



**Gitau v Kenje Winston Company Limited (Environment and Land Case Civil  
Suit 131 of 2007) [2022] KEELC 3014 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3014 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 131 OF 2007**

**LC KOMINGOI, J**

**JUNE 16, 2022**

**BETWEEN**

**WILSON WAITHAKA GITAU ..... PLAINTIFF**

**AND**

**KENJE WINSTON COMPANY LIMITED ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated 24<sup>th</sup> May 2007, the plaintiff prays for judgement against the Defendant for:-
  - a. A declaration that the Plaintiff is the bonafide owner of land parcel Number 7814/30 (original number 7418/3/26) situate in North East of Ruiru Town and the principal registrar be directed to rectify the register and replace the Plaintiff's name in place of Defendant.
  - b. A declaration that the Defendant's agents, servants and /or agents act of transfer was fraudulent, null and void and that the Plaintiff is entitled to general damages.
  - c. An order restraining the Defendant's agents, servants and /or employees from entering the said parcel of land and/or harassing the Plaintiff through officers from Ruiru Police Station.
  - d. Costs of this suit and interest thereon.
2. The Plaintiff contended that at all material times, he was the registered owner of parcel Number 7814/30 original Number 7418/3/26 (Title IR No.1082 as delineated on land survey plan Number 150667) situate along Nairobi Thika road at North East of Ruiru town. It was his case that on or about 20<sup>th</sup> December 1996, the Defendant through its agents, servants and /or employees fraudulently and without his consent transferred the suit land to itself. He particularized the fraud on the part of the Defendant's agents.
3. The Plaintiff stated that he only discovered the Defendant's fraudulent acts when on 23<sup>rd</sup> May 2007, the Defendant's agents approached him demanding that he should give up possession of the land as it



belonged to the Defendant. He added that the Defendant's agents are now harassing him through officers from Ruiru Police Station.

### **The Defendant's case**

4. In response to the Plaintiff's claim, the Defendant filed a statement of defence and counterclaim dated 13<sup>th</sup> February 2020. It contended that the Plaintiff and the Defendant signed a sale agreement on 15<sup>th</sup> May 1996 for sale of the suit property at a consideration of KShs. 1.5 million which was fully paid by the Defendant. It was its case that the Plaintiff signed all rights, interests and ownership to and over the property to the Defendant vide a transfer dated 18<sup>th</sup> December 1996.
5. In its counterclaim, it contended that upon purchase of the suit property, the Plaintiff was required to grant vacant possession to the Defendant but it failed to do so. He particularized the breach on the part of the Defendant. In its counterclaim it seeks orders that:-
  - a. The Plaintiff's suit herein be dismissed with costs.
  - b. An order of eviction against the Plaintiff.
  - c. Mesne profits from 18<sup>th</sup> December 1996 until delivery of vacant possession of the suit premises to the Defendant.
  - d. General damages.
  - e. Interest on (c) and (d) above.
  - f. Any further orders that this Honourable court may deem fit.
6. On 7<sup>th</sup> June 2021, this court dismissed the Plaintiff's suit for want of prosecution. The Defendant's counterclaim was heard on 24<sup>th</sup> November 2021.

### **The Defendant's evidence**

7. DW1, Wilson Kirungie Gachanja a director of the Defendant testified on 24<sup>th</sup> November 2011. His statement dated 2<sup>nd</sup> November 2021 and the Defendant's list of documents of the same date were adopted as part of his evidence. It was his testimony that sometime in 1996, his late father Clement Benson Gachanja negotiated with the Plaintiff for the purchase of the suit property and the adjoining land, L.R 7418/29 which is the subject matter of a separate suit namely High Court Civil Case No. 457 of 2007.
8. He stated that the negotiations culminated into a formal sale agreement dated 15<sup>th</sup> May 1996 by virtue of which the Plaintiff sold the suit land to Clement Benson Gachanja (deceased) at a consideration of KShs. 2.7 Million. He produced copies of cheques and bank statements evidencing payment. He further stated that his late father opted to cause the suit property to be transferred to the Defendant which subsequently became the sole registered proprietor.
9. He stated that despite the Plaintiff alleging fraud, he is aware that throughout the sale transaction and the subsequent transfer, the Plaintiff has never filed a complaint to the police against his late father or the Directors of the Defendant alleging any alleged fraud, forgery or any other criminal allegations. He further stated that since the transfer, the Plaintiff has refused and neglected to hand over vacant possession of the suit property to the Defendant and has instead erected commercial shops and continues to benefit 23 years after he sold the suit land. He also stated that he is aware that the Plaintiff placed a caution against the title of the suit property. He also stated that the Defendant seeks mesne profits for the Plaintiff's illegal occupation and trespass of the property which is at Exit 13, of Thika



Super Highway Kiganjo Road Junction and that the Defendant had intended to put up a commercial building thereon.

10. At the close of the oral testimonies, the defendant tendered final written submissions.

**\*he Defendant's submissions**

11. They are dated 3<sup>rd</sup> January 2022. Counsel for the Defendant submitted that the Plaintiff's suit having been dismissed for want of prosecution collapses the Plaintiff's claim thus there is no valid challenge against the Defendant's title over the suit premises.
12. He also submitted that on the strength of Order 21 Rule 13 of the *Civil Procedure Rules*, the Defendant during lead examination prayed for the Court to conduct an inquiry in respect of the assessment of mesne profits due to the Defendant since it is difficult to assess the same when the Defendant is not in possession. He relied on the case of *Kibuchi Murithi v Izaak Mwangi Kuria* [2018] eKLR and the case of *Priscilla Nduta Kairu & 3 others v Keziah Njeri Gachanja & another* [2014] e KLR.
13. It was his submission that by declining to part with possession of the suit premises, the Plaintiff breached the terms of the sale agreement and is also guilty of unjust enrichment by retaining both the purchase price and the benefit and enjoyment of the suit premises for the last 25 years, all at the expense, loss and determinant of the Defendant. He added that the Defendant prays for general damages for breach of contract of Kshs.6,750,000/= calculated at a conservative return of 10% per annum of the purchase price of Kshs.2.7 Million.
14. I have considered the pleadings and the evidence on record, the written submissions and the authorities cited. The issues for determination are:-
  - i. Whether the Defendant is the owner of the suit land.
  - ii. Has the Plaintiff breached the contract of sale?
  - iii. Is the Defendant entitled to the reliefs sought?
  - iv. Who should bear costs of this suit?
15. The Plaintiff's suit against the Defendant was dismissed for want of prosecution on 7<sup>th</sup> June 2021. What is to be determined is the Defendant's counterclaim for ownership of the suit land. The Defendant's case is that its claim is unchallenged. An unchallenged claim is not automatic. In *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the Court held that: "It is not automatic that instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest."
16. In a bid to prove its case, the Defendant produced the sale agreement dated 15<sup>th</sup> July 1996 between the Plaintiff as vendor and one Clement Benson Gachanja (deceased) as purchaser of the suit land. The purchase price was Kshs.2.7 million. There is evidence that the entire purchase price was paid into the Plaintiff's bank account. There is also evidence that as at June 2002, DW1 who is Clement Benson Gachanja's son was a director of the Defendant together with her late mother Keziah Njeri Gachanja. In the sale agreement entered into between the Plaintiff and Clement Benson Gachanja (deceased) as purchaser, the term "purchaser" included his assignees and heirs. DW1 told the court that his late father Clement Benson Gachanja elected to transfer the property to the Defendant. There is evidence that the Plaintiff signed the transfer dated 16<sup>th</sup> December 1996 transferring the suit property to the Defendant. On a balance of probabilities, the Defendant has established ownership of the suit land.



17. The Defendant has established that it is the registered proprietor of the suit land. This is prima facie evidence that it is the proprietor of the suit land as provided for under Section 26 of the Land Registration Act, Act No. 3 of 2012.
18. On the issue whether the Defendant is in breach of contract, it is the Plaintiff's admission that he has not given up vacant possession to the purchaser to date. The contract between the Plaintiff and the purchaser, Clement Benson Gachanja (deceased) bestowed obligations upon the vendor; that he would give vacant possession. He transferred the suit property to the purchaser's assignee but failed to give vacant possession. The Plaintiff is therefore in breach of the contract and has violated the Defendant's proprietary rights.
19. The Plaintiff has no right to be on the property or to use it in any way. The Defendant indicated to the court that it intended to put up a commercial building in the suit property but it did not prove the same. Being that the Plaintiff has used the land for over 20years, the Defendant must have suffered some loss which it could not quantify. In the absence of proof of damages, the court would award nominal damages.
20. It is the Defendant's case that the Plaintiff continues to occupy the suit property illegally and forcefully. The Plaintiff admitted that he is in occupation by virtue of being the owner thereof the evidence by the Defendant has not been controverted.
21. I find that the Plaintiff has breached the contract by failing to deliver vacant possession to the Defendant. The Defendant is entitled to damages. The Defendant suggests Kshs.6,750,000/- as adequate to compensate it for the loss. I find this to be reasonable. I award Kshs.6,750,000/- general damages for breach of contract.
22. The Defendant has also sought an order for mesne profits. It is not in dispute that the defendant is not in possession of the suit property. It has urged this court to allow it to adduce further evidence in support for the claim of mesne profits once it has recovered possession of the suit property in order to conduct an assessment. I see no reason to deny it this opportunity.
23. In conclusion, I find that the Defendant has proved its case as against the Plaintiff on a balance of probabilities.
24. Accordingly judgment is entered in favour of the Defendant as against the Plaintiff in the following terms:-
  - a. That an order of eviction is hereby issued against the Plaintiff.
  - b. General damages for breach of contract Kshs.6,750,000/-
  - c. Mesne profits to be assessed later.
  - d. Costs of the suit and interest.

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2022.**

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**L. KOMINGOI**  
**JUDGE**

In the presence of:-



No appearance for the Plaintiff

Mr. Gachanja for Mr. Muema Kitulu for the Defendant

Steve - Court Assistant

