



Githiaka v Mwaura & 2 others (As the trustees of the family members of Erastus Mwaura Kiongi - Deceased) (Environment & Land Case 143 of 2022) [2024] KEELC 4180 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4180 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 143 OF 2022**

JE OMANGE, J

MAY 2, 2024

BETWEEN

ESHBAN C NDURIRI GITHIAKA PLAINTIFF

AND

JAMES KIONGI MWAURA 1ST DEFENDANT

JEREMY KIONGI MWAURA 2ND DEFENDANT

GODFREY KIONGI MWAURA 3RD DEFENDANT

**AS THE TRUSTEES OF THE FAMILY MEMBERS OF ERASTUS MWAURA
KIONGI - DECEASED**

JUDGMENT

1. This suit arises out of Land LR NO 9363/25 hereinafter, referred to as the suit property.
2. In a plaint filed in court on 19th April 2022 the Plaintiff deponed that vide a sale agreement dated 14th September 2010 he purchased 4 acres of land which were to be hived off the suit property. He depones that it was a term of the agreement that he would pay Kshs 6,000,000/= for the suit property.
He paid an initial deposit of Kshs 1, 560,000/= and later remitted instalments of Ksh. 3,790,000/= leaving him with a balance of Ksh 650,000/=.
3. He avers that he did not pay the Kshs. 650,000 as the Defendants did not avail to him the completion documents as agreed. Instead they subdivided the suit property into various parcels and obtained individual titles to the properties, including the 4acre portion that they had sold to the Plaintiff.
4. That it has come to his attention that, the Defendants intend to sell this parcel of land to a third party. This, he states amounts to a breach of the sale agreement as they have refused to effect transfer of the 4-acre parcel to the Plaintiff.



5. He depones that, the Defendants have breached the terms of the sale agreement by failing to deliver completion documents and putting up the 4-acre parcel of land for sale to a third party.
6. He sought for orders of specific performance of the sale agreement to facilitate transfer of the 4 acres curved from the suit property in his name, an order for permanent injunction restraining the Defendants from offering for sale, transfer of the 4 acres curved out of the suit property to any other person other than himself or in the alternative the Defendants pay for loss of bargain in the sum of Ksh 114,650,000/= or in the alternative a refund of the monies paid to them in the sum of Ksh 5,350,000/= paid to the Defendants.
7. The Defendants were all served as attested to by the affidavit of service by Moses Osano Osoro dated 30th June 2022 but failed to enter appearance nor file any statement of defence.
8. The Plaintiff testified in court on 26th July 2023 and relied on the witness statement dated 19th April 2023 and bundle of documents dated the same day. In the witness statement the Plaintiff reiterates the contents of the Plaintiff. He produced as exhibit the sale agreement which he signed with the Defendants dated 14th September, 2010 and the statement of accounts and the completion documents.
9. The Plaintiff's evidence was uncontroverted as the Defendants did not testify. That notwithstanding, the Plaintiff has a burden to discharge the burden of proof as envisaged by Section 107 and Section 108 of the Evidence Act, which provide;

“ 107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108.

Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

10. The court in Daniel Kenga Katana & 4 others v Dzitoto Bokole & 3 others [2022] eKLR addressed the issue of uncontroverted evidence. The court stated;

“The issue that the court has to deal with is whether the Plaintiff discharged the burden of proof. The Plaintiff gave evidence to prove ownership of the suit land by adducing oral and documentary evidence which was uncontroverted. It is trite that uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. The evidence cannot be controverted by allegations in the statement of defence if the Defendants fail to call a witness to adduce evidence and be cross-examined to test the evidence.” He further restated the quote by Justice Mwongo in Peter Ngigi & Another (suing as legal representative of the Estate of Joan Wambui Ngigi) v Thomas Ondiki Oduor & Another 2019 eKLR wherein the learned Judge stated: -

“There are any authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general



position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements”

11. The issues for determination before the court are; Whether the Plaintiff is entitled to an order for specific performance of the sale agreement dated 14th September 2010 or the alternative orders sought Whether the Plaintiff is entitled to an order for permanent injunction restraining the Defendants from selling or transfer the 4 acres curved out of the suit property herein
12. The Defendants in this case, did not file statement of defence and did not counter the testimony by the Plaintiff. The evidence of the Plaintiff is that, he purchased the 4 acres from the Defendants vide a sale agreement dated 14th September, 2010 and had made payments towards the same leaving a balance of Ksh. 650,000/= which he did not pay as the Defendants failed to avail him with the completion documents.
13. The agreement herein was between the Plaintiffs and the Defendants who are acting as trustees of the family members of Erastus Mwaura Kiongi. Crucially paragraph 3 of the agreement states that, the vendors in this case the Defendants are in the process of applying for letters of administration in respect of the deceased’s estate. The title document confirms that, at the time of the agreement the title was in the name of the deceased Erastus Mwaura Kiongi. The Title further evinces that on 19th February, 2014 the title was transferred to James Kiongi Mwaura, Jeremy Kiongi Mwaura, Godfrey Kiongi Mwaura to hold in trust for all the family members.
14. From the foregoing, it is evident that at the point of execution of the agreement the Defendants had no letter of administration, leave alone a confirmed grant. It is equally clear that, when they finally confirmed the grant four years after the instant case, the administrators hold the suit property in trust for other beneficiaries.
15. What then is the fate of the agreement that resulted in the Plaintiff paying a sum of Kshs. 5,350,000 to the Defendants? The suit property which was the property of a deceased person was under the protection of the Law of Succession Act. Section 82 of the Law of Succession Act defines Powers of personal representatives thus;

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—



<p>a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;</p> <p>(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:</p> <p>Provided that:- Table</p>		
(i)	any purchase by them of any such assets, shall be voidable at the instance of any other person interested in the asset so purchased; and	
(ii)	no immovable property shall be sold before confirmation of the grant;	
(c)	to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;	

16. The section is explicit that, an administrator shall not dispose of immovable property before confirmation of grant. As such, the agreement contravened the law. The courts have addressed this unfortunate state of affairs that is all too common severally. In the case of Estate of Isaac Kaburu Marete (deceased) [2017] eKLR Justice Gikonyo had this to say: -
17. Courts have said time and again- and I will not be tired of stating it again- that, under Section 82(b) (ii) of the *Law of Succession Act*, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under Section 55 of the *Law of Succession Act*, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property.



It is during confirmation hearing that the court establishes the respective identities and shares of persons beneficially entitled, and when confirmed the grant specifies such persons and their respective shares in the estate. See Section 71 of the Law of Succession Act. Therefore, before confirmation, the interest of the beneficiary remains amorphous and entangled within the estate; and vested in the administrator or executor as the estate property as by law stated.

18. On the fate of such a transaction, the court went further to quote and I reiterate, Lord Denning M.R in the case of *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169 at pg. 1172 that:-

“..... If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

19. This is the situation the Plaintiff finds himself in. The agreement he signed with the Defendants is a nullity and is one which this court cannot enforce.

It is unfortunately, a situation he knowingly put himself in, as at the point of executing the agreement he was aware going by paragraph 3 of the agreement, that the registered owner was deceased and that, the letters of administration had not been obtained.

20. The question then is the fate of the Kshs 5,350,000 which the Plaintiff had paid to the Defendants. I find that, the words of the Court of Appeal in ‘the case of *Macharia Mwangi Maina & 87 Others v Davidson Mwangi* [2014] eKLR offer useful guidance. The court stated;

“This is a court of law and a court of equity. Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing and equity detests unjust enrichment;”

21. It would be unjust enrichment, for the Defendants to have used the Plaintiffs money in their hour of need. Yet sell the suit property to other parties and still keep the Plaintiffs money. I find that, the Plaintiff is entitled to a refund of the money he paid the Defendants.

22. Consequently, Judgement is entered for the Plaintiff against the Defendants jointly and severally as follows;

- a. Refund of Kshs 5,350,000 paid to the Defendants
- b. Costs of the suit
- c. Interest at court rates

JUDGEMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS ON 2ND OF MAY 2024.

JUDY OMANGE

JUDGE

In the Presence of: -

Mr. Osoro for the Plaintiff

No Appearance by Defendant

Court Clerk: Steve

