



Gacheru & 2 others v Patita & 2 others (Administrators of the Estate of Jonathan Patita Katua (Deceased)); Magana (Interested Party) (Environment & Land Case 16 of 2021) [2023] KEELC 20632 (KLR) (9 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20632 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 16 OF 2021
MN GICHERU, J
OCTOBER 9, 2023**

BETWEEN

**MARTIN MWANGI GACHERU 1ST PLAINTIFF
JAMES GACHOKA KABERERE 2ND PLAINTIFF
JAMES MWANGI GACHERU 3RD PLAINTIFF**

AND

**OSCAR LEMAYIAN PATITA 1ST DEFENDANT
MARVIN LENANA PATITA 2ND DEFENDANT
CATHERINE MARESO PATITA 3RD DEFENDANT
ADMINISTRATORS OF THE ESTATE OF JONATHAN PATITA KATUA
(DECEASED)**

AND

JAMES MAGANA INTERESTED PARTY

JUDGMENT

1. The plaintiff² claim against the defendants is as follows.
 - a. A declaration that the defendants hold a portion of 20 acres in the title No. Kajiado/Kitengela/29515 in trust for the plaintiff.
 - b. An order for specific performance compelling the Defendant to excise three portions of ten (10) acres, five (5) acres and five (5) acres from the original title no. Kajiado/Kitengela/29515 (suit land) and hand over to the plaintiff all documents as are or would be necessary to transfer



the portions excised from the suit land into the plaintiff names and/or into the names of the plaintiff nominees as follows; James Mwangi Gacheru, James Gachoka Kaberere and Martin Mwangi Gacheru respectively.

- c. In the alternative, a refund of the full purchase price as follows;
 - i. Kshs. 3,500,000/- to James Gachoka Kaberere and Martin Mwangi Gacheru and
 - ii. Kshs. 8,000,000/- to James Mwangi Gacheru.
 - iii. General damages for breach of contract.
 - iv. Costs of this suit.
 - v. Interest on (c) above.
2. The plaintiff case is as follows. On 17/12/2009 they entered into an agreement with Jonathan Patita Katua, now deceased for purchase of ten (10) acres to be excised from Kajiado/Kitengela/29515, the suit land. The purchase price was Kshs. 3, 500,000/- which was at the rate of Kshs. 350,000/- per acre. The agreement was reduced into writing. It stipulated that Kshs. 1 million would be paid on the date of the agreement and the balance within 14 days of the registration of the plaintiff as the owners of their ten (10) acres. It was the responsibility of the seller to obtain the necessary consents from the land control board and to execute the land transfer forms in favour of the plaintiff. The plaintiff were to take possession of the land on payment of the balance of the purchase price.
3. The first plainliff and the late Jonathan entered into a second agreement for an additional ten (10) acres to be excised from the same suit land. The total purchase price would be Kshs. 8 million at Kshs. 800,000/- per acre. The second transaction was to benefit the third Defendant who was to be the registered owner of ten acres. The beneficiaries of the first transaction would be the first and second defendants. Each one of them would be registered as owner of five acres. In total therefore, the plaintiff were buying 20 acres of land from the late Jonathan at a total consideration of Kshs. 11,500,000/-. The plaintiff paid the full purchase price. After this, the late Jonathan took the first plainliff to the Land Registry where the Land Registrar confirmed that Jonathan owned 51.75 hectares. An official search dated 21/1/2010 confirmed this as did a copy of the green card.

The deceased went on to subdivide the suit parcel to Kajiado/Kitengela/31794-31798 comprising 2.91, 4.05, 2.02, 2.02 and 11.28 hectares respectively. He said he had also obtained the consent of the Land Control Board to subdivide and then transfer. He gave the plaintiff title deed for their parcels namely 31795, 31796 and 31797 respectively. The plaintiff occupied their respective parcels and enjoyed possession. They fenced the land, planted over 3000 trees and other crops. They also kept livestock.
4. Suddenly on 16/6/2011, some other people invaded the plainliff's land claiming to be the legitimate owners. Three days later, the plaintiff were evicted from the land. Their property worth Kshs. 500,000/- was destroyed. Investigations revealed that the Defendant had committed fraud. He had not obtained genuine transfer and other necessary documents. He acted fraudulently hence this suit.
5. In support of their case, the plaintiff filed the following evidence.
 - i. Witness statement by first plainliff dated 31/1/2016.
 - ii. Copy of title deed for the suit land.
 - iii. Copy of agreement for sale dated 17/12/2009.



- iv. Copies of payment receipts and acknowledgements showing that between 17-12-2009 and 23/10/2010, the plaintiff paid the deceased a total of Kshs. 6, 110,000/-.
 - v. Copy of certificate of official search for the suit land dated 21/1/2010.
 - vi. Copy of fake title deed showing that the deceased's land measures 51.75 hectares.
 - vii. Copy of mutation form no. 342213 dated 21/1/2010.
 - viii. Three copies of fake title deeds for land parcels numbers 31796 and 31797.
 - ix. Copy of charge sheet dated 22/9/2011.
 - x. Copy of demand letter dated 16/11/2015.
6. The defendants in a written statement of defence dated 23/6/2021 generally deny the plaintiff's case. Specifically they aver that the plaintiff did not pay the entire purchase price.
- Secondly, they aver that the sale agreement did not comply with the law because it was not reduced into writing.
- Thirdly, there was no consent of the Land Control Board and finally the plaintiff are not in possession of the suit property.
- For the above reasons, they called for the dismissal of the plaintiff's case.
7. In support of their case, the defendants filed two witness statements by the deceased Jonathan Patita Katua and Catherine Mereso Patita. In the statements the two witnesses say that they did not receive the purchase price as agreed. The amount received was only Kshs. 6, 250,000/-. They deny giving the plaintiff the fake title deed and conclude by saying that the plaintiff did not occupy the suit land or any part thereof.
8. James Magana Muigai joined the suit as an interested party. His case is that he bought a total of 4.5 acres from the deceased which was to be excised from the suit land. The purchases were between February and August 2011. He took possession immediately on purchase and at the time he joined the suit, the land that he bought had not yet been excised from the suit land. At the entry point into the suit, the interested party filed a copy of an agreement for sale of land between him and the Defendant dated 23/2/2011. He also filed five (5) pictures showing some buildings and sheep grazing in an open field.
9. At the trial on 7/12/2022, only the first plaintiff and the first Defendant testified. After taking oath, they generally adopted their evidence already filed. They were then cross-examined by the counsel for the opposite party.
10. Counsel for the parties filed written submissions on 21/3/2023 and March 6, 2023. The issues raised in the submissions are as follows.
- a. Whether the transaction between the parties was void for failure to procure land control board consent?
 - b. Whether the plaintiff paid the full purchase price to the deceased?
 - c. Whether the sale agreement dated 17/12/2009 is statutorily time barred?
 - d. Whether the agreement for the sale of additional 10 acres offends section 3 of the *Law of Contract Act*?
 - e. Whether the court can order specific performance?



f. Whether the prayers can be granted?

I find that the issues as identified will resolve the disputes between the parties. I have carefully considered the evidence adduced by all the parties including the witness statements, documents and oral evidence at the trial and I make the following findings.

11. On the first issue, I find that the transaction between the plaintiff and the defendants is void and want of the consent of the Land Control Board. section 6(1)(a) of the Land Control Act provides as follows:-

- “(1) Each of the following transactions that is to say –
- a. The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act”.

It is not in dispute that the necessary consent was never obtained in this case.

12. As to whether the plaintiff paid the full purchase price, I find that they were not able to prove this. The burden was on the plaintiff to prove this aspect. The receipts which they produced were not clear on the dates and the amounts. Even the plaint and the witness statement by the first plainliff do not tabulate the dates and the amounts. The blurred receipts that I saw together with the acknowledgements by the deceased show that a total of Kshs. 6, 110, 000/- was paid to the deceased. In their witness statements, the deceased and his daughter admit having received a total of Kshs. 6, 250,000/-. I find this to be the proved or admitted amount.

13. Coming to the third issue, I find that the sale agreement dated 17/12/2009 is time barred by dint of section 4 of the Limitation of Actions Act. The six years within which the action was alive lapsed on 17/12/2015 and this suit was filed on 15/4/2016 which is about four (4) months outside the time set by statute.

14. As to whether the agreement for the sale of the additional 10 acres offends section 3 of the Law of Limitations Act, I find that it does. It provides at subsection (3);

“No suit shall be brought upon a contract for the disposition of an interest in land unless –

- a. The contract upon which the suit is found –
 - i. Is in writing
 - ii. ...

The plainliff himself said that the second agreement for the extra 10 acres was verbal. It is null and void.

15. Regarding whether the court can order specific performances, I find that it cannot. Specific performance is an equitable remedy and it will only be granted when the plainliff can convince the court that damages are not adequate in the circumstances. The award will be given where it can be shown that the subject matter of the contract is rare or unique and it is the object rather than its value that the plainliff desires. See *Gathuthi Hotel v Fazal Ilabi* (1957) EA 17.

Again, before ordering for specific performance, the plaintiff must have approached the court with clean hands free from any blame. There must be no delay and no hardships should be occasioned to the



Defendant. In this case, the plaintiff are not blameless because they have not proved that they paid the entire purchase price. They brought the case after a long time and they defendants will suffer hardships because the value of the land has gone up.

From the above, it is quite clear that the plaintiff prayers cannot be allowed. However, just like the land has appreciated, the plaintiff money which the defendants have had for all those years should also appreciate. This is because it cannot buy the same land that it could have bought in the years 2009 and 2010.

In conclusion, I dismiss the plaintiff² suit and I order as follows:-

1. defendants to refund Kshs. 6, 250,000/- to the plaintiff with interest of 14% per annum from the date each installment was received by the deceased to the date of refund.
2. Costs of the suit to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 9TH DAY OF OCTOBER, 2023.

M.N. GICHERU

JUDGE

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