



Chege v Statutory Manager United Insurance Company Limited(Under Statutory Management) & another (Environment and Land Appeal E038 of 2021) [2023] KEELC 21157 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21157 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E038 OF 2021
MN GICHERU, J
OCTOBER 31, 2023**

BETWEEN

ROSEMARY WANGARI CHEGE APPELLANT

AND

**STATUTORY MANAGER UNITED INSURANCE COMPANY
LIMITED(UNDER STATUTORY MANAGEMENT) 1ST RESPONDENT**

JEREMIAH MWAU 2ND RESPONDENT

*(Being an appeal from the Judgment delivered on 2/12/2021 by
HON. P. Achieng (SPM) in the Senior Principal Magistrate's Court;
Environment and Land Court Case No. 36 of 2018 at Ngong Law Court)*

JUDGMENT

1. On the December 2, 2021, the learned trial Magistrate dismissed the appellant's suit in Senior Principal Magistrates Court Ngong ELC No. 36 of 2018 for lack of merit. In the suit before the lower court, the appellant was the plaintiff while the respondents were the defendants.
2. In the suit, the appellant had sought for an order of specific performance of a sale agreement and transfer of title to L.R. Kajiado/Kaputiei-North/156xx and 15636 to herself, among other prayers.
3. Dissatisfied with the decision of the lower court, the appellant filed this appeal seeking the following orders.
 - i. The appeal be allowed and the judgment of the Honourable Senior Principal Magistrate be set aside.
 - ii. Judgment be entered for the appellant against the respondents as prayed in the plaint.



- iii. The costs of the appeal and the lower court suit be borne by the Respondents.
4. The grounds of appeal as per the memorandum dated 22/12/2021 are as follows. The learned magistrate erred in law/fact,
- i. In failing to find that the plaintiff had proved her case against the defendants on a balance of probabilities and dismissing the plaintiff's case having regard to the evidence on record,
 - ii. In finding that the plaintiff's claim for an order compelling the first defendant to render a statement of account of her terminal dues and benefits owed by the insurance company (United Insurance Limited, the company) was caught up by section 90 of the Employment Act and cannot be determined in total ignorance and or disregard of the express provisions of law under the Insurance Act (Cap 487); Section 67(c) (10) providing for suspension of running time for purposes of limitation,
 - iii. In her determination that the plaintiff failed to pay the purchase price within the stipulated duration on the sale agreement in total disregard of the law on running of time under section 67 (c) (10) of the Insurance Act,
 - iv. In her finding that payment of the sale price was not pegged on whether or not the contract of employment between the Plaintiff and the company was in existence within the duration the Plaintiff was to pay; in total disregard of the evidence before the court that the Plaintiff was in employment until the company was placed under statutory management and the company was recovering the sale price by way of installments in monthly deductions from the Plaintiff's salary, and failing to find that the company was by its conduct estopped from denying the fact; and in further total disregard that the company has not issued any statement of account to controvert that it is the company that was indebted to the Plaintiff without which statement of account the court was wrong in its determination that the Plaintiff was indebted to the company,
 - v. In her determination that the plaintiff failed to pay the full purchase price and the defendant was at liberty to sell the land as per the agreement in absence of any statement of account on the part of the company to controvert the Plaintiff's evidence that the Plaintiff was not indebted to the company, to the contrary the company was indebted to the Appellant,
 - vi. In her determination that the first Defendant was entitled to advertise to sell L.R. 156xx in total disregard of the facts and evidence before the court that the Plaintiff was purchasing and had made payment for L.R. 156xx and 156xx of which the company had received payments on account of both yet the court found that L.R. 156xx was transferred to the second Defendant before the date of sale to the Plaintiff; impliedly then the company had nothing to transfer to the Plaintiff save L.R. 15635 for the consideration the company had received for the two plots and which payment is not denied,
 - vii. In her finding that L.R. 156xx was transferred to the second Defendant before the sale to the Plaintiff despite there being no defence to the claim by the second Defendant notwithstanding the entry on record on judgment or liability against the second Defendant with the court reliance on a purported entry on the green card pleaded by the Plaintiff to be a fraudulent entry and in the absence of any defence by the second defence to exonerate himself from the fraudulent entry in the green card and/or evidence of the purported transfer to the second Defendant and in total disregard of the evidence by the Plaintiff that the entry on record of the green card must have been fraudulent read with other records before the court which records



the court did not consider at all in its determination that there was a transfer to the second Defendant.

- viii. In her finding that the Plaintiff failed to pay the full purchase price and the first Defendant was at liberty to sell land L.R. 156xx as per the agreement in the absence of any statement of account on the part of the company to disprove the evidence by the Plaintiff that it is the company that was indebted to the Plaintiff,
 - ix. In failing to take into account and or appraising and or properly appraising the issues for determination and the evidence before the court, and taking into consideration extraneous matters that were not raised before the court by the parties and thus ruling against the weight of evidence and hence arrived at a bad decision,
 - x. In her determination that the Plaintiff was in breach of contract and failing to find that the first Defendant was in breach of contract in not at all complying with the provisions of the sale agreement to give relevant completion notice to the Plaintiff and purporting to offer to sell the only one plot available of the two that had been offered for sale to the Plaintiff,
 - xi. In not having any regard to the submissions by the Plaintiff, and or the issues for determination before the court,
 - xii. In her determination dismissing the Appellant's claim against both the first and second Respondents with costs to the first Defendant.
5. The Plaintiff's case is that on 1/4/2004 she entered into an agreement with the first Defendant for the purchase of L.R. 156xx and 156xx, suit land. The purchase price was Kshs. 220, 000/= per parcel. According to the sale agreement, the purchase price was payable by monthly instalments of Kshs, 9,166.70 which was to be deducted from the Plaintiff's salary. The Plaintiff was at the material time an employee of the first Defendant.

On 15/7/2005, the first defendant was placed under statutory management and in the same month the plaintiff's employment with the first defendant was terminated. The first defendant owed the plaintiff salary arrears amounting to Kshs. 516, 731, pension amounting Kshs. 132,000/- among other terminal benefits.

By the time of the termination of the Plaintiff's employment, she had substantially paid for the suit land leaving only a balance of Kshs. 42,080/-.

6. On October 11, 2005 and 13/12/2005, the Plaintiff wrote to the first Defendant lodging her claim for the suit land. On the 11/7/2012 and 2/10/2012 the first Defendant advertised in the local dailies, the sale of the suit land. This is what prompted the Plaintiff to file the suit in the lower court.
7. The first defendant through counsel on record filed a defence in which it pleaded as follows.
Firstly, the sale agreement was categorical that the purchase price was to be paid by way of monthly installments of Kshs. 9, 166.70 for a period of twenty four (24) months.
Secondly, the agreement did not provide that the monthly installments be deducted from the Plaintiff's salary.
Thirdly, the first Defendant denies fraud in its dealings with the suit land.
Fourthly, the first Defendant denies transferring the suit land to the second Defendant. Other averments are that the Plaintiff has never owned the suit land as it has never been transferred to her and that contrary to the averments in the plaint, the Plaintiff filed Miscellaneous Application No. 1345 of 2005 long before filing this suit.



8. Counsel for the Appellant filed written submissions dated 12/1/2023 but she did not identify the issues for determination.

On the other hand, counsel for the first Respondent filed their submissions on 19/4/2023 and identified three issues for determination. They were as follows.

- i. Whether the trial court erred in finding that the appellant's claim for an order compelling the first defendant to render a statement of account for her terminal dues and benefits owed by the first defendant was time barred.
 - ii. Whether the trial court erred in finding that the appellant failed to prove her case on a balance of probabilities as against the respondents.
 - iii. Whether the first respondent fraudulently transferred L.R. 156xx to the second respondent herein as alleged under ground 7 of the memorandum of appeal.
9. I have carefully considered the entire appeal including the memorandum, the record, the submissions by learned counsel for the parties and the issues raised therein. "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, 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..." See *Selle v Associated Motor Boat Company* [1968] EA 123.
 10. In the absence of clear cut issues identified by the Appellant, I will treat the twelve grounds in the memorandum of appeal as the grounds of appeal. I make the following findings on the twelve grounds.
 11. On the first ground, I find that the learned trial Magistrate did not err in finding that the appellant had failed to prove her case against the defendants to the required standard. As correctly found by the trial magistrate the burden of proof lay on the plaintiff as she was the one who would fail if no evidence was adduced. At paragraph 7 of the amended plaint dated 25/2/2013, the plaintiff alleges fraud on the part of the defendants. In the case of *Elizabeth Kamene Ndolo v George Matata Ndolo* Civil Appeal No. 128 of 1995, it was held that where fraud is alleged, the party alleging such fraud has a burden higher than the ordinary burden of proof on a balance of probabilities. In this case not a single instance of fraud was proved by the Appellant.
 12. Regarding the second ground of appeal, I find that the trial magistrate did not err. The agreement between the plaintiff and the first defendant did not refer to any other agreement between the parties. It was not dependent upon any other arrangement as it was self-contained. The letters that the Plaintiff said that she wrote to the first Defendant on 11/10/2005 and 13/12/2005 did not form a second agreement. The appellant has not proved that the first respondent accepted her new offer to offset the balance of the unpaid purchase price from her terminal dues. She cannot therefore use it as a basis for rewriting the agreement of April 1, 2004. This finding covers the third, fourth and fifth grounds of appeal put forth by the Appellant.
 13. When it comes to the sixth ground, I find that the trial magistrate did not err because the appellant did not prove that she paid for the suit land as stipulated in the agreement. Had she performed her part, the appellant would be heard to say that the first respondent was in breach. She was in breach when she came to court. She cannot therefore be heard to say that advertising land for sale by the first Appellant was improper. Clauses 5 and 6 of the agreement provided that transfer of the land to the purchaser was dependent upon her completing all the monthly payments. The completion period was 24 months from the date of the agreement and time was essence. In her own evidence, the Appellant did not comply with the two clauses. The finding on this ground also covers the remaining grounds of appeal.



Failure to pay the full purchase price as stipulated in the sale agreement constituted a fundamental breach of the agreement and that issue alone was sufficient to find the Appellant at fault.

14. The pleadings raise the issue of specific performance. This is as per paragraph 14(c) of the plaint dated 9/10/2012. Specific performance is not proved in this case. It is an equitable remedy and it will only be granted when the plaintiff can convince the court that damages are not adequate in the circumstance. The award will be given where it has been shown that the subject matter of the contract is rare and unique and it is the object rather than its value that the Plaintiff desires. See *Gathuthi Hotel v Fazal Ilabi* [1957] E.A. 17.

Again, before ordering for specific performance, the Plaintiff must have approached the court with clean hands free from any blame. There must be no delay and no hardships should be occasioned to the Defendants.

In this case the Appellant has not proved that the land was unique in any way and different from other land in the area. She has not proved that she paid the agreed purchase price as stipulated. She has not proved that she is in occupation of the land. In fact, under clause 11 of the agreement, she was forbidden from putting up any permanent development on the land until successful completion of the transfer in terms of clause 3. She also came to court after inordinate delay. She filed the suit on 9/10/2012 which was more than six years after the period of completion of the agreement. It is clear that neither the order of specific performance nor any of the other orders sought by the Plaintiff could be granted to the Plaintiff after she had breached a fundamental term of the agreement dated 1/4/2004.

15. Finally, the jurisdiction of this court as per article 162 (2) (b) of the Constitution is limited to hearing and determining disputes relating to the environment and the use and occupation of and title to, land. Some of the grounds of appeal relate to employment and labour relations. They include grounds numbers (ii), (iii), (iv) and (v). Such issues are outside the jurisdiction of this court by virtue of article 162 (2) (a) of the Constitution which vests such jurisdiction in the employment and labor relations court.

It is not correct to say that because the second Respondent did not file a defence, then automatically he was liable. Entry of interlocutory judgment is not sufficient. The liability of the second Respondent had to be formally proved to the required standard by the Plaintiff and this did not happen in the case in the lower court.

For the above stated reasons, I find no merit in the appellant's appeal and I dismiss it with costs to the first respondent.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 31ST DAY OF OCTOBER, 2023.

M.N. GICHERU

JUDGE

