



REPUBLIC OF KENYA



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Nouvetti Realtor Limited v Onduso (Suing On Her Own Behalf And On Behalf Of The Estate Of The Late George Kisanda Onchiri) (Environment and Land Appeal 3 of 2023) [2024] KEELC 3504 (KLR) (8 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3504 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 3 OF 2023
CA OCHIENG, J
APRIL 8, 2024

BETWEEN

NOUVETTI REALTOR LIMITED APPELLANT

AND

JACKLINE NYAMBERI ONDUSO RESPONDENT

SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF THE LATE GEORGE KISANDA ONCHIRI

(Being an Appeal from the Judgement of the Chief Magistrate's Court at Machakos by the Hon. E. H. Keago CM, delivered on 27th of May, 2021 in Civil Suit No. 156 of 2012)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the 21st June, 2021, the Appellant appealed against the whole judgement delivered by Hon. E. H. Keago (CM). The genesis of this appeal is the Judgment of the Chief Magistrate's Court at Machakos in Civil Suit No. 156 of 2012 by the Hon. E. H. Keago CM, delivered on 27th of May, 2021, where the trial court proceeded to enter judgement in favour of the Plaintiff (Respondent) as against the Defendant (Appellant).
2. The Appellant being dissatisfied with the whole of the said judgement filed a Memorandum of Appeal dated the 21st June, 2021 which contains the following grounds: -
 1. The learned trial Magistrate erred in both law and in fact by finding there was a contract between the deceased Plaintiff and the Defendant herein.
 2. The Learned trial Magistrate erred in law and in fact by finding that there was a valid MOU between the Plaintiff and the Defendant thereby arriving at the impugned Judgement.



3. The Learned trial Magistrate erred in both law and fact by failing to find that the alleged MOU was tainted with numerous alterations, variations in dates, obliterations and therefore could not constitute a valid contract.
 4. The Learned trial Magistrate erred in law and in fact by finding that there was a promise by the Defendant to give the Plaintiff plot No. 28 and changed to Plot No. 2 yet the Defendant was not a party to the alleged contract.
 5. The Learned Trial Magistrate erred in both law and fact by failing to find that there was no privity of contract between the Plaintiff and the Defendant thereby arriving at a wrong decision.
 6. The Learned Trial Magistrate erred in both law and fact by failing to find that Nouveti Realtors and Nouveti Realtors Limited are two distinct legal entities from the other thereby arriving at a wrong decision.
 7. The Learned Trial Magistrate erred in law and fact by failing to appreciate the principles of company law and the difference between a limited liability company and a business name thereby arriving at a wrong conclusion.
 8. The Learned Trial Magistrate erred in law and fact by failing to find that the Defendant had no proprietary interest in the suit property and therefore had no right to pass.
 9. The Learned Trial Magistrate erred in law and in fact by failing to appreciate the principles of repudiation of contract thereby arriving at the impugned judgement.
 10. The Learned Trial Magistrate erred in law and fact by correctly finding that the Respondent had not acquired good title from the Appellant but proceeded to order the Appellant to compensate the Respondent.
 11. The Learned Trial Magistrate erred in both fact and law by failing to find that the Appellant was not the owner of the suit property and therefore had no good title to pass.
 12. The Learned Trial Magistrate erred in law and fact by ordering the Appellant to compensate the Respondent the value of the suit property.
 13. The Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's defence and submissions thereby occasioning miscarriage of justice.
3. Reasons Wherefore, the Appellant prays for judgement against the Respondent that:
- a. The Appeal be allowed and the judgement of the trial court delivered on the 27th May, 2020 be quashed and set aside.
 - b. That the Respondents' claim vide further amended Plaint dated the 13th July, 2018 be dismissed with costs.
 - c. Costs of this Appeal and that in the Trial Court be borne by the Respondent.

The appeal was canvassed by way of written submissions.

Submissions

4. The Appellant in its submissions provided a background of the dispute herein and contended that the trial Court erred in finding that the Respondent had authority to sue on behalf of the deceased as she did not produce Letters of Administration Intestate. It insisted that the Respondent did not have locus



standi as she neither produced the Death Certificate nor Grant hence failed to establish the capacity under which she had brought the instant suit. It further submitted that the trial Court erred in finding that there was a contract which the deceased had entered into with it. It insisted that it is a different entity from Nouveti Realtors. Further, that the understanding was between George and Nouveti Realtors and not the Appellant. Further, that the Appellant was incorporated on 7th December, 2004 and by the time of the contract on 16th February, 2004, it was not in existence hence there was no contract between them. To support its arguments, it relied on the very many decisions including: *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123; *Dayki0 Plantations Limited v National Bank of Kenya Limited & 2 Others* (2019) eKLR; *Isaya Masira Momanyi v Daniel Omwoyo & Another* (2017) eKLR; *Rahab Wanjiru Nderitu v Daniel Muteti & 4 Others* (2016) eKLR; *Elijah Nderitu Gachaga v Francis Gakuu Gachaga & 2 Others* (2019) eKLR; *Savings & Loan (K) Limited v Kanyenje Karangita Gakombe & Another* (2015) eKLR; *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* (1985) eKLR; *St. Lavina Medical & Laboratory Services Limited v National Hospital Insurance Fund Board of Management* (2018) eKLR and *Nicholas Mabibu Muriithi v Barclays Bank Kenya Limited* (2018) eKLR.

5. The Respondent in her submissions provided a background of the dispute herein and contended that there was a binding agreement/contract between the Appellant and George Kisanda (deceased). She made reference to the Memorandum of Understanding dated the 16th February, 2004. She further submitted that prior to 2005, one witness Mr. Thomas M. Musau was the sole proprietor of Nouveti Realtors, before it became a limited liability company. Further, that Nouveti Realtors was undertaking business of real estate. She further submitted that the Appellant never disputed nor challenged the letter dated the 14th April, 2004 on allocation of Plot No. 2 to George Kisanda Onchiri. She reiterates that one Thomas M. Musau t/a Nouveti Realtors signed the Memorandum of Understanding which included his personal representative, successor, assigns, hence the Appellant became a legal representative. On the issue of locus standi, she explained that the lower court suit was instituted by George Kisanda Onchiri on 5th March, 2012 but he died on 7th May, 2017 after which she obtained Grant of Letters of Administration Ad Litem and moved the Court vide her application dated 4th May, 2018 to substitute the deceased, which orders were granted. She hence insisted that she had requisite locus. To support her arguments, she relied on the following decisions: *Edward Ouko v National Industrial Credit Bank Ltd* (2013) eKLR and *Peter Nganga Muiruri v Cooperative Bank of Kenya Ltd & 2 others* (2014) eKLR.

Analysis and Determination

6. Upon consideration of the Memorandum of Appeal, Record of Appeal and the rivalling submissions, the following are the issues for determination: Whether the Respondent had Locus Standi to proceed with the lower court suit. Whether there was a Valid Memorandum of Understanding (contract) between the deceased George Kisanda Onchiri and the Appellant. Whether the Appeal is merited. Who should bear the costs of the Appeal.
7. I will proceed to provide a brief background to the instant appeal. Vide a Plaintiff dated the 2nd March, 2012, amended on 10th April, 2014 and further amended on 13th July, 2018, the Plaintiff who is the Respondent herein sought the following orders:
 - a. Specific performance by the Defendant on Memorandum of Understanding dated 16th February, 2004 supported by the Defendant's letter dated 14th April, 2004 and Plot Number 2 now known as LR No. 12715/3207 being a subdivision of LR Number 12715/361 be transferred to the Plaintiff by the Defendant upon payment of Kshs. 17,400/= as transfer fees, government stamp duty and registration of title been paid by the Plaintiff to the Defendant.



- aa . An alternative order for valuation of the suit plot Number 2 now known as LR No. 12715/3207 be made and the current market value of the suit Plot Number 2 now known as LR No. 12715/3207 to be determined for purposes of compensating the Plaintiff by the Defendant in the circumstances that the Defendant has transferred the suit plot number 2 now known as LR No. 12715/3207 to a third party contrary to the Memorandum of Understanding dated 16th February, 2004 and supported by the letter dated 14th April 2004.
- b. A permanent order of injunction restraining the Defendant, his servants, employees, agents, assigns or any other person claiming under or through it from trespassing, selling, transferring and/or interfering with Plot Number 2 now known as LR No. 12715/3207 been a subdivision of LR Number 12715/361.
- c. Any other orders that the Honourable Court may deem just and fit to grant.
- d. Costs of this suit and interest at court rates.
8. The Defendant who is the Appellant herein filed its Amended Statement of Defence dated the 5th December, 2018 where it denied that at no particular time did they employ the Plaintiff. It insisted that it is not privy nor a party to the alleged Memorandum of Understanding and contended that the same is fraudulent, a forgery, illegal and irregular. It denied that the letter dated the 14th April, 2004 was authored by Nouvetti Realtors nor itself. Further, that it had no proprietary rights over the suit land. It reiterated that it had wrongly been sued and denied receiving the notice of intention to sue.
9. The lower court matter proceeded for hearing where each party called one witness. The trial court in its determination delivered a judgement in favour of the Plaintiff (Respondent). The Appellant being aggrieved with the said judgement proceeded to lodge this Appeal.
- As to whether the Respondent had Locus Standi to proceed with the lower court suit.
10. The Appellant claims the Learned Magistrate erred in finding that the Respondent had locus standi to proceed with the lower court suit yet there was no Death Certificate nor Letters of Administration Intestate produced. I have perused the proceedings in the Trial Court and note that the Respondent filed an Application dated the 4th May, 2018 seeking to substitute the deceased. In the said application, I note she annexed the Death Certificate, Grant of Letters of Administration Ad Litem in Machakos CMC P & A No. 25 of 2018 in the matter of the estate of George Kisanda Onchiri given on 11th April, 2018 and a Consent signed by both the Appellant and Respondent's Advocates dated the 4th May, 2018 allowing the said application. Further, on 7th May, 2018, the Senior Principal Magistrate, allowed the said application for substitution. In the circumstance, I beg to disagree with the Appellant and find that the Respondent indeed had locus standi to proceed with the lower court case.
11. As to whether there was a Valid Memorandum of Understanding (contract) between the deceased George Kisanda Onchiri and the Appellant.
12. The Respondent claimed the deceased entered into a Memorandum of Understanding (MOU) with Nouvetti Realtors wherein they agreed that the deceased would show potential purchasers plots emanating from LR No. 12715/361, on behalf of the said business and he would be given one plot No. 28, measuring 29 x 100 as compensation. From perusal of the MOU dated the 16th February, 2004, I note it was between George Kisanda Onchiri and Nouvetti Realtors. Further, the said Nouvetti Realtors appointed the said person as a site agent to show potential purchasers plots for sale and undertook to give him Plot No. 28. I note, George Kisanda Onchiri was to pay Kshs. 17,400/= as Transfer fees, Government Stamp Duty and Registration of Title. It was the Respondent's contention in the lower court that the Appellant had failed to adhere to the terms of the MOU which culminated



in their filing the lower court case. I note the said MOU was signed by Thomas M. Musau and Julius M. Ngila. In the lower court case, the Respondent sued Nouveti Realtors Limited. From the Record of Appeal, I note the Appellant was registered on 7th December, 2004 as per the Certificate of Incorporation which was produced as an exhibit. The Appellant has insisted that it is different from Nouveti Realtors which was a business name. From the proceedings in the Lower Court, it is evident that the Appellant was not in existence at the time the parties entered into the aforementioned MOU. The question we hence need to ponder is whether the said MOU bound the Appellant or not.

13. In the case of *St. Lavina Medical & Laboratory Services Limited v National Hospital Insurance Fund Board of Management* [2018] eKLR, the Court while dealing with a dispute revolving around a company and business firm held that:

The plaintiff is a limited liability company which was incorporated on 8th August 2012 vide Certificate of Registration NO. CPR/2012/81109 under the provisions of the *Companies Act*. For emphasis, the plaintiff is called ST. Lavina Medical & Laboratory Services Limited. It was and still is governed by the *Companies Act*. Upon incorporation as a limited liability company, the plaintiff acquired corporate legal personality; it is a legal person distinct from the people who compose it. This is the greatest innovation of law borne of the famous case of *Salmon v Salmon*. In particular, see the opinion of Lord Macnaghten that:-

“The company is at law a different person altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act”.

[18] The plaintiff is therefore distinct from the business firm known as St. Lativa Medical & Laboratory Services. The latter is a Business firm composed of individuals and the plaintiff is an incorporated company; the two are different entities with different features and personalities. A company incorporated under the *Companies Act* is obliged in law to use the word limited at the end of its name unless it is exempted as by law required. ”

See also the decision in *Nicholas Mabihu Muriithi v Barclays Bank Kenya Limited* (2018) eKLR.

14. Based on the facts before me including the evidence that was tendered in the lower court while associating myself with the decisions cited, I find that the Appellant is indeed distinct from Nouveti Realtor. Further, that the Appellant did not enter into an MOU with the late George Kisanda Onchiri. Insofar as I sympathise with the plight of the Respondent and even if, there is a claim that the persons behind Nouveti Realtors And Nouveti Realtors Limited are the same, however, it is trite that a business firm and a company are two separate legal entities.
15. In the circumstances, I find that the Learned Magistrate erred in entering judgement against an entity that did not have a contract with the deceased George Kisanda Onchiri. Further, from the Certificate of Title which was produced by the Appellant, I note the respective subdivisions were disposed to third parties who were not parties in the Lower Court suit. I opine that the deceased ought to have pursued the business entity it entered into the MOU with, instead of the Appellant which is a Limited Liability Company.
16. In the foregoing, I find that the trial Court erred in making a finding that there was a contract between the deceased Plaintiff (Respondent) and the Defendant (Appellant) herein. I hold that the learned



trial Magistrate erred in law and in fact by finding that there was a valid MOU between the Plaintiff (Respondent) and the Defendant (Appellant). I opine that the Learned Trial Magistrate should have noted the anomalies in the MOU and hold that since one of the parties in the lower court suit was different from the parties that entered into the MOU, there was no privity of contract between them.

As to who should bear the costs of the Appeal.

17. Since the current Respondent was a representative of the estate of the deceased, noting that the lower court suit had been commenced by the deceased, in the interest of justice, I will direct each party to bear their own costs.
18. In the circumstance, I find the Appeal merited and will allow it by setting aside the judgement of the trial court delivered on the 27th May, 2021. I direct that the Respondent's Claim vide further amended Plaint dated the 13th July, 2018 be dismissed.

Each party to bear their own costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8TH DAY OF APRIL, 2024

CHRISTINE OCHIENG

JUDGE

