



**Gichuhi v Muhura (Sued as the Legal Representative of the Estate of Gathimba Karanja - Deceased) & another; Omega (Sued as the Surveyor of the Estate of the Late Gathimba Karanja) (Interested Party) (Environment & Land Case E057 of 2022) [2023] KEELC 20905 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20905 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E057 OF 2022**

**JG KEMEI, J**

**OCTOBER 18, 2023**

**BETWEEN**

**ALLAN KIHARA GICHUHI ..... PLAINTIFF**

**AND**

**JANE NGUBIA MUHURA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GATHIMBA KARANJA - DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS KAMAU GATHIMBA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE GATHIMBA KARANJA) ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**FREDRICK OMEGA (SUED AS THE SURVEYOR OF THE ESTATE OF THE LATE GATHIMBA KARANJA) ..... INTERESTED PARTY**

**JUDGMENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the children of the late Gathimba Karanja who passed away about 20 years ago. It is averred that the deceased owned parcel No parcel No Ngenda/Kahuguini/1713 (originally Ngenda/Kahuguini/905). The Plaintiff is their neighbour and the Interested Party was the surveyor who subdivided the family land to create the portion described as 100ft by 100ft, the subject of this suit.
2. Allan Kihara Gichuhi, the Plaintiff commenced suit against the Defendants on the 25/5/2022 seeking the following orders;



- a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have breached the sale agreement dated June 24, 2014 and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are liable to hand over vacant possession of the property.
  - b. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their children, servants, employees and/or agents are illegal trespasses onto the suit property and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves or any other beneficiary of the estate of the late Gathimba Karanja are not entitled to be, remain, enter, cross, trespass, or in any way interfere with the Plaintiff's occupation of the suit property being the earmarked plot measuring approximately 100X100 to be hived off Ng'enda/Kahuguini/1713 (originally Ng'enda/Kahuguini/905).
  - c. A permanent injunction do issue directed at the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves or any other beneficiary of the Estate of the late Gathimba Karanja from cultivating, sub-dividing, entering, trespassing onto the suit property.
  - d. In the alternative to the above, a mandatory injunction do issue directed at the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to deposit with the Plaintiff a sum of Kshs. 200,000/- and Kshs. 108,000/- surveying costs, costs incurred to improve the parcel of land, and other incidental costs incurred plus damages together with interest thereon at the rate of 14% pa from June 24, 2014 to date.
  - e. Costs of this suit plus interest.
  - f. Any other or further relief that this Honourable Court may deem fit and just to grant.
3. The Plaintiff averred that vide an agreement of sale dated the 24/6/2014 the 1<sup>st</sup> Defendant offered to sell and the Plaintiff agreed to purchase the 1<sup>st</sup> Defendants portion of inheritance land being 100 by 100 feet to be excised out of parcel No Ngenda/Kahuguini/1713 (originally Ngenda/Kahunguini/905) which land was then registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants father namely Gathimba Karanja Deceased. That the administration of the estate of the late Karanja having not concluded the 2<sup>nd</sup> Defendant being the legal administrator gave his blessings to the said transaction between the Plaintiff and the 1<sup>st</sup> Defendant by witnessing the signatures of the parties in the agreement of sale.
  4. The Plaintiff further states that the agreed purchase price was Kshs 300,000/- out of which he paid to the 1<sup>st</sup> Defendant the sum of Kshs 200,000/- receipt of which was acknowledged in the agreement of sale. The balance of the sum of Kshs 100,000/- was payable upon the conclusion of the succession of the estate of the late Karanja as well as obtaining the land control board consent in respect to the said transaction. The Plaintiff added that he also expensed Kshs 108,000/- towards the survey of the land which monies was paid to the Interested Party on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Thereafter he took possession of the land, planted trees and fenced.
  5. Upon the conclusion of the succession process the 1<sup>st</sup> Defendant made an about turn and refused to transfer the suit land to the Plaintiff contrary to the terms and conditions of the agreement and is now looking to sell the land to other third party buyers at a high price
  6. The Court was urged to interalia grant the Plaintiff orders of specific performance.

### **The Case of the Defendants**

7. Despite being served the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to enter appearance nor file any defence to the Plaintiff's case.



8. On the 17/1/2023 the Interested Party entered appearance through the law firm of Messrs Muturi Njoroge & Co. Advocates but failed to file any pleadings in response to the claim of the Plaintiff.
9. Consequently, the Plaintiffs case proceeded to hearing by way of formal proof.

### **The Hearing**

10. PW1 – the Plaintiff led evidence and relied on his witness statement dated the 13/5/2022 and produced documents in his trial bundle marked as Pex 1-4.
11. The witness reiterated the contents of his pleadings and added that he purchased the land from the 1<sup>st</sup> Defendant who is the sister of the 2<sup>nd</sup> Defendant, the administrator of the estate of Karanja. The 2<sup>nd</sup> Defendant witnessed the agreement of sale. He is in possession of the suit land since 2018 to date. The 1<sup>st</sup> Defendant has refused to transfer the land to him despite acknowledgement of the part purchase price. He urged the Court to grant his prayers.
12. With that the Plaintiff closed his case
13. The Plaintiff filed written submissions which I have read and considered.

### **Analysis and Determination**

14. The key issue for determination is whether the Plaintiff has proved his case.
15. The case of the Plaintiff has not been rebutted. That said he bears the burden of proof his case on a balance of probabilities however undefended his claim is by the opponents.
16. It is the Plaintiffs case that he purchased the suit land vide an agreement of sale in 2014. It is also his averment that the land was registered in the name of the deceased father of the Defendants. That the 2<sup>nd</sup> Defendant being the administrator of the estate consented to the sale by witnessing the agreement between the parties. That he paid part payment of the purchase price in the sum of Kshs 200,000/- leaving a balance of Kshs 100,000/- which was pending the conclusion of the succession proceedings in the estate of Karanja. That in order to facilitate the subdivision of the family land for the beneficiaries, the 1<sup>st</sup> Defendant included he paid Kshs. 108,000/- to the Interested Party for purposes of surveying of the land. It is his case that he deserves the orders of specific performance given that he has been in occupation since 2018 to date. It is his case that the 1<sup>st</sup> Defendant is in breach of the terms of the agreement of sale.
17. The Court has perused the certificate of confirmation of grant dated the 24/12/2015 issued in the estate of Githimba Karanja. In the said grant parcel No 905 was distributed to the 2<sup>nd</sup> Defendant as a sole beneficiary. The claim therefore that the 1<sup>st</sup> Defendant was the beneficial owner of the 100 by 1000 feet purchased by the Plaintiff or such other parcel of land in the estate of Karanja is unfounded. Having held no beneficial interest in the suit land, the 1<sup>st</sup> Defendant had no locus to transfer the portion of the land to the Plaintiff. In other words, the 1<sup>st</sup> Defendant sold nothing and consequently the Plaintiff received nothing. The Court noted that the Plaintiff failed to produce a copy of the title of the mother title if for nothing to link it to the estate of Karanja and possibly show who the current owners are.
18. There is another compelling ground that militates against the Plaintiffs claim. Section 45 of the [Law of Succession Act](#) provides 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.

- (2) Any person who contravenes the provisions of this section shall—
- (a) be 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 to both such fine and imprisonment; and
  - (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 the due course of administration.”

19. The effect of the above provision of the law 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. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.
20. Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. *In Re Estate of M’Ngarithi M’Miriti* [2017] eKLR it was held that:

“... it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act* ... any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the Court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

21. It is the Plaintiff’s case that he purchased the suit land, while the same was registered in the name of the late Githimba Karanja. That the estate was yet to be fully administered and succeeded. It was his case that the 2<sup>nd</sup> Defendant being the administrator of the estate of Karanja consented to the sale.
22. Going by the provisions of the law, it is clear that the actions of the Plaintiff and the Defendants in disposing the suit land, taking possession, occupation and development thereon amount to intermeddling with the estate of the deceased. By this time the estate of Karanja had not been devolved by way of succession and issuance of a confirmation of grant which was done in 2015.
23. The Court finds that the sale of the land was illegal null and void and no interest ever was conveyed by the 1<sup>st</sup> Defendant to the Plaintiff. Equally the Plaintiff received no interest in the suit land. The reason being that by 2014 even the 2<sup>nd</sup> Defendant had no power to sale the land as the grant was yet to be confirmed by the Court. There was no evidence led by the Plaintiff to show that the leave of the Court was sought and obtained for the disposal of the land pre-confirmation of grant.



24. I shall now focus my attention to the relief sought in this case which is that of specific performance.
25. In the case of *Reliable Electrical Engineers Ltd. vs. Mantrac Kenya Limited* (2006) eKLR, the Court stated that: -

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles. The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”

26. Specific performance is an equitable remedy not granted as a matter of course but based on the particular circumstances of the case in particular the conduct of the parties; whether the party seeking the remedy has come to Court with clean hands; whether it has performed its obligations under the agreement sought to be enforced; whether it has always been ready and willing to perform its part of the agreement. It was submitted that the Plaintiff has fulfilled all these requirements and whether the contract is valid and enforceable.
27. In the case of *Nabro Properties Ltd vs. Sky Structures Ltd & 2 Others* [2002] 2 KLR that an invalid agreement for sale cannot be a basis for an order of specific performance. This is because specific performance is based on the existence of a valid and enforceable contract.
28. In this case the Court has already held that the agreement of sale and the transaction of purporting to dispose, take possession and develop the land was illegal null and void. Consequently, the equitable relief of specific performance is not available to the Plaintiff.

### **The Alternative Prayers.**

29. The Plaintiff case was also hinged on an alternative prayer of refunds of monies paid to the Defendants. The Plaintiff failed to show any receipt or acknowledgement of the sum of Kshs 108,000/- allegedly paid to the Interested Party. This amount therefore is not supported in evidence and is dismissed.
30. With respect to the sum of Kshs 200,000/- the Court notes that the same was acknowledged by the 1st Defendant under para 1 of the agreement of sale. This in the view of the Court is supported in evidence. The 1st Defendant having failed to rebut the claim of the Plaintiff; the Court takes this evidence as credible.
31. With respect to the compensation for developments, it was argued by the Plaintiff that he took possession of the land in 2018, fenced and planted trees which were later destroyed by the Defendants. The Plaintiff failed to present any evidence in form of a valuation report to support the said improvements on the land. This claim too fails and is dismissed.
32. The Court is of the view that the 1st Defendant having acknowledged receipt of the sum of Kshs 200,000/-, allowing her to keep it would amount to unjust enrichment which a Court of equity would frown upon. For this reason the Court allows this claim from the date of Judgement until payment in full at Court rates.



### **Costs**

33. Ordinarily costs follow the event. The suit having been undefended I make no orders as to costs.
34. Final orders for disposal
  - a. The Plaintiff's suit succeeds to the extent of the alternative prayer of refund in the sum of Kshs. 200,000/-.
  - b. In the alternative the 1<sup>st</sup> Defendant is ordered to refund the sum of Kshs. 200,000/- to the Plaintiff together with interest at Court rates from the date of this Judgement until payment in full
  - c. No orders as to costs.
35. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 18<sup>TH</sup> DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

