REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT 114 OF 1998

SEBASTIAN NJAGE MARIA.....PLAINTIFF

VERSUS

MRS. NAU MUNGANIA MUNYINYI

LEGAL REPRESENTATIVE OF THE DECEASED ESTATE.....DEFENDANT

JUDGMENT

This suit was instituted in 1998 by Sabastian Njagi Maria (the plaintiff) against Mrs. Nau Mungania Munyinyi as the legal representative of the estate of the deceased, Mungania Munyinyi (the deceased).

The plaint was subsequently amended. In it, the plaintiff seeks, in the main, an order that the defendant does transfer back to him parcel of land No. MUTHAMBI/EGIRA/298 measuring 9.00 acres. His case is fairly simple.

He avers that on 17th July 1978 he agreed to transfer to the defendant's husband for valuable consideration of Kshs. 10,000/= one of his two parcels of land, namely MUTHAMBI/ERIGA/267 measuring 4 acres. That by mistake he transferred to the defendant's husband the title for MUTHAMBI/ERIGA/298 (the suit land) measuring 9 acres.

In 1991 while in the process of subdividing MUTHAMBI/ERIGA/298 for his sons he discovered that he had committed a mistake. That he had the title for MUTHAMBI/ERIGA/267 and that instead he had transferred the suit land to the defendant's husband. He approached the defendant's family as the defendant was deceased and with the defendant's elder son, Njeru, they approached the Land Control Board and the Board consented to the exchange to regulize the transaction and correct the mistake. At the stage of executing the transfer documents, the defendant's family declined to perform their part. The plaintiff filed HCCC No. 404/1992 which suit was dismissed in 1997 for want of prosecution. Subsequently, in 1998 he filed the present suit.

The defendant has denied that there was a mistake. It is the defendant's case that the plaintiff had intended and did infact sell the suit land to the defendant's husband. The purchaser, Mungania Munyinyi, the defendant's husband passed away before this suit was filed. His widow, the defendant, was sued as his legal representative.

The plaintiff also died but after testifying in this suit and has been substituted by his son, Elias

Kaburu Wanjagi. The plaintiff testified that after selling No. 267 to the defendant's husband he showed him the actual parcel and he moved with his family and livestock and settled down.

When he finally decided to subdivide the suit land for his sons in 1991 he discovered that he had transferred it to the defendant's husband. As the defendant's husband had died at this time, the plaintiff approached the defendant and explained the mix-up to her. On her part the defendant asked her elder son, Njeru, to accompany the plaintiff to the Land Control Board with a view to rectifying the mistake by exchanging the titles to the two parcels of land. The plaintiff went further to explain that once consent was granted, the defendant and her family declined to execute documents to effect the exchange. That is when the plaintiff filed CMCC No. 404/1992, which was subsequently dismissed in 1997. Following that dismissal, the plaintiff sought in HCCC No. 66 of 1998 and obtained leave to bring the instant suit.

The second witness for the plaintiff, Erastus Mwiandi, A.K.A. Kaibi Ntwiga who described himself as the sub-area, another title for the village elder, testified of how the defendant's husband had asked him look for land for him to purchase. That he got parcel of land No. 267 measuring four (4) acres and introduced the seller (plaintiff) and the defendant's husband who entered into an agreement for the sale which he (the witness) witnessed. He also took the defendant's husband to the land that was being sold No. 267. That the defendant's husband, after selling the piece of land where they were living moved to No. 267 with his two wives, children and livestock.

When the defendant's husband died, he was buried in No. 267. It is after his death that the defendant, on realizing that the land which had been transferred was the suit land and due to heavy flooding of No. 267, moved with her family to the suit land. The witness confirmed that currently No. 267 is vacant.

The plaintiff's third witness, the legal representative of the plaintiff's estate, who is also the plaintiff's son, Elias Kaburu Njagi (Njagi), testified of how the mistake was discovered when the plaintiff attempted to sub-divide the suit land for purposes of distributing it to his family. It is when the mistake was disclosed to the defendant that she became hostile after initially cooperating. It is at that stage that she moved to the suit land. It was his evidence that the defendant's husband and his family lived on No. 267 between 1978 and 1991. That the defendant's husband was buried in No. 267.

The fifth witness (Nthambu Mburugu) testimony was to the effect that the plaintiff had two parcels of land; one, measuring 4 acres, at Kairanga (also known as Eriga) which he (the plaintiff) sold to the defendant's husband and another situated at Nkuruka. That the defendant's husband, after purchasing the land at Kairinga, moved and settled there with his family. He also reiterated the evidence of Njagi that the tea bushes on the suit land were planted in 1986 before the defendant occupied it.

Turning now to the defendant's case, it was her testimony that her husband bought the suit land (No. 298). She was however unable to state when this happened. She was emphatic that she does not know No. 267. That they sold their land at Karaa and with the proceed therefrom purchased the suit land. She confirmed that her husband was buried on the land at Kairanga – No. 267. That she relocated to the suit land after the death of her husband. This was after she discovered, through her son, Njeru that No. 267 was not registered in her husband's name. It was her evidence that her husband had been misled into settling on No. 267. She however, did not know the respective sizes (acreage) of the two parcels of land in question.

The defendant's second witness, Mugo Karangu (Mugo) was employed as a driver of a bus called Chogoria Rider which belonged to a person by the name Njeru (not the son of the defendant). Mugo testified that he had been sent by the company manager to collect the defendant's husband and the plaintiff and to take them to Nkuruka where the plaintiff was going to show the defendant's husband the land he (the plaintiff) was selling. Nkuruka is the area the

suit land is situated.

It is clear from the evidence of Mugo that the bus company, Chogoria Rider was buying the defendant's husband's land at Karaa the proceeds from which he was to utilize to purchase the suit land. He further stated that after viewing the suit land they returned to the bus company offices and one week later he took the defendant's husband and the plaintiff to the lands office where the plaintiff transferred the suit land to the defendant's husband.

Edward Nkonge Mungania – DW3 (Nkonge) a son of the defendant, confirmed the testimony of Mugo that his father sold the land at Karaa to Chogoria Rider and was informed by the defendant that they had purchased land No. 267 at Iriga and they relocated and settled there. That due to flooding on No. 267, in which they lost livestock, they moved to the suit land, after they discovered that No. 267 was not registered in his father's name.

The foregoing constitutes the evidence presented by both sides. From that evidence it is not in dispute that the plaintiff had two parcels of land at Nkuruka, No. 298 (the suit land), measuring nine (9) acres and at Kairanga (Iriga) No. 267, measuring four acres. It is also common ground that the plaintiff intended to sell to the defendant's husband and indeed did sell one of the two parcels of land. The only dispute is whether the plaintiff sold to the defendant's husband No. 298 (the suit land) at Nkuruka or No. 267 at Kairanga (Iriga). But before I consider that issue, learned counsel for the defendant has raised four matters of law which I intend to dispose of at this stage.

The first issue is that this suit is *res judicata* Meru CMCC No. 404 of 1992. The plaintiff filed RMCC No. 404 of 1992 against the defendant after the defendant declined to surrender the suit land to him. It is on record that that suit was dismissed on 1st September 1997 for want of prosecution.

The doctrine of *res judicata* is legislated in section 7 of the Civil Procedure Act, which provides that:-

"***7. No court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

Although there is no dispute that the parties and the subject matter in RMCC No. 404 of 1992 were the same as those in the present suit, it is also not in dispute that the suit was never heard and determined on merit as it was dismissed for want of prosecution. I find, for that reason, that section 7 of the Civil Procedure Act is not applicable.

The second matter is that this suit was statutory barred by limitation of time and that the leave obtained by the plaintiff to bring it was irregular and of no effect as the order was made *exparte* contrary to the law and the same can only be challenged at the trial. In support of the last limb of this submission, counsel cited the case of **Mary Wambui Kabugu V. K.B.S. Ltd.** Nbi Civil Appeal No. 195 of 1995.

In response counsel for the plaintiff submitted that leave sought and granted was superfluous as the plaintiff was still within time. That the mistake was discovered seven (7) years before the suit was filed. That since the contract in question involved land, a suit could be brought within 12 years. He referred to the case of **Edward Mugambi V. Jason Mathiu,** Civil Appeal No. 286 of 2002.

Prior to 1991 when the defendant occupied the suit land it was occupied, according to the

plaintiff's testimony, by the plaintiff. Although the agreement was entered into in 1978 it did not relate to the suit land but to No. 267, as I will shortly demonstrate. The cause of action in respect of the suit land could only have arisen when the defendant took possession in 1991.

The plaintiff filed the first suit RMCC No. 404 of 1992 to recover the suit land. That suit was dismissed in 1997 and the present suit filed in 1998. Clearly from 1991 to 1998 twelve (12) years provided for in section 7 of the Limitation of Actions Act had not lapsed. Furthermore by dint of section 26 of the Limitation of Actions Act in an action where the relief sought arises from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the mistake. The evidence of the plaintiff that he discovered the mistake in 1991 has not been challenged. The circumstances of the discovery are realistic in that he had no reason to deal with that land prior to 1991 when he intended to sub divide it for distribution.

Thirdly, the suit land was registered in the name of the defendant's husband on 2nd March 1982. The first suit RMCC No. 404 of 1992 was filed within 10 years.

I turn to address the third point which is to the effect that the defendant was wrongly sued as a legal representative without seeking, in the first instance, her appointment as a legal representative of her deceased husband. Exhibit 6 produced by the plaintiff shows that in the High Court Misc. Application No. 66 of 1998, Etyang, J. made the following orders among two others:-

"***IT IS HEREBY ORDERED***

1. An order is hereby issued appointing Mrs. NAU MUNGANIA MUNYINYI to be legal representative of Mungania Munyinyi estate (sic) for purposes of filing suit to claim Mwimbi/Iriga/298 under the Law Reform Act."

Legal representative is defined in section 2 of the Civil Procedure Act as follows:-

"***Legal representative means a person who in law represents the estate of deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."***

The term used in the Law of Succession Act is "***personal representative"*** which is defined to mean '***executor'*** or '***administrator'*** of a deceased person. Both definitions mean the same thing. The Law of Succession Act provides an elaborate procedure for appointment of a personal representative (administrator). Whether that procedure was followed or not cannot be for this court to determine. The order permitting the defendant to be sued on behalf of her husband's estate was issued by a judge of concurrent jurisdiction. I therefore have no powers to question the order. Suffice to state that only a legal or personal representative to whom a grant of representation has been issued can be sued or sue in respect of a deceased person's estate.

The final point raised by learned counsel for the defendant was that the suit against the defendant abated following the death of the original plaintiff on 21st March 2002. That he was not substituted until 12th April 2005 – over two (2) years. Opposing this argument, counsel for the plaintiff submitted that it is the date of filing of application for substitution that is relevant and not the date the actual substitution is allowed.

With respect, I cannot agree more with that submission. Order 23 Rule 3(2) of the Civil Procedure Rules is clear that:-

"***2. Where within one year no application is made under subrule (1) the suit shall abate so far as the deceased plaintiff is concerned, and on the application of the defendant, the court may award him the costs which he may have incurred in defending the suit to be***

recovered from the estate of the deceased plaintiff." (emphasis added).

In computing the one year following the death of the plaintiff, it is the date of filing the application for substitution and not the date of substitution that is relevant. On the evidence, the original plaintiff died on 21st March 2002 and seven months afterwards on 22nd October 2002, the application for substitution was brought. That disposes of the four points raised by counsel for the defendant.

As I have already observed, the sole question in this dispute is whether the plaintiff intended to dispose of the suit land No. 298 or No. 267. This dispute arose after the death of the defendant's husband who is alleged to have been a party to an agreement for the sale of a parcel of land by the plaintiff.

It is that agreement that is at the core of this dispute. It was written in the Kimeru language. Its translation has been challenged by counsel for the defendant who has argued that the qualification of the witness (PW4 – translator) was not provided and that the translated version has been contradicted by PW2 who stated that he was the only witness to the agreement yet the same has five witnesses.

There are those witnesses who testified to the fact that the agreement was executed by both parties to it. There are, on the other side, those who confirmed that there were documents which were signed but did not know the contents. The plaintiff testified before his death and was categorical that he drafted the agreement which he and the defendant's husband signed in the presence of witnesses. If the defendant refutes those facts then by dint of section 112 of the Evidence Act she was required to disprove them. It is not disputed that the signature on the document was that of the plaintiff's deceased husband.

The language of this court is English as provided for in section 86 of the Civil Procedure Act. It follows, therefore, that any document to be used in proceedings in this court which is not in English language must be translated to that language.

I find nothing objectionable in the translation in that the translator was an officer of this court. He gave a certificate that he was conversant in the Kimeru language and he was called to testify and was cross-examined. From that translation, it is apparent to me that the document was signed by the two parties and witnesses on 17th July 1978 before the amendment to section 3(3) of the Law of Contract Act. Before the amendment it required that a contract for the disposition of land be in the form of a written memorandum or note must be in writing and signed by the defendant. It read:-

"***3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:***

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –

(i) has in part performance of the contract taken possession of the property or any part thereof: or

(ii) ***being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."***

The proviso to that section states that a suit will not be defeated by reason only of the absence of writing as long as the intending purchaser who has performed or is willing to perform his part

of the contract has in part performance of the contract taken possession of the property or part thereof, or being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.

The agreement is clear that the property which was the subject of sale was described as MUTHAMBI/IRIGA-KAIRANGA – measuring four (4) acres. There is evidence that parcel No. 267 is located at Kairanga (Iriga). Secondly, there is also evidence that the plaintiff had two parcels, namely the suit land No. 267 and No. 298. The former measured 9 acres while the latter was 4 acres.

I am persuaded that the land the plaintiff was selling to the defendant's husband was sufficiently described and I come to the conclusion on this point that that parcel of land was No. 267 and not to the suit land. Upon execution of the agreement, the defendant's husband moved with his entire family and personal belongings and settled on No. 267.

There is evidence that they lived on that land from 1978 to 1991. That is a period of thirteen (13) years. The defendant's husband died and was buried on parcel No. 267. Indeed Nkonge – the defendant's son confirmed that the defendant informed him that they were relocating to parcel No. 267. Nkonge was at the time only fourteen (14) years.

The plaintiff contended that in 1991 when in the process of distributing the suit land to his sons he discovered that instead of transferring parcel No. 267, he infact had transferred the suit land to the defendant's husband. Initially, the defendant's family cooperated and the Land Control Board approved the intended exchange of the two parcels. It would appear that the defendant changed her mind and because parcel No. 267 had been flooded she took advantage and relocated to the suit land.

It is interesting to note that the defendant in her evidence in chief was categorical that she did not know about parcel No. 267. That the only parcel her husband purchased and which she developed was the suit land. However, in cross-examination, she admitted that her husband was buried in parcel No. 267 which they vacated and moved to the suit land after the death of her husband. That her son, Njeru, had explained to her that all along they have been occupying a wrong parcel of land. The defendant's evidence was recorded by Sitati, J. who noted that the witness was difficult – (refusing to answer questions).

From the evidence that the defendant's husband settled on parcel No. 267 and lived therefore for a long time the evidence of Mugo that the defendant's husband was shown the suit land cannot be credible. It is curious that Mugo could not remember when he took the defendant's husband and the plaintiff to the suit land yet he recalls the number of the suit land which he only heard being mentioned in 1978.

From all this, I come to the conclusion that the defendant's husband being the purchaser, having been shown parcel No. 267 by the plaintiff and upon making full payment of the purchase price, relocated with his family and livestock to parcel No. 267 where he remained until his death. He was buried there and his family continued to live there. He did not protest as parcel No. 267 and the suit land were clearly distinct. They were in different localities and measured different acreage. It is those who were not involved in the sale transaction that are, on discovery of the mistake and realizing that the suit land is bigger while parcel No. 267 is susceptible to floods, fuelling this dispute.

The main relief sought by the plaintiff is:-

"***(a) an order that the defendant transfer back the plaintiff (sic) land Ref. MUTHAMBI/ERIGA/298 measuring 9.00 acres."***

Learned counsel for the defendant asked what would happen to L.R. No.

MUTHAMBI/ERIGA/267 if the suit land was transferred to the plaintiff. It was his view that the correct prayer would have been to seek rectification of the register under section 143 of the Registered Land Act. He added, however, that under sub section (2) it was incumbent upon the plaintiff to demonstrate that the defendant's husband was aware of the mistake or caused it or substantially contributed to it. Responding counsel for the plaintiff simply asked the court to order for rectification of the register.

As I have already found, there was no mistake in the contract *per se.* The parties identified and agreed on the subject matter. There was, therefore, correspondence between the offer and the acceptance. The mistake only occurred at the point of transfer. It was a mistake on the part of the plaintiff who believed he was transferring parcel No. 267 but was infact transferring the suit land.

That kind of mistake is referred to as unilateral mistake. According to R. W. Hodgin, the author of Law of Contract in East Africa at page 140, a unilateral mistake is usually not sufficient to affect the contract, except in two instances, namely when the mistake relates to the identity of the contracting party and where the mistake relates to the document signed. In both situations the contract would be void. That is how a mistake is treated at common law.

Hodgin found this treatment of mistake at common law rigid and observed that to ameliorate this, equity has introduced certain remedies. Relevant to this case is rectification. This being a court of equity, the remedy for the plaintiff is rectification. The defendant's husband held a title document for the suit land without knowing up to the time of his death that the title he held was not for the land he occupied. He was clearly also mistaken of the fact of the suit land.

For all the foregoing reasons, it is ordered that the register in respect of parcel of land No. MUTHAMBI/ERIGA/298 be rectified by cancellation of the name of Mungania Munyinyi and the replacement thereof with the name of Elias Kabuu Wanjagi, the administrator of the estate of the plaintiff.

It is further ordered that the register in respect of parcel of land No. MUTHAMBI/ERIGA/267 be rectified by cancellation of the presently registered owner and substituting it with the name of the defendant herein.

I award costs to the plaintiff.

Dated and delivered at Meru this 11th day of June 2009.

W. OUKO

JUDGE