

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO.44 OF 2019

DORCAS ATIENO OWUOR PLAINTIFF

VERSUS

MOMBASA WATER PRODUCTS LIMITED

DEFENDANTS

JOSEPH MBUGUA GICHANGA DEFENDANTS

LYDIA NJURA GICHUHI

DEFENDANTS

JUDGMENT

1. By a Complaint dated 15th March 2019 as amended on 26th April 2024, Dorcas Atieno Awuor prays for judgment against the three (3) Defendants jointly and severally for:

- a) **A declaration that the Defendants are in breach of the Agreement for sale dated 13th June, 2005 and that the Plaintiff is entitled to damages;**

- b) **An order directing the Defendants to forthwith refund to the Plaintiff the sum of Kshs 1,050,000/= being the purchase price of the parcel of land**

known as Plot No. 12006/I/MN and registered as CR. 34748/2 together with interest at the rate of 18% per annum from 13th June, 2005, until payment in full;

c) Costs of and incidental to this suit together with interest thereon; and

d) Any such other or further relief as this Honourable Court may deem appropriate.

2. Those prayers arise from the Plaintiff's contention that she entered into an agreement with the 1st Defendant dated 13th June 2005 for the purchase of two (2) portions of the parcel of land known as Plot No. 12006/1/MN and registered as CR No.34748/2 situated within Mombasa County plus developments thereon at the sum of Kshs. 1,050,000/-. The Plaintiff asserts that she paid a deposit of Kshs. 800,000/= and that the balance was payable upon successful transfer and registration of the sub-division in her favour.

3. It is the Plaintiff's case that the 1st Defendant was to undertake the sub-division of the suit property and to avail the respective

titles to the Plaintiff within 45 days from the date of execution but the 1st Defendant failed to do so. On 22nd January 2019 while visiting to inspect the property, the Plaintiff realised that the suit property was undergoing development. The Plaintiff avers that upon conducting a search, it emerged that the 2nd and 3rd Defendants had on behalf of the 1st Defendant fraudulently transferred the title to third parties.

4. The Plaintiff avers that as a result of the Defendants' fraudulent and illegal conduct, she was denied her right to own the suit property and the sale agreement dated 13th June 2005 was frustrated by deliberate and illegal conduct on the part of the Defendants.
5. Mombasa Water Products Limited (the 1st Defendant) is opposed to the Claim. In its Statement of Defence dated 16th May 2010 as amended on 9th July 2024, the 1st Defendant avers that the sale agreement is unenforceable against itself as it was neither executed by the 1st Defendant nor did the 1st Defendant's Board of Directors authorise the sale.
6. The 1st Defendant further avers that the Plaintiff's claim based on the alleged sale agreement dated 13th June 2005 is time

barred under the provisions of the Limitations of Actions Act, Cap 22 Laws of Kenya.

7. Joseph Mbugua Gichanga (the 2nd Defendant) and Lydia Njura Gichuhi (the 3rd Defendant) are equally opposed to the claim. In their joint Statement of Defence dated 5th July 2024, the 2nd and 3rd Defendants deny that the suit property was transferred through fraud or any illegality. The two equally assert that the Plaintiff's claim is time barred under the Limitation of Actions Act. It is further the Defendant's case that there is no privity of contract between the Plaintiff and themselves and hence the Plaintiff has no reasonable cause of actions against themselves.
8. At the trial herein the Plaintiff testified as the sole witness in her case while the Defendants chose not to call any evidence.

Analysis and Determination

9. I have carefully perused and considered the pleadings filed herein by the parties, the sole testimony of the Plaintiff as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.

10. By her suit as amended, the Plaintiff has urged the court to make a declaration that the three (3) Defendants herein are in breach of a Sale Agreement dated 13th June 2005 executed between herself and the Defendants and that the court declares that she is entitled to damages. In addition, the Plaintiff has asked the court to direct the Defendants to forthwith refund to herself the sum of Kshs. 1,050,000/- being the purchase price paid under the said Agreement.
11. It was the Plaintiff's case that she did enter into the said Sale Agreement for the purchase of two portions of the land known as Plot No. 12006/1/MN situated within Mombasa and registered in the name of the 1st Defendant. The Plaintiff told the court that while the Sale Agreement required the 1st Defendant to carryout sub-divisions on the land and to avail the respective titles to herself within 45 days, the 1st Defendant did not do so. She thereafter came to learn that the Defendants had fraudulently transferred the properties to two individuals namely, John Turasha Kinyanjui and Irene Mbere Njue.
12. The Defendants on their part denied that the 1st Defendant has executed any Sale Agreement with the Plaintiff. It was further

the Defendants' case that the Plaintiff's claim was time barred under the provisions of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

13. In support of her case, the Plaintiff has produced a copy of the Sale Agreement dated 13th June 2005 as executed between herself and Mombasa Water Products Ltd (the 1st Defendant) which is indicated thereon to be the registered proprietor in fee simple of all that parcel of land known as Plot No. 12006/1/MN situated in Mombasa Municipality.
14. Clause 1 and 2 of the Agreement witnesseth that the agreed purchase price for the property was Kshs. 1,050,000/=. At Clause 3 thereof, the vendor acknowledges receipt of Kshs. 800,000/= from the purchaser. Under Clause 6 of the Agreement, the vendor undertook and guaranteed that it would carry out the sub-division at its cost and to hand over the respective title deeds for the purpose of transfer to the purchaser within the next 45 days. The balance of the purchase price being Kshs. 250,000/= was, under clause 4, to be paid upon transfer of the property in favour of the purchaser.

15. From the material placed before the court, it was not in dispute that Joseph Mbugua Gichanga and Lydia Njuru Gichuhi (the 1st and 2nd Defendants) are the only directors of the 1st Defendant Company. It was also apparent that for some unstated reasons, the two who are a husband and wife were unable to transfer the property to the Plaintiff within the stipulated period and requested for more time to do so.

16. That much is clear from a series of correspondences between the transaction Advocate S.M. Mutisya (trading as Mutisya & Co. Advocates) and the 1st Defendant produced herein by the Plaintiff. In one handwritten letter written on an unclear date in January 2009, the 2nd Defendant made a promise as follows:

“I Joseph M. Gichanga, director Mombasa Water Products Ltd do hereby undertake to give Dorcas Atieno Owuor her title Plot No. 2 portions subdivisions on No. 12006/I/MN on or before 25/2/2009, failing which she can take any legal action, subdivide/survey at my costs.

Signed.”

17. It was again apparent from the material placed before me that no such sub-division was done. Instead, on 15th July 2016 the

1st Defendant Company made a Report at Nyali Police Station alleging that it had lost its original Title Deed No. CR 34751. The purpose of that Report would become clear a year later when on 28th September 2017, Lydia Njura Gichoni (the 3rd Defendant) swore an Affidavit under the Oaths and Statutory Declarations Act stating as follows:

- 1. That I am a Director of Mombasa Water Products Limited (the Company) which is the registered owner of all that piece or parcel of land known as Subdivision Number 12006(Original No. 11748/5) Section I Mainland North Mombasa. I annex hereto a copy of the Certificate of Title marked "LNG 1";**
- 2. That all along I had been in possession of the original Certificate of Title for the above mentioned property among other documents of the Company. However, I am unable to locate the said Certificate of Title amongst the Company documents. Despite diligent search in all places where I reasonably expected to find the said document I have been unable to find the same. I verily believe that the said Certificate of Title has been lost;**

3. That I make this affidavit to confirm to the Registrar of Titles Mombasa that the said Certificate of Title is lost and all efforts to trace the same have proved futile;

4. That it is my humble wish that the Company be issued with a provisional Certificate of Title for the above mentioned property and in the event that the original Certificate of Title is located after a provisional certificate of title has been issued, then I undertake to present the said documents to the Registrar of Titles for destruction of one of them;

5. That I hereby confirm that the original Certificate of Title to the above mentioned property has not been pledged or charged to any person and the same has not been encumbered in any manner whatsoever; and

6. That all what I have stated hereinabove is true to the best of my knowledge and belief.”

18. There was however no truth in that Affidavit and it actually amounted to perjury as the Defendants knew where that Original Certificate was at the time. In the Sale Agreement

dated 13th June 2005 as executed between the Plaintiff and the 1st Defendant, clause 7 thereof provided as follows:

“7. The Original title of the Original Plot No. 12006/I/MN shall be deposited with Ms. Mutisya & Co. Advocates until the Certificate of title for the portions herein are duly processed.”

19. It was interesting to note that some two (2) weeks before the 3rd Defendant swore the false Affidavit the 1st Defendant despite the purported loss of title had on 13th September 2017 entered into another Sale Agreement with one John Turasha Kinyanjui and Irene Mbere Njue wherein it purported to sell the same suit property to them for a sum of Kshs. 2,500,000/-. A Provisional Title was subsequently issued in the names of the duo (the Original 2nd and 3rd Defendants before the Plaintiff was amended) on 9th October 2018.
20. That informs the position by the Plaintiff that when she visited the property on 22nd January 2019, she realized that it was undergoing certain developments and it is on that basis that she proceeded to conduct a search and came to the realisation that the Defendants herein had disposed the suit properties

despite the fact that the original title was still being held by the Advocate who had drawn the Sale Agreement between them.

21. In their pleadings filed herein the Defendants have asserted that the suit was time-barred. In their submissions filed herein, they assert that this suit is barred either under Section 4(1) of the Limitation of Actions Act or under Section 7 of the same Act. Section 4(1) bars the filing of an action founded on a contract from being brought after the end of six years from the date the cause of action accrued. Section 7 of the act on the other hand bars the institution of an action to recover land after the end of 12 years.
22. I was however unable to find any basis for that position. In her pleadings herein the Plaintiff has accused the Defendants of fraud. It was the Plaintiff's case that she only came to discover the fraud when she found developments going on at the suit land in January 2019. The Plaintiff who resides away in England had all along engaged the Defendants to transfer the suit property to her name secure in the knowledge that the original title was held by the parties' joint advocate. She had no knowledge of the fraudulent nature of the Defendants until

they transferred the properties to third parties in the year 2018. She filed this suit in March 2019.

23. In that respect, the Plaintiff has particularized the particulars of fraud on the part of the Defendants at Paragraph 12 of the Amended Plaint as follows:-

a) Making a false report to the police of an alleged loss of certificate (of) title to the suit property;

b) Having the 1st and 2nd Defendants swear a false Affidavit in an attempt to defraud the Plaintiff of her interest in the suit property;

c) Obtaining a Provisional Certificate of Title when in fact they knew that the Original Certificate of Title was in custody of the common Advocates for the parties in respect of the sale transaction between the Plaintiff and the 1st Defendant;

d) Obtaining by false pretenses the re-issuance of Certificate of Title for the suit property;

e) Purporting to offer for sale and causing a transfer of title to the entire parcel of the suit property when it had no legal capacity to sell or transfer the title to the entire parcel of the suit property;

- f) Receiving and accepting payment of the purchase price from John Turasha Kinyanjui and Irene Mbere Njue over the suit property sold to the Plaintiff;**
- g) Kowingly transferring the suit property into the names of Mr. John Turasha Kinyanjui and Irene Mbere Njue using a Provisional Certificate of Title obtained by material non-disclosure, fraud and false misrepresentation;**
- h) Offering for sale the suit property to John Turasha Kinyanjui and Irene Mbere Njue when in fact knew (sic) that the Plaintiff was the legitimate and bonafide purchaser of the suit property;**
- i) Failing to observe, obey and adhere to and abide by the laws relating to ownership and transactions in land and more particularly the Constitution of Kenya, 2010; and**
- j) Inducing the Land Registrar to effect an illegal transfer of title to the suit property.**

24. Those particulars of fraud were clear and on point. All the acts complained of did not occur in 2005 when the Agreement was

executed but between 2016 and 2018 when the Defendants initiated their fraudulent schemes to obtain a duplicate title and to dispose of the suit property.

25. In any event, the Defendants failed to call any witness to challenge the Plaintiff's evidence or to support the allegations contained in their statements. Where the Defendant fails to call evidence to support the allegations in the Statement of Defence, such a Defence is considered a mere denial. That was the case in ***Trust Bank Limited -vs- Paramount Universal Bank Limited & 2 Others (2009) eKLR***, where the court held as follows:

“It is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”

26. Similarly in ***North End Trading Company Limited -vs- City Council of Nairobi (2019) eKLR***, it was held as follows:

“...It is trite law that where a party fails to call evidence in support of its case, the party’s pleadings are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleadings which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff’s case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation, the plaintiff is taken to have proved its case on balance of probability in absence of the defendant’s evidence.”

27. In the matter before me, the Plaintiff’s evidence remains unchallenged and uncontroverted. In addition to the refund, the Plaintiff has prayed for damages and interest to be calculated at 18% per annum. The principles governing the loss that is recoverable and the measure of damages upon breach by a seller of land are stated in ***Halsbury’s Laws of England, Volume 12, 4th Edition at paragraph 1183*** as follows:

“...Where it is the vendor who wrongfully refuses to complete the measure of damage is similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain.”

28. In the matter before me the Defendants had title to the suit property which they failed to transfer to the Plaintiff in accordance with the Sale Agreement. Instead, they sold and transferred the property to third parties through a dubious process. It is therefore clear that the Plaintiff is entitled to restitution of the deposit she paid and expenses incurred. Those expenses have not been laid down by the Plaintiff however.
29. As to the Loss of bargain, the normal measure of damages for loss of bargain is the market value of the property at the time of repudiation less the contract price. The contract price from

the Sale Agreement of 13th June 2005 was Kshs. 1,050,000/=.

The Plaintiff had all along indicated her willingness to complete the sale even after the date of completion had lapsed as can be discerned from the correspondences that were made.

30. As at the time the Defendants repudiated the contract and transferred the suit property to the third parties on 13th September 2017, they sold the same at Kshs. 2,500,000/=.

The Plaintiff is therefore entitled to the loss of bargain of Kshs. 1,450,000/= being the difference in value between the contract price and the market price of the suit property as at the date of repudiation.

31. In the premises, I hereby enter judgement for the Plaintiff as against the Defendants jointly and severally as follows:

(a) A declaration is hereby issued that the Defendants are in breach of the Agreement for sale dated 13th June, 2005.

(b) An order is hereby issued directing the Defendants forthwith to refund to the Plaintiff the sum of Kshs. 800,000/= being the deposit paid towards the purchase of the parcel of land known as Plot No. 12006/I/MN and registered as CR. 34748/2 together

with interest at court rates from 13th June 2005 until payment in full.

(c) The Defendants shall pay the Plaintiff damages assessed at Kshs. 1,450,000/= with interest at court rates from 13th September 2017 until payment in full.

(d) The costs of this suit are awarded to the Plaintiff.

Judgement dated, signed and delivered in open court and virtually at Mombasa this 13th day of November, 2025

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**J.O. OLOLA
JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Mutubia Advocate for the Plaintiff
- c) Mr. Omollo Advocate for the Defendants