



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Sure v Awuor (Environment and Land Appeal E033 of 2023)
[2024] KEELC 13558 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13558 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E033 OF 2023
GMA ONGONDO, J
DECEMBER 5, 2024**

BETWEEN

JOHANA OBUDHO SURE APPELLANT

AND

TERESA AWUOR RESPONDENT

(An appeal arising from the judgment and decree in Homa Bay Chief Magistrate's Court Environment and Land Case number 13 of 2020 by Hon. J. S. Wesonga, PM on 29th May 2023)

JUDGMENT

1. On 29th May 2023, the trial court (Hon. J. S. Wesonga, PM) rendered judgment in Homa Bay Chief Magistrate's Court Environment and Land Case number 13 of 2020 (The original suit) wherein she partially allowed the plaintiff/respondent's suit with costs.
2. The said judgment attracted the instant appeal originated by way of a memorandum of appeal dated 31st May 2023 founded upon five grounds, inter alia;
 - a. The purported agreement was illegal.
 - b. The court ignored the provisions of Section 45 of the [Law of Succession Act](#).
 - c. The Land Reference Number did not support the purported sale of land in question.
 - d. The appellant was not the legal representative of the estate that was purportedly sold.
 - e. The court ended up making awards that were not prayed for against the rules of pleadings.
3. So, the appellant has prayed that this Honourable Court quashes the decision of the trial magistrate and allow this appeal with costs of both the trial court and this court to the appellant.



4. The appeal was heard by way of written submissions pursuant to the directions of this court given on 30th September 2024.
5. The appellant's counsel, Aluoch Odera and Nyauke Advocates, filed submissions dated 14th October 2024 and submitted, inter alia, that the purchase price of Kshs.75,000/- was paid through a third party who was not called to testify in court. That the respondent never prayed for a refund of the purchase price yet the trial court granted that relief. That the suit land (infra), which was the subject of the alleged sale agreement between the parties, belonged to the appellant's deceased father thus, such agreement for its disposal violated Section 45 of the Law of Succession Act, Chapter 160 Laws of Kenya.
6. By the submissions dated 4th November 2024, Bruce Odeny and Company Advocates, learned counsel for the respondent, identified a single issue for determination thus: whether the trial court erred in her judgment of 28th April 2023. Counsel submitted that the nullification of the sale agreement was to the extent of its enforceability but that does not negate the fact that it existed and was in fact executed by the parties herein. That the respondent suffered loss on account of misrepresentation by the appellant and the only remedy available was for a refund of the sum of Kshs. 75,000 with interest, as directed by the court. That the instant appeal is devoid of merit hence, he urged the court to dismiss the same with costs to the respondent.
7. It is important to note that the instant appeal being the first one from the trial court, this court has the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Peters-vs-Sunday Post* (1958) EA 424 at 429.
8. Thus, the respondent who was the plaintiff at the trial court sued the appellant by way of a plaint dated 10th June 2020 over the suit land, Gem Kotieno Kowuor/1150 for;
 - a. A declaration that the appellant is in breach of the sale agreement for the suit land.
 - b. A declaration that the respondent herein is the legal owner of the suit land and the appellant be compelled to execute transfer documents of the suit land to the respondent's name.
 - c. A permanent injunction to issue restraining the appellant, his servants, agents and/or whomsoever jointly and severally from trespassing, encroaching, forceful entry, fencing, selling, disposing, transferring, alienating, charging, stepping on, advertising, evicting the respondent and/or dealing whatsoever with the suit land.
 - d. In the alternative to prayers (b) and (c) above, the appellant be compelled to pay the respondent the market value for the suit land.
 - e. Damages for breach of contract.
 - f. Costs of and incidental to this suit plus interest.
 - g. Any such other or further relief as this honourable court may deem appropriate.
9. In her evidence, the respondent (PW1) relied on her statement on record which was adopted as part of her evidence. She testified that the suit land resulted from the subdivision of L. R. No. Gem/Kotieno/Kowuor/46. Under cross-examination, she stated that she purchased ½ acres out of the suit land from the appellant, vide a representative named James Odera Obonyo. That she was not present during the transaction and when the agreement for sale was made as she was living in the United States of America. That the appellant was paid a total of Kshs.75,000/- in two installments of Kshs.50,000/- and Kshs.25,000/-, as consideration.



10. Also, PW1 stated that she fenced the land but the appellant destroyed the fence. That the appellant also declined to transfer the suit land into her name. She admitted that her representative did not have power of attorney to carry out the transactions on her behalf. That she also did not conduct a search on the suit land, prior to purchase. That the registered owner of the suit land is one Sure Amollo, who was not a party to the original suit. She relied on various documents inter alia: a sale agreement, a copy of caution and copies of photographs of the suit land (PExhibits 1 to 3).
11. PW2, John Odhiambo Otieno Ogwe, Area Chief Kotieno Location, testified that he drafted the sale agreement (PExhibit 1) which was executed by the appellant in person and the respondent through proxy. That the appellant was paid the purchase price of Kshs.75,000 in two installments and he witnessed the payment. During cross-examination, he stated that he did not know that the suit land belonged to a deceased person. He admitted that he did not see a search certificate in respect to the suit land, prior to the sale.
12. Moses Obondi Olwuor (PW3) testified that he valued the suit land and prepared a report (PExhibit 4). On cross-examination, he admitted that he did not possess a valid annual practicing license as at the time of filing PExhibit 4. That PExhibit 4 bore errors in that the nature of interest over the suit land was indicated as leasehold and the acreage indicated as 0.5 Ha. That he was not able to obtain a search certificate in respect to the suit land. That he assessed the value of the suit land as Kshs.320,000/-, the cost of fencing to be Kshs.200,000/- and the value of the fence and gate to be Kshs.120,000/-. However, he stated that he was not furnished with a receipt for purchase of the fencing materials.
13. The appellant opposed the claim vide a statement of defence dated 22nd July 2020, wherein he urged the court to dismiss the respondent's suit with costs.
14. The appellant (DW1) denied selling the suit land to the respondent herein. He averred that he does not own the suit land but the same belongs to his father. He relied on an official search certificate in respect to the suit land (DExhibit 1).
15. In the foregone, the issues for determination herein are as set out on the grounds of appeal which crystallize to:
 - a. Whether the instant appeal is tenable?
 - b. Just orders to issue herein.
16. It is important to note that the learned trial magistrate stated the parties' respective cases, delineated three issues for determination, discussed them and reached her decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
17. The appellant contends that the purported sale agreement was illegal and the trial court ignored the provisions of Section 45 of the *Law of Succession Act*. That the Land Reference Number did not support the purported sale of land in question. That further, the appellant was not the legal representative of the estate of Sure Amollo (deceased) who is the registered proprietor of the suit land. That the trial court granted prayers that were not sought by the respondent.
18. In that regard, I note that the trial court did in fact find the sale agreement (PExhibit 1) ex facie illegal and unenforceable since it offended Section 82 of the *Law of Succession Act*, Chapter 160 Laws of Kenya. In her judgment, which was corrected on 29th May 2023, the learned trial magistrate stated thus:

“...The sale of the suit land was in contravention of the *Law of Succession Act* and therefore vitiated by that illegality. It was thus invalid, null and void transaction...”



19. Indeed, it is trite law that without a confirmed grant, a party does not have the capacity to enter into a binding agreement for the sale of immovable property of a deceased person; see Rajesh Pranjivan Chudasama-vs-Sailesh Pranjivan Chudasama (2014) eKLR and Section 82 of the *Law of Succession Act*, Chapter 160 of the Laws of Kenya.
20. Section 45 of the *Law of Succession Act*, Chapter 160 of the Laws of Kenya provides that the authority to handle the assets of a deceased person emanates from grants of representation to the estate of such deceased; see also Kothari –vs- Quareh (1967) EA 364. Therefore, I endorse the trial court’s finding that the said agreement (PExhibit 1) is null, void and unenforceable in the circumstances.
21. Regarding the appellant’s contention that the trial court granted prayers that were not sought by the respondent, I bear in mind that in prayer (d) of the plaint, the respondent urged the court to compel the appellant to pay her the market value for the suit land.
22. So, the trial court entered judgment for the respondent and against the appellant for the refund of Kshs.75,000/- with interest. The trial court observed that although the respondent claimed a refund of the purchase price at the current market value, the Valuation Report (PExhibit 4) was in respect to a different parcel of land namely Gem/ Kotieno Kowuor/46 and not the suit land herein.
23. From the trial court’s record, PW1 testified that she paid the appellant a total of Kshs.75,000/- in two installments of Kshs.50,000/- and Kshs.25,000/-, as consideration. This assertion was corroborated by the Area Chief (PW2) who stated that he witnessed payment of the purchase price. It is important to note that the parties did not obtain the consent of the Land Control Board in respect to the transaction as prescribed under Section 8 of the *Land Control Act*, Chapter 302 Laws of Kenya.
24. Section 7 of the *Land Control Act* provides for recovery of consideration thus:

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22.”
25. In the foregone, it is my considered view that the respondent proved, on a balance of probabilities, that she paid the appellant a sum of Kshs. 75,000/- as consideration for sale of the suit land. Such transaction having been rendered void, the respondent is entitled to recover that money as stated under Section 7 of the *Land Control Act* (supra). Therefore, it is my considered view that this ground of appeal is untenable.
26. This court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:
 - i. 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.
 - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
27. To that end, I find that the respondent who was the plaintiff at the trial court partially proved her claim on a balance of probabilities. In the premises, the trial magistrate’s judgment delivered on 28th April 2023 is not faulty at law. I hereby endorse the same.
28. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated May 31, 2023, is devoid of merit. The same is hereby dismissed with costs to the respondent.



29. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 5TH DAY OF DECEMBER 2024.

G.M.A ONG'ONDO

JUDGE

Present

Mr. S. Nyauke, Learned Counsel for the appellant

Malachi, Court Assistant

