



**Wafula (Suing as the Personal and Legal Representative of the Estate of the Late Henry Wafula Masibayi Deceased) v Masinde (Environment and Land Appeal E017 of 2022) [2023] KEELC 18897 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18897 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E017 OF 2022**

**EC CHERONO, J**

**JULY 17, 2023**

**BETWEEN**

**GEORGE MASIBAYI WAFULA (SUING AS THE PERSONAL AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE HENRY WAFULA MASIBAYI DECEASED) ..... APPELLANT**

**AND**

**RICHARD WAFULA MASINDE ..... RESPONDENT**

*(Appeal arising from the judgment by Hon.C.A.S MUTAI, SPM  
BUNGOMA in CM-ELC NO.143 of 2018 delivered on 26/11/2021)*

**JUDGMENT**

1. This Appeal arises from the decision by Hon.CAS Mutai, SPM in CM-ELC No143 of 2018 delivered on November 26, 2021. The brief facts of this appeal is that Henry Wafula Masibayi, the Respondent herein filed the former suit Bungoma CM-ELC No 143 of 2018 against Richard Wafula Masinde, the Appellant herein seeking orders inter-alia for a permanent injunction against the defendant, his servants and or agents or any person claiming through him from interfering with the suit land as long as the suit was still pending, registration in his names of land measuring 50ft x 120ft comprised in land reference NoE.Bukusu/S.Kanduyi/2461 and or alternatively an order for refund of the purchase price of the said plot at the current market value.
2. Vide a statement of defence dated May 2, 2018, the defendant/Respondent denied the claim and averred that the purported sale in which the claim is based dated July 21, 2004 is illegal and set out particulars of the alleged illegalities thereunder.



3. After hearing the parties and their witnesses and upon considering the evidence placed before him and the law, the trial Magistrate rendered himself on November 26, 2021 by striking out the suit with each party to bear his own costs.
4. The plaintiff was aggrieved and preferred the present appeal on the following grounds;
  1. The Trial Magistrate erred in law in dismissing the Appellant's suit without considering that the respondent had admitted to refund him the purchase price of Ksh 500,000/=
  2. The Trial Magistrate erred in law and fact by dismissing the appellant's suit and therefore misdirected himself in law.
  3. The Trial Magistrate erred in law and fact by failing to deliver a justified judgment in the interest of justice. He based it on technicalities that are against the substantive law and the *Constitution* dismissed the appellant's suit
  4. The Trial Magistrate erred when he ignored to consider and take into account the overwhelming evidence and submissions of the appellant.
  5. The Trial Magistrate erred in law and fact by only accepting the respondent's case on defence at the face value without considering the fact that the appellant had interest in the suit land as a purchaser and further the fact that there was construed trust being held by the respondent on behalf of the appellant who was already in the possession in the said land.
  6. The Trial Magistrate erred in law and fact by failing to apply the relevant pertinent judicial principles and precedents and trends regarding to cases of this nature.
  7. The Trial Magistrate misdirected himself in law and was therefore biased in his judgment.

### **Appellants Submissions**

5. The appellant through the Firm of M/s Elizabeth Chunge & Company Advocates set out six issues for determination as follows;
  - a). Whether the appellant was entitled to orders of a permanent injunction against the respondent to restrain him, his servants and or agents or any person claiming through him from interfering with the suit plot otherwise comprised in LR No E Bukusu/S Kanduyi/2461.
6. The learned counsel submitted that section 38 to 41 of the *land Registration Act* has a clear provision of the contracts over land that provides for when a vendor can seek to repossess land that has been sold. She submitted that it is mandatory that the vendor only repossess the land where the purchaser has breached the contract and in this case, it is the respondent who is in breach of the contract. The learned counsel further submitted that it is not in dispute the respondent has a grant of letters of administration being one of the legal and personal representative of the estate of his father, the suit land being among the said estate. She submitted that by the land sale agreement herein, the appellant purchased the portion of land measuring 50ft x 120ft from the respondent's share of his inheritance in the suit land which portion was to be excised LR No E Bukusu/S Kanduyi/2461 and transferred to the appellant's father. She also submitted that it is not in dispute that the purchase price was paid in full.



7. The learned counsel further submitted that it is clear that the plaintiff in the subordinate court who is also the appellant herein took possession exclusively of the suit land and has been in actual use and peaceful enjoyment openly, continuously and exclusively from the time of purchase to date or until the time of judgment of the lower but just after the judgment, for no reasonable cause, the respondent who had even promised to refund the purchase price and during the inception of this suit continues to refuse alternatively to execute the registration and transfer instruments to facilitate the transfer of title to the appellant.
8. She submitted that the sale agreement herein which is the primary document was signed by both parties on willing buyer –seller basis and that there was no influence, coercion, duress or force and the respondent had legal capacity or locus to sell off the same to the late Henry Masibayi Wafula.
9. The counsel submitted that the agreement herein was valid and that being the basis of the jurisdiction of specific performance which the appellant is seeking is based on the existence of an enforceable contract like the one in this case.
10. The learned counsel submitted that the appellant’s father having paid the full purchase price and having put into possession of the suit property acquired proprietary rights of interest as provided in the [Land Registration Act](#).
11. She cited the following decided cases in support;
  1. [Reliable Electrical Engineers & Another v Kenya Petroleum Refinery Limited](#) (HCC 190 of 2005) (UR)
  2. [Maina & 87 Others v Kagiri](#) (2014) eKLR
  3. [Land Registration Act](#) No3 of 2012
  4. The [Law of Contract Act](#)

### **Respondents Submissions**

12. The respondent did not file submissions within the timelines given by the court.

### **Legal Analysis And Decision**

13. I have considered the extract of the appeal and the Submissions by counsel for the Appellant. I have also considered the applicable law. This being the first appeal, I am reminded of the court’s duty to re-evaluate and re-examine the evidence presented before the trial court and the findings reached by the trial magistrate and make my own independent conclusion. In the case of *Selle versus Associated Motor Boat Company Ltd* (1968) EA 123, the court held thus;

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judges’ finding of fact if it appears either that he/she had clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of the witness is inconsistent with the evidence in the case generally (*C Abdul Hammed Shariff versus Ali Mohammed Solan* (1955) 22 EACA 270)”



14. The gravamen of the plaintiff/appellant's claim in the former suit before the trial court and the subject of this appeal is a claim for a portion of land measuring 50ft x 120ft comprised in land parcel NoE.Bukusu/S.Kanduyi/2461. From the sale agreement dated July 21, 2004, the vendor, Richard W. Masinde is stated to be the owner of the demised premises. Another agreement was also entered into between the parties, one year later on July 6, 2005. The subsequent agreement is similar to the earlier agreement except that the subject property for sale changed to LR No E Bukusu/S Kanduyi/11591 and the payment of the purchase price is said to have been paid in full settlement. The subsequent agreement also provides that Possession of the sold parcel of land shall be given to the purchaser immediately upon execution thereof. The said subsequent agreement is not indicated as an addendum or a further agreement to the earlier agreement made on July 21, 2004. From the evidence adduced, it is not in dispute that when the first agreement was entered into on July 21, 2004, the suit land was indicated as parcel No E Bukusu/S Kanduyi/2461 and registered in the name of Alfonse Masinde (deceased). At the time the second agreement was entered into on July 6, 2005, it also indicates that the vendor, Richard Wafula Masinde was the registered owner of the subject property for sale which had now changed to land parcel No E Bukusu/S Kanduyi/11591. No certificate of search was produced confirming the ownership of the properties as alleged in the two agreements.
15. From a valuation Report by PI Khaoya dated July 22, 2019, the valuer could not also establish the land registry status of the subject plot No E.Bukusu/S.Kanduyi/11591 but confirmed that in February 2018, the original land parcel NoE Bukusu/S Kanduyi/2461 was registered in the name of Alphonse Masinde (deceased)
16. It is not in dispute that at the time the agreement was entered into on July 21, 2004, the subject property No E Bukusu/S Kanduyi/2461 was registered in the name of Alphonse Masinde(deceased). There is also no evidence showing that land parcel No E Bukusu/S Kanduyi/11591 was registered in the name of the seller Richard Wafula Masinde when the subsequent agreement was entered into on 6<sup>th</sup> July 2005. In the first agreement entered into on July 21, 2004, the purchaser had only paid a down payment of Kshs 100,000/- leaving a balance of Kshs 400,000/= but in the subsequent agreement dated July 6, 2005, the vendor acknowledges receipt of the purchase price in full settlement.
17. Before determining whether the agreement(s) under review are enforceable or not, the intention of the parties must be established as was held in the case of *Patel v Singh (No2)* (1987) KLR 585 AT 588 where the Court of Appeal cited with approval the words of Devlin LJ (as he then was), in *Archbalds (freightage Ltd V S Spanglett Ltd* (1961) 1QB 374 at 388 reiterated;

“ The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; If the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that as at the time of performance he did not know what he was doing was illegal.

The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy”. (Emphasis added)
18. It is my view that the agreement entered into between the parties dated July 21, 2004 is an illegal contract as the subject property of sale was registered in the name of one Alphonse Masinde. It is an



offence punishable by imprisonment to sell or dispose a property belonging to a deceased person before the estate is succeeded. In the case of *Virginia Mwari Thurania v Purity Nkirote Thurania* (2017) eKLR, Gikonyo J observed as follows;

“The said sale agreement is null and void for violating Section 82 (b) (ii) of the *Law of Succession Act*, as the said Julia Thurania had not obtained Letters of Administration of the estate of the deceased at the time of the alleged sale. The property of a deceased person vests in the legal representative and constitutes the estate of the deceased person. It is only the legal representative of the estate or a person under the authority of the written law shall have authority to deal with the estate of the deceased, but in accordance with the grant or authority of the written law or order of the court.....”

19. Again in the case of *Re Estate of Paul M' Maria (Deceased)* (2017) eKLR, the court held;

“The restriction provided by law that no immoveable property shall be sold or distributed before confirmation of grant is not merely directory or embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the *law of Succession Act* is tainted with killer poison; thus, property so acquired does not enjoy the protection of property rights under Article 40(6) of the *Constitution*. See the claw - back provision of the *constitution* that; 40(6) The rights under this Article do not extend to any property that has been unlawfully acquired. Therefore, applying the law and the *Constitution*, the sale of plot 18A Mitunguu Market on July 12, 2004 was in contravention of the *law of Succession Act* and therefore vitiated by that illegality. It is thus invalid, null and void transaction. Such contract is *ex facie* illegal and is unenforceable; no person can maintain an action based on or recover on the basis of a contract which is prohibited by statute.”

20. From the decided cases cited above, it is clear that the Sale transaction under which the appellant made the claim for injunction and/or refund in the former suit was based on a contract which is prohibited by statute.

21. From the entirety of my analysis herein above, I find this appeal without merit and the same is hereby dismissed with costs.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS  
17<sup>TH</sup> DAY OF JULY, 2023**

**HON. E.C CHERONO**

**ELC JUDGE**

**In the presence of;**

1. Mr. Makokha holding brief for Mr. Were for Respondent
2. Appellant/Advocate- absent
3. Joy- Court Assistant

