



**Kabera v Mwangi & 3 others (Environment & Land Case
241 of 2012) [2022] KEELC 2868 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2868 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 241 OF 2012**

JA MOGENI, J

MAY 17, 2022

BETWEEN

PATRICK KIGUNYA KABERA PLAINTIFF

AND

GRACE WANJIRU MWANGI 1ST DEFENDANT

JOHN NJUGUNA NJUKU 2ND DEFENDANT

MESHACK MUGO KIMANI 3RD DEFENDANT

DAVID KAMANDE MUNGAI 4TH DEFENDANT

JUDGMENT

Introduction and Pleadings

1. This suit was commenced by way of plaint filed on 08/04/2012 which was later amended on 19/04/2013 to include the 2nd, 3rd and 4th Defendants. The plaintiff pleaded that on 26/10/1995 he bought Juja/Juja East/Block 1/253, then unregistered and referred to as plot no. 253 Kiganjo ranching Company Ltd, from Ezekiel Gachu Mwangi (deceased) who was the husband of the 1st defendant at an agreed sale price of Kshs. 150,000. The plaintiff pleaded that in the same year 1995 he occupied the land after paying Kshs. 102,000 leaving a balance of Kshs 48,000. He states that he was not able to pay the balance because when he finally got the money the defendant's husband the registered proprietor of the suit property refused to take the balance and asked for more money. He states that later he was informed that the vendor Mr Ezekiel Gachu Mwangi had passed and when the plaintiff looked for the 1st defendant, she demanded Kshs. 100,000 so that she could transfer the land and the plaintiff gave her the money.
2. Later when the 1st defendant and the plaintiff appeared before the Land Control Board they were advised to secure letters of administration first since the land was still registered in the name of the



vendor Mr Ezekiel Gachu Mwangi. Later when the plaintiff followed up with the 1st defendant about the consent, he states that she informed him that the parcel of land was encumbered by a loan. He states that he later learned that the land had been sold to a third party who are the 2nd, 3rd and 4th defendants in the instant suit.

3. The plaintiff prays for judgment against the defendants for the following orders:
 - a) A declaration that Juja/Juja East Block 1/253 belongs to the plaintiff should therefore be availed to the plaintiff
 - b) That a permanent injunction do issue injuncting the Defendants or anyone claiming a right under the defendants from interfering with Juja/Juja East Block 1/253 or the resultant parcels to the plaintiff
 - c) General damages
 - d) Costs and interest of the suit
 - e) Any other remedy which the honorable court may deem fit
4. This suit is contested and the 1st defendant filed her statement of defence on 25/04/2013, and denied all the allegations made by the plaintiff. The 1st Defendant stated that the plaintiff was informed by the 1st defendant and the Ezekiel Gachu Mwangi (deceased) of the intention to rescind the agreement for failure to pay the balance way back in May 1998. The 1st defendant states that the plaintiff never responded and as a result and being the administrator of the late Ezekiel Gachu Mwangi, she transferred and sold the property to the willing buyers. She contends that the sale between the 1st defendant and the 2nd, 3rd and 4th defendants was legal and above board, it was proper. She prays that the plaintiff's suit is dismissed.
5. The 2nd, 3rd and 4th defendants denied that they had any knowledge of any previous sale of the suit property. They averred that they were bona fide purchasers of the suit property. They contend that the suit property was vacant at the time of purchase and that the three defendants are in full occupation. They contend that the plaintiff failed to comply with provisions of the Land Control Act and the prayers sought are misplaced in law and incapable of being granted. They prayed that the suit is dismissed with costs.
6. The 2nd, 3rd and 4th defendants filed an amended defence on 2/10/2019 and introduced a counter-claim against the plaintiff. They stated that they had tried to commence development of the suit property but the plaintiff has resisted and interfered with the effort and are therefore seeking the following in the counter claim:
 - a. The plaintiff's suit be dismissed with costs to the defendants
 - b. An order of injunction permanently restraining the plaintiff from interfering with the 2nd, 3rd and 4th defendants quiet possession of parcel of land no Juja/Juja East Block 1/253.
 - c. The plaintiff to pay costs of the counter-claim
7. The matter commenced for viva voce hearing on the 21/02/2022 and the parties each called one witness.

Evidence of The Parties

8. In his evidence, the plaintiff adopted his witness statement as part of his evidence dated 8/05/2012 and a bundle of documents dated the same date which he wanted the court to adopt as his exhibits PWExh



- 1-6. He testified that in the year 1995, Mr Ezekiel Gachu Mwangi (deceased) who was the husband to the 1st defendant, Grace Wanjiru Mwangi, sold him the suit property and they wrote a sale agreement dated 26/10/1995. He testified that the purchase price was Kshs 150,000 and that Kshs 102,000 was paid on the same day they wrote the agreement on 26/10/1995 and that balance was supposed to be paid later. That when he got the balance of Kshs 48,000 the husband of the 1st defendant refused to take demanding more money.
9. The 1st defendant also demanded more money and the plaintiff testified that in May 2010 he deposited the sum of Kshs 100,000 in her favour. It is his testimony that they later went to the Land Control Board but were advised to pursue the matter of transfer of title through court. It is the plaintiff's testimony that he later learnt that the 1st defendant was in the process of transferring the ownership of the said parcel of land into her own name. That despite building a permanent house on the said parcel of land he was shocked to see the surveyor subdividing the land and putting beacons on it. The day of the agreement.
10. In cross-examination, he stated that the agreement was signed by himself and the deceased Mr Ezekiel Gachu Mwangi, the 1st defendant though present, did not sign the agreement. He stated that the late Ezekiel told him to pay for the balance of the purchase price in instalments but he needed to be through by 1996. It was his testimony that he paid Kshs. 100,000 through Waithera Mwangi around 2000 although the agreement did not state that he pays through Waithera Mwangi. He stated that he sued the 1st defendant because she was the administrator. During further cross-examination by the Counsel for the 2nd, 3rd and 4th defendants, he stated that he gave Grace Wanjiru Mwangi Kshs. 100,000 but he did not have any record as to whether she got the money. He stated that he was the one in occupation of the suit property which is at Kimosho and even the chief knows him since he stays on the suit property.
11. In re-examination it is the plaintiff testimony that the 1st defendant was part of the transaction since the letter from her advocate Waithera Mwangi dated 26/04/2013 addressed to the plaintiff acknowledged that he had paid Kshs. 102,000 and had a balance of Kshs 48,000 to pay. The plaintiff contends that he has finalized paying the balance and that he moved into the suit property on 26/10/1995. He further states that the sale agreement did not have a breach clause. With the above evidence, the plaintiff closed his case.
12. DW-1 Mr John Njuguna Njogu stated that they had written a statement filed on 25/07/2013 which he wanted the court to adopt as his evidence including a list of documents dated 18/07/2013 which he wanted adopted which was marked as DWExh 1-3. He testified that he is the chairman of Kerachu Self Help Group and that they bought the suit property after undertaking due diligence. They did a search and found that the owner of the suit premises was Grace Wanjiru Mwangi. They have therefore filed a counter-claim.
13. In cross-examination he stated that the 1st defendant Grace sold to them the land in 2012. That when they undertook a search, the name that showed on the title of the suit property was that of the 1st defendant and not that of the Ezekiel Gachu Mwangi. Further it was the Mr Njuguna's testimony that there was no encumbrance on the title of the suit property it was a clean title. The stated that they paid Kshs 2.5 million. He testified that no one claimed the land during the transfer. Further that they got to know the plaintiff when the court summoned the defendants. He also testified that they fenced the suit property and that when they went to see the land they never found any one on the land though there was a site house but there was no one on the land.
14. During further cross-examination he stated that they bought the land as three officials of the Self-Help group in 2011. He testified that he stays 2 kilometres from the suit property in the same village. He stated that they got a loan from a bank to buy the suit property he however did not have any evidence



in court to show that they got a loan. He further stated that the transfer was done before advocate Wangari. He stated that he had no Land Control Board approval in court and neither did he have the approval from the District Officer. He testified that they paid stamp duty but he did not have the documents and therefore he did not produce them in court.

15. He stated that the plaintiff uprooted the beacons and they reported to the chief but he had no record of the report made to the chief. He further testified that he did not in the counter-claim seek compensation from the one who sold them the land. He also testified that he did not have a written consent or authority from the 3rd and 4th defendants to represent in them in court. He also testified that he did not file any minutes about the purchase of the suit property and he stated that from his copy of the title to suit property it shows that the suit property was registered on 14/02/2012 to the Trustee of Kerachu Self-Help Group. It was his testimony that in the counter-claim the prayer made is for an order for injunction to restrain the plaintiff from interfering with the 2nd, 3rd, and 4th defendant's quiet possession and not the self help group. With the above evidence the 2nd, 3rd and 4th defendants closed their case.
16. The 1st defendant did not file a witness statement despite being directed to do so upon the application by Mr D Mwangi Counsel for the 1st defendant on 08/12/2021 and neither did she attend the hearing of the suit. Consequently, the court could not adopt the list of documents presented by the 1st defendant as she did not present herself for cross-examination and verification of the same.

Analysis and Determination

17. There is no contestation from the evidence adduced in court that there was a sale agreement entered into on 26/10/1995 between Mr. Patrick Kigunya Kabera and Mr Ezekiel Gachu Mwangi (now deceased). There is also no argument that the 1st defendant herein Grace Wanjiru Mwangi is the administrator of the estate of the deceased and is therefore properly enjoined in the suit. The agreement was for purchase of land parcel No 253 in Kiganjo The purchase price was Kshs150,000 out of which a deposit of Kshs 102,000 of the total purchase price was paid by the purchaser leaving a balance of ksh 48,000 which was to be paid. The 1st defendant who is the administrator of the estate of Ezekiel Gachu Mwangi did not deny there was an agreement between her late husband and the plaintiff.
18. It is also not in dispute that completion of the contract did not take place and the plaintiff never paid the balance of Kshs. 48,000 as was expected and as result the contract was rescinded and the property was sold to a third party. Title in respect of the property sold has already been issued to the 2nd, 3rd and 4th defendants who have filed a counter claim. Equally, there is also no dispute that the suit property is agricultural land and that consent of the Land Control Board was neither sought nor obtained. Having held that there was no valid consent of the Land Control Board, it follows that the plaintiff's claim must fail. The plaintiff's claim is therefore hereby dismissed.
19. In view of the foregoing, only two issues emerge for determination. Firstly, whether the transaction is null and void. Secondly, whether the reliefs sought are available.
20. The requirement of a consent in respect of a transaction on agricultural land is found at section 6 of the [Land Control Act](#). Section 8 of the same Act states that if the application is to be made then the consent is to be made within six months of the making of the agreement. In the present suit no such application was made therefore and there is no order sought by the plaintiff for extension of time to apply for the consent of the Land Control Board meaning the transaction made by the plaintiff on 26/10/1995 becomes null and void for all intents and purposes, and cannot be enforced. The only remedy is a refund of the purchase price which is recoverable as a debt by the person who paid it from the person to whom it was paid.



21. Further I have noted that the sale agreement was entered into in 1995 and the cause of action was brought to court in 2012 well over the six years legally stipulated and provided for in the *Limitation of Actions Act*. Section 4 (1) (a) of the *Limitation of Actions Act* provides as follows: -
- 4 (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) Action founded on contract .
22. In the case of *Gathoni -Vs - Kenya Co-operative Creameries Ltd* (1982) KLR 104 Potter JA stated the rationale of the law of limitation thus :-
- “The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”
23. In the case of *Joas components’ Co Ltd -vs- The County Government of Homa Bay* (2017) eKLR Omondi, J in considering the application of section 4(1) (a) of the *Limitation of Actions Act*, cited with approval the case of *Richard Toroitich v mike K Lelmet & 3 others*(2014) eKLR where the court made reference to the case of *Director Ltd -vs- Samani* (1995-1998) 1EA where the court stated as follows: -
- No one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued on the action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely an action that is based on contract six years after the cause of action arose or any application to extend such time for bringing of the action based on contract”
24. In the case of *Rawal –vs- Rawal* (1990) KLR 275 the court stated thus:-
- “the object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he has lost his evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims”
25. The net effect of the statute of limitation is that it bars the bringing of various causes of action after the expiry of particular periods of time. The fact that a cause of action may be barred from being brought by reason of expiry of the period within which it could have been brought does not mean the cause of action is extinguished. It is only that such cause of action cannot be enforced by way of litigation. The plaintiff’s action is therefore time barred under the Act and therefore null and void.
26. The 2nd, 3rd and 4th defendants filed a counterclaim in which they sought to have the plaintiff’s suit dismissed and an order of injunction permanently restraining the plaintiff from interfering with the 2nd, 3rd, and 4th defendants’ quiet possession of parcel of land No. Juja/Juja East Block 1/253 and costs of the counter-claim to issue.
27. I have carefully considered the pleadings, the oral evidence and the authorities proffered by the parties. Referring to the authorities both parties have proffered to court, I opine that they are all good authorities in their facts and circumstances. However, no two cases are congruent to each other to a degree of mathematical certitude. In coming to the determination I have made in this suit I have considered the principles enunciated in those authorities.
28. The plaintiff and the defendants in their evidence have sought to prove the precedence of the occupation of the parties upon the suit land. In their evidence there have been some inconsistencies by



the parties both claiming to be in occupation of the suit property. Only the plaintiff attached pictures to proof that they have put up a structure on the suit property. The defendants though claiming to be in possession lead evidence stating that the plaintiff uprooted beacons to the suit property. At the end of the day, the plaintiff has claimed that the 1st defendant occasioned registration of the land in the names of the 2nd, 3rd and 4th defendants. The defendants reposit that the registration of the suit land in their names was done procedurally after the 1st defendant obtained a grant of letters of administration in February 2008 through Succession Cause No. 226 of 2007 in Kiambu. Which the plaintiff sought to challenge but has not provided any determination from the High Court showing nullification of the grant.

29. I therefore find that there is no legal bar to 2nd, 3rd and 4th defendants enjoyment of the land that they acquired. This court finds that at the time of transfer of the property by Grace Wanjiru Mwangi to the 2nd, 3rd and 4th defendant, the former was the absolute proprietor of the suit land. The relevant law is the Land Registration Act No.3 of 2012. Section 24 provides that registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
30. For want of a valid consent, the sale transaction is therefore hereby declared to be a nullity. The only other issue is the prayer for permanent injunction for the 2nd, 3rd and 4th defendants who hold a valid title to land. Having held for the defendants, I cannot deny the defendants this prayer. I direct the plaintiff to vacate the suit premises within a period of 30 days from the date hereof, and in default, the defendants are at liberty to apply for an order of his eviction.

On who should pay costs?

31. The last issue is costs. The plaintiff has lost the suit but I am sympathetic to him as he had imagined that he had a valid contract and that he could obtain consent from the court which is abit bizarre since the law is clear on sale of agricultural land and the processes that need to be followed. The plaintiff had a counsel who should have guided him appropriately. Agricultural land cannot be transferred if there is no consent of the Land Control Board, period. Given the circumstances of this case, I think it is only fair that each party bears its own costs.
32. Section 27 of the Civil Procedure Act requires that costs follow the event but the court has the discretion to rule otherwise. The court in Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR quoted the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227 held:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (*Fripp vs Gibbon & Co.*, 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”
33. While the defendants are successful litigants, it will follow that they are entitled to costs. However, this court notes the misfortune that befell the plaintiff the only available recourse for the plaintiff's would be to seek court's intervention. Just because the plaintiff lost does not mean they may not succeed in a claim for refund. Condemning the plaintiff to pay costs will be such a heavy financial burden on him. The court shall exercise the discretion and direct that each party shall bear their own costs.



Disposal Orders

34. In summary, I make the following final orders :-

- a) The sale agreement dated 25/10/1995 between the plaintiff and 1st defendant over the land parcel Juja/Juja East Block 1/253 cannot be enforced for want of a valid consent of the Land Control Board the said agreement is hereby declared to be null and void.
- b. The plaintiff's remedy is to claim a refund of the money paid under the transaction, but this court is unable to make any determination on this point, as no evidence was tabled on the exact amount of money paid under the transaction. The plaintiff is at liberty to file a separate claim for this, and the claim if and when filed, will be determined on its merits.
- c. An order is hereby made of injunction permanently restraining the plaintiff from interfering with the 2nd, 3rd and 4th defendants quiet possession of parcel of land no Juja/Juja East Block 1/253.
- d. The 2nd, 3rd and 4th defendants are entitled to vacant possession of the suit property Juja/Juja East Block 1/253 and I order the plaintiff to vacate the suit land within 30 days from the date hereof. In default, the defendants are at liberty to apply for an order of eviction.
- e. There shall be no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2022

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MOGENI J

JUDGE

In the presence of

Mr. Nguring'a for the Plaintiff

Ms. Wambugu h/b for Mr. Mwangi for the 1st Defendant

Ms. Ng'ang'a for the 2nd, 3rd and 4th Defendants

Mr. Vincent Owuor.....Court Assistant

