



REPUBLIC OF KENYA



**Maundu v Kipilosh (Environment and Land Appeal E044 of 2022)
[2024] KEELC 6310 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E044 OF 2022
LC KOMINGOI, J
SEPTEMBER 26, 2024**

BETWEEN

JOHN BOSCO NGETA MAUNDU APPELLANT

AND

OPONE OLE KIPILOSH RESPONDENT

*(Being an Appeal against the Ruling of Hon. Irene Marcia Kabuya (PM)
in Kajiado ELC Case No. 107 of 2018 delivered on 7th September 2022)*

JUDGMENT

1. The learned Hon. I. Kahuya in the Judgement dated and delivered on 7th September 2022 in CM ELC No. 107 of 2018 ordered;
 - i. A refund of the purchase price of Kshs. 28,000 by the Defendant with interest as stipulated in paragraph 4 of the sale agreement dated 12/2/1986.
 - ii. Costs of the suit and interest at court rate from the date of filing to the date of judgement.
2. Aggrieved by the said Judgement the Appellant appealed on the following grounds:
 1. The Learned Magistrate erred in both law and in fact in failing to hold that the Appellant had fully fulfilled his obligations under the contract but the Defendant was in full breach of the sale agreement executed on 12th February 1986.
 2. The Learned Magistrate erred in both law and in fact in failing to hold that the Respondent was in breach of the sale agreement executed on 12th February 1986 and award the Appellant relief for general damages for breach of contract.
 3. The Learned Magistrate erred in both law and in fact in finding that the Appellant was only entitled to refund of Kshs.28,000/= plus interest as per paragraph 4 of the sale agreement



executed on 12th February 1986 yet there were other forms of consideration which the Appellant paid in addition to the cash which was one cow, two sheep and two lambs all of which were not disputed by the Respondents thus financially prejudicing the Appellant in her judgment.

4. The Learned Magistrate erred in both law and in fact in failing to find that the Appellant was entitled to the prayer for specific performance for transfer of 12 acres yet the learned Magistrate had found that the contract executed on 12th February 1986 was valid and had all the basic principles of a valid contract.
5. The Learned Magistrate erred in both law and in fact in impliedly holding that the Respondent had no land available to grant the relief of specific performance to the Appellant for transfer of 12 acres yet the Respondent had not denied existence of land to compensate the Appellant or adduced contrary evidence to that effect.
6. The Learned Magistrate erred in both law and in fact in failing to find that the relief for specific performance and or compensation of the current market value of the land as sought by the Appellant were the fair reliefs available to the Appellant in view of the circumstances of the case, period of time, economic trends and rate inflation.
7. The Learned Magistrate erred in both law and in fact ordering that the Appellant was only entitled to refund of the purchase price of Kshs. 28,000 paid to the Respondent on 12th February 1986 plus interest of Kshs.28 per every 100 shillings which merely translates to an estimated total amount of Kshs, 282, 240 which award had not been sought by the Appellant, was too low, unreasonable and unjustified considering the current market value of 12 acres of land that the Appellant had purchased from the Respondent, circumstances of the case, period of time, economic trends and rate inflation.
8. The Learned Magistrate erred in both law and in fact in failing to award compensation to the Appellant equivalent to the current market value of the 12 acres of land purchased on 12th February 1986 which as per the valuation report filed in court which valuation report was uncontested by the Respondent confirmed that the current market value of an acre of land where the Appellant had purchased sold at Kshs. 400, 000.
9. The Learned Magistrate erred in both law and in fact in failing to exercise her discretion vis a vis current economic realities and failed to award the Appellant the relief of compensation of the current market value of 12 acres of land as per the valuation report produced in court and instead erroneously held that a refund of Kshs.28,000 paid to the Respondent on 12th February 1986 plus interest as per paragraph 4 of the sale agreement executed on 12th February 1986 was reasonable and fair compensation to the Appellant.
10. The Learned Magistrate erred in both law and in fact in failing to award the Appellant a relief for general damages yet the Appellant had substantively demonstrated that the Respondent was in breach of contract as collaborated by the Appellant's witnesses.
11. The Learned Magistrate erred in both law and in fact in failing to find that the relief for specific performance and or compensation of the current market value of the 12 acres of land as sought by the Appellant was to fully and fairly compensate the Appellant for the loss suffered over a period of time in not utilizing his 12 acre piece of land purchased on 12th February 1986 since no prejudice was to be suffered by the Respondent if such an award was to be made and the Respondent had not demonstrated such prejudice



12. The Learned Magistrate erred in both law and in fact in failing to find that the relief for specific performance and or compensation of the current market value of 12 acres of land as sought by the Appellant which translated to Kshs.4,800,000 was not excessive and unfair in view of the conduct of the Respondent and period of time that the Appellant had been subjected to wait and tossed from one promise to the other by the Respondent.
 13. That by ordering that the Appellant be refunded the purchase price of Kshs. 28,000 plus interest as per paragraph 4 of the sale agreement executed on 12th February 1986, the Learned Magistrate awarded the Appellant the lowest relief which was not sought in the amended Plaint excluding the most reasonable reliefs that reflected the current market prices and economic realities thus subjecting the Appellant to huge financial loss, ridicule and financial embarrassment.
 14. The Learned Magistrate erred in both law and in fact in failing to appreciate the Appellant's evidence, witness statement and submissions of the Appellant on record.
 15. The Learned Magistrate erred both in law and in fact by misdirecting herself in the interpretation of law and facts in the instant case and thus arriving at wrong, erroneous and unjust conclusion.
 16. The decision in its entirety is against the law and an irredeemable travesty of justice.
 17. The entire decision is contrary to law and a misapprehension of the law.
3. This appeal was canvassed by way of written submissions.

The Appellant's submissions

4. Counsel summarised the 17 grounds of appeal into three issues summarised here below.
5. On whether the Respondent was breach of sale agreement executed on 12th February 1986, counsel submitted that the Appellant had proved that he purchased 12 acres of land from the Respondent in 1986 as per the executed sale agreement which was amended on 7th January 2008, Erangau group ranch member register and mutation forms among others. Upon purchase, he paid Kshs. 28,000, one cow, two sheep and two lambs and took physical possession of the land until sometime in 2006. The respondent approached him with information that when selling the land, he sold it to more people than the land could accommodate and persuaded the Appellant to relocate with the promise that he would give him another piece of land which he failed to honour despite executing amended sale agreements to that effect.
6. On whether the Appellant was entitled to an order of specific performance, counsel submitted that at the time of purchase, the land was community land and unregistered to individuals, but it had since been subdivided and registered and the respondent's parcel was Kajiado/Kaputei Central/1769 measuring approximately 29.51 hectares. Therefore, the trial court's holding that the Appellant was only entitled to refund of Kshs. 28,000 plus interest was an error and uneconomical because the learned magistrate did not consider the other forms of consideration in form of animals adding that the current market value of the property as per the valuation report produced as evidence was Kshs. 4,800,000. The Respondent should therefore be compelled to refund Kshs. 4,800,000 or transfer 12 acres of land. Reference was made to Gacheru J.'s decision in *Mburu Muhindi v Nyingi Kabinga* [2018] eKLR where the learned judge held that money or consideration was recoverable as a debt by the person who paid it.



7. And should the Respondent decline to adhere to the orders given, then the Deputy Registrar be directed to execute the transfer documents and the OCS Kajiado be ordered to supervise the enforcement of the order.
8. On the issue of general damages, counsel submitted that the Appellant was entitled to damages of Kshs. 1,500,000 for being denied peaceful possession of property he purchased in the year 1986 together with costs.

The Respondent's submissions

9. Counsel submitted that the Respondent contested the Appellant's claim on grounds that the suit was time barred by Section 7 of the *Limitation of Actions Act*, the prayer of specific performance was untenable under Section 4(1) of *Limitation of Actions Act*, the sale agreement was null under Section 3(3) of the *Law of Contract Act* and the whole claim was equally void under Section 6(1) and 7 of the *Land Control Act*.
10. On whether there was a valid sale transaction, counsel submitted that the Appellant did not produce transfer instruments or land control board consent form for the alleged transfer of land. Adding that at the time of the sale, the respondent was not a proprietor of the land because it belonged to the group ranch. He could thus not sell what he did not own citing Lenaola J. (as he then was) in *Ditozon Koikai v Lialo & 2 others* [2015] eKLR. Counsel also submitted that there was no evidence of the alleged consideration of Kshs. 28,000, a cow, two sheep and two lambs.
11. On whether the suit was time barred, counsel submitted that the sale agreement the Appellant sought to enforce was executed in 1986 and another one in 2008 while this suit was filed in 2014 which was beyond the 12 year limitation period provided under Section 7 of the *Limitation of Actions Act*. And an action founded on a contract should be brought within 6 years as per Section 4 of the *Limitation of Actions Act*. Reference was made to: *Gathoni v Kenya Coopertative Creameries Ltd* (1982) KLR 104, *Dickson Ngige Ngugi v Consolidated Bank of Ltd (formerly Jimba Credit Corporation Ltd) & another* [2020] eKLR, *Edward Moonge Lengusuranga v James Lanaiyara & another* [2019] eKLR, and *Dennis Koikai Naisho v Eric Tipis & 3 others* [2019] eKLR.
12. Counsel submitted that there was need to have consent to transfer agricultural land as espoused under Section 6 of the *Land Control Act* but the Appellant had not produced any consent which made the transaction void. Reference was made to the cases of: *James Njuguna Mwaura v Paul Wandati Mbochi* [2018] eKLR, *Isaac Ngatia Kihagi v Paul Kaiga Githui* [2017] eKLR and *Koyumkei Multipurpose Coopertative Society Ltd & 17 others v rael Chepng'etich Koech* [2019] eKLR.
13. On whether compensation of the land at market value was an available remedy, counsel submitted that having established that the suit was time barred, and no consent was obtained this remedy could not be granted. Adding that the remedy of specific performance was not available in these circumstances and that general damages were also not available for breach of contract but special damages. Citing *Joshua Ngatu v Jane Mpinda & 3 others* [2019] eKLR, *Makicher Geneal Contractors Ltd v Communication Graphics Ltd* [2021] eKLR, *China Overseas Engineering Company Ltd v Isaaq Kichwen Kijo* [2019] eKLR and *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2021] eKLR.
14. He urged that the appeal be dismissed with costs to the Respondent.

Analysis and Determination

15. Having considered the grounds of appeal, the record of appeal, the rival submissions and the authorities cited, I find that the issues for determination are:



- i. Whether the lower court erred in finding that the Appellant was only entitled to a refund of the purchase price of Kshs. 28,000 by the Respondent together with interest as per the sale agreement dated 12/2/1986;
 - ii. Whether the Appellant is entitled to the orders sought.
 - iii. Who should bear costs of the appeal?
16. This being a first appeal, it is the duty of the court to re-analyse and re-evaluate the case at the trial court and come up with its own findings as held by the Court of Appeal in *ICEA Lion General Insurance Company Limited v Noble Merchants Shipping Limited & another* [2023] KECA 1061 (KLR) where it was stated;

“This being the first appeal, in *Selle v Associated Motor Boat Co.* [1968] EA 123, this Court has held that: “The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
17. The Appellant has outlined 17 grounds of appeal against the judgment delivered on 7th September 2022 by Hon. I. Kahuya in CM ELC Kajiado Case 107 of 2018. These grounds can be summarised into the issues set out above.
18. The Appellant avers that on 12th February 1986 he got into a sale agreement for the purchase of twelve (12) acres of land from Kajiado South Elegau Ranch plot No. 6 which belonged to the respondent and took possession. However, in 1990 the Respondent asked him to move out of his property because he had sold it to more people than the actual acreage, and promised to give him twelve (12) acres from another parcel of land. The Appellant complied but the Respondent did not keep his promise.
19. The Appellant produced typed and handwritten sale agreements executed by the parties in the presence of witnesses. The typed sale agreement reads “the purchase price shall Kshs. 28,000 plus one cow, two sheep and two lambs receipt whereof the seller acknowledges. The seller undertakes to execute all necessary documents and procure consent from the Land Control Board to effect the transfer of the said parcel of land into the buyer’s name...” The handwritten sale agreement also dated 12th February 1986 reads: “... I Mr. Oponi Ole Kipilosh on this day of 12/2/1986 agreed to sell my land to John Bosco Ngeta 12 ha... He has paid me my cash... What is remaining is to wait for Kenya Survey to show me my shamba boundaries then I subdivide my land plots. Secondly, we have agreed that if I sell his 12 acres to somebody else, I will pay him his money plus interest of 28/- per 100/- from when he paid me...”
20. The Appellant vacated the land in Kajiado South Elegau Ranch with the persuasion of the Respondent that he would avail alternative land at Imaroro area. The Respondent later declined necessitating the Appellant to approach the Maasai Council of Elders who summoned the Respondent who assured them of his commitment to give the Appellant alternative land. An additional agreement was executed between 2011 and 2013.
21. It appears the Respondent became reluctant to avail alternative land after the Appellant vacated the land at Kajiado South Elegau Group Ranch.



In the case of *Housing Company of East Africa Limited v Board of Trustees NSSF & 2 Others* [2018] eKLR, the Court held thus;

“.....contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its Judgement for that of the parties. Indeed, when a contract is clear and unambiguous, a Court’s role is to interpret the Contract as written and not re-write it because.....”

22. It is clear from the series of agreements that the Respondent was aware and had committed to avail alternative land to the Appellant.

23. I find that the Learned Trial Magistrate erred in denying to grant an Order of Specific Performance. There is evidence that, the Respondent is the registered owner of Kajiado/ Kaputiei/Central/1769 measuring 29.5 Hectares having been issued with a title deed on 11th April 2011.

24. According to *Chilly on Contracts* 30th Edition Vol. 1, it is stated;

“The Jurisdiction of Specific Performance is based on the existence of a valid, enforceable Contract. It will not be ordered if the Contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the Contract invalid or unenforceable.”

25. Similarly, in the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Ltd* [2006] eKLR Maraga J (as he then was) stated;

“Specific Performance like any other equitable remedy is discretionary and the Court will only grant it on well stated principles.

The Jurisdiction of Specific Performance is based on the existence of a valid enforceable Contract. It will not be ordered if the Contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality which makes the contract invalid or unenforceable. Even where a Contract is valid and enforceable, Specific Performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted from another source..... Even where damages are not an adequate remedy Specific Performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant.”

26. The Respondent does not deny that he has alternative land that he can transfer to the Appellant. I reiterate that the Learned Trial Magistrate erred in denying to grant an Order of Specific Performance. The Appellant has waited for too long to have the land which he paid for. He is entitled to damages for breach of contract. I award Kshs.300,000/= which I think is reasonable.

27. In conclusion I find merit in this Appeal and the same is allowed.

28. In essence the Judgement of the Lower Court delivered on 7th September 2022 is hereby set aside and the same is substituted with the Prayers in the Amended Plaintiff.

a. That the Respondent is hereby directed to transfer twelve (12) acres out of Kajiado/Kaputiei Central/1769 within Ninety (90) days from the date of the Judgement.



In Default, the Deputy Registrar of this Honourable Court do execute the necessary documents to effect transfer.

- b. General damages Kshs.300,000/=
- c. That the costs of the Appeal and of the suit in the lower Court be borne by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF SEPTEMBER 2024.

L. KOMINGOI

JUDGE.

In The Presence Of:

Mr. Were for Mr. Musungu for the Appellant.

Ms. Katao for the Respondent.

Court Assistant – Mutisya.

