



REPUBLIC OF KENYA



KENYA LAW
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**Ondari v Atandi (Environment & Land Case 4 of 2021)
[2022] KEELC 3487 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 4 OF 2021**

JM KAMAU, J

JULY 27, 2022

BETWEEN

DELILAH ONDARI PLAINTIFF

AND

FRANCIS ONDIEKI ATANDI DEFENDANT

JUDGMENT

1 On 3rd June 2021 the Plaintiff filed a suit against the Defendant claiming that the Defendant agreed to sell her a parcel of land to be used as an access road measuring 5 x 100 feet out of the latter's land parcel number West Mugirango/siamani/1859 which borders the Plaintiff's West Mugirango/siamanani/1960 at a consideration of Kshs. 50,000/= with a default clause that whoever defaults must pay the other 10% of the consideration monthly for the entire period of default. She came to court because the Defendant failed to transfer the access road to her and avers that she continues to suffer economically and psychologically as a result and is now seeking: -

- (a) A declaration that the Defendant is in breach of the Sale of Land Agreement.
- (b) A declaration that the Defendant has denied the Plaintiff access to her land thus denying her right to property.
- (c) A declaration that the Defendant misrepresented facts thus misleading the Plaintiff to pay.
- (d) A declaration that the Defendant obtained money by false pretenses from the Plaintiff.
- (e) A declaration that Defendant's conduct of subjecting the Plaintiff to economical and psychological torture and breach of the Sale of Land Agreement is oppressive, high handed, outrageous, insolent and vindictive.
- (f) Compensation of the Plaintiff for breach of Sale of Land Agreement as per its terms.



- (g) General Damages for Breach of the Sale of Land Agreement.
- (h) Interests at Court rates on (f) above herein from the date of filing this suit till payment thereof in full.
- (i) Cost of the Suit and interest at Court rates.
- (j) Any other and/or further relief that this honourable court may deem just and expedient to grant.”
- 2 In her statement accompanying the Plaint, the Plaintiff claims that she paid the total consideration of Kshs. 50,000/= and brought to court Hellen Bigogo and Mr. Josiah Onyancha as a witnesses.
- 3 The Defendant on the other hand admits in his Defence that he owns LR No. West Mugirango/siamani/1859 but denies the validity and enforceability of the contract for want of consent from the Land Control Board under Section 6 of the *Land Control Act* and also claims that the suit is time barred. He also claims that he never received the consideration of Kshs. 50,000/= and that consent was not obtained within a period of six months of the contract as required by law. In his statement dated 11th April 2022 the Defendant stated that the Plaintiff advanced him Kshs. 50,000/= for the footpath on 24th September 2006 but only Kshs. 10,000/= was paid and that the balance of Kshs. 40,000/= has never been paid. He also contends that the interest sold is not registrable since the same concerned a right of way and that the Plaintiff failed to obtain consent from the Land Control Board under Section 6 of the *Land Control Act* without giving a satisfactory reason. He concluded his written statement by claiming that the Plaintiff is only entitled to a refund of Kshs. 10,000/=.
- 4 Before the hearing of the case the Defendant filed a Preliminary Objection dated 12th January 2022 as follows: -
- “ 1. THAT the suit is statute barred and no leave to file the same out of time was sought.
2. THAT the suit is an abuse of the court process.
3. THAT in the circumstances, the suit is procedurally and substantially bad in law, hence suitable to be dismissed and/or struck out with costs to the Defendant.”
- The same was disallowed on 27th January 2022.
- 5 At the hearing of the case the Plaintiff adopted her aforesaid statement filed in court on 3rd June 2022 as her evidence in chief. She then asked the court to order that the footpath be transferred to her or in the alternative a refund of Kshs. 50,000/= be made to her. She produced copies of the following documents in support of her case:-
- “ 1. Sale Agreement undated.
2. Plaintiff’s Title Deed issued on 7th November 2017.
3. A Sketch of the Adjoining parcels of land.
4. Police order to arrest the Defendant on charges of obtaining money by false pretense dated 27th November 2020.”



- 6 On Cross-examination by Ms. Shilwatso for the Defendant, the Plaintiff said that both the Defendant and herself had bought their respective parcels of land from Mr. Ogenga Anuru Ndege and that she only purchased the footpath from the Defendant and that she paid Kshs. 10,000/= on 24th September 2006 and later Kshs. 40,000/= as was shown in the Sale Agreement and that the Defendant had bought his portion earlier. She doesn't live on the suit land and was not aware of Criminal Case No. 1253 of 2020 in Nyamira Chief Magistrate's Court.
- 7 In her witness statement, Dw2 Hellen Bigogo, a retired Civil Servant who lives in Kisii Town and an elder sister to the Plaintiff adopted her statement filed in court on 3rd June 2021. She said that Mr. Josiah Onyancha and herself witnessed the Sale Agreement and that Kshs. 10,000/= had been paid earlier on and the balance of Kshs. 40,000/= paid the date the agreement was reduced in writing, signed and witnessed on 24th September 2006 in her presence and that today there is construction going on where the footpath is.
- 8 On cross-examination by Ms. Shilwatso, Hellen said that she was not present when the Kshs. 10,000/= was paid earlier. On re-examination, Hellen said that the Kshs. 40,000/= was paid in cash and in the presence of her mother.
- 9 Dw3, Josiah Onyancha, a retired Bishop who lives in Kisii and a brother in-law to the Plaintiff and husband to Hellen adopted his statement filed in court on 3rd June 2021. He said that the Kshs. 40,000/= was paid to the Defendant by the Plaintiff on 24th September 2006 and that he is the one who counted the money before it was handed over to the Defendant. Later, when he inquired from the Defendant why he had not made good his part of the contract Mr. Atandi said that he was ready to refund the Kshs. 50,000/=. On cross-examination, Bishop Onyancha said that both parties agreed on 24th September 2006 that Kshs. 10,000/= had already been paid and that in the criminal case the Defendant said that the footpath was still intact and available. This turned out later to be untrue.
- 10 The Defendant on his part said that the property in question is opposite Kisii High School in Kisii. He adopted his statement dated 11th April 2022 and also produced proceedings from Criminal Case No. 1253 of 2020 in Nyamira Chief Magistrate's Court where he was allegedly acquitted of the charges of obtaining money by false pretense.
- 11 He said that he only received Kshs. 10,000/= from the Plaintiff and is yet to receive the balance of Kshs. 40,000/= and has never blocked the footpath yet the Plaintiff has another access road on the rear side. But on cross-examination by Ms. Kwamboka the Defendant said that he sold his land LR No. North West Mugirango/ Siamani/ 1859 in 2020 to Kennedy Marende. He admitted that although he denied to have entered into the Sale Agreement he did in fact sell the footpath measuring 5 x 100 feet to the Plaintiff but has never demanded the balance of Kshs. 40,000/= and on re-examination he said he has never received the balance of Kshs. 40,000/=.
- 12 This is the analysis of the facts of the case.
The issues for determination are:
- a. whether there was breach of the sale agreement dated 24/9/2006 and if so,
 - b. is the claim barred on account of the Limitations of Actions Act?
- 13 There is no dispute as to the Agreement of Sale of the 5feet x 100feet of the parcel of land Title No. West Mugirango/Siamani/1859 at Nyamira. The issue is how much was paid and whether the suit is time barred. From the undated Agreement of Sale produced by the Plaintiff which is said to have been entered into on 24/9/2006, both parties have appended their signatures to the Agreement and



the sum of Kshs. 10,000/= had been received by the date of signing the agreement with the balance of Kshs. 40,000/= to be paid. The agreement seems to be a standard one used or to be used for other contracts and the same is full of contradictions. But one thing is crystal clear. That by the time of signing the said agreement Kshs. 10,000/= had already been paid. In his Defence, the Defendant says that he never transferred the suit property to the Plaintiff for want of Consent of the Land Control Board. He further states that he is still the Registered owner of LR No. West Mugirango/Siamani/1859 and that “the Plaintiff advanced me Kshs. 10,000/= on the 24/9/2006.” She was left with a balance of Kshs. 40,000/= which she needed to clear before she was allowed the use of the footpath. She never cleared the balance. The Defendant said that he was not in breach of the Sale Agreement and that it was the Plaintiff who was in breach of contract for not completing the payment. He further stated that the interest sold was not registrable as the same concerned a right of way. And that the Plaintiff should have obtained Consent of Transfer within 6 months. He sums up his statement by claiming that the Plaintiff is only entitled to a refund of Kshs. 10,000/= which she paid. When asked by the court, the Defendant said that he was the author of the standard form agreement signed by both. The Defendant continuously accuses the Plaintiff for not having sought Consent of the Land Control Board.

- 14 The obligation to seek Consent of the Land Control Board under Section 7 (a) of the [Land Control Act](#), Cap 302 of the Laws of Kenya is that of either party. The Defendant cannot have received whatever amount of consideration, used it and does not bother to initiate the process of obtaining the said consent and when the demand is made he does not respond and then accuses the Plaintiff of inaction. If he wants the court to take him as a man who acted in good faith, why didn't the Defendant then write a Demand Letter to the Plaintiff asking her to go for Consent or better still refund the money paid to her?
- 16 Under Section 7 (a) of the [Land Control Act](#), Cap 302,
- (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.
 - (2) The land control board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court.
 - (3) For the purposes of subsection (1), an application shall be deemed to be made when it is delivered to the authority prescribed in the manner prescribed.
- 17 Of most significance in this case is that the Defendant all along told the court that he was still the registered proprietor of the suit property until the last few minutes before the close of this case when in cross examination by Ms. Kwamboka for the Plaintiff, he admitted that he had long sold the property to a third party. This goes on to prove dishonesty on the part of the Defendant. When did he sell the property? And in the absence of a Sale Agreement between the Defendant and the third party, Kennedy Morande how can we be sure that it was in 2020? It could even have been immediately after the sale of 2006. How else was he going to fulfil his part of the contract? This set the motion for breach of the Sale Agreement. He can therefore not accuse the Plaintiff of breach. In any case it would have been foolish for the Plaintiff having given 20% of the consideration to continue paying more without any step towards fulfilment of the agreement by the Defendant. It is common today for the Purchaser to deposit only 10% of the purchase price until completion of the agreement by the vendor by way of



transfer. And I must confess that this is good practice. The Purchaser should not have been expected to continue paying. She had an obligation to mitigate her losses in case of default by the Defendant. And more so when on the footpath the subject of this suit, some construction was taking place. I also find it interesting for the Defendant to say that in any case the Plaintiff had another access road to get to her property. The above admission is also contradictory to his own evidence in cross examination in criminal case No. 253 of 2020 at the Chief Magistrate's Court, Nyamira where the Defendant said that he began developing the plot in 2020. This is the same year he said that he sold it to one Kennedy Morande. Although the Defendant testified that he was charged in the above case for receiving money by false pretense and was acquitted, he only produced a copy of the proceedings of the same but no copy of judgment at all. The court can therefore not go speculating as to the outcome of the case.

- 18 Turning now to the question as to whether the suit is time barred or not, the suit is anchored on breach of contract. Under Section 4 of the *Limitation of Actions Act*, an action founded on contract cannot be brought after the end of six years from the date on which the cause of action arose.
- 19 Though the plaintiff's claim is for the refund of money from a land transaction whose limitation period is 12 years as provided for under Section 7 of the *Limitation of Actions Act*, the provisions of Section 26 of the same Act provides that the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it.
- 20 In the case of *Koinange & 13 others v. Charles Karuga Koinange* 1986 KLR at page 23 Justice Amin citing the case of *Ratilal Patel Makanji* (1957) EA 314 observed as follows:

When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required”

What is the meaning of fraud?

- 21 According to the Merriam– Webster Dictionary Fraud means: -
- intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right.”
- 22 Under paragraph 13 (3) of her Complaint the Plaintiff gave as particulars of breach attributed to the Defendant as: -
- Misrepresenting facts thus misleading the Plaintiff to pay.”
- 23 Under paragraph 13 (4)
- Obtaining money by false pretenses from the Plaintiff”
- 24 This fraud was demonstrated by the fact that the Defendant himself sold the piece of land out of which he was to carve out the 5 feet by 100 feet he had already sold to the Plaintiff without disclosing this to the Plaintiff and even when he came to Court he kept this information to himself until intense cross-examination was applied by Ms. Kwamboka. This is fraud. To further demonstrate fraud on his part the Defendant said in his testimony that the interest sold was not registrable. Why then sell what cannot be transferred?



When did time start running?

25 In the case of *Joseph Mwaniki Muchira v Godfrey Muchangi* [2018] eKLR the court held that: -

..... This is to say that time starts to run when the Plaintiff discovers the fraud. So where fraud committed and does not come to the notice or is not known by the party who is affected by it and who would be entitled to sue as a Plaintiff time does not run. Time starts to run when the would-be Plaintiff becomes aware of the fraud.....”

26 The Plaintiff discovered that there was deceit on the part of the Defendant when the access road was closed to pave way for the construction of a building in 2020 and she immediately filed this suit This was when time started running.

27 On that qualification under Section 26 of the Act, I find that this suit is not time barred.

28 Having said so, I find that the Plaintiff has proved her case way above the usual standard of proof in civil cases and since the land in Question has already changed hands an order of compensation for breach of Damages would be appropriate. I therefore order that the Defendant do pay to the Plaintiff the sum of Kshs. 50,000/= in General Damages plus costs of this suit and interest on both from the date of judgment till payment in full. In addition, the Defendant is also ordered to make good his commitment to refund the Kshs. 10,000/= he admits to have received from the Plaintiff. This is an admission of indebtedness which this court cannot overlook.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 27TH DAY OF JULY 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant - Sibota

Mr. Bigogo for the Plaintiff

Mr. Ochoki for the Defendant

