



Waweru v Buruburu Farmers Company Limited (Environment and Land Case Civil Suit 64 of 2019) [2023] KEELC 20270 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20270 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 64 OF 2019
OA ANGOTE, J
SEPTEMBER 21, 2023**

BETWEEN

DAVID NGUGI WAWERU PLAINTIFF

AND

BURUBURU FARMERS COMPANY LIMITED DEFENDANT

JUDGMENT

1. In the Amended Complaint dated March 25, 2022, the Plaintiff has sought for the following orders:
 - a. A declaration that the Defendant did not have legal capacity to enter into an agreement with the Plaintiff over the sale of Title Number Nairobi/ Block 102/242.
 - b. A declaration that the Defendant did not pass good title over land parcel number Nairobi Block 102/ 242 to the Plaintiff.
 - c. An order and direction by this court that the Defendant registers an alternative Parcel of land of equal value, quality and acreage as land parcel number Nairobi Block 102/ 242 in favour of the Plaintiff.
 - d. An order that the Defendant reimburses the Plaintiff the sum of Kshs. 4,840.35 paid per year as land rates from the year 2001 to date.
 - e. An order for refund of monies spent by the Plaintiff to conduct valuation of the suit property being Kshs. 15,000/-.
 - f. In the alternative to prayer (c) above, the Plaintiff prays for compensation of equivalent parcel of land as land parcel number Nairobi Block 102/ 242 at current market value.
 - g. Mesne profits owing to the restriction placed over Title Number Nairobi Block 102/242 from 20.01.2009.



- h. Costs of this suit.
 - i. Interest at court rates (b) and (c) above.
 - j. Any other or further orders the Honourable court may deem fit and necessary to grant.
2. The Plaintiff's case is that he entered into a sale agreement on January 3, 2001 with the Defendant for the purpose of purchase of a parcel of land known as Nairobi/Block 102/242 situated in Njiru within Nairobi County (the suit land) and that the duly executed land transfer forms in his favour were registered in Nairobi District Land Registry.
 3. It was deposed by the Plaintiff that a Certificate of Lease dated October 24, 2001 was issued to him; that he thereafter took possession of the suit property and continued to pay the land rates as demanded by the Nairobi City Council and that on or about January 20, 2009, he noticed that there was a restriction on the land which was registered on January 20, 2009 by the Public Trustee on behalf of the Estate of Muiruri Njoroge (Deceased).
 4. According to the Plaintiff, the deceased was alleged to be the rightful owner of the suit property herein. The Plaintiff avers that Criminal Case No. 25411 of 2003 Republic v Waweru Nginya & 5 Others was later filed, in which case the Defendant's directors were charged and convicted for obtaining money under false pretense from the Plaintiff.
 5. The Plaintiff avers that he also instituted a suit against the Estate of Muiruri Njoroge (Deceased), praying for orders that a declaration be issued that he is the lawful owner of the suit property herein and that the restriction lodged against the suit property be removed, and that the suit was dismissed after the court held that his claim of ownership was not tenable since the vendors who had fraudulently sold the property to him had been convicted of the offence.
 6. The Plaintiff deposed that he bought the suit property for value without notice of any adverse claim and that he paid valuable consideration to the Defendant in good faith; that the Defendant breached the terms of the sale agreement by fraudulently selling the suit property to him and that he is seeking for special damages including loss of land measuring approximately 0.1036 Ha.
 7. In its Statement of Defence dated May 13, 2019, the Defendant denies the Plaintiff's narration in the Plaintiff. The Defendant averred that it has never executed any transfer of land forms for the suit property in favour of the Plaintiff and that the criminal charges in Criminal Case No. 25411 of 2003 against the Defendant's directors were preferred against them in their individual capacity and not in the official capacity as directors of the Defendant.
 8. It is the Defendant's case that the criminal charges against the Defendant's directors were actuated by malice, to coerce and intimidate the Defendant's directors into illegally allocating a portion of the Defendant's land to the Plaintiff.
 9. The Defendant denied the allegations of fraud and the Plaintiff's claim of ownership of the suit property because no valuable consideration has ever been paid to the Defendant company by the Plaintiff for the suit property.
 10. The Defendant also filed a Notice of Preliminary Objection dated January 24, 2023 in which it averred that this suit is a claim for breach of contract for the sale of land which was orchestrated twenty two years ago on January 3, 2009 and discovered by the Plaintiff thirteen years ago on January 20, 2009; that the Plaintiff's suit is time barred under the provisions of Section 4(1) of the *Limitation of Actions* (Cap 22) Laws of Kenya and that the Honourable Court lacks jurisdiction in law to hear and determine this matter which is statutorily time barred.



Hearing & Evidence

11. The Plaintiff, PW1, relied on his statement dated March 25, 2022. In the statement, PW1 stated that he entered into a Sale Agreement with the Defendant dated January 3, 2001, for the suit property and that in the Agreement of Sale, the Defendant represented itself as the legal owner of the suit property.
12. PW1 stated that the Defendant had the legal capacity to sell the suit property to him; that the transfer of land forms were subsequently signed by the Defendant in his favour and registered at Nairobi District Land Registry and that a Certificate of Lease dated October 24, 2001 was issued to him.
13. PW1 asserted that he took possession of the suit property and paid land rates as demanded by the City Council to date; that he came to learn on January 20, 2009 that a restriction had been placed on the suit property by the Estate of Muiruri Njoroge (Deceased) who alleged to be the owner of the suit property and that the Defendant's directors were charged with obtaining money under false pretenses from him in Criminal case No. 25411/03 Republic v Waweru Nginya & 5 Others and judgement against them delivered in 2008.
14. PW1 stated that he instituted a suit CMEC No. 8215/2019 against the Estate of Muiruri Njoroge (Deceased) and that he lost this case after the court held that his claim to ownership of the land was not tenable; that he bought the suit property without notice of any adverse claim and that he paid valuable consideration in good faith.
15. PW1 produced a bundle of documents as PEXB1, which included a copy of the sale agreement dated January 3, 2001; a copy of the Certificate of Lease dated October 24, 2015; receipts dated December 10, 2015 for payment of land rates; a letter from the Plaintiff's advocates to the Chief Land Registrar dated January 12, 2009 inquiring on the restriction of the suit property and a letter dated November 4, 2009 to the Public Trustee on behalf of the Estate of Muiruri Njoroge (deceased).
16. PW1 also produced in evidence a copy of the judgement in Criminal Appeal Number 211 of 2009 dated February 20, 2014; a copy of the judgement in Civil Suit No. 8215 of 2009; copies of letters dated October 11, 2018, March 10, 2014 and November 17, 2003; a copy of the valuation report of November 12, 2021 and an official receipt issued for the valuation exercise.
17. The Defendant did not call any witness.

Submissions

18. Counsel for the Plaintiff submitted that the Defendant did not pass good title to the Plaintiff. Counsel relied on Section 26 of the *Land Registration Act*, 2012 and argued that the oral and documentary evidence tendered by the Plaintiff demonstrates that although he holds title to the suit property, the same was deemed to have been illegally acquired in Nairobi Criminal Appeal No. 211 of 2009.
19. Counsel submitted that in its judgement, the High Court noted that the Defendant's directors admitted that they sold the plot to him and that the judgement found no fault with him but noted that the Defendant's directors misrepresented to the Plaintiff that they had authority to sell and means to pass ownership of the suit property.
20. The Plaintiff's Counsel further submitted that this judgement was never challenged on appeal or set aside. They relied on the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* (2015) eKLR, where the trial court held that upon a court finding that title was acquired fraudulently, the onus shifts to the opposite party to challenge the claim that a title is tainted with fraud.



21. Moreover, Counsel submitted, from the evidence that the Plaintiff has adduced, the suit property appeared to have been transferred to him by the Defendant by legal process and that it was only on February 20, 2014 that the Defendant's Directors held that its directors acted fraudulently in selling him the suit property. Counsel relied on *Central Bank of Kenya Limited v Trust Bank Limited & 4 Others* [1996] eKLR.
22. The Plaintiff's Counsel urged that having proved fraud on the part of the Defendant's Directors, the Plaintiff is entitled to refund of the purchase price at current market value and that the documentary evidence adduced by the Plaintiff establishes that the Plaintiff was a bona fide purchaser for value without notice of defect in title to the suit property, for which he paid KShs. 100,000 on January 3, 2001.
23. The Plaintiff's Counsel's submitted that this suit is not time barred as the dates in the Defendant's Preliminary objection are vague and contradict those in the Statement of Defence. It was submitted that the period of limitation does not begin to run until the Plaintiff has discovered the fraud; that if the Plaintiff's appeal had been successful, this suit would have been unnecessary and that consequently, this suit was filed timeously on February 22, 2019.
24. Counsel for the Defendant submitted that the Plaintiff's assertion that he only came to know that the title was fraudulently passed to him in 2009 is false because the Plaintiff was a prosecution witness, PW4, in the criminal trial case against the Defendant's directors and that as the criminal proceedings were initiated in 2003, it is apparent that the Plaintiff was aware of the Defendant's impropriety in selling him the land in 2003.
25. Counsel submitted that this suit is a claim of breach of contract and that the prayers sought by the Plaintiff are for the Defendant to honor its obligations under such contract of sale of land. That being the case, it was submitted, the claim ought to have been instituted within six years from the date when the cause of action arose under Section 4(1)(a) of the *Limitation of Actions Act*.

Analysis and Determination

26. The issues for determination in this suit are:
 - a. Whether this suit is time-barred.
 - b. Whether the Plaintiff is entitled to the remedies they have sought.
27. The Plaintiff filed this suit seeking a remedy for breach of contract of a sale of land agreement. The facts as pleaded by the Plaintiff are that he entered into a contract dated January 3, 2001 for the sale of land known as land parcel number Nairobi Block 102/ 242 situated in Njiru within Nairobi County (the suit land).
28. The Plaintiff averred that he paid a consideration of KShs. 100,000; that the land was legally transferred to him and a Certificate of Lease dated October 24, 2001 was issued to him; that he took possession of the suit land and that it was only in 2009 that he discovered that a caveat had been registered against the title of the land.
29. The Plaintiff informed the court that Criminal Case No. 25411 of 2003 Republic v Waweru Nginya & 5 Others was later filed, in which case the Defendant's directors were charged and convicted of obtaining money under false pretense from him. The Plaintiff consequently has sought a declaration that the title to the property did not legally pass to him and for an order that the Defendant registers an alternative parcel of land of equal value, quality and acreage as the suit land in his favour.



30. The Plaintiff has also sought for reimbursement of land rates and land survey fees; and an alternative order of compensation of the current value of the suit property, costs and interest.
31. The Defendant has denied the allegations of fraud on its part and denied that the Plaintiff's claim of ownership of the suit property. According to the Defendant, the Plaintiff was not a bona fide purchaser for value of the suit property without notice.
32. It is the Defendant's case that its directors were sued in the Criminal case in their individual capacities and not as directors of the Defendant company, and that in any event, the suit is time barred.
33. The Defendants herein have averred that this suit is time barred under Section 4(1) of the [Limitation of Actions Act](#) which provides that actions founded on contract ought to be filed within 6 years.
34. Section 26 of the [Limitation of Actions Act](#) extends limitations in cases of fraud as follows:

“Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

35. The law of limitation of actions is meant to protect Defendants from unreasonable delays in instituting suits against them. The Court of Appeal in [Alba Petroleum Limited v Total Marketing Kenya Limited](#) [2019] eKLR quoted with approval the case of [Gathoni v Kenya Co-Operative Creameries Ltd](#) [1982] KLR 104, Potter, JA at page 107 who expressed himself thus:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

36. The Court of Appeal also quoted the case of [Iga v Makerere University](#) [1972] EA where it was held as follows;

“A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rule of Uganda which has same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”



37. It is trite that the issue of limitation goes to the jurisdiction of the court. Where a suit is statute barred, a court has no jurisdiction to hear and determine it. This was held in *Bosire Ogero v Royal Media Services* [2015] eKLR:

“The Law of Limitation of actions is intended to bar plaintiffs from instituting claims that are stale and (is) aimed at protecting defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same.”

38. The facts in this matter are that the parties entered into a contract on January 3, 2001 for the sale of land. It is not disputed that fraud was attendant on the part of the Defendant’s directors. Consequently, the Defendant’s directors were charged and found guilty of obtaining money by false pretense from the Plaintiff in Criminal Case No. 25411 of 2003 Republic v Waweru Nginya & 5 Others.

39. Section 26(a) of the *Limitation of Actions Act*, quoted above, provides that where an action is based on fraud, the period of time does not begin to run until the Plaintiff has discovered it. In *Justus Tureti Obara v Peter Koipetai Nengiso* (2014) eKLR Okongo J stated as follows:

“...The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial.”

40. In this case, the date on which the Plaintiff discovered the fraud and thereby, when this cause of action arose is not clear. It is however clear that by 2003, the issue of whether the suit property had lawfully passed to the Plaintiff was raised.

41. When the Criminal case was filed in 2003, the Plaintiff was a witness in the suit. The criminal court entered a guilty verdict against the Defendant’s directors on November 11, 2008. The Defendant’s Directors preferred an appeal in the High Court through Criminal Appeal No. 211 of 2009, which on February 20, 2014 was dismissed, and the Defendant’s directors’ convictions upheld.

42. In Kenyan law, concurrent civil and criminal litigation is provided for under Section 193A of the *Criminal Procedure Code* as follows:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

43. There are certain circumstances in which the courts have held that either the civil proceedings ought to be stayed pending determination of criminal proceedings. This is where an accused person shows that he might be prejudiced in the criminal proceedings should the civil proceedings be heard first. Conversely, where the criminal suit is oppressive, and not in the public interest or in the interest of administration of justice, the same may be stayed. This was the position taken by the by the Court



of Appeal in *Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and Others* [2013] eKLR where it was held as follows:

“While the law (section 193A of the *Criminal Procedure Code*) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.”

44. The Plaintiff had the right to institute civil proceedings as against the directors of the Defendant alongside criminal proceeding, although it was prudent on the part of the Plaintiff to await the decision of the criminal court on the culpability of the Defendant’s directors.
45. Indeed, I agree with the Plaintiff that he could only be sure of the culpability of the Defendant and its Directors in the entire transaction, after the determination of the criminal case which decision was made in 2009. This decision must have informed the Plaintiff to file the suit in CMEC No. 8215 of 2019 against the Estate of Muiruri Njoroge (Deceased) which was dismissed after the court held that his claim to ownership of the land was not tenable.
46. That being the case, time started running in the year 2009 when the criminal court returned a verdict of guilt as against the Defendant’s directors and not in the year 2003. Considering that the dispute herein is in respect to land, the limitation of time provided for under section 7 of the *Limitation of Actions Act* is 12 years. This suit is therefore not time barred.
47. The criminal court did return a verdict of guilt as against the claim that the Defendant’s directors had fraudulently sold to the Plaintiff the suit property. This verdict was upheld on appeal. Considering that a company always acts through its directors, the Plaintiff is entitled to damages as against the Defendant in the form of damages.
48. The damages that the Plaintiff is entitled to is for the refund of the money he paid for the land, and not for an alternative land. I say so because under section 3 (3) of the *Law of Contract Act*, land can only be transferred after a valid sale agreement has been executed and attested. There is no such agreement before me for an order of compensation in the form of land to be made.
49. That being the case, and in view of what I have stated above, the Plaintiff will be paid the Kshs. 100, 000 he paid with interest at court rates from the date when the money was paid to the Defendant in the year 2001. The Plaintiff will also be entitled to a refund of Kshs 15,000 which he paid for the preparation of the valuation report, a receipt whereof was produced in evidence.
50. Although the Plaintiff has also prayed for the refund of the rates allegedly paid to the Nairobi City County Government, there is no evidence to that effect. The said money cannot therefore be refunded.
51. Consequently, the court makes the following orders:
 - a. The Defendant to pay the Plaintiff Kshs. 100,000 together with interest at court rates from the January 3, 2001 until payment in full.



- b. The Defendant to reimburse the Plaintiff Kshs 15,000 being the payment of the valuation report.
- c. The Defendant to pay the costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY ON 21ST SEPTEMBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Wachira for Plaintiff

Mr. Macharia for Defendant

Court Assistant - Tracy

