



**Musau v Kabaru & another (Environment and Land Appeal  
E090 of 2022) [2023] KEELC 20525 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20525 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E090 OF 2022  
OA ANGOTE, J  
OCTOBER 5, 2023**

**BETWEEN**

**PAUL KIMANI MUSAU ..... APPELLANT**

**AND**

**ANGELA WANGECHI KABARU ..... 1<sup>ST</sup> RESPONDENT**

**FAITH NYAMBURA KABARU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgement of Hon. M.W. Murage (SRM) delivered on the 21<sup>st</sup> day of September, 2022 in Nairobi CMCC No. 8129 of 2019 Milimani Commercial Court)*

**JUDGMENT**

**Background**

1. The subject matter of this appeal is the judgement delivered on 21<sup>st</sup> September 2022 by Hon. M.W. Murage in Milimani Commercial Court Civil Suit No. 8129 of 2019. The Plaintiffs/Respondents instituted Milimani Commercial Court Civil Suit No. 8129 of 2019 and sought for an order of permanent injunction, restraining the Appellant from trespassing on LR No. 13330/285 Nairobi which they claimed to be their property.
2. The Respondents/Plaintiffs in the lower court additionally sought that the Appellant/Defendant be evicted from the property and be ordered to pay mesne profits to them.
3. The Appellant/Defendant, in his Defence and Counterclaim, stated that he had entered an agreement for the sale of half a plot of LR No. 4921/R, Thome vs Company Limited measuring 0.25 acres at the cost of Kshs. 200,000 and that he entered in an agreement with Rhoda Nyambura Kabaru and Joseph Kamau Kabaru the deceased's mother and brother respectively, who were the illegal representatives of the estate of Sammy Cosmas Kabaru (deceased).



4. The Appellant stated in his Defence and Counter claim that the Respondents changed the property to LR No. 13330/285 to conceal the fact of such sale and that after purchase, he took possession of the suit property, had it surveyed and beacons marked, constructed a permanent house and erected a chain-link fence with a gate.
5. In his counterclaim, the Appellant sought a declaration that he was a bona fide purchaser for value without notice of any defect; a declaration that the Respondents claim was time barred; and a declaration that the sale agreement dated 21<sup>st</sup> February 2003 was valid and that an order of specific performance do issue directing the appellants to execute a transfer in his favour.
6. The Appellant/Defendant further sought for a declaration that the title issued to the Respondents for LR No. 13330/285 is null and void and the same be revoked or cancelled and a mandatory injunction against the Respondents to issue to restrain them from entering, selling or interfering with the suit property.
7. In its judgement, the trial court allowed the Plaintiff's/ Respondent's case save for the issue of mesne profits and dismissed the Defendant/ Appellant's Counterclaim. The court found that the Plaintiffs were the only parties that had the capacity to administer the estate of the deceased, and that the sellers had no capacity to sell the suit property to the Defendant.
8. The Appellant, being dissatisfied with the judgement, filed this appeal raising ten grounds of appeal. These grounds can be summarized as follows:
  - a. That the Learned trial magistrate erred in law and in fact by disregarding and/ or adjudging as void ab initio the sale agreement dated 21<sup>st</sup> February,2003.
  - b. That the learned trial magistrate erred in law and in fact in relying on extraneous and insufficient evidence to enter judgement for the respondent, as the certification of Confirmation of Grant produced in court by the respondent did not cover the suit property.
  - c. That the learned trial magistrate erred in law and in fact and had misdirected herself on the evidence tendered by the respondent and in so doing arrived at an erroneous finding. That the respondent's suit at the lower court was a candidate for dismissal ab initio for failure to join all the necessary parties to the sale agreement dated the 21 February,2003 and that the question of privity of contract to the sale agreement was not considered by the trial court.
  - d. That the Learned trial magistrate erred in fact and in law in ignoring evidence of the appellant purchase of land buttressed by the appellant entry in to the suit plot and commencing developments thereon in an open and undisturbed acts of ownership of land performed by him(the appellant) going back to the year 2003.
9. The Respondents opposed the appeal vide a Replying Affidavit dated 29<sup>th</sup> October 2022. They averred that they are the registered proprietors of Land Parcel No. 13330/285 which was transferred to them by Joreth Limited; that the said property originally belonged to their father Sammy Cosmas Kabaru, who had bought the same from Joreth Limited and that upon his demise, Joreth Limited transferred the same to them.



10. It is the Respondents' averment that the Appellant, alleging to have bought a portion of the said parcel from Joseph Kamau Kabaru and Rhoda Nyambura Kabaru, invaded a half portion of the said land and started excavation to lay a foundation for construction.
11. The Respondents averred that Joseph Kamau Kabaru and Rhoda Nyambura Kabaru were neither the personal representatives of the late Sammy Cosmas Kabaru nor Administrators of the deceased's estate; that they had fraudulently applied for Grant of Letters of Administration to the deceased's estate which Angela Wangechi Kabaru objected to and that the objection was sustained.
12. It is the Respondents' case that as a result of the Appellant's invasion of their property, they filed the suit in the lower court which is the subject of this appeal. According to the Respondents, upon the court hearing the matter, it was apparent that the persons from whom the Appellant alleged to have bought the suit property were intermeddlers and had no legal capacity to deal with the deceased's estate. The Appeal was canvassed by way of written submissions.

### **Appellant's Submission**

13. Counsel for the Appellant submitted that the ten grounds of appeal can be condensed into one ground, which is whether the appellant was an innocent purchaser of the suit property vide a sale agreement dated 21<sup>st</sup> February 2003. Counsel submitted that the Appellant is an innocent bona fide purchaser of land for value and that he was in occupation of the property.
14. Counsel submitted that the sale agreement dated 21<sup>st</sup> February 2009 satisfied the provisions of Section 3(3) of the *Law of Contract Act*. He argued that the Respondents were trying to re-write the contract, which a court cannot be invited to do and that the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved, which has not been done in this case.
15. It was Counsel's submission that the estate of Cosmas Kabaru received the purchase price and that the Respondents were willing to refund the purchase price because they do not dispute the sale of the land. Counsel referred to a letter dated 14<sup>th</sup> June 2018 at page 193 of the Record of Appeal, in which the Respondents admit the appellant's purchase of the land. Counsel submitted that the Respondents cannot benefit from an illegality that they themselves or the estate of the deceased created.
16. Counsel submitted that the Appellant proved an illegality on the part of the Respondents in processing the title in 2012 for a property that the appellant had purchased way back in 2003 and was in occupation from 2003 to date and that the trial court should have ordered for a rectification of the register as it was tainted with mistake and or illegality.
17. Counsel relied on *Republic vs Minister for Transport & Communication & 5 Others ex-part Waa Ship Garbage Collector & 15 Others* [2006] 1 KLR (E&L) 563, which was cited with approval in *Kenya National Highway Authority vs Shalien Masood Mughal & 5 Others* [2017] eKLR.
18. Counsel for the Petitioner submitted that the Respondents' production of a title deed will not suffice as it amounts to a mere dangling of title in court. They urged that the Respondents' claim that they had acquired the claim through succession had not been proved and that the Respondents gave authority to Rhoda Kabaru and Joseph Kabaru, the sellers of the land.
19. Counsel relied on the Court of Appeal case of *Munyu Maina vs Hiram Gathiba Maina* (2013) eKLR and the case of *Ibrahim vs Hassan & Charles Kimenyi Macharia, Interested Party* [2019] eKLR.
20. Counsel urged that privity of contract is a major fundamental principle of the English contract law and that the Plaintiff failed to enjoin all the parties to the dispute by failing to join the sellers and that the court was thereby entitled to dismiss the suit.



21. Counsel submitted that while the Respondents testified that they objected to the sellers' grant of administration, they did not produce a certificate of revocation of grant in court and that the sellers of the suit land were not fraudsters as they were the legally appointed administrators of the estate of the deceased Sammy Cosmas Kabaru.
22. According to the Appellant's counsel, their claim was not caught up by the limitation period as the Appellant has been in occupation of the property since 2003 with no interference from the Respondents, who only obtained the title to the suit property on 24<sup>th</sup> August 2012; that such occupation has been demonstrated by photographs showing the developments and the trees planted by the Appellant and a letter dated 4<sup>th</sup> July 2005 from the Appellant's advocate to the Respondents' advocate indicating the Appellant's occupation and development.
23. Counsel for the Appellant submitted that the contract was frustrated by the Respondents who have not effected the transfer and that the Appellant has a right to immediate possession of the land because he has been in occupation since the purchase of the property. Counsel relied on the Court of Appeal case of *Benja Properties Limited vs Syedna Mohammed Burbannudin Sabed & 4 Others* (2015) eKLR.
24. In his written submissions dated 17<sup>th</sup> May 2023, the Respondents' counsel submitted that the Appellant, in the trial court, only produced a copy of the Petition in Succession Cause No. 328 of 1998 and the Gazette Notice and that they did not produce the copy of the grant of Letters of Administration to prove that the sellers were appointed as legal representatives of the deceased's estate.
25. Counsel submitted that while Rhoda Nyambura Kabaru and Joseph Kamau Kabaru petitioned to be appointed as administrators of the estate of the deceased in Succession Cause No. 328 of 1998, the 1<sup>st</sup> Respondent's uncle and aunt Muchiri Kabaru Njagi and Florence Wangui objected to that and that consequently, no Grant of Letters of Administration was ever issued to the purported sellers.
26. It was submitted by the Respondents' counsel that the sellers did not have the legal capacity to sell the suit property and were thus intermeddling with the suit properties, contrary to Section 45 of the *Law of Succession Act*. Counsel relied on the case of In the Matter of the Estate of Kimutai Tiony Eldoret Succession Cause No. 30 of 2017 on intermeddling.
27. Counsel further submitted that the Appellant did not, in his Statement of Defence, seek to impeach the Respondents' title on grounds of fraud; that the trial court did not err in finding the sale agreement in issue invalid, null and void and that the Appellant was not an innocent purchaser for value without notice.
28. Lastly, counsel submitted that the Appellant's claim that the Respondents' suit had been overtaken by the *Limitation of Actions Act* was not true; that the appellant only trespassed on the suit property in 2016 when he attempted to develop a foundation and that the Appellant was not able to prove that he trespassed on the land earlier through approval of a development plan or otherwise.
29. The Appellant's counsel, in rejoinder, submitted that it was irregular and illegal for the Respondents to process the title of LR No. 13330/285 in 2012 when the Appellant had exclusive possession of his portion of the plot and that the Respondents could not dangle such a title as the basis of their claim to the land. Counsel relied on Benjamin Leonard Macfoy and United Africa Company Ltd Appeal No. 67 of 1960 as well as the Supreme Court Case of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] eKLR.



## Analysis and Determination

30. This court has considered the pleadings and submissions filed by the parties. The duty of a first appellate court, as in this case, is to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, bearing in mind that it did not have a firsthand account of the testimony of witnesses. This was aptly stated by the Court of Appeal in *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, as follows:
- “An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
31. The Appellant contends that the trial court wrongfully found that the sale agreement dated 21<sup>st</sup> February 2001 was invalid and void ab initio. He instead contended that he was a bona fide innocent purchaser for value without notice.
32. The crux of the Appellant’s suit is that the contract dated 21<sup>st</sup> February 2003 is valid. The Respondents however asserted that the sellers in the contract were strangers to the suit property, as they were not the legal representatives to the Estate of Cosmas Kabaru (deceased).
33. The Appellant, on his part, asserted that Rhoda Nyambura Kabaru and Joseph Kamau Kabaru, the deceased’s mother and brother respectively, were the legal representatives of the estate of Sammy Cosmas Kabaru (deceased).
34. The Appellant, through its List of Documents, produced the sale agreement dated 21<sup>st</sup> February 2003; the Petition for letters of grant in Nairobi High Court Succession Cause No. 328 of 1998 and the gazette notice issued on 24<sup>th</sup> April 1998. The Respondents however asserted that while Rhoda Nyambura Kabaru and Joseph Kamau Kabaru indeed petitioned to be appointed legal representatives over the deceased’ estate, the Petition was successfully objected to and no Grant of Letters of Administration were issued to them.
35. To support their assertion, the Respondents at the trial court presented the following documents: an objection to the making of the Grant filed by Kabaru Njagi and Florence Wangui Kangaru in Succession Case No. 328 of 1998; a Petition for Letters of administration in Succession Cause No. 275 of 1998 and accompanying documents and a Gazette Notice with respect to Cause No. 275 of 1998.
36. The Respondent’s also produced in evidence that certificate of title for LR No. 13330/285 dated 24<sup>th</sup> August 2012; the Letters of Administration Intestate for the estate of Sammy Cosmas Kabaru issued to Kabaru Njagi and Angela Wangechi dated 9<sup>th</sup> June 1998 and a certificate of confirmation of the Grant of representation issued to Kabaru Njagi and Angela Wangechi Kabaru dated 26<sup>th</sup> February 1999.
37. It is trite that the process of appointment of a personal representative of the Estate of the deceased is instituted in the form of a Petition under Section 51 of the *Law of Succession Act* and Rule 7 of the Probate and Administration Rules, 1980. In this case, the deceased, Cosmas Kabaru, died intestate, without a will.
38. The second requirement is that of publication of a notice in the Kenya Gazette inviting objections under Section 61 of the *Law of Succession Act*. Both the Appellant and the Respondents have presented



- copies of a petition and a gazette notice with respect to their respective applications for the Grant of Letters of Administration.
39. Let it be clear, a Petition for letters of administration and a gazette notice inviting objections do not constitute issuance of a grant of letters of administration. Without the grant, a party cannot claim to have any authority to deal with the deceased's property. In this instance, it is only the Respondents who have presented a Grant of Letters of Administration with respect to the deceased's property which was confirmed on 26<sup>th</sup> February 1999.
40. Without a grant of letters of administration, the sellers, Rhoda Nyambura Kabaru and Joseph Kamau Kabaru had no power to deal with the deceased's property. As such, they were intermeddlers, as defined under Section 45 of the *Law of Succession Act*. They therefore had no authority to enter into the contract dated 21<sup>st</sup> February 2003.
41. As stated by Musyoka, J in *Veronica Njoki Wakagoto (Deceased)* [2013] eKLR:  
“The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”
42. Further, *in Re Estate of John Gakunga Njoroge (Deceased)* [2015] eKLR Muriithi, J was of the view that:  
“A person can only lawfully deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the *Law of Succession Act*...For the transactions 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 section 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 on the powers duties of the personal representatives under section 82 (b) Proviso (ii), which provides that:  
(ii) no immovable property shall be sold before confirmation of the grant.”
43. The conclusion of the above analysis is that the sellers who sold the suit property to the Appellant lacked the legal authority to enter into the contract of 21<sup>st</sup> February 2003. The said contract therefore had no legal effect and was void ab initio. This is because a party cannot pass a better title than that which they have.
44. As the sellers had no title, they could not pass any interest in the suit property to the Appellant. The trial court therefore did not err in its finding that that the contract dated 21<sup>st</sup> February 2003 was void ab initio.
45. While the Appellant claimed that the suit is a candidate for dismissal for failure to join all the necessary parties to the suit, it is trite that a suit cannot be defeated on grounds of joinder or misjoinder. This is provided for under Order 1 Rule 9 of the Civil Procedure Rules as follows:  
“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”



46. A consideration of the record of the court also shows that the Defendant made no application or any other effort to enjoin the sellers to this suit. It is also apparent, from the Plaintiff, that the Respondents did not seek any relief that could be granted against the sellers.
47. It is clear that the Respondents were not seeking to enforce the terms of the contract in the lower court. They were instead arguing that the contract was invalid. The trial court and this court has been persuaded as to the invalidity of the said contract. On the basis that the contract was void ab initio, the principle of privity of contract has no application and need not have been considered at all.
48. It is on the basis of the above detailed analysis that this court finds that the appeal lacks merit. The appeal is dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5<sup>TH</sup> DAY OF OCTOBER, 2023.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mrs Korir holding brief for Arusei for Appellant

Mr. Gachuhi for 1<sup>st</sup> Respondent

Court Assistant - Tracy

