



**Nyaga v Njiru (Environment and Land Appeal E008 of 2020)  
[2023] KEELC 22513 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22513 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E008 OF 2020  
A KANIARU, J  
DECEMBER 13, 2023**

**BETWEEN**

**PATRICK NJUE NYAGA ..... APPELLANT**

**AND**

**MICHAEL NJERU NJIRU ..... RESPONDENT**

*(Being an appeal from the judgement and decree of Hon. N. Nyakweba, Principal Magistrate in ELC No. 109 of 2018 at the Chief Magistrate's Court, Embu dated 8th December, 2020)*

**JUDGMENT**

1. This appeal arose from the judgement of the lower court (Hon. H. Nyakweba, Principal Magistrate – as he then was) in ELC Case No 109 of 2018. The plaintiff in the lower court case – Patrick Njue Nyaga – is now the appellant here while the defendant – Michael Njeru Njiru – is the respondent. In the lower court, the appellant had impleaded the respondent for breach of a land sale agreement in which the appellant was buying one acre from the original land parcel No Gaturi/Weru/433 jointly owned at the time by the plaintiff and others. The pleadings show that that parcel of land was subdivided and the respondent became the sole registered owner of parcel No Gaturi/Weru/7983. The appellant was to get his one acre from this land parcel but that did not happen.
2. It is common ground that the appellant paid 240,000/- towards purchase leaving a balance of 160,000/- to complete the purchase price of 400,000/- agreed upon. The appellant filed the suit in the lower court asking, among others, an order for specific performance in order that the respondent could transfer the one acre to him.
3. It appears clear that the respondent was served but he never entered appearance. He didn't also file a defence. The matter was subsequently heard without the input of the respondent but the appellant lost the case. That loss is what triggered this appeal.
4. The appeal is premised on six (6) grounds as follows:



1. That the learned trial magistrate erred in law and fact by invoking the outlived provisions of the *Land Control Act*.
2. That the learned trial magistrate failed in law and fact in not applying the principles of equity and justice as enshrined in the *Constitution* of Kenya, 2010.
3. The learned trial magistrate erred in law by ignoring trite law that once in possession and occupation of land you acquire an inalienable interest in the same.
4. The learned trial magistrate erred in law and fact in failing to find that, being in possession and occupation of such land in purchase, the seller held in trust the purchasers interest in such land.
5. The learned trial magistrate erred in law in holding and invoking the provisions of *Limitation of Actions act* yet from the start the appellant was in possession and occupation of his interest in the subject land and the claim by the appellant was unlimitedly within time.
6. The learned trial magistrate erred in law by not invoking the principles of law as settled by the superior courts in the best interest of equity and justice.

Arising from the above grounds, and presuming a favourable determination of all or some of them, the appellant asked for the following orders:

- a. Setting aside of the trial courts judgement dated 8/12/2020.
  - b. The honourable court be pleased to decree/order in appellant's favour
  - c. Costs of the appeal.
5. The appeal was argued before court on 16/2/2023. Njiru mbogo for appellant made various references to the record of appeal. He then argued, interalia, that the fact of the appellant purchasing the land, paying for it, and going into occupation created a constructive trust and the lower court therefore should have found that the appellant was entitled to own it. It was pointed out that in the lower court, the respondent did not file any papers. He did not defend the suit.
  6. The lower court was said to have dismissed the suit before it on grounds that it was filed outside the allowed statutory period and that parties did not obtain the requisite consent form the Land Control Board. Counsel argued that obtaining the consent of Land Control Board is not a mandatory requirement in some circumstances. According to counsel, this would be so particularly where a party has taken possession and done some developments. Reference was made to the decided case *Willy Kimutai Kitilit v Michael Kibet*: CA No 51 of 2015, Eldoret [2018] eKLR where a constructive trust was inferred to override the requirement that consent of Land Control Board should be obtained. This court was urged to invoke the law of Equity and do justice in this matter.
  7. The respondent on his part said its true that he was selling land to the appellant and was even paid 240,000/- as part-payment. But it's a surveyor, who was a friend of the appellate, who paid the money. That surveyor was the same one who was to do the subdivision of the land and he even started exercise but never finished it. The respondent had to look for another surveyor to complete the exercise. The appellant was said to have never gone to the respondent as he preferred dealing with the respondent through the surveyor.
  8. The respondent also said that he was being served late with the court process in the lower court matter. He wondered why the appellant had never approached him so that they could talk. He also talked of mediation being tried at one point but it failed because the appellant was not available.



9. To the respondent's averment, counsel for the appellant responded that that should have been presented to the lower court. The respondent was said to have had the opportunity to do so but did not make use of the opportunity.
10. I have considered the appeal as filed, rival arguments presented before court, and the lower court record made available to this court. This is a first appeal. As the first appellant court, it is my duty to subject the lower court matter to a fresh scrutiny and make appropriate findings while bearing in mind that I did not see or hear the evidence given to the lower court. The law requires – see *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and *Williams Diamonds Ltd v Bron* [1970] EA – that I make due allowance for the fact that it is not my court that tried the case. Is the appeal herein merited?
11. The lower court judgement had its outcome premised on points of law namely:
  1. Section 4(1)(a) of *Limitation of Actions Act* (Cap 22) which inter alia provides as follows:
 

“Actions of contract and tort and certain other 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.
  2. Sections 6(1)(a) and 8(1) of the *Land Control Act* (Cap 302) which, inter alia, provide thus:
    - (6) Transactions affecting agricultural land:
      - (1) Each of the following transactions; that is to say -
        - (a) the sale, transfer, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a Land Control area;

Is void for all purposes unless the Land Control Board for the Land Control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.
      - (8) Application for consent:
        - (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six months of the making of the agreement for the controlled transaction by any party thereto:
 

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.
12. On the issue of *Limitation of Actions Act* (Cap 22) the lower court had this to say:
 

“From the law as set out herein above, any action based on contract may not be brought after the end of six years from the date when the cause of action accrued. In the present case, it is based on contract whose date of accrual was 01/05/2010. This suit was therefore statute barred by dint of the law aforesaid. The orders sought can not therefore be granted.”
13. On the issue of *Land Control Board Act* (Cap 302) the lower court said as follows:
 

“... for any transaction involving the sale of land under a controlled transaction such as the one herein to be valid, the consent of the local Land Control Board is supposed to be obtained not later than the end of six months from the time of making the agreement unless



such period is extended by the High Court. In the present case, the transaction for the sale of the land in question was entered into on 01/05/2010. There is no evidence that the requisite consent of the Land Control Board was obtained before the end of six months from 01/05/2010. There is no evidence either that this period of six months has been extended by the High Court. Clearly, this transaction for the sale of the land in question is void for lack of consent of the Land Control Board. The same can not therefore be enforceable at law.”

14. There is no doubt therefore that the decision of the lower court was based purely on the law applicable to the timelines within which a particular action should have been taken but was not. In his appeal, the appellant has taken issue with the lower court for invoking “the outlived provisions of the [Land Control Act](#)”; for not invoking the principles of equity to do justice; for ignoring the long possession of the land by the appellant which has given him “inalienable interest”; for failing to infer trust arising from purchase, possession and occupation; and for invoking the [Limitation of Actions Act](#), yet the appellant was in possession and occupation thus making his action “unlimitedly within time.”
15. In the appellant’s counsel’s argument before this court, he focused more on the omission or failure to obtain consent of the Land Control Board. He argued that obtaining the consent of Land Control Board is not mandatory in all circumstances and this is especially so where the purchaser has gone into possession and occupation. The counsel then cited the case of [Willy Kumtai Kitiliti v Michael Kibet](#): CA No 51 of 2015, Eldoret, where the court invoked the law of Equity and inferred a constructive trust in a land sale transaction where the seller had failed to transfer land to a purchaser and then turned round to say that the transaction was void for lack of consent of Land Control Board. This court was urged to do the same in this matter.
16. But counsel did not address himself to the issue of [Limitation of Actions Act](#) though having raised a ground of appeal based on it.
17. It is necessary to point out that the appellant’s suit in the lower court was not based on trust. It was based on breach of the contract. The lower court had not been invited to infer trust in the pleadings or even in the evidence tendered during trial. The appellant was merely asking for specific performance. It appears to me clear that the appellant is trying to ask this court for benefits he never asked for in the lower court. He is further faulting that court for not giving him what he never asked to be given. Had the appellant urged his case in the lower court on the basis of trust, this court would probably understand when the appellant’s counsel argues that the appellant were entitled to the land by way of trust. But this unfortunately is not the position. Trust is only being raised on appeal. The suit in the lower court was based on breach of contract, period.
18. There is also the fact that, the suit was caught up by the statute of Limitation. Indeed, from a factual standpoint, it was. From a legal perspective too, it was. Under Section 4(1) of the [Limitation of Actions Act](#) (Cap 22), a suit based on breach of contract should be filed within six years from the time the cause of action arose. In this particular case itself, the appellant filed it outside the six year period. He was definitely time-barred.
19. May be an argument may be raised that the principles of Equity can be invoked to ameliorate the situation. In my view, the [Limitation of Actions Act](#) (Cap 22) is clear that time for actions based on contract can not be extended. The appellant did not even bother to explain why he filed his suit out of time. Though the law of Equity takes a pride of place in our new constitutional dispensation, one would have to reckon with the fact that Equity itself does not encourage delay. Delay is said to defeat Equity. The appellant delayed. The [Limitation of Actions Act](#) is clearly telling him that his claim was stale when it was filed. Equity is also said to follow the Law – *Aequitas sequitur legem* – which means



that equity will not allow a remedy that is contrary to law. It is clear from this that equity itself is a respecter of the law. It only occasionally intervenes where the law is wanting in some circumstances or is found to have limitations. I have already pointed out that the appellant has not explained why he couldn't file his suit within the time allowed by law.

20. For all these reasons, I find no good reason for interfering with the lower court decision. The appeal herein is therefore for dismissal and I hereby dismiss it. I make no order as to costs.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 13<sup>TH</sup> DAY OF DECEMBER, 2023.**

**A.K. KANIARU**

**JUDGE**

**13/12/2023**

In the presence of Mutiso for Njiru Mbogo for appellant and respondent present in person.

Court assistant: Leadys

Interpretation: English/Kiswahili

