



REPUBLIC OF KENYA



Gachoni Enterprises Limited v Nyaga & 5 others (Environment & Land Case 561 of 2015) [2024] KEELC 5321 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5321 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 561 OF 2015**

AA OMOLLO, J

JULY 11, 2024

BETWEEN

GACHONI ENTERPRISES LIMITED PLAINTIFF

AND

DAVID NJERU NYAGA 1ST DEFENDANT

MARTIN NJERU NYAGA (BOTH OF THEM T/A NJERU, NYAGA & CO. ADVOCATES) 2ND DEFENDANT

ARTHI HIGHWAY DEVELOPERS LIMITED 3RD DEFENDANT

ONESMUS KIMANI NGUNJIRI 4TH DEFENDANT

JUSTUS WAINAINA NJUGUNA 5TH DEFENDANT

FRANLINE KAMAU KAMATHI 6TH DEFENDANT

RULING

1. The 3rd Defendant took out a Preliminary Objection dated 25th September, 2017 against the Plaintiff's suit on the following grounds;
 - a. The Honourable court does not have the requisite jurisdiction to hear and determine the suit herein for the reason that the claim is about recovery of money which is not stipulated under section 13 of the *Environment and Land Court Act* and article 162(2) of *the Constitution* of Kenya, 2010.
 - b. The Plaintiff's case is based on fraud and under the Limitations of Actions Act such matters should be brought within 3 years. The Plaintiff discovered the alleged fraud in July, 2010 and hence it is out of time.
 - c. The Plaintiff never gave any Notice to complete sale and hence the suit is premature.



- d. The Plaintiff has not paid costs as ordered in ELC 381 of 2010 and thus bringing this case before settling the costs in vexatious.
2. The 6th Defendant also filed a Preliminary Objection dated 25th September, 2017 raising the following grounds;
- a. The Honourable court does not have the requisite jurisdiction to hear and determine the suit herein for the reason that the claim is about recovery of money and damages which is not stipulated under section 13 of the *Environment and Land Court Act* and article 162(2) of *the Constitution* of Kenya, 2010.
- b. The Plaintiff's case is based on fraud and under the Limitations of Actions Act such matters should be brought within 3 years. The Plaintiff discovered the alleged fraud in July, 2010 and hence it is out of time.
- c. The 6th Defendant cannot be sued personally for the actions of the 3rd Defendant which is a legal person capable of suing and being sued in its own name. Moreover, the 6th Defendant was not a party in ELC No. 167 of 2007 and was not found culpable by Justice Nyamweya.
3. Both Preliminary Objections were prosecuted by way of written submissions. The 3rd and 6th Defendants filed submissions dated 19th June, 2019. The Plaintiff filed submissions dated 4th March, 2024. I have read and considered the respective submissions.
4. I have perused the plaint and noted that the cause of action pleaded at paragraph 3 of the plaint arises from a contract for sale of land executed on 19th February, 2010 between the Plaintiff and the 3rd Defendant. In the Plaint dated 15th May, 2015, the prayers sought are inter alia;
- a. A declaratory judgment against all the Defendants that the Agreement for sale of L.R 7149/115 dated 19th February, 2010 between the Plaintiff and third Defendant is/was a nullity and void abinitio.
- b. Judgment against the third, fourth and the sixth Defendants jointly and severally for General Damages for Loss of Bargain measured by the difference between the market value of L.R No. 7149/115 (to be assessed by the court at the trial of this suit) and the agreed purchase price for that property together with interest on those damages at court rates from the date of filing suit until the date of full payment.
- c. In the alternative to (b) above, the Plaintiff shall pray for an order for payment of the deposit of Shs.5,500,000/= and the agreed penalty damages of Shs.5,500,000/= as provided for in clause 13-1 of the Sale Agreement between the Plaintiff and the third Defendant together with interest thereon at court rates compounded every month from 20th February, 2010 until the date of full payment.
5. It is my considered view from a reading of the plaint that the claim is not premised on fraud perse. The fraud pleaded under paragraph 17 of the plaint is pleaded alongside misrepresentation to explain the grounds why the sale agreement ought to be declared null and void for instance paragraph 17(b), (d) and (g) states thus;
- “b) induced the Plaintiff to enter into an unlawful Agreement for Sale of that land in violation of the injunction orders issued by the court against the Defendants and the undertakings they had given to the court to maintain the status quo.



- d) Concealed and/or failed to disclose to the Plaintiff that two Caveat Emptors had been advertised in the newspapers by West End Butchery Ltd stating that it was the genuine and lawful owner of the parent land L.R No. 7149/10
 - g) concealed from the Plaintiff that the Subdivision of L.R 7149/10 and sale of its subdivisions were unlawful transactions carried out in violation of the said injunction order and Section 52 of the Indian Transfer of Property Act.”
6. Section 4(1)(d) of the Limitation of Action Act provides that actions premised on contract should not be brought after the expiry of 6 years. If time is contended from the date of agreement the expiry date would be 15/2/2016. There is still the question whether time would begin to run from the date of the agreement or from the date when the breach was realised.
 7. Section 4(2) of Cap 22 relied on by the 3rd defendant does not apply since this action is not premised on tort. Similarly, the case law of Kenya Bus Services Ltd & Another Vs. Minister for Transport & 2 Others (2012) eKLR and Martha vs BBK (2019) eKLR are not relevant since time for filing the suit had not run out.
 8. On whether this court has jurisdiction to hear a claim for recovery of money, the 3rd Defendant cited the provisions of article 162 (2) (b) of *the Constitution* and Section 13(2) of the *Environment and Land Court Act*. According to it, the recovery of money is not stipulated in the two provisions.
 9. The plaintiff referred this court to the provisions of Section 13(1) (d) which states that the Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land;
 - “ d. relating to public, private and community land and contract, choses in action or other instruments granting any enforceable interests in land.”
 10. I am persuaded by the submissions of the plaintiff on this limb which is also in accordance with his pleadings and the law that the dispute arises from an alleged breach of a contract to sell land parcel No. L.R No. 7149/115. See also the decision of Peter Mukunya Maloba Vs Denis Kusinyo (2020) eKLR cited which held thus;

“ A determination of the question as to whether there was a valid sale of the registered land, and therefore, entitling the buyer to a right to have the interests sold transferred to him, in accordance with the relevant land legislation, is an issue that is well outside the jurisdiction of the High Court. Both the *Land Registration Act* and the *Land Act* carry provisions which state the jurisdiction of the court with regard to the application and interpretation of the two statutes.... My understanding of these provisions, in the context of the matter that was before the trial court, is that any disputes or questions or issues that require court intervention which revolve around sale, registration and transfer of land, and rescission of the land sale agreement, possession and breach of contract fall within the jurisdiction of the Environment and Land Court.”



11. On the question whether the 6th Defendant should be sued personally for the actions of the 3rd Defendant, the 6th Defendant relied in the decision of *Koloba Enterprises Ltd. Vs. Sham Shuddin Hussein Varvani & Another* (2014) eKLR which held thus;

“It should be appreciated that the separate corporate personality is the best legal innovation ever in common law. The famous case of *Salomon Vs. Salomon* (1897) A.C 22 H.L held that a company is a different person altogether in from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceeding where a company is involved.”

12. The Plaintiff argues that the question whether the 6th Defendant is a proper party calls for adduction of evidence thus not a pure point of law. I find the case of *Dennis Wanjohi Vs. Peter Mburu Njihia* (2021) EKLR cited by the Plaintiff as distinct from the reasons stated by the 6th Defendant.
13. Under paragraph 4 of the plaint, the 4th – 6th Defendants are described as directors/shareholders of the 3rd Defendant and this becomes a question of law whether the directors can be sued alongside the company without lifting of the corporate veil. I would have granted this objection but there is need for affidavit evidence to explain that the 6th Defendant acted on behalf of the 3rd Defendant.
14. In summary, I find no merit in both Preliminary Objections as filed by the 3rd and 6th Defendants. They are dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY, 2024

A. OMOLLO

JUDGE

