



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

ELC NO. 171 OF 2017

PETER MURIITHI NYAGA.....APPLICANT

VERSUS

FRANCIS NJIRU NJAGI.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Applicant- **PETER MURIITHI NYAGA** first filed this suit in court against the Respondent – **FRANCIS NJIRU NJAGI**- on 29.08.2016 vide Originating Summons dated 13.06.2016. The Originating Summons was later amended, dated 17.06.2021, and filed on 18.06.2021. The suit was initially filed in the High Court as HCC NO. 7 of 2016 but was transferred to the ELC Court via court order issued on 23.8.2017.

THE SUIT

2. The Applicant claims a purchaser's interest of $\frac{1}{4}$ acre of land parcel LR NGANDORI/KIRIARI/1756 registered in the name of Njagi Karungari (deceased). It is his assertion that he purchased a $\frac{1}{4}$ of the share of Njeru Njagi who was entitled to 2 acres of land parcel LR NGANDORI/KIRIARI/1756 from the estate of Njagi Karungari. The purchase is said to have been via a sale agreement dated 26th August 2008 but that the vendor died before transfer to the land was effected. The Respondent is sued in his capacity as the administrator to the Estate of Njagi Karungari vide certificate of confirmation of grant dated 31.7.2006 and is accused of failing to transfer the $\frac{1}{4}$ acre from the share of Njeru Njagi in LR Ngandori/Kiriari/1756.

3. In the suit the Applicant has raised seven questions which he seeks for the court to determine which are as follows;

- i) Did Njeru Njagi (deceased) sell $\frac{1}{4}$ of an acre of Land Parcel No. Ngandori/Kiriari/1756 to the applicant Peter Muriithi Nyaga?
- ii) Is Njeru Njagi (deceased) entitled to 2 acres of Land Parcel No. Ngandori/Kiriari/1756 by virtue of the amended certificate of the confirmation of Grant dated 31/7/2006?
- iii) Is the respondent the administrator of the estate of Njagi Karungari (deceased)?
- iv) Is Njagi Karungari (deceased) the registered owner of Land Parcel No. Ngandori/Kiriari/1756?
- v) Should the respondent be deemed to hold $\frac{1}{4}$ parcel of an acre of Land Parcel No. Ngandori/Kiriari/1756 in trust for the applicant?
- vi) Should the administrator of the estate of Njagi Karungari (deceased) be ordered to transfer $\frac{1}{4}$ of an acre of Land Parcel No. Ngandori/Kiriari/1756 to the applicant?
- vii) Who should be awarded the cost of this summons?

4. The prayers sought by the applicant are that the Respondent be compelled to subdivide and transfer to him $\frac{1}{4}$ acre from parcel number Ngandori/Kiriari/1756, or, in the alternative, the Respondent be compelled to refund to him Kshs. 120,000/= plus interest at court rate from 26th August 2008 to date. Lastly, he sought for cost of suit and interest and any other orders that the court may deem fit to grant.

5. The Respondent did not enter appearance nor file any replying affidavit in response to the suit. However, the court was satisfied that the

respondent was served with the court pleadings and the suit proceeded undefended.

SUBMISSIONS

6. The amended Originating Summons was canvassed by way of written submissions dated 19.10.2021 and filed on even date. According to the Applicant, the Respondent should be deemed as having admitted the pleadings as drawn by virtue of failing to contest the summons. Further, the Applicant sought to be deemed as having proved his case on a balance of probability against the Respondent by virtue of the absence of a Replying Affidavit or defence to the amended Originating Summons. It was contended that where evidence adduced in trial is not rebutted then the court should consider such evidence as reliable and judgment should be in favour of the uncontested evidence. Ultimately, the court was urged to allow the claim on refund of Kshs. 120,000/= plus interest at the rate of 14% from 26th August 2008 until payment in full.

ANALYSIS AND DETERMINATION

7. I have had a look at the originating summons and the submissions of the applicant's counsel. The applicant's claim is un-defended and is therefore without a rebuttal. It is clear that the applicant is claiming ¼ acre of land from Land parcel No. Ngandori/Kiriari/1756. The ¼ acre is supposed to be excised from the two acres to which the seller of the land to the applicant, one Njagi Njeru, is entitled as a beneficiary. The said Njagi Njeru is himself deceased. The respondent herein is not the legal representative of the estate of the late Njagi Njeru. He is the legal representative of the estate of the late Njagi Karungari who is the registered owner of the entire land parcel No. L.R. Ngandori/Kiriari/1756.

8. There is an annexed sale agreement executed by both the vendor – Njagi Njeru – and the applicant herein. The agreement is dated 28/8/2008. From the agreement, it is clear that the registered owner of the land was deceased at the time the vendor and the applicant transacted over the land. At that time also, it is clear that the succession process had already been completed and the respondent herein was the legal representative of the estate of the late Njagi Karungari. It seems clear that the vendor was already a beneficiary but the legal ownership of the two acres he was entitled to had not yet formally become vested in him. Yet, knowing this, the applicant did not see any need to involve the respondent in the agreement.

9. It is clear that later on, the seller died and his estate itself became one requiring a legal representative. The ¼ acre that the applicant claims is obviously part of that estate. As I have already pointed out, the respondent herein is not the legal representative of that estate. Under the law, specifically Section 45 (1) of the Succession Act (Cap. 160), the estate of a deceased person can not be interfered with by any person before the requisite grant is issued and duly confirmed. For the avoidance of doubt, Section 45 (1) and (2) (a) provide as follows:

“45 (1) Except so far as expressly authorized by this Act or by any 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 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 due course of administration.

10. If the court chooses to agree with the applicant, then it would be coercing the respondent to engage in a criminal enterprise that would lead him to violate Section 45 (1) and (2) (a) and (b) of the Succession Act. This would be so because the respondent would be intermeddling with an estate of which he is not the legal representative. The court itself would be amenable to charges or allegations of incompetence or criminal collusion.

11. Further, for the applicant to get what he is asking for, the estate of the person who sold the land to him needs to have a legal representative who already has a confirmed grant. In DANIEL GITUMA MARETE Vs FRANKLINE MUTWIRI: HCC SUCCESSION CAUSE NO 716 of 2011, MERU, F. Gikonyo J expressed himself as follows:

“Acquisition of land before confirmation of grant is unlawful and does not enjoy property rights under the constitution.”

The applicant herein is only entitled to pursue his claim against the estate of the deceased seller. That legal representative, if one already exists, is unknown to this court. Certainly, the respondent is not the legal representative of that estate and he is therefore under no legal obligation to satisfy the applicant's claim. His obligation is only to the beneficiaries named in the confirmed grant.

12. To make the matter clearer, it is necessary to point out that any confirmed grant prescribes specifically how the properties of a deceased person should be distributed. The legal representative is enjoined to strictly follow the prescriptions contained in the grant. Doing anything beyond what is contained in the grant or acting contrary to its mandate is illegal. The grant issued to the respondent herein does not capture the applicant's interest. The applicant herein is therefore asking the respondent to go beyond the grant by doing what the grant does not prescribe.

13. I now turn to the submissions of the applicant's counsel. The counsel submitted, inter alia, that as the applicant's claim is not opposed, then the court should, for that reason only, allow it. This is not the true position in law. The law still requires that even in a situation like that, some minimum legal threshold should be met. It is also required that the claim should be legally sound and/or tenable. That does not appear to be the case here. As already shown, the claim has many legal shortcomings which make it clearly untenable.

14. I think it is necessary also for me to engage in broader thinking which does not necessarily confine itself only to provisions of Succession Act. In this regard, I must point out that even if the applicant's claim is treated as one that is acceptable under Succession Act, the applicant would still have to reckon with the provisions of Land Control Act (Cap. 302) – specifically Section 8 thereof, which requires that consent of Land Control Board be obtained within six (6) months of entering into a sale agreement.

15. Where such consent is not obtained, the transaction becomes void for want of consent and the purchaser can only seek to recover the consideration paid. Such consideration is treated as a Civil debt under the Land Control Act. It is a civil debt arising out of contract. Decided cases emphasizing the need to obtain consent include ELIZABETH CHEBOO Vs MARY CHEBOO GIMNYIKA, C.A. No. 40 of 1978, OMUSE ONYAPO Vs LAWRENCE OPUKA KAPLA, C.A. No. 149 of 1992, JOSEPH NORO NGERA Vs WANJIRU KAMAU, C.A. No. 32 of 2005 and DANIEL NG'ANG'A KIRATU Vs SAMUEL MBURU KIRATU: CA No. 58 of 2005, to name but a few. The cumulative thrust of all these decisions is that consent must be obtained within the requisite period and that the court can not be invited to act or grant specific performance in respect of void agreement or contract. The applicant herein has not shown that he obtained the consent of Land Control Board. In all probability therefore, the agreement he is now trying to rely upon became void or stale six months after it was entered into.

16. But the applicant's predicament would not end there. It is clear to me that as an alternative remedy the applicant wants a refund of the consideration paid. His claim in this regard would be caught up by Limitation of Actions Act (Cap 22) which requires at Section 4(1) that actions based on contract can not be brought after the end of six years from the time the cause of Action arose. The sale agreement between the applicant and the deceased seller was entered into in August 2008. If we allow the six (6) months period within which the consent of Land Control Board was supposed to be obtained, it is clear that the cause of action arose sometimes in the year 2009. This claim itself was filed in the year 2016. This is clearly beyond the six (6) year period envisaged under the Limitation of Actions Act. The claim would therefore still encounter legal headwinds because of this.

17. I think I have now said enough to demonstrate that the decision in this matter will not depend on giving answers to the questions posed in the originating summons. The legal concerns raised herein sufficiently demonstrate that the applicant's case is a legal miscalculation and a non-starter. There is therefore no need of addressing the questions posed in the originating summons.

18. The upshot, when all is considered, is that the matter herein is one for dismissal. The same is hereby dismissed with no order as to costs.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **18TH** day of **JANUARY, 2022**.

In the presence of Eddie Njiru for applicant and in the absence of the respondent

CA: Leadys

A.K. KANIARU

JUDGE

18.01.2022