



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 222 OF 2015

**MARTHA NJERI MBENE (Suing for and on behalf of the
estate of James Monari Bosire – deceased)..... PLAINTIFF**

VERSUS

**THE STATUTORY MANAGER,
UNITED INSURANCE COMPANY LIMITED.....DEFENDANT**

JUDGMENT

The Plaintiff brought this suit against the Defendant on 10th March 2015 seeking the following reliefs;

- a) A declaration that the Plaintiff is entitled to all that parcel of land known as Kajiado/Kaputiei North/15666 (hereinafter referred to as “the suit property”).
- b) An order directing the Defendant to immediately transfer and facilitate the issuance of a title deed in respect of the suit property to the Plaintiff.
- c) Costs of the suit.
- d) Any other relief the court may deem fit to grant.

In her plaint dated 5th March 2015, the Plaintiff stated as follows: The Plaintiff is the legal representative of the estate of James Monari Bosire, deceased (hereinafter referred to only as “the deceased”) while the Defendant is the Statutory Manager of United Insurance Company Limited which is under Statutory Management. At all material times, the deceased was an employee of United Insurance Company Limited (hereinafter referred to only as “the company”). In the course of his employment with the company, the company sold to the deceased a parcel of land known as LR. No. Kajiado/Kaputiei North/15666 (the suit property) at a consideration of Kshs. 110,000/- and on other terms and conditions that were set out in the agreement for sale dated 17th November 2004. The purchase price for the suit property was to be paid by the deceased in 24 installments of Kshs. 4,583.35/- per month that was to be deducted from the deceased’s salary at the end of every month.

It was a term of the said agreement for sale that the company would transfer the suit property to the deceased once the deceased had completed the payment of the purchase price. The deceased paid the purchase price for the suit property in full within 12 months by adjusting the payment of the monthly installments to Kshs. 9167/- per month. However, before the suit property could be transferred to the deceased, the company was placed under Statutory Management with the Defendant as the Statutory Manager. The deceased unsuccessfully followed the issue of the transfer of the suit property with the Defendant before he died on 22nd November 2005. The Plaintiff after obtaining grant of letters of administration in respect of the estate of the deceased made a demand upon the Defendant to transfer the suit property to her but the Defendant refused to do so leaving her with no alternative but to file the present suit.

The Defendant filed a statement of defence on 2nd November 2018. The defendant denied the Plaintiff’s claim in its entirety. The Defendant admitted that the deceased had entered into an agreement with the company under which the company agreed to sell and the deceased agreed to purchase the suit property. The Defendant contended however that the deceased failed to fulfil his part of the agreement by failing to pay the agreed purchase price to the company as a result of which the agreement was rescinded and/or expired by effluxion of time. The Defendant averred further that the said agreement was null and void for failure by the parties to secure Land Control Board Consent within the prescribed period. The Defendant averred further that the Plaintiff’s suit was time barred.

The Defendant averred that as at the time of filing suit, the company was and still is under Statutory Management and as such the Plaintiff could not institute and proceed with a suit against the company. The Defendant averred that there was a moratorium in place freezing

payment of any debts by the company to its creditors and as such granting of the orders sought would be tantamount to giving preferential treatment to a creditor which is against the law.

The Defendant averred that it was not privy to the acts complained of by the Plaintiff and that its role extended only to managing and preserving the assets of the company in trust for its creditors. The Defendant averred that the moratorium that was given in Milimani High Court Civil Suit No. 748 of 2009 which was still in force stayed all proceedings and suits relating to the company during the pendency of the moratorium. The Defendant averred further that the Defendant could not be sued for acts and/or omissions of the company while it was a going concern. The Defendant averred that the Defendant's suit was fatally defective and incompetent. The Defendant averred that the suit was brought contrary to the order that was given in Milimani High Court Civil Suit No. 748 of 2009 on 23rd October 2009 that stayed all and/or any proceedings against the company during the pendency of the moratorium. The Defendant urged the court to dismiss the suit with costs.

Together with the defence, the Defendant filed a Notice of Preliminary Objection to the suit dated 25th January 2019. In the objection, the Defendant contended that the Plaintiff's suit was time barred under section 4 of the Limitation of Actions Act. The Defendant contended further that the agreement of sale between the company and the deceased was null and void for want of land control board consent. On 13th September 2019, the court ordered that the Preliminary Objection would be determined together with the main suit.

At the trial, the Plaintiff adopted her witness statement filed in court on 16th March 2015 as her evidence in chief. In the statement, the Plaintiff stated as follows: She was a co-administratrix of the estate of the deceased who died on 22nd November 2005. The deceased was an employee of the company. While in the company's employment, the deceased purchased the suit property from the company at a consideration of Kshs. 110,000/- which the deceased paid in full. The deceased was supposed to settle the purchase price in 24 installments of Kshs. 4,500/- per month but the deceased increased the monthly instalments to Kshs. 9167/- and managed to clear the purchase price in 12 months by July, 2005. The company was placed under Statutory Management in 2005 before it could transfer the suit property to the deceased. The defendant who was the company's statutory manager refused to transfer the suit property to the deceased and subsequently to her even after receiving the purchase price in full as aforesaid.

The Plaintiff produced as exhibits among others, Sale Agreement dated 17th November 2004, copies of pay slips showing the deductions which were made towards the purchase price, various correspondence exchanged with the Defendant, a copy of the deceased's death certificate, a copy of Grant of Letters of Administration in respect of the estate of the deceased dated 5th February 2008 and a copy of a certificate of official search on the register of the suit property. The Plaintiff urged the court to grant the reliefs sought in the plaint.

The Defendant called Christopher Onyango (DW1), the company's operations manager as its witness. DW1 adopted his witness statement dated 6th December 2018 as his evidence in chief. He also produced the documents attached to the Defendant's list of documents dated 4th December 2018 as exhibits. In his statement, DW1 reiterated the contents of the Defendant's statement of defence that I have highlighted above. DW1 added that there was a pending winding up petition against the company namely, Nairobi High Court Winding Up Cause No. 22 of 2006 in which the Plaintiff could pursue her claim together with the other creditors of the company. In his brief oral testimony in court, DW1 told the court that the moratorium that was declared in respect of the company had been extended from time to time.

After the close of evidence, the parties made closing submissions in writing. The Plaintiff filed submissions dated 12th May 2021 while the Defendant filed submissions dated 13th September 2021. In her submissions, the Plaintiff framed four issues for determination by the court namely, whether the Plaintiff's suit is unmaintainable on account of the moratorium that was declared by the Defendant and extended by the court from time to time, whether the Plaintiff's suit is time barred, whether the suit is incompetent on account of want of land control board consent and whether the plaintiff paid the full purchase price.

On the issue of moratorium, the Plaintiff cited County Government of Kwale v United Insurance Company Limited & another [2020] eKLR and submitted that the moratorium provided for under Section 67C. (10) of the Insurance Act Cap. 487 Laws of Kenya applies only to the payments due to policy holders and other creditors of the insurance company. The Plaintiff has submitted that she is neither a policy holder nor a creditor of the company. The Plaintiff has submitted that in the circumstances, the moratorium declared by the Defendant and extended by the court from time to time is inconsequential as far as her claim which is for specific performance is concerned.

On the issue whether the suit is time barred, the Plaintiff has submitted that the suit herein is for specific performance and as such the limitation period in respect thereof is 12 years in accordance with Section 7 of the Limitation of Actions Act and not 6 years stipulated under Section 4(1) of the same Act as contended by the Defendant. In support of this submission, the Plaintiff has cited several authorities. On the issue of the land control board consent, the Plaintiff has submitted that the same is an afterthought. The Plaintiff has submitted that it would be inequitable for the Defendant to refuse to transfer the suit property to the Plaintiff and then call to its aid the provisions of the Land Control Act. The Plaintiff has submitted that it is the Defendant who failed to execute the application for land control board consent and as such it cannot rely on that failure to void the agreement between the company and the deceased. The Plaintiff cited Willy Kimutai Kitilit v Michael Kibet [2018] eKLR and submitted that lack of consent of the land control board does not preclude the court from giving effect to equitable principles.

On the Defendant's contention that the deceased did not pay the purchase price in full, the Plaintiff has submitted that she proved at the trial that the purchase price was being deducted from the deceased's salary and that the same was paid in full. The Plaintiff has submitted that the Defendant's failure to transfer the suit property to the deceased was not on account of nonpayment of the purchase price.

In its submissions in reply, the Defendant framed four issues for determination namely; whether the plaintiff's suit is time barred, whether the agreement for sale between the deceased and the company is null and void for want of land control board consent, whether the deceased breached the agreement between the parties and whether the Defendant is liable to pay the previous and past dues that accrued while the company was still a going concern.

On the issue of time bar, the Defendant has cited several authorities and submitted that since the agreement of sale between the deceased and

the company was entered into on 17th November 2004, a suit in respect thereof ought to have been filed latest by November 2010 within the 6-year limitation period provided for in Section 4(1) the Limitation of Actions Act. The Defendant has submitted that the Plaintiff's suit that was filed on 16th March 2015 was filed outside the limitation period and as such is time barred.

On the issue of land control board consent, the Defendant has cited Sections 2(a), 6(1) and 8(1) of the Land Control Act, Cap. 302 Laws of Kenya and has submitted that the transaction between the deceased and the company was a controlled transaction and as such subject to the provisions of the Land Control Act. The Defendant has submitted that since no consent of the land control board was issued in respect of the transaction, the same was void for all intents and purposes and as such unenforceable. The Defendant has cited several authorities in support of this contention. The Defendant has submitted that the decision in Willy Kimutai Kitilit v Michael Kibet(supra) that was cited by the Plaintiff is distinguishable.

On whether the deceased breached the agreement of sale between the deceased and the company, the Defendant has submitted that the evidence placed before the court by the Plaintiff shows that the deceased paid only a sum of Kshs. 82,503/- out of the purchase price of Kshs. 110,000/-. The Defendant has submitted that by failing to pay the balance of the purchase price, the deceased breached the terms of the agreement of sale between him and the company. The Defendant has submitted that a party who is in breach of an agreement of sale cannot seek specific performance of the same. The Defendant has submitted further that since the company is under a moratorium that has suspended settlement of all claims, the Plaintiff is not entitled to a refund of the purchase price paid to the company.

On whether the Defendant is liable to settle the liability incurred by the company before being placed under Statutory Management, the Defendant has submitted that its statutory duties do not extend to settlement of such liabilities. In support of this submission, the Defendant has cited Joseph Mbuthia Gichuru v Kenya Re-Insurance Corporation Ltd. [2012] eKLR. The Defendant has submitted further that if the court allows this claim against the defendant it will set a bad precedent and will open a flood gate of suits against the Defendant in respect of the other parcels of land that were sold by the company.

Determination:

I have considered the evidence tendered by the parties in support of their respective cases. I have also considered submissions of counsels and the authorities that were cited in support thereof. The issues arising for determination in the suit are as follows;

1. Whether the suit is time barred.
2. Whether the suit is incompetent for want of land control board consent for underlying agreement of sale.
3. Whether the suit is incompetent on account of the moratorium that was declared by the Defendant and which has been extended from time to time by the court.
4. Whether the deceased breached the agreement of sale between him and the company.
5. Whether the Plaintiff is entitled to the reliefs sought.
6. Who is liable for the costs of the suit?

Whether the suit is time barred.

In her plaint, the Plaintiff has sought a declaration that she owns the suit property and an order that the same be transferred to her. I am in agreement with the submission by the Plaintiff that in the circumstances, the applicable limitation period is 12 years provided for in Section 7 of the Limitation of Actions Act, Cap. 22 Laws of Kenya rather than the 6 years provided for under section 4 (1) of the same Act. The Plaintiff's suit that was filed on 16th March 2015 is therefore not time barred. I wish to add that the Defendant's time bar plea is inconsistent with its contention that the company was at all material times under a moratorium since a moratorium declared under Section 67C. (10) of the Insurance Act suspends the limitation period imposed under any law.

Whether the suit is incompetent for want of land control board consent for underlying agreement of sale.

The issue of lack of land control board consent was raised by the Defendant. The agreement for sale between the parties did not explicitly refer to such consent; whether it was required and if so, who was responsible for obtaining the same as between the deceased and the company. The burden was on the Defendant to prove that the transaction between the deceased and the company required land control board consent. No evidence in that regard was placed before the court. In the absence of evidence that the suit property was agricultural land, the issue of whether or not consent of the land control board was obtained is not relevant. Even if I am wrong on the foregoing conclusion, I am in agreement with the Plaintiff that in the circumstances of this case trust can be inferred. The deceased was an employee of the company, the company sold to him the suit property, for 12 months the company deducted his salary to settle the purchase price. In the agreement between the parties, the company undertook to transfer the suit property to the deceased upon completion of the payment of the purchase price that was being paid in installments. After the deceased completed the payment of the purchase price, the company refused to transfer the property to the deceased. I am of the view that upon payment of the purchase price in full, the company held the suit property in trust for the deceased awaiting transfer thereof to the deceased. This trust can only be realized by the transfer of the suit property to the Plaintiff. Such transfer would not require consent of the land control board. Due to the foregoing, it is my finding that this suit is not incompetent for want of land control board consent.

Whether the suit is incompetent on account of the moratorium that was declared by the Defendant and extended from time to time by the

court.

On this issue, I am in agreement with the opinion of my brother Munyao Sila J. in County Government of Kwale v United Insurance Company Limited (Under Statutory Management) & another(supra) that was cited by the Plaintiff. Moratorium declared under Section 67C. (10) of the Insurance Act, Cap. 487 Laws of Kenya by the Statutory Manager must be restricted to the matters set out in that section. Under that section, moratorium is to be declared in respect of “payment by the insurer of its policy holders and other creditors...” Under Section 67C. (3) of the Act, the High Court is given power to extend the term of the Statutory Manager beyond 12 months. Section 67C. (10) of the Act does not empower the Statutory Manager to extend the moratorium to persons who are not policy holders or creditors of the company. The Defendant did not point out to the court any provision of the Insurance Act or any other law giving the court power while extending the term of the Statutory Manager under Section 67C. (3) of the Act to widen the scope of the moratorium declared by the Statutory Manager to cover persons other than those provided for in Section 67C. (10) of the Act. The Defendant did not also highlight any provision of the Insurance Act or any other law providing that once an insurance company is placed under Statutory Management, no suit can be filed and no claim can be made against it howsoever arising. I doubt if such law can hold under the current constitutional dispensation. From the material before the court, the company herein was placed under Statutory Management on 15th July 2005. As at the time of the hearing of this suit in 2021, that is 16 years later, the court was told that the company was still under Statutory Management and according to the Defendant no claim could be made against it. I wonder how a person’s constitutional right to access court and have his claim heard and determined can be suspended for 16 years. I do not think that that was the intention of the legislature when it enacted Sections 67A to 67F of the Insurance Act.

Back to the case before me, the deceased was neither a policy holder nor a creditor of the company. The Plaintiff is not claiming any payment from the Defendant. In the circumstances, the Plaintiff was not barred by the moratorium declared by the Defendant from pursuing the deceased’s claim against the company. The Defendant had mentioned that there were orders issued by the High Court staying all proceedings against the company. The Defendant also mentioned the existence of winding-up proceedings against the company. No evidence was placed before the court showing that the Plaintiff was a party to or was notified of the said proceedings in which stay orders were issued. No evidence was also placed before the court showing that the said orders were still in force. As for the winding up proceedings, again, no evidence was placed before the court showing the existence of the same. The Defendant did not also explain whether the winding-up proceedings were instituted by a creditor or on application by the Commissioner of Insurance.

On whether the Defendant is liable for the actions of the company while it was a going concern, I am of the view that the plaint was not properly drafted. The suit should have been brought against United Insurance Company Limited (Under Statutory Management) rather than against “The Statutory Manager, United Insurance Company Limited” since the Plaintiff’s claim arose before the appointment of the Statutory Manager. I am of the view however that the Defendant has not suffered any prejudice. Whether the suit was brought against United Insurance Company Limited (Under Statutory Management) or in its present form, it was the Defendant to respond to the same. Appointment of a Statutory Manager by the Commissioner of Insurance under Section 67C. (i) of the Act suspends the powers of the board of directors of the insurance company and puts the Statutory Manager fully in charge of the company. I am not in agreement with the Defendant’s submission that the Plaintiff should have sued the directors of the company in their personal names.

Due to the foregoing, it is my finding that the Plaintiff’s suit is not bad in law on account of the moratorium and the fact that the suit has been brought against “the Statutory Manager, United Insurance Company Limited” rather than against “United Insurance Company Limited (Under Statutory Management)”.

Whether the deceased breached the agreement of sale between him and the company.

There is no dispute that the deceased entered into an agreement of sale of the suit property with the company on 17th November 2004. The purchase price was agreed at Kshs. 110,000/-. It was a term of the said agreement of sale that the Defendant would transfer the suit property to the deceased once the deceased had paid the purchase price in full. I am satisfied from the totality of the evidence before me that the deceased fulfilled his part of the agreement by paying the purchase price in full to the company. There is no evidence that the company had at any time raised the issue of non-payment of the purchase price with the deceased. What the Defendant sought from the deceased was evidence of payment which the Plaintiff provided to the Defendant. There is no evidence that the company or the Defendant demanded the payment of the alleged balance of the purchase price from the deceased or the Plaintiff. The fact that the Plaintiff did not produce all the pay-slips did not mean that the purchase price was not paid in full. The deceased was an employee of the company. The company had his employment records including his salary payment details. Nothing would have been easier for the Defendant than to produce the deceased’s salary payment records to show that there were no deductions from his salary beyond Ksh. 82, 503/-. It is my finding therefore that the deceased did not breach the agreement of sale between him and the company.

Whether the Plaintiff is entitled to the reliefs sought.

From what I have stated above, I find no merit in the defences that have been put forward by the Defendant to the Plaintiff’s claim. The Plaintiff has proved her claim against the defendant to the required standard and as such she is entitled to the reliefs sought in the plaint. As I have stated, the Plaintiff has sought the transfer of the suit property to her name as the main relief. In the absence of evidence that the transfer cannot be effected, there is no reason why the Plaintiff should be denied the relief. The Plaintiff is also entitled to the declaratory relief sought and the costs of the suit.

Conclusion:

In the final analysis and for the foregoing reasons, I enter judgment for the Plaintiff against the Defendant in terms of prayers (i) and (ii) of the plaint dated 5th March 2015. The Plaintiff shall have the costs of the suit.

DELIVERED AND DATED AT NAIROBI THIS 14TH DAY OF MARCH 2022

S. OKONG’O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mwariri for the Plaintiff

Ms. Wangui h/b for Mr. Saenyi for the Defendant

Ms. C. Nyokabi-Court Assistant