



NANCY MUTHONI KIROO.....APPELLANT

*Versus*

RUFUS KANGETHE MANYEKI.....RESPONDENT

*(Being an appeal from the Ruling & Order of the Principal Magistrate's Court at Murang'a in Succession Cause No.162 of 2002 by G.K. Mwaura - PM)*

### **J U D G M E N T**

This is an appeal arising from the ruling and order of the learned Principal Magistrate **G.K. Mwaura** (*as then was*) delivered on 7<sup>th</sup> May, 2004 in Murang'a P.M.SUCC.162 of 2001. **Kiriro Waituika** hereinafter referred to as "*the deceased*" died on 22<sup>nd</sup> December, 1996. At the time of death he was the registered proprietor of land parcel No.Loc.8/Gaturi/438 measuring 1.44 Ha. Hereinafter referred to as "*the suit premises*". The respondent then petitioned for a grant of letters of administration intestate dated 24<sup>th</sup> January, 2001 as a purchaser. He also named the appellant as a wife to the deceased.

Upon the appellant being issued with citation to accept or refuse letters of administration, the appellant appeared on 30<sup>th</sup> October, 2001 and filed her objection, answer to petition and petition by way of cross application for grant on the same date. On 22<sup>nd</sup> February, 2002 the grant was duly issued on letters to the appellant as being the wife of the deceased, she had priority over the

respondent under S.66 of the Law of Succession Act. Subsequent thereto the appellant applied for confirmation of grant. That application was made with a protest from the respondent. On 14<sup>th</sup> March, 2003 directions were given that the cause be heard by way of oral evidence. Before the case was heard as aforesaid, the appellant filed an application dated 15<sup>th</sup> January, 2003 seeking to have the respondent evicted from the suit premises for being a trespasser. On the same date the advocate for the appellant indicated that the appellant was amenable to a negotiated settlement. However on 17<sup>th</sup> February, 2003 the appellant changed instructions from **Gathiga Mwangi & Co. Advocates** to **J.N. Mbutia & Co. Advocates**, and on 14<sup>th</sup> March, 2003 **Mr. Mbutia** informed the court that negotiations had flopped. To counter the appellant's application for eviction the respondent filed an application under certificate of urgency dated 25<sup>th</sup> March, 2003 for maintenance of status quo in respect of his occupation and utilization of a portion of the suit premises. The grounds upon which the said application was premised upon were that the respondent had been in occupation of a portion of 1.0 acres, since 1987 by cultivating and had erected a house on the same. On 4<sup>th</sup> April, 2003 an order was made in terms of the application aforesaid i.e an order for maintenance of the status quo with regard to the suit premises was made. Hearing of the cause then commenced before the learned magistrate on 13<sup>th</sup> October, 2003. The appellant testified

that she was the wife of the deceased. The deceased never sold a portion of the land to the respondent. All that she was aware of was that the deceased had dealings with the respondent's father. She confirmed that the respondent had put up a house on the suit land albeit that the said house was put up as soon after the deceased's death. She also admitted that the deceased had taken some money from the respondent and that she had personally taken Kshs.20,000/= from him to enable her file succession proceedings. She also admitted that the respondent and his father **Joseph Manyeki** had cultivated the suit premises for a long time and that the latter had bought a portion of the suit premises through many installments and that at one time, she saw a document as the payments of the installments. Her further evidence was that the deceased had told her that he had sold the portion to the respondent's father and had showed them the portion. In essence, the appellant was agreeing that the deceased had sold at least a portion of his land either to the respondent or to the respondent's father. Her only contention in court was that she was ready and willing to refund the Kshs.20,000/= she personally received from the respondent and any other money that may have been paid. On being cross-examined, the appellant confirmed that the respondent had been cultivating 1.0 acres of the suit land, the portion he was cultivating had since appreciated in value. She said she was ready to refund whatever market value is assessed of the portion. She further admitted that Ksh.75,000/= had been paid for the 1.0 acres and the respondent

had put a house on the 1.0 acres portion and was even ready to compensate for the said house.

At this juncture the respondent sought and obtained an adjournment to enable him engage a qualified valuer to value for the 1.0 acre from the deceased's estate. On 23<sup>rd</sup> February, 2004 the respondent called a valuer **Mr. Moses Muriithi Njuguna** trading as Zenith Valuer, who testified and produced a valuation report for the 1.0 acres aforesaid. He valued portion at Ksh.291,000/=.

The testimony of the respondent was that in the lifetime of the deceased he had bought 1.0 acres of the suit land for a total consideration of Kshs.55,000/= and in appreciation of the said sale the deceased put the respondent in occupation since 1987. Since the respondent was working at Thika, he would give the money towards the purchase price to his father **Joseph Manyeki** for onward transmission to the deceased. That the father used to be his agent in the sale transaction. After being given the 1.0 acres in 1987, he took vacant possession, build a semi-permanent house, and a hedge was put to mark out the 1.0 acres portion. Unfortunately the deceased died before transferring the portion to the respondent but he left the respondent peacefully in occupation.

The appellant too had received Kshs.20,000/= from him to assist her file succession proceedings. The respondent was hoping that upon the conclusion of the succession cause, the appellant would transfer 1.0 acres to him. This was however never to be. In support of this case, the respondent called his father as a witness who admitted that he was acting as an agent of the respondent, in the transaction and would pass over the purchase money from the respondent to the deceased.

In a reserved ruling delivered on 7<sup>th</sup> May, 2004, the learned Magistrate held thus;

**“After anxiously considering this issue, I find that the deceased had sold the one acre to the protester. The administrator who is aware of this fact, has a duty to complete the sale or transfer of the land.**

**This is one of her duties as administrator as set out in section 83 of the succession Act. Therefore, I cannot confirm the grant in the terms proposed when the interest of Ruffus is not taken into account.**

**To take care of his interest, she has to consider compensating him as she agreed in court or transferring the one acre of land to him as her husband intended.**

**I will not confirm the grant at this stage. Under section 71 (2) (d) of Cap 160, the confirmation is postponed for six (6) months. In the meantime, the administrator is to make arrangements to transfer the one acre or refund the protester its value. The administrator to pay the protester costs of this mater in any event. Orders.”**

In essence the learned trial magistrate invoked S 71(2) (d) of the Law of Succession Act and postponed the confirmation for six months for the appellant to make arrangement for the transfer of 1.0 acres thereof of the suit premises to him.

It is this ruling that provoked this appeal. In 7 point memorandum of appeal the appellant faulted the ruling aforesaid on the following grounds:-

- “1. The learned Principal Magistrate erred in law and fact in finding that the one acre that was claimed by the respondent out of land parcel No.Loc.8/Gaturi/438 was not the free property of the deceased despite the fact that the contract for the purchase of land had failed long before the deceased died for want of the relevant land board consent.**
- 2. The learned Principal Magistrate erred in law and fact in ordering for specific performance or refund of the purchase price while well aware that he had no jurisdiction to do so in a succession cause.**
- 3. The learned Principal Magistrate erred in law in failing to follow the Land Control Act which provides that the consideration on a failed transaction for land registered under chapter 300 laws of Kenya becomes a civil debt and that such a debt may not be claimed in a succession cause but through a plaint or other originating process.**
- 4. The learned Principal Magistrate erred in law and fact in finding that the deceased ever entered into a contract with the respondent in the absence of the sale agreement and in the light of the admission that the person who dealt with the deceased was the respondent’s father.**
- 5. The learned Principal Magistrate misdirected himself in fact and in law in entertaining the claim by the respondent who was a bushy body allegedly on the basis of an agency to which the deceased was not privy.**
- 6. The learned principal magistrate misapplied section 83 of the Law of Succession Act in treating the respondent’s claim as a debt payable from the estate whereas such a debt if any could only be ascertained through a Civil Suit.**
- 7. The learned Principal Magistrate erred in law in postponing the confirmation of the grant for 6 months under section 71(2) (d) of the Succession Act whereas the respondent is neither a dependant nor creditor to the**

## estate.”

When the appeal came up for hearing parties agreed to canvass it by way of written submissions. The submissions were duly filed and exchanged. I have read and considered them alongside cited authorities.

As correctly pointed out by the learned magistrate the only issue for determination was whether the respondent was entitled to the 1.0 acres out of the suit premises. The learned magistrate in essence proceeded to hold that due to the alleged sale by the deceased to the respondent a portion of the suit premises, that portion was no longer the free property of the deceased. He therefore ordered that the confirmation of the grant be stayed pending either the transfer by the appellant of the one acre, or the payment of its value thereof to the respondent. Was the learned magistrate right in making such an order? I do not think so.

Under section 71 (2) (d) a court is entitled to post pone the confirmation of the grant for such period or periods pending issue of further citations or otherwise, as may necessary in all circumstances of the case. If we were to invoke ejusdem generis rule of construction of statutes. I do not think that the confirmation of a grant can be postponed for purposes of effecting a transfer or paying compensation thereof. In any event the order is defeatist and incapable of enforcement. If the entire suit premises is in the name of the deceased, how can a portion thereof be sliced and transferred to the respondent by the appellant in the absence of a confirmed grant to the appellant. Further and as correctly submitted by **Mr. Mbutia**, learned counsel for the appellant the suspension of the confirmation of the grant for 6 months was not legally tenable unless the court envisaged a further hearing in which the respondent was going to be involved. What was to happen if the appellant failed to follow the order of the court to either transfer the one acre or pay Ksh.291,000/=. The confirmation of grant to my understanding can only be postponed pending issuance of further citations or anything else along those lines. It cannot be postponed as it happened here on the basis of the respondent's alleged interest in the estate.

It is the case of the respondent that the deceased having received the full purchase price for the acre from the respondent and having thereafter put him into possession, then the said portion automatically ceased to be the deceased's free property within the meaning of section 3(1) of the Law of Succession Act. What is free property? It is defined in the Law of Succession Act in relation to a deceased person “.....as the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death....” At the time that deceased passed on the suit premises were still registered in his name. He was thus legally competent to deal with the same as he pleased. Yes he may have sold a portion of the suit premises to the respondent. Yes, he may even have put him into possession. However for as long as the suit premises were still registered in his name, he could still have disposed it of to another party, the sale to and possession by the respondent thereof notwithstanding. After all how many times have we seen vendors selling the same suit premises to several persons. It is a common occurrence. Accordingly the respondent cannot be heard to say that the deceased had in his lifetime sold 1.0 acres from his free property. He had received a valuable consideration from the respondent and in acknowledgement thereof had put the respondent into vacant possession. However that does not mean that the deceased could not in his lifetime have freely and legally disposed of the same. In my view for as

long as the suit premises or that portion remained in the name of the deceased, it was his free property and could have freely disposed it of in his lifetime whether he had sold it to the respondent and in fact given him possession thereof did not fetter that right. Cases of broken promises are abound.

Further, I note that the alleged sale was not the subject of a consent from the relevant land control board. A sale that had been blessed with land control board consent could perhaps interfere with the proprietor's power since the purchaser could file a suit for specific performance. According to the evidence on record, the deceased passed on 1996. During his lifetime the deceased sold the respondent a portion of the suit premises over a long period of time. Infact according to the respondent they began the sale transaction in 1987. By the time the deceased passed on they had not appeared before the relevant land control board for the consent. This was agricultural land. That being the case, a consent for transfer let alone to subdivide is mandatory. The six months period within which the consent to such transaction should be sought and obtained had long expired. The respondent could not therefore, have legally have compelled the deceased to transfer the suit premises to him for want of consent. If the respondent had no capacity to seek for specific performance in a civil suit that capacity cannot even be contemplated in a succession cause. In making the order aforesaid, the learned magistrate did not address his mind to this aspect of the matter. It is evident that in so doing he was actually sanctioning an illegality. Sections 6 and 7 of the Land Control Act makes the agreement void and money paid in consideration of a land transaction rendered void for want of consent, a civil debt which can be recovered by way of suit. In the case of **Karuri V Gaturu (1981) KLR 247** it was held that **"...The provisions of Land Control Board Act (sic) are of an imperative nature, there is no room for the application of any doctrine of equity to soften its harshness..."** In the circumstances of this case therefore, it matters note that the respondent is in possession and has infact extensively developed the portion. His remedy lies in recovering his outlay so far as a civil debt.

Finally on the same issue of consent, the court of appeal in the case of **Wamukota V Donati (1987) KLR 280** stated;

**"...Although the respondent had purchased and paid for the land and was correctly in occupation, the contract of sale was not in writing as required by the Law of Contract Act (cap 23) section 3 and neither was it consented to by the land control board as per the Land Control Act (Cap 302).....An agreement to be a party to a controlled transaction becomes void for all purposes at the expiration of 3 months after the making of the agreement if the application for consent of the land control board has not been made within that time. In this case no consent was applied for and as a result the agreement becomes void at the expiration of 3 months. Even though the land control act was later amended within which to apply for the consent, and established the power given to the High Court to extend the period, those provisions did not apply in 1976.....The sale of agricultural land is void for all purposes, unless the land control board has given its consent to the sale.....Under the Land Control Act (cap 302) section 22, any person who remains in possession of property in furtherance of avoided transaction is in breach of the Act and is subject o a penalty. The respondent has no legal or equitable claim, and the only redness available is to recover the money or valuable consideration paid in the course of the void transaction as per the Land Control Act...."**

The same situation obtains here. However the record shows that the parties herein had filed a dispute at Kahuro Land Disputes Tribunal over the same

subject matter. The dispute went all the way to the Provincial Land Disputes Appeals Committee, Central Province. The two tribunals it would appear awarded the respondent 1.0 acre. The award was adopted as a judgment of the court in the senior Principal Magistrate's Court at Murang'a in LDT No.62 of 2000. That was way back on 8<sup>th</sup> December, 2000. That order has never been reviewed and or set aside. That be in the case, there is nothing to stop the respondent from executing the said order and or decree against the appellant. There lies the respondent's remedy. It was therefore not necessary for the learned magistrate to postpone the confirmation of grant.

The upshot of the foregoing is that I find the appeal merited. Accordingly it is allowed. The order of the learned magistrate dated 7<sup>th</sup> May, 2004 is set aside. In substitution I make the order that the respondent's protest be and is hereby dismissed and the application for confirmation of the grant be and is hereby allowed with costs to the appellant in this appeal as well as in the court below.

*Dated at Nyeri this 22<sup>nd</sup> day of March, 2010.*

**M.S.A. MAKHANDIA**  
**JUDGE**

*Delivered on 22nd day of March, 2010,*

*By:*

**J.K. SERGON**  
**JUDGE**