



REPUBLIC OF KENYA



KENYA LAW
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**Wanyoike v Mbogo (Environment & Land Case 679 of 2017)
[2023] KEELC 389 (KLR) (23 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 389 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 679 OF 2017**

BM EBOSO, J

JANUARY 23, 2023

BETWEEN

PETER MAMBO WANYOIKE PLAINTIFF

AND

JOSEPH THUKU MBOGO DEFENDANT

JUDGMENT

Background

1. The plaintiff initiated this suit at Milimani Environment and Land Court on 15/6/2016 through a plaint dated 5/6/2016. He sought against the defendant an order for specific performance of the land sale agreement dated 1/7/2010, relating to sale of $\frac{1}{4}$ of an acre out of land parcel number LOC 16/Mbugiti/2163. As alternative reliefs, he sought:
 - (i) a refund of the purchase price of Kshs 155,000 together with the agreed liquidated damages equivalent to 30% of the purchase price and interest at court rate on the two items from the date of the sale agreement;
 - (ii) special damages – Kshs 361,000;
 - (iii) interest; and
 - (iv) costs of the suit. The defendant contested the plaintiff's claim through a defence dated 8/9/2016.
2. On 9/2/2017, Obaga J issued an order transferring the case to Murang'a Environment and Land Court. On 12/7/2017, Kemei J issued an order transferring the suit to Thika Environment and Land Court.



Plaintiff's Case

3. The totality of the plaintiff's case is contained in the plaint dated 15/6/2016; the witness statement dated 15/6/2016; the oral evidence tendered during trial; the 13 exhibits produced during trial; the written submissions dated 20/4/2022; and the supplementary written submissions dated 8/7/2022. The written submissions were filed through M/s R W Chege & Associates Advocates. In summary, the plaintiff's case is that, he entered into a land sale agreement dated 1/7/2010 with the defendant, pursuant to which the defendant sold to him $\frac{1}{4}$ of an acre out of land parcel number Loc 16/Mbugiti/2163 at a purchase price of Kshs 155,000. He paid to the defendant the agreed purchase price in full. Upon paying purchase price in full, he took possession of the land and made improvements on it by planting tea bushes on the land. He has been cultivating the land since then. It was his case that the defendant kept on assuring him that, upon finding a purchaser for an adjacent plot, he would procure consent of the land control board and he would convey the land to him. In 2016, it became known to him that the defendant had no intention of procuring the consent of the land control board to facilitate transfer of the land to him. After failing to obtain a resolution of the dispute through the Office of the Deputy County Commissioner, he initiated this suit.
4. The plaintiff contends that he caused the $\frac{1}{4}$ parcel of land to be valued and the valuer returned a value of Kshs 500,000. He paid a valuation fee of Kshs 15,000 to the valuer. He produced the 13 documents itemized in his list and bundle of documents dated 15/6/2016. It was his foremost prayer that he be granted an order of specific performance. During cross –examination, he testified that the defendant had never offered to refund to him the purchase price. He conceded that he had made an alternative plea for damages.

Defendant's Case

5. The defendant filed a statement of defence dated 8/9/2016; a witness statement dated 8/9/2016; a bundle of two documents; and written submissions dated 4/5/2022, filed through M/s Mbiyu Kamau & Co Advocates. He testified as DW1 and closed his case. In summary, his case is that, indeed he entered into the sale agreement dated 1/7/2010. He acknowledges receipt of full purchase price. He contends that the sale was voided by section 6 of the Land Control Act owing to lack of the consent of the Land Control Board. His position is that the tea bushes which are on the land were planted by his mother and not by the plaintiff.
6. During cross-examination, he confirmed that subdivision of parcel number Loc 16/Mbugithi/2163 was done in pursuance of the sale. He confirmed that he did not object to the taking of possession of the land by the plaintiff after the plaintiff paid to him purchase price in full in October 2010. He added that he changed his mind about the sale in 2015 and decided he would not conclude the sale. He added that he had the right to sell the same piece of land to someone else and return to the plaintiff the purchase price paid to him. He conceded that he had never issued any notice to the plaintiff cancelling the sale. He also testified that he had not taken any action to remove the plaintiff from the land. It was his evidence that by October 2010, the plaintiff had paid to him purchase price in full.

Submissions

7. In her submissions, counsel for the plaintiff identified the following as the issues that fell for determination in the suit:
 - (i) Whether the parties entered into the sale agreement dated 1/7/2010;



- (ii) Whether the plaintiff paid the defendant the sale price for the suit property in terms of the sale agreement;
 - (iii) Whether the plaintiff's claim is time-barred;
 - (iv) Whether the transaction ensuing from the sale agreement dated 1/7/2010 became void for want of consent of the land control board;
 - (v) Whether the defendant is in breach of the sale agreement;
 - (vi) Whether the plaintiff is entitled to the prayers sought in the plaint for specific performance of the sale agreement (sic);
 - (vii) Whether the plaintiff is, without prejudice to the prayer for specific performance, entitled to the alternative prayers in the plaint;
 - (viii) Who should meet the costs of the suit.
8. On whether the parties to this suit entered into the sale agreement dated 1/7/2010 and whether the plaintiff paid to the defendant the purchase price stated in the sale agreement, counsel for the plaintiff submitted that whereas in paragraph 5 of the statement of defence the defendant denied entering into the sale agreement and payment of purchase price by the by the plaintiff, he admitted the two contested facts in paragraphs 2 and 6 of his witness statement dated 8/9/2016. On whether the plaintiff's claim was statute-barred, counsel submitted that the material sale agreement was executed on 1/7/2010 and the six year limitation period applicable to contracts relating to sale of land was to lapse on 30/6/2016. Counsel contended that this suit having been filed on 15/6/2016, it was brought within the limitation period of six years.
9. On whether the land sale contract was void for want of consent of the land control board, counsel cited the decision of the Court of Appeal in *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR and argued that the defendant having received the full purchase price and having put the plaintiff in possession, he became a constructive trustee of the plaintiff and he was estopped from reneging on the transaction. On whether the defendant was in breach of the contract, counsel submitted that it was manifest from the defendant's conduct - receiving purchase price in full and failing to apply for consent of the land control board, that he was in breach of the contract.
10. On whether the plaintiff was entitled to the relief of specific performance or to the alternative reliefs, counsel reiterated the Court of Appeal decision in *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR. Counsel argued that the plaintiff had invested in the suit property and had continued to develop it with the legitimate expectation of acquiring title to the suit property. It was the position of counsel for the plaintiff that the most appropriate remedy was an order for specific performance of the agreement for sale. Counsel emphasized that although the plaintiff had pleaded the alternative remedy of damages, his foremost relief was an order for specific performance of the sale agreement. On costs, counsel submitted that costs follow the event.
11. On her part, the defendant's counsel submitted that parties to the sale agreement having failed to obtain consent of the land control board, the agreement became null and void and the court could not issue an order of specific performance in respect of a contract that was null and void. Counsel cited the Court of Appeal decisions in
- (i) *David Sironga ole Tukai v Francis Arap Muge & 20 others* Nairobi Civil Appeal No 76 of 2014; and



(ii) *Onyango & another v Lwayi* [1986] KLR 513.

Counsel submitted that the plaintiff was only entitled to

“a recovery of the sum of monies paid and for breach of contract but not transfer of the suit to his name.” [sic].

Analysis and Determination

12. I have considered the parties’ respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and the prevailing jurisprudence on the key issues in this suit. Although in his pleadings, the defendant denied entering into the agreement dated 1/10/2010 and receipt of the full purchase price, he admitted in his adopted witness statement that he indeed entered into the sale agreement. He also admitted during cross-examination that he received purchase price in full and he signed an acknowledgement to that effect, dated October 16, 2010. Lastly, through his written submissions, the defendant argued that the remedy available to the plaintiff was an order for “recovery of the monies paid and for breach of contract but not transfer of the suit land to his name.”
13. Taking into account the totality of the parties’ respective pleadings, evidence and submissions, the key issue to be determined in this suit is the question as to the appropriate remedy the plaintiff is entitled to, in the circumstances of this suit. The plaintiff’s preferred relief is an order for specific performance of the contract. His alternative relief is for:
 - (i) an order for refund of the purchase price in addition to the agreed liquidated damages at 30% of the purchase price together with interest at court rate from the date of the agreement;
 - (ii) special damages in the sum of Kshs 361,000;
 - (iii) interest at court rate from the date of filing suit; and
 - (iv) costs of the suit.
14. On his part, the defendant contends that the plaintiff is entitled to a refund of the purchase price together with liquidated damages as agreed in the contract [see paragraph 6 of the defendant’s witness statement; the last paragraph of his written submissions; and his oral evidence in court].
15. In urging the court to grant an order of specific performance, counsel for the plaintiff relies on the Court of Appeal decision in *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR in which the Court of Appeal invoked the doctrine of constructive trust to confer to the purchaser land in a transaction that did not meet the requirements of Section 6 of the *Land Control Act*. In the said case, the Court of Appeal relied on its preceding decision in *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR where it had held that the vendor’s action of receiving purchase price and putting the purchasers in possession created a constructive trust in favour of the purchaser.
16. On his part, the defendant relies on the Court of Appeal decision in *David Sironga ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR in which the Court of Appeal refused to infer a constructive trust in a transaction that did not comply with the requirements of Section 6 of the *Land Control Act*, emphasizing that such a transaction was null and void.
17. Contradictory jurisprudence by the Court of Appeal on the legal status of a land sale contract that does not satisfy the requirements of Section 6 of the *Land Control Act* has been a source of uncertainty in Kenya’s land jurisprudence. Owing to this uncertainty, the third tier superior courts and the magistracy have tended to apply what they consider to be the approach that best serves the justice of the case at hand.



18. On my part, I would not have hesitated to invoke the principle laid by the Court of Appeal in *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR and subsequently applied in *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR were it not for the fact that parties to this suit, in their respective wisdom, expressly agreed on the remedy that would be available to an aggrieved party in the event of default by either party. In this regard clause 8 of the agreement for sale provided as follows:

“In the event of default, it is mutually agreed between the parties hereto that liquidated damages for breach of contract will be 30% of the purchase price.”

19. Given the above clause, the finding this court makes is that the remedy available to the plaintiff, as a result of the defendant’s default to procure conveyance of the suit property to him, is a refund of the purchase price together with the agreed liquidated damages equivalent to 30% of the purchase price. The agreed purchase price was Kshs 155,000. The defendant acknowledged receipt of the said purchase price in full. 30% of the said sum is Kshs 46,500%.

20. Acknowledgement of receipt of full purchase price was signed by the defendant on October 16, 2010. Consequently, the court will award the plaintiff interest on the sum of Kshs 155,000 at court rate from October 16, 2010 until payment of the money in full. The agreed liquidated damages, translating to Kshs 46,500, will attract interest at court rate from the date of filing this suit, to wit, 15/6/2016 till payment in full.

21. The plaintiff prayed for Kshs 361,000 as special damages. He particularized the above special damages in paragraph 7 of the plaint as follows:-

Particulars of Loss and Special Damages

1. Appreciation and development the suit property as per the Current Valuation of LOC.16/Mbugiti/2319 - Kshs 345,000
2. Valuation fee paid to Top Mark Valuers Limited - Kshs 15,000
3. Caution fee & search fee - Kshs 1,000
Kshs 361,000

22. Appreciation of the suit property is an element that is taken care by the agreed liquidated damages. On the aspect of development of the suit property, the plaintiff testified that he had planted some trees and tea bushes on the land. He at the same time conceded that he found some trees and tea bushes on the land. He did not, however, present a valuation report relating to the specific trees or tea bushes that he planted on the land. In the absence of evidence relating to the value of the developments that the plaintiff made on the land, the court has no basis for assessing and making an award relating to the alleged developments.

23. In relation to valuation fee paid to M/s Top Mark Valuers, the plaintiff produced a receipt dated 4/6/2016 for Kshs 15,000 paid to the said firm. The court is therefore satisfied that this specific limb of the claim for special damages was specifically pleaded and proved.

24. On the plea for Kshs 1000 relating to monies paid by the plaintiff in relation to the caution and search fees, receipt serial number 4435901 for Kshs 500/= and receipt serial number 4435911 for Kshs 500/= were produced. The court is therefore satisfied that this particular limb of the claim for special damages was specifically pleaded and proved.

25. On costs, the defendant filed a statement of defence in which he denied entering into the agreement dated 1/7/2010 and receipt of the purchase price of Kshs 155,000. He put the plaintiff to strict proof.



Although he subsequently made an admission in the witness statement, he did not tender to the court the purchase price which he had received together with the agreed liquidated damages. He took the plaintiff through the vigours of a full trial. In the circumstances, the principle in Section 27 of the Civil Procedure Act will be invoked against the defendant. The defendant is therefore liable to bear costs of the suit.

26. In the end, the plaintiff's suit against the defendant succeeds and Judgment is entered in favour of the plaintiff against the defendant in the following terms:
- a. Refund of purchase price of Kshs 155,00 together with interest at court rate from October 16, 2010 till the money is paid in full.
 - b. Contractually agreed liquidated damages equivalent to 30% of the purchase price translating to Kshs 46,500, together with interest at court rate from the date of filing suit (June 15, 2016) till payment in full.
 - c. Special damages of Kshs 16,000.
 - d. Costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF JANUARY 2023.

B M EBOSO

JUDGE

Court Assistant: Ms Osodo

