



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
SUCCESSION CAUSE NO. 2083 OF 2008
IN THE MATTER OF ESTATE OF CHEGE MURIRA Alias NJIHIA MURIRA (DECEASED)
STEPHEN IRUNGU WANJENGA.....OBJECTOR/PROTESTOR
VERSUS
KARANJA MURIRA.....RESPONDENT

R U L I N G

Background:

1. The deceased to whose estate these proceedings relate is Chege Murira alias Njihia Murira who died intestate on 6th December, 2007. Karanja Murira (hereinafter the Respondent), applied for and was granted Letters of Administration intestate on 26th November, 2009. He filed summons for confirmation of grant dated 25th January, 2016 to which Stephen Irungu Wanjenga (hereinafter the Protestor), filed an affidavit of protest dated 21st September, 2016.

2. By a consent order dated 25th January 2016 and filed in court on 12th February 2016 the parties herein agreed *inter alia* that the court be at liberty to consider all the affidavits, witness statements and documentary evidence already on record during the determination of the summons for the confirmation of grant and the protest thereof.

Protestor's case:

3. The Protestor on the strength of the consent order, dated 25th January, 2016 relies on the affidavit of one Njuguna Murira, a brother to the Petitioner sworn on 21st July 2010 and filed in court on the same day together with the annexure thereto. The Protestor also relies on all the affidavits and documentary evidence presented in court by Francis Wanjenga Ndegwa sworn in support of the abandoned application for the revocation of grant as well as the affidavit of protest sworn on 21st September 2016 together with the annexures.

4. The Protestor in his affidavit deposes that his father Francis Wanjenga (deceased) was a bonafide purchaser of Land Parcel No. Loc.3/Mukuria/945 which the deceased sold to him at a consideration of Kshs.300,000/=. That the deceased gave the Protestor's father possession of the said land on 19th March, 1998, and also deposited the title with him which the Protestor still holds to date.

5. The Protestor argues that the Respondent is guilty of concealment of material facts because when he applied for confirmation of grant, he was aware of the fact that the Protestor's father was a creditor to the deceased's estate. That therefore the estate owes late his father Kshs.300,000/= as purchase price, with interest thereon and the cost of all developments made on the land, or in the alternative, the said asset be transferred to him.

6. Mr. Kariuki learned Counsel for the Protestor filed written submissions in which he states that the father of the Protestor was a bonafide purchaser for value of all that piece of land known as LR LOC 3 MUKURIA/945. That his father paid the full purchase price and was given the original title deed of the said parcel of land and was put in full possession of the land, where he built a house for the deceased herein and also made extensive development of his own.

7. Mr. Kariuki argues that at this time the Petitioner was living in the Rift valley and only came onto the scene to claim the property of the deceased after his (deceased's) death. Counsel admits that the deceased and the Protestor's father did not obtain the requisite Land Control Board consent but this is attributed to the deceased's fear that once the consent was given, the purchaser would abandon him yet he had no one else to look after him since he had no wife or children.

8. Counsel urges that indeed under the **Land Control Act Cap 302**, a sale agreement is invalidated for lack of the requisite Land Control Board consent but that there is Court of Appeal case law which states that there is a resultant **implied or constructive trust** in such circumstances as these one. He likened the circumstances of this case to what obtained in the case of **Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri (2014)eKLR**.

9. Counsel avers that the Protestor has also shown that his father developed the said parcel of land between 1998-2010 and the developments were valued at Kshs. 382,800.00, which amount the Protestor also claims from the said estate.

10. Counsel submits that in the proposal for the distribution of the asset the administrator gives himself the whole parcel of land, while the deceased had one other and two sisters. The Applicant did not consider them for any share whereas they are of equal rank in line to inherit from their brother. He does not justify why he alone should benefit from the asset of the deceased. According to counsel this is a clear manifestation of dishonesty, just like his failure to recognize that at the time his brother died, he had already relinquished all his rights and interest to the parcel of land to the father of the Protestor.

11. Counsel has urged the court to find for the Protestor and have the grant of letters of administration confirmed in line with paragraph 3 of the affidavit of Protest of Stephen Irungu Wanjenga sworn on 21st September 2016 and filed in court on 10th October 2016.

Petitioner's Case:

12. The Petitioner did not file a replying affidavit but has filed written submissions through learned counsel Mr. Mugo. Mr. Mugo avers for the Petitioner that the document alleged to be a sale agreement between the deceased and the Protestor's father, Francis Wanjenga Ndegwa (deceased) is not a sale agreement and/or a valid contract in law for the reason that it does not indicate anywhere that the deceased received the purchase price from the said Francis Wanjenga Ndegwa. He argued that the protestor is thus asking for a refund of money which was not paid in the first place.

13. Counsel submits that the execution of the sale agreement is also denied and there is not a single paragraph to stipulate that the deceased acknowledged the receipt of a certain sum of money, or consideration of whatever nature and the payment thereof. He argues that for this reason the claim for a refund of the purchase price should fail since the deceased received none.

14. Counsel submits that should the Protestor maintain that his father was in possession of the subject matter of this cause, then he should be ordered to pay a mesne profit for utilizing the land unlawfully as it has emerged that no sale agreement actually existed between the deceased and the said Francis Wanjenga.

15. Counsel also contended that the purported contract was not enforced within the six years, as required by law, and particularly during the lifetime of the deceased. He opined that it would be safe to deduce in the circumstances, that no contract existed and that the protestor and/or his deceased father only want to disinherit the petitioner /administrator herein.

16. Counsel has urged the court to note that there is no evidence and/or affidavit, on the part of the drawer of the purported agreement and that the deceased was buried on the suit land which would not have happened had he sold the said land.

Lastly, Counsel argues that contracts touching on land are deemed to be null and void where consent to transfer has not been obtained such as in the alleged sale of LR LOC /3 MUKURIA/945. As such even if a sale agreement existed it would be invalidated by the letter and the spirit of section 6, Land Control Board Act (CAP 302). Counsel relied on the **E.L.C Case No. 178 of 2011 Peter Gachini Murigi vs Said Athman Mzee & Another** where Angote J held that in the absence of the land control board consent ,the sale agreement dated 14 August 2009 cannot prima facie form a basis for order of specific performance.

Analysis:

18. I have considered both the Protestor's case and that of the Petitioner and observe that the parties in this cause are not disputing that the two deceased persons, the vendor Chege Murira and the purchaser Francis Wanjenga Ndegwa entered into some sort of an agreement in respect of all that piece of land known as LR LOC 3 MUKURIA/945 on 19th March 1998. There is a document named as the sale agreement which states that the consideration in the agreement was to be Kshs. 300,000. The said agreement is in the court's record.

19. The Petitioner argued however that the document adverted to is not a sale agreement valid in law, as it did not indicate anywhere that the deceased Chege Murira received any purchase price from the said Francis Wanjenga Ndegwa. Further, that the purported contract was not enforced within 6 years and particularly during the lifetime of the deceased as required by law. That in the circumstances it would be safe to deduce that no contract existed and that the protestor only wants to disinherit the Petitioner herein.

20. The said sale agreement was detailed in its provisions and states inter alia that:

'3. The purchaser is at liberty to take possession of the plot and continue developing it as he deems fit',

'4. The vendor shall continue living until his death in the two-ironed rooms built by the purchaser in the same plot on 21st February 1996',

'5. The purchaser undertakes to meet costs of the upkeep of the vendor until his (the vendor's) death, when such upkeep is necessary.

'6. To ensure the purchaser does not change his mind and neglect the vendor, the plot shall remain in the name of the vendor until his death, when the purchaser will be at liberty to transfer the same to the name of his choice.'

'7. To prove the vendor has sold the plot to the purchaser, he (vendor) voluntarily hands over the Title Deed of Plot No. LR LOC 3 MUKURIA/945 and his original National Identity Card no. 6744048 to the purchaser for safe custody.'

'8. If for any reason the vendor is in breach of this sale agreement, he undertakes to refund to the purchaser, full amount of the cost of the plot, cost of the development and cost of upkeep plus interest at 25% of total cost incurred by the purchaser.'

From the terms used in the foregoing clauses it is clear that first, the two deceased persons entered into a

sale agreement voluntarily. Secondly, the terms of the contract and how they would be effected in different situations that could present themselves were also agreed.

21. In the agreement the vendor Chege Murira was to continue living in the suit land, in a house built for him by the Purchaser and the purchaser was at liberty to take possession and develop the land which, he did. As proof of his intent the deceased handed over to the Protestor's father both the title deed to the suit land and his original National identity card whose number is indicated as 6744048.

22. John Chege Ndirangu, the carpenter who was instructed by Francis Wanjenga Ndegwa to build a house for the deceased Chege Murira swore a supporting affidavit to that effect on 21st July 2010. He deposed that he was instructed in the month of February 1996 and that the Protestor's father bought the building materials and also paid for the labour expenses. That the Protestor's father took possession of the suit land in the year 1998.

23. Another supporting affidavit dated 21st July 2010 was sworn by Njuguna Murira the younger brother to Chege Murira (deceased) and he deposes that he knew Francis Wanjenga Ndegwa as they lived in the same neighborhood. He avers that he was aware that Francis Wanjenga Ndegwa had developed the said parcel of land since the year 1998 when he was put in possession by the deponent's late brother. That he planted trees and tea bushes, and had built a house for his brother the deceased during his lifetime.

24. Njuguna Murira further deposes that the Petitioner lived in Nakuru and was not aware of the relationship between the Protestor's father and their brother. That the Petitioner had his own parcel of land adjacent to that of the deceased. The deponent supports the Protestor's claim of the whole of the said parcel of land and in the alternative the Protestor be refunded the purchase price of the land together with all the developments thereon by the deceased's estate.

25. Francis Wanjenga Ndegwa was the original Objector in this cause who, upon his demise has been substituted by his son the Protestor. His has therefore claim found support in the supporting affidavit of John Chege Ndirangu the carpenter who was instructed to build the house for Chege Murira and another affidavit by Njuguna Murira the younger brother to Chege Murira.

26. The court notes that there is no indication in the sale agreement that the deceased acknowledged receipt of a certain sum of money, or consideration of whatever nature. It is however apparent that the Protestor's father and Chege Murira had an agreement without involving any third parties on the terms of the sale agreement. They included the purchase price of Kshs. 300,000/= as the consideration for the sale and on that understanding the Protestor's father took possession and also did certain things for Chege Murira such as build him a house and provide for his upkeep. Therefore even though the deceased did not acknowledge receipt evidenced in writing that does not vitiate the sale agreement.

27. The Petitioner argues that the contract was not enforced within 6 years and particularly during the lifetime of the deceased. It is my considered view that the contract of sale actually took effect within the stipulated 6 years as evidenced by the deceased applicant taking possession of and developing the suit land. He also honored the terms of the said sale agreement during the lifetime of Chege Murira as has been testified to by the affidavit evidence of Njuguna Murira and John Chege Ndirangu.

28. Contracts touching on land may indeed be deemed to be null and void where consent from the Land Control Board to transfer the land has not been obtained. Even where a sale agreement exists it may be invalidated by **Section 6 of the Land Control Board Act Cap 302**. The Protestor admits that the deceaseds did not obtain the requisite Land Control Board Consent and that this was because Chege Murira feared that once consent was given, the purchaser would abandon him yet he had no one else to look after him as he had no wife or children.

29. It is true that under the **Land Control Act, Cap 302**, a sale agreement is invalidated for lack of the requisite Land Control Board consent. Court of Appeal case law have constrained cases such as these to mean that an **implied or constructive trust** has been created in circumstances such as these, where the vendor of the property had wholly relinquished his rights over the property and put the purchaser in

possession thereof.

30. The possession and occupation by the Protestor's father of the suit property is an overriding interest attached to the suit property. Koome and Otieno Odek JJA and Mwilu JA (as she then was), in the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (2014) eKLR**, to which counsel for the Protestor has referred the court held that:

“Pending the sale of all 240 plots by the respondent, the question that comes to mind is what was to be the legal status and relationship between the respondent and the appellants as purchasers who had paid the purchase price for the individual plots? it is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots”.

31. The court observed that the Respondent had created a Constructive trust in favour of all individuals who had paid the purchase price for respective plots and that the trial court erred in failing to note that consent of the Land Control Board is not required where a trust is created over agricultural land. The court observed that the possession and occupation by the appellants of the suit property is an overriding interest attached to the said property.

32. In **Mwangi & another –vs-Mwangi (1986) KLR 328**. it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. That the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under **Section 126 (1)** of the **Registered Land Act** is merely permissive and not mandatory.

33. Further in **Mutsonga –vs- Nyati (1984) KLR 425** and **Kanyi -vs-Muthiora(1984) KLR 712** , It was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered and by virtue of **Section 163** of the **registered Land Act** which provides for the application of the common law of England as modified by equity.”

34. I find that the evidence on the court's record is enough to support the Protestor's contention that the suit property was indeed lawfully acquired by his deceased father even without the evidence of the purported drawer of the agreement. It is clear to the court that both deceased persons agreed that the vendor Chege Murira would continue living in the suit property until his death and since he did not have any other property under his name or any children, or wife, it was only reasonable that the deceased be buried in the suit property upon his demise.

35. For the foregoing reasons I find that the deceased Applicant Francis Wanjenga Ndegwa was entitled as the rightful owner of all that parcel of land known as L.R. LOC 3 MUKURIA/945, as the deceased Chege Murira had for all intent and purpose transferred all his rights and interest in respect of the subject land to him.

36. In the premise the court orders that the said parcel of land being L.R. LOC 3 MUKURIA/945 be and is hereby transmitted to the Protestor on behalf of the estate of Francis Wanjenga Ndegwa (deceased)

Parties shall bear their own costs.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **24th** day of **April 2017**.

.....

L. A. ACHODE

JUDGE