



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL SUIT NO.91 OF 2005 (O.S)

HADIJA NANJALA

CHEMIATI.....PLAINTIFF

~VRS~

JAMIN WASIKE CHEMIATI.....DEFENDANT

JUDGMENT

The Plaintiff Hadijah M. Chemiati sues the Respondent Jasmin Wasike Chemiati for determination of issues listed in the originating summons dated 31/11/2005. The main issues are whether the deceased Sila Chemiati had an estate capable of distribution to his heirs at the time of his demise; whether any fraud was committed by the parties in disposing of some assets of the deceased even before the succession cause was filed or determined; whether the disposal of the properties was for the benefit of the estate and whether the Plaintiff has any remedy against the 3rd parties who bought the deceased's Plot No.228 Bungoma township.

The Defendant in his replying affidavit depones that he is a son of the deceased by his first wife who was deceased at the time his father died. He lists three properties belonging to the deceased at the time of his demise namely:

- a) **East Bukusu/South Kanduyi/489,**
- b) **Bungoma township plot no.228,**
- c) **East Bukusu/North Mateka/166.**

All the land parcels were included as assets of the deceased in Bungoma High Court Probate and

Administration Cause No.25 of 1985. It was later discovered that the Plaintiff had disposed of parcel No.E. Bukusu/S. Kanduyi/489. The Defendant also disposed of plot no.228 Bungoma township allegedly by pay a loan left outstanding by the deceased.

The Plaintiff testified in this case that the deceased owned two assets namely Bungoma township plot no.228 and plot no.489. Plot no.228 was a developed commercial plot while plot no.489 was undeveloped. The deceased had borrowed a loan using the commercial plot as security. After his death, the Plaintiff went on servicing the loan. Later on, the Plaintiff could not afford to continue paying the loan. With the consent of clan elders and in presence of the Defendant, she was allowed to sell plot no.489 and used the proceeds to clear the loan. She sold it and fully paid the loan. The Defendant filed a succession cause no.25 of 1985 without the knowledge of the Plaintiff. Before the cause was finalized, the Defendant sold plot no.228 to 3rd parties. The Plaintiff applied for revocation of grant which resulted in both parties herein being appointed administrators of the estate. The presiding judge declined to confirm the grant ordered that the parties file this suit to determine the issues in dispute before confirmation of grant. The disputed issues were whether the parties unlawfully sold assets in the estate of deceased and whether there was still any assets to be distributed for the benefit of the beneficiaries. It is the Plaintiff's case that she is the one who bought the land where she resides namely: East Bukusu/North Mateka/166. It was her testimony that she used money from her cereals business to purchase the land. It was argued that the Defendant had no share on that land. This is the land where the Plaintiff resides with her children and the place where the deceased was buried. The Plaintiff urges the court to order that plot no.228 Bungoma town be returned to the family for distribution.

The Defendant adopted evidence he had adduced in H. C. Misc. Application no.38 of 1994. He testified therein that the Plaintiff was the second wife to the deceased. The Defendant's mother predeceased his father. According to the Defendant the deceased had three properties for distribution being plot no.228 Bungoma town, plot no.489 and plot no.116. Only plot nos. 228 and 489 were registered in the name of the deceased. These are the only two plots the Defendant included in the list of assets when he filed the Succession Cause no.25 of 1985. He told the court that he sold plot no.228 to offset the loan of deceased with Industrial & Commercial Development Corporation (I.C.D.C). The Defendant said he gave plot no.489 to his mother who sold it to one Ramadhan Machio without consulting him. Having cleared the loan, the Defendant bought himself one (1) acre of land using the balance of proceed for sale of plot no.228. Without a share in plot no.116, the Defendant testified that he was entitled to sell plot no.228.

The Plaintiff produced the letter of consent for sub-division of L.R. no. West Bukusu/North Mateka/111 from which plot no.116 was excised. The vendor was one Barasa Waswa and the buyer was the Plaintiff. The land was sub-divided and the Plaintiff took possession of the land. PW2 testified that the Plaintiff bought the land from one Barasa Waswa. He at one time accompanied her to. The Defendant did not produce any document to prove that plot no.116 belonged to his late father. The exclusion of the land from the assets of the deceased by the Defendant may be taken to mean that he had knowledge that the land did not belong to his late father. This court found the evidence of the Plaintiff and PW2 in regard to plot no.116 credible. I am therefore satisfied that plot no.116 belongs to the Plaintiff and that it would not have been a subject matter of distribution in the deceased's estate.

It is not disputed that the Plaintiff sold deceased's plot no.489 before the succession process was done. Neither is it disputed that the Defendant sold plot no.228 Bungoma township before the succession cause he had himself filed was determined. Each of the parties gave the reasons for disposal of the properties as sourcing for funds to service the loan of the deceased with Industrial Commercial & Development Corporation (ICDC). It is not in dispute that the deceased had such a loan. The copy of register for the security offered for the loan Bungoma township plot no.228 shows that the loan advanced by ICDC was Ksh.48,000/=. The charge was registered on 25/03/1974. The deceased serviced the loan until his death. The Plaintiff took over the balance when auctioneers came knocking on her door. The outstanding balance was Ksh.21,934.05 as at 13th May 1983. The Plaintiff produced receipts of payment between 1983 and 1986 totaling to Ksh.31,050/=. The Defendant produced two receipts totaling to Ksh.19,000/=. Each of the parties paid part of the loan with the Plaintiff paying the bulk of it. Interest rates were accruing over the years and the total amount paid from the date of the Auctioneers notice was over and above the Ksh.21,934/-. The discharge of charge was issued on 29/7/1986 and registered on

8/9/1986. The Defendant was appointed administrator of the estate on 31/01/1986. It is after this date that he paid the balance of the loan leading to the conclusion that the reason for payment was to obtain the discharge of charge in order to sell the plot which was the security. The plot no.228 was sold on 26/6/1986 according to the agreement. Transfer was to be done in 1991. The succession cause was still pending in court with the grant awaiting confirmation. A copy of register shows the Defendant sold the plot as the administrator of the deceased Sila Chemiati.

The evidence and the facts are clear that the Defendant sold the plot before confirmation of grant. The Plaintiff was not aware that there was any succession cause filed in court in respect of the deceased's property. The sale and transfer of plot no.228 was done by the Defendant fraudulently.

He lacked capacity to sell the plot even as an administrator of the estate.

The Plaintiff sold plot no.479 on 6/6/1983. This is the time that ICDC was threatening to sell the security to the loan plot no.228. The auctioneers sale by public auction notice is dated 10/06/1983. This confirms the Plaintiff's evidence that she was under financial pressure to repay the loan and save plot no.228 from being sold. After the death of deceased the Plaintiff serviced the loan only once as shown by one receipt dated 14/10/1982. After the sale of the plot, the Plaintiff resumed payments from June 1983 to January 1986. She did not pay any lumpsum but paid the loan installments. At the time plot no.489 was sold, the succession cause had not been filed. The Plaintiff also lacked capacity to sell the plot. The pressure on her to save the security from the chargor is not a justification to sell the plot. It does not matter that the family elders allowed her to sell the plot. The plot was also sold illegally for lack of capacity. However there is no evidence of fraud on the part of the Plaintiff.

The issue that arises is whether the Plaintiff is entitled to a remedy in law as regards the estate of the deceased. The Plaintiff has proved that she sold the plot with the aim of repaying the balance of the loan left outstanding by the deceased. It was a time when the chargor had advertised the security for sale by public auction. The plot was sold for Ksh.17,000/=. Although the money was not paid in lumpsum, the Plaintiff produced evidence to show that she continued paying the loan resulting to a total of Ksh.31,050/=. It is correct to say that the sale of the plot was meant for the benefit of the estate of the deceased.

The Plaintiff seems to have honestly believed that she was doing the right thing despite the illegality involved. She had no intention to defraud and for this reason I find that the Plaintiff is entitled to a remedy in this case.

As for the illegal transaction for plot no.489 and the fraudulent and unlawful one for plot no.228, I hereby make a few observations. These plots were sold in 1983 and 1986 respectively. The buyers took possession immediately I believe. The purchasers may have developed the plots extensively over the more than twenty five (25) years. The case before me was filed in the year 2005 and is now being determined six (6) years later. The succession cause no.25 of 1985 is still pending because its fate depends on the outcome of this suit. None of the parties herein or the purchasers of the said properties are responsible for the delay of the case. The main cause for the delay may be said to be the clogged judicial system. For that reason, it is my considered opinion that the status quo of the properties as to occupation and ownership be maintained.

I assume there were no valuation reports done on the properties when they were sold in order to determine their value. Even if there were such reports, they were not produced in evidence. The Plaintiff sold plot no.489 for Ksh.17,000/= which money was all consumed by the outstanding loan of the deceased. Over and above that sum, the Plaintiff paid Ksh.13,050/-. The Defendant sold plot no.228 Bungoma for Ksh.115,000/= in 1986. It was a developed commercial plot. It is not disputed that the Plaintiff is the widow and a beneficiary to the estate of the deceased. She is therefore entitled to a share of the proceeds of the sale of the plot. The succession cause will address issue of the value of the plot and the extent of the plaintiff's share.

It is my finding that the Plaintiff is entitled to a remedy in this case. I hereby make the following

declaratory orders:

- a) That the deceased left behind two assets for distribution namely Bungoma township/228 and East Bukusu/South Kanduyi/489;***
- b) That plot no.489 was illegally disposed of by the Plaintiff while plot no.228 was fraudulently and unlawfully disposed of by the Defendant;***
- c) That in the interests of justice the two plots cannot be taken back to form part of the estate of the deceased and be distributed in the pending succession cause;***
- d) That save for the proceeds of sale for plot no.228, there are no other assets for distribution to the heirs of the deceased's estate;***
- e) That the Plaintiff as a beneficiary should benefit from the sale proceeds of plot no.228 or alternatively be compensation for the loss of her beneficial share taking into consideration the inflation rate or interests on her share since 31/6/1986***
- f) That the Defendant instituted the succession cause for his own benefit and with the intention of fraudulently denying the other heirs their rightful inheritance;***
- g) That due to the fraudulent act of the Defendant, he is hereby condemned to pay costs of this suit.***

I hereby so declare and decree.

F. N. MUCHEMI

JUDGE

Judgment dated and delivered on the 13th day of July, 2011 in the presence of Mr. Wanyama for Mr. Ocharo for the Plaintiff and Ms Watima for Onchiri for the Defendant.

F. N. MUCHEMI

JUDGE