



REPUBLIC OF KENYA



**Mbaya v Mwirichia (Environment and Land Appeal E018 of 2022)
[2024] KEELC 3685 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 3685 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E018 OF 2022**

CK YANO, J

FEBRUARY 8, 2024

BETWEEN

JOSEPHINE KINANU MBAYA APPELLANT

AND

ADAM KINYUA MWIRICHIA RESPONDENT

*(An appeal from the Judgment of S. Ndegwa – PM dated and
Delivered 1st April, 2022 in Githongo ELC. No. E002 of 2020)*

JUDGMENT

Introduction.

1. The respondent herein instituted suit vide a plaint dated 4th September, 2020 in Githongo SPM ELC no E002 of 2020 seeking for a declaration that he was a bona fide purchaser of P. no Abothuguchi/gaitu/3154, 3155 and 3156 and wanted the appellant to transfer the said parcels of land to the respondent, and in the alternative, compensation for the said parcels of land at current market value and the developments thereon less the balance thereof.
2. The respondent pleaded that on 6th May, 2013 he entered into a Sale Agreement whereby he purchased the suit properties from the late Ayub Mbaya (Deceased) who received ksh 300,000/= from the respondent and the balance of ksh 210,000/= was to be paid upon transfer of the parcels of land. That the deceased commenced the process of transfer of the plots by booking the land Control Board but on the due date the land control board declined to issue a consent as the appellant had already cautioned the parcels of land and pursuant to that encumbrance the deceased lodged a complaint with the Land Registrar who summoned the appellant to show cause why the caution should not be lifted, but before that date the deceased passed on.
3. The respondent stated that upon entering into the said Sale Agreement, he took possession and utilized the suit lands by undertaking various developments and gave particulars of the said developments.



4. The appellant filed statement of defence dated 14th October, 2020 denying all the allegations in the plaint. The appellant specifically denied that there was any agreement entered between the respondent and the deceased and further denied that the deceased received any money from the respondent, adding that if there was such an agreement, the same was null and void abinitio for lack of spousal consent to enter into the sale transaction.
5. The matter proceeded for hearing before the trial court where the respondent testified and called 3 witnesses. The appellant also testified and did not call any witness. On 1st April, 2022, the Learned Trial Magistrate delivered Judgment allowing the respondents claim to the extent that the respondent was entitled to refund of the purchase price and liquidated damages as agreed of ksh 1,020,000/= plus costs and interests. The appellant was dissatisfied by the said decision and appealed to this court on the following grounds:
 1. That the Learned Senior Principal Magistrate erred in law and in facts in failing to appreciate that the respondent never sued the deceased in his life time and a claim for breach against the appellant as a legal representative cannot hold.
 2. That the Learned Senior Principal Magistrate erred in law and in facts by failing to appreciate that the plaintiff had raised red flags over the transaction between her deceased husband and the respondent over the family lands by lodging cautions.
 3. That the learned Senior Principal Magistrate erred in Law and in facts by failing to appreciate that the appellant had not given a spousal consent over the alleged transaction between her late husband and the respondent and the alleged agreement was in contravention of the law.
 4. That the learned Senior Principal Magistrate erred in Law and in facts by failing to have regard that land parcel LR. no ABOTHUGUCHI/GAITU/3154 belonged to one CELESTINO MUTUMA INOTI from 22/10/2012 and the same was not available for sale to the respondent and the respondent suit was incompetent for litigating over a third party's land without his notice.
 5. That the Learned Senior Principal Magistrate erred in Law and facts by awarding the respondent liquidated damages on an agreement which had not met the minimum threshold as required by the law.
 6. That the learned Trial Magistrate erred in law and facts by failing to have regard to the law of contract and the Limitation period as provided by the same.
 7. That the learned Senior Principal Magistrate's decision was against the weight of the evidence.
 8. That the Learned Senior Principal Magistrate erred in disregarding the evidence documents and testimony of the appellant.
6. The appeal was canvassed by way of written submissions. The appellant filed her submissions dated 7th November, 2023 through the firm of Gichunge Muthuri & co Advocates while the respondent filed his submissions dated 18th December, 2023 in person.

Appellant's Submissions

7. Learned counsel for the appellant gave a brief facts and evidence of the case and identified the following issues for determination: -
 - a. Whether or not the respondent's suit was properly filed in court



- b. Whether or not the alleged agreement is enforceable in law.
 - c. Whether this appeal has merit
 - d. Who bears the costs of this appeal and those of the trial court?
8. On the first issue, the appellant's counsel submitted that the respondent's claim before the trial court was statute barred and could not be cured or at all. Learned counsel cited Section 4(1) of the Limitation of Actions Act and relied on the case of *Iga v Makerere University* (1972)EA, *Joseph Mungai Wanene v Housing Finance Company of Kenya Limited* (2017)eKLR and pointed out that the alleged agreement was made on 6th May, 2013 while the suit before the trial court was instituted on 4th September, 2020, a period of more than seven years after the alleged agreement was executed. That the time within which the respondent was required to institute the suit had lapsed and did not seek time to institute the same out of time as required by law.
 9. On the issue whether or not the alleged agreement was enforceable in law, the appellant's counsel submitted that the said agreement was completely bad in law and therefore unenforceable. That it is trite law that Land Control Board consent ought to be obtained within 6 months from the making of the agreement and if not, the agreement becomes null and void automatically. The appellant's counsel cited the provisions of Section 8(1) and 6(1) and 6(2) of the Land Control Act and relied on the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 Others* [2014]eKLR where the Court of Appeal dealt with the issues of obtaining consent from the Land Control Board and the doctrine of constructive trusts and proprietary estoppel and held that where contracts of a specific type are expressly declared to be illegal by a particular statute in this case Section 6(1) of the Land Control Act and Section 3 (3) of the Law of Contract Act, the contract is rendered void and unenforceable. The appellant's counsel also relied on the case of *Simiyu v Watambamala* (1985) KLR852, *Onyango & Another v Luwayi* (1986) KLR 513 and submitted that the respondent did not produce any consent from the Land Control Board. The court was urged to find and hold that the alleged agreement entered on 6th May, 2013 is null and void, and the appellant's counsel submitted that the occupation by the respondent if any, of the suit properties is illegal and the court cannot aid the respondent to continue committing a criminal offence. Learned counsel for the appellant relied on the decision in *Mapis Investment (K) Limited v Kenya Railway Corporation* (2005) 2KLR 410 where the court cited with approval Lindley L. J in *Scott v Brown Doering MCNAB & co*(3) (1892) 2QB 724.
 10. It is also the appellant's submission that the doctrine of constructive trusts and proprietary estoppel are not applicable in this suit and therefore cannot supersede the provisions of statute, in this case the Land Control Act and Law of Contract Act. They relied on the case of *David Sironga Ole Tukai* (*supra*) which quoted the decision on *Lucia Mwethya t/a Kalebran Enterprises v Nairobi Bottlers Limited & 3 others* HCCC no 10 of 2012.
 11. It is further submitted that the suit land no Abothuguchi/gaitu/3154 was not registered in the name of the appellant's husband and therefore he had no capacity at all to enter into a Sale agreement over the said land, hence making the agreement null and void *ab initio*. That the respondent ought to have done due diligence before purchasing the said land to make the agreement binding. The appellant's counsel relied on the case of *Charles Wambicho Kinuthia v Planchem Limited* [2018]eKLR and submitted that the alleged agreement is void by all means.
 12. On whether the appeal has merits, the appellant's counsel faulted the trial court for awarding the respondent ksh 1,020,000/= for breach of contract arguing that this was a total misguidance of the law since the respondent did not also honour his part of the bargain. The appellant's counsel relied on the case of *Charles Wambicho Kinuthia* (*supra*) and submitted that there was nowhere in the alleged



agreement that the parties agreed on what would have happened in the event of breach of contract by both parties and argued that the, respondent cannot benefit from breach of contract alone yet he had also not honoured his part of the bargain. The appellant's counsel further submitted that the trial court misguided itself by awarding a prayer that the respondent did not seek. Counsel relied on the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others* [2014]eKLR and *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR and submitted that it is trite law that parties are bound by their pleadings presented before the court. Learned counsel for the appellant also quoted Biblical teachings in the Book of Mathew 7:9 - 11, and submitted that the orders granted by the trial court are untenable and discriminatory and urged the court to dismiss the appeal with costs to the appellant.

Respondent's Submissions

13. In his submissions, the respondent relied on the case of *Nancy Wanja Warubiu (suing as the Legal Representative of the Estate of Njoroge Kaguathi(Deceased) v Trustees of Orthodox Church Karuri* [2020]eKLR which was also relied on by the trial court and submitted that all the elements of a valid contract were met by the agreement between the respondent and the deceased. The respondent argued that from the evidence, there is a clear pattern showing that the deceased was willing to transfer the suit parcels before his sudden demise, but the appellant frustrated those efforts. The respondent further submitted that there is no evidence presented to show that the property was matrimonial/ family property. The respondent cited the definition of matrimonial home in Section 2 of the *Land Act* 2012 and relied on the case of *Ellyjoy Kageni v Bank of Africa Kenya Limited & 3 others* [2018]eKLR and submitted that he who alleges must prove.
14. On Limitation and jurisdiction, the respondent relied on the case of *Iga v Makerere University (supra)* and submitted that he was unable to file his case in time due to Covid-19 pandemic and the trust he had from the appellant who had promised to refund the money but failed to do so. He further submitted that the issue was not raised during the trial and the same cannot be adjudicated in the appeal.
15. The respondent submitted that he took possession immediately after executing the agreement in 2013, and that it is trite law that parties to a Sale Agreement are bound by the terms of the contract and relied on the case of *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd & Another CA no 95 of 1999 (2002) 2EA 503*.
16. The respondent submitted that he sought an alternative prayer for compensation as per the agreement by the parties in order to cover for the developments he had put up in the suit parcels. That the court cannot close its eye to the situation as doing so would amount to allowing the appellant to eat her cake and still retain it, which would amount to condoning unjust enrichment. The respondent urged the court to dismiss the appeal with costs to the respondent.

Analysis and Determination

17. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made and the authorities. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & Another v Associated Motor Boat co Ltd* (1968) EA 123.
18. The issue I find for determination are whether there was a valid contract, whether the suit was stature barred and whether the appeal has merit or not.



19. From the evidence on record, the Sale Agreement produced as an exhibit was executed on 6th May, 2013 between the respondent and the deceased. The agreement for sale contains the name of the parties, the properties sold, the purchase price, the deposit that was paid and a clause that the outstanding balance would be paid on transfer. There was also a default clause, whereby any party who breached the agreement would pay the innocent party double of the consideration. The agreement was witnessed before an advocate. In my view, the trial court rightly found that the agreement between the parties was a valid contract, and I uphold that finding.
20. In the plaint, the respondent was claiming a declaration that he was a bona fide purchaser of the suit properties and wanted the appellant to transfer the same. In this case, the suit was filed on 4th September, 2020 while the agreement for sale was entered into on 6/5/2013. The claim was for transfer of the land. Section 7 of the *Limitation of Actions Act*, provides that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him. In this case the claim was made after a period of about seven years which was within twelve years. It is therefore my finding, that the suit was not statute barred as submitted by the appellant.
21. In this case, it is also not in dispute that no consent for the proposed transaction concerning agricultural land had been given. The evidence on record indicates that the consent was not given by the Land Control Board because there was a caution registered on the land. This therefore means that the deceased was unable to transfer the land as per the Sale Agreement. In my view, the deceased was the one in breach of the agreement and as per the terms of the agreement and in particular, the default clause, the deceased was liable to pay double the consideration. It is trite law that parties are bound by the terms of their agreement. It is my finding that the learned trial magistrate was justified in arriving at the decision he made and I find no basis to interfere with that finding.
22. In the result, I find no merit in the appellant's appeal and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF FEBRUARY, 2024

HON. C. YANO

ELC – JUDGE

In the presence of:-

Court Assistant: Kiragu

Ms. Mugo for Appellant

Respondent in person

