



REPUBLIC OF KENYA



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Gathere & 2 others v Kaburi & 11 others (Environment & Land Case 664 of 2017) [2023] KEELC 23 (KLR) (16 January 2023) (Judgment)

Neutral citation: [2023] KEELC 23 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT & LAND CASE 664 OF 2017

JE GICHERU, JE GICHERU & MN GICHERU, JJ

JANUARY 16, 2023

BETWEEN

DR. SAMUEL KAGIMA GATHERE 1ST PLAINTIFF

DR. SAMUEL KAGIMA GATHERE 2ND PLAINTIFF

DR. SAMUEL KAGIMA GATHERE 3RD PLAINTIFF

AND

KENEDDY MONCHERE KABURI 1ST DEFENDANT

KENEDDY MONCHERE KABURI 2ND DEFENDANT

KENEDDY MONCHERE KABURI 3RD DEFENDANT

ALLOYS NYAMWARO OSORO 4TH DEFENDANT

ALLOYS NYAMWARO OSORO 5TH DEFENDANT

ALLOYS NYAMWARO OSORO 6TH DEFENDANT

G.H. MEENYE T/A KIRIMA ADVOCATES 7TH DEFENDANT

G.H. MEENYE T/A KIRIMA ADVOCATES 8TH DEFENDANT

G.H. MEENYE T/A KIRIMA ADVOCATES 9TH DEFENDANT

LAND REGISTRAR, KAJIADO 10TH DEFENDANT

LAND REGISTRAR, KAJIADO 11TH DEFENDANT

LAND REGISTRAR, KAJIADO 12TH DEFENDANT



JUDGMENT

1. Dr. Samuel Kagima Gatherer, the plaintiff seeks the following reliefs against Kennedy Monchere Kaburi, first defendant, Alloys Nyamwaro Kaburi, Second Defendant, G.K. Meenye T/A Meenye and Kirima Advocates, third defendant and Land Registrar Kajiado, fourth defendant.

- a. Vacant possession of land reference No. Kajiado/Kitengela/22531.
- b. In the alternative, refund of the purchase price.

This is what can be discerned from the originating summons dated April 17, 2015 at paragraphs 3 and 4.

2. The plaintiff's case is as follows. On the July 16, 2012, he entered into an agreement for sale of L.R. Kajiado/ Kitengela/22531 measuring 0.809 hectares for Kshs. 7 million. He paid the entire purchase price in two installments of Kshs. 700,000/- on 6/9/2012 and Kshs. 6, 300,000/- on 21/12/2012.

The defendants procured the necessary consents and the suit land was registered in the plaintiff's name. The only problem that arose is that the plaintiff could not obtain vacant possession of the suit land.

Upon visiting the land, he found some persons purporting to be caretakers of the real owner. When the plaintiff complained to the first and second defendants of his inability to occupy the suit land, they promised to ensure that he would get such possession. He never got it and that is why he filed this suit.

3. In support of his case the plaintiff filed the following documents.

- a. Supporting affidavit dated April 17, 2015.
- b. Copy of agreement for sale dated 10/7/2012.
- c. Copy of acknowledgment of deposit by the first and second defendants dated 7/9/2012.
- d. Copy of plaintiffs' bank statement from 1/12/2012 to 18/7/2013 showing the transfer of Kshs. 6, 300,000/- to the defendants.
- e. Copy of letter of consent dated 10/10/2012 for charge of the suit land by the plaintiff to the Family Bank.
- f. Copy of application for consent of the Land Control Board.
- g. Copy of title deed for the suit land in the names of the first and second defendants dated 7/11/2007.
- h. Copy of certificate of official search dated 28/11/2012.
- i. Copy of letter dated 7/7/2013.
- j. Copy of letter dated 10/1/2013.
- k. Copy of mutation form for L.R. Kajiado/Kitengela/22530 dated 21/12/2006.
- l. Copy of transfer form for the suit land between the first and second defendants and one Ibrahim Lei Elesondai.
- m. Copy of letter dated 28/5/2013.



- n. Seven copies of the plaintiff's pay slips showing monthly deductions for the loan with Family Bank.
4. The first defendant filed an affidavit dated 26/8/2015 and sworn on his behalf and on behalf of the second defendant. In the replying affidavit he admits everything that the plaintiff has said in his supporting affidavit. He promises to complete their part of the sale once he settled the problem with Ibrahim Lei Elesonda.
5. In support of their defence the two defendants filed the documents used to transfer and register the suit land from Ibrahim Lei Elesonda to themselves.
6. The third defendant in a replying affidavit dated 26/5/2015 does not dispute the salient issues and facts raised by the plaintiff. What he disputes is that he is to blame for failure by the plaintiff to have vacant possession of the suit land. He shifts that blame to the first and second defendants.

According to him, he discharged his obligation to his client's the moment the plaintiff got registered as the owner of the suit land. He therefore avers that the suit as it relates to him is misconceived and without any legal basis.

7. The parties, through their counsel on record, opted to rely on the affidavits and documents on record instead of viva voce evidence and cross-examination. Their counsel relied on the written submissions on record as on 28/6/2022 when the case came up for hearing.

The submissions by the plaintiff's counsel dated 2/2/2022 relate to the notice of motion dated October 14, 2019 and not to the originating summons dated 17/4/2015.

Only the submissions filed by the first, second and third defendants dated May 30, 2021 relate to the suit itself. The issues that arise from the entire suit are as follows.

- i. Whether this suit's determination should await the tracing of Ibrahim Lei Elesonda?
 - ii. Whether failure to put the plaintiff in possession amounts to a fundamental breach of the agreement for sale of the suit land?
 - iii. What remedy, if any, is available to the plaintiff?
8. I have carefully considered the summons in its entirety including the pleadings, affidavits and annexures and I make the following findings on the three issues raised above.
9. On the first issue, I find that there is no reason at all to wait for the tracing of the original seller of the land because as per the ruling of this court dated 19/5/2022 which is on record, there is no privity of contract between the original seller and the plaintiff herein.

There is no guarantee either on how soon this seller will be traced. No reason has been given on the efforts made to trace him and why he cannot be found.

10. On the second issue, I find that failure to put the plaintiff in possession of the suit land constitutes a fundamental breach of the agreement for sale of land dated 10/7/2012. Clauses 9:3, 9:4, 9:5, 9:6, 9:7 and 9:8 constitute the warranties the vendors covenanted. More than ten (10) years down the line, the said clauses stand breached because the Plaintiff is not in possession of the suit land.

Though the express period of completion was 45 days from the date of the agreement, the parties by their conduct extended the period because the defendants received the balance of Kshs. 6, 300,000/- on 21/10/2012 which was outside the 45 day period.



There can be no excuse, however, for failure to have put the plaintiff in possession of the suit land by April 22, 2015 when he filed the suit.

11. On the final issue of the available remedy, I find it is clearly stipulated in clause 5.2 of the agreement dated 10/7/2012 as follows.

“If the vendor fails to comply with the vendors’ obligations under this agreement, the purchaser shall give the vendor 21 days notice in writing to comply with the vendor’s obligations and such notice shall specify the default and require the vendors to make it good within 21 days of such notice (time being of essence) and if the vendor then fails to comply with the notice, the purchaser shall at their discretion and without prejudice to their rights and remedies rescind this agreement and the vendor shall forthwith refund the deposit to the purchaser with interest at the rate of fifteen percent (15%) per annum within seven (7) days of the expiry of such notice”.

The agreement between the parties is self-executing as per the above clause. It is clear that the plaintiff’s counsel vide the letter dated 28/5/2013 issued the requisite notice of 21 days which the first and second defendants did not heed.

12. I find that the third defendant is not liable in the breach of agreement committed by the first and second defendants because it was not party to the agreement. The agreement was strictly between the plaintiff and the first and second defendants.

- 13 In conclusion, I enter judgment for the plaintiff against the first and second defendants in the following terms.

- a. Refund of the purchase price of Kshs. 7 million.
- b. Interest on (a) above at the rate of 15% per annum from the date of payment until the date of refund in full.
- c. Costs of the plaintiff and the third defendant to be borne by the first and second defendants.

- 14 It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 16TH DAY OF JANUARY, 2023.

M.N. GICHERU

JUDGE

