



**Mwangi & another v Tumuti (Environment & Land Case 396 of 2017)
[2024] KEELC 6284 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6284 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 396 OF 2017
LC KOMINGOI, J
SEPTEMBER 26, 2024**

BETWEEN

DANIEL G MWANGI 1ST PLAINTIFF

AGNES GATHONI GATUNGU 2ND PLAINTIFF

AND

LEIYAN TUMUTI DEFENDANT

JUDGMENT

1. By the Complaint dated 23rd February 2017 and Amended on 17th October 2019, the Plaintiffs claim that they agreed to purchase parcel Ngong/Ngong/5464 from the Defendant and they were issued with the original title deed. That on 11th January 1996, the 1st plaintiff and the Defendant entered into a further agreement that should the Defendant default in paying back Kshs. 291,500 then the land would be transferred to them using the title deed in their possession which had been held as security for the amount. The Defendant neither refunded the amount nor transferred the land to them. They would later find out that the Defendant had subdivided the suit property into two parcels; Ngong/Ngong/85020 and Ngong/Ngong/85021 and transferred the latter to a third party. This transfer was aimed at defrauding the Plaintiffs and would occasion them loss and damage. They thus sought:
 - i. An order to restrain the Defendant from disposing the remaining parcel Ngong/Ngong/85020 that is still in his and his wife's name.
 - ii. An order compelling the Defendant herein to execute transfer in favour of the Plaintiff and in default the Deputy Registrar to execute for the remainder of the parcel known as Ngong/Ngong/85020.
 - iii. In the alternative the Defendant be compelled to refund Kshs. 291,500 plus interest from 11th January 1996 until payment in full.



- iv. A declaration that the Defendant's actions are illegal.
 - v. Damages for breach of contract.
 - vi. Costs of this suit.
 - vii. Any other remedy that this Hon. Court deems fit.
2. The Defendant in his Amended Statement of Defence contested the Plaintiffs claim indicating that he paid all the money owed to the 1st Plaintiff but the 1st Plaintiff refused to return the original title Number Ngong/Ngong/5464. Efforts to trace him were futile and the Defendant thus applied for gazettment and replacement of the title. He stated that the Plaintiffs cannot claim to suffer loss and damage for what they did not have, adding that the suit property belonged to his parents had since been subdivided to Ngong/Ngong/85020 and 85021. LR. NO. Ngong/Ngong /85021 had been transferred to his brother who has since subdivided it and sold off portions to third parties. That Ngong/Ngong 85020 was his matrimonial property where he resided with his family. He prayed that the suit should be dismissed with costs.

Evidence of the Plaintiff

3. PW1, Agnes Gathoni Gatungo adopted her witness statement as part of her evidence in chief and produced her bundle of documents as exhibits in this case. She stated that the 1st Plaintiff, who was her husband, has since passed away. She stated that they were introduced to the Defendant sometimes in August 1994 by one Mrs. Munjiri. The Defendant was selling a portion of his land in Kerarapon Ngong. Thereafter they met the Defendant at Karen shopping centre who had documents to prove ownership. The purchase price was Kshs. 300,000. They paid a deposit of Kshs. 200,000 and the balance of Kshs. 100,000 was paid in three instalments. This transaction was successfully undertaken and they got title to the parcel in their names.
4. In 1995, the Defendant would then approach her stating that he wanted to sell the adjacent parcel to the one they had bought for Kshs. 391,000. They agreed to purchase it and paid a deposit of Kshs. 50,000 and would later clear the balance. Unfortunately, the Defendant became evasive and did not transfer the said land to them. They filed a report and the Defendant was arrested. He agreed to refund Kshs. 100,000 and promised to refund the balance within 45 days or transfer the land to them. He gave them the original title deed for the said parcel Ngong/Ngong/5464 in his name as security. They came back from the United Kingdom in 2006 and by then they were unable to trace him. In 2015 they visited the Land Registry and were informed that the land had been subdivided. They did not know how this was done because they had the original title. She thus seeks the defendant be compelled to transfer the land to them or refund the balance with interest.
5. On cross-examination, she stated that she has been residing in the United Kingdom since 1997, while her husband joined her in 1998. She further stated that her husband passed away on 10th August 2021. She confirmed that she held the title deed for the parcel of land they had purchased from the Defendant. However, she acknowledged that there was no written sale agreement for the second transaction, which took place in 1995.
6. She also admitted that she did not possess any evidence to prove payment of the purchase price, which she claimed to have paid in cash. She also confirmed that she was not present when the debt agreement dated 11th January 1996 was executed but was aware of its existence. She also admitted that this debt agreement did not make any reference to the parcel of land. Moreover, she did not produce the transfer forms that were allegedly executed by the Defendant, stating that they had been misplaced.



7. She further admitted that she was not aware of any payment of Kshs. 291,000 by the Defendant to her husband. She indicated that by 2005, both she and her husband were living in the United Kingdom and had not informed the Defendant of their relocation, citing difficulties in contacting him due to a change in his telephone number. She also confirmed that they were unaware of Gazette Notice No. 6672, published on 26th August 2005.
8. Finally, she acknowledged that the certificates of search dated 1st September 2006 and 12th January 2008 showed that the land in question remained registered in the Defendant's name, with a caution registered by one Samuel Mboroki indicating purchaser's interest. She confirmed that the land had not been subdivided as of those dates.

Evidence of the Defendant

9. DW1 Leiyan Ole Tumuti adopted his witness statement as part of his evidence in chief and produced his bundle of documents marked as D. Exhibit 1-9. He confirmed that he sold a parcel of land to the Plaintiffs where they reside but did not sell a subsequent parcel. He also confirmed that when they became friends, they sold a motor vehicle to him. He confirmed that he sought a friendly loan of Kshs. 291,000 from the 1st Plaintiff which he took a while before refunding. This necessitated the 1st Plaintiff to report him to the police and he paid Kshs. 100,000 and promised he would pay the balance within forty five (45) days and they wrote an agreement to that effect. The 2nd Plaintiff was not party to that agreement. He confirmed that the 1st Plaintiff sought security for the balance and he gave him the original title for Ngong/Ngong/5464. He stated that he did not execute any transfer forms because he was not selling the land. He stated that he fully paid the balance in instalments, but when he asked the 1st Plaintiff for the title he informed him that the 2nd Plaintiff had left for the United Kingdom with all the documents. He promised that he would send the title once he got to the United Kingdom. However, after ten years he did not receive the title and he applied for another title. Once he got the title, he sought the Land Control Board consent to subdivide and the subdivision was carried out in 2015. By this time this suit had not been instituted. He testified that he was also summoned by the Director of Criminal Investigations Ngong regarding the suit property and he provided all the information. As per the letters from the Director of Criminal Investigations, it was recommended that the investigation be closed.
10. On cross examination he confirmed that he knew the Plaintiffs as he had sold them another parcel of land. He also confirmed that the 1st Plaintiff advanced him a friendly loan of Kshs. 291,500 which he had fully refunded and not Kshs. 391,500 as claimed. He confirmed that by the time the 1st Plaintiff went to the United Kingdom he had fully refunded the money although he did not have evidence to support this. He maintained that he was informed that the 2nd Plaintiff had gone to the United Kingdom with all the documents including the original title deed for parcel Ngong/Ngong/ 5464 and after waiting for 10 years to get the title back, he sought issuance of another title.
11. On re-examination he stated that before seeking issuance of a provisional title, he reported the loss to the police and was issued a police abstract which he used to apply for another title deed.
12. At the close of oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions

13. On whether the contract between the Plaintiffs and the Defendant is enforceable, counsel submitted that the parties in 1995 entered into an oral agreement for the sale of parcel of land Ngong/Ngong/5464 for Kshs. 400,000 and paid a deposit of Kshs. 50,000 and the balance in instalments. The Defendant failed to perform his part of the contract necessitating the Plaintiffs to file a report



at Kilimani Police Station in the year 1997. The Defendant promised to pay the balance and an agreement was entered into but the Defendant still failed to abide by it. As such, the oral agreement was enforceable and the Defendant should be compelled to make good the contract.

14. On whether the plaintiff is entitled to refund of the balance together with interest, counsel submitted that the Plaintiff had proved that she was entitled to this prayer as she had proved her case as required under Section 107, 108 and 109 of the Evidence Act and as held in *Mbuthia Macharia vs Annah Mutua & another* [2017] eKLR and *Kenya Pipeline Co. Ltd vs Corporate Business Forms* (2019) eKLR. Adding that the Defendant sought replacement of title knowing that it had not been lost and by using misleading information. As such, she was entitled to refund of the balance of Kshs. 295,000 together with interest and costs of the suit.

The Defendants' submissions

15. Counsel submitted on the following issues for determination summarised below.
16. On whether the 2nd Plaintiff had authority to sue on behalf of the 1st Plaintiff, counsel submitted that as per Order 1 Rule 13(1) and (2) in cases of more than one Plaintiff, one or more of them may be authorised by the others to appear or plead. However, in this suit, the 2nd Plaintiff did not have authority from the 1st Plaintiff. There was also only one Verifying Affidavit sworn by the 2nd Plaintiff without a written authority from the 1st Plaintiff.
17. On whether the 2nd Plaintiff had letters of administration to represent the Estate of the late Daniel G. Mwangi, counsel submitted that there was no evidence that the 2nd Plaintiff had obtained letters of administration to represent the Estate of her late husband as was held in *In re estate of Jennifer Kusuro Musiwa(deceased)*[2021] eKLR.
18. On whether the court should compel the Defendant to transfer property Ngong/Ngong/85020 to the Plaintiffs, counsel submitted that on 11th January 1996, the Defendant took a Kshs. 291,500 loan from the 1st Plaintiff and gave him title deed for property Ngong/Ngong/5464 as security. In the loan agreement produced by the 2nd Plaintiff, it was agreed that the 1st Plaintiff would transfer the land to him if the Defendant did not repay the debt within 45 days and the Defendant signed the transfer forms. He however paid the loan in full but the 1st Plaintiff had misplaced the original title and he was issued with another title on 26th August 2005 after following the due process in title replacement. Counsel submitted that the fact that the 1st Plaintiff did not transfer the property to himself was because the loan was fully repaid and this was not contested because the 1st Plaintiff had since passed way. Therefore, the issue of transfer of property to the 2nd Plaintiff could not be sustained because the loan agreement was between the Defendant and the 1st Plaintiff. Counsel also added that the 2nd Plaintiff did not produce the original title deed for property Ngong/Ngong/5464.
19. On whether this suit was a land or commercial related, counsel submitted that the dispute emanating from a loan means that it was outside the jurisdiction of this court citing *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR. And that the Plaintiffs have not proved their case on a balance of probabilities and should be dismissed with costs.

Analysis and Determination

20. I have considered the pleadings, the evidence on record, the rival submissions and the authorities. The issues for determination are:
 - i. Whether this court has jurisdiction to determine the suit;



- ii. Whether the suit is time barred;
 - iii. Whether Plaintiff is entitled to the prayers sought;
 - iv. Who should bear costs of the suit?
21. The first issue for determination is whether the suit at hand is within this court’s jurisdiction because jurisdiction is everything and without it, a court should down its tools and not make a move. See Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR. This court derives its jurisdiction from Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act:
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land...
22. It cannot be gainsaid that a suit flows from the pleadings and parties are therefore bound by their own pleadings as held by the Court of Appeal in Galaxy Paints Company Ltd V Falcon Guards Ltd [2000] eKLR: “... It is trite law, and the provisions of O.XIV of the Civil Procedure Rules, are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court’s determination..” Once again, the Court of Appeal in Independent Electoral and Boundaries Commission & another v Mule & 3 others [2014] KECA 890 (KLR) held that: “...parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce...”
23. The Amended Plaintiff reads:
- “ 4. At all material times to this suit the 1st and 2nd Plaintiffs agreed to purchase the said parcel of land measuring 0.5 Ha in the name of the Defendant and were issued with original Title deed.
 - 5. On the 11th January 1996, the 1st Plaintiff and the Defendant entered into an agreement that should the Defendant default in paying back Kshs. 291,500 the 1st Plaintiff to transfer the title in his possession parcel number Ngong/ Ngong/5464.



6. That the said parcel was to be used as security for the amount given and was offered an original title for that purpose and even undertaken to sign Land Control Board forms and transfer forms to effect transfer.
 7. That to date twenty two years down the line the Defendant has not repaid the amounts nor transferred the parcel as agreed in the agreement.”
24. From the pleadings and evidence presented before this court, it is not clear whether the dispute between the parties arises from a sale agreement or a loan transaction. The 2nd Plaintiff, testifying as PW1, told the Court that they intended to purchase the property identified as Ngong/Ngong/5464 from the Defendant in 1995. According to the 2nd Plaintiff, the Defendant, later refused to execute the necessary completion documents and became evasive, and the transaction could not be concluded. Consequently, the Plaintiffs requested a refund of the purchase price. The Defendant allegedly paid Kshs. 100,000, leaving a balance of Kshs. 291,500, which, according to the agreement dated 11th January 1996, was to be settled within forty five (45) days. The 1st Plaintiff retained the title deed to the property as security for the balance. To this date, the balance has not been refunded, leaving the Plaintiffs with no choice but to file this suit for recovery of the same.
25. On the other hand, the Defendant has contested the Plaintiff’s claims, stating that the sum in question was not related to a sale of property but rather a friendly loan extended to him by the 1st Plaintiff. The Defendant admitted his failure to repay the loan in full, which led to his arrest. He confirmed that an agreement was entered into on 11th January 1996, wherein the mode of repayment was stipulated, and he provided the original title deed for parcel Ngong/Ngong/5464 as security. Additionally, the Defendant claims to have executed the necessary transfer documents as part of this agreement. However, it is his case that he subsequently refunded the full amount, but the 1st Plaintiff failed to return the original title deed, on the pretext that the 2nd Plaintiff had taken the documents to the United Kingdom.
26. The Plaintiffs have maintained that the money advanced to the Defendant was part of consideration for the purchase of land, based on an oral agreement. It is pertinent to note that, according to Section 3(3) of the Law of Contract Act, as it was applicable in 1996, contracts for the sale of land are required to be in writing, signed by all parties and attested by a witness who is present at the signing of the contract. Despite this statutory requirement, PW1 confirmed that following the 1996 agreement, the Defendant provided them with duly executed transfer documents for the suit property. If the Plaintiffs indeed possessed the duly executed transfer forms for the property, and if the Defendant failed to refund the outstanding Kshs. 291,500 within the stipulated 45-day period, why did they not proceed to finalize the transfer of the property? This court finds this curious.
27. PW1 Agnes Gathoni Gatungu in her testimony stated;
- “My husband reported the matter to Kilimani CID Mr. Leiyen was then arrested. He agreed to refund Kshs.100,000/= at the time and refund the balance later. My husband agreed but he was also to deposit a title deed as security.....”
28. It is clear from the above testimony that the Debt Agreement dated 11th January 1996 was meant to ensure the Defendant refunds the loan advanced. The deposit of the title deed with the Plaintiff was to act as security and to ensure the loan was repaid. There is no agreement for sale of land.
29. Section 7 of the Limitation of Actions Act provide that: An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him



or, if it first accrued to some person through whom he claims, to that person. From this Act, this means that if there was a claim for land against the Defendant, then the Plaintiffs ought to have instituted the suit by the year 2008. Similarly, if the issue was based on breach of contract as per the reliefs sought in the Amended Plaintiff, then the same ought to have been brought within six years as per Section 4(1) (a) of the Limitation of Actions Act.

30. I therefore find that even if this suit was within the court's jurisdiction, it cannot stand because the claim is time barred. The Court of Appeal in *Alba Petroleum Limited v Total Marketing Kenya Limited* [2019] eKLR... held thus;

31. In *Iga vs. Makerere University* [1972] EA it was held:

“A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rule of Uganda which has same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

31. When cross-examined by the Defendant's counsel PW1 told the Court that they did not inform the Defendant that they were relocating to the United Kingdom as he had changed his phone number. PW1 is one of the plaintiffs in the suit. She did not require any authority from her late husband to testify. She also did not require Letters of Administration as she is one of the plaintiffs in the suit. She therefore had the Locus standi to prosecute this suit.

32. It is the Defendant's case that he repaid the loan fully to the 1st plaintiff (now deceased). As to whether this is true or not is between the defendant and the deceased. The defendant said he had nothing to show that the loan was repaid fully.

33. In conclusion I find that the plaintiff has failed to prove her case as against the defendant on a balance of probabilities.

The suit is hereby dismissed with costs to the Defendant.

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

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Kori for Mr. Maruja for the Plaintiffs.

Mr. Kiptoo for the Defendant.

Court Assistant – Mutisya.

