



**Geoffrey (Suing as Personal Representative of the Estate of Geoffrey Ngige Kahombora Deceased) v Kabande (Environment & Land Case E016 of 2021) [2023] KEELC 19054 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19054 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE E016 OF 2021  
LC KOMINGOI, J  
JULY 27, 2023**

**BETWEEN**

**JOYCE WANJIKU GEOFFREY ..... PLAINTIFF  
SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GEOFFREY  
NGIGE KAHOMBORA DECEASED**

**AND**

**JOSEPH KABANDE ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 22<sup>nd</sup> March 2021, the Plaintiff claims that her husband the late Geoffrey Ngige Kahombora purchased five (5) acre parcel of land known as LR No. Kajiado/Kisaju/2980 (herein referred to as the suit property) hived off from LR No. Kajiado/Kisaju/527 from the Defendant through a sale agreement dated 31<sup>st</sup> January 1990. The purchase price agreed as KShs. 20,000 was paid in full on diverse dates between 31<sup>st</sup> January 1990 and 17<sup>th</sup> August 1993.
2. However, despite ceaseless follow up and request by her late husband to have the suit property transferred to him, the Defendant failed to effect the transfer and even went ahead to sell off two acres of the said property to a third party. Aggrieved by this, the Late Geoffrey lodged a formal complaint with the Land Dispute Tribunal at Kajiado North District. Vide a Ruling dated 8<sup>th</sup> November 2012 the Tribunal ruled that the Defendant should transfer the remaining three acres to the Deceased.
3. Despite the Tribunal's orders and demand notices dated 30<sup>th</sup> April 2015 and 9<sup>th</sup> February 2016 issued to the Defendant, the transfer is yet to take place. As such, the Plaintiff prays for:
  - i. A declaration that the Defendant is in breach of the Agreement duly entered on 31<sup>st</sup> January 1990;



- ii. An order of specific performance of the agreement dated 31<sup>st</sup> January 1990 directing the Defendant to release duly executed completion documents to the Plaintiff with immediate effect;
  - iii. In the alternative, the Court be pleased to direct the Executive Officer, ELC Kajiado Law Courts to execute all completion documents on behalf of the Defendant;
  - iv. General damages for breach of contract;
  - v. Costs of the suit.
4. Being undefended the matter proceeded to formal proof hearing.

### **Evidence of the Plaintiff**

5. The Plaintiff Joyce Wanjiku Geoffrey (hereinafter referred to as PW1) wife and representative of the Estate of the Late Geoffrey testified and adopted her witness statement dated 22<sup>nd</sup> March 2021 as her evidence in chief and went on to produce nine documents which were admitted and marked as Plaintiff Exhibit 1 to 9.
6. She restated contents of the Plaintiff adding that the late Geoffrey and the Defendant were friends but the Defendant failed to transfer and register the suit property in George's name but gave him copy of a Title Deed for 3.5 acres at Kisaju 2980. She indicated that the sale agreement dated 31<sup>st</sup> January was witnessed by three people who had all passed away.
7. She thus wanted orders for the Defendant to transfer the remaining 3 acres of the suit property to her or alternatively be compelled to refund the purchase price in the current market value which was about Kshs. 1 million per acre.

### **The Plaintiff's Submissions**

8. Counsel for the Plaintiff in their submissions dated 17<sup>th</sup> April 2023 and filed on 15<sup>th</sup> June 2023 highlighted the case and submitted that the Plaintiff being cognisant of the conditions of Section 7 of the *Limitation of Actions Act* moved the court through Misc. Application No. 24 of 2020 pursuant to Section 27 and 28 of the *Limitation of Actions Act* seeking leave to file for recovery of land and the same was allowed *vide* a ruling dated 9<sup>th</sup> March 2021 in *Joyce Wanjiku Geoffrey vs. Joseph Kabande* [2021] eKLR. It is worth noting here that the court confirmed that this information was accurate.
9. Counsel outlined that the two issues for determination were: Whether the Plaintiff had proven the validity of the sale agreement dated 31<sup>st</sup> January 1990 on a balance of probabilities; and what remedy was therefore appropriate.
10. On the issue of validity of contract, counsel submitted that as per Section 3 (3) of the *Law of Contract Act*, the sale agreement entered between the late Geoffrey and the Defendant was valid as it satisfied the elements of a contract in that it was in writing, signed by the parties and witnessed by at least two witnesses as was held in *Nelson Kivuvani vs Yuda Komora & Another* as mentioned in *Broadspect Investment Ltd vs Francis Njoroge Mwangi* [2017] eKLR.
11. Counsel submitted that the Plaintiff was entitled to the remedy of specific performance because the Defendant breached the contractual terms by failing to give vacant possession of the suit property as was held in *Sisto wambugu vs Kamau Njuguna* (1983) eKLR, *Thomas Openda v Peter Nartin Ahn* [1984] eKLR, *Mwangi Macharia and 87 others v Davidson Mwangi* [2014] eKLR and as per Article 10(2)(b) of the *Constitution*. Additionally, the Defendant went against the agreement by selling off a



portion of the suit property leaving only 3 acres of the suit property known as LR Kajiado/Kisaju/2980 which was yet to be transferred to the Plaintiff.

12. Counsel while highlighting the Court of Appeal case of *Capital Fsih Kenya Ltd v Kenya Power & Lighting Company Ltd* (2016) eKLR; *Julie Mukami Kanyoko & 2 others v Samuel Mukua Kamere & another* [2021] eKLR and *Hydro Water Well (K) Ltd v Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society)* ... “To successfully claim damages, a plaintiff must show that (a) a contract exists or existed; (b) the contract was breached by the Defendant; and (c) the Plaintiff suffered damage (loss) as a result of the Defendant’s breach...” noted that the Plaintiff was entitled to general damages for the unquantifiable loss they had suffered by not being in possession of the suit property. And concluded by stating that costs should follow the cause.
13. I have considered the pleadings, evidence on record and written submissions and authorities cited. The issues for determination are:
  - i. Whether the sale agreement dated 31<sup>st</sup> January 1990 was breached;
  - ii. Whether the Plaintiff is entitled to the remedy of specific performance and general damages for breach of contract.
14. Did the Defendant breach the sale agreement dated 31<sup>st</sup> January 1990? In determining whether there was breach of contract, this court shall consider whether there was a valid contract between the Plaintiff and the Defendant in the first place.
15. The Plaintiff suing as a legal representative of the Estate of her late husband Geoffrey Ngige adduced a said sale agreement entered on 31<sup>st</sup> January 1990 marked as Plaintiff Exhibit 2. The agreement between her late husband Geoffrey and the Defendant Joseph Kabande indicated in Swahili that the Defendant had agreed to sell the late George 5 acres of his property title number 527 at Kenya Shillings 4,000 per acre totalling to Kenya Shillings 20,000 for the five acres. In the said agreement it clearly indicates that the late George had given the Defendant Kenya Shillings 10,000. The agreement was signed by the late George and Joseph and attested by the following witnesses: Mbugua, Karongo Kiuri, Mary Mwaniki, Henry Kariuki and Peter Kamau. And that the Defendant breached the agreement by not granting vacant possession and transfer of suit property despite the late Geoffrey having made payment in full of Kshs. 20,000.
16. From the above and without evidence to the contrary, it cannot be gainsaid that there was a valid contract. Counsel for the Plaintiff rightly submitted elements of a contract as per Section 3(3) of the *Law of Contract Act* and this court is in agreement that the same were met and shall not belabour the point. “The law of contract recognizes and respects the freedom of parties to enter into agreements setting out the parameters within which they are to be governed...” Court of Appeal in *Mombasa Bricks & Tiles Ltd & 5 others v Arvind Shah & 7 others* [2019] eKLR. Similarly, Courts have time and again held that they cannot and do not re-write contracts. “... It is settled law ... that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement... Indeed, when a contract is clear and unambiguous, a court’s role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally...” Court of Appeal in *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others* [2018] eKLR.
17. The Plaintiff went on to produce an assortment of handwritten records acknowledging receipt of Kshs. 20,000 marked as Plaintiff Exhibit 3 as payment of purchase price for the suit property. The said payments were made in diverse dates between 31<sup>st</sup> January 1990 and 14<sup>th</sup> August 1983. Therefore,



there being a valid contract and duly paid purchase price as evidenced, it would only be proper for the Defendant to perform the contract as stipulated. However, the Plaintiff claimed that despite incessant follow up by the Late George the Defendant failed/ refused to transfer the suit property. In fact, in total disregard of the agreement and payment made, the Defendant went ahead and disposed of two acres of the suit property to a third party leaving the property measuring 3 acres.

18. The Court of Appeal in *George Njenga Kagai v Samuel Kabi Njoroge & another* [2019] eKLR held: “... in the case of *Njamunya v Nyaga* (1983) KLR 282 this Court emphasized that in the case where it is not stipulated in the contract that time is of essence, notice must be given to the defaulting party and that notice is what will make time to be of essence. It is also a requirement that such notice must give a defaulting party a reasonable time within which to rectify the default...” After several years of back and forth and not getting his rightfully purchased land, the late George put a caution on the suit property in 2011 and filed a complaint with the District Land Dispute Tribunal in 2012. It has also been evidenced that the Tribunal summoned the Defendant to appear before it vide a letter dated 4<sup>th</sup> October 2012 marked as Plaintiff Exhibit 5 but the Defendant did not appear.
19. The Tribunal thereafter delivered a ruling dated 8<sup>th</sup> November 2012 marked as Plaintiff Exhibit 6 in favour of the Late Geoffrey. The ruling reads in part:

“... After having heard and the documents presented to us we now rule as follows: That the whole parcel of land i.e. the three acres to be transferred to the claimant. That the Senior Resident Magistrate Court to appoint its executive officer to sign on behalf of the objector...”
20. The late Geoffrey through his advocates consequently demanded for transfer of the suit property as shown in the demand letters dated 30<sup>th</sup> April 2015 and 9<sup>th</sup> February 2016 marked as Plaintiff Exhibit 8 and 9 respectively but the Defendant did not heed to the demands. “The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them...” as held by the Court of Appeal in *William Kazungu Karisa v Cosmas Angore Chanjera* [2006] eKLR
21. Regardless of whether this suit is defended or not, it is worth noting that Court is expected to test whether the evidence adduced by the Plaintiff discharges the burden of proof on a balance of probabilities as set out in Section 107, 108 and 109 of the *Evidence Act*:
  - (1) 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.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
22. On this, Hancox JA in *Karugi & another v Kabiya & 3 others* [1983] eKLR had this to say: “... Neither can I agree with Mr ... that the burden of proof is in any way lessened because the case is heard by way of formal proof. The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge...”(emphasis mine).
23. Looking through the aforementioned evidence this court is satisfied that the plaintiff discharged the burden of proof as stipulated. It is clear that the Plaintiff has incessantly asked the Defendant to make good the agreement entered on 31<sup>st</sup> January 1990. But three decades later, the Defendant has not only been unresponsive but has also shown no compunction for his deeds/ misdeeds.



24. Is the Plaintiff therefore entitled to the remedy of specific performance and general damages as prayed?
25. Based on the foregoing analysis, this court cites in agreement the Court of Appeal case of *George Njenga Kagai v Samuel Kabi Njoroge & another* [2019] eKLR which held as follows on the issue of specific performance:

The order of specific performance can only issue based on the existence of a valid and enforceable contract. *Halsburys Laws of England (4th Edition)* at paragraph 487 vol. 44 states that:

“ A plaintiff seeking specific performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implication and which ought to have been performed at the date of the writ in the action.

In *Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madbbuti*, Civil Appeal No. 165 of 1996 this Court stated thus:

“Gicheru, JA (as he then was): When the appellants sought the relief of specific performance of sale of the respondent’s property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement...”

26. Correspondingly, the Court of Appeal in *Ngaira v Cheng’oli* (Civil Appeal 397 of 2017) [2022] KECA 80 (KLR) (4 February 2022) (Judgment) held:

“... the threshold for sustaining a plea for specific performance has now been crystallized by case law numerously enunciated both by the predecessor of this Court and this Court. We take it from the decision in the case of *Thrift Homes Limited vs. Kenya Investments Limited* [2015] eKLR in which it was stated, inter alia, that “the remedy of specific performance like any other equitable remedy is discretionary. Second, the jurisdiction to grant the relief of specific performance is based on the existence of a valid enforceable contract. Third, specific performance will not be ordered if the contract suffers from some defect such as mistake or illegality or if there is an alternative effective remedy...”

... On the basis of the prerequisites for granting the equitable remedy of specific performance highlighted above, we find that the undisputed circumstances obtaining herein would usher in the invocation and operation of the equitable principles to demand that it would be unequitable for the respondent as the registered legal owner of the suit property to keep and or retain the suit property and the purchase price. We therefore find and hold that the respondent having received the purchase price as consideration for sale of the suit property and which as we have alluded to above was neither refunded to the purchaser nor tendered the same to court, the only effective remedy in the circumstances of this appeal is an order compelling the respondent to specifically execute the contract in favour of the appellant as the prima facie beneficial owner of the suit property.”

27. From the foregoing, this court is satisfied that there is no evidence on the record pointing towards any defect, mistake or illegality in the sale agreement executed by the rival parties herein. The Plaintiff is thus entitled to an order of specific performance considering that he upheld the terms of the contract and had relentlessly sought the Defendant to complete the terms of the agreement.



28. On the final issue of general damages, counsel for the Plaintiff submitted that the Plaintiff was entitled to general damages because she had lost earnings and economic gain for not being in possession of the suit property and made reference to *Capital Fish Kenya Ltd v Kenya Power & Lighting Company Ltd* (2016) eKLR. This Court has perused the said authority which goes on to hold:

“... The appellant having conceded to the general proposition regarding the award of damages for breach of contract, it was incumbent upon it to lead evidence so as to bring the respondent’s conduct into the exceptions it alluded to above. In this case the mere fact that the appellant wrote several letters to the respondent without remedial measure being undertaken immediately cannot amount to oppressiveness, insolent or vindictive behaviour. The correspondence was responded to explaining what was being undertaken. The fact that the respondent took no corrective action only making incessant promises that the issue was under investigations is not of itself evidence of high handedness, outrageous, or insolent conduct...”

29. Going by the above, this court finds that the Defendants behaviour of not only failing to transfer the suit property to the Plaintiff but also going ahead and disposing part of it could rightly fall within the category of oppressive, insolent or vindictive behaviour as stated by the Court of Appeal. As such, the court deems it fit to grant the Plaintiff general damages for the two acres of land disposed of from the 5 acres sold to them.

30. Accordingly, judgment is entered for the plaintiff as against the defendant as follows;

a. That the Defendant is hereby ordered to duly execute completion documents for property known as LR No. Kajiado/Kisaju/2980 within the next ninety (90) days from the date of this Judgement.

Failure to the Defendant adhering to order (a) above, the Deputy Registrar of this Honourable Court be at liberty to execute all completion documents on behalf of the Defendant.

b. Kshs.500,000/= being General damages for breach of contract.

c. Costs of the suit to the Plaintiff.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 27<sup>TH</sup> DAY OF JULY 2023.**

**L. KOMINGOI**

**JUDGE.**

