



**Gathumbi v Wachira (Environment and Land Appeal 25 of 2019)
[2023] KEELC 19949 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19949 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 25 OF 2019**

**JO OLOLA, J
SEPTEMBER 22, 2023**

BETWEEN

JOHN KARIUKI GATHUMBI APPELLANT

AND

STEPHEN NDEI WACHIRA RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Ruling delivered by the Honourable Nelly W. Kariuki – Senior Resident Magistrate, on 29th August, 2019 in Nyeri CMCC No. 7 of 2018; *John Kariuki Gathumbi v Stephen Ndei Wachira*.
2. By a Plaint dated 17th January 2018, John Kariuki Gathumbi (the Appellant) had sought orders against the Defendant as follows:
 - (a) An order for specific performance for the Defendant to transfer 2 acres from Title Number Nyeri/Endarasha/1678 pursuant to the Agreement dated 19th August 2011, for the sale of two (2) acres to be excised from Title Number Nyeri/Endarasha/1678;
 - (b) An order for the Defendant to execute the necessary documents and obtain the requisite consents to effect the sub-division and transfer of 2 acres from Title Number Nyeri/Endarasha/1678. In default, the Deputy Registrar to be at liberty to execute the same;
 - (c) An order of permanent injunction restraining the Defendant, his servants and/or agents from interfering with the Plaintiff's possession, quiet and peaceful enjoyment of two (2) acres comprised in Title Number Nyeri/Endarasha/1678;
 - (d) Any other and further orders as this Honourable Court may deem just in the circumstances; and
 - (e) Costs of the suit.



3. Those prayers arose from the Appellant's contention that on 19th August 2011, he had entered into an Agreement with the Respondent for the sale of the two acres that were to be excised from the Respondent's Title Number Nyeri/Endarasha/1678 at an agreed consideration of Kshs.880,000/-. It is the Appellants' case that despite his paying the purchase price in full and taking over possession of the two acres, the Respondent has to-date been reluctant to obtain the Land Control Board consent and to transfer the two acre portion to his name.
4. But in his Statement of Defence dated 26th March 2018, Stephen Ndei Wachira (the Respondent) while admitting that they entered into the Sale Agreement asserted that the transaction had become null and void for all purposes by dint of the provisions of Sections 6 and 8(1) of the Land Control Act, Cap. 302, Laws of Kenya as no Land Control Board consent was obtained within six (6) months from the date of execution of the Agreement.
5. In addition, the Respondent denied that the Appellant was in possession of the land and asserted that if indeed the Appellant was in possession as indicated, then such possession was in contravention of Section 22(b) of the Land Control Act aforesaid. It was further the Respondent's case that the Appellant's suit was barred under the provisions of Section 4 of the Limitation of Actions Act, Cap. 22 Laws of Kenya.
6. Subsequently and by a Notice of Preliminary Objection dated 2nd October 2018, the Respondent objected to the entire suit on the grounds;
 1. That the transaction herein became null and void for all purposes by dint of the provisions of Sections 6 and 8(1) of the Land Control Act, Cap. 302 of the Laws of Kenya as the Land Control Board consent was not obtained within six (6) months from 19th August, 2011;
 2. That this suit is statutory barred under the provisions of Section 4 (of the Limitation of Actions Act, Cap. 22 Laws of Kenya; and
 3. That this Honourable Court has no jurisdiction as this suit is statutory barred.
7. That Preliminary Objection was heard by the Honourable Nelly W. Kariuki, Senior Resident Magistrate who in a Ruling delivered on 29th August, 2019 upheld the same to the extent that the suit was time-barred and proceeded to dismiss the same with costs.
8. Aggrieved by the said determination, the Appellant lodged the Memorandum of Appeal herein dated 26th September, 2019 urging this Court to set aside and/or vary the Ruling on the grounds:
 1. That the Learned Trial Magistrate erred in law and fact by applying the wrong principles of law thus erroneously concluding that the suit was statutorily time barred by dint of the provisions of Section 4 of the Limitation of Actions Act whereas the Appellant had interrupted the period of limitation by issuing a demand letter to the Respondent within the limitation period, thereby occasioning a gross miscarriage of justice;
 2. That the Learned Trial Magistrate erred and misdirected herself in law by selectively interpreting the law thus making erroneous finding to the effect that the suit was statutorily time barred notwithstanding the fact that the Respondent had received the full purchase price from the Appellant, thus the Respondent had become a trustee holding the suit property in favour of the Appellant, thereby occasioning a miscarriage of justice;



3. That the Learned Trial Magistrate erred in law and fact by applying the wrong principles of law thus making an erroneous finding to the effect that the suit was statutorily time barred notwithstanding the fact that the Appellant having been in possession of the suit property acquired an equitable beneficial interest in the suit property, thereby occasioning a miscarriage of justice;
 4. That the Learned Trial magistrate erred and misdirected herself in law by selectively interpreting the law thus making an erroneous finding to the effect that the period of limitation had run whereas the Appellant had pleaded the equitable doctrines of constructive trust and proprietary estoppel thereby occasioning a miscarriage of justice;
 5. That the Learned Trial Magistrate erred in law and fact by applying the wrong principles of law thus making an erroneous finding by countenancing the actions of the Respondent in relying on the defence that the agreement for sale of the suit land was void for non-compliance with Section 6 and 8(1) of the *Land Control Act* thereby occasioning a miscarriage of justice;
 6. That the Learned Trial Magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at an erroneous finding in the Ruling thereby occasioning a miscarriage of justice; and
 7. That the Learned Trial Magistrate failed to address her mind to the pleadings on record, the documentary evidence by the Parties, the Appellant's submissions and the law, thereby occasioning a miscarriage of justice.
9. This being the first appellate Court, it is mandated to re-evaluate the evidence before the trial Court as well as the Ruling and to arrive at its own independent Judgment on whether or not to allow the Appeal (See *Selle & Another v Associated Motor Boat Company Limited & Others* (1968) EA 123).
 10. I have accordingly carefully perused and considered the Record of Appeal including the impugned Ruling. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties.
 11. By their Notice of Preliminary Objection dated 2nd October 2018, the Respondent had objected to the Appellant's suit on two grounds. The first was that the transaction had become null and void for the failure by the Parties to obtain Land Control Board consent to transfer the two acres of land within six (6) months from 19th August, 2011 when the Sale Agreement was executed. This ground was overruled by the Court. The second ground which was upheld by the Court was that the suit was statutorily barred by dint of Section 4(1)(a) of the *Limitation of Actions Act*.
 12. Having considered the issue of Limitation of Actions, the Learned Trial Magistrate delivered herself at paragraphs 5 to 8 of her Ruling as follows:

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“5. Section 4(1) and (3) of the Limitation of Actions Act provides as follows:

- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued –
 - (a) actions founded on contract;



- (b) actions to enforce a recognizance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions, claiming equitable relief, for which no other period of limitation is provided by this Act or any other written law.
- (3) An action for an account may not be brought in respect of any matter which arose more than six years before commencement of the action.

6. I have perused the plaint filed on 18th January, 2018. It is noted that the cause of action arose on 19th August, 2011 which was the date of execution of a land sale agreement between the Parties herein. A quick mathematical calculation would place the end of the six year period as interpreted by the Act at 19th August 2017; therefore the suit was filed 6 months out of time. The respondent submits that the limitation of time would not apply in this case because this is a claim to recover land and therefore the provisions of Section 7 of the Limitation of Actions (which) provides as follows would apply:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.”

7. I having (sic) looked at the prayers in the plaint and note that the substance of the prayers are for orders of specific performance for the applicant with respect to transferring the suit land to the respondent and executing the necessary documents to obtain the requisite consent to effect the transfer. These are prayers seeking to enforce a contract. It is the admission of the respondent that he has been in physical possession of the suit land as he was placed in occupation by the applicant a little over a month after the execution of the sale agreement as per the Plaint.

To my understanding, can one recover what one they already physically possess? In my considered view, the respondent’s Submissions are at variance with his pleadings. The prayers in the Plaint clearly seek enforcement of a contract more than 6 years after the right of action accrued.”

13. As it were, the prayers made by the Appellant arise from his contention that on 19th August 2011, he had entered into an agreement with the Respondent for the sale of the two acres of land that were to be excised from the Respondent’s land parcel No. Nyeri/Endarasha/1678 at an agreed consideration of Kshs.880,000/-. It is the Appellant’s case that despite paying the agreed consideration in full, the Respondent has to-date been reluctant to obtain the necessary consents and to transfer the two acre portion of land to his name.



14. That being the case, it was apparent to me that contrary to the findings of the Learned Trial Magistrate, the Appellant had instituted the suit to recover the land from the Respondent as the Respondent had despite conceding to have executed the Sale Agreement failed to transfer the land to the Appellant. That is the reason under Section 2 of the *Limitation of Actions Act* that was cited by the trial Court, a “right of action to recover land” is defined to include references to a right to enter into possession of the land and references to the bringing of an action in respect of such a right to make an entry on the land.
15. As it were, all contracts for the sale or disposition of land were required in law to be in writing. While Section 4 of the *Limitation of Actions Act* required that all actions based on contract be instituted within six (6) years, it was evident that Section 7 of the same *Act* was inserted therein for purposes of extending time when the matter in issue, be it based on contract or not entailed the question of recovery of land.
16. Arising from the foregoing, I was persuaded that the Learned Trial Magistrate misdirected herself and hence arrived at the wrong conclusion in her Ruling dated 29th August, 2019.
17. Accordingly I hereby set aside the Ruling and orders issued on 29th August 2019. In their stead, I hereby make an order dismissing the Respondent’s Preliminary Objection dated 2nd October, 2018.
18. There will be no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 22ND DAY OF SEPTEMBER, 2023.

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J. O. OLOLA

JUDGE

In the presence of:

Mr. Magua for the Appellant

Mr. Wahome Gikonyo for the Respondent

Court assistant – Kendi

