



REPUBLIC OF KENYA



**KENYA LAW**  
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**Paul Kago Mbugua v Samuel Mbiru Ngugi (Civil Suit 169 of 2014)  
[2022] KEELC 15715 (KLR) (18 March 2022) (Judgment)**

*Paul Kago Mbugua v Samuel Mbiru Ngugi [2022] eKLR*

Neutral citation: [2022] KEELC 15715 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**CIVIL SUIT 169 OF 2014**

**JO MBOYA, J**

**MARCH 18, 2022**

**BETWEEN**

**PAUL KAGO MBUGUA ..... PLAINTIFF**

**AND**

**SAMUEL MBIRU NGUGI ..... DEFENDANT**

**JUDGMENT**

1. Vide Plaintiff dated the 30<sup>th</sup> January 2014, the Plaintiff herein sought for the following reliefs;
  - a. Transfer of Dagoretti/Uthiru/1441 and or Dagoretti/Uthiru/1442.
  - b. Costs of the suit and interest thereon
2. Upon being served with the Plaintiff and Summons to Enter Appearance, the Defendant herein duly entered appearance on the 23<sup>rd</sup> April 2014, and thereafter filed a statement of defense on the 3<sup>rd</sup> June 2014, whereby the Defendant essentially denied and/or disputed the claim lodged by the Plaintiff.
3. Nevertheless, it is worthy to note that the Defendant admitted and acknowledged that same indeed entered into and executed a land sale agreement over and in respect of a portion of LR Dagoretti/Uthiru/1425, but contests that at the time of execution of the sale agreement, same was not seized of the requisite legal capacity to transact over the estate of the deceased.

**Evidence By The Parties**

**Evidence By The Plaintiff**

4. The Plaintiff herein filed a written statement dated the 30<sup>th</sup> January 2014, which written statement was duly adopted and thereby became the Plaintiffs evidence in chief.



5. Further, the Plaintiff testified that same entered into a land sale agreement with the Defendant herein, which sale agreement was reduced into writing and thereafter signed by and/or on behalf of both the Plaintiff and the vendor, respectively.
6. It was the Plaintiff further testimony that pursuant to the sale agreement, the Defendant herein covenanted to sale and to transfer unto him a portion measuring 0.5Ha, to be exercised out of LR No Dagoretti/Uthiru/425, and that the total purchase price was agreed at Kes.2, 000, 000/= only.
7. On the other hand, the Plaintiff further testified that at the time of the execution of the sale agreement same paid to and in favor of the Defendant the sum of kes.1, 000, 000/= only, which was duly received and acknowledged by the Defendant. In this regard, the Plaintiff testified that what therefore remained owing and outstanding was the sum of Kes.1, 000, 000/= only.
8. The Plaintiff further testified that the balance of Kes.1, 000, 000/= was agreed to paid to and in favor of the vendor at the time of the transfer of the sold portion of land and issuance of title. However, as at the time of filing of suit, no such transfer had been done but hence the outstanding portion of the purchase price has not been paid.
9. Based on the foregoing, the Plaintiff therefore implored the court to compel the Defendant to transfer the suit properties, Dagoretti/Uthiru/1441 and/or Dagoretti/Uthiru/1442.
10. On cross examinations, the Plaintiff herein stated that at the time of the entry into the sale agreement, same was shown documents which confirmed that the suit property was registered in the name of one Geoffrey Ngugi Gachemi and not the Defendant herein.
11. On the other hand the Plaintiff further testified that same was also supplied with various documents, including a copy of Death certificate in respect of Geoffrey Ngugi Gachemi, copy of the title deed and that from the documents which were supplied to him, it was evident that the owner of the suit property, was deceased.
12. On further cross examination, the Plaintiff further testified that at the time of entering into the land sale agreement the suit property was not registered in the name of the Defendant.
13. Besides, the Plaintiff herein conceded that the Defendant herein did not have capacity to enter into and/or execute a land sale agreement over and in respect of the suit property, which belonged to and was registered in the name of Geoffrey Ngugi Gachemi, who was deceased.
14. Finally, on the issue of refund, the Plaintiff testified that the Defendant herein has never offered to refund the portion of the purchase price that was paid to and/or on his favor.
15. For clarity, the Plaintiff pointed out that the Defendant has never written any letter showing willingness to refund the portion of the purchase price.

### **Evidence By The Defence**

16. After the close of the Plaintiffs case, the Defendant's counsel sought for and obtained an adjournment to be able to call the Defendant and defense witnesses. Consequently, the court adjourned the matter and granted a fresh dates for defense hearing.
17. On the resumed date for hearing, namely the 2<sup>nd</sup> December 2021, counsel for the Defendant informed the court that same had made frantic efforts to reach out to the Defendant through his cell-phone number but the Defendant's cell-phone number was switched off and that all efforts to reach the Defendant, did not bare any fruits.



18. Be that as it may, counsel pointed out that the Defendant herein had been duly informed and/or notified of the scheduled hearing date and in this regard, Counsel was therefore unable to proffer any reason and/or basis for the absence and/or failure by the Defendant to attend court.
19. Based on the foregoing, counsel for the Defendant thereby proceeded to and applied to close the Defense case. Consequently, the defense case was marked as closed without any evidence having offered and/or tendered by and/or on behalf of the defense.

### **Submissions By The Parties**

20. At the close of the defense case, the parties herein proposed to file and exchanged written submission and in this regard, the court proceeded to and issued directions pertaining to and concerning the filing and exchange of the written submission.
21. Pursuant to the directions of the Court, the Plaintiff proceeded to and filed his written submissions on the 9<sup>th</sup> December 2021, whereas the Defendant filed his written submissions on the 21<sup>st</sup> February 2022. For clarity, the two sets of the written submissions are on record and same have been duly considered and taken into account.
22. On behalf of the Plaintiff, it was submitted that same was a bonafide purchaser for value without notice who entered into and executed a land sale agreement with the Defendant herein and based on the land sale agreement, it is submitted that the court should proceed to decree specific performance.
23. In support of the foregoing submissions, counsel for the Plaintiff has quoted and relied on various decisions including the decision in the case of *Weston Gitonga & 10 Others v Peter Rugu Kikanga and Another* (2017) eKLR, *Lawrence P Mukiri Mungai, Attorney Francis Muriuki Mwaura v Attorney General & 4 Others* (2017) eKLR, *Katana Kalume & Another v Municipal Council of Mombasa & Another* (2019) eKLR, *Republic v The Registrar of Titles, Mombasa & 2 Others Ex-Parte Mfill Ltd* (2012) eKLR, *David Kiprugut Maiyua v Rebeca Chekurgat Main* (2019) eKLR, to support and underscore the claim founded and anchored on bonafide purchase for value.
24. Secondly, the Plaintiff has also submitted that same is entitled to refund of the purchase price which was paid to and in favor of the Defendant herein. In this regard, the Plaintiff has claimed refund of Kes.1, 956, 590/= only.
25. In support of the claim for refund, the Plaintiff has relied in the decisions in cases namely *Lilian Wairimu Kimotho v Samuel Njogu Kimoth & Another* (2020) eKLR and *Said Kosgei Chebii v Paul Kimutai Chmueno & Another* (2016) eKLR.
26. On his part, the Defendant has submitted that the sale agreement that was entered into between the Plaintiff and the Defendant was entered into with a person who had no capacity to transact over and in respect of the estate of Geoffrey Ngugi Gathemi, deceased, who was at the material point in time registered as the owner of the suit property.
27. Based on the fact that the Defendant herein had neither taken out nor been issued with Grant of letters of administration over and in respect of the estate of the deceased, same was therefore not seized of the capacity to sale, alienate and/or dispose of any portion of the suit property.
28. Further, it was submitted that the suit property was agricultural land and the parties had agreed that the requisite Land Board Consent would be procured and/or obtained to facilitate the transfer and registration of the sold portion of the suit property.



29. However, it was submitted that the intended Land Control Board Consent, was neither applied for nor obtained within the statutory six months period or at all. In this regard, the Defendant's counsel submitted that the entire transaction became void.
30. Other than that the fact that the entire transaction was rendered void, the Defendant further submitted that the Plaintiff herein was never a purchaser for value without notice of any defect. Consequently, the Defendant has submitted that the claim for specific performance, does not lie.

### **Issues for Determination**

31. Having reviewed the Plaintiff filed by and/or on behalf of the Plaintiff, together with the witness statement and the bundle of documents attached therewith and having considered the statement of defense filed by the Defendant, as well as the oral testimony tendered by the Plaintiff herein and having similarly taken into account the written submissions filed by the parties, the following issues are germane for determination;
  - a. Whether the Defendant herein had the requisite *locus standi* to sell, alienate and/or dispose of any portion of Dagoretti/Uthiru/425, which was registered in the name of a deceased person and prior to the grant of letters of administration.
  - b. Whether the Plaintiff herein is entitled to specific performance either as claimed or at all.
  - c. Whether the Plaintiff is entitled to a refund and if so the quantum therefore.

### **Analysis and Determination**

#### **Issue Number 1. Whether the Defendant herein had the requisite locus standi to sell, alienate and/or dispose of any portion of Dagoretti/Uthiru/425, which was registered in the name of a deceased person and prior to the grant of letters of administration.**

32. During his testimony, the Plaintiff herein testified and confirmed to the court that at the time of entry into and execution of the land sale agreement dated the 26<sup>th</sup> April 2007, same was availed and/or provided with copies of various documents including copy of Title Deed in respect of LR No Dagoretti/Uthiru/425 and copy of each certificate of one Geoffrey Ngugi Gachemi.
33. It was the Plaintiff's further testimony that upon evaluating the documents availed unto him, same ascertained and/or authenticated that the suit property was a deed registered in the name of Geoffrey Ngugi Gachemi, who was deceased, as at the time of entry into the sale agreement.
34. Other than the foregoing, the Plaintiff herein made further concessions during cross examination and same were as hereunder;

“The Defendant did not have a capacity to enter into a sale agreement.

“The land was not registered in the defendant's name at the time of the sale”.

35. From the foregoing, it is apparent that the Plaintiff herein dealt with and/or transacted over and in respect to a property of a deceased person, with a person to whom no grant of letters of administration had been issued and/or confirmed. Consequently, the person, namely the Defendant, with whom the



Plaintiff engaged with did not have any capacity to either enter to any sale agreement over a portion of the estate of the deceased, let alone, alienating same.

36. In support of the foregoing position, it is worthy and/or imperative to take cognizance of the provisions of section 82 of the [Law of Succession](#) Chapter 160 of the Laws of Kenya, which provides as hereunder;

82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that— (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- (ii) no immovable property shall be sold before confirmation of the grant;

37. On the other hand, it is worthy to take cognizance of the decision [In the case of the Estate of Isaac Kaburu Marete \(deceased\)](#) [2017] eKLR, where the court stated as hereunder;

“under section 82(b) (ii) of the [Law of Succession Act](#), sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the [Law of Succession Act](#), the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property. It is during confirmation hearing that the court establishes the respective identities and shares of persons beneficially entitled, and when confirmed the grant specifies such persons and their respective shares in the estate. See section 71 of the [Law of Succession Act](#). Therefore, before confirmation, the interest of the beneficiary remains amorphous and entangled within the estate; and vested in the administrator or executor as the estate property as by law stated.

38. But for completeness of the foregoing discourse, I wish to go two steps up. First, a void transaction is in law a nullity. It is not only bad, but incurably bad. And every proceeding or perceived right which is founded on it is not only bad but incurably bad. On this I can do no better than Lord Denning M.R. in the case of *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169 at pg. 1172 that:

“...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every



proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

39. The excerpt alluded to herein before is based on fracas various issues of law, but what I beg to point out is the fact that a person to whom a certificated of confirmation has not been issued to, has no capacity to enter into any sale agreement over and in respect of the estate of a deceased.
40. In the premises, I find and hold that the agreement between the Plaintiff and the Defendant, whose effect was to alienate a portion of the suit property, was entered into with a person who was bereft of capacity to do so.

**Issue Number 2. Whether the Plaintiff herein is entitle to specific performance either as claimed or at all.**

41. The Plaintiff herein has sought for specific performance over and in respect of the suit property, namely Dagoretti/Uthiru/1441 and or Dagoretti/Uthiru/1442, which however were not the subjects of the sale agreement dated 26<sup>th</sup> April 2007.
42. Nevertheless, I have pointed out in the course of discussing issue number 1 that the sale agreement, upon which the Plaintiff seeks an order of specific performance, was entered into with a person who was neither authorized nor constituted to act for and/or on behalf of the estate of Geoffrey Ngugi Gachemi, deceased.
43. At any rate, it is common ground that the Defendant herein had not been issued with a certificate of confirmation of grant over and in respect of the estate of the deceased, pursuant to and I line with the provisions of section 71 of the *Laws of Succession Act*, Chapter 160 Laws of Kenya and hence same could not transact on behalf of the estate of the deceased.
44. Thirdly, it is important to note that the suit property was subject to land control board consent and in this regard, the parties themselves stated in the special conditions as hereunder;

“the vendor will upon obtaining the land control board consent to transfer, endorse the transfer form, and issue is pin and passport photographs to the purchaser to facilitate the transfer of the portion”

45. From the foregoing, it is obvious that the parties to the land sale agreement, were alive to the fact that the Land Control Board Consent was required, to effectuate and/or facilitate the completion of the transaction.
46. On the other hand, it was admitted and conceded by the Plaintiff that no land control board consent was sought for and/or obtained. In this regard, it is therefore imperative to take cognizance of the import and tenor of the provisions of sections 6 and 7 of the *Land Control Act* Chapter 302 Laws of Kenya, which provides as hereunder;

6. Transactions affecting agricultural land

- (1) Each of the following transactions that is to say—
  - (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
  - (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of [Rev. 2012] cap. 302 Land Control 7 [Issue 1] less than twenty acres into plots in an area to



which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

- (c) Deleted by Act No. 22 of 1987, Sch. 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.
- (2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).
- (3) This section does not apply to—
  - (a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or
  - (b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.

7. Recovery of consideration

If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt.”

- 47. Having taken note of the foregoing observation, it is now appropriate to consider whether an equitable remedy of specific performance can issue to and in favor of the Plaintiff either in the manner sought or at all.
- 48. To start with, it is imperative to note that an order of specific performance can only be considered or issued where there exists a valid contract between two parties that is legally enforceable and where the parties seeking an order of specific performance has performed his part of the bargain and has shown his willingness to perform his part of the bargain.
- 49. However, in respect of the subject matter, I have pointed out that the sale agreement between the Plaintiff and the Defendant was invalid, for various reasons, inter-alia, having been entered into with a person who had no capacity to alienate a portion of the property belonging to the estate of the deceased.
- 50. In my humble view, an order of specific performance cannot be granted and/or issued in the scenario as the one before the honourable court, insofar as the contract that belies the transaction is null and void.
- 51. In support of the foregoing observation, I adopt and reiterate the decision in the case of *Reliable Electrical Engineers Ltd v 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.”

52. In a nutshell, I find and hold that the Plaintiff herein is not entitled to an order of specific performance to the extent that the sale agreement that belies the impugned transaction is firstly invalid and thus unenforceable in law.

### **Issue Number 3. Whether the Plaintiff is entitle to refund and if so the quantum therefore**

53. Other than the claim for specific performance, which the Plaintiff herein sought at the foot of the Plaintiff, the only other relief that was sought by the Plaintiff was cost of the suit and interest thereon.
54. It is worthy to note that the Plaintiff herein neither sought for nor obtained leave to amend the Plaintiff and therefore the subject matter was prosecuted on the basis of the Plaintiff dated the 30<sup>th</sup> January 2014.
55. To the extent that the subject matter was prosecuted on the basis of the said Plaintiff, it is worthy to state that the Plaintiff is bound by his pleadings. Consequently, the Plaintiff herein, would be obliged to restrict himself to the relief that were impleaded at the foot of the Plaintiff.
56. Suffice it to refer to the decision in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, where the court stated as hereunder;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

57. I would have been have been constrained to apply the cold letter law and hold that the Plaintiff herein cannot now implead and lay a claim for refund of the purchase price or part of the purchase price that was paid to the Defendant.



58. However, the Defendant herein vide his statement of defense dated the 3<sup>rd</sup> June 2014, has averred at para three (3) as follows;

“the Defendant has repeatedly informed the Plaintiff that the sale agreement was null and void in law and has offered to refund all monies paid to him by the Plaintiff but the Plaintiff has refused to receive the said funds”.

59. It is instructive to note that the Defendant is conceding that indeed same was paid and actually received monies at the foot of the sale agreement and that same has been ready and willing to refund the monies to and in favor of the Plaintiff.

60. Now that the sale agreement between the Plaintiff and the Defendant has been found to be void and invalid and incapable of enforcement and hence the land at the foot of the transaction shall remain with the Defendant, it will be inequitable to allow the same Defendant to benefit twice in respect of the same transaction and more particularly from his own default.

61. In the premises, article 159 (2) (b) of the *Constitution* requires that justice should not be delayed. This matter has been in the courts since 1993. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. article 159 (2) (a) of the Constitution requires justice to be administered to all, irrespective of status; article 159 (2) (g) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.

### **Final Disposition**

62. Having considered and addressed the issues which were itemized herein before, it is now appropriate to render a determination and/or final orders.

63. Suffice it to say, that the Plaintiff herein is not entitled to an order of specific performance, either as sought for or at all, insofar as the sale agreement, which was entered into and executed between himself and the Defendant was fraught with illegality.

64. Nevertheless, having paid hard-earned money to and in favor of the Defendant herein, it would be inequitable, unjust and utterly unfair for the Defendant to retain the monies that were unfairly extracted from the Plaintiff.

65. Consequently, judgment be and is hereby entered in favor of the Plaintiff as against the Defendant for refund of the sum of Kes.1, 956, 590/= only, plus interest at 14%, from the date of filing the suit up to date of full payment thereof.

66. On the other hand, the Plaintiff is also entitled to costs of the suit.

67. It is hereby Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**



**IN THE PRESENCE OF;  
JUNE NAFULA COURT ASSISTANT  
NO APPEARANCE FOR THE PLAINTIFF  
NO APPEARANCE FOR THE DEFENDANT**

