



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kandie v Kakeny (Civil Appeal 31 of 2023)  
[2023] KECA 1188 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1188 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 31 OF 2023  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
OCTOBER 6, 2023**

**BETWEEN**

**DAVID KIPKURUI KANDIE ..... APPELLANT**

**AND**

**JOHN LEMISO OLE KAKENY ..... RESPONDENT**

*(Being an appeal from the judgement of Hon Justice C.  
Yano on 21st September, 2021 in ELC Case No. 126 of 2019)*

**JUDGMENT**

1. By a plaint dated July 1, 2019, the Respondent herein sued the Appellant seeking a declaration that the Appellant is registered as the owner of the premises known as Mombasa Municipality/Block XXVI/212 (hereinafter referred to as the suit land) in trust for the Respondent and that the same belongs to the Respondent; an order cancelling and revoking the Certificate of Lease and the Sale Agreement dated January 7, 2010 between the Respondent and the Appellant over the suit land; a permanent injunction restraining the Appellant from selling, charging, constructing, interfering with the suit land; a mandatory injunction compelling the Appellant and/or the District Land Registrar, Mombasa to transfer the suit land to the Respondent; General Damages; and Interests and Costs of the suit.
2. The Respondent's case was that he entered into a sale agreement with the Appellant dated January 7, 2010 to purchase the suit land at the price of Kshs 10,000,000.00; that in full trust and friendship between the Appellant and the Respondent the Respondent entrusted and transferred the suit land to the Appellant in expectation that the Appellant would make good his promise and pay the Respondent the entire purchase price; that the Appellant pleaded with the Respondent to take Kshs 300,000.00 as part payment deposit with the balance to be paid upon the sale of the same property to a third party, one Shamsudin, whom the Appellant had identified; that as a result of a legal dispute between the Appellant on the one hand and Waterfront Holdings Ltd in Mombasa ELC No 22 of 2012, the



- Respondent and the Appellant agreed to put the payment of the balance of the purchase price on hold pending the determination of the said suit; that after the hearing of the said case the court delivered its judgement in favour of the Appellant on February 15, 2019; and that notwithstanding the foregoing, the Appellant refused to pay the Respondent the balance of the purchase price.
3. The Respondent, while conceding that he was a witness in ELC Case No 22 of 2012, insisted that he only informed the Court that he had been paid Kshs 7.5 m while the balance was offset from the debt he owed the Appellant, due to the friendship and trust between him and the Appellant, a fact which was not true. According to him, the value of the suit land had appreciated to Kshs 230,000,000.00.
  4. In support of his case, the Respondent called PW2, Kennedy Begi Onkoba, an advocate of the High Court, who testified that he acted for the Respondent in the transaction between the Appellant and the Respondent. The gist of his evidence was that the land sale transaction between the Appellant and the Respondent was based on trust and it was meant to facilitate the Appellant in handling the sale transaction with the third party purchaser and that the Respondent only received a deposit of Kshs 3000,000.00 from the Respondent.
  5. In his written statement of defence, the Appellant averred that he discharged his legal obligation at the time of signing the agreement by paying the Respondent the full purchase price receipt of which the Respondent acknowledged; that this was confirmed by the Respondent in his testimony in Mombasa ELC Case No 22 of 2012; that the Respondent's suit was statute barred under Section 4(1)(a) of the Limitation of Actions Act; and that the Respondent was not entitled to the prayers sought in the plaint; that after purchasing the property, he got a buyer for the land who paid a deposit; that Waterfront Holdings Ltd, however, emerged claiming that the property belonged to it and as a result ELC Case No 22 of 2012 was filed.
  6. In his judgement, the Learned Trial Judge found that there was no dispute that the Appellant and the Respondent entered into an agreement for sale dated January 7, 2010 over the suit land at an agreed purchase price of Kshs 10,000,000.00; that for the purposes of limitation, since the ownership of the suit land was only confirmed in the judgement in ELC No 22 of 2012 on February 15, 2019, that was when the cause of action arose; that therefore the suit was not time barred; that in any case since the agreement for sale was entered into on January 7, 2010, by the time of the filing of the suit in 2019, the 12 year limitation period for recovery of land had not run out and that based Sections 109 and 112 of the Evidence Act as well as the case of *Anne Wambui Ndiritu v Joseph Kiprono Rokoï & Another* 1 EA 334, the burden was on the Appellant to prove that he paid the Respondent the full purchase price; that the Appellant did not pay the full purchase price; and that the Appellant was holding the property in trust for the Respondent and went on to grant the orders as prayed in the plaint, save for general damages.
  7. We heard this appeal on the Court's virtual platform on May 23, 2023 when Learned Counsel Mr Ondabu with Ms Rajab appeared for the Appellant while Mr Kurauka appeared for the Respondent. Counsel relied on their written submissions which they briefly highlighted.
  8. It is clear from the submissions made before us that the Respondent's claim against the Appellant was hinged on the finding by the trial court in ELC No 22 of 2012 that the suit property belonged to the Appellant in this appeal. This is clear from the decision of the learned trial Judge in his decision that gave rise to this appeal when he held that the cause of action in this matter only arose after the determination of ownership of the suit property in ELC No 22 of 2012.
  9. However, the decision in ELC No 22 of 2012 which was determined in favour of the Appellant herein was the subject of an appeal before this Court, being Civil Appeal No 88 of 2019 – *Waterfront Holdings Ltd v David Kipkurui Kandie & 2 Others*. In that appeal, we found that the decision by



the trial court in ELC No 22 of 2012 declaring the Appellant herein as the rightful owner of the suit property was arrived at in error. We accordingly, set aside the said decision. In our holding, the suit property was properly allocated to the Appellant in Civil Appeal No 88 of 2019, Waterfront Holdings Ltd and we upheld its title.

10. In light of that decision, it follows that the Respondent's cause of action, based as it were on the finding of the trial court in ELC No 22 of 2012, is founded on quicksand and is unsustainable.
11. In the premises, we set aside the judgement made on September 21, 2021 in ELC Case No 126 of 2019 and dismiss the suit. Considering the unique circumstances of this case we make no order as to the costs, both before the trial court and in this appeal.
12. Judgement accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**S. GATEMBU KAIRU, FCIArb.**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

*I certify that this is the true copy of the original*

**DEPUTY REGISTRAR**

