



Kenya Assemblies of God (KAG) North Church Kisumu (Suing through Registered Trustees) v Otieno (Environment and Land Appeal E010 of 2020) [2023] KEELC 22138 (KLR) (7 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22138 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E010 OF 2020**

E ASATI, J

DECEMBER 7, 2023

BETWEEN

KENYA ASSEMBLIES OF GOD (KAG) NORTH CHURCH KISUMU (SUING THROUGH REGISTERED TRUSTEES) APPELLANT

AND

ELSA ALUOCH OTIENO RESPONDENT

(Being an appeal arising from the judgment of the learned Hon. J. Wambilianga (PM) delivered on the 20th of January, 2020 in KISUMU CMCC ELC Case No.111 of 2018)

JUDGMENT

Introduction

1. Vide the Memorandum of Appeal dated 7th February 2020, the appellant herein appealed to this court challenging the Judgment of Hon. J. Wambiliangah (PM) delivered on 20th January 2020 in Kisumu CMC E & L CASE No. 111 of 2018 (the suit). The appellant seeks for orders that: -
 - a. the appeal be allowed,
 - b. the lower court Judgment be set aside and in its place there be judgment in favour of the appellant as per the plaint and
 - c. the counter claim be dismissed with costs and
 - d. costs of the appeal.
2. A brief background of the appeal is that the appellant instituted the suit in the Lower court vide the plaint dated 31st January 2012 against the Respondent herein seeking for: -



- a. An order of permanent injunction against the Defendant either by herself, her agents, servants and those working under her restraining her from entering encroaching onto, developing disposing off or in any way interfering with the plaintiff's quiet and lawful use and occupation of the suit land herein designated as Kisumu/Municipality/Block 6/333
 - b. Declaration that the plaintiff is the legal owner of the suit land herein designated as Kisumu/Municipality/Block 6/333 and an order for specific performance ordering the Defendant to transfer the suit parcel to the plaintiff's name.
 - c. Costs of the suit and interest.
 - d. Any other order just and expedient for the court to grant.
3. The record shows that the Respondent filed defence and counter claim denying the appellant's claim, praying that the same be dismissed and judgment be entered in favour of the Respondent on the counter-claim for a permanent injunction, eviction, mesne profits and costs and interest thereon.
 4. The appellant's case was that on 9th July 1997, it entered into an agreement with one Samuel Otieno Okiki, now deceased, for the purchase of land parcel known as Kisumu/Municipality/Block 6/333 (the suit land) at Ksh 260,000/= That upon execution of the agreement the plaintiff assumed vacant possession of the suit land, established a church thereon for worship purposes and has since been carrying out worship and other Christian activities thereon. That the vendor had executed all the requisite documents for transfer but upon presentation of the said documents for registration, the appellant learnt that a caution had been registered on 19th November 1998 to restrict any transfer of the land. That the appellant then learnt that the Respondent had taken out Letters of Administration to the estate of the vendor and put in motion the process of transfer of the suit land to 3rd parties thereby ignoring the Appellant's interests in the land. The Appellant therefore sought the court's intervention.
 5. The record shows further that the case was heard before the trial court which vide its Judgement dated 10th January 2020 dismissed the plaintiff's claim with costs, allowed the counter-claim and made orders that:
 - a. A permanent injunction do issue restraining the Defendant in the counter-claim (the trespassing or remaining or entering upon all that piece of property situate in Kisumu City and known as Kisumu/Municipality/Block 6/333
 - b. The Defendant in the counter claim (the appellant herein) is hereby ordered to vacate the portion of property owned by the plaintiff in parcel number Kisumu/Municipality/Block 6/333 within Sixty (60) days after being served with the order of this court or in default thereof the plaintiff shall be at liberty to evict them from the said parcel of land.
 - c. Costs to the plaintiff in the counter-claim.
 6. Aggrieved by the Judgement the appellant filed the present appeal. The grounds of appeal as contained in the Memorandum of Appeal are that:
 - a. The learned Principal Magistrate erred in law by failing to appreciate that the land parcel Kisumu/Municipality/Block 6/333 was subject to an agreement that was entered into by the appellant and the deceased husband of the Respondent for the purchase of the land parcel by the appellant.
 - b. The learned Principal Magistrate erred in law by failing to appreciate that the appellant at the time of execution of the agreement had paid the whole purchase price agreed at ksh 260,000/=



and as such were allowed by the vendor who was the Respondent's husband to take possession of the said property.

- c. The Learned Principal Magistrate erred in law by failing to appreciate the fact that the transfer of the said suit land parcel was frustrated by the fact that there was a caution and the vendor passed on before transfer could be effected.
 - d. The Learned Principal Magistrate erred in law and fact by failing to rely on the weight of the evidence on record that clearly pointed that the Respondent falsely misrepresented that she was not aware of the agreement over land parcel No. Kisumu/Municipality/Block6/333
 - e. The Learned Principal Magistrate erred in law and fact by relying on the false evidence of the Respondent against the solid evidence of the appellant.
 - f. The Learned Principal Magistrate erred in law and fact by failing to consider the appellant's claim and representation in court and instead believing wholly on the Respondents witness and documents and representation.
7. Directions were given on 15th February 2023 that the appeal be canvassed by way of written submissions. In compliance, written submissions on behalf of the appellant were filed by the firm of Ben Aduol Nyanga & Company Advocates. Written submissions dated 21st September 2023 were filed by the firm of Olel Onyango, Ingutiah Advocates LLP on behalf of the Respondent.

Issues for determination

8. The grounds of appeal are the issues for determination herein.

Analysis and determination

9. This being a first appeal, this court reminds itself of the obligation it has as a first appellate court in respect to the appeal herein. The court is under an obligation to reconsider the evidence, re-evaluate and analyze the same so as to arrive at independent conclusion and so determine whether the decision of the trial court was consistent with the evidence adduced. In doing this the court bears in mind that unlike the trial court, it has had no chance of seeing or hearing the witnesses first hand. In *Gitobu Imanyara & 2 Others vs Attorney General [2016]* eKLR the Court held that:
- “ this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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.”
10. The first ground of appeal is that the trial court erred by failing to appreciate that the suit land was subject to an agreement that was entered into between the appellant and the Respondent's late husband for the purchase of the same.

The appellant had pleaded in paragraphs 3 to 6 of the plaint that the land sale agreement was entered into on 9th July 1997, that the appellant paid the entire of the purchase price of ksh 260,000/=, that the deceased executed all the requisite documents for transfer and put the appellant in occupation of the suit land.



The Appellant's evidence before the trial court as presented by PW1 was that on 9th July 1997 the appellant bought a plot for the Church from Samuel Okiki, deceased. PW1 produced the land Sale Agreement dated 9th July 1997 as exhibit in the case.

11. The Respondent on her part in paragraph 3 of her defence denied that the appellant entered into a Sale Agreement with the deceased for purchase of the suit land. In paragraph 5 of the defence she denied that the appellant was given vacant possession of the suit land or have built a church thereon. The Respondent further denied that the deceased signed the requisite transfer documents.
12. The Respondent further contended in paragraph 9 of the defence in the alternative and without prejudice, that the plaintiff never completed the sale transaction with the deceased after the family raised objection to the sale of the land which was being done fraudulently and without their consent.
13. The trial court in its Judgement faulted the appellant for failing to raise any objection when succession to the estate of the deceased was being conducted and observed that the transfer forms which were produced in court were neither signed by the transferee, nor dated or endorsed with the names of the transferee and transferor. The court found that the plaintiff failed to explain why the sale transaction was not completed and transfer effected in the lifetime of the Vendor if the sale agreement took place in the year 1997 and the vendor died in the year 1999.
14. The Appellant faulted the court for this finding and submitted in this appeal that there was a contract in existence that was partly performed by the vendor. That when a contract is executed in accordance with the law, it remains the duty of the parties to the contract to ensure that each party fulfills his obligation under the contract. Counsel relied on the case of Samuel Chege Gitau & Another v Joseph Gicheru Muthiora ELC Suit No. 1245 of [2014] eKLR to support this submission. Counsel submitted further that transfer of the land was frustrated by certain events including the death of the vendor. On whether the death of the vendor defeated the appellant's rights, Counsel relied on the case of [*Estate of Solomon Wangi Waweru\(deceased\) \[2018\]*](#) eKLR where it was held that:

“The adverse claims against the estate of a deceased person are determined through settlement or where it is applicable through suit against the administrator of the estate”
15. The Respondent's submissions on this issue was that the Appellant bases its claim over the suit land entirely on the allegation that it entered into a sale of land agreement dated 9th July 1997 with the husband of the Respondent. That there is no record anywhere that the balance of Kshs.30,000/= of the purchase price was ever paid. That it was incumbent upon the appellant to ensure that it obtained not just possession but also ownership of the suit property within the time allowed by law. That the suit was filed 15 years after the date the agreement for sale was entered into. That under Section 4 of the [*Limitation of Actions Act*](#), Cap 22 Laws of Kenya an action founded on contract may not be brought after the expiry of six (6) years from the date on which the cause of action arose and that under Section 7 of the Limitation of Action Act, an action to recover land may not be brought after twelve (12) years from the date the cause of action accrued. Counsel relied on the case of [*Edward Muonge Lengusaranga v James Lenaiyara & Another \(2019\)*](#) eKLR to submit that the plaintiff's suit was time barred as it was filed out of time without leave of the court. That the appellant herein did not demonstrate that his claim could be brought under any of the exceptions to the limitation.
16. I have considered the pleadings, the evidence and submissions on the first ground of appeal. It is clear that the appellant and the deceased entered into a land sale agreement dated 9th July 1997. Although at first the Respondent denied the existence of the agreement in her defence, she subsequently acknowledged the existence of the agreement. She pleaded that the agreement existed only that it was



fraudulent and hence the family stopped it, she also challenged the appellant to demonstrate that the balance of the purchase price of Kshs.30,000/= was ultimately paid.

17. Perusal of the Judgment shows that the trial court did appreciate the existence of the agreement. The court faulted the appellant for failure to register its interest on the land in the succession cause, for not having duly signed transfer forms and for failing to explain why the transfer did not happen in the lifetime of the deceased.
18. I find that the trial court did not fail to appreciate that the suit land was subject of the land sale agreement.
19. The second ground of appeal is that the trial court erred by failing to appreciate that the appellant had paid the agreed purchase price and allowed by the vendor to take possession of the suit land. The appellant pleaded in the plaint that it paid the entire of the agreed purchase price of Kshs.260,000/= and was allowed to have vacant possession of the suit land by the vendor. The Respondent denied this. Among the exhibits produced by the appellant was the land sale agreement dated 9th July 1997. In clause 1 of the agreement, it stated that the consideration for the land was Kshs.60,000/= In clause 2 it stated that the vendor had acknowledged receipt of ksh 230,000/= on execution of the agreement and clause 3 stated that the balance of Kshs.30,000/= “shall be paid before 11th August 1997 (date is of essence).” No document was produced to show that the balance of Kshs.30,000/= was ever paid. The trial court in its judgment found that from the evidence placed before her, there was no evidence of payment of the balance of the purchase price.
20. I have considered the evidence. I find that though there is evidence that the appellant paid Kshs.230,000/= on the date of execution of the agreement, there is no evidence that the balance of Kshs.30,000/= was ever paid as per the agreement or at all. There was therefore no basis for the trial court to appreciate that the appellant at the time of execution of the agreement paid the whole of the agreed purchase price of Kshs.260,000/= as this would be contrary to the contents of the agreement.
21. The third ground of appeal is that the Principal Magistrate erred in law by failing to appreciate that the transfer of the suit land parcel was frustrated by the fact that there was a caution placed on the land and the vendor passed on before the transfer hence the transfer could not be effected.

Concerning this ground of appeal, it was the defence case that the family of the vendor protested the sale “as it was being done fraudulently.” A copy of the certificate of official search in respect of the suit land produced as exhibit shows that the restriction was placed on the suit land on 19th November 1998. It was part of the evidence that the vendor died in the year 1999. The trial court when considering the issue of transfer in its judgment stated:

“The plaintiff failed to explain why if the transaction took place in 1997 and the vendor died in 1999 why the transfer never took place when all were alive.

And on page 6 of the judgment the court stated further:

“Fourthly, the plaintiff has failed to explain why the transfer never took place before 1999 when the vendor was alive if at all the transaction was a smooth one”

22. In this appeal, the appellant has not been able to explain the period between 9th July 1997 when the agreement was signed and 19th November 1998 when the caution was lodged. This was a period of over one (1) year. The appellant’s case is that the vendor signed all the requisite documents for transfer, at the time of execution of the agreement. What then prevented the appellant from registering them before the caution was lodged and before the death of the vendor?



23. The next ground of appeal was that the trial court failed to rely on the weight of the evidence. I have analyzed the evidence placed before the trial court. The appellant's evidence on the claim based on the contract of sale of land left several gaps namely; whether the entire purchase price was paid, why the transfer was not effected soon after the agreement was executed and in the lifetime of the deceased vendor, the transfer form produced as exhibit was not signed by the vendor, the witness who was called to testify about the land sale agreement was not a signatory to the agreement and there is no evidence that the appellant took any steps when the family placed the restriction on the land or when succession to the estate of the vendor was being done. The weight of the evidence as far as the claim in the plaint was concerned, tilted against the appellant.
24. The 5th and 6th grounds of appeal are related to ground 4 of the appeal for they concern the credibility of the evidence adduced. The appellant faults the trial court for believing the evidence of the Respondent and dismissing that of the appellant. The trial court after pointing out the gaps in the appellant's evidence observed that under section 107 of the *Evidence Act*, the burden of proof was upon the appellant and that the appellant had failed to discharge that burden. The appellant relied on the law of contract and sought specific performance. The suit was filed in 2018 which was more than 6 years since the agreement (the contract) was entered into and since the restriction was lodged on the land. The suit was filed out of time.
25. The totality of the evidence however is that the appellant is in occupation of the suit land. The appellant pleaded and evidence was adduced on its behalf that it took possession of the suit land soon after execution of the sale agreement in the year 1997. Though the Respondent in paragraph 5 of the defence denied that the appellant assumed possession of the suit property or established a worship place on the suit land, in paragraph 6 of the counter claim the Respondents pleaded that the appellant wrongfully entered and took possession of the suit property and have thereafter wrongfully remained in possession thereof. The Respondents sought, inter alia, for an order of eviction of the appellant from the suit property and an order of permanent injunction restraining the appellant from interfering with the suit property.
26. The date of the appellant's entry onto the suit property was in the year 1997 as no evidence was produced to controvert the appellant's evidence on the date. The Respondent's case is that the sale transaction was not completed as the family objected because the sale was fraudulent and without the consent of the family. The cause of action to the deceased vendor and his family accrued the moment they refused to complete the transaction. The record shows that the restriction was registered on 19/11/1998. The vendor ought to have taken steps to remove the appellant from the land and thereby assert his title to the land. Under section 7 of the *Limitation of Actions Act* relied upon by the Respondent;
- “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.”
27. The counterclaim was for recovery of the suit property from the appellant. It was filed in the year 2012. This was 15 years from the time the cause of action accrued to the vendor and his successor, the Defendant herein. The counter claim was therefore filed outside the limitation period. There is no evidence that time extended was extended for filing of the counterclaim. One of the prayers in this appeal is that the counterclaim be dismissed.



28. On the basis of the findings herein that the plaintiff did not prove its claim based on the contract of sale and that the counterclaim was filed out of time, I find that the appeal herein succeeds partly. The appeal is allowed as follows: -

i. The judgement of the trial court is hereby set aside and replaced with judgement dismissing both the suit and the counterclaim

ii. Each party to bear own costs of the appeal.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 7TH DAY OF DECEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Ocheing holding brief for Nyanga for the Appellant.

Omollo holding brief for Onyango for the Respondents.

