



Ngethe v Koinange Investment and Development Limited (Civil Case 3164 of 1995) [2021] KEHC 150 (KLR) (Civ) (14 October 2021) (Ruling)

Neutral citation: [2021] KEHC 150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL CASE 3164 OF 1995
F TUIYOTT, J
OCTOBER 14, 2021**

BETWEEN

ROBERT NELSON NGETHE PLAINTIFF

AND

KOINANGE INVESTMENT AND DEVELOPMENT LIMITED DEFENDANT

RULING

1. I am asked to consider three applications which have a connection. But a brief background to this old and winded matter helps give context to the applications.
2. Through an agreement conferring an option to purchase dated 5th December 1988 Koinange Investment and Development Limited (the defendant or Koinange Investment) granted Robert Nelson Ngethe (the Deceased) the option to purchase, at a price of Kshs.50,000,000/=, all that piece of land being a portion of LR. 209/9099 measuring approximately 0.2642 of a hectare to be subdivided and excised from the said LR. 209/9099.
3. The option was to be exercisable by notice in writing to Koinange Development any time before the expiry of 90 days from the date of the agreement or before the expiry of 30 days from the date on which all sub-divisional conditions were complied with by Koinange Development and a survey deed plan availed and evidence thereof supplied to the Deceased, whichever date occurred last.
4. In an amended Plaint dated 4th December 1995, the Deceased averred that, through letters dated 16th August 1995 and 11th September 1995 from his advocates, he exercised the option by deposit of Kshs.5,000,000/= that accompanied one of the letters. He complained that by a letter dated 12th September 1995, the advocates of Koinange Development rejected the deposit and stated that the Deceased had no rights under the agreement.



5. In that pleading, the Deceased sought the following orders:-
 - a) A declaration that the deed of 5 December 1998 is valid;
 - b) A declaration that the plaintiff has validly exercised his option thereunder;
 - c) An order that the defendant do within a time to be fixed complete the subdivision of the plot sold to the plaintiff, and that in default that the plaintiff may do so;
 - d) Judgment for any costs incurred by the plaintiff under prayer (c);
 - e) An order that the defendant do transfer the subdivision to the plaintiff or to his order and that in default the registrar may execute any necessary documents;
 - f) Costs.
6. In response to that claim, Koinange argued that the option to purchase had not been exercised in accordance with the terms of the agreement and was no longer capable of being exercised having terminated by the conduct of the parties or extinguished by effluxion of time.
7. As an alternative Defence, it was asserted that a condition precedent to the exercise of the said option was that subdivision of the property would first be completely effected and only when such subdivision was done and separate deed plans issued in respect to the two subdivisions, could the option be exercised. Koinange stated that the subdivision had never been carried out and no deed plans issued.
8. It is common ground that, as the Deceased had a claim over the property, he registered and maintained a caveat over it. In a Counterclaim, Koinange sought cancellation or removal of the said caveat and general damages for wrongful encumbrance of the property.
9. After some false starts, this matter was, on 17th July 2002 heard by Osiemo J. Neither Koinange Development nor its advocates attended Court. The deceased testified and judgment set for 29th July 2002, but was eventually delivered on 14th October 2002. In that judgment, Osiemo J granted to the Deceased the prayers as sought in the amended plaint.
10. What followed was an application dated 8th November 2002 for setting aside of the judgment. Upon considering that application, Osiemo J on 28th November 2002 dismissed the application. Aggrieved by that decision, Koinange preferred an appeal against it in Civil Appeal No. 108 of 2003 Koinange Investment & Development Ltd. vs Robert Nelson Ngethe. That appeal, too, was dismissed on 23rd March 2012.
11. Undeterred by the setbacks, Koinange Investment sought to escalate the matter to the Supreme Court but that attempt first met headwinds when the Court of Appeal declined to grant a certificate that the issue involved matters of general public importance. Brakes to the Supreme Court were finally slammed by the apex Court itself, when on 13th March 2014, it refused to review the Court of Appeal ruling of 8th March 2013.
12. On 8th October 2014, the Deceased died and, after substitution, his personal representative are the current Plaintiffs.
13. In the meantime and even after filing the applications now before Court, Koinange Investment commenced a suit by way of originating summons, being Nairobi Misc. Civil Application No. 278 of 2015, against the estate of the Deceased. In the main, Koinange Investment sought two orders. That in view of the provisions of section 4(4) of the Limitations of Actions Act, the judgment of 14th October 2002 by Osiemo J was no longer capable of being executed and that by dint of section 7 of the same



statute, Koinange Investment having continued to be in continuous and uninterrupted possession of the portion of LR No. 209/9099 for a period of more than 12 years after delivery of the judgment, it be declared the legitimate and sole owner of the said property.

14. Persuaded that there was no merit in the originating summons, C. Kariuki J on 6th November 2015 dismissed it with costs. An appeal against that decision (Nairobi Civil Appeal No. 177 of 2016), faced a similar fate on 20th December 2019.
15. With that background I return to the three applications I am asked to determine. They are of 9th June 2014, 7th July 2014 and 8th July 2014
16. The first, of 9th June 2014, seeks that the Transfer from the defendant to the plaintiff for L.R no.209/9099/2 Nairobi that was drawn by the plaintiff's advocates and executed by D.W. Nyambu, Deputy Registrar of the High Court, on 12th May 2014 be recalled by this Court and cancelled. As an alternative, it is sought that the Registrar of Titles or any other land officer who is designated to make entries be ordered to cancel any entries on the grant in respect to the title that may be registered in respect of or pursuant to the impugned transfer.
17. The application of 7th July 2014 is for leave to the defendant to amend its statement of Defence and Counterclaim.
18. The last, that of 8th July 2014, is for an order that, in the interest of justice, the Court does review the judgment of Osiero J delivered on 14th October 2012 in order to accord with the following antecedent and/or subsequent facts:-
 - a) THAT although the Judgment stated that the Plaintiff had validly exercised his option to purchase a portion of the Defendant's property known as L. R No. 209/9099 (I.R 34318), Nairobi, the Plaintiff herein subsequently failed, refused or neglected to meet or comply the fundamental terms and conditions which were contained in the said Agreement Conferring Option to Purchase made on 5th December, 1988 between the Plaintiff and the Defendant which included a clause for payment of the sum of Kshs.50 Million to the Defendant and, in default thereof, to pay interest thereon at the Bank rates. Todate the Plaintiff has neither paid the said sum of Kshs.50 Million to the Defendant nor the interest thereon at Bank Rates as anticipated in the said Agreement;
 - b) THAT although the Plaintiff has neither paid the said sum of Kshs.50 Million to the Defendant nor the interest thereon (with effect from 5th December 1988), the Plaintiff has commenced the process of transferring to himself a portion of the Defendant's property based on a false representation or pretense that he has actually paid the said sums to the Defendant, when he has not;
 - c) THAT the Plaintiff is obliged to refund to the Defendant a proportionate share of any monies that the Defendant has paid to the Government of Kenya or the County of Nairobi (City Council of Nairobi) for the portion of the Defendant's property that the Plaintiff claims. The Plaintiff has not paid a single cent by way of Land Rent or Land Rates for the portion that he claims;
 - d) That the Plaintiff is obliged to obtain valid clearance certificate for the Land Rates and Land Rent before he can register any transfer for the portion of the Defendant's property that he claims. Upto date, the Plaintiff has not paid any Land Rent or Land Rates to the Government of Kenya or the County of Nairobi respectively to enable him to obtain the said Clearance Certificates;



- e) THAT the Defendant's property cannot be legally and lawfully sub-divided because of the Special Conditions attached to Grant No. I. R. 343 and if the Plaintiff herein insists on sub-dividing the Defendant's property (even pursuant to a Court Order/Decree), the Defendant's property, including the remainder that is not the subject matter of this suit, may be forfeited to the Government of Kenya by virtue of provisions of Sections 23, 26 and 31 of Lands Act 2012;
 - f) THAT the Defendant's Counterclaim, including its Amended Defence and Counterclaim, has not been heard and determined. The said Judgment ought to be reviewed in such a manner as to accord with this Honourable Court's determination of the Defendant's Amended Defence and Counterclaim.
 - g) THAT the said Judgment ought to be reviewed in such a manner as to accord with the law; with fairness and justice; common sense; just determination of the dispute between the parties; and with the spirit and intent of the Constitution of the Republic of Kenya 2010.
19. It is apposite to start with the application of 7th July 2014 and the reason becomes apparent shortly. In it Koinange Investment seeks that it be granted leave to amend its Defence and Counterclaim.
20. Abridged, Koinange seeks to amend the Defence and Counterclaim for four main reasons. That overtime it has had to pay land rent and rates in respect to the property; it has had to incur substantial legal expenses to reverse an illegal purchase of the property by one Creative Homes Development Limited; and that upto now the estate of the Deceased has neither paid the purchase price anticipated in the agreement or interest on it.
21. Koinange also asserts that on 7th June 1994 the Deceased, through his advocates Messrs. Hamilton Harrison & Mathews, requested for payment in the sum of Kshs.25 Million by way of damages to enable him surrender his option to purchase the said property. By a letter of 8th June 1994, and copied to the Deceased, Koinange instructed M/s Pandya & Talati Advocates to pay the said sum to the Plaintiff. Koinange argues that the option to purchase was therefore fully compromised and settled and any further attempt by the Deceased or his estate to resuscitate the same is unconscionable.
22. Koinange proposes the following amendments to the prayers in the Counterclaim:-
- 1. A declaration that in lieu of the sub-division of a portion of the Defendant's property known as LR. No. 209/9099 Nairobi, the Plaintiff is entitled to an award of damages to be agreed upon by the parties or assessed by this Honourable Court after the taking of accounts between the parties;
-OR-
 - 2. ALTERNATIVELY, a declaration that the issues that arise in this suit were compromised by the parties through correspondence dated 7th June, 1994 and 8th June, 1994 respectively between the parties and therefore there ought not to be any further compensation or damages of property that may be paid or transferred to the Plaintiff by the Defendant;
-OR-
 - 3. In the event a sub-division and transfer of a portion of the Defendant's property is ordered by the Honourable Court as claimed by the Plaintiff in the Plaint then:-
 - a) This Honourable Court be pleased to order a valuation of the said portion as of today's date or any other date that this Honourable Court may be pleased to order, and the Plaintiff be ordered to pay a sum of money equivalent to the said value to the Defendant before any such sub-division or transfer is undertaken or made;



-OR-

- b) Alternatively, the Plaintiff herein be ordered to pay to the Defendant a sum of Kshs.50 Million with interest thereon at a rate of 18 percent per annum (being the Bank rates) from the 5th day of December 1988 to the date of payment to the Defendant before any such sub-division or transfer is undertaken or made;

-AND-

- c) The Plaintiff be ordered to pay to the Government of Kenya a proportionate share of the Land Rent due and payable for the said portion and/or the Plaintiff be further ordered to refund to the Defendant a proportionate share of any Land Rent that the Defendant may have paid to the Government of Kenya on his behalf for the said portion after 5th December 1988 before any such sub-division or transfer is undertaken or made;

-AND-

- d) The Plaintiff be ordered to pay to the County of Nairobi a proportionate share of the Land Rates that are due and payable for the said portion and the Plaintiff be further ordered to refund to the Defendant a proportionate of any Land Rates that the Defendant may have paid to the County of Nairobi on his behalf after 5th December 1988 before any such sub-division or transfer is undertaken or made;

-AND-

- e) The Plaintiff be ordered to pay to the Defendant a proportionate share of the legal expenses and losses that the Defendant may have incurred or suffered in relation to the suit property and in High Court Civil Appeal No. 535 of 2006 (Koinange Investments and Development Limited vs Nairobi City Council and three others) and Court of Appeal Civil Appeals Numbers 129 of 2009; 163 of 2009; and 175 of 2009 together with Court of Appeal Civil Application No. 181 of 2009 (Creative Homes Limited and others –vs- Koinange Investments and Development Limited) following the unlawful sale of the suit property (including the portion claimed by the Plaintiff herein) by Messrs. Regent Auctioneers (N) Limited on 17th October, 2006 to Messrs. Creative Homes Developer Limited for Kshs.113 Million before any such sub-division or transfer can be undertaken or made;

-AND-

- f) An inquiry be made to determine whether a sum of Kshs.25 Million, or any portion thereof, was paid to the Plaintiff or his Advocates by the Defendant or Messrs. Pandya & Talati Advocates, Mombasa pursuant to the letter dated 7th June, 1994 written by the Plaintiff's Advocates to the Defendant demanding on behalf of the Plaintiff, a sum of Kshs.25 Million and the Defendant's letter of Pandya & Talati Advocates dated 8th June 1994 authorizing such payment and if any such payment was made, the same be refunded by the Plaintiff to the Defendant with interest thereon from the date of payment before any such sub-division or transfer can be undertaken or made;

-AND-

- g) An order directing that the accounts be taken between the Plaintiff and the Defendant herein to determine the amount of money that may be payable by the Plaintiff to the



Defendant or the Government of Kenya or to the County of Nairobi in relation to prayers numbers 3(a) or 3(b), and 3(c) and 3(d) and 3(e) and 3(f) hereinabove and an order that any such monies that may be due and payable by the Plaintiff to the Defendant or the Government of Kenya or to the County of Nairobi be first paid before any such sub-division or transfer can be undertaken or made.

23. It is argued for Koinange Investments that the law on leave to amend pleadings is that it can be granted at any stage of the proceedings on such terms as to costs or otherwise as may be just and in such manner as the Court may direct. In what is said to be special circumstances of this case, counsel for Koinange Investments submitted that the Court of Appeal pointed out that Osiemo J had clearly stated in his ruling that the Applicant was at liberty to pursue its counterclaim and this must have influenced the decisions of both the Judge and the Court of Appeal in this matter.
24. The application is opposed. The estate of the Deceased makes the argument that the matter has been fully determined by this Court and an appeal from that decision dismissed by the Court of Appeal and that the application is a non-starter, misconceived and is for dismissal.
25. In the Judgment in which it rejected the Appeal against the Ruling and order of Osiemo J dated 28th November 2002, the Court of Appeal observed:-

“Osiemo J in a short ruling dismissed the application on the main ground that the appellant neither admitted nor denied P.O. Box 44286 Nairobi was its registered postal address. For that reason and relying on section 391 of the Companies Act he was satisfied the appellant had been properly served with a hearing notice. He also ruled that the appellant was at liberty to pursue its counterclaim?”

(Underlining mine)

26. I understand Koinange Investment to rely on this portion of the Judgment to suggest that this suit is still alive and for that reason it can pursue its counterclaim. To fully appreciate the implication of that suggestion, the Judgment of the Court of Appeal needs to be read as a whole. The portion cited by the Koinange should not be considered in isolation.
27. After finding that the Appeal was unmerited, the Court held:-

“Having come to the foregoing conclusion, it is not worthwhile to consider either the arguability of the applicant’s defence and counterclaim or whether damages were likely to adequately compensate the respondent had the Court considered it proper to vacate the exparte judgment.”

28. It does seem to me that the portion of Osiemo J’s decision that ruled that Koinange was at liberty to pursue its counterclaim was not upset and in a sense the suit is alive in that regard. What, however, requires a more involved consideration is whether Koinange should be allowed to pursue the counterclaim in the drastically changed circumstances set in the amendments sought and which changes have been caused by the delay in bringing the application, that is between the date of the decision of Osiemo J of 28th November 2002 and now.
29. The delay is in excess of 12 years and it has not been explained why, notwithstanding the liberty to pursue its counterclaim, Koinange chose not to do so immediately. But it is clear to me that the liberty granted by the Court was a hollow victory for Koinange because the counterclaim could not succeed in the face of judgment of Court in which it made four declarations; that the deed of 5th December 1998 was valid; that the Deceased had validly exercised his option; an order that Koinange do within



30 days complete the subdivision of the plot and in default the deceased be at liberty to carry out the exercise of subdivision.

30. It seems to me that, in the face of this profound delay, the estate of the Deceased should not be laden with any expenses or costs that did not exist on the date the counterclaim was filed. Expenses and costs which have been incurred over time because of the reluctance by Koinange Investment to accept the fate of the decision of Osiemo J, a decision affirmed by the Court of Appeal. Save for the purchase price of Kshs.50 million, no other money would have been due from the Deceased to Koinange Investment on the date he presented this suit and I would have therefore been inclined to grant leave in respect to that limited amendment but this is unnecessary in view of the application for review which I now turn to consider.
31. In respect this sum, it is undisputed that the option to purchase was exercisable at a price of Kshs.50,000,000/=. Tender of deposit of Kshs.5,000,000/= by the Deceased was rejected by Koinange Investment and hence this suit. It is therefore common ground that at the time of filing this suit the purchase price had not been paid. Again, I repeat, that this Court had in its judgment of 14th October 2002 found that the Plaintiff had validly exercised his option to purchase. The Deceased or his estate could not therefore be found to blame for the delay in paying the purchase price for two reasons. First, its attempt to pay the purchase price was rejected by Koinange Investment. Second, the delay in finalizing this matter has been caused by the appeal by Koinange Investment against the decision of this Court and the filing of the failed originating summons and the appeal therefrom.
32. And the argument by Koinange Investment that the entire arrangement had been compromised through the exchange of letters in 1994 is insincere because this was never raised by Koinange in its defence and counterclaim dated 21st November 1995. It must be called out for what it is. A red herring!
33. I think, as well, that there is merit in the argument by counsel for the estate of the Deceased that it should not pay the purchase price because Koinange has been unlawfully occupying the property from 1995 to date, over 25 years and it has been prejudiced. Nonetheless, I also note counsel's concession that his client is still willing to pay the purchase price of Kshs.50,000,000/=.
34. In the end what endears this Court as a just way of resolving this old matter is by ordering the estate of the deceased to pay Koinange Investments the sum of Kshs.50,000,000/= (without any interest thereon) less costs that may be due to the estate emanating from the various proceedings related to the suit property which may be unpaid. Parties to agree on what is due and when is to be paid. An agreement in this regard to be reached within 14 days hereof failing which any party shall be at liberty to apply.
35. The Court shall then make final orders in regard of all the three applications before it.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021

A. MABEYA, FCI Arb

JUDGE

