



**Milgo v Laboso (Environment & Land Case 168 of 2017)  
[2023] KEELC 947 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 947 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE 168 OF 2017  
CG MBOGO, J  
FEBRUARY 21, 2023**

**BETWEEN**

**ALICE MILGO ..... PLAINTIFF**

**AND**

**PAUL LABOSO ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed an amended plaint dated 28<sup>th</sup> September, 2022 seeking judgment against the defendant for: -
  - a. An order of specific performance to compel the defendant to perform his obligations and to specifically excise transfer of 17.3 acres from parcel No. Cis-Mara/Ololulunga/349 in the agreed area within 14 days of service of the decree.
  - b. The defendant be compelled to execute all the necessary documents effecting transfer of the acres to the plaintiff and in the alternative, an order to issue compelling the defendant to refund the purchase price of the 17.3 acres of land at a court's interest rare to the plaintiff.
  - c. Costs of the suit and interests.
2. In the amended plaint, the plaintiff stated that at all material times the defendant was the secretary of Kuto Kongasis Farm, a group that was selling land and that on or about 1994, the defendant collected a sum of Kshs. 740,000/- from the plaintiff to sell and purchase of 49.3 acres to be excised from Cis Mara/Ololunga/349 belonging to Kuto Kongasis Farm.
3. The plaintiff further stated that she was allocated 32 acres and sometime in the year 2013, she was shown an extra 17.3 acres but since then the defendant has refused to transfer land and handover possession of the 17.3 acres. Further, that as a result of the defendant's refusal to transfer the remaining 17.3 acres, she has been unable to continue with farming activities.



4. The defendant filed a statement of defence dated 20<sup>th</sup> November, 2014. The defendant denied the contents of the plaint dated 7<sup>th</sup> August, 2014. The defendant stated that he had no farm to give to the plaintiff as it was Kuto Kongasis Group that was the owner of the land and had no direct transaction save as secretary of Kuto Kongasis Group.
5. The plaintiff's case proceeded for hearing on 22<sup>nd</sup> November, 2022. The plaintiff while adopting her witness statement dated 7<sup>th</sup> August, 2014 testified that sometime in the year 1994, the defendant whom she knew as a teacher approached her at this time when she was a principal in a school. That the defendant informed her about Kuto Kongosis Farm and that she could purchase land and pay in instalments. The plaintiff paid him in instalments which suit land was sold for Kshs. 15,000/- per acre. That upon paying, the defendant would issue her with receipts. She paid him from the month of February to November in the year 1994.
6. The plaintiff further testified that she intended to purchase 49.3 acres since she paid Kshs. 740,000/-. Further, that in November, 1994, the defendant showed her the beacons of her land and she brought a surveyor who established that the land showed to her was 32 acres instead of 49.3 acres. She complained to the defendant who told her that he would allocate her 17 acres of his farm but when she tried to fence the 17 acres in the year 2013, she realised that there was a new occupant and the defendant had fled from the area.
7. The plaintiff produced a demand letter dated 18<sup>th</sup> March, 2014, copies of receipts of payment and a schedule of payment. Further, that it is not true that the defendant does not have any land to give him as he is the one who received the payments and showed her the land which turned out to be 32 acres.
8. The plaintiff filed written submissions dated 19<sup>th</sup> January, 2023. The plaintiff raised five issues for determination as below: -
  1. Whether the present suit is statute barred.
  2. Whether there was an agency relationship between the plaintiff and the defendant.
  3. Whether the agreement ought to have been written since the subject matter is land.
  4. Whether the defendant failed to fully perform his part of the agreement.
  5. Whether the defendant should be ordered to perform part his part of the agreement.
9. On the first issue, the plaintiff submitted that the issue of time was not raised or pleaded by either of the parties but the same must be addressed since the transaction of purchase of the land took place in the year 1994. The plaintiff submitted that Section 7 of the *Limitation of Actions Act* provides for time within which a suit whose subject matter is land ought to be filed within 12 years from the date of cause of action. It was her submission that the cause of action arose when she took possession and when she was about to fence, realised that the defendant had re-allocated 17.3 acres to someone else and this was in the year 2013. As such the present suit was filed within the timelines. The plaintiff relied on the case of *Edward Moose Lengusuranga v James Lenaiyara & Another* [2019] eKLR.
10. On the second issue, the plaintiff submitted that without doubt, although there was no oral or written agreement appointing the defendant as the plaintiff's agent, the defendant portrayed himself as an agent of the plaintiff. Further, that the conduct of the two parties impliedly created an agency relationship. The plaintiff placed reliance on Bowstead and Reynolds on Agency, Seventeen Edition, Sweets Maxwell page 1-001 and *Halsbury's Law of England*, 4<sup>th</sup> Edition Volume 1.



11. On the third issue, the plaintiff submitted that it is trite law that an agreement for disposition of land should be in writing but in this case, there appears to be no sale agreement except for the receipts. Further, that in some circumstances, the court has brought instances where they can tolerate a suit for a claim of land even without an agreement for sale. That in fact, even without a valid sale agreement, the defendant delivered 32 acres without an excuse and cannot decide to escape delivering the deficit on ground that there was no written agreement. That the plaintiff having fully performed her part of the agreement and taken possession of part of the land bought cannot claim to fail to benefit on an agreement because it ought to have been written. The plaintiff relied on the cases of *Daudi Ledama Morintat v Mary Christine Kiarie & 2 Others* [2017] eKLR and *Anne Jepkemoi Ngeny v Joseph Tireito & Another* [2021] eKLR.
12. On the fourth issue, the plaintiff submitted that by allocating 32 acres out of the 49.3 acres, there was outright non-compliance on the part of the defendant.
13. On the fifth issue, the plaintiff submitted that the defendant portrayed to the plaintiff that he was in a position to deliver 49.3 acres upon payment of the purchase price and by claiming so, the defendant failed to fulfil part of his obligation. The plaintiff submitted that the doctrine of estoppel by representation was established to prevent a party from going back on their word. The plaintiff relied on the case of *Carol Construction Engineering Limited & Another v National Bank of Kenya* [2020] eKLR. The plaintiff submitted that the defendant presented himself as the secretary of Kuto Kongasis Farm and that he could sell to her 49.3 acres of land. That by delivering 32 acres, it meant that he was in a position to actually sell the land to her. For this reason, it would be just that the defendant is estopped from turning away from his previous action of demonstrating that he was in a position of selling to the plaintiff 49.3 acres.
14. Save for filing a memorandum of appearance dated 29<sup>th</sup> September, 2014 and a statement of defence dated 20<sup>th</sup> November, 2014, the defendant did not participate in the hearing despite service of the same.
15. I have carefully analysed and considered the pleadings, the written submissions and the evidence of the plaintiff and the issue for determination is whether the amended plaint dated 28<sup>th</sup> September, 2022 has merit.
16. In this case, the plaintiff testified that at the time of purchasing the land she was a teacher and the defendant approached her with an offer that he would sell to her land from Kuto Kongasis Farm. The sale price of the land was Kshs. 15,000/- per acre and she paid the same in instalments to the tune of Kshs. 740,000/- and was issued with receipts as proof of payment. It was the plaintiff's case that when she took possession of the land shown to her, she realised that the same was 32 acres having called a surveyor who confirmed the same. She complained to the defendant who promised to allocate her 17.3 acres and he showed her the land which she could possess. When she went to take possession, she realised that the land the defendant showed her had been sold to another party.
17. It is not in dispute that there was no written agreement for sale of land between the parties. It is also not in dispute that the defendant received money amounting to Kshs. 740,000/- from the plaintiff.
18. The defendant in his statement of defence denied having any land to transfer and give possession to the plaintiff as he had no direct transaction as it was Kuto Kongasis Group. However, the defendant in his statement of defence did not deny having received the sums of money. The question then is for what purpose did he receive the money. The defendant did not also contest the sale of 32 acres which the plaintiff is in possession.



19. In Civil Appeal Number 22 of 2013, *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR, the Court of Appeal held;

“Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the *Law of Contract Act* excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the *Law of Contract Act*, came into effect on 1st June, 2003. .... Prior to the amendment of Section 3(3) of the *Law of Contract Act* in 2003, the subsection read as follows: -

- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (1) Has in part performance of the contract taken possession of the property or any part thereof; or
- (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.” (Emphasis mine)

20. I find the evidence that the plaintiff upon being shown the land she would occupy, called the surveyor who confirmed that the land was 32 acres instead of 49. 3 acres points to the actions of the intentions of the defendant to sell land to the plaintiff. It appears that it was the defendant who showed the plaintiff the land and no other person. The defendant having denied not receiving the sums of money is estopped from going back on his word. I place reliance in the case of *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR where the Court of Appeal held:

“It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced.”

21. In this case, the evidence of the plaintiff is not contested and I have no doubt in my mind that the plaintiff, on a balance of probabilities is entitled to the prayers sought.
22. Arising from the above, the amended plaint dated 28<sup>th</sup> September, 2022 is allowed in the following terms: -
- i. An order of specific performance is hereby issued compelling the defendant to transfer 17.3 acres to the plaintiff which is to be hived off from parcel No. Cis Mara/Ololulunga/349 within 14 days of service of the decree.



- ii. The defendant is hereby compelled to execute all transfer documents in favour of the plaintiff in line with prayer i. above.
- iii. In the alternative, an order is hereby issued directing the defendant to refund the purchase price of 17.3 acres at court's interest rate from the time of filing the suit i.e. 26th August, 2014.
- iv. Costs of the suit. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 21ST DAY OF FEBRUARY, 2023.**

**MBOGO C.G.**

**JUDGE**

**21/2/2023**

**\*In the presence of:\*\***

CA:Chuma

