



**Omayo v Gusii Farmers Coffee Co-op Union Ltd & another (Environment & Land Case E001 of 2021) [2023] KEELC 22143 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22143 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT & LAND CASE E001 OF 2021**

**JM KAMAU, J  
NOVEMBER 15, 2023**

**BETWEEN**

**PETER ONDARI OMAYO ..... PLAINTIFF**

**AND**

**GUSII FARMERS COFFEE CO-OP UNION LTD ..... 1<sup>ST</sup> DEFENDANT**

**ROBERT G.N. MAINYA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was filed on 24/10/2021 where the Plaintiff was lured by an advertisement in the “Daily Nation” printed by the 1<sup>st</sup> Defendant on 16/10/1997 inviting members of the public to purchase land from the said 1<sup>st</sup> Defendant. He did purchase 10 acres of LR No. 7487/2 which Title was changed to Gesima Block I(Simbauti)167 on 12/6/2008. His offer was accepted on 14/11/1997. He paid a total of Ksh. 4,700,000/- for the land. Although he would at time fail to pay in good time both Defendants would extend the deadline for each payment with the last payment being made in 2014, a total of 14 years since the contract began. He further paid a total of Ksh. 222,000/- to the 2<sup>nd</sup> Defendant and other officers of 1<sup>st</sup> Defendant at the latter’s request. The Plaintiff avers that he incurred a further Ksh. 1,347,900 due to delay caused by the 1<sup>st</sup> Defendant’s agents. The Plaintiff claims his legitimate expectation of 10 acres. The plaintiff claims that failure by the Defendants to transfer to him 10 acres to be curved out of the 57.488 Hectares of LR No. 7487/2 Simbauti Farm which was later changed to Gesima Block 1/(Simbauti)167 is as a result of fraud and he now seeks Judgment for: -
  - a. Specific performance by way of processing and issuance of certificate of Title to himself for a parcel of land measuring ten (10) acres to be curved out of LR No. 7487/2 Simbauti Farm – Gesima Block 1/(Simbauti)167 or to be curved out of the farm or remainder of the farm known as Simbauti farm in Borabu constituency in Nyamira County.



- b. That no further transaction be undertaken on the subject property in the nature of sale or transfer without first actualizing the transfer prayed for in
    - (a) above of 10 acres to the Plaintiff
  - c. Cost of the suit and interest.
2. On 4/5/2022 the Defendants filed Defence and denied the Plaintiff's claim in that the Plaintiff breached the terms of the offer making it a null and void abinitio". The Defendants also denied that the property LR No 7487/2 was never changed to Gesima Block1/Simbauti)167 on 12/6/2009. The Defendant also denied that there were meetings that extended the payment period and that either the payments were made belatedly or not at all. They further aver that if any payments were ever paid the same were made without consent nor knowledge of the Defendants and must have been of no legal consequence. They also deny extension of the payment period. The Defendants also averred that the suit is defective due to there being no sale agreement and that the 1<sup>st</sup> Defendant has never been the registered proprietor of LR No.7487/2 nor Gesima Block1/Simbauti/167 or 345.
  3. On 10/5/2022 this court made injunctive orders as follows; -
    1. That the Defendants/Respondents jointly and severally, their agents, servants and/or employees or any other person deriving Title from the said Defendant s are hereby restrained by way of a temporary injunction from carrying any further sub division, sale or effecting any transfer or alienating the property currently registered as Gesima Block (Simbauti/167 (Formally LRNo.7487/2 or any part thereof until the determination of this suit.
    2. That the parties herein are given 15 days from the date hereof to comply with the provisions of Order 11 of the Civil Procedures Rules.
    3. That the suit shall be set down for hearing and be heard within the next 45 days from the date hereof.
    4. That the costs of the Applcationdated31/03/2022 shall abide the outcome of the suit.
  4. On 26/7/2023 the Plaintiff herein Peter Ondari Omayo took to the witness stand and adopted his statement accompanying the Plaint as his testimony that in the year 1997 he was lured by an invitation to the general public to buy 10 acres out of the property known as LR No 7487/2 Simbauti farm and he made a banker's cheque of Ksh. 375,000/- and a letter from the Kenya Commercial Bank Ltd guaranteeing payment of a further Ksh.500,000/- to the 1<sup>st</sup> Defendant.
  5. Pursuant to a meeting held on 23/9/2013 between the Defendant's Officials and the Plaintiff, he made further payments as follows: -
    - Ksh. 900,000/0 (Banker's cheque) on 17/1/2014
    - Ksh.150,000/- on 22/1/2014
    - Ksh.625,000/- on 21/12/2002
    - Ksh.600,000/- on 29/9/2003
    - Ksh.1,600,00/- on 30/4/2014
    - Ksh. 1,020,000/- on 4/12/2014
    - Ksh. 72,000/- on 2/2//1998 to the 2<sup>nd</sup> Defendant (Simbauti)
    - Ksh.150,000/- on 22/1/2014 Title Registration



All totaling Ksh.4,700,00/- inclusive of the Ksh.1,347,900/- the Plaintiff claims to be “latent costs”.

6. The Plaintiff also testified that on 20/1/2014 he was asked to sign transfer forms which he did and handed over to the Defendants, copies of his PIN certificate and Identity card and passport size photographs. The Ksh. 150,000/- paid on 22/1/2014 was in respect of survey and registration fees. To support his case, the Plaintiff produced the following documents.

1. Copy of Invitation Tender dated 14<sup>th</sup> November, 1997.
2. Copy of Bank Cheque dated 11<sup>th</sup> December, 1997.
3. Copy of Bank Cheque dated 2<sup>nd</sup> February, 1998
4. Copy of Bank Cheque dated 21<sup>st</sup> December, 2002
5. Copy of Bank Cheque date 29<sup>th</sup> September,2003
6. Copy of Bank Cheque dated 26<sup>th</sup> February, 2009
7. Copy of letter dated 9<sup>th</sup> January, 2012
8. Copy of letter dated 12<sup>th</sup> March,2012
9. Notes from the meeting held on 23<sup>rd</sup> September, 2013.
10. Copy of Bankers Cheque dated 17<sup>th</sup> January, 2014
11. Copy of letter dated 20<sup>th</sup> January, 2014.
12. Copy of Bankers Cheque dated 22<sup>nd</sup> January, 2014,
13. Copy of letter dated 24<sup>th</sup> January,2014.
14. Copy of Bankers Cheque dated 3<sup>rd</sup> December,2014.
15. Copy of Bankers Cheque dated 30<sup>th</sup> April,2014
16. Copy of letter dated 30<sup>th</sup> September, 2020.
17. Copy of letter dated 30<sup>th</sup> November, 2020.
18. Copy of letter dated 30<sup>th</sup> December.2002.
19. Copy of letter dated 26<sup>th</sup> October, 2000.
20. Application for Consent of Land Control Board dated 20<sup>th</sup> January,2014
21. Personal Identification Number dated 12<sup>th</sup> August,1994
22. Inspection Report of Kisii Farmers Co-operative Union Ltd CS/225 dated 2<sup>nd</sup> June, 1999.
23. CS/25 Gusii Coffee Farmers’ Co-operative Union Ltd dated December, 2011
24. Schedule for M-pesa payments
25. Certificate of search dated 11<sup>th</sup> June, 2021.
26. Tender letter of offer dated 14/11/1997.



7. On cross examination by Mr. Onsongo for the Defendants, the Plaintiff said that he fulfilled condition No. 1 of the letter of offer but outside the 15 days provided by paying Ksh. 375,000/- and Bank security of Ksh. 500,000/- which indemnity was cleared in full settlement on 11/12/1997. He said that the parties did not execute a sale agreement nor was consent of the Land Control Board obtained although he filled forms for the Application of the same. He also said that it is the 1<sup>st</sup> Defendant who should have facilitated the obtaining of consent of The Land Control Board. He further assured that he has never been given possession of the land he bought nor any refund of the money. He has always been assured of specific performance and that he has never been promised any refund. On re-examination by his Advocates Mr. Nyambega, the Plaintiff said that the last payment he made on 13/4//2014 was by RTGS to 1<sup>st</sup> Defendant's Account No. 01120016633902, Co-operative Bank. He wound up his evidence by saying that he paid more than he ought to have paid for the 10 Acres land and that all the letters from the 1<sup>st</sup> Defendant always talked of the contract being on course and asking him to make further payment even as late as the year 2014.
8. After the close of the Plaintiff's case, DW1 Robert G. N. Mainye who is also the 2<sup>nd</sup> Defendant started adducing his evidence by adopting his statement dated 28/4/2022. He introduced himself as the 1<sup>st</sup> Defendant's C.E.O, He said that the tender dated 14/2/1997 was null and void ab initio since there was breach of terms of the offer by the Plaintiff who did not pay the deposit of Ksh. 875,000/- to the 1<sup>st</sup> Defendant within 15 days being 25% of the purchase price and that the Bank Guarantee of Ksh.500,000/- was not considered by the 1<sup>st</sup> Defendant as payment at all, that as a consequence of the delay, the Plaintiff was not issued with an official receipt. He also testified that there was no sale agreement between the parties which agreement would have set the conditions of the sale. He further adduced evidence that the balance of 75% Ksh. 2,625,000/- was also not paid within 30 days from the date of executing the sale agreement which in any case was never executed. That all the money was to be paid to the 1<sup>st</sup> Defendant's Advocates and not directly to the 1<sup>st</sup> Defendant. Therefore, there was no binding contract. The 1<sup>st</sup> Defendant also testified that the suit is time barred. The Defendants also said that the contract was not enforceable for lack of consent of the Land Control Board to sub divide and transfer and also because the same was not reduced to writing. Mr. Mainye said that the letter of offer was rescinded before maturity into the contract. He also argues that should the prayers sought in this suit be granted then the same would interfere with new Title Holders without giving them a chance to be heard and that there was no agreement to pay the money directly to the 1<sup>st</sup> Defendant. He produced the following documents to build up his case: -
1. Letter from G.J. Mainye & Co. Advocates dated 20<sup>th</sup> June, 2000 together with list of purchase's names (46 in number)
  2. Tender to purchase 10 Acres of Simbauti Farm dated 14/11/1997.
9. On cross examination by Mr. Nyambega for the Plaintiff, the witness said that although it is true he met the Plaintiff in his (witness) office he cannot remember having directed the Plaintiff to deposit any money in the 1<sup>st</sup> Defendant's Account and that the letter to that effect dated 20/7/2014 was not directed to the Plaintiff but the note thereon of Ksh.3,200,000- is in the witness handwriting, but the letter dated 12/3/2012 is indeed addressed to the Plaintiff and that it was his personal account which cannot be honored by the 1<sup>st</sup> Defendant for lack of backing of the Board of the 1<sup>st</sup> Defendant. The letter does not talk of any refund. He did admit that the Plaintiff had applied for 10 Acres of land. he finally said that he wanted to assist the Plaintiff by allowing him more time to settle the consideration because the 2 are friends. He denied that the 1<sup>st</sup> Defendant signed Land Control Board forms and that the Plaintiff did not pay the total sum of Ksh. 3,200,000/-.



10. After the close of the Defendant's case bringing the case to a conclusion, I allowed the parties to file written submissions which I have considered before writing this Judgment.
11. Of importance is whether there was indeed a contract and if so whether the parties met their obligations in order to have the same enforced by way of Specific Performance.
12. It is not denied that there was an invitation to members of the public and on the 14/11/1997 a letter was written to the Plaintiff by the 1<sup>st</sup> Defendant offering him 10 acres at KSh.3,500,000/- subject to payment of the 25% ,875,000/- to the 1<sup>st</sup> Defendant within 15 days from the aforesaid date and an official receipt would be issued which was to be presented to the 1<sup>st</sup> Defendant's Advocate Mr. G.J. Mainye to enable him prepare a sale agreement for execution after which the balance would be paid within 30 days from the time of executing the agreement to the aforesaid Advocate. Legal charges, survey fees, transfer, registration charges and stamp duty would be paid to the same Advocate on the execution of the sale agreement. There was a default clause stating that should any of the conditions fail to be met within the stipulated time the tender would lapse.
13. On 11/12/1997 the Kenya Commercial Bank Nyamira Branch wrote an indemnity for Ksh. 500,000/- to the 1<sup>st</sup> Defendant in favour of the Plaintiff. The Plaintiff also made payments as follows: -
  - a. Ksh.72,000/- 2/2/1998
  - b. Ksh.625,000/- on 21/12/2002
  - c. Ksh.600,000/- on 29/9/2003
  - d. Ksh.900,000/- on 17/1/2014
  - e. Ksh.150,000/- on 22/1/2014
  - f. Ksh. 1,600,000/- on 30/4/2014
14. All totaling Ksh4,507,000/-. The Defendants' Defence is that all the above payments were made outside the period specified in the letter of offer. Whereas from the dates of payment shown above it is true as late as 12/3/2012, the 1<sup>st</sup> Defendant acknowledged the payments had been deposited in her account but that his case was being given close attention ".....Please though you paid late, we are in the process of sorting you out". This letter must be interpreted to have given the Plaintiff hope and assurance that the contract was still on. It also meant that his payments had been received and acknowledged. Should this not have been the case, nothing would have been easier than saying so and refunding the monies paid so far. By this time Ksh. 2,175,000/- had already been paid. It is not clear what the defendants meant by saying that the Plaintiff had purchased 5 Acres when it was actually 10 Acres according to the letter of offer dated 14/11/1997 and as late as 20/9/2014 the 1<sup>st</sup> Defendant in a hand written note in her commentary slip advised the Plaintiff to pay a total of Ksh. 3,200,00/- to its Account 01120016633962. The same is signed by the 2<sup>nd</sup> Defendant who also testified that he did sign the same and another one on 23/9/2013 giving a new schedule of payments to the Plaintiff.
15. There was also some RTGS paid from the Plaintiff's account number 0520\*218 to the 1<sup>st</sup> Defendant's Account number 01120\*02, Co-operative Bank Kisii Ksh. 1,600,000/-.
16. The 1<sup>st</sup> Defendant also signed Application forms for consent to Borabu Land Control Board for 4 Hectares which is equivalent to 10 Acres on 20/1/2014. The Plaintiff also extended the same on his part but the fate of the said Application is not given. With all these assurance as well as acceptance of monies (consideration) after the expiry of the time for payment, the 1<sup>st</sup> Defendant is estopped from failing to honor her part of the contract citing delay and expiry of the payment period. The 1<sup>st</sup> Defendant also



uses Gusii and Kisii interchangeably since in her letter of offer she describes herself as Kisii Farmers Cooperative Union Ltd, but in her letter dated 12/3/2012 she is now Gusii. The 1<sup>st</sup> Defendant is not being truthful when she says that she never owned LR NO. 7487/2 yet in the letter of offer the reference reads “your tender to purchase 10 acres of Simbauti farm Land LR No. 7487/2”. In the Application for consent, the land is referred as Nyansiongo/Gesima/Block 1(Simbauti). In the premises the Plaintiff’s claim succeeds with costs.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2023**

**MUGO KAMAU**

**JUDGE**

In the Presence of: -

Court Assistant: - Brenda

Plaintiff – Mr. Mose Nyambega

Defendant – No appearance

