



REPUBLIC OF KENYA



**Njenga & another v Muchina & 2 others (Environment & Land Case 440 of 2016) [2024] KEELC 864 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 864 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 440 OF 2016  
A OMBWAYO, J  
FEBRUARY 22, 2024**

**BETWEEN**

**SAMUEL MUNA NJENGA ..... 1<sup>ST</sup> PLAINTIFF**

**NANCY KABURA NJENGA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JESSE MUCHINA ..... 1<sup>ST</sup> DEFENDANT**

**ABDUL GHANI KIPKEMBOI KOMEN ..... 2<sup>ND</sup> DEFENDANT**

**ABDUL KHALID KIPKEMBOI KOMEN ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs commenced this suit vide an Amended Plaint dated 12<sup>th</sup> February, 2020 against the Defendants seeking the following orders:
  - a. Kshs. 4,000,000 being refund of the purchase price.
  - b. General damages for breach of contract.
  - c. Kshs. 4,000,000 being the agreed 10% liquidated damages.
  - d. Costs and interest of this suit.
2. The 1<sup>st</sup> Defendant filed his Amended Defence and Counter claim dated 6<sup>th</sup> July, 2020. It sought for the following orders in its counter claim:
  - a. That a declaration be issued to declare that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the lawful owners of the suit land measuring 5 acres forming part of LR 10013/4 by dint of the sale agreement dated 19<sup>th</sup> October, 2011.



- b. That an order of eviction be issued to remove the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or any other person other than the 3<sup>rd</sup> and 4<sup>th</sup> Defendants from the 5 acres forming part of LR 10013/4 in actual or constructive occupation of the said suit property.
  - c. In the alternative the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be ordered to refund to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants the sum of Kshs. 4,000,000 paid as purchase price and any other damages awardable to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants being damages suffered as a direct consequence of the illegal actions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  - d. The costs of the suit be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  - e. Any other relief that this Honourable court may deem fit to grant.
3. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their Defence to the Counter claim where they averred that the issue had already been addressed in ELC 111 of 2016 and judgment delivered and therefore the same amounts to res judicata. They further averred that the counter claim is time barred as the sale agreement had been made on 1<sup>st</sup> September 2011. They urged the court to dismiss the counterclaim with costs.

### **Plaintiffs' Case**

4. Samuel Muna Njenga the 1<sup>st</sup> Plaintiff herein testified as PW1. He produced his statement dated 17<sup>th</sup> October, 2016 which he relied as his evidence in chief. He testified that he purchased a portion of the suit property LR No. 10013/4 from the 1<sup>st</sup> Defendant. He testified that they entered into an agreement dated 19/10/2011 where he purchased the suit property for a consideration of Kshs.4,000,000/=. He further testified that he purchased 5 acres out of the 7 acres while the other 2 acres purchased by a different person.
5. He produced the sale agreement produced as PEX1. He also testified that the sale agreement had been signed by himself and his wife, the 2<sup>nd</sup> Plaintiff herein and the Defendants'.
6. He was referred to the agreement where he testified that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were legal beneficiaries since the 1<sup>st</sup> Defendant had purchased the land from 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He went on to testify that he had paid the entire consideration through the lawyer M/s Seth & Wathigo who was representing both of them. He produced the banking slips as PEX 2 (a) (b) (c) and (d) for the sum of Kshs. 4,00,000. He testified that the lawyers through a letter dated 19<sup>th</sup> March, 2012 wrote to him confirming that full payment had been made. He produced the said letter as PEX3 after which he then took possession.
7. It was his evidence that the 1<sup>st</sup> Defendant received the money from the advocates. He testified that he had been in possession up to sometime in 2016. He explained that on 22<sup>nd</sup> April, 2016 he visited his land and was accosted by a group of men 9 about 15 in number including the 2<sup>nd</sup> Defendant who chased him out. He testified that the men were armed with panga and machetes who claimed that he did not own the suit land. He testified that he swore an affidavit explaining why he discharged the gun. He produced the affidavit sworn on 9<sup>th</sup> May, 2016 as PEX 4.
8. It was his testimony that he came to court after the incident to file the instant suit. He was referred to paragraph 5 of agreement where he testified that the completion date was within 120 days of execution of agreement. He added that it was then that the completion documents were to be availed to him but that never happened. He testified that the court had granted an order that the status quo of the suit property be maintained but that notwithstanding the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants caused subdivisions into numerous plots. He further testified that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sold the plots to third parties after



which their advocates wrote to Ogeto & co advocates regarding the sales. He produced the said letter as PEX 5. He testified that he also wrote to the 1<sup>st</sup> Defendants advocate vide a letter dated 24<sup>th</sup> October, 2019 which he produced as PEX 6. He testified that he could not return to the land as it is already occupied. He sought for a refund of his money.

9. Upon cross examination by Mr. Ndubi for the 1<sup>st</sup> Defendant, he confirmed that the 1<sup>st</sup> Defendant disclosed he had purchased 7 acres of the suit land from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He admitted that he was not aware that the 1<sup>st</sup> Defendant did not hold a title to the land. PW1 was referred to paragraph (a) of the sale agreement where he confirmed that it was only the 1<sup>st</sup> Defendant who had a sale agreement. He further confirmed that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were the beneficiaries and they were to sign the transfer to him. He confirmed that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were fully involved in the sale and they never raised any objection to the said sale. He also confirmed that the other person who had bought the balance of 2 acres from the 1<sup>st</sup> Defendant had also been chased.
10. He stated that he fenced, planted trees and cultivated for 3 years after he took possession. He added that his neighbor had constructed a residential house on his 2 acres portion. He stated that his occupation had been peaceful until April 2016 when the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant forcibly ejected them from the land. He further stated that the 1<sup>st</sup> Defendant never interfered with his possession and/or use of the land. He also stated that he was aware that the 1<sup>st</sup> Defendant's company went to court in another matter and an order preserving the property was issued even though the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant had already subdivided the land with the order in place.
11. PW1 stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant sold the land to the 1<sup>st</sup> Defendant who resold to other persons since they were evicted. He stated that his only claim is for refund from the 1<sup>st</sup> Defendant to whom he paid the money.
12. Upon cross examination by Ms. Rotich for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, he confirmed that the parties to the agreement dated 19/10/2011 were himself and the 1<sup>st</sup> defendant. He further confirmed that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants never participated in the negotiations. PW1 stated that he paid the 1<sup>st</sup> Defendant the total consideration and that the completion documents were to be availed by the vendor's advocates. He also stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants appended their signatures to the agreement as the legal beneficiaries. He stated that the vendor was the one to pay him back the money.
13. Upon reexamination, he stated that he had bought the suit land for his use and that the 1<sup>st</sup> Defendant's advocates were supposed to give him the completion documents. He stated that the letter that confirmed completion was dated 19/3/2012

This marked the close of the Plaintiff's case.

### **Defendant's Case**

14. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant did not give any evidence.

### **Submissions**

15. The Plaintiffs filed their submissions dated 28<sup>th</sup> December, 2023 on 3<sup>rd</sup> January, 2024. They gave a summary of the case and submitted that the only evidence was that of the Plaintiff which was never challenged. They submitted that they tendered evidence for proof of purchase of the suit property vide the sale agreement. They submitted that they also produced receipts to show payment of the purchase price to the firm of Sheth Wathigo Advocates. The Plaintiff submitted that the 2<sup>nd</sup> Defendant through his pleadings admitted that the purchase price had been paid in full.



16. They submitted that they were never issued with the completion documents ten years after purchase of the suit property. The Plaintiff relied on the case of *Photo Production v Securicor Ltd* [1980] AC 827 and submitted that the Defendants jointly and severally breached the sale agreement dated 19<sup>th</sup> October, 2011. They submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants signed the sale agreement hence they were bound by the said terms which were very clear.
17. In conclusion the Plaintiffs submitted that they have demonstrated the instances of the breach and urged the court to find the Defendants jointly and severally liable.  
The Defendants did not file any submissions.

### **Analysis and Determination**

26. This court has carefully considered the pleadings and the evidence on record and is of the view that the sole issue for determination is whether the Plaintiff is entitled to the orders sought.  
Order 24 rule 4 of the *Civil Procedure Rules* provides as follows:  
Procedure in case of death of one of several defendants or of sole defendant
  - (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
  - (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
  - (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.
27. Upon death of a Defendant and on application, the court has the discretion to substitute the deceased Defendant and if no application is made after one year, the suit abates. In the instant case, the 1<sup>st</sup> Defendant died in November, 2022 and counsel for the Plaintiff sought for time to substitute but the same was not done.
28. This court endorsed the abatement of the suit against the 1<sup>st</sup> Defendant on 5<sup>th</sup> May, 2023.
29. It is not in dispute that the Plaintiff and the 1<sup>st</sup> Plaintiff's evidence on record shows that the claim against the Defendants is pegged on breach of contract against the 1<sup>st</sup> Defendant. It is also clear that the Plaintiff's claim is an order of refund of the purchase price for the suit property from the 1<sup>st</sup> Defendant.
30. During evidence, the 1<sup>st</sup> Plaintiff confirmed that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants never participated in the negotiations. He also confirmed that he paid the 1<sup>st</sup> Defendant the full total consideration. He stated that his only claim was for refund from the 1<sup>st</sup> Defendant to whom he paid the money.
31. The upshot is that this suit having abated against the 1<sup>st</sup> Defendant, the cause of action against him does not survive.
32. Consequently, the Plaintiff's suit is dismissed with no orders as to costs.  
It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.**



**A.O.OMBWAYO**  
**JUDGE**

