



Landluck Investments Limited v Njoroge & 2 others (Environment and Land Appeal E010 of 2023) [2023] KEELC 20166 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20166 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E010 OF 2023
JG KEMEI, J
SEPTEMBER 27, 2023**

BETWEEN

LANDLUCK INVESTMENTS LIMITED APPELLANT

AND

JAMES MURAGE NJOROGE 1ST RESPONDENT

BENJAMIN NJERU MUCHUNGI 2ND RESPONDENT

SALIM JUMA KARIUKI MACHARIA 3RD RESPONDENT

*(Being an appeal from the Judgement in RUIRU MCLE No 171 OF 2021
delivered by Hon J A AGONDA, Principal Magistrate delivered on the 18/1/2023)*

JUDGMENT

1. In the trial Court the 1st and 2nd respondents being plaintiffs sued the 3rd respondent and the appellant as 1st and 2nd defendants vide an amended Plaint dated the 14/9/2022 seeking the following orders;
 - a. A permanent injunction restraining the defendants jointly or severally whether by themselves, agents, servants and/or workmen be restrained by way of an injunction order from trespassing, taking possession, selling, charging or in any other way interfering with the plaintiff / applicant quiet possession of Plot No. F26 and F27 Ruiru Kiu Block 2/githunguri/15661 and 15662 (suit lands).
 - b. That the defendants jointly and severally be ordered to transfer L.R. No. Ruiru/Kiu Block 2/ Githunguri/15661 and 15662 to the plaintiffs.
 - c. That in the alternative the first defendant be ordered to indemnify and pay restitution to the plaintiffs by way of monetary compensation equivalent to the current value of the suit property being Kshs. 7,500,000/-.



- d. Any other order the court may deem fit.
 - e. Cost and interest of the suit.
2. It was the case of the plaintiffs that they purchased two plots being Nos. F26 and F27 being subplots from the mother title being Ruiru/Kiu/Block2/3467 from the 1st defendant and paid the full purchase price upon which they were given possession and started fencing and farming thereon. The plots were held by the 1st defendant in form of Share Certificates Nos 344 and 345 having been issued to him by the 2nd defendant, the previous owner of the plots. By then the titles had not been processed and the 1st defendant undertook to liaise with the 2nd defendant/appellant to obtain the titles once the subdivision was completed. The mother title was subdivided in 2016 and the plots were registered as parcel Nos 15661 and 15662 respectively in the name of the 2nd defendant. That instead of transferring the plots to the 1st and 2nd respondents the 2nd defendant posted an advertisement for sale of the properties.
 3. The 1st defendant admitted the plaintiffs claim and averred that he purchased the plots from the 2nd defendant, paid the purchase price in full and took possession. In addition, he was issued with Share Certificates Nos 344 and 345 as he awaited the subdivision of the mother titles. That in the meantime in 2012 he sold his interest in the said plots to the plaintiffs with the knowledge of the 2nd defendant. That he introduced the plaintiffs to the 2nd defendant for purposes of transfer of the plots once subdivision of the mother title was complete. That the 2nd defendant subdivided the mother title in 2016 and reneged to transfer the plots to the plaintiffs. In his counterclaim he contended that the 2nd defendant held no interest in the land having conveyed the same to him and that it held the titles in trust for him. He sought for orders as follows;
 - a. Damages for emotional distress and anguish caused upon the 1st defendant by the 2nd defendant through his refusal to transfer registration of the suit lands to the rightful owners resulting in the 1st defendant, a devout Muslim who believes in justice and fairness, to be labelled a conman and a fraudster.
 - b. Reputational damages.
 - c. Cost and interests.
 4. The 2nd defendant denied the plaintiffs claim. He also denied being a party to the sale agreement between the plaintiffs and the 1st defendant. That it has never at any one time sold the land to the plaintiffs /1st defendant. He urged the court to dismiss the suit with costs.
 5. Further in its counterclaim it averred that it owns the suit lands and that the plaintiffs have not exhibited any ownership to the suit lands to warrant transfer of the same to them. That in any event the agreement between the plaintiffs and the 1st defendant provided for default in the event of non-completion of the same for whatever reasons. The plaintiffs purported purchase of the suit lands from the 1st defendant is fraudulent. The particulars of fraud were enumerated as; The plaintiffs procuring and entering a sale agreement without out due diligence; the 1st defendant entering into an agreement by false pretense.
 6. The 2nd defendant sought Judgement against the plaintiffs and the 1st defendant jointly and severally for;
 - a. A declaration that the 2nd defendant is the bonafide owner of the suit lands.
 - b. Costs of the suit and the counterclaim.
 7. Upon hearing the parties the trialcourt delivered its Judgement as follows;



- a. A declaration that the suit lands L.R. No. Ruiru Kiu Block 2/Githunguri/15661 and 15662 belongs to the plaintiffs.
 - b. A permanent injunction restraining the defendants jointly and severally whether by themselves, agents, servants and or workmen be restrained by way of an injunction order from trespassing, taking possession, selling, charging or in any other way interfering with Plot No. Ruiru Kiu Block 2/Githunguri/15661 and 15662.
 - c. The 2nd defendant is ordered to transfer L.R. No. Ruiru Kiu Block 2/Githunguri/15661 and 15662 to the plaintiffs.
 - d. All transactions registered on Plot No. Ruiru Kiu Block 2/Githunguri/15661 and 15662 be cancelled and the Land Registrar, Ruiru be and is hereby directed to rectify the land register of suit lands to reflect the name of the plaintiffs as their proprietors.
 - e. The costs of this suit is awarded to the plaintiff to be paid by 2nd defendant.
 - f. The 2nd defendant is condemned to pay for the counterclaim.
8. Aggrieved by the said Judgement the appellant proffered an appeal on the following grounds;
- a. That the learned Magistrate erred in law and fact in having found that the dispute relate to a contract dated September 28, 2012, and the plaint being dated 6TH December, 2021, which over nine (9) years, she ought to have found that the dispute was and is stale by virtue of being statute barred section 4(1) a of the Limitation Action Act provides.

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(1) The following actions may not be brought after the end of six years from the date on which the cause of action occurred:- (a) actions founded on contract.”

- b. That the learned Magistrate erred in law and facts in that having found that the dispute emanated from an expired contract that did not involve the appellant herein, that the same could not be enforced as against the appellant.
- c. That the learned Magistrate erred in law and facts in misunderstanding the terms of the expired contract in particular clause 10, in default thus:- “If for any reason whatsoever other than the non-completion caused by the default of the purchaser the transaction shall not be completed on the completion date or such other date as the parties may agree then the vendors shall refund the entire amount paid within fourteen (14) days of service of demand plus 10% interest on the purchase price. On the other part if the purchaser defaults on the terms of the agreement the vendors shall



refund the amounts paid herein within fourteen (14) days of service of demand notice less 10% of the purchase price.”

- d. That the learned Magistrate erred in law and facts in creating evidence, that the 1st & 2nd respondents herein informed the appellant about the expired contract and that the appellant was part of the said expired contract.
- e. That the learned Magistrate erred in law and facts when she held that an expired contract can transmit property in land.
- f. That the learned Magistrate erred in law and facts in making a comparison between the certificates emanating from the appellant and the certificate from the Land Registrar as provided for in the land law.
- g. That the learned Magistrate erred in law and facts when she implied fraud on the part of the appellant in processing the title deeds herein, missed to recognize that the appellant was always, the owner of the plots, without prejudice to the foregoing how would she then allocate to the 1st and 2nd respondents, property acquired by the appellant fraudulently or if at all.
- h. That the learned Magistrate erred in law and facts when she indicated that the appellant required to provide a Land Control Board Consent, ignoring that the dispute before her was an expired contract in which the appellant was not part of, without prejudice to the foregoing the learned Magistrate does not seem to demand a Land Control Board Consent from the respondents.
- i. That the learned Magistrate erred in law and facts when she misunderstood herself that the 3rd respondent herein had filed a counterclaim, That the pleadings do not indicate that the 3rd respondent filed a counterclaim to the property, how would he file a counterclaim, when he claims he no longer owned the property.



- j. That the learned Magistrate erred in law and facts when she failed to realize that the appellant herein received no money from the 1st & 2nd respondents herein.
 - k. That the learned Magistrate erred in law and facts when she ignored the business dealings between the appellant and the 3rd respondent that involved monies in amounts beyond what he claimed to have paid for the plots, and hence he had surrendered the certificates back to the appellant.
 - l. That the learned Magistrate erred in law and facts when she failed to appreciate the 3rd respondent had nothing to sell to the 1st and 2nd respondents herein.
 - m. That the learned Magistrate erred in law and facts in not appreciating that no particulars of fraud or misrepresentation were pleaded by any of the parties as against the appellant herein thus to determine the dispute on misconceived fraud was biased and a miscarriage of justice, the Court cannot presume and determine a matter on fraud without evidence.
9. The appellant sought the following orders on appeal;
- a. That the appeal be allowed.
 - b. The Judgment of the Honourable A. Agonda Principal Magistrate delivered on January 18, 2023 in MC. ELC CASE NO. E171 OF 2021 at Ruiru be wholly overturned.
 - c. That the prayers sought in the counterclaim by the appellant herein in the MC ELC e171 of 2021 Ruiru be allowed.
 - d. That the respondents bear the costs of the appeal.
 - e. Any other order that the Court may deem just and fit to grant under the circumstances
2. Upon admission of the appeal, the parties elected to canvass the appeal by way of written submissions which I have read and considered and shall highlight the same in the Judgement. The Court would like to thank Counsel for their industry and diligence.

The appellant's submissions

11. The appellant submitted that the agreement between the respondents did not confer any interest or right to the 1st and 2nd respondents for the reasons that; the appellant was not privy to the contract; the 3rd respondent did not own the suit lands; the properties were registered in the name of a third party as at 1992 and the appellant only became registered owner of the land as at 1/10/13; the 1st and 2nd respondents purchased mere Share Certificates which do not confer any interest in land; The Share Certificates are not equivalent to the certificate of titles envisaged in the [Land Registration Act](#).



12. Further that the title of the appellant has not been contested seeing that there is no plea of fraud in the 1st and 2nd respondents pleadings. That the parties having agreed on a default clause the 3rd respondent should refund the purchase price to the 1st and 2nd respondents.
13. The appellant further submitted that the trial Court based its Judgement on an expired contract thus offending the provisions of section 4(1) (a) of the Limitation of Actions Act (LAA) which states as follows;

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 - (1) The following action may not be brought after the end of six years from the date when the cause of action accrued -
 - (a) actions found on contract.”
14. That the suit having been filed 9 years later is stale as actions based on contracts may not be brought after a period of limitation of 6 years and that the 1st and 2nd respondents suit was barred by the provisions of the LAA and that a claim barred in law is no claim and must be rejected. That the suit having been time barred the Court had no jurisdiction to assume the power to determine the same. It added that the contract having been time barred nothing stands on it.
15. In further submissions the appellant faulted the 1st and 2nd respondents for failing to obtain a transfer of the suit lands in their name as well as the land control board consent. That in the absence of the land board consent the transaction between the respondents was null and void and the only remedy available to the 1st and 2nd defendants was the refunds of the purchase price. In support of this point the appellant relied on the decision of the superior courts in; Wasike v Swala CA No 6 of 1983; Onyango & anor vs Luweyi CA No 93 of 1985; Onyango & another v Luweyi CA 93 of 1985; Karuri v Gituru CA. 25 of 1980.
16. In further submissions the appellant averred that one of the terms of the agreement was that the completion period was 30 days and having been breached the 1st and 2nd respondents ought to seek refunds of the purchase price in accordance with the agreement instead of pursuing the suit lands. It also contends that the contract between the appellant and the 3rd respondent must fail for lack of land control board consent and also the Share Certificates had been surrendered to the appellant. The Court was accused of having suo moto found fraud yet there was no pleading no evidence to support the same. That the cancellation of the titles of the appellants was based on a biased decision.

The 1st and 2nd respondents submissions

17. It was submitted that the appellant relinquished its ownership of the suit lands on the 28/10/08 upon receipt of the purchase price for plot Nos F26 and F27 leading to issuance of two Share Certificates being Nos 344 and 345. The fact of the sale was admitted by the appellant's director in para 10 of his witness statement. That the averments that the Share Certificates were surrendered to the appellant in lieu of payment of a debt was an afterthought for which the 1st and 2nd respondents are in agreement with the findings of the trial Court.
18. On whether the suit was statute barred the respondents submitted in the negative. It was submitted that this is a new issue that was not determined in the trial Court and the appellant is estopped from raising it on appeal. It was further argued that even if it was to be made an issue the cause of action revolves around the recovery of land and the same would fall under the provisions of Section 7 of the LAA. In addition, that the cause of action arose in 2021 when the appellant instead of transferring the



land to the 1st and 2nd respondents registered it in its name. That the suit having been filed in 2021 is well within the statutory limits and cannot be said to be statute barred.

19. On the issue of fraud, the respondents submitted that the act of the appellant in purporting to register the land in its name instead of the 1st and 2nd respondents was fraudulent and illegal. The appellant had sold its interest in the land to the 3rd respondent and it held the title in trust and for the account of the 1st and 2nd respondents. Having sold the land it is deceitful for it to turn around, renege on the contract between it and the 3rd respondent and purport to claim any interest in the suit lands, an interest that he relinquished on receipt of the purchase price and issuance of Share Certificates. That the action of the appellants offends section 26 (b) of the *Land Registration Act*.

The 3rd respondents submissions.

20. On the issue of statute bar, the 3rd respondent agreed with the 1st and 2nd respondents that the suit is not statute barred. That the cause of action arose in July 2021 when the appellant registered the plots in its name and purported to advertise them for sale to third parties yet it knew or ought to have known that it had no interest in the same. The actions of the appellant therefore in lieu of transferring the land to the 1st and 2nd respondents were purely fraudulent and smirked of illegalities. That the cause of action being the recovery of land, the period of limitation applicable is 12 years and not 6 years as erroneously argued by the appellant.
21. It was further submitted that the appellant having not been privy to the agreement of sale between the respondents is barred from the principles of privity of contract for the simple reason that the said contract did not confer any rights to the appellant. That there exists no dispute between the respondents who are parties to the agreement and the appellant cannot be allowed to create a dispute for them.
22. On fraud, the 3rd respondent argued that the issue arose from the evidence and pleadings and that the trial Court was well in its right to determine the same.
23. Did the court create evidence? The 3rd respondent answered in the negative. The 3rd respondent informed the appellant about the sale of the land to the 1st and 2nd respondent so that it could process the titles directly in the name of the 1st and 2nd respondents. The court was urged to dismiss the appeal.

Analysis and determination.

24. Having carefully considered the grounds of appeal, the written submissions, the record of appeal, the entire trial court file and all the materials placed before me on appeal, the issues that commend themselves for determination are;
 - a. Whether the suit was time barred
 - b. Whether the appellant proved fraud on the part of the respondents.
 - c. Whether the trial Magistrate erred in finding for the 1st and 2nd respondents
 - d. Costs of the appeal.
25. The 3rd respondent supports the 1st and 2nd respondents case. The appeal therefore is against the whole decision of the court which favoured all the respondents.
26. The background of the suit has been laid out in the preceding paras in this Judgement and in my view will not serve any purpose to regurgitate the same. I shall therefore proceed to determine the suit bearing in mind that I have not heard nor seen the witnesses as did the trial court. this being a first



appeal, it is the duty of the court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & another v. Associated Motor Boat Co Ltd & others* [1968] EA 123, this principle was enunciated thus:

“... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”

27. I shall be guided further by the principles set out in the case of *Mbogo & another v Shah* [1968] EA where the court held as follows;

“An Appellate Court will not interfere with the exercise of the trial courts discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice.”

28. The issue of time bar has been raised by the appellant in submissions. A close perusal of the pleadings and evidence in the trial court shows that this issue was never pleaded nor evidence led and therefore it is a new matter that is being raised at the submissions. There is no evidence that the appellant sought and obtained leave to adduce new evidence at the Appellate Court. It is trite that submissions can never take the place of evidence.

29. The court holds that the issue of statute bar is moot. It is struck out.

30. Even if the court was to be wrong the issue of time bar, the court has perused the pleadings and it is clear that the cause of action occurred in July 2021 when the appellant refused to transfer the land to the 1st and 2nd respondents and instead advertised it for sale to third parties. The court holds that the suit was not barred given that it was for recovery of land which is within 12 years. The suit was filed in 2021 within the year of the cause of action. The first issue is therefore determined in the negative.

31. The genesis of the suit is the sale of two plots by the appellant to the 3rd respondent. Evidence was led by the 3rd respondent that it purchased plots Nos. F26 and F27 from the appellant in 2008. The appellant led evidence and annexed two receipts dated the 20/10/2008 for Kshs. 132,500/- each in favour of the 3rd respondent with respect to plot Nos F26 and 27. It refers to the transaction dated 20/7/2008. The plots appear on the sketch map on page 18 of the Record of Appeal. It is commonly agreed between the appellant and the 3rd respondent that it issued Share Certificates to the 3rd respondents on its letterhead certifying that he was the legal owner thereof.

32. The Share Certificates Nos. 344 and 345 were issued on 7/7/2009. The certificate is endorsed with a condition that no transfer of the above shares can be registered unless accompanied by this Share Certificate.

33. The appellant admits selling the plots to the 3rd respondent but argues that the same plots were surrendered to it in satisfaction of a debt in the sum of Kshs 800,000/- advanced to the 3rd respondent. A number of payment receipts were annexed by the appellant in support of the said payments. That the 3rd respondent gained entry to his office and took the certificates away, a position that was vehemently refuted by the 3rd respondent. The appellant did not table any evidence in support of the surrender. It also failed to show evidence of a police abstract showing that the 3rd respondent illegally took the



said certificates. Interalia the Court has perused a business Finance agreement entered between the 3rd respondent and the appellant dated the 11/10/2010 in which it was agreed that the appellant would finance import and marketing of undisclosed products and the profits to be shared would be shared on a 50;50 basis. In that agreement the 3rd respondent acknowledged the sum of Kshs 400,000/- from the appellant. There is no term in the said agreement that the land or for that matter the Share Certificates would be used to secure the monies. The first time the issue of surrender of shares is mentioned is in the letter dated the 22/2/2018 when the appellant admitted to selling the plots to the 3rd respondent which plots were forfeited in lieu of receipt of Kshs 812,050/- from the appellant. It suffices to note that there is no agreement with respect to these sums leave alone one which documents the surrender of the land/shares.

34. From the forgoing the court makes the findings as thus; there was a valid agreement of sale between the appellant and the 3rd respondent; the description of the plots sold were F26 and 27 to be excised from parcel 3467; the appellant acknowledged the full purchase price; the 1st respondent was put in possession; the appellant issued the 3rd respondent with the Share Certificates Nos. 344 and 345 showing the interest acquired in the plots awaiting the processing of subdivision and registration of the lands; the 3rd respondent legally acquired title and interest as stated in the Share Certificate; what was being awaited was the formality of transfer of the land in the name of the 3rd respondent; the appellant therefore relinquished all its interest and or rights in the two parcels of land which are identifiable and certain in description; he held the interest in the two parcels in trust for the 3rd respondent pending the transfer and registration of the same in the name of the purchaser, the 3rd respondent.
35. It is not in dispute that the 3rd respondent sold the two plots to the 1st and 2nd respondents vide an agreement of sale dated the 20/9/2012 for a sum of Kshs 1.2 M. By then the 3rd respondent had owned the land for over 3 years. Upon payment the 1st and 2nd respondents were put in possession of the land. It was the evidence of PW1 that before they entered into the agreement they visited the offices of the appellant to inspect the map and confirm that the 3rd respondent owned the land. It was also disclosed that the titles had not been processed and that the purchasers were to pursue the execution of the transfers with the appellant with the help of the 3rd respondent. Interalia the Share Certificates were to be transferred to the purchasers in 30 days.
36. The appellant in its counterclaim pleaded fraud against the respondents. It contended that the 1st and 2nd respondents purchased land without due diligence and that the 3rd respondent sold nothing to the said respondents. Far from it.
37. Fraud is defined as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
38. Fraud is proven by tendering evidence. It cannot be inferred from the evidence on record. See the decision in *Ndolo vs. Ndolo* (2008) I KLR.
39. It is the finding of the Court that the appellant failed to prove fraud on the part of the respondents. Consequently, the counterclaim of the appellant fails. It is dismissed.
40. Having held that the appellant had relinquished its interest in the suit lands, I agree with the trial Court Magistrate that the appellant held the title resulting from the subdivisions in trust for the 3rd respondent. There was no valid claim remaining in the land sold by the appellant. The act of the appellant therefore in registering the land in its name and purporting to advertise it for sale to third parties was a fraudulent and illegal act. This is because he held no interest in the land the same



having been conveyed fully to the 3rd respondent. The Court finds that the trial Magistrate did not err in ordering the cancellation of the titles in the name of the appellant in favour of the 1st and 2nd respondents.

41. In the end I am inclined to find no error in the conclusion arrived by the Learned trial Magistrate.
42. The appeal is devoid of merits and it is dismissed with costs in favour of the respondents.
43. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Appellant – Absent

Muriithi for 1st and 2nd respondent

Misiko Ms. Mumbia for 3rd respondent

Court Assistants – Phyllis/Lilian

