



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
SUCCESSION CAUSE NO. 93 OF 2006

**IN THE MATTER OF THE ESTATE OF JOHN MANYONGE WAKOLI (DECEASED)
AND**

**1. IN THE MATTER OF RABECA NALIKA
MANYONGE)**

2. WYCLIFFE KASEMBELI) :~::~:
PETITIONERS

VERSUS

ALBERT MALECHE :~::~: OBJECTOR

RULING

The facts of this case as the court understands them, are that when the deceased John Manyonge Wakoli died on 5th April, 2006 he was the registered owner of the parcel of land known as L.R. No.Bungoma/Kabisi/546. His wife Rabeca Naliaka Manyonge and Wycliffe Kasembeli applied for a joint grant of letters of administration which was granted to them in the interim on 1.12.2006. They then by a Chamber Summons dated 15.5.2007 applied for the confirmation of the grant.

The record however shows that the Objector, Dr. Albert Maleche, filed an affidavit of protest against the confirmation of the grant aforesaid. His reason to file such objection was that in 1973 the deceased, John Manyonge Wakoli was selling the said piece of land. The objector, who was in the United States of America, used his brother Meshack Maleche Ajesa to purchase the piece of land. Apparently he sent all the purchase money through him.

There is an indication at one stage that Meshack Maleche Ajesa took the deceased to the chambers of Magina & Company advocates where he paid Kshs.8300/- to him as part of the purchase price. It is not clear how much money Meshack Maleche Ajesa received from Dr Albert Maleche nor is it clear how much of such purchase money was paid to the deceased before his demise.

There is also no evidence that Meshack Maleche Ajesa entered into any Sale Agreement with the deceased. Indeed, the making of any sale agreement was denied by the deceased in an affidavit he swore on 17th March, 1998 in which apparently, Dr Albert Maleche believing that the land had been registered in his brother's name sued his brother Meshack Maleche Ajesa to recover the land. There is no evidence that either Dr Albert Maleche or his brother Meshack Maleche Ajesa denied that fact or even tried to

contradict the same in this suit.

A third fact is that this transaction of the purchase of the said agricultural piece of land, measuring 15 acres, was never given the local Land Control Board. No reason for this omission is given although there is far-off indication that the deceased refused to apply for or give consent to it.

Although the deceased apparently later indicated unwillingness to formally transfer the piece of land to either Dr Albert Maleche or his brother Meshack Maleche Ajesa, there is clear indication that the deceased had allowed Meshack Maleche Ajesa to enter the land and occupy part of it while the deceased and his family continued to occupy the rest. The only indication that suggested that Meshack Maleche may have paid the whole or most of the purchase price, whatever such price was, is the fact that Meshack Maleche at one time, ousted the deceased and his family from the land. They went to live elsewhere as squatters. Unfortunately for Meshack Maleche, the title never at any stage passed to Meshack since the deceased refused to co-operate. That is why when the deceased died, his wife and family easily petitioned for a grant of letters which was issued without including the interest of the purchaser although she knew of its existence. It was only during the process for confirmation that Dr Maleche got opportunity to object as he did.

There is finally some evidence on the record that Meshack Maleche Ajesa, was throughout the relevant time trying to mislead his own brother Dr Albert Maleche. Apparently Meshack tried to register the land in his own name although the purchase money came from Dr Albert Maleche. It is not clear whether or not that is why the deceased became unwilling to transfer the land to him. Later he suggested in his affidavit that it was to Dr Albert Maleche and not his brother Meshack Maleche that he sold the land. In addition he suggested that Meshack did not pay all the purchase money.

Be that what it may, it is clear that the sale of L.R. No.Bungoma/Kabisi/546 otherwise properly known as Tongaren/Kibisi/546, which is said to be an agricultural land, was never put in writing. If the transaction was put into writing, then Meshack Maleche Ajesa, for reasons known to him alone, chose not to produce the written contract.

The law in Kenya is that any contract concerning sale or purchase of land must be reduced into writing which must be signed by both parties concerned in the transaction. In this case no such written contract has been produced. The transaction accordingly, even if it existed, cannot be a basis of legal action such as the one the objector is trying to enforce. That point alone should dispose of this objection.

There is however a second ground for dismissing this objection. The transaction was one which required the consent of the local Land Control Board. No such consent was obtained within six months of the entering of the sale. The transaction that was entered between the purchaser and seller as stated herein is termed a “controlled transaction” which under Section 6 of the Land Control Act, must receive a consent within 6 months or be devoid of any legal effect. In Court of Appeal Civil Appeal No.257 of 2001 **Peter Waweru Waititu versus Cyrus .J. Karanja**, the court stated the principle thus:-

“We agree with the superior court that it is plain that the Agreement of Sale related to agricultural land and that such agreement is void unless the Land Control Board for the land control area where the suit land is situated had given the necessary statutory consent. The parties agree that no application for consent was ever made or consent obtained and it followed that the respondent had no legal right or interest in the suit property capable of being protected.....”

The result accordingly is that this objection by Dr Albert Maleche has no merit for the two reasons

discussed above. It is hereby dismissed with costs to the petitioners. The petitioners should immediately proceed to seek confirmation of the grant. Orders accordingly.

Dated and delivered at Bungoma on the 23rd February, 2011.

D.A. ONYANCHA
JUDGE