



REPUBLIC OF KENYA



**Wende v Owiti (Environment and Land Appeal E006 of 2022)
[2023] KEELC 17662 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17662 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E006 OF 2022
GMA ONGONDO, J
MAY 24, 2023**

BETWEEN

JOSEPH OPIYO WENDE APPELLANT

AND

GABRIEL ODONGO OWITI RESPONDENT

*(An appeal from the An Appeal from the Judgment and decree of Oyugis Senior
Principal Magistrate's Court (C.A OKORE, PM) in the original ELC case No. 63 of 2018)*

JUDGMENT

1. The instant appeal radiates from the judgment rendered on January 27, 2022 where the Hon learned trial magistrate held that the plaintiff who is the respondent herein had proved his case on a balance of probabilities against the defendant, the appellant herein. Thus, the court ordered as follows;
 - a. An order be and is hereby issued compelling the defendant to transfer land originally parcel No West Kasipul/Konyango Kokal/2073, presently parcels No West Kasipul.konyango Kokal/2857 and 2858 measuring approximately 0.25 Ha (the suit land herein) to the plaintiff failing which the Court Administrator of Oyugis Senior Principal Magistrate's Court to sign the documents in favour of the plaintiff herein.
 - b. A permanent injunction be and is hereby issued restraining the defendant, his servants and/or agents from interfering or in any other way trespassing or selling the said land
 - c. Eviction order be and is hereby to evict the defendant and or third party or stranger/trespasser on the said land.
 - d. Each party shall bear its own costs.
2. The appellant is represented by the firm of Bana and Company Advocates.



3. The respondent is represented by the firm of Mimba and Company Advocates.
4. It is important to note that this being the first appeal, this court is bound to revisit the evidence on record, evaluate it and reach an independent conclusion. Nonetheless, it must be borne in mind that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they are based on no evidence at all, or on a misapprehension of the same, or the court is shown demonstrably to have acted on wrong principles in reaching the findings; see *Mwanasokoni v Kenya Bus Services Limited* (1982-88) 1 KAR 278.
5. At the trial court, the respondent sued the appellant by way of a plaint dated April 5, 2014 for orders as stated at paragraph 1 herein above and any other relief.
6. By a statement of defence dated September 4, 2014, the appellant denied the respondent's suit and implored the court to dismiss the same with costs. He stated that if he made the alleged sale of land agreements with the respondent and his co-buyer, Elisaphan Magak (Deceased herein), then the said agreements were terminated, the respondent charged and convicted of obtaining money by false pretences. That the contract was tainted with fraud, illegality, unenforceable and cannot be relied upon as a basis for the specific performance relief. He termed the suit time-barred by the *Limitation of Actions Act* Chapter 22 Laws of Kenya.
7. The respondent (PW1) testified in part that he bought a portion of land measuring 75 ft by 100 ft out of the suit land from the appellant and obtained consent to sub divide it. That the appellant refused to transfer the same to him. He relied on his statement dated April 5, 2014, sale agreement dated May 2, 2002 (PEXhibit 3a), sale agreement dated November 22, 2002 (PEXhibit 3b) and PEXhibit 7 namely a green card in respect of the suit land, PEXhibits 8a and 8b being proceedings and judgment respectively in criminal case number 32 of 2006, among others.
8. PW2, John Oliech Owidi Lawrence, a farmer and formerly assistant chief of Kokal sub location stated *inter alia*, that he signed PEXhibits 3a and 3b. That he was not informed that the deceased, Magak Okumu had sold his interest to the appellant. That the only witness who was present during the making of PEXhibit 3b, was Denis Otieno Wende. That the name Samwel Okal Opiyo was added to PEXhibit 3b by another person without his (PW2) knowledge, presence and signature.
9. The appellant (DW1) testified by relying only on his statement and called no witness. He stated, *inter alia*, that he sold a portion of land measuring 50 feet by 100 feet of the suit land to the deceased, Magak Okumu at Kshs 450,000/= only. That the deceased who made a down payment of Kshs 50,000/= to him, demanded a refund of it and the same was refunded accordingly. That thereafter, he sold the same portion of land to another person and not the respondent. That he does not owe the respondent any land or money.
10. In arriving at the impugned judgment, the trial court observed, *inter alia*, that the respondent legally and procedurally bought the land in dispute from the appellant but transfer of the same had not been effected in favour of the respondent. That the appellant sub divided the suit land and resold it to two other individuals who must be evicted from the land and that the respondent was entitled to a permanent injunction in the circumstances.
11. The appeal was commenced by way of a memorandum of appeal dated February 15, 2022 founded upon the following grounds;
 - a. The learned magistrate erred in law and in fact when she failed to find that the Respondents suit was failed outside the limitation period and without the leave of court having first been applied for and obtained.



- b. The learned trial magistrate erred in law and in fact when she failed to find that she had no jurisdiction to entertain the respondent's suit for lack of such leave.
 - c. The learned trial magistrate based her judgment on sale agreements that were null and void and or unenforceable.
 - d. The learned trial magistrate based her judgment on sale agreements that had substantially and unilaterally been altered by the respondent.
 - e. The learned trial magistrate erred in law when she failed to find and hold the said sale agreements had terminated and the appellant discharged therefrom.
 - f. The learned trial magistrate failed to consider and wrongly disregarded a substantial part of the evidence before her and thus arrived at a wrong decision.
 - g. The learned trial magistrate misunderstood and wrongly applied the principles governing the equitable relief of specific performance.
12. Wherefore, the appellant prays that this appeal be allowed and the judgment of CA Okore, PM dated January 27, 2022 set aside with costs to the appellant.
13. On November 16, 2022, the court directed that the appeal be heard by way of written submissions.
14. So, learned counsel for the appellant filed submissions dated March 6, 2023 and implored the court to allow this appeal with costs to the appellant in the interest of justice. In summary, counsel submitted that the learned trial magistrate wrongly granted the orders in the impugned judgment as the original suit was filed out of time, the sale agreements which were the foundation of the suit, were unenforceable, null and void. To buttress the submissions, counsel relied upon *Reliable Electrical Engineers Ltd v Maritrac Kenya Ltd* (2006) KLR, Anne *Murambi v John Munyao Nyamu and another* (2018) KLR, section 3 of the *Law of Contract Act* Chapter 23 Laws of Kenya and sections 6 to 8 of the *Land Control Act* Chapter 302 Laws of Kenya.
15. In the submissions filed in court on February 20, 2023, learned counsel for the respondent referred to the impugned judgment, the memorandum of appeal and a brief genesis of the original suit. Counsel submitted that the trial court found that there was a valid sale of land between the respondent and the appellant. That the latter took away the sold piece of land from the former and sold it to another purchaser. That the appellant has not come to court with clean hands. That therefore, the appeal lacks merit and an abuse of the court process hence, it be dismissed with costs.
16. In that regard, the issues for determination are contained in the grounds of this appeal which crystallize to whether:
- a. the original suit was time-barred under the *Limitation of Actions Act*,
 - b. the sale of land between the appellant and respondent was null and void and or unenforceable,
 - c. The equitable orders including, specific performance granted as prayer 1 in the judgment were meritorious.
17. As regards the first issue, the 1st sale agreement dated May 2, 2002 and 2nd agreement dated November 22, 2002 are PExhibits 3a and 3b respectively. The original suit was lodged in court on May 14, 2014.



18. The appellant raised a preliminary objection at paragraph 12 of his statement of defence which reads;
“ The plaintiff’s suit is time-barred under the statute of Limitation.”
19. It is well settled that examples of preliminary objection include a plea of limitation; see *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA 696.
20. Indeed, the preliminary objection was raised at the inception of the original suit. It was a threshold question and called for determinative and prompt pronouncement; see *Kakuta Maimai Hamisi v Peris Pesi Tobiko and 2 others* (2013) eKLR.
21. Clearly, the original suit was filed 12 years long after the 1st and 2nd agreements (plaintiffs exhibits 3a and 3b) were entered into. Therefore, the suit was barred by dint of section 4 (1) (a) and (e) of the *Limitation of Actions Act* (Cap 22 Laws of Kenya).
22. During cross examination by Mr Bana learned counsel for the appellant, the respondent stated that he filed the original suit on May 14, 2014. That he sought leave of the court before he filed the same. However, the alleged leave sought and granted was not presented in court.
23. On the second issue, PW1 stated that Magak (deceased) and himself signed PExhibit 3a in the presence of PW2 who signed it on July 18, 2002. PW2 stated that he drafted PExhibit 3b and signed both PExhibits 3a and 3b. That the name, Okal Opiyo was added to PExhibit 3b by another person on a date unknown to him (PW2).
24. PExhibit 3b reveals that the two parties entered into sale of a portion measuring 75 by 160 ft of the suit land. The deceased, Magak withdrew from PExhibit 3a afterwards as confirmed by both PW1 and DW1. On that account, the sale as shown in P Exhibit 3a and 3b were null, void and or unenforceable pursuant to section 3 (3) of the *Law of Contract Act* (Cap 23 Laws of Kenya)
25. Further, sections 6, 7 and 8 of the *Land Control Act* (Cap 302 LOK) govern consent of Land Control Board in respect of transaction relating to agricultural Land. This Court is aware of the decision in *Kariuki v Kariuki* 1983 KLR 227 regarding general and special damages and or any money or consideration paid in respect of a transaction which is void for all purposes for want of consent are recoverable.
26. As pertains to the third issue, article 10 (2) (b) of the *Constitution of Kenya, 2010* equates equity to a principle of justice and a constitutional principle therefore the courts must protect and promote the principle, among others as noted in Kitilit case (infra).
27. In *Willy Kimutai Kitilit v Michael Kibet* (2018) KLR, the Court of Appeal opined thus;
“the lack of the consent of land control Board does not preclude the court from giving effect to equitable principles, in particular, the doctrine of constructive trust.....”
28. Similarly, in *William Kipsoi Sigei v Kipkoech Arusei and another* (2019) KLR, it was held that Constructive trust and equitable estoppel applied in favour of a purchaser who paid full purchase price and took 14 years possession of a parcel of agricultural land but failed to obtain land control board consent under section 6 (1) of the *Land Control Act* Chapter 302 of the Laws of Kenya as the agreement between the appellant and 1st respondent was valid and enforceable
29. The trial had the mandate to compel the appellant to transfer the suit land to the respondent further to article 40 (1) *Constitution of Kenya 2010*. However, jurisdiction of specific performance (equitable



relief) based on the existence of a valid and enforceable; see *Reliable Electrical and Anne Murambi cases* (supra).

30. A permanent injunction was another equitable relief sought and granted by the trial court. The three pillars on which rests foundation of any order of injunction, interlocutory or permanent. It is established that all the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially; see *Nguruman Limited v Jan Bonde Nielsen and 2 others* (2014) eKLR.
31. Further, prohibition of unlawful occupation of private land is provided for under section 152A of the *Land Act, 2016* (2012). Thus, the eviction order granted by the trial court.
32. Besides, in light of the outcome of the 1st and 2nd issues, hereinabove, the learned trial magistrate was not faultless in her judgment.
33. Thus, the instant appeal is hereby allowed in terms of paragraph 12 hereinabove.
34. The costs of this appeal and the original suit be borne by respondent.

DATED AND DELIVERED AT HOMA BAY THIS 24TH DAY OF MAY 2023

G.M.A ONG'ONDO

JUDGE

PRESENT:

1. Mr. B. Mulisa holding brief for Bana for the appellant
2. Mimba for the respondent.
3. Court Assistant, Mutiva

