



REPUBLIC OF KENYA



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**Wairiuko v Mwangi & 10 others (Environment & Land Case
540 of 2017) [2022] KEELC 2279 (KLR) (10 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2279 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 540 OF 2017**

BM EBOSO, J

MAY 10, 2022

BETWEEN

RICHARD NDIRANGU WAIRIUKO PLAINTIFF

AND

JOYCE WAMBUI MWANGI 1ST DEFENDANT

LAWRENCE WAMBUI NJOROGE 2ND DEFENDANT

JOSEPH KANGETHE CHEGE 3RD DEFENDANT

PRIVITECH ENTERPRISES 4TH DEFENDANT

GEORGE MWANGI MACHARIA 5TH DEFENDANT

FRANCIS WANJOHI MWANGI 6TH DEFENDANT

LILIAN NJOKI MWANGI 7TH DEFENDANT

CHARLES MUTHEE MWANGI 8TH DEFENDANT

JAMES KUNGU KIMANI 9TH DEFENDANT

GRACE WANJIKU GIKONYO 10TH DEFENDANT

RANCHING CO LTD 11TH DEFENDANT

JUDGMENT

1. The plaintiff, Richard Ndirangu Wairiuko, initiated this suit at the Environment and Land Court in Nairobi on 29/3/2016 through a plaint dated 29/3/2016. The suit was subsequently transferred to Thika Environment and Land Court in May 2017. On 15/7/2019, the plaintiff filed an amended plaint dated 25/3/2019. Trial begun before Gacheru J on 21/6/2020. In September 2021, Gacheru J



was transferred to Muranga Environment and Land Court. Consequently, subsequent hearing of the case proceeded before me. The case now falls for determination.

2. One of the key issues to be determined in the suit is whether the plaintiff is entitled to the reliefs sought in the plaint. The said reliefs are as follows:
 - a. An order that the Land Registrar Thika do cancel the registration of LR Ruiru/Kiu/Block 2/3706 and Ruiru/Kiu Block 2/16440, Ruiru/Kiu Block 2/16441, Ruiru/Kiu Block 2/16442, Ruiru/Kiu Block 2/16443, Ruiru/Kiu Block 2/16444, Ruiru/Kiu Block 2/16445, Ruiru/Kiu Block 2/16446, Ruiru/Kiu Block 2/16447, Ruiru/Kiu Block 2/16448, Ruiru/Kiu Block 2/16449 in the names of 1st and 2nd defendants and do register and issue a certificate of title deed to the plaintiff herein. Alternatively, and without prejudice the 1st, 2nd and 11th defendants to pay the plaintiff the current value of the suit land.
 - b. Damages of breach of contract costs and/or expenses incurred as a result of the sale agreement and of the Criminal Case No. 2210 of 2012.
 - c. Costs of this suit.
3. The original title, Ruiru/Kiu Block 2/3706, was subdivided and disposed during the pendency of this suit. The subdivision and disposals are what triggered the amendments made to the plaint in March 2019. It is not clear why the plaintiff elected not to register the status quo order issued on 13/6/2017 against the title to prevent any dealings in the land.

Plaintiff's Case

4. The plaintiff's case is contained in the amended plaint dated 25/3/2019; the witness statement dated 29/3/2016; his oral evidence tendered in court on 21/6/2020; the evidence of PW2; the documents produced during trial; and the written submissions filed through his advocates, M/s Wangari & Co Advocates, dated 1/11/2021. In summary, his case is that, through a sale agreement dated 17/7/2007, the 1st defendant sold to him a parcel of land described in the sale agreement as Ruiru/Kiu Block 2 (3706) together with Share Certificate Number 4453 and Ballot No 139 A relating to the land, measuring 1¼ acres. The agreed purchase price was Kshs 330,000. She duly paid the said purchase price to the 1st defendant in full. They subsequently went to Githunguri Constituency Ranching Company offices where they caused the internal records of the said company to be amended to reflect him as the new proprietor of the land. Upon paying the requisite fees, the company issued him with Share Certificate Number 747 together with a clearance certificate. When she subsequently erected a temporary structure on the suit property in March 2012, the structure was demolished by the 1st defendant. When he raised the matter with the 1st defendant, the 1st defendant disowned him and denied selling to him the suit property.
5. The plaintiff contends that as a result of the 1st defendant's conduct, he lodged a complaint with the Criminal Investigations Department. Criminal Investigations were carried out and the 1st defendant, together with Francis Wanjohi Mwangi, were arraigned in the Chief Magistrate's Court. The 1st defendant was subsequently convicted of the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. Particulars of the offence were that on 17/7/2007, at Ruiru Township in Ruiru District within Kiambu County, jointly with others, she obtained a sum of Kshs 330,000 from the plaintiff by falsely pretending that she was in a position of selling to him land parcel number Ruiru/Kiu Block 2 (3706).



6. The plaintiff contends that registration of the defendants as proprietors of the suit land was procured through fraud. He adds that subdivision of the land and transfer of the subdivisions to various defendants by the 1st defendant was effected during the pendency of this suit.
7. Counsel for the plaintiff submitted that the 1st defendant had no title to subdivide and transfer to the 2nd to 9th defendants because she had already sold the land to the plaintiff. Counsel urged the court to cancel the titles and order that the original land be registered in the name of the plaintiff. Counsel added that, in the alternative, the defendants should be ordered to pay the plaintiff the current value of the suit land together with damages for breach of contract and costs of the suit.

1st Defendant's Case

8. The case of the 1st defendant is contained in her statement of defence dated 17/5/2016; her witness statement dated 12/5/2016; the evidence of her attorney, Francis Wanjohi Mwangi (6th Defendant); and the written submissions filed by her advocates, dated 30/11/2021. Her case is that the agreement dated 17/7/2007 was marred with material non-disclosure and was tainted with fraud, hence it is unenforceable. She adds that the said agreement was not supposed to be an absolute sale but a licence to the plaintiff to use the land for a limited period, which period lapsed without the plaintiff's possession or use of the land. She adds that the criminal case instigated by the plaintiff only confirms that she [1st defendant] received money from the plaintiff, a fact she contends she has never contested. She states in her witness statement that the said monies were paid as a licence fee. It is her case that because there was no consent of the land control board, the plaintiff is not entitled to any of the reliefs sought in the plaint.
9. In her written submissions filed through the firm of Kaumbi & Co Advocates, she contends that the plaintiff has failed to prove fraud as itemized in the plaint because her title was registered and issued way back in 1992. She adds that the sale contract relied upon by the plaintiff was invalidated by the lack of consent of the land control board.

Case of the 2nd Defendant

10. The 2nd defendant filed a statement of defence dated 17/5/2016. He testified as DW2. His case is that the 1st defendant sold to her two subdivisions out of the suit property. At the time of sale, the 1st defendant was the registered proprietor of the two parcels. He paid to the 1st defendant the full purchase price and the two subdivisions were transferred to him. He is the registered proprietor of the two subdivisions. He was not privy to the alleged fraud. He contends that the plaintiff has not demonstrated a cause of action against him and that he is an innocent and bonafide purchaser for value.

Case of the 6th Defendant

11. Although the 6th defendant (Francis Wanjohi Mwangi) testified as DW2, the court record does not bear any statement of defence or witness statement filed by him. He testified as an attorney of the 1st defendant. He adopted the witness statement of the 1st defendant.

Case of the 9th, 10th and 11th Defendants

12. Through written submissions dated 8/11/2021, Mr Kanyi Kiruchi of Kanyi Kiruchi & Co advocates submitted that, through a typographical error, they had made filings indicating that they represented the 8th, 9th and 10th defendants yet the correct position was that they represented the 9th, 10th and 11th defendants. The above clarification was not challenged.



13. The 9th, 10th and 11th defendants filed a joint statement of defence dated 16/12/2019; a witness statement by James Kungu Kimani dated 16/12/2019; witness statement by Grace Wanjiku Gikonyo dated 16/12/2019; and written submissions dated 8/11/2021. Mr. James Kungu Kimani testified as DW3 while Grace Wanjiku Gikonyo testified as DW4. In summary, their case is that they were not privy to the fraud alluded to by the plaintiff. They add that James Kungu Kimani and Grace Wanjiku Gikonyo are bonafide purchaser for value and registered proprietors of the subdivisions which they purchased from the 1st defendant. They add that the plaintiff's suit is statute-barred under the *Limitation of Actions Act* because the sale agreement is dated 17/7/2007 and this suit was initiated on 29/3/2016.

Analysis and Determination

14. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issues falling for determination in this suit. Parties did not agree on a common set of issues to be determined by the court. Having considered the parties' respective pleadings, evidence and submissions, the following are the key issues which fall for determination in this suit: (i) Whether the plaintiff's suit is statute-barred under the law relating to limitation of actions; (ii) Whether the defendants were privy to the fraud complained of by the plaintiff; (iii) Whether the plaintiff is entitled to the reliefs sought, and if so, against which party; and (iv) What order should be made in relation to costs of this suit. I will make brief sequential pronouncements on the four issues in the above order.
15. The first issue is whether the plaintiff's suit is statute-barred under the relevant law of limitation. I have looked at the amended plaint. The first prayer in the plaint is a plea for an order cancelling registration of parcel number Ruiru/Kiu Block 2/3706 together with its various subdivisions in the names of the defendant and an order directing the Land Registrar to register the land in the name of the plaintiff and issue the plaintiff with a title. The second prayer is a plea for damages for breach of contract and costs/expenses incurred as a result of the sale agreement and Criminal Case Number 2210 of 2012. The third plea is a prayer for costs of the suit.
16. What emerges from my reading of the amended plaint is that the plaintiff seeks to recover land parcel number Ruiru/Kiu Block 2/3706 which the 1st defendant sold to him in 2007 and for which he contends that he paid purchase price in full in 2007. He contends that he acquired the land in 2007. When he erected a structure on the land in March 2012, the structure was demolished and the 1st defendant disowned the sale, despite having received purchase price in full.
17. Under Section 7 of the *Limitation of Actions Act*, the limitation period for a claim for recovery of land is 12 years. Under Section 4 of the same Act, the limitation period for a claim founded on contract is 6 years. From March 2012 when the cause of action in this suit accrued to March 2016 when the present suit was initiated is a period of 4 years. It cannot, in the circumstances, be said that the plaintiff's suit was statute-barred at the time it was initiated. Consequently, my finding on the first issue is that, based on the nature of the claim before court, the plaintiff's suit is not statute-barred under the relevant law on limitation of actions.
18. The second issue is whether the defendants were privy to the fraud complained of by the plaintiff. The plaintiff tendered evidence to the effect that the 1st defendant was charged and convicted of the offence of obtaining money through false pretences. Proceedings of the trial court indicate that DW2 confirmed that indeed the 1st defendant received the sum of Kshs 330,000. The plaintiff tendered a sale agreement dated 17/7/2007 indicating that the basis upon which the 1st defendant received the sum of Kshs 330,000 was a sale contract relating to the suit property. The 1st defendant admits receiving the



money but contends that it was a licence fee for hire of the land for a certain period. There is, however, no evidence to support the contention that there was a licence agreement between the two parties. The 1st defendant neither conveyed the land on the basis of the sale agreement nor released it to the plaintiff on account of the alleged licence agreement. She instead kept the money and proceeded to subdivide and dispose the land. All the above evidence points to acts of fraud on part of the 1st defendant. The court is, in the circumstances, satisfied that the plaintiff has proved the allegation of fraud on part of the 1st defendant.

19. There is, however, nothing brought before this court to suggest that the other defendants were privy to the fraud perpetrated by the 1st defendant. Most of the defendants are innocent purchasers who purchased land from the 1st defendant on the basis of registered titles that existed in the Land Registry in the name of the 1st defendant. The plaintiff had the duty of procuring registration of the status quo order that existed, to prevent dealings in the land. He did not do that. In the circumstances, the court has no proper basis upon which to find acts of fraud on part of the other defendants. Consequently, the finding of the court on the second issue is that there was fraud on part of the 1st defendant. There is, however, no evidence of fraud on part of the other defendants.
20. The third issue is whether the plaintiff is entitled to the reliefs sought in the plaint. The first relief is a plea for an order cancelling registration of the defendants as proprietor(s) of the original parcel and the subsequent subdivisions and registration of the plaintiff as proprietor of the land. Evidence presented to the court indicates that the sale was subject to the provisions of the *Land Control Act*. No consent of the land control board was obtained in relation to the material sale agreement. Secondly, the land was subsequently subdivided and sold to innocent purchasers for value. The innocent purchasers hold titles and have been dealing with the various subdivisions. Thirdly, clause 8 of the material sale agreement anticipated a scenario of breach or non-completion and provided a remedy in the following terms:

“ 8 THAT in case of failure of either party to abide with this agreement and in particular if the vendor is unable to transfer the said land to the purchaser the vendor undertakes to refund the amount received plus 18% of the same and other costs that may mutually be agreed between the parties and the same case shall apply to the purchaser.”
21. Fourthly, Sections 25 and 26 of the *Land Registration Act* protect innocent purchasers for value. The defendants who purchased the subdivisions are innocent purchasers. Given the above circumstances, I do not think the relief of cancellation of the titles and registration of the plaintiff as proprietor of the original parcel is available at this stage.
22. The plaintiff made an alternative plea for an order requiring the 1st, 2nd and 11th defendants to pay him a sum equivalent to the current value of the suit land. However, no evidence was tendered to assist the court ascertain the current value of the suit land. Secondly, no evidence was tendered to justify the grant of such an order against the 2nd and 11th defendants.
23. In my view, an award in form of damages in tandem with prayer (b) of the plaint and clause 8 of the sale agreement would be appropriate in the circumstances of this case. I take this view because the sale agreement clearly stipulated the appropriate monetary remedy available to the parties in the event of non-completion. The result is that the court will order the 1st defendant to pay the plaintiff damages in terms of clause 8 of the sale agreement. The damages translate to Kshs 330,000 [purchase price paid] plus Kshs 59,400 [being 18% of the purchase price]. The said amount will attract interest at court rate from 01/4/2012, being the date when the 1st defendant disowned the sale agreement and elected to keep both the land and the purchase price.



24. On costs, this suit would not have been necessary if the 1st defendant either completed the sale or made a refund in terms of clause 8 of the sale agreement. Secondly, she proceeded to subdivide and dispose the suit land despite being aware that this suit existed and there existed a preservatory order. In the circumstances, the 1st defendant will bear the plaintiff's costs and costs of all the other defendants who filed defences in this suit.

Disposal Orders

25. In the end, the court makes the following disposal orders.

- a. The 1st defendant shall pay the plaintiff damages in the sum of Kshs 389,400 together with interest at court rate from 1/4/2012 till the sum is paid in full.
- b. The 1st defendant shall bear the plaintiff's costs of this suit together with the costs of all the defendants who filed defences in this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 10TH DAY OF MAY 2022

B M EBOSO

JUDGE

In the Presence of:

Ms Wangari Mwangi for the Plaintiff

Ms Kaunyangi holding brief for Mr Kaumbi for the 1st and 2nd defendants

Ms Muchemi holding brief for Mr Kanyi for the 9th, 10th and 11th defendants

Court Assistant: Lucy Muthoni

