA LUBANGA APPELLANT

AND

HUDSON K A AGALO RESPONDENT

JUDGMENT

1. *Vide* the Memorandum of Appeal dated June 9, 2020, the Appellant Mary Muhonja Lubanga being dissatisfied with the ruling of the Senior Principal Magistrate (Hon Jacinta Owiti) delivered on May 14, 2020 in Kapsabet PMCELC No 31 of 2018 between Mary Muhonja Lubanga as Plaintiff and Hudson KA Ogalo as Defendant penned 7 grounds of Appeal of consideration of this Court.
2. The grounds of Appeal were as follows;
 - i. That the learned Magistrate erred in law misdirecting herself by making an erroneous finding that the limitation period for a claim under a contract for sale of land is 12 years and is founded on Section 7 of the *Limitation of Actions* when the correct section was Section 4 of the said Act and the *law of Contract Act*.
 - ii. The Learned Magistrate thereafter erred in law, in relying on the *law of contract Act* where the Limitation is 6 years, to allow a claim for specific performance, when the aid 6 years had lapsed. The Learned Magistrate consequently adopted two different approaches with regard to the Appellant's and Respondent's case, recognizing a contract in favour of the Respondents case and dismissing the same contract period as against the Appellant.
 - iii. The Learned Magistrate erred in law by delivering a conditional judgment regard to the Respondent paying the balance of the purchase price, when she was required to give a final judgment, and when there was no evidence that the Respondent had ever been willing ready



or in a position to make payment and without giving a reason for the time given to the Respondent to pay.

- iv. The Learned Magistrate erred in law by misdirecting herself over the evidence adduced and giving an order for the demarcation of the suit parcel along the area already fenced by the Respondent, when there was no evidence of any fencing by the Respondent thus making the judgement unenforceable.
 - v. The Learned Magistrate erred in law by acting on wrong principles of law in tasting that the Appellant had agreed to allow the Respondent to occupy the suit parcel since she did not file contempt proceedings and the Magistrate then allowed the Respondents to benefit from disobeying a Court order stopping any development on the land.
 - vi. The Learned Magistrate erred in law by going against the tenets of the role of a judicial officer by adding to the terms of the contract thus creating her own contract and forcing the parties to comply, giving rise to a miscarriage of justice.
 - vii. Consequently the entire judgment is a recipe allowing for illegalities, is unreasonable oppressive and prejudicial to the Appellant, capricious and thus a travesty of justice.
3. On strength of the above grounds the Appellant sought for reliefs that,
- i. That the appeal be allowed.
 - ii. That the judgment of the Senior Principal Magistrate Jacinta Owiti (Mrs) delivered on May 14, 2020 in Kapsabet PMCC ELC No 31 of 2018 *Mary Muhonja Lubanga versus Hudson KA Agalo* be set aside and the prayers sought by the Appellant in the lower Court be allowed with costs.
4. Upon admission of the appeal and perusal of the record of Appeal, the Court has found that whereas the title of the Appeal suggests that the Appeal has been preferred against a “ruling” delivered by Hon. Jacinta Owiti on 1May 4, 2020; in Kapsabet PMCC ELC No 31 of 2018 between *Mary Muhonja Lubanga versus Hudson KA Agalo* the record reflects that a judgment and not a ruling was delivered on May 14, 2020 hence this appeal is thus from the said judgement and not on a ‘ruling’.
5. Parties were directed to file submissions on the appeal. The Memorandum of Appeal was dated June 9, 2020 and was filed by the firm of MA Ochanji – Opondo and Company Advocates on June 11, 2020, the record of appeal was firstly filed on December 8, 2020; and was filed by Ms Ivy Maria Kerre Advocates, pursuant to a notice of change of Advocates.
6. The Appellants filed their submission on February 20, 2023 whilst the Respondent filed this submissions on March 3, 2023, and the Court had initially reserved the judgment for May 4, 2023, but deferred it today for delivery.

Appellants Submissions: -

7. The Appellant submits that the cause of action was not an action for recovery of land under Section 7 of the *Limitation of Action Act* but it was an action based on contract for sale of Land.
8. The Appellant further submits that in allowing specific performance, the Court failed to take into consideration the equitable principle of “he who comes to equity must come with clean hands and must do equity.”



9. The Appellant submits that the Respondent in admitting that he had failed to pay the balance of the purchase price, but also that the agreement he presented before the trial Court and wished to rely upon contained forged terms relating to acreage.
10. The Appellant submits that her claim was based on breach of contract and not recovery of land, while the counterclaim by the Respondents was for specific performance hence it was time barred, Under Section 4 of the Limitation of Action.
11. The Appellant further submit that there was no basis in law or in fact to allow the Respondent to pay the balance of the purchase price in terms set out in the impugned judgment.
12. The Appellant submit that the judgment as delivered is incapable of execution since there was no fenced portion belonging to the Respondent.
13. The Appellant submits that the Learned Magistrate erred in Law in creating additional Contractual terms; and thus re-wrote the terms of the contract an cites the decision National Bank of Kenya vs Pipe Plastics Samkolit (k) Ltd.

Respondents Submission: -

14. The Respondent framed the following as issues for determination.
 - i) Applicable law
 - ii) Burden of proof
 - iii) Equity
 - iv) Specific performance
 - v) Possession and occupation
 - vi) Overriding interests
15. On applicable law to Respondent has placed reliance on the decision in *Selle and Another vs Associated Motor Boat Ltd & others*. On the jurisdiction of an Appeal Court to hear an appeal by way of a retrial. Court to consider evidence evaluate the same and draw its conclusions.
16. The Respondent has cited Section 107 (1) of Evidence Act on the burden of proof.
17. The Respondent submits that the Trial Court had found evidence the Appellant had received money from the Respondent in respect of 1 acre out of the two acres he had bought.
18. On equity, the Respondent submits that person in possession or occupation of land has equitable rights which are binding on the land; and that a purchaser in possession has an overriding interest under the provisions of the Registered Land Act.
19. The Respondent further submits that in respect of the 1acre he had paid in full save for the issue of the Land Control Board Consent to subdivided and transfer; and that the Appellant did not dispute the same.
20. With regard to the issue of the Land Control Act, the Respondent had cited the decisions in the cases of Kiplagat Kotut vs Rose Jebor Kisongok on the equitable doctrine of constructive trust and proprietary estoppel with regard to the land.



21. Finally the Respondent in his submissions submits that the judgment of the Lower Court cannot be enforced since the Appellant has not taken out letters of administrations over the Estate of the co-vendors, that the Respondent thus cannot be said to be unwilling to settle the balance notwithstanding that he is okay with the paid up of 1.00 acres.
22. Issues for Determination: -
 - i. What was the cause of action and applicable law in respect of the Plaintiff's suit in the Lower Court and in respect of the Defendant's counterclaim before the lower Court?
 - ii. Was the acreage sold provided for in the Agreement for Sale?
 - iii. Whether or not the appeal is merited?
 - iv. What reliefs ought to issue?
 - v. Who bears the costs of the appeal?

Analysis and Determination: -

23. As correctly submitted by the Respondents Advocate, the duty of an Appeal Court is to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in this respect.
24. Guided by the above principles as elaborately set out in the case of *Selle and Another vs Associated Motor Boat Company Ltd and others* 1968 (EA 123), the Court shall now reevaluate the evidence as contained in the Record of Appeal.
25. The plaint given rise to the impugned judgment and this appeal was dated April 27, 2018 and it pleaded at paragraph 7 particulars of breach of contract and law generally.
26. The Plaintiff pleaded breach of the agreement made on November 12, 2011. At paragraph 8 and 9 the Plaintiff pleaded an entry by the Defendant on the suit land and sought an eviction and an injunction barring the Defendant from entry.
27. From the plaint the cause of action is basically the entry by the Defendant on the suit land hence the suit would thus be a suit to recover the property, hence the prayer for an eviction and permanent injunction. The declaratory prayer for the agreement for sale being null and void was an incidental prayer.

The Court finds that the cause of action in respect of the Plaintiffs suit, as an action to recovery suit property whose applicable law in terms of the *Limitation of Action Act* is Section 7 as was rightly found by the Learned Magistrate. Accordingly ground 1 of the memorandum of Appeal fails.
28. With regard to the counterclaim by the Defendants, paragraph 13 thereof sought for order of subdivision and transfer of 2.0 acres out of Nandi/Koibarak "B" 768 and execution of all documents.
29. Although Respondent did not expressly plead specific performance, paragraph 13 of the counterclaim is deemed for all intents and purposes a prayer for specific performance with regard to the Agreement for sale dated November 12, 2011. The Law in terms of the Limitation of Action Act applicable for cause of action based on specific performance of a contract, is Section 4 of the said Act. Thus the Respondent claim in terms of the order pleaded at paragraph 13 of the defence and counterclaim was clearly time barred.
30. Having found the applicable law on the causes of action in the plaint and the counterclaim respectively, it follows that the counterclaim having pleaded on specific performance, and been time barred, the



learned Magistrate feel in error when she extended time for payment of the balance of the purchase price. Accordingly ground 2 of the Appeal partial succeeds in so far as it relates to the limitation of action of a claim of specific performance and ground 3 of the Appeal equally succeeds.

31. I have perused through the original Court file and found that whereas there was no barbed wire fence, there was a hedge on the photographs where the house had been built, and that ledge must have been the fence demarcating the Respondent's house and the Learned Magistrate was correct in holding the ledge as the fence and ground No 4 of the appeal fails.
32. Having taken possession pursuant to the agreement for sale, the Respondent acquired overriding interests with respect to the portion occupied although the Land Control Board consent had not been obtained.
33. On issue number 2, as to what acreage had been sold. The Agreement for sale produced as P Exhibit 7 – did not specify the completion time as well as the acreage sold. The P Exhibit 8 was an agreement that the Plaintiff termed as forced agreement as it contained the acreage sold as 0.8Ha. The Defendant in his testimony indicated that he paid kshs 300,200/= for one acre.

While the Plaintiff testified that 0.1 acres was sold for kshs 150,000/= hence kshs 300,000 paid would have been for 0.2 acres. This was contained in the further witness statement as well as the testimony of the Plaintiff.
34. In the judgment however the learned Magistrate found that 1 acre was sold for kshs 150,000/=. There was no basis therefore for the learned Magistrate to find that the Respondent bought 2 acres as the Respondent conceded that the Agreement P Exhibit 8, included terms that not been agreed on thus was altered.
35. Having earlier found that the Agreement for sale that the Respondent sought to enforce was time barred and having found that there was no basis for extension of time to the Respondent to make the extra payment, and as the Court finds no acreage was agreed between the Appellant and the Respondent; the Court finds merit in grounds 5 and 6 of the Appeal.
36. Since the Respondent had taken possession pursuant to the agreement, the Respondent is entitled to a portion of Nandi/Koibarak B/768. The said portion would be where the Respondent has already commenced construction, but since the acreage was not provided for in the agreement for sale, it follows that the Respondent is entitled to the acreage that commensurate to the kshs 300,000/= he paid in 2011.
37. The Appellant has thus succeed partially in the Appeal but is not entitled to the reliefs she had in the lower Court, thus;

Disposition: -

38. The Appeal is allowed in terms that the suit is remitted back to the trial Court so as to hear evidence the sole issue of the acreage entitled to the Respondent for the payment made in 2011. The parties to file a valuation report on the values that existed in 2011 and what acreage would have sold for kshs 300,000/= and thereafter the Appellant to transfer the said acreage to the Respondent.
39. Judgement accordingly.

DELIVERED AND DATED AT KAPSABET THIS 25TH DAY OF MAY, 2023.

Hon. M. N. Mwanyale,

JUDGE



In the presence of;

1. Mr. Choge for Respondent
2. Ms. Kerre for the Appellant

