



Njoroge v Chal Developers Limited & another (Environment & Land Case 383 of 2017) [2024] KEELC 408 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 383 OF 2017
CA OCHIENG, J
JANUARY 31, 2024**

BETWEEN

TOM WAIHARO NJOROGE PLAINTIFF

AND

CHAL DEVELOPERS LIMITED 1ST DEFENDANT

MARGARET NYAMBURA KARANJA 2ND DEFENDANT

JUDGMENT

1. By a Complaint dated the 14th September, 2017 which was amended on 1st November, 2021, the Plaintiff prays for Judgment against the Defendants for:
 - a. A declaration that the Plaintiff is the rightful proprietor of all that piece of land known as Land Reference Numbers 28052/26 and 28052/28, derived from all that parcel of land known as Land Reference 18046 each measuring 0.1090 Hectares respectively.
 - b. An order of specific performance of the Agreement dated the 16th September, 2006.
 - c. An order of Mandatory injunction compelling the Land Registrar, Nairobi, to effect transfer of all parcels as Land Reference numbers 28052/26 and 28052/38 each measuring 0.1090 Hectares respectively, both situate in Mavoko Municipality in Machakos District, Machakos County upon payment of Kshs 245,000.00 by the Plaintiff to the 1st Defendant as per the terms of the Agreement dated 16th September, 2006.
 - d. Costs of this suit.
 - e. Any other relief or further relief this Honourable Court may deem fit and just to grant in the circumstances.



2. The 1st Defendant filed its Statement of Defence including Counter-claim dated the 30th October, 2017 where it denied the averments in the Plaint except the descriptive and jurisdiction of the Court. It contended that the Plaintiff was not entitled to orders of specific performance. In the Counter-claim, it sought for the Plaintiff's suit to be dismissed with costs and Judgment be entered on its behalf as per the said Counter-claim, by the Plaintiff being compelled to withdraw the caveats registered in IR No. 179708 and 1794562.
3. The 2nd Defendant filed a Defence and Counter-claim dated the 15th June, 2021 where she denied the averments in the Plaint except the descriptive and sought for the following Orders:
 - a. Dismissal of the Plaintiff's suit.
 - b. Judgment be entered for the 2nd Defendant in her Counter-claim against the Plaintiff for:
 - i. An order from the Honourable Court directing for the removal of the caveats and/or cautions placed on the suit properties namely Land Reference Numbers 28052/26 and 28052/38.
 - ii. General damages.
 - c. Costs of this suit and Counter-claim.
4. The matter proceeded for hearing where the Plaintiff called one witness while the Defendants' had two witnesses.

Evidence of the Plaintiff

5. The Plaintiff claimed that on 16th and 26th September, 2006 respectively, he paid the 1st Defendant a total of Kshs 500,000 under two receipt numbers being 0607 and 0609 as a commitment fee for the purchase of two plots. He confirmed that on 16th September, 2006, they executed a Sale Agreement stipulating the terms and conditions of the purchase of the two plots with the total purchase price being Kenya Shillings one (1) million. He contends that as at the time of executing the said Sale Agreement, he had paid a total of Kshs 755,000 but was not issued with a receipt for Kshs 255,000. He states that the 1st Defendant breached the contract as it failed to perform the terms set out in the Sale Agreement. Further, that it declined to receive the balance of the purchase price from him. He explained that in 2010 together with other purchasers of portions from the same parcel of land being land reference number 18046 in a bid to protect their interests, they placed a caveat on the said land. Further, vide a letter dated the 2nd October, 2012, together with other purchasers, they sought for the 1st Defendant to perform its part of the contract but it never acknowledged receipt of the said letter nor acted on it. He stated that in 2015, the said group of purchasers agreed to pay for all the pending land rent and rates to facilitate other requirements for their respective portions of land to be registered in their names culminating in his lifting the caveat. Further, that the 1st Defendant proceeded to sign transfer documents to most of the aforementioned purchasers except in his favour. He admitted that on 13th April, 2017, he placed caveats on two plots namely land reference numbers 28052/26 and 28052/38 respectively. The Plaintiff produced the following documents as exhibits: Copy of his National Identity Card; Copy of Sale Agreement dated 16th September, 2006; Copies of two receipts numbers 0606 and 0609 dated 16th and 26th September, 2006 respectively; Copies of Title Deeds, Deed Plan and Leases for all those parcels of land known as Land Reference 28052/26 and 28052/38; Copy of Notice of Withdrawal of Caveat for all those parcels of land known as Land Reference 28052/26 and 28052/38; Copy of Rent Clearance Certificate for all those parcels of land known as Land Reference



28052/26 and 28052/38 and Copies of Application for Registration of Caveat on all the parcel of land known as Land Reference 28052/26 and 28052/38.

Evidence of the Defendants

6. The 1st Defendant confirmed entering into a Sale Agreement in 2006 with the Plaintiff but insisted that it is the Plaintiff that failed to meet his obligations under the said agreement by failing to pay the agreed purchase price. It contended that the suit was statute barred and the Plaintiff was not entitled to allude to the acknowledgement clause as proof of payment. It claimed that in 2010, the Plaintiff had registered a caveat on the whole of LR No. 18046 which was wrong as his interest was only on two parcels of land. Further, that payment of land rent was supposed to be done by the purchasers. It explained that the first caveat was lifted culminating in its signing transfer forms for those purchasers who had paid the purchase price but it could not sign in favour of the Plaintiff since he had not done so. It argued that the caveats placed by the Plaintiff on Land Reference Numbers 28052/2 and 28052/38 are not proper since the Plaintiff has no legal or equitable rights on the said title. The 1st Defendant produced the following documents as exhibits: Copy of Sale Agreement dated 16th September, 2006; Copies of two receipts numbers 0607 and 0609 dated 16th and 26th September, 2006 for a total sum of Kshs 500,000/=; Copies of Notice of Withdrawal of Caveat registered as IR 94695/3 in respect to the Caveat registered as IR 94695/1 and Copies of Caveats registered as IR 179608/2 and 179456/2 against LR No. 28052/38 and 28052/26.
7. The 2nd Defendant claimed she entered into two Sale Agreements with the 1st Defendant dated the 23rd July, 2012 and 18th October, 2014 respectively for purchase of LR No. 2805/26 and 2805/38 and paid the full purchase price. She stated that she took vacant possession of the two parcels of land and has since developed them. She confirmed that the 1st Defendant executed transfer documents in respect to the two aforementioned parcels into her name and furnished her with duly attested transfers together with an affidavit confirming she is the bona fide purchaser of the two properties. Further, that she presented the transfer for registration on 14th July, 2020 but discovered there was a caution placed on the two parcels of land. She sought for the 1st Defendant to apply for removal of the caution as she is unable to complete the registration of the leases. She insists that this suit is statute barred. The 2nd Defendant produced the following documents as exhibits: Sale Agreements for LR No. 28052/26 and 28052/38; Application for registration of Lease in respect to LR Nos. 28052/26 and 28052/38 respectively in favour of 2nd Defendant; Affidavits sworn on 16th July, 2020 by the 1st Defendant's Director in support of the 2nd Defendant's application for registration of Leases for LR Nos. 28052/26 and 28052/38; Payment of rates to Machakos County Government in respect to LR Nos. 28052/26 and 28052/38 and Letter by the Registrar of Titles Nairobi Registry giving Notice to the Plaintiff for removal of caveat registered against LR Nos. 28052/26 and 28052/38.

Submissions

Plaintiff's Submissions

8. The Plaintiff in his submissions relied on his pleadings, testimony, including exhibits and provided a background of the dispute herein. He contended that this suit was not statute barred as claimed by the Defendants since the 1st Defendant responded to the completion notice his advocates messrs Kimani Kahiro & Associates on 7th November, 2012, when he realized there is a breach of contract, hence that is when the cause of action arose. Further, the cause of action arose when his advocates issued a completion notice to the 1st Defendant, dated the 17th October, 2012. He further submitted that he is entitled to the specific performance of the Agreement for Sale dated the 16th September,



2006. Further, that he has always been ready to settle the balance of the purchase price. He argued that if he indeed he was in breach of the contract, it was incumbent upon the 1st Defendant to send a completion notice before selling the plots to the 2nd Defendant. He also submitted that the 2nd Defendant cannot be deemed to be a bona fide purchaser for value as the 1st Defendant knowingly sold the suit plots to the 2nd Defendant to defraud him as they already had a contract with the 1st Defendant. Further, that he is hence entitled to orders sought in the Plaint. To support his arguments, he relied on Sections 4(1) and 7 of the *Limitation of Actions Act*, Section 71(1) of the *Land Registration Act* as well as the following decisions: *Olive Mwea Wachira & Dan Ndubiu Wabome (as administrators of the estate of John Wabome Wachira (deceased) v Amboseli Court Limited* (2021) eKLR; *Schon Noorani v Damji Ramji Patel & 2 Others* (2006) eKLR; *Toshike Construction Company Limited v Harambee Cooperative Savings & Credit Society Limited* (2021) eKLR; *James Muchangi Gachemi v Solio Group Ranch* (2023) (unreported on KLR) and *Abdelhafid Tchoketch & Another v Mercy Nyambura Kanyara* (2021) eKLR.

Defendants' Submissions

9. The 1st Defendant in his submissions relied on his pleadings including testimony of its witness and insisted that this suit is statute barred as it offends the provisions of Section 4(1) of the *Limitation of Actions Act*. Further, that this court hence lacks jurisdiction to hear and determine it. It argued that the Plaintiff having entered into a contract with it on the 16th September, 2006, any action in relation to the impugned Agreement should have been instituted by 16th September, 2012. It insisted that the Plaintiff cannot rely on Section 7 of the *Limitation of Actions Act* as he had not taken vacant possession of the suit land as he breached the contract first by failing to pay part payment of the deposit as well as the remaining purchase price. It contended that the suit should have been instituted through an Originating Summons to recover land. Further, that since it was founded on contract, it should have been filed within six (6) years when the cause of action accrued and in this instance there is no specific time indicated when the alleged breach of contract was discovered. It contended that it is the Plaintiff who breached the contract as he failed to provide proof that he paid Kshs 255,000. Further, that he had been asked to pay the said amount severally but he failed to do so. It reiterated that the completion date in the impugned Sale Agreement indicated it was on 31st March, 2006. Further, that the Plaintiff failed to complete the payment of the purchase price and resorted to insulting it as well as placing caveat on the suit land. It further submitted that the caveats placed by the Plaintiff on the suit land were not appropriate as his interest was only on two portions of land and not the whole of LR No. 18046. Further, that the Plaintiff proceeded to place caveats in LR No. 28052/26 and 28052/38 without having any legal or equitable right to do so. To buttress its submissions, it relied on the following decisions: *In the matter of Interim Independent Electoral Commission* (2011) eKLR; *Attorney General & Another v Andrew Maina Gitinji & Another* (2016) eKLR; *Dennis Koikai Naiso v Erik Tipis & 3 Others* (2019) eKLR and *Victoria Laundry (Windsor) Ltd v Neman Industries Ltd: Coulson & Co. Ltd (Third Parties)* (1949) 2KB 528 as quoted in the case of *Kenya Tourist Development v Sundowner Lodge Limited* (2018) eKLR.
10. The 2nd Defendant in her submissions also relied on her pleadings, testimony and exhibits. She contended that this suit is statute barred as it offends the provisions of Section 4(1) of the *Limitation of Actions Act* and is hence incompetent. Further, that she was not privy to the contract between the Plaintiff and the 1st Defendant. She claimed that the Plaintiff did not file a Defence to Counter-claim and in the absence of the same, her Counter-claim should be allowed. It was her further submission that the Plaintiff had not proved his claim for specific performance for the contract dated the 16th September, 2006, to the required standard and he was hence not entitled to the orders sought as per the Plaint. Further, that a party seeking specific performance must demonstrate that he performed all



the terms of the agreement and that he has not acted in contravention of the essential terms of the said agreement. It was her argument that the Plaintiff having admitted in his pleadings as well as testimony that he had not paid the full purchase price, was hence in breach of the terms of the said contract. Further, that the alleged contract not having been completed within the fixed period, it would entail great hardship, oppression and injustice to the 1st Defendant to be required to part with property no longer available for sale and transfer. She further reiterated that the Plaintiff was not entitled to remedy of a mandatory injunction compelling the Land Registrar, Nairobi to effect transfer of the suit plots to him upon payment of the Kshs 245,000 as this would create a new state of affairs. Further, that the Plaintiff is guilty of laches and is therefore not entitled to the favourable discretion of the equitable relief sought. She stated that she had proved her Counter-claim to the required standard as she is an innocent purchaser for value without notice. To support her averments, she relied on the following decisions: *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* (2018) eKLR; *Adnarm v Earl of Sandwich* (1877) 2QB 485; *Haron Onyancha v National Police Service Commission & Another Kisii* ELC 168 of 2016; *Kenya Airways Ltd v Classical Travel & Tours Ltd* (2003) LLR 2704 (CCK); *Gurdev Singh Birdi & Marinder Singh Ghatora v Abubakar Madhubuti* CA No. 165 of 1996; *Amina Abdulkadir Hawa v Rabinder Nath Anand & Another* (2012) eKLR; *Reliable Electrical Engineers Limited v Mantrac Kenya Limited* (2006) eKLR; *Malier Unissa Karim v Edward Oluoch Odumbe* (2015) eKLR and *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* (2015) eKLR; *Samuel Kamere v Lands Registrar, Kajiado* (2015) eKLR.

Analysis and Determination

11. Upon consideration of the respective parties' pleadings herein including the testimonies of the witnesses, exhibits and rivalling submissions, the following are the issues for determination:
 - a. Whether the Plaintiff's claim is statute barred.
 - b. Whether the Plaintiff is entitled to orders of specific performance.
 - c. Whether the Plaintiff is entitled to orders sought in the Plaintiff.
 - d. Whether the Defendants are entitled to orders sought in the Counter-claim.
12. As to whether the Plaintiff's claim is statute barred.
13. The Defendants have claimed that this suit is statute barred by dint of Section 4 of the *Limitation of Actions Act* which fact is opposed by the Plaintiff that has sought to rely on Section 7 of the *Limitation of Actions Act*.
14. Section 4(1) of the Limitations of Actions Act stipulates inter alia:

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;”
15. While Section 7 of the *Limitation of Actions Act* provides that:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right to action accrued to him or, if it first accrued to some person through whom he claims to that person.”
16. In the case of *Mehta v Shah* [1965] EA 321, the Court held that:

The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his



defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

17. While in the case of *Salim Mohamed Salim Tweshe v Khalid Salim Naaman & 5 others* (2020) eKLR the court observed that:

The cause of action in this case is indicated to have arisen on 14th May, 1983. The suit was filed on 2nd October, 2018 which was far beyond the six years period within which an action founded on contract may be brought and also beyond the twelve years within which an action may be brought for the recovery of land. From the above provisions of the law, it is evident that the plaintiff's suit herein is statute barred. In this case, the plaintiff argues that the time the cause of action accrued is contested and therefore the objection before court is not on a pure point of law. However, in my view the matters raised are purely on points of law and in particular the issue that the suit is caught by limitation of time. From the pleadings and especially the plaint, it is clear that the plaintiff's claim is grounded on a contract which arose in the year 1983. The court does not require any evidence to arrive at a finding that the suit is caught by limitation of time. Am alive to the fact that at this stage, the court cannot investigate on some facts as to when the cause of action arose. The moment a court is invited to conduct a mini-trial on facts to establish whether a preliminary objection is valid, then that preliminary objection itself ceases to be a preliminary objection. I am only beholden to look at the pleadings as I have done in the instant case.”

18. On perusal of the Plaint herein, I note the cause of action arose from the Sale Agreement between the Plaintiff and 1st Defendant dated the 16th September, 2006. Further, on perusal of the aforementioned Sale Agreement at paragraph 5, which was produced as an exhibit, it indicates completion date is 31st March, 2006 which the Plaintiff informed court was a mistake and should have been 31st March, 2007. Be that as it may, from the year 2007 upto the time this suit was filed on 15th September, 2017, it was more than ten (10) years. The Plaintiff has argued in his submissions that the cause of action only arose in 2012 after his advocates messrs Kimani Kahiro & Associates had issued a completion notice dated the 12th October, 2012 to the 1st Defendant. I have perused the said letter and note it was sent several years after the completion date. It is trite that a Court is not supposed to change the terms of the contract between parties and since timelines were set in the aforementioned Sale Agreement and parties agreed to adhere to certain terms, I opine that the Plaintiff is estopped from relying on Section 7 of the *Limitation of Actions Act*. It is my considered view that both the Plaintiff and 1st Defendant were bound by the terms of the aforesaid Sale Agreement. In the foregoing, while associating myself with the decisions cited as well as relying on legal provisions quoted, I find that this suit is indeed statute barred.
19. As to whether the Plaintiff is entitled to orders of specific performance.
20. The Plaintiff seeks orders of specific performance in respect to the Sale Agreement dated the 16th September, 2006, which is disputed by the Defendants who insist that it is the Plaintiff who breached the terms of the said contract. I wish to highlight an excerpt from the Sale Agreement dated the 16th September, 2006 between the Plaintiff and the 1st Defendant, which forms the fulcrum of the dispute herein.

Whereas...2. The Vendor has subdivided the said piece of land into several plots and has agreed to sell and purchase has agreed to purchase plots Numbers 46 & 48 as shown on the map annexed hereto...NOW THIS AGREEMENT WITNESSETH as follows:-



1. The Vendor shall sell and the Purchaser shall buy the said Plots at the agreed purchase price of the Kenya Shillings One Million (Kshs 1, 000,000) which sums shall be paid to the Vendor by the Purchaser as hereunder.
 - i. The sum of Kenya Shillings Seven Hundred Fifty Five Thousand (Kshs 755,000) paid to the Vendor prior to execution hereof (receipt whereof is hereby acknowledged).
 - ii. The balance of Kshs Two Hundred Forty Five Thousand (Kshs 245,000) be paid on or before the completion date as hereinafter provided.
 2. The Vendor shall obtain all the necessary approvals and consents as by law required prior to completion...
 5. Completion date shall be on 31st March, 2006.
 6. The Vendor shall point out the beacons to the Plots to the Purchaser prior to completion.
 7. Upon payment of sum set out in Clause 1 (ii) above to the Vendor, the Vendor shall deposit with the Purchaser's Advocates the original deed plan for the Plots awaiting completion."
21. On specific performance, in the case of *Gurdev Singh Birdi and Marinder Singh Ghatora v Abubakar Madhubuti* CA No.165 of 1996 it was held that:
- ...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action."
22. From the aforementioned excerpt it is clear that the Plaintiff was to pay the full purchase price before the completion date. The Plaintiff insists he could not have paid the balance until all the completion documents were availed to him. However, this is not what was indicated in the aforementioned Sale Agreement.
23. In the case of *Joseph Kiprono Maswan v Veronica Mukami Nkatha Reithi & another* [2021] eKLR which cited in approval the case of *Amina Abdulkadir Hawa v Rabinder Nath Anand & Another* [2012] eKLR, where the court had quoted *Chitty on Contracts*, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors have stated as follows:
- Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles.....specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which



performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party.....severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible.”

24. In this instance, the 1st Defendant proceeded to sell the suit lands to the 2nd Defendant who took possession and has constructed thereon. Insofar as the Plaintiff has sought specific performance, noting that the 2nd Defendant already purchased the suit lands from the 1st Defendant, vide two Sale Agreements dated the 23rd July, 2012 and 18th October, 2014 respectively for purchase of LR No. 2805/26 and 2805/38 and paid the full purchase price, I opine that this prayer would cause severe hardship to the Defendants as the 1st Defendant disposed of the two plots way after the completion date. Further, since the Plaintiff admitted in both his pleading and evidence that he was yet to finalize payment of the purchase price, I find that he is the one who failed to perform the terms of the Agreement. I opine that he is not entitled to orders of specific performance but his remedy lies in pursuing redress as per the terms of the contract they entered into with the 1st Defendant, in the event of any party breaching the said contract.
25. In the circumstances, I find that the Plaintiff is not entitled to orders as sought in the Plaint as he has not proved his case on a balance of probability and will proceed to dismiss it with costs.
26. I further find that the Defendants have proved their case as per the Counter-claim and will enter Judgment in their favour in the following terms:
 - i. An order be and is hereby issued directing the Land Registrar, Nairobi to remove the caveats and/or cautions placed on the suit properties namely Land Reference Numbers 28052/26 and 28052/38.
 - ii. Costs of this suit and Counter-claim is awarded to the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF JANUARY, 2024.

CHRISTINE OCHIENG
JUDGE

