



**Chege (As the administrator of the Estate of the Late Njoroge Mugo - Deceased) v
Gitau (Land Case 21 of 2023) [2024] KEELC 5239 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5239 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
LAND CASE 21 OF 2023**

**YM ANGIMA, J
JULY 11, 2024**

BETWEEN

**GITICHE CHEGE (AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE
NJOROGE MUGO - DECEASED) PLAINTIFF**

AND

GEORGE GITAU DEFENDANT

JUDGMENT

A. Plaintiff's Claim

1. By a plaint dated 16.06.2017 and amended on 26.11.2022 and further amended in court on 06.05.2024 the Plaintiff sued the Defendant seeking the following reliefs:
 - a. Specific performance.
 - b. A refund of the purchase price in the sum of Kshs.4,412,000/=.
 - c. Damages for breach of contract in lieu of or in addition to specific performance.
 - d. Compensation for loss of user.
 - e. General damages.
 - f. Costs of the suit.
 - g. Any other relief the court may deem just to grant.
2. The original Plaintiff pleaded that vide a sale agreement dated 06.11.2004 he purchased 35.3 acres out of Title No. Nyandarua Mkungu/2572 which was then registered in the Defendant's name for an agreed purchase price of Kshs.4,412,500/=. It was his pleading that the said property was transferred to him on 31.12.2004 upon payment of the full purchase price to the Defendant. It was his case that he



took possession and commenced farming activities thereon peacefully until May, 2005 when he came to learn that his title deed had been cancelled in Nakuru HCCC No. 50 of 1980, a suit between the Defendant and his estranged wife - Milka Mugure.

3. The original Plaintiff pleaded that he also discovered that prior to the sale transaction the Defendant had recorded a consent order dated 20.01.1986 for the equal sharing of Title No. Nyandarua Mkungi/2572 (which was initially part of parcel 659) with his wife and that the Defendant had fraudulently sold part of the said land to him without disclosing the existence of the said suit and the consent order.
4. It was the Plaintiff's case that later in 2016 the Defendant offered to sell and transfer to him 35.3 acres from another parcel of land being Title No. Nyandarua/Mumui/13 in which the Defendant was entitled to a share of 121 acres. It was further pleaded that the Defendant later on reneged on his word by failing or neglecting to excise and transfer the said 35.3 acres to the Plaintiff. The original Plaintiff ultimately passed on without getting either the land or a refund of the purchase price.

B. Defendant's Response

5. The record shows that the Defendant did not enter appearance and he did not file any defence to the action.

C. Trial of the Action

6. At the hearing hereof the Plaintiff, who was the administrator of the original Plaintiff, Njoroge Mugo, testified on behalf of the estate of his late father. He adopted the contents of his witness statement dated 20.11.2022 as his evidence in-chief. He also produced the documents in the Plaintiff's list of documents as exhibits except 3 which were produced by his witness. The Plaintiff's evidence at the trial simply mirrored what was pleaded in the amended plaint hence he prayed for the reliefs sought in the suit.

D. Directions on Submissions

7. Upon conclusion of the hearing on 06.05.2024 the Plaintiff was granted 21 days to file his written submissions on the suit. This period was extended by a further 14 days on 03.06.2024 but by the time of preparation of the judgment the Plaintiff's submissions were not on record.

E. Issues for Determination

8. The court has perused the pleadings, evidence and documents in this matter and is of the opinion that the following are the key issues for determination:
 - a. Whether the Plaintiff has proved his claim against the Defendant.
 - b. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - c. Who shall bear costs of the suit.

F. Analysis and Determination

a. Whether the Plaintiff has proved his claim against the Defendant

9. The court has considered the material and evidence on record. It is evident that the Defendant did not file any defence to contest the suit and he did not attend court for trial either to challenge or controvert the Plaintiff's evidence. The court is thus inclined to accept the Plaintiff's evidence as true. The court



is satisfied that the Plaintiff is the legal representative of the original Plaintiff who was his father. The court is satisfied that the original Plaintiff paid the full purchase price for the first parcel of land which was the subject of Nakuru HCCC No. 50 of 1980 and that his title was subsequently cancelled by the High Court because the Defendant had fraudulently and illegally sold the land in breach of court order made in that suit.

10. The court is also satisfied that the Defendant's offer to replace the first parcel in Mkungi Settlement Scheme with another one from his share of land from Mumui area did not materialize hence the original Plaintiff lost both the land and his money. The court is thus satisfied that there is a legitimate cause of action against the Defendant and that there is adequate evidence on record to prove the same. As a result, the court finds and holds that the Plaintiff has proved his claim against the Defendant on a balance of probabilities as required by law.

b. Whether the Plaintiff is entitled to the reliefs sought in the suit

11. The court has considered the prayer for specific performance. The court takes it that the Plaintiff is seeking specific performance of the second 'agreement' for the excision and transfer of 35.3 acres out of Title No. Nyandarua/Mumui/13. The court has noted that there is no formal sale agreement for the sale of 35.3 acres from the land located in Mumui which complies with the provisions of Section 3(3) of the Law of Contract Act (Cap.23). There is no consent of the Land Control Board for either sub-division of the said parcel or for transfer of any portion thereof.
12. In the case of Reliable Electric Engineers (K) Ltd - v- Mantrac Kenya Limited [2006] eKLR it was held, inter alia, that:

“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 unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy...”
13. For reasons given in paragraph 11 thereof, the court is not satisfied that there was a valid and enforceable contract between the original Plaintiff and the Defendant for the sale and transfer of 35.3 acres out of Title No. Nyandarua/Mumui/13. As a result, the court is not inclined to grant an order for specific performance as sought in the suit.
14. The court has considered the claim for a refund of the purchase price together with interest thereon. The court has already found that the Defendant was paid the full purchase price for parcel 2572. However, there was a complete failure of consideration since the purchaser's title was subsequently cancelled by the High Court for reasons alluded to earlier. The court has no doubt that the estate of the original Plaintiff is entitled to recover the purchase price together with interest thereon at court rates from the date of full payment being 03.01.2005 until payment in full.
15. The court is not impressed by the claim for general damages for breach of contract. The court takes the view that a breach of contract inevitably leads to financial loss which may be quantified and pleaded as such. It would be a rare case where general damages for breach of contract may be deserved. The court further finds that the claim for loss of user ought to have been pleaded with particularity and proved at the trial. No credible evidence was tendered at the trial to demonstrate either the income the original Plaintiff could have generated from the land or the profit or benefit the Defendant may have obtained from making use of the land. As a result, the court is not inclined to award either general damages for breach of contract or compensation for loss of user.



c. Who shall bear costs of the suit

16. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons – v- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Plaintiff shall be awarded costs of the suit.

G. Conclusion and Disposal Orders

- 17. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his claim against the Defendant on a balance of probabilities. As a consequence, the court makes the following orders for disposal of the suit:
 - a. Judgment be and is hereby entered for the Plaintiff against the Defendant for payment of the sum of Kshs.4,412,500/= being a refund of the purchase price together with interest thereon at court rates with effect from 03.01.2005 until payment in full.
 - b. The Plaintiff is hereby awarded costs of the suit.
 - c. The rest of the prayers in the plaint are hereby declined.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 11TH DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

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Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Ndettoh for the Plaintiff

N/A for the Defendant

C/A - Carol

