



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

CIVIL SUIT NO 61 OF 2009

DAVID WARUIRU NGOTHO.....PLAINTIFF

VERSUS

BETTY ABONYO OYUGI.....1ST DEFENDANT

DAVID OGOT OYUGI.....2ND DEFENDANT

DOREEN ARIBETA OYUGI.....3RD DEFENDANT

BEATRICE AKINYI AMENYA.....4TH DEFENDANT

SAMUEL AYODO OGANGO.....5TH DEFENDANT

CHRISTOPHER ONYANGO AYODO.....6TH DEFENDANT

ARTHUR ODUOR OYUGI.....7TH DEFENDANT

DOUGLAS OYUGI.....8TH DEFENDANT

JOSHUA ONYANGO OYUGI.....9TH DEFENDANT

JOB OKUNA OYUGI.....10TH DEFENDANT

MARY AKUMU OYUGI.....11TH DEFENDANT

JUDGMENT

BACKGROUND

1. The Plaintiff filed a claim against the Defendants herein by way of a Plaint dated 18th of February 2009. He sought the following:-
 - a. Kshs 20,000,000/= being the refund of the full purchase price and further sum of Kshs 2,000,000 being the 10 % of the purchase price on account of penalty for breach of contract.
 - b. Cost of this case.
 - c. Interest on (a) above at 14% P. A from the date the 1st and 3rd Defendants received the same purchase price to the date of full payment
2. The 1st to 6th Defendants entered appearance on 26th February, 2009 and jointly filed defence dated 10th March 2009 denying the plaintiff's claim.
3. The 7th and 11th Defendants entered appearance on 26th February, 2009 and jointly filed their defence dated 10th March 2009 denying Plaintiff's claim.

4. The 8th, 9th and 10th Defendant entered appearance on 26th February, 2009 and jointly filed their defence dated 18th March 2009 denying plaintiff's claim.

PLAINTIFF'S EVIDENCE

5. PW1 **Thomas Ng'ang'a Ngotho**, testified as a brother of the Plaintiff who resides in South Africa and informed the Court that he has power of attorney to represent his brother; he produced it in Court marked Exhibit 1.

6. He testified that on or about July 2004, he was approached by **Samuel Ayodo** the 5th Defendant, who was selling property in Nakuru. He approached him as he was in the business of buying and selling of property through **Ngotho Commercial**. He told him that he also had property in Nairobi. He said **Samuel Ayodo** informed him that the property belonged to the deceased Akinyi.

7. PW1 testified that he informed the Plaintiff who was in South Africa about the property; the plaintiff came and was shown four maisonettes which all had tenants. He said he also saw the house of **Mary Akumu**, widow of the Deceased. He said they agreed on the price of Kshs.20,000,00/= and that they went to **J. K. Gatimu & Co. Advocates**, in accompaniment of a person called **Tom** from Nairobi. He said they had Certificate of Grant, Original title, IDs and Pins for all the people who were there; Betty, Dorine and Beatrice.

8. PW1 said the agreement drawn and signed in the presence of **Gatimu Advocate**. They then paid the commitment and down payment for the maisonettes. After payment the property was released to him and they started to collect rent.

9. PW1 testified that the tenants informed him that **Arthur Oduor Oyugi** called and harassed them telling them to pay rent to his company. PW1 said he later learnt that the said Oduor was the son of the Deceased. PW1 went to see one of the sons. PW1 said he never suspected the ladies as they were old and were selling for school fees. He said he opted to move out of the property because of threats. He prayed for refund of money paid to the deceased's widows.

10. On cross examination, he stated they received the Title Deed and Confirmation of Grant and the documents were in the name of **Dr. Ngotho**. He said the agreement shows that they were buying 3 houses but there was no description but the title was ready in the name of **Mr. Oyugi**; he had not transferred to **Betty, Dorine and Beatrice**. PW1 stated that he knew Mr. Oyugi was deceased and the advocate confirmed the Certificate of Grant was from the High Court. PW1 said Mr. Arthur never appeared before **Mr. Gatimu Advocates** to sign the agreement and the other people who came were **David Okoth** and **Christopher**.

11. He said the rent was between Kshs.150,000 to Kshs.160,000. He said he had filed the suit in Milimani. The tenants were being harassed and they reported to Kileleshwa Police Station. He did not pay the 7th Defendant anything.

12.. On further cross examination he stated that his brother bought the house in June and July 2005. He stated that according to Clause 3 of the agreement the widows of the late Hezekiah Oyugi had agreed to the sale. They were to pay Kshs.300,000 then execute the agreement. The date of the agreement was 20th of June 2005. The date of payment was 24th March 2006 and he signed the agreement on the 20th of June 2005. He undertook to pay Kshs.4,000,000 in 90 days subject to prove that he succession cause of the Late Hezekiah Oyugi was in progress.

13. He further stated that he was to pay Kshs.5,000,000 upon production of the consent to transfer. He stated that he had never met **Mary Oyugi** nor **Douglas Oyugi** and that he met **Joshua Onyango** once.

14. He further stated that around 17th of July 2006 David came to his office saying he was sent by his mother to collect school fees. He gave him Kshs.250,000 in cash. Christopher came on the 11th of July 2006 for the money. It was part of the purchase price. The property was transferred on the 14th of December 2005. He said Plaintiff signed the transfer document. The title is not the same as in the bundle of documents.

15. On re-examination, he stated that the consents and affidavits were brought when they were in the process of buying. The children were all grown up. His claim is to have his money back. He stated that he did not suspect that it was not genuine. He paid stamp duty.

DEFENDANT'S EVIDENCE

16. 10th Defendant **Job Okuna** testified as DW1, he said the 9th Defendant **Joshua Oyugi** is his uncle. He adopted the written statements filed on the 24th October 2014 and stated that he learnt that PW1 had purchased 4 units in July. He said the Succession Cause has not been concluded and that they were not involved in the purchase process of the property and that they were not paid any money as administrators of the estate of the deceased.

17. DW1 testified that they had not agreed that the property be given to Betty and Dorine. He produced a list of documents filed on the 24th of October 2014. He attached his passport to show he was out of the Country at the time the alleged affidavit was signed and his uncle the 9th Defendant did not also sign any document. He said they still hold the original title for the property and they have not signed any documents for transfer in favour of anybody. He denied having met **Mr. David Ngotho** or the PW1. He urged the Court to dismiss the case.

18. In cross-examination DW1 said he was appointed the administrator of his father's estate and his mother is **Mary Akumu** the 11th defendant. He stated that he had 3 step-mothers, his mother being the 1st wife. He said that Dorine the 3rd defendant in her affidavit stated that she received Kshs 10,000,000 and said he took up the matter of forgery with the police and they were in the process of looking at the assets and liabilities. He said the estate has certain assets where it earns income. Both are movable or immovable. He said as the

administrators if they wanted to sell any property for school fees or hospital bill we go to Court to get permission; that they sought court's leave for any property they have sold.

19. In re-examination he stated that the application of Douglas Oyugi to sell property to Ngotho was dismissed.

20. DW2, **Douglas Odhiambo Oyugi** stated that he had filed his written statement on the 5th of December 2018 and he wished to adopt it. He stated that:

a. He concurred with the testimony of the DW 1. He stated that he never appeared before Gekonga Advocate to instruct him to prepare the affidavit. He never granted the authority to Dorine or Betty to sell the property. He met Thomas Ngotho for the 1st time in Court and had never received any money from him. He never executed any agreement.

b. On cross examination he stated that he is the co-administrator of the deceased estate. They had disposed movable and immovable property as per orders of court. They had not concluded succession due to interference like the purported sale. They stated that they know all the property of the deceased. They did not know the property of the deceased had been sold. He stated that the name was his but the signature was not his.

21. 7th defendant **Arthur Oduor** testified as DW3. He stated that **Mary Akumu Oyugi** the 11th defendant was his mother. He adopted his written statement dated 23rd of October 2014. He testified that he was living in house number 5 one of the houses purported to have been sold. Said he received a call in the year 2005 informing him that his house had been sold. He called his lawyer who advised him to do a search and find out who had purchased the property. On inquiry they realized that the tenants had been paying rent to a 3rd party.

22. DW3 testified that their lawyers followed up and found that the property had not been transferred; they registered a caveat. He said they learnt that plaintiff had claimed to have purchased the property and was holding a document in the form of a title. He said the plaintiff subsequently proceeded to pay for the property despite being made aware that it was part of the estate. He testified that the tenants thereafter were asked to leave as they were not paying rent.

23. He said that during the period **Mr. Ngotho** took over the premise and the tenants were paying rent through his company **Regiman Consult Ltd.**

24. In Cross-examination DW3 stated that he knew the agreements were done in 2005. He was aware of 2 agreements and the property sold were house No. 3, 4, 5 and 6 and that he was living in No. 5 and 8th defendant Douglas was living in house number 1. He said his father passed away on the 7th of August 1992. He was born on 15th March 1993. He said he had been managing the property since 2001; that he was the manager of a management company that only collected rent and manages the property. He said they learnt that rent had not been paid for 4 months.

25. He said Doreen never sought authority to sell from the Court. He said as administrators they had disposed some of the property, he further stated that the Grant of Confirmation used is the same grant that the High Court had said did not come from the succession matter. He said it was a forgery. He stated that plaintiff had a judgement against the 3rd Defendant and that the time the property had been sold most of them had finished school.

26. In re-examination he stated that he did not authorize **Regiman** to collect rent on its behalf. He said it never offered any service to the tenants as they were still paying security water and maintenance. He said he never met Mr. Ngotho or his representative neither did he receive any money. He said the succession matter of the Estate of late Oyugi had not been concluded and all property are managed under one company and a caveat was placed on the title. He said at the time Mr. Ngotho took over there was no rates, City Council taxes and land rent.

SUBMISSIONS BY PLAINTIFF

27. The Plaintiff filed submissions dated 20th September 2016. On whether the Plaintiff paid the purchase price of 20,000,000/= to the 1st and 2nd Defendants for houses 3, 4, 5 and 6 on land parcel LR40276 L.R 209/309, he submitted that the Plaintiff entered into a sale agreement with the two widows of the deceased on 25th June 2005. The sale agreement was for the purchase of houses No.3, 4 5 and 6 also identified as C1, C2, B1 and B2. He added that he produced a list of documents to prove the actual payment, this includes; a title deed, an official search for the suit property, consents, affidavits, cheques, payment vouchers, receipts, acknowledgments of payments and letters which showed that the Defendants accepted receipt of the purchase price.

28. As to whether the Defendants held themselves out as the beneficiaries/ administrators of the estate of the deceased the late **Hezekiah Nelson Oyugi** and as duly authorized to transact in the said property, the Plaintiff produced 2 sale agreements which bear the names of the 1st and 3rd Defendants (widows of the Deceased) who were holding themselves out as administrators of the estate of the deceased. He further stated that the letter from the Principal Registrar of the High Court denouncing the Certificate of Grant shows that the Defendants had given the Plaintiff fake documents.

29. On prayers sought in the plaint, Plaintiff submitted that having proved Issue 1 and 2 above as per the agreement, Plaintiff is entitled to the prayers sought. Plaintiff cited the case of **Danson Muniu Njeru v William Kiptarbei Korir & 6 others [2014] eKLR** where the court held that the remedy lies in getting a refund of what they paid under the transaction.

30. And in the case of **Joseph Kirumba Ndungu v Wakakoro Ole Sakuda [2019] eKLR** the court held that since the transaction was not complete, it was just and equitable for the Plaintiff to be refunded the purchase price it paid.

31. On costs plaintiff submitted that under **Section 27 (1) of the Civil Procedure Act** which provides that the costs largely follow the event and the Court is given discretion to determine which party will meet the costs; finally that the Plaintiff has discharged his burden of proving his case against the Defendants on a balance of convenience.

SUBMISSIONS BY 2ND, 4TH AND 6TH DEFENDANT

32. In their submissions dated 30th October 2019, on whether the 1st and 3rd Defendant had capacity to contract with the Plaintiff they referred to **Section 82 of the Law of Succession Act** on the power of the personal representatives. They reiterated that that they did not participate in the alleged transaction.

33. As to whether the Plaintiff, the 1st Defendant and 3rd Defendant intermeddled with the property of the deceased, they draw Court's attention to the case of **Kamau Gitau & 2 others v Wandai & 5others [1989] eKLR** and the case of **Benson Mutuma Muriungi v C. E. O. Kenya Police Sacco & Another [2016] eKLR**.

7TH & 11TH DEFENDANT'S SUBMISSIONS

34. In their submissions dated 15th of November 2019, they submitted that the 7th and 11th Defendant produced the original title of the suit property in their bundle which clearly indicated that the suit property is under the name of the Late **Hezekiah Nelson Oyugi** who is deceased and property was never registered in the name of the 2 sellers and they had no *locus standi* to enter into transactions on behalf of the estate of the deceased.

35. They referred to **Section 24 of the Land Registration Act, 2012** on the interested conferred by registration. They further quote **Section 26 of the Land Registration Act**.

36. As to whether the 1st and 3rd Defendants had the rights to sell the suit property and whether any contract entered into by them was valid and binding, they referred Court to **Section 82 of the Law of Succession Act**. They further stated that it is noteworthy to take cognizance of the fact that the said sellers were never personal representatives of the Estate of the Late Hezekiah Nelson Oyugi and the law is very clear that no immovable property forming part of the estate of the deceased can be subject to sell before a confirmation of grant is issued.

37. They referred to the case of **Francis Musyoki Kilonzo & another v Vincent Mutua Mutiso [2013] eKLR** where the court held that sale of a property belonging to the deceased amount to intermeddling.

38. And further in **Re estate of John Gakunga Njoroge [2015] eKLR** the court held that any agreement entered into before the confirmed grants are invalid for offending the provision of **Section 45 and 82 of the law of Succession Act** and in the case of **Moris Mwiti Mburugu v Denis Kimathi M'Mburugu [2016] eKLR** the court held that Intermeddling is unlawful and cannot be protected by the Court. Further, in **Re Estate of Mutungi Rithara (deceased) [2018] eKLR** the court held that any conveyance of immovable property of the estate property or any part thereof in contravention of **Section 82 of the law of Succession Act** renders such acquisition or conveyance unlawful and therefore, invalid in law.

39. Further in the case of **Peter Maingi Ndegwa & Another v Moses Muiruri Ng'ang'a & 2 Others[2019] eKLR** the court held as follows:-

“Before the grant of letters of administration, no one including the administrator of the estate the deceased can deal with the property of the deceased by way of intermeddling therewith or effect a sale of immovable property belonging to the estate.”

40. Defendants concluded that the Plaintiff has failed to prove his case on a balance of probabilities to warrant the Court to grant the prayers and relief sought and urged the court to dismiss this suit in its entirety with costs to the defendants.

ANALYSIS AND DETERMINATION

41. I have considered evidence adduced and submissions filed. From the evidence adduced, there is no dispute that the property alleged to have been sold to the plaintiff was registered in the name of the late **Hezekiah Oyugi** at the time it was alleged to have been sold. Plaintiff's evidence adduced is to the effect that two widows of the deceased the 1st defendant and the 3rd defendant sold the property to the plaintiff. The plaintiff's evidence is that the two widows presented themselves to him as having authority or capacity to sell the two of the 4 houses. In her defence the 1st defendant denied having received Kshs 10,000,000 but admitted having received Kshs.2,000,000. Notably the 3rd defendant never filed defence and judgment was entered against her.

ISSUES FOR DETERMINATION

- i. Whether the 1st and 3rd defendants had authority or capacity to sell the said properties.
- ii. If not did the Plaintiff have reason to believe that the two widows had capacity and authority to transact over the two properties?
- iii. Is the Plaintiff entitled to refund and if so from who?

42. On the first issue, evidence adduced is that the 8th, 9th and 10th Defendants are administrators of the estate of late **Hezekiah Nelson**

Oyugi. The issue that arise is whether they had capacity to sell the property to the Plaintiff; whether they had capacity to enter into contract with Plaintiff to sell their deceased husband's property.

43. **Section 45 of the law of Succession Act** provide as follows:

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

44. There is no dispute that the 1st and 3rd defendants received payments in respect to 4 units of the late **Hezekiah Oyugi** to the Plaintiff. A fake certificate of grant was shown to the Plaintiff. The two widows had no capacity to sell the said property as it was demonstrated to court that succession matter is still pending.

45. The Plaintiff was made to believe that the two widows had capacity to sell the said property. Upon the alleged sale, the Plaintiff took possession and started collecting rent from the premises as stated in the 1st Defendant's defence.

46. It is admitted that some of the properties of the deceased have been sold while succession matter is pending to meet needs of the beneficiaries but with the authority of the court. There was however, no authority in respect to the property herein.

47. The Plaintiff is not claiming property but refund of money paid. Judgment has already been entered against the 3rd defendant. In her defence the 1st defendant admitted having transacted with the plaintiff. Plaintiff is entitled to refund of money paid for the said properties.

48. **FINAL ORDERS ORDERS**

1. Judgment is entered for Plaintiff against the 1st and 3rd defendant for Kshs.20,000,000.

2. Interest on 1 above from the time of filing this suit.

3. Suit against the 2nd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th defendant dismissed.

4. Costs to be paid by 1st and 3rd Defendant to the Plaintiff and other defendants.

Judgment dated, signed and delivered at Nakuru this 27th day of February, 2020

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

Jeniffer/Schola – Court Assistant

Mr. Ngotho Counsel for the Plaintiff

Omoiti for 8th, 9th and 10th defendant

Ms. Obura holding brief for Ogola for Counsel for the 7th & 11th Defendants