



Macere (Suing as the legal representative of the Estate of Peter Macere Kamundo (Deceased) v Kirinyaga County Government & another; Mwangi (Interested Party) (Environment and Land Appeal 9 of 2020) [2023] KEELC 21698 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21698 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 9 OF 2020
JM MUTUNGI, J
NOVEMBER 23, 2023

BETWEEN

NANCY MUTHONI MACERE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETER MACERE KAMUNDO (DECEASED) APPELLANT

AND

KIRINYAGA COUNTY GOVERNMENT 1ST RESPONDENT

REGINA MUTHONI MWANGI 2ND RESPONDENT

AND

MICHAEL MUTHII MWANGI INTERESTED PARTY

(An Appeal arising from the Judgment of Honourable E.O Wambo Principal Magistrate (PM) delivered on 20th December 2018 in Kerugoya CMCC No. 323 of 2012 at Kerugoya)

JUDGMENT

1. The subject matter of this appeal is plot No 98 Kiburu Village (suit property) which, from the proceeding of the Lower Court, was allocated to the 2nd respondent through Council Minute No WTPM&H 125/2009.
2. The appellant in her Complaint dated November 20, 2012, claimed that the suit property was allocated to her deceased husband *vide* Council Minute No WTPM&H 59/96 and that the 1st respondent illegally nullified the said minutes and allocated the suit property to the 2nd respondent *vide* the Council Minute No WTPM&H 125/2009. It was admitted that the deceased, Peter Macere Kamundo, was the initial owner of the suit property and that the interested party was in possession and was utilizing the suit property.



3. The 1st and 2nd respondents filed their responses to the appellant's *Plaint vide* their defences dated October 17, 2014 and April 25, 2013 respectively. The 1st respondent denied any form of illegality in allocating the said suit property to the 2nd respondent and contended that the deceased had never been registered as the absolute owner of the suit property. The 2nd respondent on her part denied the content of the *Plaint* and claimed that the *Plaint* did not disclose any cause of action and stated that she would apply for it to be struck out. On his part, the interested party filed his defence and claimed that the deceased sold the suit property to his father, Bernard Mwangi (deceased) and that they have been in occupation of the property since 1976. He also averred that after the transaction, transfer was not effected which culminated to a dispute in 2009, that was filed at the defunct County Council of Kirinyaga. After hearing the dispute, the council awarded the suit property to the 2nd respondent. It was his position that the appellant had not appealed this decision and thus it remained in effect and unchallenged.
4. By its Judgement dated December 20, 2018, the trial court, declared that the appellant had failed to prove her case on a balance of probability, dismissed the suit and awarded the costs of the suit to the respondents.
5. Aggrieved and dissatisfied by the decision of the Magistrate's Court, the appellant filed a Memorandum and Record of Appeal dated June 8, 2020 and November 5, 2020 respectively. The Appellant's Memorandum of Appeal sets out 4 grounds of appeal, as follows: -
 1. That the learned magistrate erred in law and in fact by finding that Plot No 98 Kiburu had been sold to the 2nd respondent in the absence of any such evidence to prove the alleged sale.
 2. That the learned magistrate erred in law in failing to consider the evidence tendered by the appellant in support of her case, the testimony of the appellant witness at the hearing and ultimately finding that the plaintiff had failed to prove ownership of Plot No 98 Kiburu.
 3. That the learned magistrate erred in law holding that the 1st respondent's acted lawfully in nullifying Min. No WTPM&H 59/96 through Min No WTPM&H 125 and subsequently allotting the suit property to the 2nd respondent.
 4. That the judgment of the learned trial magistrate is against the law and weight of the evidence on record.

The appellant prayed; that the Court do allow the appeal, set aside the decree and costs be awarded to her.

6. The appeal was canvassed by way of Written Submissions. The appellant filed her Written Submissions dated May 23, 2023 on the same date. The appellant submitted that the trial magistrate failed to consider the fact that the 2nd respondent did not have a sale agreement pertaining to the suit property and that failure to produce a sale agreement to corroborate the evidence of Charles Muikia Kabuu and Kimotho Karaba meant that, there was no proof of the sale and that the 2nd respondent was not the legal owner of the suit property. The appellant argued that the contract between the deceased and Bernard Mwangi being a disposition of an interest in land, needed to be in writing pursuant to section 3 (3) of the *Law of Contract Act*, cap 23 Laws of Kenya and as the same was not in writing, it could not be enforceable.
7. The appellant further submitted that the trial court failed to appreciate the evidence by the area Chief who testified in support of the appellant's case which confirmed that the suit property was allocated to Peter Macere Kamundo (deceased) and which was being utilized by another person, with the family's authority. The appellant further submitted that the trial court erred by not finding that



the 2nd respondent acquired the suit property illegally and unprocedurally and hence failed to protect the appellant's ownership of the suit property pursuant to section 26(1) of the [Land Registration Act, 2012](#).

8. The Interested party filed Written Submission on June 16, 2023. The interested party contended that Peter Macere Kamundo (deceased) and Bernard Mwangi (deceased) entered into an oral agreement for the sale of the suit property in 1976. He further submitted that it was uncontroverted evidence that his family had been in occupation of the suit land since 1976 and had been utilizing it as the owners thereof. He further submitted that the deceased Peter Macere Kamundo did not transfer the suit land to his late father and that they filed a dispute before the Kirinyaga County Council, which heard and determined the dispute in favour of the 2nd Respondent. He submitted that the Appellant did not challenge the County Council's decision either by way of Judicial Review or appeal and the decision was given effected.
9. Upon evaluation of the record of appeal and the submissions of the parties, the following issues arise for determination.
 - i. Whether the trial magistrate erred in fact and law in finding that there was a valid oral Sale agreement between Peter Macere and Bernard Mwangi;
 - ii. Whether the trial magistrate erred in law by holding that the 1st respondent acted lawfully in awarding the Plot No Kiburu Village to the 2nd respondent.
10. This being an appeal of first instance, the Court is duty bound to appraise and re-evaluate the evidence in keeping with the principle enunciated in the Court of Appeal Case of *Selle & another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123.
11. On the issue whether there was a valid oral sale agreement between Peter Macere and Bernard Mwangi, the Trial Court made a finding that there was a valid oral Sale Agreement between the parties. The trial court observed that although there was no formal written sale agreement between Peter Macere and Bernard Mwangi, the evidence led by the interested party proved that Peter Macere sold the suit property to Bernard Mwangi.
12. The appellant submitted that the Trial Court found in favour of the respondents in the absence of evidence proving the sale of the suit property. The appellant submitted that the 2nd respondent's witnesses confirmed in cross examination that there was no Sale Agreement pertaining to the suit property. The appellant averred that the respondents failed to prove that there had been a sale and as such, Peter Macere was the absolute owner of the suit land and that his title ought to be protected in accordance to section 26 (1) of the [Land Registration Act](#).

The appellant relied on section 3(3) of the [Law of Contract Act](#) cap 23 of Kenya which provides as follows:-

'No suit shall be brought upon a contract for the disposition of an interest in land unless----

- (a) the contract upon which the suit is founded-----
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; to support her argument.



The appellant also relied on section 3 (7) of the Law of Contract Act which makes exceptions to oral sale agreement entered into before the commencement of section 3 (3) of the Law of Contract Act as amended in 2003. section 3(7) of the Act provides as follows:-

(7) The provisions of Subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that Subsection.

13. According to the appellant, the former section 3 of the Law of Contract Act required that contracts for disposition of an interest in land be in writing and provided only two exceptions to this requirement which the 2nd respondent did not fall under

14. The interested party in response submitted that there existed a valid oral agreement between his late father and Peter Macere. To prove that this oral agreement existed, he called two witnesses who gave evidence to the effect that they witnessed the sale between Peter Macere and Bernard Mwangi of the suit property. The evidence by the two witnesses was uncontroverted.

I agree with the Appellant that the substantive law that regulates contracts for the disposition of interests in land is as provided under section 3 (3) of the Law of Contract Act, cap 23 Laws of Kenya. However, where a contract was entered into before the amendment that incorporated section 3(3) of the Law of Contract Act, such a contract needed not to be in writing to be enforceable. Prior to the amendment of section 3(3) of the Law of Contract in 2003 the Subsection read as follows:-

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded, or some Memorandum or note, thereof is in writing and is signed by the party to be charged or by some person authorised by him to sign it.

Provided that such a suit shall not be prevented by reason of the absence of writing, where an Intended Purchaser or Lessee who has performed or is willing to perform his part of a contract-

- i. Has in part performance of the contract taken possession of the property or any part thereof; or
- ii. Being already in possession, continues in possession in part performance of the contract and had done some other act in furtherance of the contract.

In the Court of Appeal Case of Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR, the Court of Appeal while dealing with an issue as to whether there was a sale agreement or not observed as follows:

‘...It is our view that section 3 (7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. We find that section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contract for sale of land concluded before Section 3(3) of the Law of Contract of the Act came into force. The provision to section 3(3) of the Law of Contract Act applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the Law of Contract Act.’

15. In the circumstances and relying on the above cited Court of Appeal decision, in so far as the 2nd respondent failed to produce a Sale Agreement, I find that since the land was purchased in 1976 before the commencement of subsection 3 (3) of the Law of Contract Act, section 3 (7) of the Act should apply. I also find that the existence of an oral agreement between the parties was supported by the evidence given by the two witnesses called by the Interested Party, it is indeed corroborative proof that indeed there was a land transaction between them.



16. Additionally, the interested party further submitted that they had been in occupation of the suit property since 1976. The appellant and the area Chief in their evidences, admitted to the fact that indeed the Interested Party had lived in the suit property, albeit with authority. The Appellant failed to prove how the interested party acquired that authority and from whom. The Council Minute WTPM&H 125/2009 that was produced as evidence in the Trial Court was proof that the 2nd respondent is the legal owner of the suit property. The appellant alleged that the Minutes WTPM&H 59/96 were illegally nullified by the County Council of Kirinyaga but provided no proof. The evidence on record shows that before the allocation to the appellant's husband was nullified the 1st respondent had accorded all the parties a hearing.
17. It is noteworthy that although the appellant alleged that the interested party's family was in occupation and possession of the suit property with the appellant's authority, no evidence was adduced to show how such authority was given and/or when it was given. There was no evidence that the interested party's family were occupying the premises as rent paying tenants of the Appellant. The interested party maintained they were occupying the premises as owners and that assertion was not controverted at all.
18. On the basis of the evidence that was adduced before the learned trial magistrate, I am satisfied that the learned trial magistrate rightly found that there was a sale agreement between the interested party's late father and Peter Macere(deceased).
19. The interested party submitted that he filed a dispute against the appellant on July 22, 2009, in the County Council of Kirinyaga which heard and determined the dispute in favour of the 2nd Respondent. The appellant admits that the County Council of Kirinyaga nullified minutes WTPM&H 59/96 and allocated the 2nd respondent the suit property *vide* council minutes WTPM&H 125/2009. Although, the respondents and the interested party did not raise a Preliminary Objection it is pertinent that the appellant could not properly challenge the decision of the 1st respondent by filing a suit, but by way of filing Judicial Review proceedings. Hence had the issue of jurisdiction been taken up, the Court may very well have held that it lacked jurisdiction.

The appellants appeal lacks any merit and the same is ordered dismissed with costs to the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 23RD DAY OF NOVEMBER 2023.

J. M. MUTUNGI

ELC - JUDGE

