



REPUBLIC OF KENYA



KENYA LAW
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**Kirombi v Juliana; Njiru (Substituted Appellant) (Civil Appeal
36 of 2016) [2023] KEHC 24253 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24253 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 36 OF 2016
FN MUCHEMI, J
OCTOBER 26, 2023**

BETWEEN

ELIJAH NJIRU KIROMBI APPELLANT

AND

PAUL NJERU JULIANA RESPONDENT

AND

ANDREW MBURIA NJIRU SUBSTITUTED APPELLANT

*(Being an Appeal from the Judgment of Hon. P. T. Nditika (SRM) delivered
on 20th September 2010 in Kerugoya CM Succession Cause No. 68 of
2006. In the Matter of the Estate of Juliana Kabari Njogu (Deceased))*

JUDGMENT

Brief facts

1. This appeal arises from the judgment in Kerugoya CM Succession Cause No. 68 of 2006 where the learned magistrate dismissed the protest and distributed the estate equally between the respondent and his siblings.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing seven (7) grounds summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in finding that the appellant failed to prove his case and thereby dismissed the protest;



- b. The learned trial magistrate erred in law and in fact in failing to consider the appellant's interests as a bona fide purchaser of LR. No. NGARIAMA/KABARE/504.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant died on 7th January 2012 and Andrew Mburia Njiru filed an application for substitution on 10th August 2010 upon obtaining limited grant of letters of administration ad litem.
5. The appellant submits that he entered into an agreement with the deceased for the purchase of LR. No. NGARIAMA/KABARE/504 vide sale agreement dated 22nd February 1999. He contends that he paid the full purchase price of Kshs. 375,000/- on 22nd February 1999. The appellant further states that the purchase price was used to buy LR. No. MWEA/MURINDUKO/935 which the deceased registered in her children's names.
6. The appellant argues that the respondent merely denied that the deceased sold the said land parcel to him but did not produce any evidence to disprove the sale agreement and acknowledgement receipts produced as evidence of the transaction. The respondent further acknowledged that the deceased bought LR. No. MWEA/MURINDUKO/935 which was registered in his name and those of his siblings but he denied that the said parcel was bought with the proceeds from the sale of LR. No. NGARIAMA/KABARE/504. The appellant argues that the respondent did not support his denial with any evidence and therefore did not discharge the burden of proof. To support his contentions, the appellant relies on the case of *Alice Wanjiru Ruhiu vs Messiac Assembly of Yahweh* [2021] eKLR.
7. The appellant further submits that the trial magistrate by failing to consider that Section 83 of the *Law of Succession Act* recognizes the right of a purchaser to stake their claim as a creditor. In view of the uncontroverted evidence of the sale agreement and purchase price paid by the appellant, he submits that LR. No. NGARIAMA/KABARE/504 was not available for distribution to the beneficiaries as the purchase price paid was equivalent to a debt owed by the estate of the deceased to him. To support his contentions, the appellant relies on the case of *In Re Estate of Mukhobi Namonya (Deceased)* [2020] eKLR.
8. The appellant states that the learned magistrate failed to consider that the deceased having received the full purchase price, was holding the suit property in trust for him pending the completion of transfer of the land. Thus, the appellant argues that the suit property was therefore subject to constructive trust at the time when it was listed as property belonging to the estate of the deceased in Kerugoya Succession Cause no. 68 of 2006.
9. Further, the appellant argues that upon the death of the deceased before obtaining land control board consent and effecting the land transfer to him does not extinguish his right to specific performance. The appellant relies on the case of *Willy Kimutai Kitilit vs Michael Kibet* [2018] eKLR and submits that equitable doctrines of constructive and proprietary estoppel are subject to the *Land Control Act* and can be applied to a contract rendered void by lack of consent from the land control board. As such, the appellant argues that he proved his case on a balance of probabilities and prays that the court may order for specific performance or in the alternative a refund of the purchase price plus interest.

The Respondent's Submissions

10. The respondent submits that the deceased was a single mother who died on 23rd June 2000 leaving behind four children:- Rose Muthoni Muriithi, Patrick Muriithi Juliana, Paul Njeru Juliana and



- David Mbogo Juliana. The respondent further states that he was appointed the administrator of the deceased's estate and upon filing for confirmation of grant, LR No. NGARIAMA/KABARE/504 was distributed to him and his siblings and registered in their joint names.
11. The respondent further submits that the appellant did not prove his case as the Official Search Certificate for LR. No. NGARIAMA/KABARE/504 showed that the deceased was the registered owner. Entry No. 3 showed that the appellant lodged a caution claiming purchaser's interest on 10/8/2000 after the death of the deceased. Further, the respondent contends that the appellant did not attach the alleged sale agreement between him and the deceased in respect of the suit property or any document to show that he purchased LR. No. MWEA/MURINDUKO/935 using the alleged proceeds of sale of the former parcel. He further did not mention the purchase price he paid in full.
 12. The respondent argues that the appellant provided scanty evidence in support of his claim in his protest. During trial, the appellant did not elucidate the contents of the agreements dated 22nd February 1999 and 19th February 1999. The 1st agreement dated 22nd February 1999 indicates that the purchase price was Kshs. 375,000/- and that the deceased had received Kshs. 30,000/- prior to that date, a sum of Kshs. 145,000/- had been transferred to the deceased's account no. 0416-15-10350 and that the balance of Kshs. 200,000/- would be paid on or before 23rd February 1999. The 2nd agreement which reads more like an acknowledgement provides that the deceased acknowledged a further sum of Kshs. 175,000/- leaving a balance of Kshs. 200,000/- to be paid upon execution of transfer. The 3rd agreement, another acknowledgement states that the deceased was paid on 22/2/1999 paid the balance of Kshs. 200,000/- yet the parties had not sought and obtained the consent from the land and control board for transfer to be executed as stipulated in the agreement dated 19/2/1999. The respondent states that none of the authors of the agreements was called to testify.
 13. According to the respondent, the agreements raise a lot of suspicion as parties entered an agreement drawn and attested by an advocate on 22nd February 1999 whereby a total of Kshs. 175,000/- is alleged to be paid to the deceased and the balance of Kshs. 200,000/- would be paid on 23rd February 1999 when another agreement had been made three days earlier 19/2/1999 stating that the deceased had received Kshs. 175,000/- and the balance of Kshs. 200,000/- would be paid upon execution of the transfer. Further, the agreement dated 22/2/1999 failed to make reference to the one dated 19/2/1999 which is contradictory in regards to the time of payment of the balance of the purchase price. The respondent further argues that what is more suspicious is the hand written agreement of 22/2/1999 which bears the same date as the typed agreement on page 117-118 of the record of appeal. The said agreement provides that the deceased acknowledged receipt of Kshs. 200,000/- which contradicts the typed agreement of the same date. The respondent argues that the sale is untrue and the alleged documents in respect of the sale are forgeries.
 14. The respondent further states that on cross examination, the appellant testified that under the agreement dated 19/2/1999 he paid Kshs. 175,000/- to the deceased's account in Kirinyaga District Farmers Sacco being account no. 0416-15-10350 which he paid through his wife's account. The respondent argues that the appellant did not produce the deposit slip, neither did he produce any evidence to prove that the said account belonged to the deceased. The appellant further testified that he paid the deceased Kshs. 200,000/- but he did not provide any evidence like his bank statements to show that he withdrew money to give the deceased.
 15. The respondent further contends that the testimony of the appellant's witnesses was contradictory. PW2, testified that the deceased was paid Kshs. 175,000/- but on cross examination she stated that she did not see the deceased being given the said sum on 19/2/1999. She further stated that the Kshs. 200,000/- was deposited in the account of one James Njogu, her son but she did not give any evidence



to show that her son ever withdrew the money and gave it to the deceased. Further PW6, testified that the deceased was personally paid the Kshs. 200,000/- in cash on 22/2/1999 in his presence which contradicted the evidence of the appellant and PW2 regarding the payment of the said sum.

16. The respondent further argues that the alleged sale agreements were never consented to by the relevant land control board. Thus they became null and void for want of consent and could not therefore be the subject of specific performance as sought by the appellant. The respondent states that even if the court were to assume that the appellant proved payment of the purchase price, he was not entitled to a refund as he only sought for specific performance as per his pleadings. Furthermore, the appellant claimed that he took possession of the deceased's land pursuant to the agreements however PW6 testified that the appellant did not take possession of the deceased's land during her lifetime and that he started harvesting tea on the land after the death of the deceased. The respondent states that this fact is averred by his own testimony that the appellant forcibly entered into his mother's land and started harvesting tea and coffee after the death of his mother. Moreover, the respondent states that the suit property is no longer in existence as they sub divided it.
17. The respondent submits that the cases relied on by the appellant are distinguishable to the facts in this case. In regard to the case of Alice Wanjiru the authority relates to the burden of proof while the appellant did not discharge his burden of proof. On the other hand, the respondent submits that he testified and called witnesses who were straightforward and credible. In *Re Estate of Mukhobi Namonya*, dealt with the issue of revocation of grant and the obligation of administrators to settle the deceased's acknowledged or lawful debts before distributing the net estate to the beneficiaries. The appellant herein did not claim any monetary debt from the deceased's estate. The alleged purchase price was neither acknowledged nor proved. In *Willy Kimutai* case the appellant in that case conceded to having received a substantial sum of the agreed purchase price and put the respondent in possession. The respondent further averred in his defence and counter claim that the agreement for sale was not null and void for want of consent of the land control board as it was not a controlled transaction since it was charged to Settlement Fund Trustees, facts which do not apply to the current appeal.

Issue for determination

18. The main issue for determination is whether the appeal has merit.

The Law

19. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

20. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.



21. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

22. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the appeal has merit.

23. The protest before the magistrate court proceeded by viva voce evidence and the appellant called 5 witnesses to support his claim that he had purchased LR No. NGARIAMA/KABARE/504 from the deceased and she used the proceeds from the said purchase to buy LR. No. MWEA/MURINDUKO/935. It was the appellant's case that he bought LR. No. NGARIAMA/KABARE/504 from the deceased through an agreement witnessed by an advocate dated 22/2/1999 whereas the hand written documents were acknowledgements but not agreements. On cross examination the witness testified that he deposited the sum of Kshs. 175,000/- into the account of the deceased being account no. 0416-15-10350 in Kirinyaga District Farmers Sacco. He further testified that the said money came from his wife's account. and that he paid the deceased Kshs. 200,000/- on 22/2/1999 although none of the deceased children knew about the transaction.
24. PW2, a sister to the deceased testified that she witnessed the deceased being paid Kshs. 175,000/- which was withdrawn from the appellant's account. On cross examination, the witness testified that the deceased was paid Kshs. 200,000/- as the balance of the purchase price and the said money was kept in the account of her son, Njogu. PW4 an estate agent, testified that he was present when the deceased bought LR. No. MWEA/MURINDUKO/935 and further when she obtained land control board consent at Mwea. On cross examination, the witness stated that he did not know where the deceased got the money to buy the said parcel of land.
25. PW5, stated that he witnessed the sum of Kshs. 175,000/- being given by the appellant and he deposited the same in the deceased's account in Kianyaga Sacco. PW6, a nephew to the deceased stated that the deceased was selling land to the appellant, and he went to Kianyaga Sacco to witness the money being paid to the deceased. He further states that he witnessed the deceased being given Kshs. 200,000/- in cash and she deposited it in his account on 22/2/1999. The witness testified that he withdrew the money on 3/3/1999 and they went to Martin to purchase land in Mwea. On cross examination, PW6 testified that at the time of the agreement the children were adults and that they were included in the said transaction. He further stated that he saw the sale agreement which had already been signed. Further PW6 testified that the appellant withdrew Kshs. 200,000/- from Kirinyaga District Farmers Sacco.
26. From the evidence of the appellant and his witnesses, it is evident that the testimonies are inconsistent and contradictory. Right from the documentary evidence to the testimonies of the witnesses there are a lot of inconsistencies in the evidence. The agreement dated 19/2/1999 is between the deceased and the appellant which acknowledges that the deceased received Kshs. 175,000/- as part payment of 0.60 ha of LR No. NGARIAMA/KABARE/504. The agreement further provides that the balance of Kshs.



200,000/- was to be paid after the land was transferred to the appellant. Further, there is an agreement dated 22/9/1999 that is an acknowledgement by the deceased that she received Kshs. 200,000/- as final payment of the purchase price. On the same date, there is a written agreement drawn by an advocate indicating that a sum of Kshs. 30,000/- was already received by the vendor, Kshs. 145,000/- was transferred into the deceased's account and the balance of Kshs. 200,000/- was to be paid on or before the 23/2/1999. What is bizarre is that the typed agreement dated 22/2/1999 makes no reference to the hand written agreement dated the same date. Further the two agreements differ on when Kshs. 200,000/- was paid or ought to have been paid. Furthermore, the appellant did not call as a witness, the advocate who drafted the agreement.

27. The appellant claims that the deceased deposited the said amount of Kshs. 200,000/- in the account of PW6 and he signed the deposit slip yet there was no proof of such deposit slip. Further the evidence indicates that the children of the deceased were never involved in the said transaction and had no idea that their mother was selling land to the appellant.
28. The written agreement further contradicts the oral testimonies of the witnesses as it states that the balance would be paid on 23/2/1999 yet PW6 testified that he saw the appellant give the deceased Kshs. 200,000/- on 22/2/1999. However PW6 said he was present from the said occasion, he did not witness in any of the agreements or acknowledgements. He only stated in his testimony that he saw the sale agreement and it was already signed.
29. The testimonies also vary on the mode of payment. PW2 testified that she saw the deceased being given Kshs. 175,000/- but on cross examination she said that she did not see the money being given to the deceased. Furthermore, the appellant stated that he deposited the Kshs. 175,000/- in the deceased's account in Kirinyaga District Farmers Sacco account number 0416-15-10350 from money that he withdrew from his wife's account. The appellant did not produce any evidence to show that the said account was the deceased's account and further he did not produce any deposit slip and bank statements from his wife's account to show that he withdrew the money from the said account and deposited it in the deceased's account. Furthermore, the appellant's evidence contradicts that of PW2 who stated that she witnessed the deceased being given Kshs. 175,000/-.
30. Additionally, the conduct of the appellant does not support his contentions as PW6 and the respondent confirmed in their evidence that the appellant moved into the suit land when the deceased died. This is despite him alleging to have paid the full purchase price. The respondent maintained that the land was registered in the name of his deceased mother and as for the land in Mwea which deceased bought was registered in his name and those of his siblings by the deceased before she died. The contention by the appellant that the deceased used the proceeds from the sale of LR No. NGARIAMA/KABARE/504 to purchase the land in mwea hold no water as PW4, the estate agent who sold the deceased the said land testified that he did not know where the deceased had gotten the money to purchase LR No. MWEA/MURINDIKO/935.
31. Section 107 of the *Evidence Act* places the burden of proof on the party that alleges. In *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others* (2014) eKLR the Supreme Court held inter alia:-

"The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue."



32. After the analysis of the evidence, I am of the considered view that the appellant failed to discharge the burden of proof before the court below. The evidence he gave in support of his case was inconsistent and wanting in my considered view and fell short of proving the case. I reach a conclusion that the ruling of the magistrate was based on the evidence placed before her and which was well considered. As such, the magistrate did not err in dismissing the appellant's protest.
33. It is my finding that this appeal has no merit and it is hereby dismissed.
34. Due to the nature of this appeal, I hereby direct that each party will meet their own costs of the appeal.
35. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 26TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 26th day of October, 2023

