



**Leipoi v Kesaika (Suing as legal representatives of The Estate of the
Late Koinasei Ole Kitaika) (Environment and Land Appeal 19 of 2019)
[2023] KEELC 21328 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 19 OF 2019
LC KOMINGOI, J
NOVEMBER 2, 2023**

BETWEEN

KASEENCHA OLE LEIPOI APPELLANT

AND

**SEPEIKAAN KOIWASEI KESAIKA (SUING AS LEGAL REPRESENTATIVES OF
THE ESTATE OF THE LATE KOINASEI OLE KITAIKA) RESPONDENT**

*(Being an appeal against the Judgement of the Hon. S. Shitubi (Mrs.) CM
at the Chief Magistrates Court in ELC Case No. 109 of 2018, Sepeikaan
Koiwasei Kesaika (Suing as legal representative of the Estate of the late
Koinasei Ole Kitaika) vs Kaseencha Ole Leipoi delivered on 8th August 2019)*

JUDGMENT

1. By an Amended Memorandum of Appeal dated 6th March 2020, the Appellant dissatisfied with the Judgement of the Hon. S. Shitubi in Chief Magistrate's Court ELC Case No. 109 of 2018 dated 8th August 2019 appealed against it on grounds that:
 - i. The Hon. Magistrate erred in law and fact by failing to hold that the agreement dated 1995 and relied upon by the Plaintiff was null and void;
 - ii. The Hon. Magistrate erred in law and fact by failing to hold that the suit was time barred;
 - iii. The Hon. Magistrate erred in law and fact by holding that the respondent had paid the entire purchase price;
 - iv. The Hon. Magistrate erred in law and fact by holding that the Respondent had proved her case on a balance of probabilities.



- v. The Hon. Magistrate erred in law and fact by failing to consider that the wife of the Appellant had not consented to the sale.
 - vi. The Hon. Magistrate erred in law and fact by failing to consider that the Appellant's land was subjected to overriding interests that affected his family members who were in actual possession and occupation of the land.
 - vii. The Hon. Magistrate erred in law and fact by failing to consider that the subject matter had been sold to third parties hence specific performance was impossible.
 - viii. The Hon. Magistrate erred in law and fact by failing to honour the procedure laid down under the *Land Control Act* Chapter 302 of Laws of Kenya.
 - ix. The Hon. Magistrate erred in law and fact by ordering specific performance of the agreement whereas the Respondent had not been shown the land.
 - x. The Hon. Magistrate erred in law and fact by failing to consider that the Respondent and family never took possession or occupation of the claimed portion of land for well over 21 years until filing of the lower court case.
 - xi. The Hon. Magistrate erred in law and fact by failing to find that the suit was a non-starter and defective.
 - xii. The Hon. Magistrate erred in law and fact by failing to hold that he court lacked jurisdiction to extend the period within which to apply for consent from the Land Control Board.
 - xiii. The Hon. Magistrate did not have jurisdiction to order transfer of land to a deceased person in absence of letters of administration.
2. He sought that the appeal to be allowed and that the judgement dated 8th August 2019 together with the Decree dated 21st August 2019 be set aside.
 3. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

4. They are dated 15th February 2023. Counsel for the Appellant submitted that indeed the Appellant and Respondent entered into a sale agreement on 12th September 1995 and the suit property being agricultural land was subject to provisions of Section 6, 7, 8 and 22 of the *Land Control Act*. In that case the Land Control Board consent should have been obtained by 12th March 1996 and this not having been done, then the transaction was void. He put forward the case of; *Hirani Ngaithe Githire vs Wanjiku Munge* [1979] eKLR. Counsel went on to submit that the Respondent did not give sufficient reasons why she was seeking for extension of time nor did she give evidence to show that she had made efforts to apply for consent from the Land Control Board and that the trial court, being a lower court had no jurisdiction to grant extension of time to apply for consent from the Land Control Board.
5. On the issue of specific performance counsel submitted that this was only enforceable for valid contracts and the Defendants had testified that the entire purchase price was not paid adding that the Appellant also acknowledged that some payment was made in form of goats. Therefore, the agreement was not fully performed to warrant the order of specific performance citing *Hirani Ngaithe Githire* (supra) and *Reliable Electrical Engineering vs Mantrack Kenya Ltd* [2006] eKLR. Counsel also



submitted that the Respondent's had not suffered any loss or damage to warrant an order of specific performance because it was clear that they had not taken possession of the suit property from 1995 when the agreement was entered into.

6. Counsel submitted that the suit was statute barred because the cause of action arose in 1995 when the agreement was entered into and not in 2012 when the Titles were issued.

The Respondent's submissions

7. They are dated 26th June, 2023. On whether the suit was time barred under Section 4(1) (a) of *Limitation of Actions Act* counsel submitted that the cause of action did not arise on the date of the signing of the agreement but in 2010 when the Appellant was issued with the Title Deed because he refused to transfer the ten (10) acres agreed in the sale agreement to the Respondent. Counsel pointed out that in 1995 when the agreement was entered into, Sajiloni Group Ranch was in the process of subdividing and titling the land. Therefore, time started running in 2010 when one of the parties failed to meet their obligations and not in 1995 when the contract was executed citing *Diana Katumbi Kii vs Reuben Musyoki Muli* [2018] eKLR and *B. Mathayo Obonyo vs South Nyanza Sugar Co. Ltd* (2019) eKLR.
8. On the issue of Section 6(1), 7, 8 and 9 of the *Land Control Act* counsel submitted that failure to apply for consent within 6 months does not void a contract but the refusal by the Land Control Board to issue the consent. He also submitted that Section 8 of the *Land Control Act* gave parties a right to apply for extension of time in which the consent is sought as was held in *Joseph Mathenge Kamutu vs Joseph Wainaina Karanja & Another* (2015) eKLR. Counsel also submitted that at the time of the agreement the land was collectively owned by the Ranch and the group representatives were the ones who ought to seek consent to subdivide and transfer and not to individuals. Counsel also indicated that a suit had to be filed for the Appellant to be compelled to participate in the application of the Land Control Board consent because he had refused to transfer the land to the Respondent and had even subdivided the property into two portions hence the delay in applying for the said consent.
9. On the issue of the suit being in contravention of Section 3 of *Law of Contract Act*, counsel submitted that there was evidence there was a written agreement between the parties and therefore this provision was adhered. Further counsel submitted that the issue of spousal consent was not a requirement in 1995 when the sale agreement was entered into and only came to play in 2012 vide Section 28 of the *Land Registration Act* which was later removed as an overriding interest by the Land Registration (Amendment) Act of 2016. As such the agreement predated the statutes and was not an overriding interest as was held in *Peninah Wambui Mugo vs NMK and MMN*.
10. The Respondent thus prayed for dismissal of the Appeal.

Analysis and Determination

11. I have considered the Record of Appeal, the rival submissions and the authorities cited. The issues for determination are:
 - i. Whether the sale agreement dated 12th September 1995 was valid or null.
 - ii. Whether the suit filed by the Respondent was time barred.
 - iii. Whether the Respondent paid the whole purchase price and proved her case on a balance of probability.



- iv. Whether spousal consent was prerequisite in land transactions when the sale agreement was entered to in 1995.
 - v. Whether the lower court had jurisdiction to extend the period for application for consent at the Land Control Board.
 - vi. Who should bear costs of this Appeal?
12. This being a first appeal, it is imperative that the Court meticulously re-examines the trial court's evidence, subject it to rigorous scrutiny and independently arrive at its own conclusion, as asserted by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR:

This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

13. Similarly in *Selle Vs. Associated Motor Boat Company* (1968) EA 123 the Court of Appeal stated as follows;

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put, they are, that this court must consider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact, if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

14. Guided by the above and many other authorities on first appeal, this court can and shall reconsider evidence adduced at the lower court and draw its own conclusions. It is not in dispute that a sale agreement was entered between the late Koinasei Ole Kitaika (purchaser) and Kaseencha Ole Leipoi on 12th September 1995. However, from the Appellant’s grounds for Appeal against the Lower Court’s decision, it can be summed up that what is in contention is whether the said agreement was valid, to what extent it was valid and what redress the Respondent has (if any).
15. The Appellant claims that the Learned Trial Magistrate erred in law and fact by not holding that the agreement dated 1995 was null and void and that the suit was time barred. Counsel for the Appellant submitted that the suit was time barred because the cause of action arose in 1995 when the agreement was entered into but the Respondent slept on his rights for twenty three (23) years. Counsel for the Respondent contested this position submitting that time started running when the Appellant failed to meet his obligations in 2010 after issuance of Title and not when the contract was executed in 1995.
16. The Respondent’s (plaintiff at the lower court) claim at the lower court was premised on the grounds that: “...On or about the year 2010, the Group Ranch issued individual Title Deeds to its members and the Defendant was issued with Title No. Kajiado/Dalalekutuk/2952 measuring approximately 14.72acres. In breach of the said agreement, the Defendant has not completed the said sale and he has wrongfully failed and refused and continues to neglect and refuse to complete the said sale or to



take any steps to convey the said parcel of land to the Deceased's Estate. Further, the Defendant has procured subdivision of Parcel No. Kajiado/Dalalekutuk/2952 into Kajiado/Dalalekutuk/3891 and Kajiado/Dalalekutuk/3892 sometimes in 2011 in a deliberate bid to frustrate the Deceased's estate claim to have 10 acres of land registered in their name..." The Respondent thus claimed for specific performance of the said agreement by executing the transfer of ten (10) acres.

17. The sale agreement dated 12th September 1995 has a clause Special Condition 4(a) which stipulates: The Title Deed in respect of the 10acres of land shall be issued in the name of the purchaser and not the vendor. From the foregoing, it appears that the dispute arose when the Title Deed was issued in 2010 in the Appellant's name and he refused to transfer it to the Respondent's name as agreed in the 1995 sale agreement. Page 4 of the impugned Judgement dated 8th August 2019 on record reads in part:

"... From evidence it was a term of the agreement that upon being issued title deed to his share of land from Sajiloni Group Ranch the Defendant was to excise from his parcel 10acres to be registered directly in the deceased's name.

Time therefore started running from the time the Defendant instead registered the two parcels of the land partitioned from his share into his name ignoring the agreement.

From copies of the title deed and mutation forms availed the registration was on 29/3/2011. This suit was filed in 2015 just four years later and therefore within the limitation period. The terms of the agreement also took effect from the date that the land was hived out of the larger Sajiloni Group Ranch and registered into the Defendant's names. This was in 2011..."

18. I find that the Learned Trial Magistrate did not err in holding that the suit which was filed in 2015 was not statute barred by Section 4(1) of the Limitation of Actions Act which provides:

"4.

(1) the following actions may not be brought after the end of six years from the date on which the cause of action accrued-

(a) actions founded on contract

..."

19. The Appellant also appealed against the judgement on grounds that the Learned Trial Magistrate erred in holding that the Respondent had paid the entire purchase price and had proved her case on a balance of probability. Counsel for the Appellant submitted that receipt of Kshs. 17,000 was not acknowledged. And that the Appellant only received some payment in form of goats therefore it was erroneous for the lower court to hold that the Respondent had proved her case.
20. In the Record of Appeal, this court notes that the Respondent who testified as PW1 at the lower court stated "...The Defendant has never come to ask for the balance of the purchase price as everything was cleared. He has never terminated the agreement. He has never refunded the purchase price given..." The chairman of the said Sajiloni Group Ranch testified as PW2 and stated, "... I was present when the land agreement herein was signed. The Defendant was selling the land at Kshs. 6,500 per acre. The Plaintiff was buying 10 acres... The Defendant has never complained to me that he did not receive the whole amount..." The Learned Trial Magistrate held "... The Defendant never complained that the purchase price had not been paid fully then..."



21. Section 109 of the *Evidence Act* provides:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

22. I am persuaded by the Court of Appeal in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2004] eKLR it was held:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80, which provides:

107. whoever desires any court to give judgment as to any legal right or
(1) liability dependent on the existence of facts which he asserts must prove that those facts exist.”

There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act, thus:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

The two sections carry forward the often repeated evidential adage: “he who asserts must prove”.

23. Having perused the Record of Appeal which includes proceedings and evidence adduced as summarised above, this court finds that there is no iota of evidence adduced by the Appellant regarding non-payment of the purchase price. He affirmed and acknowledged that the purchase price was paid as agreed. It is also not clear why counsel raised the issue of payment through goats which was clearly a mode of agreement as per Clause 2(ii) of the Sale Agreement: Kshs. 30,000/- represented by 12 He goats delivered to the vendor by purchaser @Kshs. 2,500/- per He-goat. And which the Appellant acknowledged to having duly received. The Appellant in his testimony as DW1 at the lower court testified and said, “... He paid 12 goats... We had agreed that he pays me the goats...” On cross examination he affirmed that “... I was given goats. I was paid as per our agreement...”

24. I agree and cannot interfere with the Lower Court’s finding on the issue that the purchase price was paid as agreed and that the Respondent proved her case on the required threshold of a balance of probability.

25. The other ground for Appeal was that the Learned Trial Magistrate erred in law and in fact by failing to consider that the Appellant’s wife did not consent to the sale. Page 4 of the judgement reads: “.....Failure by the Defendant to consult his wife cannot also be an issue here to deny the Estate their share of the land. There was no requirement for spousal consent the time the parties entered into agreement in 1995...” Counsel for Appellant contested this decision but counsel for the Respondent submitted that



in 1995 there was no requirement for spousal consent which came into effect in 2012. The general principle of law is, it does not operate retrospectively. This was also pronounced in Supreme Court of Kenya in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR:

“(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication...”

26. In this regard, the court upholds the lower court’s determination that spousal consent was not a requirement for sale of land at the time when the sale agreement was executed.

27. The Appellant also faulted the Learned Trial Magistrate for ordering for specific performance of the agreement on grounds that the Respondent had never taken possession of the property and they had subsequently subdivided and transferred it to third parties which meant there was nothing to perform. Counsel also submitted that specific performance was only enforceable for valid contracts and the Defendants had testified that the entire purchase price was not paid. The court has already pronounced itself on validity of the contract by upholding the lower court’s decision that the purchase price was paid as agreed in the sale agreement. Therefore did the lower court err in ordering specific performance of the contract? The Court of Appeal in *Hudani v Mukunya & 5 others* [2022] KECA 93 (KLR) held:

“... With regard to the order of specific performance, it is indeed not in dispute that the appellant had sought inter alia an order of specific performance against the 1st respondent directing her to specifically perform her obligations under the sale agreement dated 17th July 2006. It is trite law that an order for specific performance is a discretionary remedy which discretion is exercised judiciously depending on the circumstances of each case...”

28. According to Halsbury’s Laws of England 4th Edition Paragraph 487 Vol.44;

“A Plaintiff seeking Specific Performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implications and which ought to have been performed at the date of the writ in the action. However this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal Performance or is in default in some non-essential or unimportant term although in such cases it may grant compensation.”

In the instant scenario, the Appellant has never raised the issue of non-payment of the purchase price by the Respondent’s husband.

29. Given the above authorities, the granting of an order for specific performance is a remedy that hinges on the unique circumstances of each case, subject to the court’s discretion. In this particular instance, this court discerns no compelling grounds to challenge or overturn the lower court’s decision, thereby affirming it as justly granted.

30. The Appellant also questioned the lower court’s jurisdiction to extend the period within which to apply for consent from the Land Control Board. The lower court order reads:

“(a) the period within which to apply for the consent of the Land Control Board for that sale and transfer be extended for six (6) months from the date hereof.”



31. Counsel for the Respondent submitted and acknowledged their error in urging the lower court to extend the time within which consent could be obtained from the Land Control Board. Section 8(1) of the Land Control Board provides:

“ 8.

- (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.”

32. The Court of Appeal *Aliaza v Saul* [2022] KECA 583 (KLR) also affirmed this by holding:

“ An application for consent is made under section 8 (1), which requires that the application for consent should be made in the prescribed form within six months of the making of the agreement. The proviso thereto gives the High Court power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit.”

33. While I agree that the lower court had no jurisdiction to give the extension order, this court wishes to address the issue of the extension of time as follows.

34. It is on record that at the time of making the agreement, the land was un-subdivided and the issue of consent was to be sought by the Group Ranch representatives during its subdivision. Once this was done, the Title was to be in the late Koinasei Ole Kitaika’s name which is not what happened. In 2010 when the Titles were issued, the Title was issued in the Appellant’s name. The Respondent thus sought redress from the lower court by having the property transferred in their name; which was so ordered in the impugned judgement. This court while in agreement that the extension of the time within which to seek consent was outside the lower court’s jurisdiction, finds that extension of time to apply for the consent is not necessary at this juncture. This is because there was no delay in obtaining the same. The consent to transfer the land from the Appellant to the late Koinasei Ole Kitaika was already obtained by the Group Ranch upon subdivision and the Title was to be in the Respondent’s name. However, the Respondent had to seek court’s intervention for the transfer to be effected to her name due to the Appellant’s non-compliance with his contractual obligation as per the sale agreement dated 12th September 1995. Therefore, the time period for applying for consent from the Land Control Board would have started to run after issuance of the Court’s decree and herein upon the hearing and determination of this Appeal.

35. This court therefore sets aside the said order extending the period within which to apply for consent from the Land Control Board but categorically enunciates that the setting aside is absolutely inconsequential on the other orders issued by the lower court.



36. Furthermore in, Willy Kimutai Kitilit Vs. Michael Kibet (2018) eKLR the Court of Appeal stated thus;

“The *Land Control Act* does not unlike Section 3(3) of the *Law of Contract Act* and Section 38(2) of the *Land Act* save the operation of the doctrines of Constitutive trust on proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where parties in breach of the *Land Control Act* have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive trust and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board, will largely depend on the consent circumstances of each particular case.”

37. The final issue was that the lower court granted orders to a deceased person in absence of letters of administration. This was not submitted on. However, from the Record of Appeal there is copy of the Grant of Letters of Administration issued on 11th July 2013 vide court order in High Court at Nairobi Probate and Administration Cause No. 1381 of 2013. Therefore, this claim is unmerited and is hereby dismissed.

38. In conclusion, I hereby set aside the order extending the period within which to apply for consent from the Land Control Board.

However all the other Orders in the Lower Court’s Judgement dated 8th August 2019 are hereby upheld.

The Respondents shall have costs of this Appeal as well as the costs in the Lower Court

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 2ND DAY OF NOVEMBER, 2023.

L. KOMINGOI

.....

JUDGE.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

