

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC NO. 37 OF 2016

**ISAIAH TITO NYAGA KAGOCE.....
PLAINTIFF**

-VERSUS-

**AGRICULTURAL FINANCE CORPORATION.....
DEFENDANT**

JUDGEMENT

1. The defendant was impleaded before this court vide a plaint dated 18/5/ 2016. The Plaintiff claims that sometime in the year 1985, the Defendant offered for sale Land Title Number Kyeni/Mufu/1540 measuring 3.98 Hectares or thereabouts, which he bid for a sum of Kshs. 230,000/=. The defendant accepted the bid.
2. The parties applied for Land Control Board consent, which was given, and the transfer was lawfully effected on 10-07-1989. Subsequently, the title deed was duly issued.
3. However, the plaintiff avers that he never obtained actual possession of the suit land since a suit was filed by Julius Njiru Joseph challenging the manner in which the defendant had

acquired the land in exercise of its right of foreclosure. The said Julius Njiru Joseph died and the administratrix of his estate, Julia Muthanje Joseph, took over. The suit, EMBU HC No.82 of 2005 culminated in a judgment in her favour.

4. Both the Defendant and the Plaintiff challenged the said judgment and decree in separate appeals - Civil Appeal 111 of 2007 and 116 of 2007 respectively - which appeals were later consolidated.
5. On 10th October 2013, the Court of Appeal delivered its judgment and dismissed the two appeals. It upheld the judgment of the trial court, with the effect being that the Plaintiff lost the land he had bought from the defendant allegedly in good faith and for value and without notice of any defect of title.
6. The Plaintiff now seeks compensation from the Defendant for the loss of the suit land. He wants compensation at its current market value of Ksh.10,000,000/= or in the alternative a refund of the purchase price of Ksh.230,000/= with interest at court rates from 10th July 1989 when transfer was effected until payment in full.
7. Further, the Plaintiff seeks compensation for legal costs as well. He specifically prayed for the following orders:

a) The sum of Ksh.10,000,000/= with interest from the date of filing this suit until payment in full.

- b) In the alternative to prayer (a) above, a refund of Ksh.230,000/= with interest at court rates from 07-07-1989 until payment in full.*
- c) The sum of Ksh.460,000/= being legal costs incurred.*
- d) The sum of Kshs.54,400/= being valuation fees.*
- e) Damages for loss of use of Land Title Kyeni/Mufu/1540 from the year 1987 to the year 2013.*
- f) Cost of this suit with interests at courts rates.*

The Defendant's statement of defence

8. The Defendant filed a statement of Defence admitting that they did offer the suit land Kyeni/Mufu/1540 up for sale, but denied receiving the Plaintiff's valid offer or at all.
9. Further, they averred that if any offer was received, which it denied, the same was outside the timeframe within which acceptance was to be communicated.
10. With regards to its ownership of the suit land, the defendant averred that the suit property was duly registered in its name and that at the time of disposal, it was an innocent title holder and it was therefore right when it chose to dispose of its proprietary rights.
11. The Defendant therefore states that the orders being sought are farfetched and they would amount to unjust enrichment since the Defendant was an innocent title holder with no knowledge of

defect of the title. It further averred that the Court of Appeal was categorical that both itself and the plaintiff herein should meet the costs of the appeal.

Evidence at the Trial Court

12. The hearing of the suit began on 11th May 2023. The plaintiff, Isaiah Tito Nyaga, testified as PW1 and adopted his witness statement dated 17th May 2016 as his evidence. He also relied on the documents he made available.
13. In his witness statement, the Plaintiff reiterated the contents of the Plaint. He said he purchased the suit land Kyeni/Mufu/1540 for a consideration of Kshs. 230,000/=, after he bid for it through a letter sent to the defendant on 22nd September 1987, which was accepted. Land control board consent was obtained and title deed was issued to him on 10th July 1989.
14. His ownership of the property was then challenged in court, where it was successfully overturned in favour of Julius Njiru Joseph in the suit earlier filed. The Plaintiff noted that he never took possession of the suit property. He averred that the land is located in a prime agricultural area and would have generated a net yearly income of over Kshs. 1,000,000/=. He therefore seeks

damages for loss of use of the land or in the alternative, a refund of the purchase price with interest.

15. During the hearing, the Plaintiff noted he had paid a valuer who valued the suit property at Kshs. 10,000,000/= and paid valuation fees of Ksh.54,400/=. He also stated that he visited the land before buying it and it was not developed at that time. The developments on the suit land now were not done by him.
16. During cross-examination, the plaintiff acknowledged that when he saw the advertisement for the sale of the suit land, it was in the name of the defendant. He conducted a search at the lands office. He added that it was not his duty to do more than that.
17. He also acknowledged that he has filed this suit 36 years after the land was sold to him, but he stated that he took long before he filed this case because of the other pending cases. He blamed the defendant for his loss of the land.
18. During re-examination, the Plaintiff referred to the pleadings of case No. SRMCC 218 of 1998, which was to evict the people he had found on the land. He also blamed the defendant for advertising the land for sale, stating that if they had not advertised he would not have bid for it.

19. **PW 2 Mary Warigia**, a registered and licensed valuer produced her valuation report on the suit property as Plaintiff Exhibit 11 as well as the receipts for payment of her valuation fees. This was the close of the plaintiff's case. Then the defence case started.

20. **DW 1 Regina Musyoki** gave her evidence and said that she works for the defendant and is currently the branch manager at Nyeri. But she previously worked at the Embu branch. She adopted as evidence her witness statement dated 19th September 2022 as well as a list of documents. In her witness statement, she stated that she is the branch manager of the Defendant's Embu branch office. That in or about 23rd August 1978, one Julius Njiru Joseph applied for and received an agricultural development loan from the defendant of Kshs. 63,000/= . The said loan was to be repaid in full with interest within 10 years from the date of the loan. The suit property was the security thereof and a charge was prepared and registered.

21. Shortly after the defendants advanced the said Julius Njiru Joseph the loan amounts, he subsequently failed, neglected and/or refused to honour his contractual obligations to repay the outstanding loan. The defendant decided to issue him with the

requisite notice. The defendant issued a foreclosure notice dated 12th June 1981, recalling the entire outstanding loan together with interest thereon, but the said chargor persisted in his default.

22. As a result of this default, the defendant advertised the land Kyeni/Mufu/1540 for sale by way of a public auction to realize the outstanding sums owed. Since there were no suitable bids corresponding to the market value of the land, the defendant exercised its inherent powers provided for in Section 33 of the Agricultural Finance Act CAP 323 and successfully bid for the suit parcel and effected transfer in its name as a Transfer by Chargee on 20th August 1984.

23. The defendant then advertised the suit parcel of land for sale and the plaintiff, in response to the advertisement, expressed interest in the purchase of the suit property through the letter dated 22nd September 1987.

24. The said offer by the plaintiff was accepted and upon completion of sale, the defendant effected transfer of the suit land to the plaintiff. She concluded by stating that everything was done procedurally and in due regard of the existing laws from the inception of the loan to recovery.

25. Upon cross-examination, DW 1 stated that she started working in Embu in the year 2016 and acknowledged that she was not there when the exhibits in their bundle of documents were generated. She said that they do not allow 3rd parties to access their documents.
26. DW 1 also stated that the suit land was indeed in the name of the defendant when the plaintiff became interested in buying it. Further, she stated that the plaintiff would normally not have access to see the loan agreement between them and the one who defaulted in the payment and that they had an obligation to have a clean title.
27. In addition to this, DW 1 also acknowledged that the plaintiff did not have control over their advertisement and that the offer from the plaintiff was accepted outside of the time stipulated in the advertisement. She also admitted that they did receive a sum of Ksh.230,000/= in September 1987, which was never refunded the plaintiff.
28. On re-examination, DW 1 stated that the title they had was genuine. This marked the close of the defence case.

Plaintiff's written submissions.

29. Counsel for the Plaintiff summarized their case and quoted the decision of the Court of Appeal in their case, where it was found that the purported sale to the plaintiff herein had no basis and was opaque.
30. The Plaintiff's submission is that he had no control of the manner in which the defendant had initially acquired the land and that his interest in the land was vitiated as a result of the defendant not properly acquiring the title. That if the defendant had followed due process in the manner it obtained title to the suit parcel then the court of appeal would not have arrived at that decision.
31. The Plaintiff's counsel quoted section 120 of the Evidence Act and submitted that it is a general estoppel against the defendant and that the defendant is liable for any action or loss that befell the plaintiff who placed reliance on the information given to him. He relied on the cases of **Tyremasters Ltd. -vs- Commissioner of Land & 2 others (2005) eKLR** and **Danson Muniu Njeru -vs- William Kiptarbei Korir & 6 others (2014) eKLR.**
32. The Plaintiff submitted that he has established a right to seek compensation and damages from the defendant. As for the measure of damages, the Plaintiff submitted that the court should

consider the value of the land as at the time of filing the suit given it is the actual loss that the plaintiff has suffered and he should be put in the position he was in before the loss. He referred to the valuation done on the suit land, which represents the intrinsic value of the land that he lost and relied on the case of **Harp Investco Ltd -vs- National Social Security Fund Board of Trustees & 4 others (2022) eKLR.** He insisted on his main prayer of the compensation at the market value of the land as well as legal and valuation fees. He prayed that the court grants his claim as prayed for and also prayed for the costs of the suit.

Defendants' written submissions

33. Counsel for the Defendant submitted that since the sale of land between it and the defendant was declared null and void ab initio, no kind of benefit will accrue to a party to the said transaction and therefore the Plaintiff cannot seek compensation for the same. It relied on the Courts' findings in the cases of:

Wambui v. Mwangi & 3 others (Civil Appeal 465 of 2019)

(2021) KECA 144(KLR)

Joseph Kamau Kiguoya v. Rose Wambui

Muthike(2016)eKLR

Mistry Amar Singh v. Kulubya (1963) E.A 408

Root Capital Inc. vs. Tekangu Farmers Cooperative Society Ltd & Another (2016) eKLR

34. Further, upon quoting the Court of Appeal's decision in its case, the defendant submits that the sale of the land was tainted with irregularities committed by both parties and therefore none can purport to claim any advantage from the invalidated transaction. It relied on the principle of *stare decisis* as was elaborated in the case of **Dodhia v. National & Grindlays Bank Limited & another (1970) EA 195** and **Republic v. Business Premises Rent Tribunal & Another Ex parte Albert Kigera Karume (2015) eKLR**, to make the point that this court is bound by the decision of the higher court of appeal.

35. The Defendant also relied on the statute of limitation period of 12 years for land transaction. It submitted that the cause of action arose 28 years ago and that the Plaintiff did not file a counter-claim against them. On this point, they relied on the cases of **Dickson Ngige Ngugi vs. Consolidated Bank Ltd (formerly Jimba Credit Corporation Limited) & Another (2020) eKLR** and **Edward Moonge Lengusuranga vs. James Lanaiyara & another(2019)eKLR**. They submit that no party should appear to benefit from their inordinate delays and relied

on the holding in the case of **Gathoni v. Kenya Co-operative Creameries Ltd (1982) KLR 104.**

36. The Defendant submits that the court lacks jurisdiction to entertain this matter on the basis of the statute of limitation and prayed that the suit be dismissed in its entirety and the plaintiff be condemned to pay costs to the defendant.

Analysis & Disposition

37. I Have considered the case as filed, the evidence tendered, rival submissions, and the law. I think the overarching issue or consideration here is whether the merits of the plaintiff's case have been demonstrated. The plaintiff and the defendant were parties as defendants in HCC. No. 82 of 2005 filed by one JULIUS NJIRU JOSEPH. The suit related to ownership of land parcel No. KYENI/MUFFU/1540 which the defendant in this case now had sold to the plaintiff. Julius had offered the land as security for some money advanced to him by the defendant in this matter. He was said to have defaulted in payment and that is why the defendant in this suit had sold the land to the plaintiff. Julius was contesting that sale and claiming ownership. The judgement that issued in that earlier suit was in favour of Julius. Both parties in this suit now appealed but were not successful. The outcome of the

appeal is what provoked the filing of this suit. The plaintiff is blaming the defendant for the losses he incurred.

38. From the plaintiff's claim, it is clear that he wants a refund of the money he paid for the land, or compensation at the current market value for the land he lost. He would also wish to get a refund of the money spent as legal fees for the suits.

39. My considered view is that the outcome of this case should hinge on two legal concepts: Limitation of actions, which the defendant has raised, and/or res-judicata, which no one raised or mentioned. I will start with res judicata. The statutory basis for the aspect of RES JUDICATA applicable here is to be found at Section 7 of Civil Procedure Act (Cap 21) specifically as covered by explanation No. 4 therein. The section is as follows:

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court:

Explanation - (1)

Explanation - (2).....

Explanation - (3)

Explanation - (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation - (5)

Explanation - (6)"

40. Further, Section 8 of the same Act states as follows:

"8.

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action."

41. From a case law perspective, the entire concept of RES JUDICATA was captured well in the old case of HENDERSON -VS- HENDERSON [1843 - 60] ALL E.R. 378 as follows:

"... where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in

contest, but which was not brought forward only because they have, from negligence in advertence, or even accident ,omitted parts of their case. The plea of res judicata applies, except in special case not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.
(emphasis: mine).

42. In a non-judicial context, Kuloba Richard in his seminal book: JUDICIAL HINTS ON CIVIL PROCEDURE: Law Africa Publishing (K) Ltd: 2nd edition, at page 475 stated the test for RES JUDICATA as follows:

“The test whether a suit is barred by res judicata is this: Is the plaintiff before the court, in another way or in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings which had been adjudicated upon? If so the plea of res judicata applies not only to the points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable

diligence, might have brought forward at the time.” (emphasis: mine).

43. It is clear from all this that if a claim, or defence, or even an issue could have been raised or brought forward in a previous case but was not, a litigant is barred from raising or bringing it forward in a subsequent suit between the same parties relating the same subject matter. This legal position or rule promotes judicial efficiency and serves to prevent multiplicity of proceedings. It requires and/or encourages the litigating parties to present all their available claims or issues at once. It is in light of this that bringing a separate suit on a matter that should have been raised as a counter claim can be considered as RES-JUDICATA or even as an abuse of the court process. It amounts to unnecessary duplication of proceedings and inefficient use of judicial time and resources.

44. As pointed out earlier in this matter, the parties in this suit were first sued as defendants by one JULIUS NJIRU JOSEPH in HCC No. 82 of 2005. That suit contested the ownership of land parcel No. KYENI/MUFFU/1540 by the plaintiff. The plaintiff had been sold the land by the defendant herein. That sale too was in dispute.

45. The law then, as now, was that a defendant could file a claim or counter-claim against a fellow defendant where both or more of them are sued in a suit. This happens where a defendant feels that a fellow defendant should bear or take responsibility if the plaintiff in the suit they are sued wins. It is a claim or counter-claim filed by a defendant against a fellow defendant asking the court to order the fellow defendant to compensate, or take responsibility, or bear the loss. The law as it was then is still there in Order 1 rule 24 of Civil Procedure Rules, 2010. Just to substantiate further, Order 1 Rule 24 provides as follows:

“(1) Where a defendant desires to claim against another person who is already a party to the suit

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- (a) That he is entitled to contribution or indemnity;***
or
- (b) That he is entitled to any relief to or connected with the original subject matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or***
- (c) That any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and defendant and should properly be determined not only as between the plaintiff and the defendant but as***

between the plaintiff and the defendant and such other person or between any or either of them, The defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.”

46. In this matter, the plaintiff desires that he gets a refund of the money he had paid for the land, or, in the alternative, that he be paid a sum of money equivalent to the current value of the land he lost. At the time the plaintiff and the defendant were both sued in HCC No. 82 of 2005, the plaintiff herein could have lodged a claim or counter-claim against the defendant. The cause of action had already arisen. The court that handled HCC No. 82 of 2005 would have handled the entire matter at once and any appeals arising would have included all matters that the parties were dissatisfied with. The plaintiff did not lodge a claim. He didn't complain. He lost in the High Court and in the Court of Appeal. Some eleven (11) years after the first suit was filed, he then filed this claim. My considered view is that the plaintiff's suit is coming rather late in the day. It should have been filed when the first suit was instituted.

47. Now the plaintiff also wants a refund of the Kshs. 230,000/= he paid for the land plus interests at court rates upto this time. If he had filed his case at that early stage, the defendant, even if found

liable, would not have to pay so much by way of interest. If, as desired in the alternative, the value of the land is what the plaintiff desired, it would also not be the large amount of money he is claiming now. It can be seen therefore that the plaintiff's dilatoriness or lack of tact or prudence is obviously prejudicial to the defendant. It would also be so as regards costs. If the approach taken by the plaintiff was as suggested herein, the costs would have been much lower. Such costs would also not require to be agitated for in a separate suit. They would, if awarded, be handled in the usual manner that such costs are assessed in suits.

48. The point here is that the suit before the court ought to have been a claim or counter claim by the plaintiff against the defendant in HCC No. 82 of 2005. To the extent that he didn't lodge this suit as a claim then, then it is proper to say that as raised now, the suit is RES JUDICATA. I say this because from 2005 to date, the parties have been involved in litigation for over twenty (20) years. My considered view is that even the compensation the plaintiff is claiming as legal fees could have been handled, if proved, as an issue of costs in the earlier suits had the claim now before the court been made part of the suits.

49. I now come to the issue of limitation of time. Section 4 (1) (a) and (e) states as follows:

“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

(b)

(c)

(d)

(e) Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

50. The claim before me is not a land matter *sensu stricto*. It is essentially a money claim arising from concluded land matters. But broadly speaking, an argument can be made for treating the matter as a land matter. The prayers sought by the plaintiff can offer useful guidance: The plaintiff would wish to Kshs. 10,000,000/= being the value of the land he lost, or Kshs. 230,000/= plus interests, which is the purchase price he paid to the defendant long ago. He is claiming legal fees amounting to Kshs. 460,000/= expended on the suits in court. An amount of Kshs. 54,400/= is claimed as the sum paid for valuation of the land and finally, damages for loss of use of the lost land from the year 1987 to 2013 are also asked for. Basically, then, though the

claim prima facie looks like a monetary one, it's clear that the monies claimed are intrinsically related to land or land linked interests, hence the argument that the matter can be viewed as a land matter. But I will not rely on Section 7 of the Limitations of Actions Act as cited by the defendant. That section is about recovery of land. The plaintiff is not seeking to recover land.

51. As pointed out earlier, the monetary value for the land or even the 230,000/= purchase price could be claimed against the defendant herein when the first suit was filed in court way back in the year 2005. The plaintiff did not lodge the claim then. He filed it in the year 2016, some eleven (11) years later. If the monies being claimed now are to be treated as accruing or arising from a failed or frustrated sale of land contract, Section 4 (1) (a) of Limitations of Actions Act (Cap 22) would delegitimize the claim because it was filed outside the six (6) years allowed for filing claims based on contract. If on the other hand it is argued that it is not a claim based on contract, it becomes a claim not expressly provided for under the Limitations of Actions Act (supra) and in this regard, Section 4 (1) (e) provides that such claims should be brought also within six (6) years. The claim therefore would also be barred by that provision.

52. As regards the claim or prayer for refund of the legal fees paid, I note that the receipts made available are for the years 2007 and 2008. This claim was filed in the year 2016. That is also way outside the six (6) year period allowed by Section 4 (1) (a) and (e) of the Limitations of Actions Act. It is therefore also untenable in law. The same case applies to the other prayers because they are hinged on a stale claim filed outside the legally allowed period.
53. In my considered view therefore, the suit before me fails to succeed first, because it is RES JUDICATA and/or, second, because it is time barred under the relevant provisions of Limitation of Actions Act. I therefore dismiss the plaintiff's suit as it is caught by the statute of Limitations and also by Section 7 of Civil Procedure Act (Cap 21).
54. As regards the issue of costs, I realize that the applicable law - see Section 27 of the Civil Procedure Act (Cap 21) - is that costs follow the event. What this essentially means is that the defendant herein should get costs as the event, meaning the outcome of this case, has favoured it. But the law is also that costs are also granted at the discretion of the court. The parties in this suit have litigated together as parties on one side in the previous concluded suits. Both have been in courts of law for a

long time. It is clear to me that the plaintiff herein is the ultimate loser. His bitterness and frustration as a human being can therefore be easily understood. It is not difficult to see why he turned against the defendant. My considered view is that he should not be condemned to pay costs in this matter. He belatedly filed this claim hoping to recoup some of the losses he made. Unfortunately, the law as it stands does not favour him. Bearing all this in mind, I order that each side should bear its own costs.

JUDGEMENT DATED, SIGNED and DELIVERED online at **KITUI** this **28th day of April, 2026** pursuant to notice dated **21/4/2026**.

In the presence of,

Court Assistant - Musyoki

Plaintiff - absent

Defendant - absent

No counsel present

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI