



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE NO. 93 OF 2010

MAGDALENE WAKARIMA KARUIRU.....1ST PLAINTIFF
MARY ANN WAMUYU WACHIRA.....2ND PLAINTIFF
MARGARET WANGARI MUCHEMI.....3RD PLAINTIFF

*(Suing for and on behalf of St. Catherine Catholic
Church Women group)*

Versus

DAVID GACHAGI WANG'OMBE.....1ST DEFENDANT
AGNES WANJIRU WANG'OMBE.....2ND DEFENDANT

*(Sued for and on behalf of the Estate of Donatos
Wang'ombe Gachagi - deceased)*

RULING

In the motion dated 28th February 2011, Agnes Wanjiru Wang'ombe the 2nd Defendant/Applicant herein, applied for the originating summons to be dismissed. The plaintiffs filed the replying affidavit of Andrew Kariuki to oppose the motion.

I have considered the grounds set out on the face of the motion plus the facts deponed in the replying affidavit. I have further considered the oral submissions of learned counsels from both sides. Mr. Karweru learned advocate for the 2nd Defendant, pointed out that the land in dispute i.e. L.R. no. Thegenge/Karia/1560 formed part of the estate of Donatos Wang'ombe Gachage, deceased and that it was a subject of transmission vide Nyeri H.C. Succ. Cause no. 67 of 2002. The estate was duly distributed

after protest proceedings were heard and determined. In his judgment delivered on 17th September 2009, Honourable Mr. Justice Makhandia ruled that Agnes Wanjiru Wang'ombe and Hellen Njeri Wang'ombe should share the aforesaid land in equal portions. It would appear that in the year 2003, Hellen Njeri Wang'ombe and David Gachangi Wang'ombe had attempted to sell the aforesaid land. By then the duo were not the administrators of the estate. It is the submission of Mr. Karweru that no rights can flow from an illegal contract and therefore the originating summons can stand. Mr. Kariuki, learned advocate for the 2nd Respondent was of the view that the O.S is competently before this court. It is argued that Order 37 of the Civil Procedure Rules is intended to be used to determine all questions relating to the validity or otherwise of a contract. Mr. Kingori learned advocate for 1st Respondent was of the view the ruling of Justice Makhandia created a trust.

There is no dispute that the land in dispute was distributed vide Nyeri H.C. Succ. Cause no. 67 of 2002. Magdalene Wakarima Karuiru, Mary Ann Wamuyu Wachira and Margaret Wangari Muchemi suing on behalf of St. Catherine Catholic Church Women Group have now filed the amended originating summons dated 17th September 2010 in which they sought to be declared to be entitled to 0.25 acres to be excised from L.R. no. Thegenge/Karia/1560 by way of purchase. They allege that on 27th October 2003 they entered into a sale agreement with David Gachagi Wang'ombe to purchase 0.25 acres at a cost of Kshs. 430,000/=. They paid Kshs 390,000/= leaving a balance of Kshs. 40,000/= payable at the conclusion of the transaction. It is not in dispute that the grant was made to Patrick Ihiga Mugwara and confirmed on 17th September 2009. It is therefore obvious that by the time of executing the sale agreement, the vendors had no legal authority to enter into such an agreement. The sale agreement dated 27th October 2003 is therefore null and void from the beginning. To say the least, the same amounts to intermeddling with the deceased's estate under Section 45 of the Law of Succession Act. The law under Order 37 of the Civil Procedure Rules did not envisage a trust to be created in such circumstances. With respect I agree with the submission of Mr. Karweru, learned advocate for the Applicant that the amended originating summons dated 17th October 2010 is incompetent and lacks legal foundation.

I find the motion dated 28th February 2011 to be well founded. It is allowed as prayed.

Dated and delivered this 14th Day of October 2011.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Kariuki for the Applicant, N/A for C.M. Kingori for the 1st Respondent, 3rd Respondent in person and Mr. Nderi h/b for Karweru for the 2nd Respondent.

J.K. SERGON

JUDGE