



REPUBLIC OF KENYA



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**Kiriinya v Kimathi (Environment and Land Appeal E030 of 2023)
[2024] KEELC 5639 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5639 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E030 OF 2023**

CK NZILI, J

JULY 31, 2024

BETWEEN

VERONICA NGUGI KIRIINYA APPELLANT

AND

JAPHET KIMATHI RESPONDENT

*(Being an appeal from the judgment of Hon. S. Ndegwa (PM)
delivered on 28.3.2023 in Githongo PM ELC No. 5 of 2021)*

JUDGMENT

1. The appellant, as the plaintiff at the lower court, had sued the respondent as the defendant by a plaint dated 10.2.2021. The appellant claimed that through fraud and illegality, the respondent misrepresented to her that she had agreed on the sale of ½ an acre of land with the appellant's sister for consideration, and hence, she should transfer in exchange L.R No. 3691 initially held Abothughuchi/Kariene/3691 in trust for her sister with the authority, mandate and on behalf of her sister Grace Kapunge.
2. The appellant averred acting on that representation and believing the respondent, the respondent took advantage of her innocence and goodwill and mistakenly obtained transfer and registration of the suit land to his name. The appellant averred that as a result of fraudulent misrepresentation, the respondent obtained registration of the suit land without any consideration, caused her loss, condemnation and disagreements with other family members, suffering incessant and protracted court battles with family members. The appellant sought the cancellation of the title deed, reversal of the same to her name, eviction, and general damages.
3. The respondent opposed the claim through a statement of defense dated 22.3.2021. The admitted the contents of paragraph 4 of the plaint that the appellant had caused subdivision of L.R No. Abothughuchi/Kariene/2910 that he held in trust for family members into four resultant parcels



- of land namely L.R No's. Abothuguchi/Kariene/3689 – 3692 and that she was holding L.R No. Abothuguchi/Kariene/3691 in trust for Grace Gapunge.
4. The respondent denied causing the suit land to be transferred to his name under any misrepresentation or fraud as alleged or at all or being party to the alleged appeal or suit before any court of law. On the contrary, the respondent averred that by written agreements dated 23.10.2009 and 16.1.2010, the said Grace Gapunge, whose land L.R No. Abothuguchi/Kariene/2910 was held in trust by the appellant, voluntarily agreed to sell to him 1/2 an acre out of the land for Kshs.750,000/= and as a consequence, she agreed to have the land directly transferred to him by the appellant.
 5. The respondent averred that he paid a deposit of Kshs.550,000/= to the appellant's sister, who acknowledged receipt thereof and the balance of Kshs.330,000/= was deposited to M/S Kiogora Arithi Advocates for transmission to the seller in full and final settlement.
 6. Similarly, the respondent averred that he subsequently took vacant possession of the land, with full knowledge of the appellant upon successful regular and procedural transfer of the same to his name and eventually erected permanent buildings and attendance developments such as water and electricity.
 7. The respondent invoked the doctrine of estoppel and acquiescence against the appellant, terming the suit as disclosing no cause of action against him.
 8. Through a reply to the defense dated 8.7.2021, the appellant averred that in Meru ELC Appeal No. 3 of 2019, the court condemned her for hijacking the transfer of the suit land without the consent or authority from her sister. Further, the appellant denied being a vendor in the sale agreement or obtaining any consideration for the transfer of land to the respondent.
 9. The appellant averred that the resident was illegally benefitting from using the suit land to her detriment, for she was now entitled to the land since the beneficial owner has since denied sanctioning the sale and transfer in Nkubu ELC No. 92 of 2013, to which she was forced to excise 1/2 an acre out of her land L.R No. Abothuguchi/Kariene/3689, to compensate her sister for the suit land now held in the name of the respondent.
 10. At the trial going by the certified proceedings dated 6.3.2024, Veronica Ngugi testified as PW 1. Relying on her witness statement dated 10.2.2021 as her evidence in chief, PW 1 told the court that L.R No. 2910 was ancestral land, which she held in trust after inheriting it from her father for the family members. PW 1 told the court that she subdivided the land into four portions, among them the L.R No. 3691, which she held in trust for Grace Gapunge. She said that the respondent acquired it from her out of a representation that her sister was selling it to him and that the respondent had already paid consideration directly to Grace Gapunge. PW 1 said that she did so, hoping to save further fees that would have been incurred if the property was to be transferred to her sister and later to the respondent.
 11. PW 1 told the court that she acted under the mistaken belief and undue influence from the respondent that her sister had already authorized, consented to, or approved the transaction. She denied receiving any consideration from the respondent as the architect of the fraudulent scheme as held in Meru ELC Appeal No. 3 of 2019; unfortunately, she was condemned by the court for hijacking the transaction and transferring the portion directly to the respondent. As a consequence, the appellant told the trial court that she was forced to give her sister an equivalent share out of the family trust land as compensation.
 12. Further, PW 1 told the court that the respondent was the one to blame for fraudulent misrepresentation and committing an illegality and that he had already paid her sister consideration, yet none had been paid at all. PW 1 told the court the consequence of the respondent's actions was family disagreements between her, her sister and her mother, resulting in court battles in Nkubu and Meru E & L court. She produced as exhibits copies of green card for L.R No. Abothuguchi/Kariene/3691,



- judgments in Nkubu CCC 32 of 2019 and Meru ELC No. 3 of 2019, the appeal thereof, certified copies of proceedings in Nkubu PMCC No. 92 of 2013 and witness statements of Grace Gapunge as P. Exh No's. 1-6 respectively.
13. In cross-examination, PW 1 told the court that the seller of land to the respondent in 2009 was her sister and she witnessed the sale agreement since she was holding the land in trust. She denied the existence of another sale agreement dated 16.1.2010. PW 1 also confirmed being present when the respondent gave her sister money.
 14. Additionally, PW 1 clarified that she transferred the parcel to the respondent and also half an acre of land to Grace Gapunge in order to reduce costs. PW 1 admitted that the respondent took vacant possession and eventually acquired a title deed. PW 1 similarly admitted that her sister Grace had never sued the respondent on account of the issues before the trial court. That she needed cash, resulting in an amendment of the initial agreement on 16.1.2010, whereby he paid Kshs.270,000/= later on Kshs.180,000/= on 6.4.2010, leaving a balance of Kshs.300,000/= that was to be paid after a transfer on September 2012, following delay since one Mary Mukami had lodged a caution against the title.
 15. PW 1 acknowledged that the respondent was neither a witness in the said suit nor at the appeal. Additionally, she said that there was no reference to the respondent in the said judgments, nor was he ordered to return the portion sold to him. Asked whether her sister was a witness to this suit, PW 1 said that these were not listed as one, save for her witness statement produced as P. Exh No. (6), in the previous suit.
 16. DW 1 was Japhet Kimathi. He relied on his witness statement dated 23.3.2021 as his evidence in chief. He stated that in 2009, one Francis Kithinji offered to sell him 1 acre of land, and after signing a sale agreement with him, he also learned that one Grace Gapunge was equally disposing of 1/2 an acre in the area. DW 1 said he met with the appellant, who confirmed that her sister was indeed disposing of her share out of family land, L.R No. Abothuguchi/Kariene/2910.
 17. DW 1 told the court that the appellant informed him that she was holding the seller's land in trust. Later DW 1 stated that she got a confirmation from the seller about the trust. Since he was buying a portion of 1 acre from one Francis Kithinji, DW 1 said that the two agreed to exchange that ½ acre with the 1 acre that he was buying. In this case, DW 1 told the court that the seller, Grace, insisted on an additional sum of Kshs.250,000/= which he consented to.
 18. DW 1 told the court that on 23.10.2009, the parties went to M/S Kiogora Arithi, Advocates signed the agreement with the appellant and her sister Grace Gapunge, which Ann Muthoni, Mugambi Francis Kithinji and Barnard Mwirigi witnessed. DW 1 said that later on, Grace changed her mind and was a witness in the land exchange agreement produced as D. Exh No's. (1) & (2), which Omari Nyambati advocate at the offices and Kiogora Arithi & Associates, had witnessed.
 19. DW 1 said that after the transfer, the seller declined to collect the balance, alleging that the value had gone up. He said that he deposited Kshs.300,000/= to the lawyers above, who wrote a letter dated 28.1.2013 to the seller to go and collect the sum.
 20. DW 1 said that the land was procedurally, willingly, and lawfully transferred to him by the appellant after he had fully fulfilled the terms of the sale agreement. He said that he eventually settled and extensively developed the land without any objection from any quarter. DW 1 said that he was not a party to any court proceedings. He denied the alleged fraud or misrepresentation, as the land was transferred and registered under his name by the appellant at the behest of her sister.
 21. DW 1 produced as exhibits copies of sale agreements dated 23.10.2009, 16.1.2010, acknowledgment receipts dated 6.4.2010, an application form for a land control board consent, an advocates letter



- dated 28.1.2013 to Grace Gapunge, a letter dated 28.8.2020, green card for L.R No. Abothuguchi/Kariene/2910, withdrawal letter of caution by Mary Mukami, application for land control board consent for L.R No. Abothuguchi/Kariene/3691, land control board consent thereof, copy of transfer forms and a certificate of official search as D. Exh No's. 1-12, respectively. He confirmed that he attended the land control board meeting with the appellant, who signed and executed the consent forms and the transfer forms. DW1 said that in the two judgments, the blame was placed on the appellant by the courts over the direct land sale to him to avoid further costs for the transfer. DW 1 told the trial court that he paid Kshs.480,000/= for the land but the seller refused to collect the balance from his advocates which has continued to be held in trust.
22. Francis Kithinji M'inoti and Julius Kiogora Arithi, advocate, testified as DW2 and 3 DW 2 produced as exhibits a transfer form duly executed by the seller and purchaser at his advocate's offices. Similarly, he said that the respondent was never a party to Nkubu PMCC No. 92 of 2013, which was filed while the respondent was already in possession of the land.
23. DW 3, on his part, confirmed that the two sale agreements were produced as D. Exh No's. (1), (2), and the acknowledgment receipt were prepared and executed in his offices witnessed by his associate Omari Nyambati advocate. DW 3 told the court that he wrote D. Exh No. (5), seeking the said Grace to come and collect her money, who declined yet the land had already been transferred and registered to the respondent. He said the money was not collected despite involving Grace Gapunge and her family members. Moreso, DW 3 said that the respondent was not under any obligation to pay the appellant any money.
24. The appellant faults the trial court through a memorandum of appeal dated 27.4.2023 for:
- i. Failing to find that the suit was premised on the judgment in Meru ELC No. 3 of 2019, which was binding on it.
 - ii. Failing to consider the admission by the respondent for not paying any consideration for the land to her led to condemnation in Meru ELC No. 3 of 2019.
 - iii. Failing to consider the unique circumstances of the case as found in the holding before Nkubu Law Courts, which was also upheld at the high court in the referenced appeal.
 - iv. Failing to consider the overwhelming evidence in support of the claim based on fraud.
 - v. For taking into consideration unpleaded issues which were not before the court for determination.
 - vi. For not appreciating sufficient evidence that she had tendered before the court.
25. With leave of court, parties were directed to canvass this appeal through written submissions to be filed by 20.7.2024.
26. An appellate court of first instance is mandated to re-appraise the lower court record and come up with independent findings as to facts and law, while giving credit to the lower court for observing the witnesses and taking up their evidence firsthand. The court has carefully read the pleadings, evidence tendered grounds of appeal and the written submissions. The issues calling for my determination are:
- i. If the cause of action before the court was statute–barred.
 - ii. If the appellant's suit had disclosed any cause of action against the respondent.
 - iii. If the appellant pleaded and proved fraud, misrepresentation and illegal against the respondent.



- iv. Whether the appeal has merits.
 - v. What is the order as to costs?
27. A cause of action refers to an action on the part of the defendant that gives the plaintiff a reason to complain. It is a combination of facts that entitles a person to obtain a remedy in court from another person who violated or threatened the violation of such right by another person. See *Karl Wehner Clasen vs Commissioner of Lands & another* (2019) eKLR and *D.T Dobie & Co. and another vs Muchina* (1982) eKLR.
 28. In *Anne Jepkemboi Ngeny vs Joseph Tireito & another* (2021) eKLR, a suit on recovery of land had been filed 28 years after the interest on land was allegedly acquired. The Court of Appeal addressed itself on what a cause of action is and when it arises in a claim for recovery of land. In other words, the court considered when a claimant in such a case is entitled to complain or obtain a remedy. The court cited with approval *A.G & another vs Andrew Maina Githinji & another* (2016) eKLR that a cause of action is an act on the part of the defendant that gives the plaintiff his cause of the complaint. Further, the court cited with approval Lord Diplock in *Letang vs Cooper* (1964) 2 ALL ER 929, that a cause of action was simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person.
 29. What the appellant complained about is that in entering and transferring L.R No. Abothuguchi/Kariene/3691, the respondent misrepresented himself that he had agreed on the sale of ½ an acre of land with her sister Grace Gapunge, whom she had already paid consideration to, took advantage of his innocence and goodwill and fraudulently obtained the title to the land when she knew or ought to have known that it was false or untrue, hence obtained a title from her through pretenses and fraud. Therefore, the appellant sought the cancellation of the title, eviction from the land, and general damages. The appellant further pleaded that due to the acts of the respondent, he was sued in Meru ELC No. 119 of 2013, filed on 13.5.2013 by her sister, Grace Gapunge. Similarly, she pleaded that she filed Nkubu PMCC No. 92 of 2013. The two files were eventually consolidated. A judgment was read on 13.12.2018 dismissing the appellant's suit, allowing that of her sister.
 30. Aggrieved by the judgment of the appellant as the 2nd appellant filed Meru ELC No. 3 of 2019. The appeal was mainly about L.R No. Abothuguchi/Kariene/1651. In a judgment dated 30.4.2020, the appeal partially succeeded by ordering that Grace Gapunge was entitled to ½ an acre of L.R No. 2689.
 31. In this appeal, the appellant argues that the cause of action allegedly arose out of the findings in both Nkubu Law Courts and High Court rendered on 13.12.2018 and 30.4.2020 from the trial courts' undisputed facts, the suit land was transferred to the respondent on 21.9.2012.
 32. Grace Gapunge did not sue the appellant in Nkubu Law Courts regarding the sale of either L.R No's. Abothuguchi/Kariene/3691 or over L.R No. Abothuguchi/Kariene/2910, 1651, or the resultant subdivisions of L.R No. 3692, namely L.R No. 4411 and 4412. The trial court, on page 17, made in passing an observation regarding the subject matter herein. At the High Court, in paragraphs 31 & 41, page 27, the court observed that parcel No. 3691 was transferred by the appellant to the respondents in 2012, measuring 0.12 ha. The court observed that the suit land came into the name of the appellant on 20.9.2012 and that on 21.9.2012, she transferred it to the respondent at a breakneck speed.
 33. In my considered view, the cause of action against the respondent cannot by any stretch of imagination be said to have accrued out of such observations by the trial court and the High Court. The appellant's cause of complaint was the transfer of the land that occurred on 21.9.2012. The appellant was not the seller of the land in the two agreements dated 23.10.2009 and 16.1.2010, regarding L.R No's. Abothuguchi/Kariene/3691. The relationship between her and the respondent, which could have



- founded a cause of action, is the transfer process, which she allegedly did with the express authority of her sister, Grace Gapunge, for whom she held the property as a trustee. The appellant was a signatory of the applicants at the land control board, land control Record No. 233 for 2012, the land control board consent dated 22.8.2012 and transfer forms presented for registration on 21.9.2012.
34. A cause of action founded on fraud, misrepresentation, or illegality has to be filed within three years after it has accrued or when the claimant discovers it with the use of reasonable diligence as per Sections 4 (4) and 26 of the *Limitation of Actions Act*. Similarly, one founded on a breach of contract under sections 4 (1) (a) thereof, has to be brought before the expiry of 6 years. Additionally, for the recovery of land, it has to be filed before the expiry of 12 years. See *Justus Tureti Obara vs Peter Koipestai* (2014) eKLR. The issue of limitation of time goes to the jurisdiction of the court as held in *Bosire Ongero vs Royal Media Services* (2015) eKLR. A statute-barred suit renders the court without jurisdiction to entertain it.
 35. In this appeal, the appellant based her claim on the tort of fraud and misrepresentation. She should have filed the suit by 21.9.2015. Her sister, Grace Kapunge, did not complain to others or any investigative agency that she abused her powers as a trustee to sell and dispose of the suit land to the respondent. The said sister was neither a witness to this suit nor had she sued the respondent for not giving her considerations as greed in the two exhibits produced as agreements of sale before the trial court.
 36. If the appellant was of the view that the transfer and registration of the land in the name of the respondent was fraudulent or there was a misrepresentation, she should have filed the suit the moment she realized her sister had filed a suit at Nkubu Law Courts in 2013. See *Javed Iqbal Abdul Rahman & another vs Bernard Alfred Wekesa Sambu & another* Civil Appeal No.11 of 2001. Even if we tabulate the time from when the respondent took vacant possession in 2010 still, the suit should have been filed by 2016 based on breach of a contract if the appellant says that the transfer was fraught with fraud, lacked consideration, or was procured through misrepresentation or pretenses. My finding is that the cause of action as framed was statute-barred.
 37. As to whether the appellant proved fraud misrepresentation and illegality on the part of the respondent, the appellant was to the seller of the land in the two sale agreements. She was a mere witness. Her primary role came during the land control board meeting, procurement of the land control board consent, signing and execution of the transfer forms. The appellant has not denied signing all the said documents. There was no averment or evidence tendered that her sister complained to her or the police or the lands office that the appellant had no powers as a trustee to sign and transfer the land on her behalf to the respondent. Fraud, misrepresentation and illegality must be specifically pleaded and proved with tangible and cogent evidence above the ordinary balance of probability.
 38. Fraud cannot be inferred or assumed from the facts. See *Arthi Developers vs West End Butchery and Virjay Morjaria vs Nansigh Madhusingh Darbar* (2000) eKLR. The burden of proof was on the appellant to prove fraud, illegality, or misrepresentation on the part of the respondent, lawyers for the parties who witnessed the sale agreement and were called as witnesses and confirmed that the bonafide beneficiary of the consideration as per the sale agreements with the respondent was paid the money and or notified to collect the balance.
 39. The appellant never called her sister Kapunge to come and deny that she collected valuable consideration from the respondent for the sale and transfer of her share of the estate of her late father which was held in trust for her by the appellant. Therefore, I find no basis for the appellant to have alleged fraud, illegality or misrepresentation, when she voluntarily and willingly executed the land control board application form, the land control board consent and the transfer form in favor of the respondent.



40. The appellant had no capacity, authority or consent from Grace Kapunge to complain on her behalf that she acquired no consideration for the suit land from the respondent for close to 11 years. The appellant was privy to or aware of the occupation of the land and developments therein by the appellant. She did not lodge a complaint to the police based on a fraudulent acquisition of the transfer and registration of the land by the respondent through misrepresentation or pretenses. The claim by the appellant lacked basis, was an afterthought and time-barred.
41. Had the appellant thought that the respondent was the source or cause of her suffering, loss or disagreements with family members from 2013 up to 2020, she would have sought to, at the very least, apply to join him as a party to the suits or at very least called him as a witness. If the cause of action was also related to the previous suits, the appellant would have filed it and sought to consolidate the suits just like her suit was consolidated with the Nkubu Law Courts case.
42. The upshot is that I find the appeal lacking merits. It is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 31st DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

No appearance

HON. C K NZILI

JUDGE

