



REPUBLIC OF KENYA



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**Lesalon v Koiyo & 3 others (Environment & Land Case 91 of 2017)  
[2022] KEELC 3097 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3097 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 91 OF 2017**

**MN GICHERU, J**

**JUNE 29, 2022**

**BETWEEN**

**SALANKAT OLE LESALON ..... PLAINTIFF**

**AND**

**TANAKO MELITA KOIYO ..... 1<sup>ST</sup> DEFENDANT**

**DOMINIC KYALO KASIMU ..... 2<sup>ND</sup> DEFENDANT**

**NICHOLAS MATHEKA KAVITA ..... 3<sup>RD</sup> DEFENDANT**

**ANNA MUMBUA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Salankat Ole Lesalon, the plaintiff, seeks the following reliefs against Tanako Melita Koiyo, Dominic Kyalo Kasimu, Nicholas Matheka Kavita and Anna Mumbua the first, second, third and fourth defendants respectively;
  - (a) A declaration that he is the registered and bona fide owner of the parcel of land known as Kajiado/Kaputiei-Central/607 (suit land).
  - (b) A declaration that the said illegal sale of the suit land or a portion thereof by the first Defendant to the second, third and fourth Defendants was null and void ab initio.
  - (c) Eviction of the defendants from the suit land by the OCS Kajiado Police Station.
  - (d) General damages for trespass and mesne profits to be assessed and awarded to the Plaintiff.
  - (e) Costs.
2. The plaintiff's case is as follows. He is the registered owner of the suit land. On January 27, 2009 he and the first Defendant entered into an oral agreement in which they were to exchange the suit land



with the first defendant's unspecified parcel of land which was purportedly situated far away from the main road.

Even before the first defendant had shown the plaintiff the land that was to be his, the first defendant purported to sell the suit land to the other defendants without the consent and authority of the plaintiff.

In the purported sale, the second defendant bought six (6) acres, the third defendant three (3) acres and the fourth defendant two (2) acres.

The plaintiff reported the unlawful sale and occupation of his land to the police as a result of which the defendants were prosecuted in a criminal case.

The first defendant admitted that he had no authority to sell the plaintiff's land after the plaintiff's Counsel wrote demand letters on 14<sup>th</sup> May, 2014.

3. In support of his case, the plaintiff filed the following evidence;
  - i. His own witness statement.
  - ii. Copy of title deed for the suit land dated 19/10/1996.
  - iii. Copy of letter dated May 19, 2014 saying that the Plaintiff did not exchange the suit land for any other land.
  - iv. Copies of letters to all the other defendants similar to number (iii) above.
  - v. Copy of statement by the plaintiff to the police dated 4/5/2017.
  - vi. Copy of statement recorded by Sirkoit Lesalon.
4. The first defendant filed a memorandum of appearance on December 9, 2019 through counsel on record but did not file a defence.
5. The third defendant, through counsel on record filed a defence and counterclaim on December 19, 2019. His defence is that on 19/2/2007 he bought a parcel of land and the agreement for sale was witnessed by the plaintiff who also acknowledged receipt of payments. He says that the plaintiff has not proved fraud and prays for the dismissal of his suit.

In the counterclaim, the third defendant avers that at the time he occupied part of the suit land, it is the Plaintiff who led the surveyor in identifying the beacons. He says that he is an innocent purchaser for value and the three (3) acres that he purchased should be transferred to him.

It is also the third defendant's case that there is a parallel suit which is Kajiado, Chief Magistrates ELC No. 152/2018 between all the other parties in this case except the first defendant. He concludes by seeking the following reliefs.

- (i) A declaration that the suit parcel was properly bought by him.
- (ii) An order of transfer of suit land to him.
- (iii) In the alternative, a refund by the plaintiff of the market price of the land bought including the value of the developments and the investments.
- (iv) A permanent injunction restraining the plaintiff, his servants, agents, employees, assigns or representatives from entering, selling, leasing, collecting rent, charging or in any other way dealing with the suit property or otherwise interfering with the suit property in any manner whatsoever.



- (v) Costs of the suit with interest at court rates.
6. In support of his case, the third defendants filed the following evidence.
- (a) His own witness statement which is undated.
  - (b) Copy of agreement for sale of land dated 19/1/2007.
  - (c) Copy of letter dated 19/5/2014.
  - (d) Copy of letter dated 8/10/2014.
  - (e) Copy of pleadings in Kajiado, Chief Magistrates ELC No. 152 of 2018.
7. At the trial on 14/12/2022 the plaintiff and the third defendant testified. Their evidence on oath was a restatement of the evidence that they filed before the close of the pleadings.
8. The 3<sup>rd</sup> defendant's counsel filed written submissions on March 14, 2022 while the plaintiff's counsel filed twice on 21<sup>st</sup> March and May 5, 2022. The first defendant's counsel did not file any submissions within the timeline of 60 days or even outside that period.

The third defendant's Counsel identified the following three issues for determination.

- (a) Whether the third defendant properly bought the 3 acres excised from the suit land.
- (b) Whether the plaintiff should be ordered to transfer to the third defendant, the legal title of the 3 acres excised from the suit land.
- (c) Whether there are sufficient grounds for issuance of a permanent injunction against the Plaintiff prohibiting any dealings whatsoever with the suit property?

On the other hand, the plaintiff's counsel has identified non compliance with the mandatory provisions of the [Land Control Act](#) as the only issues for determination.

9. I have carefully considered all the evidence adduced by the parties as well as the submissions by their learned counsel. I find that the following issues arise in this case.
- (a) What is the effect of ELC 152/2018 pending at the Chief Magistrates Court at Kajiado to this case?
  - (b) Do the doctrines of constructive trust and proprietary estoppel applied by the Court of Appeal in the case [Willy Kimutai Kitilit v Michael Kibet](#) Civil Appeal No. 51 of 2015 (Eldoret) apply in this case?
  - (c) What remedy is available to the third Defendant?

10. On the first issue, I find that the effect of ELC 152/2018 pending at the Chief Magistrate's Court at Kajiado is very grave to this case.

Order 4 Rule 1 (1) (f) of the [Civil Procedure Rules](#) provides as follows;

The plaintiff shall contain the following particulars-

- (f) An averment that there is no other suit pending, and that there have been no previous proceedings, in any Court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the plaint".



(2) The Plaintiff shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in Rule 1 (1) (f) above”.

11. At paragraph 16 of the plaint dated October 15, 2019, the Plaintiff averred as follows;

There is no pending suit of similar nature either in this court or in any other court touching on the same cause of action.”

12. In paragraph 3 of the verifying affidavit dated 15/10/2019 filed in this case, the plaintiff swore as follows:

“That I now swear this affidavit to verify as correct and true all the averments contained in the plaint filed herewith.”

13. In Case No. 152 of 2018, the plaintiff in this case is the plaintiff and the second, third and fourth defendants in this case are the defendants. The suit land in this case is the same land in issue and the orders sought therein are similar to the ones in this case because paragraph 18 (c) seeks eviction of the defendants just like paragraph 18 (c) of this suit does.

14. From the above, it is clear that before filing this case, the plaintiff ought to have withdrawn the case in the lower court. Alternatively, he ought to have proceeded with the case before the lower court to conclusion.

15. In the reply to defence and counterclaim, the plaintiff has stated as follows in paragraph 9;

Without prejudice to the above, the Plaintiff avers that the Chief Magistrates Court at Kajiado has got no pecuniary jurisdiction to hear and determine ELC No. 152 of 2018”.

16. I find that it is not correct to say that the lower court has no jurisdiction because the defendants do not occupy the entire parcel but only small portions thereof. They claim only a few acres. Since the pecuniary jurisdiction of the Chief Magistrates court is Kshs. 20 million, I find that it can handle the suit.

17. If the Court did not have jurisdiction, why then did the Plaintiff file his case there?

18. The mischief sought to be cured by Order 4 Rule 1(1) (f) of the *Civil Procedure Rules* is what used to be a rampant habit of filing a multiplicity of suits in several courts between the same parties over the same subject matter.

19. It is obvious that the verifying affidavit in this case is not correct owing to the suit in the Lower Court.

20. Though the plaint in this case complies with Order 4 Rule 1 (2) *Civil Procedure Rules*, what it says about Rule 1 (1) (f) is obviously incorrect.

21. Proceeding under Order 4 Rule 1 (6) of the *Civil Procedure Rules*, I strike out the plaintiff’s suit and order that he proceeds with the suit in the lower court.

22. On the second issue, I find that the doctrines of constructive trust and proprietary estoppel do not apply in this case because the facts of this case are very different from those in *Kitilit’s case (supra)*.

23. In the *Kitilit’s case* it is the land owner who sold the land to the defendant. In his case, it is not the owner of the land who sold it. It was the purported owner, the first defendant who did. Again unlike the case of *Kitilit*, in this case the defendants have not developed the land. They have only planted a sisal hedge.



24. Considering that the exchange between the plaintiff and the first defendant did not take place, it would not be just to allow the defendants who have no privity of contract with the plaintiff to occupy his land.
25. On the third and final issue, I find that it is unconscionable for the plaintiff and the first defendant to take the third defendant's money and fail to give him the land that he paid for. It is not disputed that he paid money to both of them towards the purchase of 3 acres of land.
26. I therefore enter judgment for the third defendant against the first defendant and the plaintiff jointly and severally as per paragraph 20 (3) of the defence and counterclaim dated 1December 8, 2019.
27. The upshot is that the plaintiff's suit is struck out with costs. the third defendant's counterclaim is allowed in terms of paragraph 20 (3) and (5).
28. Order accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 29<sup>TH</sup> DAY OF JUNE, 2022.

M.N. GICHERU

JUDGE

HON. JUSTICE M.N. GICHERU

