



REPUBLIC OF KENYA



KENYA LAW
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**Kimani v Kweli & another (Land Case 97 of 2023)
[2024] KEELC 4824 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4824 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
LAND CASE 97 OF 2023
YM ANGIMA, J
JUNE 13, 2024**

BETWEEN

JOSEPH NDICHU KIMANI PLAINTIFF

AND

JOHN NJORO KWELI 1ST DEFENDANT

BENEDICTO MURIITHI 2ND DEFENDANT

JUDGMENT

A. Plaintiff's Claim

1. By a plaint dated 18.09.2017, the Plaintiff sued the Defendants claiming the following reliefs:
 - a. An order of permanent injunction to restrain the Defendant from trespassing onto, remaining upon, or in any manner interfering with the use and occupation of Parcel No. Nyandarua/Mawingo Salient/1511.
 - b. An order of eviction of the 2nd Defendant from Parcel No. Nyandarua/Mawingo Salient/1511.
 - c. Costs of the suit.
 - d. Any other relief the court may deem fit to grant.
2. The Plaintiff pleaded that vide a sale agreement dated 01.08.2001 he agreed to sell Parcel No. Nyandarua/Mawingo Salient/1511 (the suit property) to the 1st Defendant at an agreed consideration of Kshs.140,000/= out of which the 1st Defendant paid a deposit of Kshs.90,000/=. It was pleaded that the balance of Kshs.50,000/= was to be paid by two instalments on or before 01.08.2002. It was the Plaintiff's case that the 1st Defendant had in breach of the terms of the said agreement defaulted in payment of the balance of the purchase price despite demand.



3. The Plaintiff further pleaded that the 1st Defendant had without his consent leased and put the 2nd Defendant in possession of the suit property despite his default in payment of the balance of the purchase price.
4. It was also the Plaintiff's case that the sale agreement for the suit property was null and void because the consent of the relevant land control board was never sought or obtained as required by law. He, therefore, offered to refund the deposit of the purchase price to the 1st Defendant less the penalty for his default in payment of the balance of the purchase price.

B. Defendants' Response

5. The Defendants filed a defence dated 21.09.2017 which was amended on 18.12.2018 to include a counterclaim. The 1st Defendant conceded the existence of the sale agreement dated 01.08.2001 but denied having breached any of its terms. He denied that the agreement was null and void for want of the consent of the land control board and put the Plaintiff to strict proof thereof. He did not, however, plead when and how the balance of Kshs.50,000/= was paid.
6. The Defendants further pleaded that they had been in continuous and uninterrupted possession of the suit property and that the Plaintiff's action for recovery thereof was statute-barred under the *Limitation of Actions Act* (Cap. 22). They pleaded that the suit was incompetent, frivolous and an abuse of the court process hence they prayed for its dismissal with costs.
7. By his counterclaim the 1st Defendant pleaded that it was the Plaintiff who was in breach of the sale agreement dated 01.08.2001, inter alia, for failing to avail the necessary consents and approvals and for failing to transfer the suit property to him within a reasonable period.
8. The 1st Defendant further pleaded that he had been in occupation, use and control of the suit property for over 17 years hence the Plaintiff's right to recover the same had been extinguished by operation of law and he was consequently entitled to the suit property on account of the doctrine of adverse possession. As a consequence, the 1st Defendant sought the following reliefs in his counterclaim:
 - a. A declaration that the 1st Defendant is entitled to 2 acres to be excised from Title No. Nyandarua/Mawingo Salient/1511 and an order for specific performance compelling the Plaintiff to transfer the said interest to the 1st Defendant absolutely.
 - b. In the alternative, a declaration that the 1st Defendant is entitled to be registered as proprietor of 2 acres to be excised from Title No. Nyandarua/Mawingo Salient/1511 by virtue of the doctrine of adverse possession and an order authorizing the Deputy Registry to execute all necessary documents to vest ownership of the said interest to the 1st Defendant absolutely.
 - c. Costs of the suit and counterclaim.
 - d. Any other or further relief that this honourable court may deem fit.

C. Plaintiff's Defence to Counterclaim

9. The Plaintiff filed a reply to amended defence and defence to counterclaim dated 22.01.2019. By his reply to defence, the Plaintiff joined issued with the Defendants on their defence and reiterated the contents of the plaint. He denied breaching the sale agreement as well as the particulars of breach pleaded by the 1st Defendant.
10. By his defence to counterclaim, he denied that his right to recover the suit property had been extinguished under the *Limitation of Actions Act* and put the 1st Defendant to strict proof thereof. He



further disputed that the 1st Defendant had acquired the suit property on account of the doctrine of adverse possession and put him to strict proof thereof. As a consequence, the Plaintiff pleaded that the Defendants were not entitled to the reliefs sought and prayed for dismissal of the defence and counterclaim.

D. Defendants' Rejoinder

11. The Defendants filed a reply to the defence to counterclaim dated 28.02.2019 in which they joined issue with the Plaintiff on his reply to defence and defence to counterclaim. They reiterated the contents of their defence and counterclaim and contended that the defence to counterclaim was a sham.

E. Trial of the action

12. At the hearing hereof, the Plaintiff testified on his own behalf as the sole witness. He adopted the contents of his witness statement dated 03.03.2017 as his evidence in-chief and produced his supporting documents as exhibits. His evidence was to the effect that it was the 1st Defendant who had breached the sale agreement dated 01.08.2001 by failing to pay the balance of the purchase in the sum of Kshs.50,000/= within the stipulated period or at all.
13. The Defendants, however, did not tender any evidence at the trial since the 1st Defendant failed to attend court on the date slated for defence hearing whereas the 2nd Defendant was deceased by the time.

F. Issues for Determination

14. The court has noted that the parties did not file an agreed statement of issues for determination in this matter since they opted to file separate issues. As such, the court shall frame the issues for determination as provided for under the Civil Procedure Rules, 2010. Under Order 15 rule 2 of the Civil Procedure Rules, the court may frame issues from any of the following:
 - a. The allegations contained in the pleadings or answers to interrogatories.
 - b. The allegations contained in sworn statements made by or on behalf of the parties.
 - c. The contents of documents produced by the parties.
15. The court has considered the pleadings, evidence and documents on record in this matter. The court is of the opinion that the following are the key issues for determination herein:
 - a. Whether the Plaintiff has proved his claim to the required standard.
 - b. Whether the 1st Defendant has proved his counterclaim to the required standard.
 - c. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - d. Whether the 1st Defendant is entitled to the reliefs sought in the counterclaim.
 - e. Who shall bear costs of the suit and the counterclaim.

G. Analysis and Determination

a. Whether the Plaintiff has proved his claim to the required standard

16. The court has considered the material and submissions on record on this issue. There is no doubt from the material on record that the Plaintiff was registered as the proprietor of the suit property and issued with a title deed on 09.12.2015. That is clear from the copy of the title deed he produced as an exhibit.



The 1st Defendant must have entered into the sale agreement dated 01.08.2001 on the basis that the Plaintiff was the owner of the suit property and that he had the right to sell it.

17. The court has considered the Plaintiff's evidence to the effect that the 1st Defendant was the one in breach of the sale agreement for defaulting in payment of the balance of the purchase price in the sum of Kshs.50,000/=. The Defendant did not testify at the trial to demonstrate how and when he paid the said sum of Kshs.50,000/=. The court accepts the evidence of the Plaintiff that the said balance was never paid hence the reason demand letters were sent to the 1st Defendant to either pay the same or vacate the suit property.
18. As the proprietor of the suit property the Plaintiff is entitled to enjoy all the rights of such ownership as stipulated under Section 25 of the [Land Registration Act](#) including the right to immediate possession. Since the 1st Defendant defaulted in the payment of the balance of the purchase price he could not acquire any interest, legal or equitable, in the suit property. Instead, he must have incurred some legal liability for breach of contract for which the parties provided for payment of liquidation damages.
19. The court agrees with the Plaintiff that the sale of 2 acres of agricultural land was a controlled transaction within the meaning of the [Land Control Act](#) (Cap.302) hence the failure by the parties to seek and obtain the consent of the Land Control Board invalidated the sale agreement under Section 6 of the said Act. As a result, the Plaintiff is entitled to recover the suit property. The court is thus satisfied that the Plaintiff has proved his claim against the 1st Defendant on a balance of probabilities as required by law.

b. Whether the 1st Defendant has proved his counterclaim to the required standard

20. It is evident from the 1st Defendant's counterclaim that he was seeking specific performance of the sale agreement dated 01.08.2001 with an alternative claim for adverse possession of the suit property. It is apparent from the material on record that when the suit was scheduled for defence hearing on 14.02.2024 the 1st Defendant did not attend court to prosecute his counterclaim. As a consequence, the court dismissed the same for want of prosecution. In the event, there is no valid counterclaim on record for consideration on merit.

c. Whether the Plaintiff is entitled to the reliefs sought in the suit

21. The court has already found and held that the Plaintiff has proved his claim on a balance of probabilities. It would, therefore, follow that the Plaintiff is entitled to the reliefs sought in the plaint for vindication of his property rights. However, since the 2nd Defendant is deceased and his personal representative was not joined in the proceedings, the reliefs sought shall only lie against the 1st Defendant as shall be specified in the judgment.

d. Whether the 1st Defendant is entitled to the reliefs sought in the counterclaim

22. In the view of the dismissal of the 1st Defendant's counterclaim for want of prosecution, it would follow that the 1st Defendant is not entitled to any of the reliefs sought therein.

e. Who shall bear costs of the suit and the counterclaim

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967]



EA 287. The court finds no good reason to depart from the general rule. As a result, the Plaintiff shall be awarded costs of both the suit and the counterclaim to be borne by the 1st Defendant.

H. Conclusion and Disposal Order

24. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his claim against the 1st Defendant to the required standard whereas the latter has failed to prove his counterclaim. As a consequence, the court makes the following orders for disposal of the suit and counterclaim:
- a. Judgment be and is hereby entered for the Plaintiff against the 1st Defendant in the following terms:
 - i. The 1st Defendant shall hand vacant possession of Title No. Nyandarua/Mawingo Salient/1511 to the Plaintiff forthwith.
 - ii. A permanent injunction is hereby issued to restrain the 1st Defendant from trespassing, remaining upon or in any manner interfering with the use and occupation of Title No. Nyandarua/Mawing Salient/1511.
 - b. The 1st Defendant's counter-claim be and is hereby dismissed in its entirety.
 - c. The Plaintiff is hereby awarded costs of both the suit and counterclaim to be borne by the 1st Defendant only.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 13TH DAY OF JUNE, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Bosibori holding brief for Mr. Ndubi for the Plaintiff

Mr. Ojare or the 1st Defendant

N/A for the 2nd Defendant

C/A - Carol

Y. M. ANGIMA

JUDGE

