



**Ratemo & 3 others v Rioba & another (Environment & Land Case
82 of 2021) [2023] KEELC 20711 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20711 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT & LAND CASE 82 OF 2021

JM KAMAU, J

OCTOBER 12, 2023

[FORMERLY AT ENVIRONMENT AND LAND COURT AT KISII CASE NO. 34 OF 2020]

BETWEEN

OYUNGE BARNABUS RATEMO 1ST PLAINTIFF

MALACH RATEMO MATHAYO 2ND PLAINTIFF

KENNEDY MBAKA RATEMO 3RD PLAINTIFF

**DANIEL RATEMO (SUING AS THE ADMINISTRATORS OF THE ESTATE OF
MATHAYO RATEMO MAYAKA (DECEASED) 4TH PLAINTIFF**

AND

CHARLES OTEKI RIOBA 1ST DEFENDANT

HELLEN BWARI MOKONO 2ND DEFENDANT

JUDGMENT

1. In this suit which was filed on 15/09/2020 and amended on 02/06/2021, the Plaintiff, the legal representatives of the Estate of Mathayo Ratemo Mayaka who died on 20/5/1980, have sued the Defendant claiming that L.R. NO. 9346/2 was and still remains the registered property of the Deceased. They aver that the Deceased never sold the suit property to anyone and in particular to the Defendants. In November 2013, the Defendants forcefully entered into a portion of the suit land claiming her husband had purchased it from a third party the 2nd Defendant, and also started living on one of the houses thereat. In so doing, the 1st Defendant has wasted the property, dug a deep borehole and caused extreme deterioration to the semi-permanent house thereon. He also erected a structure thereon on 13/09/2020. The Plaintiffs have therefore moved the court for the following orders:-
 - a. An order of eviction against the Defendants from the deceased's land parcel L.R. NO. 9346/2.



- b. An order of permanent injunction restraining the Defendants, jointly and severally their respective agents, privies, servants and others whosoever claiming through them from entering, trespassing, tilling, constructing, wasting, harvesting trees thereon, and/or in any other manner howsoever dealing with the deceased's land parcel L.R. NO. 9346/2
 - c. General damages for trespass.
 - d. Costs of this suit and interest.
2. The 1st Defendant filed a statement of Defence in response on 13/05/2021 in which he denied all the averments and claimed that he acquired the suit property as a Licensee from an unnamed creditor to the estate. He thereof prays that the suit be dismissed with costs.
 3. The 2nd Defendant filed a Defence on 11/11/2021 and claimed that some unnamed beneficiaries of the estate sold respective portions of the suit land to more than 100 people including her husband Josiah Mokono Ombaye all of who are in occupation of the land. The 1st Defendant by an agreement dated 13/02/1992 bought a portion from One Daniel M. Ratemo and that she is therefore a Licensee or a beneficiary to the purchased portion. A Reply to Defence was filed on 07/12/2021 reiterating the contents of the Amended Plaintiff.
 4. The Hearing of the suit commenced on 24/11/2022 when Daniel Ratemo, one of the Administrators of the Deceased's Estate, testified that the Deceased who was his father died on 20/05/1980 and that the Defendants entered on the suit land in 1992. He disowned an agreement said to have been authored by him and Josiah Mokono Ombaye dated 13/02/1992. He testified that his step-mother, one Teresa Nyachama Ratemo, had even placed a caveat on the land on 27/10/1994. He said that he is not the alleged Daniel Ratemo whose identity card according to the sale agreement has serial number 0053186/63 since his ID No. is 4128449. He then produced the following documents: -
 1. Grant of Letters of Administration, Succession Cause Number 5 of 2019.
 2. Certificate of confirmation of grant.
 3. Certified of official search L.R. No. 9346/2
 4. Copy of title for the land L.R. NO. 9346/2
 5. Photographs.
 6. Letter to the Director of Public Prosecution.
 7. Demand Letter.
 8. Any other document by leave of court.
 5. On cross-examination by Mr. Nyambati for the 1st Defendant, the witness said he belonged to the 2nd house of the 6 houses of the Deceased – house of Perpetua Ondele. He also said that the Daniel Nyaega Ratemo who signed the sale Agreement is called Noah Ratemo and that he used his name to secure a job in the Office of the President in 1972.
 6. Mr. Moracha also cross-examined the witness on behalf of the 2nd Defendant. The witness said that he was aware that Noah was selling the land to Josisah Mokono and he warned them that the act was illegal and that the 2nd Defendant's son was buried thereon.
 7. On re-examination, the witness said that in 1992 when the land was allegedly sold, there were no Administrator of the Estate and even as at the date he was testifying, the distribution of the Estate had



not been concluded. DW2; Charles Oteki Rioba testified on behalf of the Defendants. He fortified his case by producing the following documents: -

1. Copies of Sale Agreements.
 2. Pleadings in Succession Cause No. 1117 of 1992 at Nairobi.
8. He said that he bought L.R. NO. 20914 which was allocated Title No. 9346/2 from the late Josiah Mokono in 1192. The same is a leasehold. He said that Mokono had bought it from Daniel Ratemo alias Noah, the latter having been a beneficiary of the property. By then there was no family dispute over the property. He was then given vacant possession of 1½ Acres. He is not aware whether any succession cause had been done over the estate. He has also not seen any letters of administration over the estate of Mokono.
9. Mokono was alive when this suit was instituted yet he was not sued. He said he has no privity of contract with the Plaintiffs and that he has developed the suit property. Mokono never told him to vacate the suit land and that the Plaintiffs were all well aware that he had bought the suit land. He also said that there are more than 100 other people who have bought part of the suit land yet none of them has been sued.
10. He then produced the following documents in support of his case.
1. Copies of Sale Agreements.
 2. Photographs of developed property.
 3. Any other document by leave of court.
11. On cross-examination by Mr. Mutai for the Plaintiff, the witness said that the sale agreement is dated 11/11/2013 which indicated the owner of the land to be the Deceased. He did not carry out a search before the contract and that his Advocates were Moerwa Omwoyo & Company. He said he understood the full contents and purport of the sale agreement. The agreement indicated that the Vendor was the son of Mathayo Ratemo who died in 1981. He knew there was a caveat placed over the land by one Teresa Nyanchana Ratemo claiming beneficial interest but he still went ahead to execute the sale agreement in spite of the caveat over L.R. NO. 20914/1.
12. On re-examination by Mr. Nyambati he said that he knew the registered owners of the suit land as Methusela Ratemo, Daniel Ratemo, Daniel Ratemo and Zachariah Ratemo and that Josiah, who had bought the land from Daniel Ratemo (Noah) sold the land to him. And that he was an Administrator of the Deceased's Estate.
13. The 2nd Defendant, Hellen Bwari Mokono, said she was the widow of the late Josiah Mokono Ombaye who died in March 2022. He said her late husband bought the parcel of land know as L.R. NO. 9346/2, 3 Acres from Daniel M. Ratemo alias Noah Nyaega Ratemo, more than 30 years ago in 1992. She later sold 1 ½ Acres to the 1st Defendant. She has developed her land. She produced a sale agreement dated 13/02/1992 as proof of the sale. She said she is still occupying the suit land. She also produced photographs showing permanent houses built by her late husband on the land. She also, like her co-defendant, said there are more than 100 people on the suit land who equally bought their respective portions before probate and wondered why the 2 were singled out, yet there is nothing special about what the 2 occupy.
14. On cross-examination by Mr. Mutai for the 2nd Defendant, Hellen said that by the time her husband died, he was living in Narok and that she didn't know that the Plaintiffs herein were the administrators of Mathayo's Estate until she was sued and that the 4 are brothers to her husband's vendor, Daniel Ratemo all of whose children she knew. She did not witness the sale agreement between her husband



and Daniel M. Ratemo dated 13/02/1992 and that the Daniel Ratemo 4th Plaintiff in court was not the same as the Daniel M. Ratemo who sold the land to her husband. She further said that in the sale agreement dated 11/11/2013 between the 1st Defendant and her late husband her name appear as a witness. She also produced a copy of official search dated 06/05/2020 which shows a caveat placed against the suit land by one of the beneficiaries. Admitting that she never filed a counter-claim Hellen said that she was not aware of succession cause No. 5 of 2019 in 2019 in Kisii High Court over this Estate.

15. Having invited all the parties herein to file Written Submissions, the issue before the court is whether any good Title was ever passed to the Defendants or any of them. In every contract these are the essentials of a valid contract: Capacity, Identification, Offer, Acceptance, Consideration, Meeting of the Minds, Competency and Legality of Contract.

And in any contract involving agricultural land the following are additional pre-requisites. Consent of the land control board from the area the land is situate. The agreement must be in writing or evidenced in any document in writing or the purchaser has taken possession.

And now coming to legal capacity, Section 45 of the Law of Succession Act Cap 160 Laws of Kenya reads as follows: -

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 person.

Any person who contravenes the provisions of this section shall: -

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

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.”

16. Further, Section 79 of the *Law of Succession Act* provides as follows: -

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

17. Acquisition of land before confirmation of Grant is unlawful and does not enjoy property rights under *the Constitution*. In the case of the Matter of the Estate of M’Ajogi M’Ikiugu alias Ikiugu Ajogi (Deceased) on sale of estate property before confirmation of grant the Court held as follows: -

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 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 of the estate property as by law stated.”

18. Consequently, any acquisition of land in violation of the [Law of Succession Act](#) is unlawful. F. Gikonyo J. in re Estate of Isaac Kaburu Marete (Deceased) [2017] eKLR Meru Succession Cause No.716 of 2011 observed that:

.....First, a void transaction is in law a nullity. It is not only bad, but incurably bad. And every proceeding or perceived right which is founded on it is not only bad but incurably bad. On this I can do no better than 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. The suit properties herein are immovable, being parcels of agricultural land. They could not be sold before confirmation of grant, unless the administrator(s) had obtained prior leave or permission of court to sell it. The sale of a deceased’s property by his son before he had obtained representation to administer the estate was not valid even where the son later on obtained representation. Even where the purchaser imagines that they had been assured by the deceased’s son that he would factor the sales in the administration of the estate of the deceased and Title Deeds of the portions that they had bought would be processed in their names.
20. Any sale transaction of land that happened before the grant was applied for therefore fell afoul of section 82(b)(ii) of the [Law of Succession Act](#). The said sale transactions happened in contravention of the [Law of Succession Act](#), and, therefore, they were unlawful and unenforceable. The purported buyers acquired no rights whatsoever under those contracts of sale. No provision of the [Law of Succession Act](#), could give a cover of legitimacy to any of the agreements. They conferred no rights whatsoever to the alleged buyers over the said property.
21. To determine this matter, one issue is crucial. What is the remedy available to a person who buys land belonging to a deceased’s estate from any beneficiary of the estate before the confirmation of the grant of letters of administration? The Defendants did not deal with the deceased. The transaction that they had with the deceased’s son did not bind the deceased, since he was already dead, and, therefore, it was not binding on his estate. The Defendants had no claim against the estate, they were not creditors of the estate, and they could not possibly be considered liabilities of the estate. The only remedy available to the buyers, with regard to the two transactions, is to pursue the person who purported to sell the property to them.
22. By dint of section 45 of the [Law of Succession Act](#), any transaction between the deceased’s son and any other person amounted to intermeddling with the estate of the deceased, and those involved, therefore, would be deemed to have engaged in criminal activity and should have been prosecuted. The sales



contravened sections 45 and 82 of the Law of Succession Act and there was no possibility that the Defendants could have acquired any valid Title from the sales, for the person who purported to sell the property to them had no Title to the land. He had nothing to sell and the Defendants bought nothing from him.

23. The late Daniel M. Ratemo alias Noah therefore did not have power by dint of section 82 of the Law of Succession Act, to sell the property. He could not enter into any binding contract with anybody over any of the assets that made up the Estate of the deceased and hence he conferred no good Title to the prompted buyers.
24. But before I pen off, I wish to also caution Administrators such as the Plaintiff herein who hold every other beneficiary at ransom so that the co-beneficiaries do not enjoy their benefits under the Estate and particularly when they get to know that a beneficiary intends to dispose of a portion of the Estate due to some dire need such as money for medical bill, school fees or even repayment of a loan etc. They also fail to move the Court to provide for the emergency. This is equally morally wrong. A beneficiary of an Estate has no superior rights over the Estate save that of administration of the Estate, which is analogous to trusteeship.
25. I therefore find and hold that the Plaintiffs indeed have capacity to bring this suit in Court on behalf of the said estate and further that they are entitled to the prayers in the amended Plaintiff and I so grant the same with costs as follows: -
the following orders: -
 - a. An order of eviction against the Defendants from the deceased's land parcel L.R. No. 9346/2.
 - b. An order of permanent injunction restraining the Defendants, jointly and severally, their respective agents, privies, servants and others whosoever claiming through them from entering, trespassing, tilling, constructing, wasting, harvesting trees thereon, and/or in any other manner howsoever dealing with the deceased's land parcel L.R. No. 9346/2.
 - c. Further, I order that the confirmation of Estate of the late Mathayo Ratemo Mayaka who died on 20/5/1980 be expedited.
 - d. Costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 12TH DAY OF OCTOBER 2023.

MUGO KAMAU

JUDGE

In the Presence of: -

Sibota - Court Assistant

Mr. Kirui for the Plaintiffs

Mr. Nyambati for the 1st Defendant

Mr. Moracha for the 2nd Defendant

