



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 642 OF 2017

CHIRCHIR ARAP KUTO.....PLAINTIFF

-VERSUS-

NANCY CHEROTICH KOECH1ST DEFENDANT

KINYUA KOECH LIMITED.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. Vide Plaintiff dated the **9th April 2015**, the Plaintiff herein sought for the following Reliefs;

- a. A refund of monies paid towards purchase of the suit property being part of the proposed subdivision of property known as L.R No. 13875 erroneously indicated as L.R No. 13675.*
- b. Sum of Kshs.24, 000, 000/= Only, being the current value of the suit property as Damages for breach of Contract.*
- c. In the alternative, an Order for Specific Performance of the contract dated 21st February 2000 do issue against the Defendants jointly and/or severally to specifically perform its part of the contract dated 21st February, 2000.*
- d. The Costs of this suit.*
- e. Any such Relief as this court may deem appropriate.*

2. Following the filing and service of the Plaintiff and summons to enter appearance, the 1st Defendant herein entered appearance but same did not file any Statement of Defense. In this regard, Interlocutory Judgment was therefore sought and entered against the 1st Defendant on the 15th June 2017.

3. Be that as it may, the 1st Defendant herein filed an Application seeking to set aside the Interlocutory judgment, but however, the Application under reference was dealt with and disposed vide ruling rendered on the 27th May 2019, whereupon this honorable court, (*albeit differently constituted*) dismissed the Application which seeking to set aside the interlocutory judgment. For clarity, the dismissal of the application under reference precipitated the filing of an Appeal to the Court of Appeal vide Civil Appeal No. 366 Of 2019.

4. Nevertheless, the 2nd Defendant herein neither entered appearance nor filed a statement of Defense in respect of the subject matter.

EVIDENCE BY THE PARTIES:

PLAINTIFF'S EVIDENCE:

5. During the hearing of the subject matter, which took place on the 16th November 2021, the Plaintiff herein testified and essentially adopted his witness statements dated the 9th April 2015.

6. On the other hand, the Plaintiff also informed the court that same had filed a list and bundle of documents dated the 9th April 2015

containing a total of 22 documents, which documents the Plaintiff adopted and relied upon. In this regard, the Plaintiff invited the court to admit the documents as exhibits and same were duly admitted as Plaintiff's exhibits P1 to P22, respectively.

7. Other than the witness statement dated the 9th April 2015, which the witness adopted, the witness further testified that on the 18th February 2000, same entered into a Contract with the Defendants herein vide letter generated by the 2nd Defendant, albeit on behalf of the 1st Defendant, whereby the 2nd Defendant indicated that same had the authority to transact for and/or on behalf of the 1st Defendant in selling Plot Number G, being part of the proposed sub-division of Property ***L.R No. 13875 erroneously indicated as L.R No. 13675.***

8. The Plaintiff further testified that arising from the letter dated the 18th February 2000, which was duly signed by and or on behalf of the 2nd Defendant, same proceeded to and indeed made various payments to and in favor of the Defendant which payments were duly received and acknowledged. For clarity, the Plaintiff confirmed that he paid a total of Kshs.1, 080, 000/= only.

9. It was the Plaintiff's further testimony that according to the Contract letter and essentially clause 2 (b) thereof, the Completion date was 17th May 2000, but however the Defendants herein, failed and/or neglected to comply and/or adhere to the terms of the contract letter.

10. Be that as it may, the Plaintiff further testified that on or about the year 2004, the Defendants herein allowed him to enter upon and take possession of the suit property, which was the subject of sale, pending the competition of the subdivision and formalization of the contract, but however, the Defendants herein reneged on the process and thereafter evicted him (Plaintiff) from the suit premises, in the year 2008, and thereby breaching the terms of the Contract.

11. It was the Plaintiff's further testimony that as a result of the breach of the terms of the contract, same has suffered immense financial loss and damage, including loss of bargain in contract as well as loss of professional fees, which was paid to the professional and consultants, including but not limited to the Advocates.

12. Based on the foregoing, the Plaintiff therefore implored the court to order and/or direct the Defendants herein to specifically perform the contract and/or in the alternative to pay the Damages equivalent of the current market value of the property which was estimated to be Kshs.24, 000, 000/= only, which figure is said to have been authenticated vide a valuation Report commissioned and prepared in the year 2014.

13. On cross examination, the Plaintiff admitted that he did not have Contract documents in the bundle of documents which he had produced before the court. For clarity, the witness confirmed that no formal agreement was ever prepared and/or entered into between himself and the 1st Defendant.

14. The Witness further confirmed that the 1st Defendant herein has also not signed any document to bind herself to any sale of land to the Plaintiff.

15. Further, the witness admitted that the letter of intent, dated the 18th February 2000, which was generated by the 2nd Defendant herein was not attested by any other witness, who witnessed the signature of any of the Parties thereto.

16. As concerns the issue of being placed in occupation of the suit property, the witness stated that he has produced several document but he could not be able to isolate and or confirm any that relates to being placed in possession of the suit property.

17. Nevertheless, the witness has reiterated that he entered upon and took possession of the suit plot, prior to same being evicted therefrom by the Defendants in the year 2008. Shortly after the re-examination, the Plaintiff's case was closed.

1ST DEFENDANTS CASE:

18. Suffice it to point out, that the 1st Defendant herein only entered appearance, but did not file any Statement of Defense. Consequently, the 1st Defendant was entitled to participate in the proceedings herein and to Cross examine the Plaintiff and the Plaintiff witness, but however same was not entitled to tender evidence and/or call any witness.

19. On the other hand, it was also pointed out herein before that interlocutory judgment was sought for and entered by Hon Justice Tuiyott, J (*as he then was*) on the 15th June 2017, and an attempt to set same aside was dismissed vide decision of Hon Lady Justice Kossy Bor, Judge, vide ruling rendered on the 27th May 2019. In this regard, the Interlocutory judgment that was entered against the 1st Defendant remains in situ.

2ND DEFENDANTS CASE

20. Similarly, I did point out that the 2nd Defendant herein neither entered appearance nor filed a Statement of Defense. In any event, the 2nd Defendant did not participate in the subject proceedings.

SUBMISSIONS

21. Following the close of the Plaintiff's case, the respective Advocates herein proposed to file and exchange written submissions and in this regard, the court thereafter directed and/or ordered that the Parties do file and exchange written submissions and timeline were circumscribed.

22. Pursuant to the foregoing, the Parties herein proceeded to and duly filed their respective submissions which are on record and which submissions I have duly considered and taken into account.

ISSUES FOR DETERMINATION:

23. Having reviewed the Plaintiff filed by and on behalf of the Plaintiff herein, the witness statement and the Bundle of Documents, which was ultimately produced as exhibits P1 to P22, respectively, and having similarly taken into account the further testimony by the Plaintiff and the cross examination arising therefrom and having considered the written submissions filed by the Parties herein, the following issues Do arise and are germane for Determination;

- a. *Whether the Plaintiff's suit is barred by the Limitation of Actions Act, Chapter, 22, Laws of Kenya.*
- b. *Whether the Plaintiff's suit, which is seeking to enforce an Interest in land, is barred by the provisions of Section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya.*
- c. *Whether the Plaintiff is entitled to the Equitable Reliefs of Specific Performance.*

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether the Plaintiff's suit is barred by the Limitation of Actions Act, Chapter 22, Laws of Kenya.

24. The Plaintiff's suit is based and/or premised on the Letter of intent dated the 18th February 2000, which was generated on the Letter head of the 2nd Defendant herein and whose preamble states as hereunder;

Mr. J C Kuto,

c/o Directorate of Civil Aviation

P.O Box 60867

Nairobi.

Re: Letter of Intent

L.R No. 13675 – sub plot Number G

.We are pleased to inform you that our client has agreed to offer to buy the above property, subject to a formal sale agreement to be prepared by the vendors lawyers based on the following terms and conditions

I.

II. (a).....

III. (b).The date fixed of completion of the sale is 17th May 2000, and you are required to pay the balance of the purchase price on or before this date”.

25. From the letter of intent, which is the only document that connects the Plaintiff on one hand and the Defendants herein, it appears that the completion date was the 17th May 2000. In this regard, it is therefore evident that if the contract was not completed and concluded by the said date, then either Party was obliged to issue a Completion or Rescission Notice.

26. Nevertheless, during the testimony by the Plaintiff no Evidence was tendered as to whether a Completion or rescission Notice was ever issued and/or served. Consequently, the Agreement, if any, between the Plaintiff and the Defendants stood breached from the 17th May 2000.

27. In the premises, the Plaintiff herein was at liberty to file and/or commence any civil proceedings for breach and/or violation of the Contract, that is, if the said Contract was in existence as at the 18th February 2000. For clarity, the right for commencement of such a suit would subsists for a duration of a period of six years in line with the Provision of Section 4(1) of the Limitation of Actions Act, Chapter 22 Laws of Kenya, which provides as hereunder;

4. Actions of contract and tort and certain other actions

(1) The following 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;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

28. Premised on the foregoing, the Plaintiff herein was thus obliged to file and/or commence the civil proceedings herein within the duration of six years *w.e.f* 18th May 2000, albeit terminating on the 17th May 2006. Consequently, the subject suit ought to have been filed on or before the 17th May 2006.

29. Nevertheless, the Plaintiff tendered evidence that despite the Completion date which was contained and/or alluded to in the letter of intent the Defendant herein, received and acknowledged various payments up to and including the 6th August 2004.

30. In this regard, the Plaintiff produced exhibits P18, as evidence confirming acknowledgment and therefore showing that the Limitation period ought not to be computed from the Completion date shown and/or reflected in the letter of intent.

31. I must point out that the veracity of exhibit P18 was neither challenged nor impeached by counsel for the 1st Defendant. Consequently, it must be taken that same was admitted and conceded to be so.

32. Based on the acknowledgement that the 1st Defendant received and acknowledged monies and/or further monies at the foot of the sale transaction, up to and including the 6th August 2004, it therefore means that the 1st Defendant waived the issue of limitation and therefore limitation period, can only be computed, *w.e.f* the date of the last acknowledgement. See the Provisions of Section 39 of the Limitation of Actions Act, Chapter 22, Laws of Kenya.

33. Be that as it may, even with the acknowledgement made on the 6th August 2004, it would still be important to note that the Plaintiff herein would have been obliged to file the civil suit within six years from the last acknowledgement. Consequently, the 6th year period would run until the 5th August 2010.

34. Thirdly, the Plaintiff herein testified that during the pendency of the transaction, the Defendants allowed him to enter upon and take possession of the suit property, pending the finalization of the sub-division and transfer thereof unto his name. For clarity, it was the Plaintiff's position that he was placed in possession as a matter of good gesture to show that the Defendants were still keen to go on with the transaction.

35. Nevertheless, in his own words the Plaintiff testified that in the year 2008, the Defendants herein evicted him from the suit property and in this regard, if there was any iota of the contract that remained and/or was in existence, it was breached and fully violated.

36. Consequently, the Plaintiff was therefore obliged to approach a court of law either for breach of contract or for recovery of the monies that same had paid at the foot of the letter of intent or the contract, whichever definition, the Plaintiff would wish to ascribe to the contractual relationship that existed.

37. From the foregoing it is evident that I have discussed three distinct instances, speaking to timelines within which the Plaintiff herein ought to file his suit before the court. For clarity, at the very latest, it is evident that the Plaintiff's suit herein ought to have been filed on or about the year 2014, that is, if one uses the 2008 as the bench mark for computing time for breach of the contractual relationship between the parties.

38. However, the subject suit was filed and/or lodged before the court on the 10th April 2015, which in my humble view, was well outside the statutory timeline, stipulated and/or prescribed pursuant to and/or under the provisions of Section 4(1) of the Limitations of Actions Act.

39. In the premises, the suit is a nullity and therefore barred in law. In this regard, it is imperative to take cognizance of the decision in the case of *Hilton v Sultan S. Team Laundry [1946] 1KB 61, 81 Lord Greene Mr* held thus:

“But the statute of limitation is not concerned with merits, once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights”.

40. *On the other hand, it is imperative to note that where a suit is barred by the limitation of actions, the court is incapacitated from granting any of the reliefs that are sought in respect thereof.*

41. *In support of the foregoing Statement of the Law, I am bolstered by the decision in the case of Iga v Makerere University [1972] EA where the court held:*

“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.”

42. Before I wind up on the issue of the subject suit being barred by the limitation of actions act, I need to point out that being a claim anchored and/or premised on breach of contract, same ought and should have been filed within the statutory timeline and in the event the statutory timeline lapsed, no window for extension is allowed and/or provided for under the law.

43. For clarity, the provision of Section 27 of the Limitation Actions Act, Chapter 22 Laws of Kenya, do not apply in respect to cases touching on and/ or concerning breach of contract, but to specific cases of Tort.

44. If any case law to anchor the foregoing statement of the law was required, the decision of the Court of Appeal in the case of ***Mary Osundwa v Nzoia Sugar Co. Ltd [2002] Eklr*** would suffice. For clarity, the court held thus:

“This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly Osiemo J had no jurisdiction to extend time as he purported to do on 28/5/1991 that the order was by consent can be neither here nor there, the parties could not confer jurisdiction on the judge by consent.”

ISSUE NUMBER 2

Whether the Plaintiff’s suit, which is seeking to enforce an Interest in land, is barred by the Provisions of Section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya.

45. The Plaintiff’s claim herein touches on and/or concerns a transaction involving and/or concerning a conveyance over and in respect of an Interest in land. Simply put, the Plaintiff is keen to have the court order and/or decree that same is entitled to be registered as the owner of one of the sub-divisions of the suit property, which is the subject of the Letter of intent dated the 18th February 2000.

46. Nevertheless, the Plaintiff herein admitted and acknowledged that the 1st Defendant who was the owner of the suit property and who was chargeable with the transaction, over and in respect of the suit property, neither entered into nor signed any Sale Agreement with himself.

47. During cross examination, the Plaintiff further admitted that other than the fact that there was no Sale agreement and/or contract between him and the 1st Defendant, the only Document, namely the Letter of intent which was produced as exhibits P1, was never attested by any other witness, who was present and witnessed the signatures of (*sic*) the Parties.

48. In short, the Plaintiff herein confirmed and acknowledged that the Letter of intent, which is the only Document in writing, that was produced before the court, does not meet and/or measure up to the Provision of Section 3(3) of the Law of Contract Act Chapter 23 Laws of Kenya, which provides as hereunder;

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

49. My understanding of the said provision is that any transaction that involves Disposition of an Interest pertaining to land must be reduced into writings and the same must contain all the terms agreed upon. Besides, same thereafter must be signed by the persons chargeable therein and the signatures must be attested by a witness who is present and witnessing the document.

50. Short of the foregoing, the Document is incapable of enforcement and/or conferring any Legal right to any one and/or either to the Parties thereto. In this regard, even assuming that the Contract before hand was not time barred, I would still have found it difficult to enforce the Letter of intent, because the Letter runs afoul of the provisions of Section 3(3) of the Law of Contract, Chapter 23, Laws of Kenya.

51. In support of the foregoing observation, I beg to adopt and endorse the succinct reasoning of the Court espoused in the case of ***Silverbird Kenya Limited –vs- Junction Ltd & 3 Others [2013] eKLR***, where the court stated inter alia:-

“...In my view it matters not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law.

The letter of 19th August 2009 in my view does not satisfy the requirements of Section 3(3) of the Law of Contract Act to be the foundation of the plaintiff’s claim against the defendants. Section 3(3) of the Law of Contract Act is indeed couched in mandatory terms and does infact divest the court of jurisdiction in instances where there is no compliance as in the instant case.

In the circumstances and by reason of the Law of Contract Act, the plaintiff's suit must fail for being in contravention of Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya.”

52. Based on the Provisions of Section 3(3), (*Ibid*) the entire of the Plaintiff's suit, would similarly have collapsed.

ISSUE NUMBER 3

Whether the Plaintiff is entitled to the Equitable Relief of Specific Performance.

53. In respect of the subject matter, other than impleading a prayer for refund of the market value of the suit property, based on the valuation that was commissioned and prepared in the year 2014, the Plaintiff herein has also sought for an order in the alternative for specific performance and essentially, an order directing the Defendants herein to complete the Contract, or better still, the Sale transaction.

54. It is important to point out, that the Relief of Specific Performance is an Equitable relief and therefore same does not ordinarily issue at the Beckon of a Party. Simply put, an order for Specific performance does not issue as a matter of right, but like all other Equitable remedies, same is subject to exercise of Judicial discretion and is dependent on the existence of other obtaining circumstance, as well as other alternative Remedies.

55. On the other hand, before a court of law can venture to deal with and issue an Order of specific performance, it is important to ascertain and/or authenticate whether there existed a valid and enforceable agreement between the Parties, which is capable of being implemented and/or enforced by a court of law.

56. In respect of the subject matter, I have pointed out herein before that no Sale agreement was ever crafted, executed and/or engrossed, whatsoever. Consequently, no valid and/or legal Sale agreement, does exist, between the Plaintiff and the 1st Defendant which is capable of enforcement to warrant Specific performance in the first instance.

57. Secondly, before Specific performance can arise and/or ensue the Agreement and/or Contract must be lawful, legal and/or legitimate, in accordance with the law and not otherwise. However in this case, I have pointed out that the Agreement was/ is illegal. In short, the plea for Specific Performance, is clearly untenable.

58. In support of the foregoing observation, one needs only to look at the decision in the case of **Reliable Electrical Engineers Ltd.....Vs....Mantrac Kenya Limited (2006) eKLR**, where Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

59. In the premises, it is apparent that yet again the Plaintiff herein is not entitled to Specific Performance, insofar as the Sale Agreement, upon which the claim and/or plea for specific performance is premised, is misguided and otherwise legally untenable.

60. Before finally disposing of the subject matter, it is important to note and/or observe that even though the 1st Defendant had procured and obtained a interlocutory judgment against the 1st Defendant, such interlocutory judgment, is no guarantee that a final judgment shall issue in favour of the Plaintiff.

61. At any rate, speaking for myself only, I highly doubt that the nature and circumstances of the Subject case, where there was no Liquidated claim or Mesne Profit, could have attracted entry of Interlocutory Judgment in line with the Provisions of Order 10 of the Civil Procedure Rules, 2010. Nevertheless, such an Issue did not arise and hence same is moot.

62. Be that as it may, the Plaintiff was still obliged to tender before the court his evidence to prove his case and where he does not do so, that is, to place his evidence before the court, then his case must Fail. For clarity, the Provision of Sections 107, 108 and 109 of the Evidence Act, Chapter 80, Laws of Kenya, are imperative.

63. Despite the foregoing, I find and hold that the Plaintiff did not discharge the requisite Burden of Proof in respect of the Subject Matter. Consequently, the Plaintiff's case must therefore Fail.

FINAL DISPOSITION:

64. Having addressed and/or considered the issues for Determination herein, I come to the conclusion that the Plaintiff's suit herein is barred by the Limitation of Actions Act, Chapter, 22, Laws of Kenya, and in this regard, the court is incapacitated from granting and/or making the Orders Sought.

65. Consequently the Plaintiff's suit be and is hereby Dismissed.

66. As concerns costs, the Defendants herein were paid Kshs.1, 080, 000/= only, towards the Purchase price of the Suit Property, which Purchase has since aborted on the basis of the Limitation of Time

67. Owing to the foregoing, it would not be appropriate, just and/ or expedient, to condemn the Plaintiff to pay Costs to and in favour of the Defendants, yet same by Operation of the Law , have retained and kept unto themselves the entire of the monies that was paid unto them.

68. Consequently and in the premises, Each Party shall bear their own costs.

69. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28th DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

N/A for the Plaintiff.

Plaintiff present in Person.

Mr. Kagicha for the 1st Defendant