



**Ngeny v Kiarie & 2 others (Environment & Land Case 453 of 2016)
[2023] KEELC 19861 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19861 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 453 OF 2016
A OMBWAYO, J
SEPTEMBER 19, 2023**

BETWEEN

TIMOTHY KIMUTAI NGENY PLAINTIFF

AND

STANLEY KABUU KIARIE 1ST DEFENDANT

WILSON KIARIE KABUU 2ND DEFENDANT

JAMES MBUGUA KABUU 3RD DEFENDANT

JUDGMENT

Plaintiff's Case

1. Timothy Kimutai Ngeni (hereinafter referred to as the Plaintiff) came to this court by way of Plaint on 26/10/2016 against Stanley Kabuu Kiarie, Wilson Kiarie Kabuu and James Mbugua Kiarie claiming that on or about 14th January 1995, through an Agreement for sale, the plaintiff entered into a sale transaction with the Defendants for the purchase of land known as Title Number; Nakuru/ Olunguruone/ Amalo/183. The agreed purchase price had been the total sum of Kshs.1,045,000.
2. Pursuant to the sale of the said property, the Defendants had made it known that the suit property was part of their deceased fathers estate one William Kiarie Kabuu. The Plaintiff was misled to believe that the Defendants had the legal capacity to sell and had no issues with the situation pertaining to the said property and was agreeable to facilitate the completion of the succession matter to enable the Defendants transfer the property in his favour, as such he had started by paying the asking price in the hopes of a successful transaction.
3. The Plaintiff had been made aware that the Defendants had finalized and were following up on their deceased father's estate being Succession Cause No.69 of 1995 with an aim of concluding the same in a timely manner. The Plaintiff proceeded to make a payment of the sum of Kshs.1,100,000 through



- the parties mutual advocate practicing under the name of Chesire & Co. Advocates. The said payment was dully acknowledged by one George Ochieng who at the time was a Secretary in the aforesaid firm of advocates and the acknowledgement was witnessed by one Johnson Njuguna. This was to confirm that the Plaintiff had paid the full purchase price, inclusive of the legal and stamp duty fees.
4. The Plaintiff proceeded to occupy Title Number: Nakuru/Olenguruone/Amalo/183 as his residential and matrimonial home, which move was not disputed by the Defendants. It was later through a letter dated 21st November 1995 and received from the parties mutual advocate one Mr. Chesire that he confirmed that the Defendants would transfer the property fully to the Plaintiff in six (6) months when the grant issued to the Defendants had been confirmed.
 5. However, after close to five years not much progress had been made and the Plaintiff approached the firm of Mrs. Violet Barasa & Co. Advocates in pursuit of finalizing the transfer of the suit property in his name as well as that of his deceased wife one Nancy C. Ng'eny, since the parties mutual advocate Mr. Chesire had become elusive in the matter. The firm of Messrs Violet Barasa & Co. Advocates wrote a letter to the Defendants herein dated 30th August 1999, requesting the Defendant to finalize the transfer of the suit property in favour of the Plaintiff. The said letter didn't elicit any response from the Defendants as they all went quiet on the matter as well.
 6. The Plaintiff had been optimistic that the Defendant would transfer the property in his favour even after signing the consent and transfer documentations not much was done. As such, the Plaintiff took upon himself to secure his interests and decided to make an application for a caution to be placed over the suit property on his behalf as a purchaser on the 30th day of October 2000. This was done out of fear by the Plaintiff that there was a likelihood that the Defendants may sell the property to a third party without transferring the same to the Plaintiff.
 7. In the month of November 2001, the Plaintiff headed to the Complainants Commission and launched a complaint against the firm of Chesire & Co. Advocates for the claimed balance of the purchase price which was hindering the transfer of the aforementioned property to the Plaintiff. The Complaint brought against Mr. Chesire the acting advocate in the transaction between the parties, was heard on 11th April 2003 before the disciplinary Committee being Cause Number 129 of 2002. Later on, on 16th May 2003 a judgment was delivered against the said advocate whose full names were Chepyegon Christopher Chesire and who was found guilty of misappropriating funds which had been due to the Defendants.
 8. Upon delivery of the judgment against Mr. Chesire to pay in full the remaining balance of the purchase price as well as accrued interest, the Plaintiff made numerous attempts through letters addressed to the Law Society of Kenya dated 31st January 2005 and 9th May 2005 to address the inaction of the society. Eventually, the advocate was disbarred and his name struck off the roll of advocates but no monies were paid back.
 9. The plaintiff asserts that it was quite evident from the agreement for sale under Clause 5, the Defendants were to do all that was within their power to obtain consent and transfer the parcel of land to the Plaintiff. In addition under Clause 6, the Plaintiff was to pay part legal fees and the stamp duty fees upon request which he never declined to do so. In fact, he had made a payment of Kshs.1,100,000 which was inclusive of the same.
 10. That as the years passed nothing transpired except that the Plaintiff's wife became terminally ill, suffering from Cancer and rendered him immobile and unable to concentrate on other things apart from her. Unfortunately the Plaintiff's wife health deteriorated and she succumbed to her illness in 2013. This was a fact well known by the Defendants. It is then in April 2016 that the Plaintiff took



upon himself to follow up with the Defendants in regards to the transfer of Title Number: Nakuru/Olenguruone/Amalo/183 which had not at any time being raised by them. After attempting three (3) times to engage the Defendants, the Plaintiff together with his son one Japheth Mutai realized the Defendants were uncooperative and were out to extort. This prompted the Plaintiff to engage his current advocates to pursue the matter on his behalf towards the finalization of the transfer in his favour.

11. The Defendants even after being engaged with the plaintiff's advocates on record in resolving the matter were not willing to come up with an amicable solution. The Plaintiff had even tried to offer them the balance of the purchase price as was then but the Defendants claimed that he buys the property a fresh which is an absurdly in itself. They further instructed their own advocates to arrange for a consultative meeting, which was all a rouse since they were delaying the transfer of the property and all their actions have wrecked of bad faith and ill intention.
12. According to the plaintiff, the Defendants actions are clearly primed to unlawfully and illegally repossess of the suit property that was willingly sold to the Plaintiff. The plaintiff is now quite apprehensive that the Defendants are indeed determined to illegally repossess the suit property without any justification and/or colour of right and the Plaintiff now seeks judicial intervention and to preserve his proprietary rights over the suit property. That in the interest of justice the Plaintiff is willing to consider compensation of Title Number: Nakuru/Olenguruone/Amalo/183 at the current market value, which valuation should be conducted by a Government valuer.
13. The plaintiff prays for an Order compelling the Defendants to transfer and register in favour of the Plaintiff, Title Number: Nakuru/Olenguruone/Amalo/183. Moreover, an Order compelling the Defendants to surrender all the title documents for Title Number: Nakuru/Olenguruone/Amalo/183 to the Plaintiff upon the successful registration of the parcel of land in his favour. Lastly, an Order do issue to compel the Nakuru County Government to assess the current market value of Title Number: Nakuru/Olenguruone/Amalo/183. In the alternative, an Order do issue to compel the Defendants to compensate the Plaintiff at the current market value price of Title Number: Nakuru/Olenguruone/Amalo/183. Costs of this suit and interest are court rates

Defence Case

14. The defendants filed defense whose gist is that the success of the sale depended on the plaintiff paying the entire purchase price, obtaining the consent of the land control board and completion of the succession cause and transfer of the property. The defendants agree that there was a sale agreement between the plaintiff and defendant but the plaintiff paid the purchase price to the plaintiff's lawyers who had to hold it until successful transfer of the suit property into plaintiff's name which money the plaintiff's lawyer holds to date. The defendant denies allowing the plaintiff to take possession of the land before completing the payment.
15. The defendants state that the sale became void upon expiring of the 6 month period from the date of the agreement without the consent of Land Control Board and the plaintiff can only claim a refund of the money paid to the defendant and not the plaintiff's lawyer. The defendant claims that the suit is time barred.
16. The case proceeded for hearing where PW1 and PW 2 testified. However on 28/3/2023, it was agreed that the case proceeds by way of case stated as the facts were not contested. Parties agreed to proceed by way of submission as the facts were straight forward and agreed.



Rival Submissions

17. The gravamen of the plaintiff's submissions is that the defendants never disclosed to the plaintiff that they had never obtained the grant in respect of the estate of the deceased William Kiarie and yet they claimed in the agreement that they were the legal representatives of the Estate. They further claimed to be the heirs of the estate of the deceased and that they were selling their rights. The defendants undertook to do all that was necessary to obtain the consent of the land control board. The defendants later went further to obtain the grant of the letters of Administration intestate and failed to disclose that they had sold the land to the plaintiff and taken possession.
18. The plaintiff submits that the court should apply the provisions of Article 159 of *the constitution* and section 76 of the *Law of Succession Act* and revoke the grant issued to the defendants and the subsequent confirmation of the grant due to fraud and concealment of material facts in relation to the suit parcel of land.
19. The plaintiff argues that the suit was filed in time as the accrual of the cause of action is shrouded in fraud and that the defendants concealed the fact that they had not filed succession proceedings over the estate of the deceased and yet they were paid the full purchase price and that they failed to obtain the consent of the land control Board to facilitate the processing of the transfer of the land.
20. The plaintiff further argues that the payment of the purchase price to the mutual advocate was deemed as payment for the suit property as the Law Society conditions of sale expressly provide that the deposit paid to the advocate for the vendor is paid to him as a stakeholder or agent and therefore he remains a trustee for the funds mandated to hold the same pending the happening of an agreed event of completion. The advocate cannot release the money without the happening of the event. The plaintiff argues that the full purchase price was to be released to the defendants upon obtaining consent. The plaintiff complied and paid the purchase price to the mutual consent whereas the defendants failed to obtain consent.
21. The plaintiff contends that payment of the full purchase price and grant of possession created a constructive trust between the parties as the defendant have admitted that they sold the property to the plaintiff. The plaintiff argues that the absence of the consent of the land control Board does not invalidate the agreement to sale as the plaintiff paid the full purchase price and he is already in possession.
22. The defendant on his part submits that the suit is time barred and not deserving of the courts discretion as the agreement was made In January 1995 and that the payment was supposed to be made on 16th January 1995 and yet the suit was instituted in 2016 that is 20 years after the cause of action accrued. Defendants argue that the plaintiff is barred by section 7 of the *Limitation of actions Act* cap 22 laws of Kenya.
23. The defendants further argue that the agreement is void for the lack of the obtaining of the consent of the Land Control Board contrary to the provisions of section 6 of the *land control Act* cap 302 Laws of Kenya.
24. The defendants submit that the plaintiff is not entitled to the reliefs sought for the fact that he has not come to court with clean hands as he did not pay the whole purchase price and therefore he is estopped from relying on the equitable principle of constructive trust due to the fact he is possession. The plaintiff is not entitled to specific performance for failing to pay the whole purchase price.



Analysis And Determination

25. I have considered the pleadings, evidence on record and rival submissions and do find that the first issue to be considered is whether the suit is time barred. The vital question in this matter is when the cause of action accrued. The cause of action accrued on the date the plaintiff discovered that the defendants were not the registered owners of the suit property and that was when the agreement was signed because it is trite law that a legal representative has no authority to dispose of an estate of the deceased person. The plaintiff was entitled to claim his money back within 6 years from the date of signing the agreement due to the fact the cause of action was premised on a contract. Section 4 of the [limitation of Actions Act](#) provides as follows=

Actions of contract and tort and certain other actions

- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
 - (a) actions founded on contract;
 - (b) actions to enforce a recognizance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
- (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

26. The plaintiff has claimed the suit property and prays for specific performance or compensation for breach of contract whose limitation period is 6 years. The plaintiff has come to court more than 20 years after the accrual of the cause of action that is when he discovered that the proprietor of the property was deceased and therefore he is out of time. Needless to say that the plaintiff was represented by a lawyer who knew or ought to have known that the transaction was a nullity and a fraud to the estate of the deceased.

27. The second issue is whether the agreement was void abinitio, the parties herein entered into agreement on the 14th day of January 1995 despite the fact that the defendants had no capacity to sell the suit property as the property was not registered in their names but in the names of their deceased father. The defendants incorrectly alleged that they were legal representatives of the estate of the deceased William Kiarie despite the fact that they had not obtained the grant of letters of Administration intestate in respect of the estate which was a clear fraud and intermeddling in the estate of William Kiarie contrary to the provisions of section 45 of the [Law of Succession Act](#) which provides as follows:-

45.

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a 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.

- (2) Any person who contravenes the provisions of this section shall-
- a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to 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."

Moreover, Section 82 of the Act provides for the legal representatives of the estate thus :-

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

- a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;
- 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:

Provided that -

- i. the 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;"

28. In the case of *Muriuki Hassan .v. Rose Kanyua and 4 others* [2014] eKLR, when faced with a situation of sale of property belonging to an estate before succession was undertaken, Makau J held:-

The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased's beneficiaries and the sale of land to them is challenged in this application. In such circumstances, the interested parties' interest cannot be considered in this matter and the remedy for them is if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan."

29. *In Re Estate of John Gakunga Njoroge* [2015] eKLR Murithi J held:-

10. A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the *Law of Succession Act*. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the *Law of Succession Act*.....



15. For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under Section 82(b) Proviso (ii), which provides that:-

"no immovable property shall be sold before confirmation of the grant." (Underlining mine).

30. In Morris Mwiti Mburugu .v. Denis Kimathi M'Mburugu [2016] e KLR, the Court held:-

.... where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same." (Underlining mine).

31. The import of the foregoing is clear; before a grant has been issued and confirmed, no part of the estate of the deceased may be dealt with in a manner that amounts to intermeddling

32. The upshot of the above is that the agreement executed by the defendants was a nullity and void abinitio for the fact that the suit parcel of land was not registered in the defendant's names but in the names of their deceased father and therefore the money paid by the plaintiff can only be recovered from the defendants as a claim for a refund and compensation for the improvement made on the land if the claim is made within time.

33. The third issue to be determined is whether the agreement is void for lack of the consent of the land control board and on this issue, I do find that the defendants were not the registered owners of the land and therefore it cannot be envisaged how they would even dare attempt to approach the chairman of the Land Control Board in 1995 when they obtained the grant in 2011. Having found that the agreement was a nullity, I do not see any reason why I should belabor on the issue of the consent of the Land Control Board. The equitable doctrines of constructive trust and proprietary estoppel are not applicable in this case because the defendants did not have any interest in the land worth transacting on.

34. On whether the plaintiff is entitled to compensation or refund, having found that the agreement was null and void, and the claim being time barred, the plaintiff is not entitled to the same. I do dismiss the suit with no orders as to costs as the defendants received money from the plaintiff purporting to sell the property and are responsible for the plaintiff taking possession of the suit, and there being no counterclaim, the defendants are not entitled to any order.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH DAY SEPTEMBER 2023

A O OMBWAYO

JUDGE

