



**Kosgei v Iravokha & 2 others (Environment and Land Appeal  
2 of 2023) [2023] KEELC 21064 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21064 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL 2 OF 2023  
JM ONYANGO, J  
OCTOBER 25, 2023**

**BETWEEN**

**WILSON CHERUIYOT KOSGEI ..... APPELLANT**

**AND**

**DEBRA SHIVERENJE IRAVOKHA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH JONA MULIMA ..... 2<sup>ND</sup> RESPONDENT**

**JAMES SHIURU SHIVERENJE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment of Hon. R. Odenyo SRM delivered on 13<sup>th</sup> January, 2022 in Eldoret CMEL case no 228 of 2018.
2. In the case in the lower court, the Appellant filed suit against the Respondents seeking to be declared as the legal owner of that land parcel known as Uasin Gishu/Kimumu/41 which he bought from the 1<sup>st</sup> Respondent in 2004.
3. The Respondents refuted the Appellant's claim by citing the Appellant's lack of capacity to enter into a valid sale agreement as well as limitation.
4. The case proceeded for hearing and both parties testified. The Appellant stated that he entered into an agreement with the 1<sup>st</sup> Respondent for the sale of land measuring a quarter of an acre at a consideration of ksh 100,000. He paid ksh 35,000/= upon signing the agreement. He subsequently paid ksh 10,000 on 17<sup>th</sup> March 2004. It was later agreed that the Appellant would buy <sup>1</sup>/<sub>8</sub> of an acre instead of <sup>1</sup>/<sub>4</sub> of an acre at an agreed price of ksh 55,000/- He paid the balance of ksh 10,000 in the form of a cow which he delivered to the 1<sup>st</sup> Respondent.
5. The Appellant testified that in 2008, he bought land measuring <sup>1</sup>/<sub>8</sub> of an acre from the 2<sup>nd</sup> Respondent who is a son to the 1<sup>st</sup> Respondent at an agreed consideration of ksh 73,000 which he paid for in



- installments. The two portions of land are adjacent to each other. It was the Appellant's testimony that he was given vacant possession of the two parcels of land and developed them by constructing a posho mill, tack shop, a small hotel, video room and a dwelling house where he stays with his family.
6. When the Appellant inquired about the transfer of the suit properties to his name he was shown a title deed indicating that the land was registered in the name of Shiverenje Likhamara -Deceased, the husband to the 1<sup>st</sup> Respondent and father to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Further that even though the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had filed a succession cause and obtained a grant in respect of the estate of the deceased, they had not catered for the Appellant's interest in the suit properties. This is what prompted the Appellant to file suit against the Respondents.
  7. On her part, the 1<sup>st</sup> Respondent testified that her husband died and left her on the land but she was not the administrator of his estate. She denied selling the land to the Appellant although she admitted that he lives on her land. The 2<sup>nd</sup> Respondent also denied selling any land to the Appellant claiming that he had no capacity to do so. Asked about the sum of ksh 50,000 he was paid by the Appellant, he told the court that it was a loan which he borrowed to cater for his child's medical bills and that he was ready to refund the same.
  8. The 3<sup>rd</sup> Respondent also denied entering into any sale agreement with the Appellant though he admitted that he was one of the administrators of the estate of the deceased.
  9. Based on the above evidence, the trial magistrate dismissed the Appellant's case on the ground that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had no capacity to sell any portion of the deceased's land without succession having been conducted.
  10. It is against this background that the Appellant filed this appeal citing various grounds.
  11. The appeal was canvassed by way of written submissions with brief oral highlights.

### **Appellant's Submissions**

12. In her submissions Miss Kambiha learned counsel for the Appellant submitted on two issues. The first one is whether the sale agreement between the Appellant and the Respondents amounts to a constructive trust. It was her contention that once the Appellant paid the purchase price and he was placed in possession of the suit property by the Respondents, a constructive trust was created which became an overriding interest over the land and they could therefore not refuse to transfer the suit property to the Appellant. She relied on the case of *Willy Kimutai Kitilit v Michael Kibet* ( 2018) eKLR.
13. Secondly, she submitted that the doctrine of promissory estoppel applied to the sale. She argued that the basis of promissory estoppel is that if someone makes a promise to do something and you rely on that promise and suffer damage the fulfillment of that promise is the only way you can be compensated. It was her contention that in this case the Appellant relied on the promise that upon payment of the purchase price the two parcels of land would be transferred to him. The Respondents failed to honour their promise by excluding the Appellant from the list of creditors of the estate of the deceased in the succession proceedings.
14. Counsel relied on the case of *Carol Construction Engineers Ltd & Another v National Bank of Kenya* (2020) eKLR where the court held that parties should be prevented from going back on their promise. She submitted that the Respondents having received the purchase price and placed the Appellant in possession are estopped from going back on their promise. She submitted that the Respondents'



contention that their signatures on the sale agreement were forged was not proved and that the 1<sup>st</sup> Respondent had in his evidence admitted that he received the sum of ksh 50,000/= from the Appellant.

### **Respondents' Submissions.**

15. On his part Mr. Mukhabani learned counsel for the Respondents submitted that from the evidence on record it was evident that the suit property belongs to a deceased person and therefore the Respondents did not have the capacity to sell the land to the Appellant. He relied on section 45 of the Law of Succession Act which prohibits intermeddling with the estate of a deceased person. He further relied on Section 55 of the Law of Succession Act which forbids the transfer of the property belonging to a deceased person before the administrator obtains a Certificate of Confirmation of Grant. He relied on the case of Peter Kim Baker & 2 Others v Sidi katana Bongo & Another (2019) eKLR.
16. He submitted that he who alleges must prove and he was of the view that the Appellant had failed to prove his case. He pointed out that the name of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had been misspelt on the sale agreements and the amounts paid by them were not clear. He added that the 2<sup>nd</sup> Respondent had acknowledged receipt of ksh 50,000 from the Appellant but he stated that the same was a loan for the treatment of his sick child.
17. It was his further submission that even though the Appellant was aware of the succession proceedings in respect of the deceased, he did not file any objection yet that is where his grievances could have been addressed.
18. This being a first appeal, this court is enjoined to revisit the evidence that was tendered before the trial court afresh, analyze it, evaluate it and arrive at its own independent findings and conclusions, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that. See the case of Selle v Associated Motor Boat Company (1968) EA 123.

### **Analysis and Determination`**

19. Having considered the pleadings, evidence on record, Grounds of Appeal and rival submissions, the main issue for determination is whether the trial magistrate erred in dismissing the Appellant's case.
20. The main ground upon which the appeal was dismissed is that the Respondents did not have the capacity to enter into a sale agreement in respect of the suit property since the land was registered in the name of a deceased person. It is not in dispute that at the time the parties are alleged to have entered into a sale agreement, the suit property was registered in the name of Shiverenje Likhamara –Deceased.

Section 45 of the Law of Succession Act stipulates as follows:

45.

- (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 of, or dispose of or otherwise intermeddle with any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall be
  - (a) guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or both such fine and imprisonment



(b) Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in due course of administration”

21. The above provision of the law is not a mere technicality as it goes to the root of the validity or otherwise of the sale agreements. The law takes a very serious view of any intermeddling with the property of a deceased person. The section is clear that the status quo at the time of death of the deceased person ought to be maintained until such time as a grant has been issued by the court.
22. It is clear from the above legal provision that the Respondents who sold the suit land to the Appellant had no legal capacity to do so as they had not yet obtained a Grant of Letters of Administration and are in fact guilty of intermeddling with the estate of the late Shiverenje Likhamara, On this ground alone, the appeal fails.
23. Although counsel for the Appellant has raised the issue of constructive trust and estoppel, I am of the considered view that the same does not come into play because there is no valid agreement between the Appellant and the Respondents as the Respondents lacked the capacity to enter into the sale agreement since they had not obtained a grant of letters of administration in respect of the estate of the deceased. The case of *Willy Kitilit (supra)* is therefore distinguishable from the instant case, as in *Willy Kitilit (supra)* the parties had the capacity to enter into the sale agreement and the only challenge was the failure to obtain the consent of the Land Control Board within the requisite period of 6 months. Similarly the doctrine of estoppel cannot apply if the contract is not valid in the first place.
24. In view of the foregoing, the appeal lacks merit and it is hereby dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF OCTOBER 2023.**

.....

**J.M ONYANGO**

**JUDGE**

In the presence of;

1. Mis Kambiha for Mr. Ngigi Mbugua for the Appellant.
2. Mr. Mukhabani for the Respondents.

Court Assistant: Oniala

