



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO.2971 OF 1992**

**MACWATT ESTATES LTD.....PLAINTIFF**

**VERSUS**

**MBWANJI LIMITED.....DEFENDANT**

**JUDGMENT**

In the plaint dated and filed on 2nd June, 1992, the plaintiff's case is set out in paragraphs 3 to 6 which read as follows:

“ 3. On or about the year 1977 the plaintiff was the owner of all that piece of or parcel of land known as L.R. 96/5 Kiambu measuring 171 acres together with a dwelling house situate thereon. During the said year the plaintiff entered into an agreement for sale to the defendant the said piece of land less ten acres and the house which according to the agreement was not to be transferred to the defendant.

4. By a conveyance in volume N1 Folio 431/36 File 642 made between the plaintiff and defendant clause 2(iv) thereof, the said conveyance reserved to the plaintiff the right to occupy and enjoy the use of the dwelling house and the premises thereon being 10 acres.

5. That the plaintiff was peacefully occupying the said premises until on or about the 6th of August 1980 the defendant through its Director one J. K. Mbugua, servants and or agents wrongfully entered the said land and premises and wrongfully took possession of the same and has thereby trespassed and is still trespassing thereon.

6. That by reason of the matters aforesaid, the plaintiff has been deprived of the use and enjoyment of the said house and premises and has thereby suffered loss and damage,”

Based on the foregoing pleadings, the plaintiff sought the following orders:

1 Possession of the said land and premises.

2 Damages or mesne profits at the rate of Shs. 20,000/- per month from the said date of 6th August, 1980 or any other later date as this Honourable Court may determine until possession is delivered up.

3 Costs of suit.

4 Interest on mesne profits and costs at court rates.

The defendant filed a defence to the plaintiff's claim and stated that the plaintiff sold the entire piece of land to the defendant. If however there was in existence of the alleged agreement for sale of the suit premises less 10 acres and the house thereof, the same became null and void in that.

(a) It was overtaken by events by virtue of the Conveyance hereabove stated.

(b) It became null and void under the provisions of the land control Act and/or the Land Control Regulations that were applicable then.

The defendant while admitting the conveyance was registered in its favour, denied that the same reserved the right for the plaintiff to occupy and enjoy the 10 acres and the house thereon. If however there was such a reserve in the conveyance which is denied, then that part of the conveyance and the alleged reserve became null and void under the provisions of the Land Control Act and/or the Land Control Regulations that were applicable then.

The contents of paragraph 5 of the plaint were denied but it is conceded without prejudice that, the plaintiff did occupy a portion of the suit premises as a licensee but ceased occupation sometimes between the months of March and April, 1980 under circumstances with the plaintiff's knowledge.

Any loss or damage is denied and finally it is pleaded that the plaintiffs claim in this suit is time barred under the provisions of the Limitation of Actions Act Cap.22 Laws of Kenya.

Both parties have called evidence in support of their respective pleadings. I also have the submissions of both learned counsel on record.

Pw1 Mrs Allison Mathilde Janss gave an account of the history leading to the present suit. She is a director of the plaintiff company. She reiterated the contents of the plaint and it will not be necessary to go over her evidence in full suffice is to say that from her evidence and the documents produced resting on the Conveyance made on 11th September, 1977, a sale transaction took place between the parties herein.

Before the said conveyance, there was a sale agreement dated 22nd July, 1977. In the conveyance aforesaid the sale was subject to several conditions but what concerns us here is clause 2(iv) which reads.

“(iv) The right of the Vendor to occupy and enjoy the use  
of the dwelling house and premises thereon”

The consideration reflected in that conveyance is Kshs. 1.1 million. However the Letter of Consent reflects a consideration of Kshs. 1.4 million some explanation for that discrepancy has been advanced by Mr. Mbugua who gave evidence on behalf of the defendant. Most of what he said was in relation to his dealings with the late Mrs Holyoak. The dead however tell no tales and one may never know the truth of those allegations.

Be that as it may, there is sufficient material on record to show that the intention of the parties was to make a reserve for 10 acres and the dwelling house thereon for the occupation of the plaintiff. This is to be found in a letter dated 20th June, 1977 written on behalf of Mawara Coffee Estate Limited a sister company to the defendant herein. This letter was admitted in evidence as Dext2. The said letter said in part:

“ That your large house plus 10 acres surround it will be registered separately in your name with new title deeds, which I will arrange, providing that, should you ever in the future, wish to sell the property out of your family, I will be given first refusal to buy.”

M/s K. Mwaura & Co. Advocates acted for both parties in this transaction. Ms Lilian Mwaura Pw2 in these proceedings, then known as Lilian Kinyanjui, dealt with the matter. She received instructions

from both the vendor and purchaser. She confirmed that 10 acres were to be retained by the Vendor and title be issued in the name of Beatrice Holyoak who was the owner of the plaintiff company. She is the one who prepared both the sale agreement and the conveyance. There is on record a letter dated 16th January, 1978 written by the said advocates to the defendants and copied to the plaintiff. The said letter reads in part:

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“ We refer to the sale agreement dated 22nd July, 1977. Macwatt Estates would like the above piece of property surveyed so that it can have its 10 acres as agreed before.

In the circumstances could you get a surveyor otherwise with your permission Macwatt Estates is willing to bring its surveyor.

We hope you will co-operate in this matter in order to finish quickly.”

This was never to be as Ms. Mwaura says after the said letter she received no further instructions in the matter from either party. Ms. Mwaura conceded that the excision of the 10 acres or retention of the same in the title of the plaintiff was not included in the conveyance. She did not know whom to blame for the failure of the transaction. The agreement to u-transfer 10 acres needed the Land Control Board Consent and since the same was lacking the agreement became null and void.

Considering the background of the matter, the sale agreement and the conveyance that followed, I find that the conveyance aforesaid was poorly drawn. It did not take care of the interest of the plaintiff in line with the intention of the parties and terms contained in the sale agreement.

There is also evidence that the land was surveyed and the map handed over to Ms. Mwaura. She had a duty to advise and render services to the parties herein who had retained her. In my judgment it is not enough for counsel to say that most transactions took place outside his or her chambers.

The transaction herein was based on an agreement of sale. The agreement is a contract and a suit based on contract has to be filed within 6 years from the date of accrual of the cause of action. The agreement was made in July, 1977. The first time the plaintiff ought to have known that the defendant was out to breach the same was when no response was made to the lawyer's letter of January, 1978. Breach can be computed from that period and so one can rightly say the plaintiff's cause of action accrued in January, 1978 and the suit ought to have been filed latest by January, 1984.

Even if we were to take the date of eviction as the starting point. The plaintiff has pleaded that the defendant entered the premises and trespassed thereon in August, 1980, then the suit should have been filed latest by August, 1986. Clearly therefore the filing of the suit in 1992 was way out of time and no leave was sought to extend time under the Limitation of Actions Act Cap 22 Laws of Kenya.

The excision of 10 acres required the consent of the Land control Board. This was not obtained. And so, even if the conveyance had included the term providing for that excision, the absence of the consent would render the re-transfer null and void.

I have watched Mrs Jauss give evidence. I have no doubt that she was honest and truthful. Mr Mbugua on the other hand was shifty and cunning. Whatever the assessment however, this is a case where the plaintiff is a victim of a negligence on the part of the lawyers who handled the transaction (not the lawyers in this trial) and the law on the other side. And so due to the said negligence, the fact that the suit is Statute barred and finally lack of consent of the Land Control Board this suit must fail. I accordingly dismiss the same.

The circumstances surrounding this case call for an order that each party shall bear own costs.

Order accordingly

Dated and delivered at Nairobi this 31st day of July, 1998.

Mbogholi Msagha

Judge

Ms. Najero for plaintiff

Mr Patel for Wachira for defendant