



REPUBLIC OF KENYA



Ngong Butchers Co-operative Society Limited v Muchene (Environment & Land Case 4 of 2016) [2023] KEELC 18931 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18931 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 4 OF 2016**

J OMANGE, J

JULY 6, 2023

BETWEEN

NGONG BUTCHERS CO-OPERATIVE SOCIETY LIMITED PLAINTIFF

AND

PATRICK KABUE MUCHENE DEFENDANT

JUDGMENT

1. This suit arises from title number 23124/25 hereinafter referred to as the suit property which was hived off LR No 23124.
2. The plaintiff sought the following orders;
 - a. An order for injunction restraining the Defendant by himself, his servants or agents or otherwise howsoever from entering into or being or trespassing or constructing or building or erecting any houses or structures or any other structures or in any other way dealing with the premises LR 23124/25.
 - b. A declaration that the lawful and legitimate owner and proprietor of LR 23124/25 is the plaintiff Ngong Butchers Cooperative Societies Limited and the land registrars, Kajiado and Nairobi Land Registry are hereby ordered and directed to issue certificates of title in favour of Ngong Butchers Cooperative Society Limited.
 - c. That the Defendant does vacate, quit, and deliver vacant possession of LR No 23124/25 to the plaintiff with immediate effect.
 - d. The Defendant does pay to the plaintiff mesne profits for occupation and use of the parcel of land for the period April 2014 to date and continue to be assessed by the Registrar of the Court.
 - e. Any approvals to any building plans that may have been issued to the Defendant by the County Government of Kajiado be cancelled, revoked and set aside.



- f. Costs of the suit be paid by the Defendants jointly and severally.
3. The Defendant filed an amended Defence and Counterclaim in which he prayed for the following orders;
 - a. A declaration that the suit is fraudulent.
 - b. A declaration that the Plaintiff holds LR 23124/25 upon trust for the Defendant following purchase of the same.
 - c. As an alternative to (a) above a declaration that the plaintiff is entitled to a transfer of LR 23124/25 by virtue of the Rule in *Commissioner of Lands Vs Hussein* (1968) EA 385 or the Rule in *Dillwyn V Llewellyn* (1862) 4 DE GF & J517, 45 ER1285.
 - d. A declaration that the Plaintiffs title has been extinguished by virtue of Section 7,13, and 17 of the *Limitation of Actions Act*.
 - e. An order that the plaintiff do transfer to the Defendant forthwith the said LR23124/25.
 - f. A permanent injunction restraining the Plaintiff by itself, its servants or agents from entering the suit property.
 - g. Damages for the materials lost, destroyed or stolen from the construction site, amounting to Kshs 294,400.
 - h. Damages being compensation for loss of income from the Commercial building being constructed in the sum of Kshs 400,000 per month from the estimated date of completion mid 2017 to date in the sum of Kshs 12 million.
 - i. Costs of the suit.
4. The plaintiff deponed that it owned LR No 23124 measuring eight acres which was allocated to it by Ol Kejuado County Council. Title deeds were issued in July 1998 whereupon the plaintiff sub divided the land into 32 plots of which the suit property is one of the 32. The plaintiff alleges that the Defendant without any colour of right trespassed onto the suit property and commenced construction. It was the plaintiffs case that the Defendant had earlier filed a suit seeking injunctive orders against the Plaintiff which was dismissed for want of jurisdiction.
5. The plaintiff avers that the Defendants allegation that he had bought the suit property is not viable as the outlined procedure was not followed. The plaintiff further contends that the period during which the Defendant alleges that he bought the property was a period when the affairs of the company were found to have been mismanaged by a management committee which was dissolved by the Commissioner of Cooperatives.
6. The plaintiff challenges the claim of the Defendant that he bought the suit property on grounds that there was no written sale agreement and no evidence of any approvals. As such the plaintiff avers that the Defendant has acted fraudulently which particulars of fraud are highlighted in the plaint. For these reasons the plaintiff prays for orders as prayed in the plaint.
7. The Defendant on his part pleads that the suit is barred by section 7 as the Defendant has been in possession of the suit property for over 12 years since October, 1997. In the alternative the Defendant avers that he bought the suit property for Kshs 350,000 which was paid in instalments, the first being of Ksh 175,000 and the remaining instalments paid variously between October 6, 1997 and 1998.



8. The Defendant argues that upon taking possession of the suit property in 1997 his possession became adverse to that of the plaintiff and the limitation period started to run in October 1997. The 12-year period expired on October 6, 2009 on which the date the title of the Plaintiff was extinguished.
9. The Defendant states that he has been paying rates to the Nairobi City County from 1998. He states that in 1998 the plaintiff handed to him a deed plan in preparation for the issuance of a title. Upon request of the plaintiff he paid a sum of Kshs 35,000 to the law firm of Obadiah Thiongo Ngwiri to cater for survey and transfer costs. The Defendant states that after this the plaintiff wrote to the commissioner of lands seeking to transfer to the Defendant the suit property and also executed a transfer in his favour. It is his case that the plaintiff is thus estopped from denying that it sold him the suit property.
10. The Defendant contends that he had commenced construction on the suit property until the plaintiff obtained an injunction restraining him from any construction on the July 1, 2015. He states that the injunction was obtained by non- disclosure of material facts. He further states that between the years 1998 and 2015 he had a semi-permanent building on the suit premises that was let out to tenants who paid him rent without any interference by the plaintiff. In view of the above, the Defendant counter claims for the orders as prayed.
11. The plaintiff's first witness Moses Muraya, Chairman of the plaintiff relied on his witness statement in which he deposed that Ngong Butchers were the owners of the suit property. He referred the court to a letter of allotment that was issued to the plaintiff. Later on they obtained a title for the land which was later sub divided into plots which included the suit property. He conceded that the plaintiff did sell some of the plots but denied that they sold the suit property to the defendant.
12. He took the court through the procedure for selling land which was that the members had to approve sale of land in a meeting in respect of which minutes were duly prepared. Following this resolution, the customer would be notified following which a sale agreement would be prepared. The plaintiff's advocates would then receive money from advocate of the purchaser after which the title would be transferred. He produced exhibits to demonstrate this process.
13. He said the documents that were produced by the defendant in support of his claim differed from genuine documents produced by the plaintiff company. He highlighted the distinguishing features which included the telephone number, the print, the logo and the name of the seller. He insisted that Ngwiri Advocate is not the plaintiff's advocate.
14. Upon cross examination, he said that he had been a chairman of the plaintiff from the year 2005 and was not able to tell whether the defendant had been in the suit property since 1998. He reiterated that the receipts and documents produced by the Defendant were not genuine. In particular he denied that the transfer was signed by the plaintiff's officials. It was his evidence that the defendant did not show up until 2014. Others who came to the office had their issues resolved.
15. The plaintiff called a second witness Patrick Mugo Karanja who took the court through the process of obtaining an approval for construction. He admitted that he was not involved in the process of planning or sub division of the suit property.
16. The Defendant relied on his witness statement and on the supplementary statement of September 22, 2022. He admitted that while there was no written agreement of sale between him and the plaintiff, he did pay Kshs 175,000 by bankers cheque dated October 4, 1997. At the time he was dealing with Joseph Gakua and Joseph Kimani. He told the court he made the 2nd payment of Kshs 80,000 on April 4, 1998. He was issued with a hand written receipt which was received on behalf of Ongata Rongai Butchers Cooperative Society. On July 24, 1998 he paid Ksh 70,000. In September, 1998 he cleared in



cash the balance of Ksh 5000. The Defendant states that he thereafter paid Kshs 35,000 to counsel for the plaintiff for survey fees but the transfer was not forthcoming.

17. Counsel for the Plaintiff submitted that it had been proved without question that the property belongs to the Plaintiff. Counsel urged the court to find that there was no valid sale agreement and that further the procedures of the Plaintiff had not been followed in selling the suit property. In particular counsel singled out the fact that there was no AGM and no approval or consent of the County Government of Kajiado, further that there was no formal agreement and no proof of payment of the purchase price. In any event counsel contended that the documentation relied upon in support of the Defendants case were not genuine company documents. Regarding the special damages which were sought in the amended defence and counterclaim counsel for the plaintiff submitted that the documents in support of the claim were only introduced in the case in 2021 in spite of having been obtained in 2014. Counsel also disputes that building plans were ever obtained and relies on the evidence of Architect Mugo who took the court through the process of obtaining building plans.
18. The plaintiff raised issue on the documents presented by the Defendant in support of his case namely ; the receipts produced by the defendant differ from the receipts the plaintiff has; the receipts do not indicate the plot number sold; the letter allegedly written by the Defendant to the plaintiff was not delivered; the plaintiff also submits that the letter produced by the Defendant which was allegedly from the Commissioner of Lands was not known to the plaintiff; the letter dated January 15, 1999 is a forgery as it does not have signatures of the officials. Lastly the plaintiff questions why the Defendant did not transfer the suit property to himself if he had all the necessary documents including the deed plan and the transfer.
19. In response to the submissions by the Defendant, counsel for the plaintiff submitted that the Rule in *Walsh V Lonsdale* is irrelevant as it only applies where a valid contract of sale exists capable of specific performance which in this case does not exist. The plaintiffs contended that the defendant had not proved fraud, payment of purchase price, or 12 years uninterrupted possession.
20. I have considered the pleadings on record, the witness statements, the evidence that was adduced in court and the detailed submissions that were filed by both parties.
21. It is not in dispute that the plaintiff is the registered owner of LR 23124 which was initially allocated by the Commissioner of Lands with the approval of the County Government of Kajiado in 1992 for use as a slaughter house vide Letter of allotment dated October 1, 1992 and a certificate of title issued on July 3, 1998. It is also common ground that at the time of filing this suit the Defendant had commenced construction of a permanent building on the suit property.
22. The following are the issues legal and factual that I have identified for determination;When the Defendant took possession of the suit property?Whether the plaintiff is fraudulent?Whether the absence of a written sale agreement invalidated an agreement if any between the plaintiff and the defendant in respect of the suit property?Whether the Plaintiff is holding the suit property in trust for the Defendant and is estopped by its conduct from denying that it sold the suit property to the Defendant?Whether the Defendant has acquired ownership of the suit property by way of adverse possession?Whether the Defendant should vacate and deliver vacant possession of the suit property? Whether the plaintiff is entitled to be paid mesne profits.Whether the Defendant has proved that he is entitled to special damages.

When The Defendant Took Possession Of The Suit Property

23. It is not in dispute that at the point this suit was filed, the defendant was in possession of the property hence the prayer that he vacates and delivers vacant possession of the suit property. The date he



took possession was seriously disputed. The Plaintiff contends that the Defendant entered the suit property in the year 2014 and thereafter filed Kajiado case no 211 of 2014 which was later dismissed for want of jurisdiction. On the other hand, the Defendant insists that he took possession of the suit property in 1997 and constructed temporary structures. It was his evidence that he had enjoyed peaceful uninterrupted possession until he started construction of the permanent building. I have considered the evidence that was given by both parties on this aspect and the submissions filed by both counsel on the issue. I am satisfied that the defendant took possession of the property in 1997 for the following reasons; The Defendant has been paying land rates since 1998 an issue which although it is not proof of possession corroborates the Defendants claim that he was in possession. The Plaintiffs witness upon cross examination said... “ the time he had put a temporary structure is when there was inquiry on our lands “ This is a clear indication that there were structures the Defendant had on the property. The site visit that was carried out by the Deputy Registrar on 7th December, 2018 confirmed not only the plot location but also that there were structures on the land which were occupied by tenants. The plaintiffs account that the Defendant suddenly appeared in 2014 and started construction leaves many unanswered questions. Did the Plaintiffs see him come in and why was he allowed to start construction in land in which he had no interest? Considering the foregoing I find that the account given by the Defendant is the probable one and do find the defendant was in possession from 1998. He started facing resistance when he tried to put up a permanent building and decided to file a case at Kajiado Law Court.

Whether The Absence Of A Written Sale Agreement Invalidated An Agreement If Any Between The Plaintiff And The Defendant In Respect Of The Suit Property?

24. It is not in dispute that the plaintiff did receive an allotment letter in respect of the property LR 23124 out of which the suit property was hived. The plaintiffs case is that there was no valid sale agreement as the agreement was not in writing and further that the plaintiff's procedures for sale of land was not followed hence no valid title could be passed to the Defendant. The plaintiffs also contend that no consent was sought for transfer of the suit property. It is common ground that there was no agreement in writing in respect of the suit property. The Defendant states that he visited the offices of the Plaintiff such as they were then and agreed with the officials who were then in office that he was to purchase a plot for Kshs 350,000. He stated that he was informed by the officials that he would secure a plot upon payment of half of the sale price which was Kshs 175,000. He produced a bankers cheque which he used to make this initial deposit and also narrated how he paid the balance of the purchase price.
25. It is submitted that this agreement if any existed should have been in writing. Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on June 1, 2003. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003,
 - (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it; Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-
 - (1) Has in part performance of the contract taken possession of the property or any part thereof; or



- (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.
26. The agreement between the parties herein took place on October 6, 1997 when the Defendant made the first payment. At this time the law had not been amended. As such the proviso to section 3(3) of the Law of Contract, reproduced above as it then was comes into effect. The question then is whether in the circumstances of this case the agreement amounted to a valid contract of sale for the suit property.
27. The Defendant alleges that he paid the full purchase price by way of two bankers for Kshs 175,000 and Kshs 20,000 and three cash payments of Kshs 80,000, Kshs 70,000 and Ksh 5,000. It is his evidence that he took possession of the suit property upon paying the purchase price. He paid the full amount of the purchase price. While the Plaintiff took issue with the receipts that the Defendant issued they did not produce bank statements to counter the bankers cheques paid by the Defendant into the plaintiff's bank accounts. They also admitted that the staff who the Defendant dealt with were the officials of the Plaintiff. The Defendant also produced a letter dated January 15, 1999 written by the officials as they then were addressed to the Commissioner of Lands seeking consent to transfer the plot number LR 23124/25. This letter followed an approval for sub division given by the Department of lands on December 14, 1998.
28. The plaintiff challenged the various documents that were produced by the Defendant. I note that the plaintiffs witness admitted that he only came into office in 2004. No valid documents in use in 1997 were produced to distinguish the documents produced by the plaintiff. The plaintiff did categorically state that any sale by the officials to the Defendant was illegal as proper procedure was not followed. They then produced minutes to demonstrate the procedure that should be followed. I note that the minutes and documents that were attached in the bundle of documents were for the years 2009, 2011 and 2013 which was well after the period the suit property herein is alleged to have been acquired. Furthermore, the suit property does not feature in the audit report which singled out instances when it was established land was irregularly disposed. This report corroborates the Defendants case that the plots were being sold at the time for Kshs 350,000. Having considered the totality of the evidence I find that the documents produced by the Defendant were valid documents given to him by the officials of the Plaintiff. The documents included the receipts issued for the various payments received and also the letter requesting sub division.
29. In view of the foregoing and given my findings above that the plaintiff took possession of the suit property and put up temporary structures, I find that there was a valid sale agreement between the plaintiffs officials who were then in office and the Defendant who paid the agreed purchase price of Kshs 350,000 and took possession of the property which has been in his possession for the last 25 years.
30. Counsel for the plaintiff at page 20 of the submissions in response did enumerate the ingredients which support proprietary estoppel as an equitable remedy as follows; Verbal agreement (which I have found existed). A certain interest or expectation created or encouraged by the landlord (The Defendant had every expectation that the suit property was his given the actions of the Plaintiff and its officials). Possession taken with consent of Landlord (the Defendant has been in possession since 1998).
31. It is unconscionable for the plaintiffs to have accepted the Defendants money through their agents who it has not been established acted without mandate of the plaintiffs rules at the time, watched while the Defendant occupied the land with the temporary structures from which he was collecting rent only to decide after more than 10 years that he did not validly purchase the property.



32. In the end, I find that the timeless words of Lord Denning reiterated by Justice A. B Shah in the case of *Titus Muiruri Doge v Kenya Cannery Ltd* (1998) eKLR offer sound guidance. I quote:

“it is a principle of justice and equity. It comes to this: when a man by his words or conduct, has led another to believe that he may safely act on the faith of them – and the other does act on them – he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so”.

33. I therefore find that by its conduct the Plaintiff is estopped from denying that it sold the suit property to the Defendant. The plaintiff as the registered owner was holding the title in trust for the Defendant.

34. Having found that there was a trust in favour of the Defendant the claim for adverse possession does not lie. On the Defendants claim for special damages I agree with the plaintiff that by the time the construction commenced the approval for construction had not been given hence the Defendant should not be compensated. Accordingly, this prayer fails.

35. In the final result, the plaintiff suit has not been proved. The Defendant has proved the counterclaim on a balance of probabilities. Judgement on the counter claim is entered for the Defendant in the following terms;

- a. A declaration that the Plaintiff holds LR 23124/25 upon trust for the Defendant following purchase of the same.
- b. An order that the plaintiff do transfer to the Defendant forthwith the said LR23124/25.
- c. A permanent injunction restraining the Plaintiff by itself, its servants or agents from entering the suit property.
- d. The Defendant is to have costs of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF JULY 2023.

JUDY OMANGE

JUDGE

