



REPUBLIC OF KENYA



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**Kitui v Waswa & 8 others (Civil Appeal E004 of 2020)
[2023] KEHC 24230 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E004 OF 2020**

DK KEMEL, J

OCTOBER 27, 2023

BETWEEN

MOSES MAINA KITUI APPELLANT

AND

MASIKA WASWA 1ST RESPONDENT

VINCENT WEKESA 2ND RESPONDENT

MARTIN MALALI 3RD RESPONDENT

MOSES WANGILA 4TH RESPONDENT

EUGINE WASWA MALALI 5TH RESPONDENT

CORNELIUS MAKOKHA WASWA 6TH RESPONDENT

PATRICK SIMIYU 7TH RESPONDENT

ALI WAKASALA 8TH RESPONDENT

ANTONY WEKESA 9TH RESPONDENT

*(Being an appeal from Bungoma CMCC No. 347 of 2018
by Hon. C.A.S Mutai SPM delivered on 30/04/2020)*

JUDGMENT

1. The Appellant herein was the plaintiff in the subordinate court wherein he had instituted the suit against the respondents. Vide his plaint dated 7/6/2018, he averred that on the 30/11/2-16, the Respondents purported to sell a piece of land measuring a quarter of an acre at a price of Kshs 85, 000/ in order to enable the Respondents meet medical expenses of their ailing father. He averred that upon payment of the said sums, he took vacant possession of the parcel of land and planted crops thereon



only for the Respondents to uproot them. He thus sought for refund of the purchase price and costs of the suit.

2. The respondents entered appearance and filed their statement of defence. They denied the allegations contained in the plaint and averred that the appellant was still in occupation of the suit property. They further averred that the appellant breached the agreement by failing to indulge them as stipulated in the agreement in regard to the filing of succession proceedings over the estate of their late father. They also accused him for failing to make arrangements with the respondents to have the surveyor visit the land, subdivide it and thereafter appear before the land control board.
3. The trial magistrate heard witnesses of both the appellant and respondents and found that the suit against the deceased persons was void ab initio having been filed after the demise of the deceased.
4. Being dissatisfied with the judgement of the trial court, the appellant filed this instant appeal wherein he raised the following grounds of appeal:
 1. That the learned trial magistrate erred in law and in fact when he held that the suit ought to have been filed against the estate of the deceased and not individuals.
 2. That the learned trial magistrate erred in law and in fact when he failed to consider the evidence and documents produced by the plaintiff.
 3. That the learned trial magistrate erred in law and fact when he failed to observe that the deceased could not have entered into any agreement when he was dead.
 4. That the learned trial magistrate erred in law and fact when he struck out the plaintiff's suit with costs without analysing all the evidence on record.
5. This being the first appeal, I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123.
6. Moses Maina Kitui (PW1) testified that according to the sale agreement, the land was sold to him by Festus Waswa Malali and that the eldest son signed the agreement on behalf of the deceased. He added that the witnesses included Eugene Waswa Malali, Cornelius Malali Waswa, Wasilwa Waswa, Moses Wangila and Joseph. He testified that he has never ploughed the land despite paying Kshs 85,000/-. On cross examination, he testified that the respondents sold him the piece of land while their father was at the mortuary. He also confirmed that he was in his right state of mind and that the father of the respondents was already dead.
7. Cornelius Makokha Waswa (DW1) testified that they received the consideration price of Kshs 85,000/- but have never transferred the title to the appellant. He added that even though the appellant was demanding the refund of the money paid, the sale agreement did not provide for the same. He testified that they needed time to institute succession proceedings and do a normal transfer as they did not have the money to refund to the appellant. On cross examination, he testified that the deceased's sons signed the agreement and that at the time of the agreement, their father was deceased. He also stated that the deceased did not rise from the dead. He confirmed that all of the sons signed the agreement on behalf of their late father Festus Waswa Malali.
8. Martin Malali (DW2) testified that a piece of land was sold to the appellant at Kshs 85,000/-. He confirmed that they received money from the appellant and gave him occupation of the ¼ acre of land. He added that the land was registered in their father's name and that the respondents are yet to process the title. On cross examination, he testified that they sold the land after the demise of their father and that they want the appellant to occupy the piece of land.



9. The appeal was canvassed by way of written submissions. The appellant submits that he sought refund of Kshs 85,000/- against the respondents which DW1 and DW2 admitted to have received and therefore it is not in dispute that the appellant advanced money to the respondents. Learned counsel pointed out that the technicalities surrounding the appellant seeking for an order for specific performance were not available. Counsel contended that allowing the respondents to retain the money would amount to unjust enrichment. The respondents did not file submissions on the appeal.

Analysis and Determination

10. I have carefully considered the submissions and the evidence tendered before the subordinate court and find the main issue raised in the appeal is whether the appellant is entitled to an order of specific performance. The court can only grant the relief of specific performance when a legally valid contract is in place, and it will not be ordered if the contract is flawed. In *Gharib Suleman Gharib v Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 the Court held that:

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”

11. According to the sale agreement, the owner of the suit land was Festo Waswa Malari who is the father to the respondents herein. It is not dispute that at the time of the agreement the said Festo Waswa Malali had died and that his sons, the respondents, were planning for his funeral. The respondents however did not have funds for the funeral and entered into an agreement with the appellant to sell part of the deceased’s land. The way the agreement is worded, the contract was between Festo Waswa Malari and the appellant but that the execution on the part of the seller was done by the deceased’s elder son while the other sons witnessed the transaction.

12. In the realm of contract law, the participation of a deceased individual in a contract is not a possibility. The correct position would be for the respondents, who were the beneficiaries of the deceased’s estate, to obtain a grant of representation and acting in capacity of administrators enter into contract with a third party. Failure to do so amounts to intermeddling under section 45 of the *Law of Succession Act*. The effect of section 45 is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law (see *Veronica Njoki Wakagoto (Deceased)* [2013] eKLR). The agreement presented before the subordinate court was in contravention of section 45 of the *Law of Succession Act*. The court in *Trans Mara Sugar Co Ltd & another v Ben Kangwaya Ayiemba & another* [2020] eKLR held as follows:

“49. The general rule is that Courts do not enforce contracts which are in contravention with statutes. In Nairobi Civil Appeal No. 165 of 2007 *D. Njogu & Company Advocates vs. National Bank of Kenya Limited* (2016) eKLR the Court of Appeal stated as follows:

23. Likewise we reiterate that any contract that contravenes a statute is illegal and the same is void ab initio and is therefore unenforceable.

50. The English Court of Appeal in *David Taylor & Son v Barnett Trading Co* [1953] 1 WLR was illustrative on the fate of contracts that are deemed illegal at



formation. In that case, Barnet Trading Co agreed to sell steak to David Taylor for a period of 4 months at a particular price. The company failed to deliver and David sued for damages. At the date of entering in into the contract there was in place an order preventing the buying or selling of meat over a certain price. The contract exceeded that particular set price. The Court held that the contract was illegal at its formation and as such could not be enforced.

51. There are however exceptions to the general rule. In determining the consequences of the illegality, Courts will distinguish between those contracts that are illegal at formation and those that are illegal through performance.
 52. According to *Chitty on Contracts Thirty-Second Edition* Vol. 1, General Principles Sweet & Maxwell Thomson Reuters publishers at pages 1335-1339 as a general rule a contract will be considered illegal at its formation when it is outrightly based on an illegal act. Contracts falling under this category cannot be enforced. Where a contract is illegal at formation neither party will acquire rights under that contract regardless of whether there was any intention to break the law. The contract will be void ab initio and it will be treated as if it was never entered into.
 53. In Kisii Civil Appeal 72 of 2008 *Safari Inns Ltd & 2 Others v Deutsche Investitions-Und Entwicklungsgesellschaft ('Deg') & others* [2011] eKLR the Court of Appeal considered instances where an illegal contract at formation may still be enforced. Referring to the decision in *Nathalal Raghavji Lakhani -vs- H.J. Vaitha & Another* [1965] EA 452 the Court observed as follows: -

.... a plaintiff is not entitled to relief in a court of equity on the ground of illegality of his own conduct. In order to obtain relief, he must prove, not only that the transaction was illegal, but something more: he must prove either pressure or undue influence. If all he proves is an illegal agreement, he is not entitled to relief...”
13. From the foregoing, it is obvious that the contract entered into between the appellant and the respondents was therefore void for want of capacity to contract and therefore not enforceable in law. Indeed, both the appellant and respondents confirmed in their testimonies that the deceased owner did not rise from the dead and executed the contract yet the deceased was indicated as the seller.
 14. I have also carefully considered the decision of the trial court and I find no error in his findings. The suit property in this case belongs to the deceased and forms part of his estate. The respondents in my view do not therefore have the *locus standi* to defend the suit. *Locus standi* is defined in *Black's Law Dictionary, 9th Edition* (page 1026) as:

“the right to bring an action or to be heard in a given forum”.
 15. The Court of Appeal in the case of *Alfred Njau & 5 others -vs- City Council of Nairobi* [1983] eKLR put it in the following terms:

“The term *locus standi* means a right to appear in Court and, conversely, as is stated in *Jowitt's Dictionary of English Law*, to say that a person has no *locus standi* means that he has no right to appear or be heard in such a proceeding.”



16. Given that there is no contention regarding the fact that the land in question belongs to the deceased, the suit could only be brought against the deceased's estate through the legally appointed administrators. It is noted that none of the respondents had obtained letters of grant to allow them enter into the alleged transaction on behalf of the estate of their late father. Hence, the purported sale agreement was void ab initio and illegal at formation. In the premises, the finding by the learned trial magistrate was sound in law and ought not to be disturbed.
17. In the result, it is my finding that the appeal lacks merit and is hereby dismissed. Each party to bear their own costs.

DATED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF OCTOBER, 2023.

D.KEMEI

JUDGE

In the presence of :

Mechi for Wamalwa Simiyu for Appellant

No appearance 1st Respondent

No appearance 2nd Respondent

No appearance 3rd Respondent

No appearance 4th Respondent

No appearance 5th Respondent

No appearance for 6th Respondent

No appearance for 7th Respondent

.....8th Respondent

.....Court Assistant

