



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND HIGH COURT

AT NYAMIRA

ELC CASE NO. 39 OF 2021

(Formerly Kisii ELC Case No. 325 of 2015)

JOSEPHINE NYAMBEKI NYAOGA.....PLAINTIFF

=VRS=

SIMON ONDIEKI MAKWORO.....DEEFENDANT

JUDGMENT

The Plaintiff, Josephine Nyambeki Nyaoga sued the Defendant, Simon Ondieki Makworo on 8/8/2016 for the nullification of the Title Deed in respect of MWONGORI SETTLEMENT SCHEME/765 and that the same be registered in the Plaintiff's name and for the eviction of the said Defendant and costs of the suit. Her claim is based on fraud. She named herself and her son Reagan Nyaoga Monyoncho as witnesses.

The Defendant on the other hand averred that the suit land was transferred after both parties entered into a Sale Agreement wherein the Plaintiff sold the suit property to the Defendant for Kshs. 1,450,000/= and after all the consents were obtained and all transfer documents were executed by both parties and the transfer duly registered. The Plaintiff also filed a Reply to Defence and pleaded that the Sale Agreement was revoked on 28/1/2013 but the terms of the revocation were not Honoured by the Plaintiff.

At the Hearing of the suit, the Plaintiff's son, Reagan Nyaoga Monyoncho adopted his undated statement filed in court on 12/10/2016. He produced a power of Attorney donated to him by the Plaintiff dated 10/5/2021 and registered on 18/5/2021 long after the agreement was allegedly revoked on 28/1/2013. He testified that the suit land is 3 Acres out of 16 Acres in MWONGORI SETTLEMENT SCHEME /724 which measured 16 Acres. MWONGORI SETTLEMENT SCHEME/765 was hived off the latter. He claimed that there was no Sale Agreement and that on 28/1/2013 he revoked the Sale Agreement between his mother and the Defendant and was to refund the monies paid to the Plaintiff i.e. Kshs. 1,450,000/= which he admitted that he has never refunded to date.

He produced a copy of the revocation of agreement dated 28/1/2013 alongside the certificate of official search, 2 letters from Tenwek Hospital dated 22/6/2015 and 23/6/2016 indicating that the Plaintiff was suffering from mental illness and hypertension and was diagnosed of psychosis and a Demand letter dated 20/05/2015 from J.K. Rono and Company Advocates. He testified that in view of the above sickness the Plaintiff did not have capacity to enter into the Sale Agreement.

On cross-examination by Mr. Ochwangi for the Defendant, Mr. Monyoncho said that he did not refund the money to the Defendant because the Defendant refused to accept it.

He also claimed that he could not confirm whether the Plaintiff had received the purchase price, because he was not present when the transaction was taking place. He said he is not familiar with his mother's signature. He also was not familiar with her National Identity Card. He admitted that he had seen some Bank deposit slips in favour of his mother but the same added up to about Kshs. 900,000/= but he could not tell the actual figure. He said that when he realized his mother had sold the suit land without involving him and his siblings he stopped the Defendant from entering the suit land but that the Defendant entered forcefully in September 2013 and is still thereon occupying 3 Acres. When asked by the court, the witness said that the Plaintiff did not sign the Revocation Agreement. He also said that he could not doubt that the purchase money was deposited in his mother's Account with Equity Bank and she also had a Bank Account with the Co-operative Bank of Kenya and also with the Kenya Commercial Bank and that he doesn't know whether she could have received money through any other avenue besides Bank deposits.

The Defendant on his part adopted his statement dated 25/1/2019 filed in court on 1/2/2019. He testified that he indeed entered into a Sale Agreement for the parcel of land known as L.R. NO. MWONGORI SETTLEMENT SCHEME/765 for Kshs. 1,450,000/= which payments are reflected in the copies of his statements from Safaricom showing the Mpesa transfers to the Plaintiff, Bank Deposit slips in favour of the Plaintiff in her Equity Bank Account Number 0520196771005 and others in the Plaintiff's KCB Account Number 1104616963, Sotik.

The Defendant also produced a copy of the mutation form in respect to L.R. MWONGORI SETTLEMENT SCHEME/729 duly signed by the Plaintiff, copies of Revenue Receipts for the monies paid for the survey work, a copy of the Green Card, Title Deed, photographs showing his house and the agricultural activities he is engaged in on the suit land, copy of the certificate of official search and the Revocation Agreement dated 28/1/2013. He stated that he paid all the purchase price of Kshs. 1,450,000/= and that when he realized that the Plaintiff's son wanted the agreement revoked, he did sign the Revocation agreement but the said Mr. Monyoncho defaulted and has never refunded a single coin of the purchase price. The same ought to have been refunded in full by September 2013, 9 years ago. On Cross-examination by Mr. Soire for the Plaintiff, the Defendant admitted that the Sale Agreement was not reduced in writing and that Mr. Monyoncho was involved in the transaction since it is he who took the Plaintiff to the Surveyor's office for sub-division of the land i.e. L.R. NO. MWONGORI SETTLEMENT SCHEME/729. He said that he agreed to enter into the Revocation agreement after some negotiations and that immediately upon signing the Revocation Agreement he gave Mr. Monyoncho his Bank Account Number but the latter breached the agreement by not refunding the purchase price and since he was to vacate the suit land upon refund of the purchase price, he could not do so due to the breach by the Plaintiff's son.

When asked by the court, the Defendant said that one of the Plaintiff's daughters by the name Lydia Nyaoga was present when the Defendant paid to the Plaintiff the sum of Kshs. 350,000/= in cash out of which Lydia was given Kshs. 120,000/= by her mother. The Defendant also said that he knew the Plaintiff's family for long and when Monyoncho wanted that land back, he opted to get the refund of the purchase price and buy another piece of land elsewhere. He concluded by saying that Mr. Monyoncho entered into a Sale Agreement with one Wesley Makworo for the latter to buy the suit land but the two ended in Kisii court over breach occasioned by Mr. Monyoncho in Kisii ELC 421 of 2015 which was filed against Monyoncho. The Defendant is therefore not ready to part with the suit land.

There are 4 main issues in this suit:

- 1. Was there a Sale Agreement between the Plaintiff and the Defendant?**
- 2. Did the Plaintiff have capacity to sell the suit land?**
- 3. Is the Revocation Agreement dated 28/1/2013 valid?**
- 4. Who is entitled to the suit land?**

Having heard both parties I now wish to condense the facts of the case. It is not in doubt that the Plaintiff entered into a Sale Agreement with the Defendant in the year 2012 when the Plaintiff sold to the Defendant the parcel of land measuring 3 Acres out of L.R. MWONGORI SETTLEMENT SCHEME/729 whose acreage was 16 Acres. Both parties contacted a Surveyor who sub-divided the land and hived off the 3 Acres after both parties signed the mutation form which was registered on 20/4/2012. The sum of Kshs. 1,450,000/= was duly paid to the Plaintiff by cash of Kshs. 350,000/= and the balance of Kshs. 1,100,000/= partly via Mpesa and by direct Bank deposits to the Plaintiff's Bank Accounts, Equity Account Number 0520196771005 and KCB Account No 1104616963, Sotik. The Defendant has produced his Safaricom statements as proof of these transactions. Transfer forms were executed and on 20/4/2012 the parcel of land known as L.R. MWONGORI SETTLEMENT SCHEME/765 was transferred and registered in the name of the Defendant. It was not until 28/1/2013, about one year later, that the Plaintiff's son was not happy with the transaction and approached the Defendant to revoke the said agreement. Both entered into a Revocation Agreement and after admitting that there was an agreement of sale of L.R. MWONGORI SETTLEMENT SCHEME/729 for Kshs. 1,450,000/= between the Defendant and his mother, the Plaintiff, Mr. Monyoncho agreed to refund the sum of Kshs. 1,450,000/= to the Plaintiff in exchange for and in redemption of the suit land by the month of September 2013 when the Defendant was to give vacant possession of the suit land. The month of September was crucial because that is the time by which the Defendant would have harvested his crop from the suit land. It is also significant to note that the Revocation Agreement was not executed by the Plaintiff but by her son who had not been given the power of Attorney by then. Other members of the Plaintiff's family were also not involved in the revocation. To date this money has never been refunded. Not even a coin and the Plaintiff has invited the court to declare the Sale Agreement a nullity.

As to whether there was a contract of sale?

Both parties agree that the Defendant paid to the Plaintiff the sum of Kshs. 1,450,000/= and in return the Plaintiff hived off 3 Acres out of L.R. MWONGORI SETTLEMENT SCHEME/729 and had it registered as L.R. MWONGORI SETTLEMENT SCHEME/765 and transferred in the name of the Defendant. She signed the mutation form and transfer and also gave out to the Defendant her 2 Bank Accounts with Equity and KCB as well as her Mpesa number where most of the monies was deposited. She also received in cash Kshs. 350,000/= out of which the Plaintiff gave her daughter Lydia Nyaoga Kshs. 120,000/=. If no money had changed hands and if no land had been transferred to the Defendant, then Monyoncho would not have gone to the extent of revoking the Sale Agreement and committing himself to refund the purchase price. You only revoke something that has been agreed upon. Consequently, there was a contract of sale for the parcel of land known as L.R. NO. MWONGORI SETTLEMENT SCHEME/765.

Did the Plaintiff have capacity to sell the suit land?

In the first place I would have expected a doctor to be called upon to testify as to the mental capacity of the Plaintiff to enter into a contract. That was not done. All that was produced in court were the 2 letters dated 22/6/2015 and 23/6/2015 and the undated witness statement from the son, Reagan Monyoncho. On the note from Tenwek Hospital dated 22/6/2015, the same does not indicate whether B. Erick is a doctor or in what capacity he was writing the note. Secondly, it states that Josephine Nyaoga:

“.....is known hypertensive and mental ailment (psychosis) for 3 years now, diagnosed of psychosis on 20/4/2012. She is on medication and is well managed.....”

The same does not explain what she is or is not capable of doing. Mental ailment is not synonymous with mental incapacity. The note goes ahead to say that she is well managed meaning that she was not mentally incapacitated.

The second note dated 25/6/2015 which is handwritten and said to be authored by a Dr. Mutai N.K. provides: -

“.....the above named person had been our client since 2010 when she was diagnosed of hypertension.....”

The same does not mention any mental ailment. Hypertension does not deny a person mental capacity. Dr. Mutai would have mentioned the mental incapacity if that were the case. The 2 notes are therefore of no consequence and with no probative value. In any case the 2 notes disprove what they were meant to affirm.

After the Plaintiff's Advocates J.K. Rono and Co. Advocates had signed this Plaintiff, this is what the Plaintiff Josephine Nyambeki Nyaoga swore in her Verifying Affidavit sworn on 16/8/2016.

Paragraph 2

“.....THAT the contents of the plaint have been read over to us and herein verify the correctness of the facts pleaded save for errors not herewith discerned and which may necessitate amendments.....”

She also affirmed that she had not filed any other suit concerning the subject matter. If indeed the Plaintiff had no mental capacity to sell the land and transfer it to the Defendant, then did she regain the capacity to be able to ascertain the correctness of all the averments in the suit? If we were to believe that since 2010 she lacked mental capacity to sell the land, equally she lacked capacity to file the suit and if we were to declare the sale of the suit land a nullity for lack of mental capacity as requested by her son, then equally the suit commenced by the Plaintiff dated 8/8/2016 and verified by the Plaintiff who appended her signature to her verifying Affidavit on 16/8/2016 should be equally struck out because she did not have mental capacity to instruct an Advocate.

I am not convinced that the Defendant lacked mental capacity in the absence of evidence by a qualified psychiatrist. Mental ailment is not synonymous with mental incapacity. This also leads me to the specific Power of Attorney executed on 10/5/2021 and registered on 16/5/2021 when the case had been filed on 8/8/2016, 5 years earlier. A mentally incapacitated person does not have capacity to donate a Power of Attorney. The Plaintiff and her son must have mistaken guardianship with Power of Attorney. The former is sought for and granted by the court when the subject is mentally incapacitated. The latter is donated by a mentally stable person who because of the distance or other tying and/or demanding circumstances he cannot be able to attend to his personal matters. The specific Power of Attorney executed on 10/5/2021 is therefore a confirmation that the Plaintiff has at all material times been in possession of her mental faculties.

Matters to do with mental incapacity are governed under PART XII of the Mental Health Act, CAP. 248 Laws of Kenya under the Title “Judicial Power over Persons and Estates of Persons Suffering from Mental Disorder.”

Section 26 of the Act provides that:

- (1) The court may make orders—
 - (a) for the management of the estate of any person suffering from mental disorder; and
 - (b) for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.

Section 27 provides for the appointment of a manager or guardian for the incapacitated person:

- (1) Where a manager is appointed under this Part, the court may order that the manager shall have such general or special powers for the management of the estate as the court considers necessary and proper regard being had to the nature of the property whether movable or immovable, of which the estate may consist:

Under Section 28 (1) of the Act,

The court may, upon application made to it by petition concerning any matter connected with a person suffering from mental disorder or with his estate, make such order, subject to this Part, regarding such application as, in the circumstances of the case, the court may think fit.

Section 32 of the Act would have given PW1 the powers he purported to exercise:

A manager, or such other person as the court may appoint for the purpose, shall

on behalf of the person suffering from mental disorder execute any conveyance and instrument relating to any sale, mortgage or other disposition of such person's estate as the court may order, and any conveyance or other instrument executed by such manager, or any other such person, with the sanction of the court, shall be as valid and effectual in all respects as if it had been executed by the person suffering from mental disorder while he was not so suffering (Emphasis mine).

This is the process the Plaintiff's son should have invoked before revoking the sale contract between the parties herein. Nothing short of this is allowed by law. The law must be followed to the letter and more so in a matter of such significance and with very hazardous and perilous consequences as this.

The documents produced on behalf of the Plaintiff from Tenwek hospital to suggest that the Plaintiff is mentally unstable, which are actually

false certificates, are outlawed by **Sections 47** and **48** of the Act:

47. Any person who, not being a medical practitioner or a person approved and authorized by the Director, knowingly and willfully signs any medical certificate for the purposes of any of the provisions of this Act shall be guilty of an offence.

48. Any medical practitioner who knowingly, willfully or recklessly, certifies anything in a certificate made under this Act, which he knows to be untrue, shall be guilty of an offence.

On the revocation of the Sale Agreement, you only revoke an agreement you were a party to. Only the Plaintiff had the capacity to revoke the sale contract and not her son. The same was therefore invalid and a nullity ab initio. In any case, the brainchild of the same breached it as soon as he had executed it and can therefore not benefit from the same. The upshot of the above is that the suit is dismissed with costs to the Defendant.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 22ND DAY OF APRIL, 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Mr. Soire

Defendant: Mr. Ochwangi