



**Horeria v Katua & 3 others (Environment and Land Case Civil Suit  
630 of 2008) [2022] KEELC 12837 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12837 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 630 OF 2008  
SO OKONG'O, J  
SEPTEMBER 26, 2022**

**BETWEEN**

**JAMES KIMANI HORERIA ..... PLAINTIFF**

**AND**

**JOHN OSCAR KATUA ( SUED ON HIS OWN BEHALF AND ON BEHALF OF  
MARGARET MARY KATUA, DECEASED ..... 1<sup>ST</sup> DEFENDANT**

**IRENE WAYUA KATUA A.K.A MULINGE ..... 2<sup>ND</sup> DEFENDANT**

**GILBERT MAKAU KATUA ..... 3<sup>RD</sup> DEFENDANT**

**JOHN KYENDE KATUA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit against the Defendants on December 31, 2008 through a plaint dated December 22, 2008. The plaintiff amended the plaint on November 15, 2013. In his amended plaint, the plaintiff sought the following reliefs;
  - a) An order for specific performance of the contract(s).
  - b) An order that the registrar of titles do cancel any illegal entry that may have been entered fraudulently regarding the suit land,
    - i LR No 13418/116-121,129-131 (13418/116,117,118,119,120,121,129,130,131) Embakasi Farm / Njiru (sold to the plaintiff by the 1<sup>st</sup> Defendant).
    - ii LR No 13418/111-115,147,149-151 (13418/111,112,113,114,115,147,149,150,151) sold to the plaintiff by Gilbert Katua (3<sup>rd</sup> Defendant).
    - iii LR No 13418/132,135,136 and 145 sold to the plaintiff by Irene Katua.



- iv LR No 13418/126 and 141 sold to the plaintiff by Oscar Katua
  - v LR No 13418/122 and 128 sold to the plaintiff by the 1<sup>st</sup> Defendant, 3<sup>rd</sup> defendant and 4<sup>th</sup> defendant.
  - vi) LR No 13418 /111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121,122, 126, 128, 129, 130, 131,132,135,136,141,145,147,149,150 and 151.
- c) A permanent injunction restraining the defendants jointly and/or severally by themselves and/or their agents, or servants not to interfere with the parcels of land mentioned in (b) above (hereinafter referred to as “the suit properties”) howsoever and not to trespass thereon, not to survey, demarcate, take possession, sell, erect any building, convey or transfer the suit land or portions thereof or adversely deal with the properties in any way howsoever.
  - d) An order that the registrar of titles do issue new titles in favour of the plaintiff for the following parcels of land, LR No 13418 /111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 126, 128, 129, 130, 131, 132, 135, 136, 141, 145, 147, 147, 149, 150,151.
  - e) A mandatory injunction for the demolition of all or any illegal structures found on the suit properties and for the eviction of trespassers.
  - f) Damages for detinue.
  - g) Costs of the suit.
  - h) Any other order this honourable court may deem fit to grant.

### **The pleadings:**

2. In his amended pleadings, the plaintiff averred that the suit properties were portions of all that parcel of land known as LR No. 6832(hereinafter referred to as “the head title”). The plaintiff averred that the head title was registered in the names of Margaret Mary Katua, deceased (hereinafter referred to as “the deceased”) and Mathew Guy Muli as trustees for herself and her children John Oscar Katua, Gilbert Makau Katua and John Kyende Katua, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.
3. The plaintiff averred that the deceased subdivided the head title into several plots amongst them LR No 13418/16, 17, 18, 20 and 21. The plaintiff averred that LR No 13418/16, 17, 18 and 20 were amalgamated and subdivided again into 42 plots namely; 13418/109-151.
4. The plaintiff averred that on May 23, 1997, the deceased sold to him a parcel of land measuring 4 acres being a portion of the LR No 13418/16, 17 and 18 to be exercised from the head title. The plaintiff averred that there was a proposed subdivision scheme prepared by Kyaloka Development Co. Ltd. in which it was indicated the said land measuring 4 acres that was sold to him were assigned numbers 8, 9,10 and 11 which were later renamed LR No 13418/116,117,118 and 119 respectively.
5. The plaintiff stated that between 1997 and 2006, the deceased by herself and through her children sold to the plaintiff additional 22 parcels of land which were also portions of LR No 13418/16, 17, 18 and 20 for which the plaintiff paid to them approximately Kshs3, 230,000/-.
6. The plaintiff averred that in September 2009, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants admitted having sold the suit properties to the plaintiff.



7. The plaintiff averred that in a letter dated September 25, 2009, the deceased and the 3<sup>rd</sup> and 4<sup>th</sup> defendants instructed their advocates on record to enter into a consent with the plaintiff for the purposes of settling this suit.
8. The plaintiff averred that in August 2011, the deceased and the 3<sup>rd</sup> and 4<sup>th</sup> defendants entered into a fresh agreement with the plaintiff in which they acknowledged having sold the suit properties to the plaintiff, the amount paid as purchase price and what was outstanding.
9. The plaintiff averred that it was an express term of the agreements that he entered into with the defendants that he was to take possession of the suit properties immediately which he did and fenced some of the plots. The plaintiff averred that once the deed plans for the suit properties were issued, the properties were to be registered in his name as a bona fide purchaser thereof for value and titles released to him. The plaintiff averred that the defendants had not issued him with deed plans and titles for the suit properties.
10. The plaintiff averred that in early November 2008, he found a structure on one of the suit properties and beacons erected on parts of the plots which was evidence of a fresh survey. The plaintiff averred that on November 24, 2008, he inquired from the defendants about the trespass but he was chased away by the 2<sup>nd</sup> defendant. The plaintiff averred that when he attempted to fence all the plots, he was confronted by strangers who claimed to have purchased parts of the suit properties.
11. The plaintiff averred that the defendants had breached the contract that the plaintiff entered into with them by failing to issue the plaintiff with title deeds for the suit properties and purporting to sell the properties to other people.
12. The plaintiff contended that the purported sale of the suit properties by the defendants to other people was unlawful and fraudulent as the suit properties had already been sold to the plaintiff for valuable consideration. The plaintiff pleaded several particulars of illegality and fraud against the defendants.
13. The plaintiff averred that as a result of the acts complained of, the plaintiff had been greatly injured having been put into great trouble and expense to protect his interest in the suit properties. the plaintiff averred that he had suffered loss and damage.
14. The defendants filed a joint statement of defence dated April 20, 2009 on April 22, 2009. The defendants denied the plaintiff's claim in its entirety. The defendants denied selling any portion of the head title to the plaintiff. The defendants denied further that the head title had been subdivided by Kyaloka Development Co. Ltd. The payment of Kshs 2,624,500/- by the plaintiff was also denied.
15. The defendants averred that if the plaintiff entered into any agreement for sale with the defendants in respect of the suit properties, no consent to transfer was obtained in respect of such agreement from the relevant authorities and as such the same was un-enforceable in law.

**The evidence tendered by the parties:**

16. At the trial, the plaintiff gave evidence as PW1. The plaintiff adopted his witness statement dated December 5, 2016 as his evidence in chief and produced the documents attached to his list of documents dated December 5, 2016 as PEXH1. The plaintiff told the court that he was a valuer and an estate agent and that he purchased the suit properties from the defendants over a period of time. The plaintiff stated that initially he dealt with the deceased who was the mother of the defendants and that subsequently he purchased other parcels of land from the defendants.
17. The plaintiff stated that the defendants were supposed to process the deed plans for the sui properties and to release the same to him together with other completion documents. The plaintiff stated that



although the defendants had completed the subdivision of the head title, they had failed to issue him with the completion documents. The plaintiff stated that he entered into an agreement dated September 1, 2009 with the defendants while this suit was pending in which the defendants had undertaken to issue him with the completion documents an undertaking which they did not fulfill. The plaintiff stated that this agreement contained the full details of the properties that were sold to him by the defendants.

18. The plaintiff stated that as at the time he entered into this latest agreement for sale, there was a balance of Kshs 1,295,500/- payable to the defendants of which he paid Kshs 95,000/- on the signing of the agreement. He stated that as at the date of the agreement, he had paid Kshs 2,624,500/- out of a total purchase price of Kshs 3,920,000/-. The plaintiff stated that he made further payments to the defendants after the execution of the said agreement.
19. The 1<sup>st</sup> defendant gave evidence on behalf of the defendants as DW1. The 1<sup>st</sup> defendant told the court that the 2<sup>nd</sup> defendant was his sister while the 3<sup>rd</sup> and 4<sup>th</sup> defendants were his brothers. The 1<sup>st</sup> defendant told the court that the 3<sup>rd</sup> defendant was their elder brother and that he had a mental illness. The 1<sup>st</sup> defendant stated that it was the 3<sup>rd</sup> defendant who introduced the plaintiff to their deceased mother. He stated that 95% of the land transactions the subject of this suit were conducted by the 3<sup>rd</sup> defendant and the deceased. The 1<sup>st</sup> defendant stated that the head title was held by the deceased and Mathew Guy Muli as trustees on behalf of the defendants. He stated that the trustees had no power to sell the suit properties which they held in trust. He stated that the suit properties were sold without his consent and that he came to the scene shortly before the death of the deceased.
20. The 1<sup>st</sup> defendant admitted that the 3<sup>rd</sup> defendant, the 4<sup>th</sup> defendant and he signed the agreement for sale dated September 1, 2009 and that they received some payment on the date of the execution of the agreement. The 1<sup>st</sup> defendant admitted further that they had the intention of settling the dispute over the suit properties with the plaintiff. He stated that the matter was not settled because they had not had an opportunity to talk to the plaintiff.

#### **The submissions:**

21. After the close of evidence, the court directed that the parties make closing submissions in writing. The plaintiff filed submissions while the defendants did not do so. In his submissions dated December 9, 2021, the plaintiff submitted that the agreement that he entered into with the defendants complied with the provisions of section 3(3) of the Law of Contract Act and that he was entitled to the reliefs sought in his amended plaint. The plaintiff submitted further that he had satisfied the conditions for grant of an order for specific performance and injunction sought. In support of these submissions, the plaintiff cited among others, the cases of Openda v Abn [1984] KLR 208, Thrift Homes Ltd. v Kenya Investmenet Ltd. [2015] eKLR and Kenya Breweries Ltd & 2 others v Washington Okeyo [2002] eKLR.

Issues for determination.

From the pleadings, the issues arising for determination in this suit are the followings:

- a. Whether there were valid agreements for sale in respect of the suit properties between the plaintiff and the defendants.
- b. Whether the plaintiff is entitled to the reliefs sought.

Whether there were valid agreements for sale in respect of the suit properties between the plaintiff and the defendants.



22. Section 3(3) of the Law of Contract Act Cap. 23, Laws of Kenya, provides as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- (a) the contract upon which the suit is founded-
  - (i) is in writing;
  - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

23. The plaintiff produced in evidence several agreements for sale. Some of the agreements were between him and the deceased while others were between him and the defendants herein either severally or jointly. The agreements were all in writing. The same were signed by the parties and witnessed. I am satisfied that the agreements entered into between the plaintiff and the defendants satisfied the conditions set out in section 3(3) of the Law of Contract Act. What has not been established however is whether the deceased and the defendants had the capacity to enter into the said agreements with the plaintiff in respect of the suit properties.
24. From the amended plaint, the plaintiff averred that the head title the portions of which were sold to the plaintiff was registered in the name of the deceased and Mathew Guy Muli as trustees for the deceased and the defendants. For reasons which are not clear, neither the plaintiff nor the defendants produced a copy of the title for the head title or copies of the titles for suit properties in evidence. The court is therefore unable to determine the nature of the trust in which the deceased and Mathew Guy Muli held the head title. There is no dispute however that the deceased and Mathew Guy Muli held the head title as trustees and that the defendants were the beneficiaries of the trust.
25. Mathew Guy Muli is a former Attorney General of the Republic of Kenya. From the information in the public domain, he died on July 17, 2004. The deceased on the other hand died on July 29, 2009. There is no evidence that the trust in respect of which the deceased and Mathew Guy Muli held the head title had been terminated and the property transferred to the deceased or the defendants who were the beneficiaries of the trust. From the pleadings and the evidence on record, the agreements between the plaintiff and the deceased and the plaintiff and the defendants were made between 1997 and 2009.
26. There is no evidence that Mathew Guy Muli was a party to any of the agreements that the plaintiff entered into with the deceased while Mathew Guy Muli was alive. There is also no evidence that the deceased obtained the consent of the court or of the beneficiaries of the trust in respect of which she held the head title together with Mathew Guy Muli before selling the suit properties. For the defendants, it is admitted that they were beneficiaries of the head title and that the same was held in trust for them by the deceased and Mathew Guy Muli. The issue that arises is whether they had the capacity as beneficiaries of the head title to sell portions of the same. I do not think so. Since the legal title in the head title was vested on the trustees, the defendants who only had beneficial interest in the property could not pass a legal title in the suit properties to the plaintiff.
27. It is my finding from the foregoing that neither the deceased nor the defendants could pass a valid title in the suit properties to the plaintiff. It follows therefore that they had no capacity to enter into the various agreements for sale that they had with the plaintiff in respect of the suit properties. The said agreements for sale were therefore neither legal nor enforceable since neither the deceased nor the defendants whether jointly or severally had the capacity to transfer the suit properties to the plaintiff. The agreement dated September 1, 2009 that the parties entered into while this suit was



pending did not save the situation. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants who executed the said agreement as vendors undertook purportedly to complete the agreements that the plaintiff had entered into with the deceased. As at the date of the said agreement the deceased was deceased and no grant of letters of administration in respect of her estate had been issued. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants had no capacity in the circumstances to complete the agreements that she had entered into or to deal with her interest in the head title or suit properties.

28. Due to the foregoing, it is my finding that the various agreements for sale entered into between the plaintiff and the deceased and between the plaintiff and the defendants were invalid and unenforceable.

**Whether the plaintiff is entitled to the reliefs sought.**

29. As stated earlier in the judgement, the plaintiff has sought several reliefs in his amended plaint. The main relief sought by the plaintiff is specific performance of the various agreements for sale that he entered into with the deceased and the defendants.

30. In *Godfrey Ngatia Njoroge v James Ndungu Mungai* [2019] eKLR, the court stated as follows on the remedy of specific performance:

“Granting of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the order look at the merits of the case based on a case to case basis and whether there is an adequate alternative. See the Case of Reliable Electrical Engineers Ltd. v Mantrac Kenya Limited [2006] eKLR, wherein Justice Maraga (as he then was) stated that:-

‘Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles...The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.’

31. In *Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti* [1997] eKLR the Court of Appeal stated as follows on the same issue:

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been under all the obtaining circumstances in the particular case, it is just and equitable to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of volume 44 of Halsbury’s Laws of England., Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:

‘must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non- essential or unimportant term, although in such cases it may grant compensation. Where a condition or essential term ought to



have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance but dismisses the claim.”

32. I have made a finding that the agreements sought to be enforced by the plaintiff are unenforceable in that even if the court was to order the defendants to transfer the suit properties to the plaintiff they would not be able to do so since neither the head title nor the suit properties are registered in their names. They will not be able to transfer a property which is not registered in their names to the plaintiff. Since the said agreements are invalid and are unenforceable, the remedy of specific performance is not available to the plaintiff. The plaintiff having failed to establish a case for specific performance, there is no basis for the other reliefs sought in the plaint which were consequential upon the court ordering specific performance.
33. From the evidence before me, the defendants admitted that as at September 1, 2009, the deceased and the defendants had received from the plaintiff a total of Kshs 2,624,500/- and that additional sum of Kshs 95,500/- was paid to them on the same date making a total payment of Kshs 2,720,000/- by the plaintiff to the defendants. Since this payment was made to the defendants pursuant to agreements for sale of the suit properties which the court has found to be unenforceable, the plaintiff is entitled to a refund of the same together with interest otherwise the defendants would be unjustly enriched by keeping both the properties and the purchase price.

#### **Conclusion:**

34. In conclusion, I hereby make the following orders:
- a. The defendants jointly and severally are at liberty to transfer to the plaintiff the following properties in the event that they have obtained titles to the same, within 120 days from the date hereof;
    - I. LR No 13418/116-121,129-131 (13418/116,117,118,119,120,121,129,130,131) Embakasi Farm / Njiru (sold to the plaintiff by the 1st defendant).
    - II. LR No 13418/111-115,147,149-151 (13418/111,112,113,114,115,147,149,150,151) Embakasi Farm / Njiru sold to the plaintiff by Gilbert Katua (3rd defendant).
    - III. LR No 13418/132,135,136 and 145 Embakasi Farm / Njiru sold to the plaintiff by Irene Katua.
    - IV. LR No 13418/126 and 141 Embakasi Farm / Njiru sold to the plaintiff by Oscar Katua
    - V. LR No 13418/122 and 128 Embakasi Farm / Njiru sold to the plaintiff by the 1st defendant, 3rd defendant and 4th defendant.
  - b. In the event that the defendants are unable to transfer the said properties to the plaintiff or are unwilling to do so, the defendants jointly and severally shall pay to the plaintiff at the expiry of 120 days from the date hereof a sum of Kshs 2,720,000/- together with interest at the rate of 14% per annum with effect from 1<sup>st</sup> September 2009 until payment in full being a refund of the purchase price that was paid by the plaintiff to the defendants.
  - c. The orders of status quo granted by the court on November 4, 2016 are extended for a period of 120 days from the date hereof after which it shall lapse automatically.
  - d. Each Party shall bear its own costs.

**DELIVERED AND DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2022**

**S. OKONG'O**

**JUDGE**



**Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

**N/A for the plaintiff**

**N/A for the Defendants**

**Ms. C. Nyokabi - Court Assistant**

