Marete v Nyaguthi (Suing as the administratix of the Estate of George Wamai Hinga- Deceased) & another (Environment and Land Appeal 23 of 2019) [2022] KEELC 12734 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12734 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT AND LAND APPEAL 23 OF 2019

JO OLOLA, J

SEPTEMBER 28, 2022

BETWEEN

ISAIAH MURIUNGI MARETE ..... APPELLANT

AND

LYDIA NYAGUTHI (SUING AS THE ADMINISTRATIX OF THE ESTATE OF GEORGE WAMAI HINGA- DECEASED) ..... 1ST RESPONDENT

SAMUEL IRUNGU WAMAE ..... 2ND RESPONDENT

(Appeal arising from the Judgment of the Honourable R. Kefa, Senior Resident Magistrate delivered in Nyeri MCL & E Case No. 104 of 2018 on 24th June, 2019)

JUDGMENT

1. This is an appeal arising from the judgment of the honourable R Kefa, Senior Resident Magistrate delivered in Nyeri MCL & E Case No 104 of 2018 on June 24, 2019. The said suit had prior to its transfer to the subordinate court been instituted at the High Court at Nyeri as Nyeri HCCC No 104 of 2009.

2. The 1st respondent herein Lydia Nyaguthii Wamae suing as the administratix of the estate of Geporge Wamai Hinga (deceased) had *vide* a plaint dated June 9, 2009 sought orders against the appellant herein – Isaiah Muringi Marete as follows:

   (i) An order for eviction and/or permanent injunction against the defendant, his servant, agent and/or any other person acting for or on his behalf from interfering with the plaintiff's quiet possession of the suit premises;

   (ii) Costs of this suit and interests at court rate; and

(iii) Any other or further relief this honourable court may deem fit to grant.

3. By an amended defence and counterclaim dated December 16, 2010, the appellant as the defendant sought orders against the respondent herein together with one Samuel Irungu Wamae as the 2nd defendant (the 2nd respondent herein) in the counterclaim for:

   (a) An order for the specific performance of the sale agreement and the transfer of the portion of 5 acres from the suit land LR 6324/11 and in the alternative, a declaration that the defendant (plaintiff in the counterclaim) is entitled to a refund of Kshs 400,000/- for failed consideration, with interest at commercial rates from September 26, 2008;

   (b) Liquidated damages of Kshs 1,989,750/-

   (c) Interest on (b) at court rated from the date of filing of this counterclaim;

   (d) Mesne profits estimated at 1 acre @ 60 bags of potatoes @ Kshs 3,500/- for 5 acres, total being Kshs 1,050,000/- per season, from December 16, 2009;

   (e) Costs of the plaintiffs suit.

   (f) Costs of the counterclaim; and

   (g) Any other relief that this honourable court deems fit to give.

4. Having heard the parties and in the judgment rendered on June 24, 2019 aforesaid, the learned trial magistrate allowed the respondent's suit and dismissed the appellant's counterclaim. Aggrieved by the said determination, the appellant lodged a memorandum of appeal herein dated July 22, 2019 seeking to have the decision overturned on the grounds:

   1. That the learned trial magistrate erred in fact and in law in making a finding that the sale agreement between the appellant and the 2nd respondent was null and void without taking into account factors relevant to the issues arising in the pleadings and evidence adduced by the parties;

   2. That the learned trial magistrate erred in fact and in law in dismissing the appellant's counterclaim entirely and especially as against the 2nd respondent who did not defend himself against the counterclaim;

   3. That the learned trial magistrate erred in fact and in law in failing to take into account material contradictions in the evidence by the 1st respondent, which would have warranted, in the very least, an appreciation of the appellant's counterclaim;

   4. That the learned trial magistrate erred in law in failing to provide reasons for the dismissal of the appellant's counterclaim;

   5. That the learned magistrate erred in law and in fact in failing to take into account the appellant's submissions, the issues raised therein and the binding authorities cited in support thereto;

   6. That the learned trial magistrate erred in fact and in law in finding and making a determination that the 1st respondent had discharged her burden of proof on a balance of probabilities; and

   7. That the learned trial magistrate erred in law in totally failing to take into account the basic requirements of procedural law under order 21 rule 4 and 5 read together with order 15 of the *Civil Procedure Rules, 2010* and eventually delivering a judgment that left apparent issues raised by the parties undetermined.

5. As it were a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and to consider the evidence and draw its own conclusions while bearing in mind that it did not see the witnesses testifying and hence give due allowance therefore. Accordingly, I have carefully perused and considered the record of appeal as filed herein. I have similarly perused and considered the rival submissions and authorities placed before me by the learned advocates representing the parties herein.

6. From the material placed before me, the dispute herein relates to a portion of a parcel of land known as LR No 6324/11 situated in Gakawa location, Nanyuki. The said property was registered in the name of one George Wamai Hinga who passed away sometime in August, 1986. Shortly after he passed away, the late George Wamai Hinga's properties were placed under the administration of the public trustee in the same year 1986.

7. Subsequently, on September 25, 2015, the grant of representation confirmed to Lydia Nyaguthii Wamai (the 1st respondent herein) one Joseph Wangi Wamai and Ruth Wanjiru Mungai. By dint of that certificate of confirmation of grant, the trio were registered to hold the suit property in their names in their personal capacities and as trustees for the other beneficiaries of the estate of the late George Wamai Hinga who included Samuel Irungu Wamai named herein as the 2nd respondent.

8. Apparently, whilst the property remained under the administration of the public trustee, the 2nd respondent and the appellant herein did sometime in September, 2008 enter into an "agreement" wherein the 2nd respondent agreed to sell a portion of the suit land measuring some five (5) acres to the appellant. It was not disputed that pursuant to that "agreement," the appellant did on September 26, 2008 pay unto the 2nd respondent the sum of Kshs 400,000/- as the first instalment of the purchase price which they had agreed on at Kshs 1,400,000/-.

9. It would appear that on the basis of that arrangement, the appellant entered the suit land and started carrying on farming activities thereon. When the 1st respondent who is the 2nd respondent's mother protested, the appellant explained that he had bought the land from her son.

10. By a letter dated March 3, 2009, (page 42 of the record) the 1st respondent sought the intervention of the Gakawa location area chief. Apparently the chief was unable to resolve the dispute and the matter was escalated to the police following a criminal complaint lodged by the appellant against the 2nd respondent. That much was clear from a copy of a bail bond issued to the 2nd respondent on April 8, 2009 requiring him to appear before a court at Nanyuki on April 14, 2009 to answer to a charge of obtaining money by false pretence (page 44 of the record).

11. That case did not however proceed. Instead, on April 15, 2009, the 2nd respondent and the appellant entered into a formal sale agreement wherein the parties put down their intentions in writing. The agreement, witnessed by the 1st respondent provided at paragraph 2 thereof as follows:

> " whereas the vendor is willing to sell to the purchaser and whereas the purchaser is willing to buy land LR 6324/11 measuring five acres which the title is registered under George Wamae Hinga – deceased and the vendor Samuel Irungu Wamae being his son, heir and beneficiary of the estate:
>
> 1. The purchase price is Kenya shillings one million four hundred thousand (Kshs 1,400,000/-)

(a) Kshs 400,000/- was paid in cash on September 26, 2008 being the first instalment of the consideration safe receipt acknowledged by the vendor.

(b) Kshs 300,000/- shall be paid on or before March 31, 2010.

(c) Kshs 300,000/- shall be paid on or before March 31, 2010.

(d) Kshs 400,000/- shall be paid upon transfer of the said property in the purchaser's name."

12. Regarding how the transfer would be done, clause 5 of the agreement provided as follows:

> " 5. That registered owner of the property is George Wamae Hinga (deceased) and the vendor shall present the name of the purchaser Isaiah Muriungi Marete to the land control board within a period of 30 days upon signing this agreement to be part of the beneficiaries."

13. Arising from the foregoing, it was clear from the onset that both the appellant and the 2nd respondent were aware that they were dealing with the property of a deceased person and that the purported vendor of the land had at the time not obtained any letters of administration to deal therewith. Such dealing was clearly prohibited under section 45 of the *Law of Succession Act*(cap 160) which provides thus:

(i) Except so far as expressly authorised by this Act, or by any other written law or by grant of representation under this Act, no person shall, for any purpose, take possession or dispose of or otherwise intermeddle with, any free property of a deceased person;

(ii) Any person who contravenes the provisions of this section shall-

(a) Be guilty of an offence and liable to a fine not exceeding one year or both such fine and imprisonment; and

(b) Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

14. In her brief analysis of the issues in the judgment delivered on June 29, 2019, the learned trial magistrate states at page 3 thereof on the validation of the sale agreement as follows:

> " The plaintiff produced a certificate of confirmation of grant to the effect that the suit property was sub-divided amongst several beneficiaries by the court on September 25, 2015. The sale agreement that was produced by the defendant was entered into in 2008 way before the grant was confirmed. The plaintiff had rightly referred to section 45 of the *Law of Succession Act* which provide for the offence of intermeddling with the free property of a deceased person. I therefore find that Samuel Irungu had no capacity to enter into a land transaction with the defendant. I therefore find the sale agreement was null and void by virtue of section 45 of the *Law of Succession Act* to the effect that no person shall, for any purpose, take possession or dispose of or otherwise intermeddle with, any free property of a deceased person."

15. The above analysis was clearly informed by the proper position in law and I am unable to fault the learned trial magistrate for arriving at that conclusion. It was indeed clear to me that the sale agreement entered into between the appellant and the 2nd respondent as witnessed by the 1st respondent was

prompted by the threats a week earlier to have the 2nd respondent prosecuted for obtaining money from the appellant by false pretence.

16. Even where one were to find that the agreement was entered into voluntarily, neither the 2nd nor the 1st respondent had any authority to carry out any transaction in regard to the land as was done herein or at all. It follows that no claim could be made against the estate as the transactions involved were illegal and criminal in nature.

17. That being the case, the claim for mesne profits by the appellants was clearly misplaced. That claim was based on certain damage assessment reports from the area agricultural officer who testified as DW2 at the trial. The basis of those reports was the claim that the land on which the crops were grown belonged to the appellant. From the above analysis, it was clear that that was not the case. The appellant had neither paid the full purchase price for the land nor did it belong to him. To be allowed to claim mesne profits in the circumstances would be tantamount to this court regularizing his acts of intermeddling in the estate of the deceased.

18. Given however that it was not disputed that the appellant had paid the sum of Kshs 400,000/- to the 2nd respondent for the failed agreement, I am persuaded that he is entitled to a refund thereof.

19. Accordingly the appeal succeeds only to that extent and I hereby make order as follows:

    (a) A declaration is hereby made that the 2nd respondent does refund the sum of Kshs 400,000/- to the appellant.

    (b) The said sum shall attract interest at court rates from the date of filing the counterclaim until payment in full.

    (c) In the circumstances herein I make no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28TH DAY OF SEPTEMBER, 2022.

In the presence of:

Ms Wanjira Murimi for the Appellants

Ms Maina for the 1st Respondent

No appearance for the 2nd Respondent

Court assistant - Kendi

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J. O. OLOLA

JUDGE