



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 136 of 2003**

1 Land and Environmental Law Division

2 Civil Appeal

3. Subject of main suit: Land

ii) Original parcel Kabete/Kabete/44

iii) Sub divided to Kabete/Lower kabete/791

Kabete/lower Kabete/ 790

iv) Kabete/Lower Kabete 791 offered to 2<sup>nd</sup> defendant/respondent by plaintiff in exchange for plots in the village (18 June 1982).

v) Land transferred to 2<sup>nd</sup> defendant/respondent

vi) Appellant/original plaintiff not given alternative land nor compensated.

vii) Files suit 29 January 2001 9 years later seeking compensation for encroachment by defendants to land and alternative plot

viii) Hearing RM Kikuyu court in absence of both defendant who failed to appear

ix) Held: Suit dismissed no proof of Special Damages. No proof of compensation. Judgment on

31 October 2002.

4. Original plaintiff appeals to High Court at Nairobi

i) Memorandum of appearance filed 14.3.03

ii) 6 months out of time

iii) Appeal rejected Ransely J

- iv) Plaintiffs advocate sought out issue of representation
- v) The advocate applies in same file to file appeal out of time
- vi) Application to file appeal out of time granted Visram J (7 March 2007)
- vii) Appeal admitted – Visram J (23.7.07) direction 19.10.07
- viii) Hearing 3.3.08

5. Civil Appeal

Appellant seeks compensation and alternative plot.

- 6. Non attendance to court by respondent 1 and 2 (Order IX b r 3(a) Civil Procedure Rules)

7. Held:

I: Procedure

a) Once appeal rejected on grounds appeal filed out of time, misc. application file in High Court be opened and application for leave to file appeal out of time be made.

b) If leave is granted, fresh/new appeal suit is filed

c) Main appeal

Did Trial Magistrate erred in stating that no receipts shown for special damages.

That court found it unclear on how much compensation is sought; then dismissed suit?

The issue is out of compensation.

Whether there was a contract?

No evidence that contract entered into for consideration. No proof of contract

Appeal dismissed.

No orders to costs as respondent 1 and 2 absent

- 8. Case law: - Nil

9. Advocates:-

O. Kenyatta of E.N. Omotti & Co. Advocates for the appellant – present

Mumo of Mutoru of Mumo Mutoru & Co. Advocates for the Respondent – absent

**AMOS MWATHI.....APPLICANT**

**VERSUS**

**KAHUNGURA KIBUGU..... 1<sup>ST</sup> RESPONDENT**

**RULING**

I: Procedure

1. The Resident Magistrate at Kikuyu Court heard and finalized its case of

**Amos Mwathi.....Plaintiff**

**Versus**

**Kahungura Kibugu.....1<sup>st</sup> defendant**

**Kikuyu Town Court.....2<sup>nd</sup> defendant**

that concerned land parcel Original Kabete/Kabete/144 registered in the original plaintiff's name. The trial magistrate dismissed the suit on 31.10.02.

2. Being aggrieved the original plaintiff appealed to this High Court on 14 March 2003. This was 5 to 6 months out of time given to appeal. The appeal was summarily rejected (Ransely J (undated) as being filed out of time though no reasons on the file was given. The procedure would then require the plaintiff to file an application for leave to file an appeal out of time in a separate High court miscellaneous application file. Instead the plaintiff filed the application in the original appeal file which is functus officio. Visram J rejected the application and questioned the locus of the advocate before the court. This took a considerable time to sort out.

3. The application to file appeal out of time was reinstated for hearing by Visram J ( 7 March 2007) after the issue of representation was sorted out. The Hon. Judge admitted the appeal for hearing on 23 July 2007. Directions as required by law was given on 19 October 2007 and the hearing of this appeal was referred to the Land and Environmental Law Division for disposal on 3 March 2008.

4. At both the lower court and at the High Court level, the original 1 and 2 defendants failed to attend court.

II: Main appeal – background

5. The appellant in his memorandum of appeal stated:-

- 1) “The Learned Magistrate erred in law and fact in dismissing the suit.
- 2) The Learned Magistrate erred in law and fact in failing to hold that the applicant had proved his case on a balance of probability.
- 3) The Learned Magistrate mis apprehended the law in holding that the applicant had not made a case for damages.
- 4) The Learned Magistrate erred in law and fact in not entering judgment in favour of the applicant as prayed.”

6. The facts of the case according to the plaintiff/applicants that he originally held land parcel LR Kabete/Lower Kabete/144 that fell under the Town Council of Kikuyu (this formerly was under the County Council of Kiambu). The council was interested in expanding the market place in Chula village in Kabete on 18 June 1982, the original plaintiff's word to the County council was that he informed them that he had 4 acres. Out of this 4 acres, he wished to give the said council ½ an acre. His intention was

that the council would give him alternative land to its equivalent in the village totaling two plots. He alleges that he found the two plots he wanted. The council asked that he transfers his plot to them. By now the plaintiff had subdivided his land to be LR Kabete/Lower Kabete No.790 and 791. He gave the latter plot to the council in 1983. Unfortunately the Council failed to allocate him the two plots he had earlier on identified. The main reason being that the villagers strongly objected to the plots in the village being allocated to the plaintiff. He produced a letter whereby the land was to be allocated to him.

The document produced though were the minutes extract of 18 June 1982.

“Min FSG PC/240/82

Matter arising from the minutes (1) Min.214182 – offer of ½ an acre from parcel No. Kabete/Kabete/144 for the extension of Chura Trading Centre by Amos Mwathi Ikere.

Upon reconsideration of the above matter by the committee

It was

Resolved

That the offer of ½ an acre from parcel No. Kabete/Kabete/144 for the extension of Chura trading Centre by Mr. Amos Mwathi Ikire be approved.”

Certified true copies of the original

J. Kinoo    Kageethee J.W

For committee clerk    County clerk.

7. In 1982 it was clearly noted that it was the plaintiff who took the initiative and offered his ½ an acre of land to the county council. There is no evidence of compulsory acquisition; no evidence of sale by the council from the plaintiffs. This transaction of transferring the ½ acre of land to the 2<sup>nd</sup> defendant was done willingly without any duress or coercion.

8) 18 years later the plaintiff/appellant claims that he had not been compensated. His land laid fallow until the 1<sup>st</sup> defendant attempted to plant trees and flowers. He was met with resistance from the plaintiff who promptly fenced off the area. The plaintiff's reasoning being that he had not yet been given his two plots. He does admit that in effect when he attempted to identify empty land he was met with resistance from the villagers.

9) He wants his compensation.

II: Opinion

10. It seems from the facts of this appeal that the plaintiff/appellant was the one who voluntarily offered his ½ acre land to the 2<sup>nd</sup> defendant. I see no evidence that he was to be given alternative two plots in the village.

If this perchance was the council position the said relationship between the appellant/plaintiff and the respondent/defendant is that of contract. This contract would have been and was frustrated as there would be no alternative plot to give. This was never said by the defendants.

11. The trial judge erred in law and the real issue in dispute. She also erred in stating that no receipts were produced for the special damages and no claim for compensation made.

12. The conclusion of dismissing the suit was correct but not her reasoning.

13. The appellant's agreement with the council being voluntary without any consideration and without any written agreement was null and void. What he had was a gentlemen agreement. This agreement carried no form of law. There in fact existed no contract between the parties.

14. I would accordingly find that this appeal lacks merits. The main suit may have been filed out of time almost 19 to 16 years later.

15. The 2<sup>nd</sup> defendant should have been sued in the name of the “County Council of Kikuyu” and not Kikuyu County Council.

16. The appeal is accordingly dismissed. The defendants 1 and 2 are absent no awards as to costs is made.

DATED THIS 5<sup>TH</sup> DAY OF MARCH 2008 AT NAIROBI.

**M.A. ANG’AWA**

**JUDGE**

O. Kenyatta of E.N. Omotti & Co. Advocates for the appellant – present

Mumo of Mutoru of Mumo Mutoru & Co. Advocates for the Respondent – absent