



**Kimani & another v Njoroge (Environment & Land Case
707 of 2017) [2022] KEELC 3066 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3066 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 707 OF 2017
MN GICHERU, J
MAY 18, 2022**

BETWEEN

JOHN KIARIE KIMANI 1ST PLAINTIFF

PAUL MBUGUA WAWERU 2ND PLAINTIFF

AND

EMMA NJOKI NJOROGE DEFENDANT

JUDGMENT

1. John Kiarie Kimani and Paul Mbugua Waweru, the Plaintiffs, seek the following reliefs against Emma Njoki Njoroge, the Defendant;
 - (a) An order for specific performance of the agreement dated 12/9/2003 requiring the Defendant to transfer to the Plaintiffs L.R. Kajiado/Olchoro-onyore/2994.
 - (b) Costs of the suit.
2. The Plaintiffs case is as follows. On 12th September, 2003, they entered into an agreement for sale of the suit land. At the time, the land was registered in the name of the Defendant's husband Njoroge Kamau. The purchase price was Kshs. 350,000/-.

On the date of the agreement, the Plaintiffs paid the Defendant Kshs. 200,000/- leaving a balance of Kshs. 150,000/= which was to be paid after the Defendant had obtained the letters of administration to the estate of her husband and executed the necessary transfer documents.

The Plaintiffs took possession of the suit land immediately after the signing of the agreement on 12/9/2003. In the year 2012, they leased it to one Peter Kantai Melonyie who is using it for quarrying purposes.



The Defendant has already obtained the necessary letters of administration to the estate of her husband but she has not transferred the suit land to the Plaintiffs as agreed despite a demand notice being issued to her. This is why the Plaintiffs filed this suit seeking orders of specific performance.

3. In support of their case, the Plaintiffs filed the following evidence;
 - (a) Witness statements by John Kiarie Kimani and Paul Mbugua.
 - (b) Copy of Sale Agreement dated 12/9/2003.
 - (c) Copy of tenancy agreement between the Plaintiffs and Kantai Melonyie.
4. In her written statement of defence dated 20/7/2017, the Defendant through her counsel on record admits that she signed the Sale Agreement of 12/9/2003 but she adds that she was forced to do so. The Plaintiffs knew or ought to have known that the property belonged to her deceased husband and that she had not taken out the letters of administration.

Other averments in the defence include that the Defendant is illiterate and could not comprehend anything about the sale, that the second Plaintiff was not a party, that the other beneficiaries of the deceased were not involved, that the Defendant did not allow the Plaintiffs to enter the suit land, that specific performance is not available to the Plaintiffs, that the consent of the Land Control Board was never obtained, that the suit is time barred and should be dismissed with costs.

5. In support of her case, the Defendant filed the following evidence;
 - (a) Her own witness statement.
 - (b) A certificate of transaction dated 21/7/2017.
 - (c) Certificate of Death for Charles Njoroge Kamau.
 - (d) Copy of Grant dated 13th May, 2004.
 - (e) Copy of Title Deed for the suit land dated 9/8/1994.
 - (f) Copy of certificate of confirmation of Grant dated 23/6/2008.
 - (g) Copy of certificate of official search whose date is not clear.
 - (h) Copy of Title Deed for the suit land in the names of the Plaintiff and James Kamau Njoroge dated 7th August, 2011.
 - (i) Witness statement by Esther Njeri Njoroge, James Kamau Njoroge and Daniel Mbuki Njoroge all dated November 22, 2019.
6. At the trial on November 30, 2021, the two Plaintiffs testified. The only new evidence that emerged was that it is the Defendant who took them to the advocate who prepared the agreement for sale. He was called Mwangi Chege and he was known to the Defendant but unknown to the Plaintiffs.

The second Plaintiff knew the Defendant before the date of the agreement but the first Plaintiff did not. It is also the Plaintiffs' evidence that at the signing of the agreement for sale, all the Defendant's children were present at the advocate's office and they had no objection to the sale of the suit land by their mother.

On the part of the Defendant she had her daughter Esther Njeri testified. The only new evidence that was not in her witness statement was that she was ready to involve the first Plaintiff in the succession cause but when she called him, he did not respond.



Though she accepted that she received the part paid purchase price of Kshs. 200,000/-, her children were not present at the advocates office when the agreement for sale was signed. The children were also not aware of the sale of the suit land and they did not therefore consent to it.

7. Counsel for the parties filed written submissions on 9th February and 17th March, 2022 respectively. The counsel for the Defendant urged the following issues;

- (i) The Plaintiffs suit is time barred by virtue of Section 7 of the [Limitations of Actions Act](#).
- (ii) The transaction between the parties is null and void for failure to comply with the provisions of the [Land Control Act](#) as pertains to consent.
- (iii) The Defendant lacked capacity to enter into the Sale Agreement as she had not been appointed as the legal representative of the estate of her deceased husband.

In his submissions, counsel for the Plaintiffs replied to the first and second issues but said nothing about the third one.

8. I have carefully considered all the evidence adduced by the parties and I make the following findings of fact;

Firstly, I find that the first Plaintiff and the Defendant entered into an agreement for the sale of the suit on 12/9/2003. Both parties are in agreement.

Secondly, I find that the Plaintiffs took possession of the suit land immediately. The Defendant has admitted and denied this fact on her evidence but I find sufficient proof from the Plaintiffs evidence and the Defendant's partial admission.

Thirdly, I find that out of the full purchase price of Kshs. 350,000/=, only Kshs. 200,000/= was paid to the Plaintiff on 12/9/2003 and the balance of Kshs. 150,000/= remains unpaid. Both parties are in agreement on this finding.

Fourthly, I find that the consent of the Land Control Board has never been obtained and the Defendant who was to obtain it is unwilling to do so and wishes to refund the part paid purchase price of Kshs. 200,000/=.

9. On the issues for determination, I make the following findings;

Firstly on the first issue, I find that the Plaintiffs' suit is not for recovery of land. It is simply for specific performance.

As already stated, the Plaintiffs are in possession of the suit land. To recover means to get back something that one had before but has lost possession of. In this case, that would apply more to the Defendant than to the Plaintiffs.

Since the Plaintiffs have possession, they do not need recovery. Section 7 of the [Limitation of Actions Act](#) does not apply in this case.

Secondly, on the issue of absence of the consent of the Land Control Board as required by Section 6 of the [Land Control Act](#), the old law was that absence of such consent meant that a transaction such as the one in this case would be null and void.

There is however new jurisprudence from the case of [Willy Kimutai Kitilit v Michad Kibet](#) 2018 eKLR which the Plaintiffs' counsel has cited.

The *ratio decidendi* in that case is that where the purchaser of the land is in possession of the suit land and has paid the purchase price, then the equitable doctrines of constructive trust and proprietary



estopped are applicable to supersede the [Land Control Board Act](#) where a transaction relating to land is void for lack of consent of the [Land Control Act](#).

In the same decision at paragraph 24, the Court of Appeal had this to say about the place of equity in our hierarchy of norms;

There is another stronger reason for applying the doctrines of constructive trust and proprietary estopped to the Land Control Board. By Article 10 (2) (b) of the [Constitution](#) of Kenya, equity is one of the national values which binds the Courts in interpreting any law. Further, by Article 159 (2) (e), the Courts in exercising judicial authority are required to protect and promote the principles of the [Constitution](#). Moreover, as stated before, by virtue of clause 7 of the transitional and consequential provisions in the sixth schedule to the Constitution, the [Land Control Act](#) should be construed with the alterations, adaptative and exceptions necessary to bring it into conformity with the [Constitution](#).”

At paragraph 21 of the same judgment the Court of Appeal had this to say...

Further by Section 28 of the [Land Registration Act](#), trusts are now overriding interests to which all registered land is subject to.”

On the third and final issue while it is true to say that the Defendant had not been appointed as the legal representative of the estate of the deceased when she entered into the agreement with the first Plaintiff, it is important to note that she was eventually appointed. Now that she has the authority, she has declined to complete the agreement. She has a good point when one considers that she received slightly over half of the purchase price (Kshs. 200,000/=) and the balance (Kshs. 150,000/=) would not buy half of the suit land (one acre) today, almost nineteen years down the line.

This dilemma can be solved in an equitable manner as I will demonstrate later. I however find that the Defendant cannot raise lack of capacity as a ground because now that she has capacity, she has refused to sign the transfer documents.

Furthermore, since the constructive trust overrides the register, it is immaterial that the Defendant had no capacity.

The final issue that remains is whether the Plaintiffs are entitled to an order of specific performance for the whole land parcel measuring 0.81 Ha. I find that they are not. This is because the suit land is currently worth more than it was in 2003. Again the Plaintiffs have admitted that they have been exploiting the entire parcel by leasing it for quarrying.

In the final analysis, I make the following orders which I find will meet the ends of justice in this case;

- i. An order of specific performance is hereby issued in favour of the Plaintiffs for half of the suit land.
- ii. The Defendant to execute all the necessary documents to transfer half of the suit land to the Plaintiffs failing which the Deputy Registrar of this Court to effect the said transfer.
- iii. The Plaintiffs to pay all the necessary charges.
- iv. No order as to costs.

Order accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 18TH DAY OF MAY, 2022.

M.N. GICHERU



JUDGE

