



**Mutia v Kinyumu & another; Mutemi (Interested Party) (Environment & Land Case E002 of 2021) [2023] KEELC 21424 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21424 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT & LAND CASE E002 OF 2021  
LG KIMANI, J  
NOVEMBER 9, 2023**

**BETWEEN**

**TEMI MUTEMI MUTIA ..... PLAINTIFF**

**AND**

**ESTHER MUNZAU SIMON KINYUMU ..... 1<sup>ST</sup> DEFENDANT**

**JEREMIAH MASAKU KINYUMU ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**TABITHA MUTEMI ..... INTERESTED PARTY**

**JUDGMENT**

1. This suit was instituted by way of the plaint dated 21<sup>st</sup> October 2021. The plaintiff claims that by a written agreement of sale of land dated 8<sup>th</sup> April 2000, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sold and the Plaintiff purchased a portion of LAND PARCEL NO. MWINGI/MWINGI/298 measuring about 0.4 Ha situated on the left of the main Thika-Garissa highway immediately after the Tyaa River Bridge about 1 km to Mwingi Town at a total consideration of Ksh.200,000. The Plaintiff paid the purchase price in full in 2 equal instalments.
2. As a term of the agreement, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were to retain a small section of the land measuring approximately 120 ft long x 60 ft wide being the portion on which was erect a stone house where the 1<sup>st</sup> Defendant lived.
3. It was averred that the land was still registered in the name of the defendant's deceased kin, Lena Kasyoka Kinyumu and the defendants requested the plaintiff to meet the costs of obtaining letters of administration intestate to her estate to facilitate the transfer of the respective portions to their said rightful owners, the defendants herein. It was stated that the plaintiff paid and a certificate for confirmation of grant was issued on 25<sup>th</sup> January 2012 through Succession Cause No. 11 of 2010 at



- the Magistrates' Court at Mwingi and the Defendants were awarded the suit land in equal shares with the understanding that they would transfer to the plaintiff his portion of the suit land.
4. The plaintiff stated that upon execution of the agreement, the boundary between the Plaintiff's and the 1<sup>st</sup> Defendant's portion of the suit land was marked by the planting of sisal and euphorbia shrubs in the presence of witnesses as is customary in the Kamba community.
  5. However, the Plaintiff shortly travelled to Europe for his doctoral studies, during which period he was unable to pursue the transfer of land. Upon travelling back and initiating contact with the Defendants for sub-division and transfer, they were evasive and declined and/or refused to effect the transfer.
  6. On 24<sup>th</sup> September 2021, the 2<sup>nd</sup> Defendant's son, Jackson Musyoka Kinyumu trespassed into the Plaintiff's suit land, harassed and threatened the Plaintiff's workers with harm should they fail to vacate the suit property. Consequently, on 27<sup>th</sup> September 2021, the 2<sup>nd</sup> Defendant, his wife, two daughters and two sons stormed the suit property and harassed the Plaintiff's workers and guests, causing damage to some wooden fencing posts and a water pump.
  7. The plaintiff avers that the defendants have breached their contract, and he has suffered damage and loss. Despite notice of intention to sue, the defendants have failed to transfer the suit property but instead continue to trespass, harass, abuse and threaten the Plaintiff, thereby interfering with his quiet possession.
  8. The Plaintiff is therefore seeking for the following orders:
    - a. THAT an order be issued compelling the Defendants to sub-divide and transfer LAND PARCEL NO. MWINGI/MWINGI/298 to the plaintiff herein as per the terms of the Agreement of 8<sup>th</sup> April 2000, failure to which an order do issue directed at the Deputy Registrar or any other officer appointed by the Court authorizing them to execute the necessary documents for sub-division and transfer.
    - b. THAT a permanent injunction do issue restraining the Defendants, either the Defendants wither by themselves or their servants, employees, agents or any other person acting for them or on their behalf from interfering with the Plaintiff's quiet possession, transferring other than in accordance with the agreement entered between the Plaintiff and the Defendants on 8<sup>th</sup> April 2000, selling, exchanging, disposing of or dealing in the suit property in any other manner whatsoever with the parcel of land known as MWINGI/MWINGI/298.
    - c. THAT an order for compensation for loss and damage, loss of business and additional costs incurred since then be issued.
    - d. Costs of this suit.
  9. The Defendants filed a joint statement of Defence denying the allegations in the plaint and putting the plaintiff to strict proof thereof.
  10. By an application dated 29<sup>th</sup> November 2021, the interested party Tabitha Mutemi, the estranged wife of the plaintiff applied to be joined to the proceedings claiming that she had an equal and identifiable stake in the suit land being property acquired during her marriage to the plaintiff. The said application was allowed.

## Evidence at the Trial Court



11. The hearing of the suit proceeded on 16<sup>th</sup> February 2023 where PW 1, Temi Mutemi Mutia, the Plaintiff herein adopted his witness statement dated 21<sup>st</sup> October 2021 as well as the bundle of documents.
12. In his witness statement, the Plaintiff reiterated the contents of the Plaintiff, that he purchased a portion of LAND PARCEL NO. MWINGI/MWINGI/298 measuring about 0.4Ha from the Defendants, at a total sum of Ksh.200,000 as consideration, which the Plaintiff paid in full in 2 equal instalments of Ksh.100,000.
13. As a term of the agreement, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were to retain a small section of the land, measuring approximately 120 ft long x 60 ft wide, being the portion, upon which was erected a stone house, where the 1<sup>st</sup> Defendant lived. The Plaintiff was to facilitate the process of getting letters of administration to the estate of the registered owner of the land, which he did. However, the Defendants declined to effect transfer and sub-division of the suit property and have been harassing him and his workers and interrupting his quiet possession of the suit property.
14. PW 1 produced the agreement for sale and the translation as exhibits 1 and 2. He also confirmed that the land was registered in the name of Lena Kasyoka Kinyumu(Deceased) and that he had facilitated payment for the succession proceedings for her estate. He produced receipts as evidence. After this, he started developing the land and converted it to a recreation garden. He sunk a shallow well, planted exotic trees, and grass and put up a fence with chain link and barbed wire in the years 2012-2013 which cost him a significant amount of money. At the time, he had a cordial relationship with the Defendants who acted as part of his caretaker team
15. As he was cross-examined by the Defendants, the Plaintiff denied asking the Defendants to cultivate the land and that he would help them with the succession case in return and leave the property to them after that. He also denied being given notice to vacate the suit land by the Defendants.
16. Upon being cross-examined by counsel for the interested party, he confirmed that the interested party was his ex-wife and the suit property was one of the properties that he had purchased during the time that they were married she was not directly involved in the purchase but she was aware. He stated that he was not aware of any court orders that were related to this property as the previous matrimonial cause filed was dismissed for want of prosecution.
17. On re-examination, the Plaintiff stated that he participated in the succession cause because the defendants had told him that they knew nothing about succession and that they did not have money, therefore he paid for their expenses, which was part of the agreement that he honoured.
18. PW 2 Mue Muinde Masika gave his testimony to the Court that he knew the 2<sup>nd</sup> Defendant during the season of 1987 when he was working for him as a driver and that he knew the Plaintiff from when he worked with an insurance company. He testified that he knew about the sale agreement from when the 2<sup>nd</sup> Defendant was working for him, who had told him that there was land that he wanted to sell and he informed the plaintiff of this and PW 2 introduced them to each other.
19. The two agreed on a purchase price of Ksh.200,000 and he was a witness to the agreement. At the time after executing the agreement, PW 2 stated to the Court that the Plaintiff dug a well and started selling water. He relied on his witness statement dated 12/7/2022 and adopted it as evidence before the Court.
20. In his witness statement, he had stated that when the 2<sup>nd</sup> Defendant wanted to sell the land, PW 2 had enquired whether the rest of his family was aware and he informed him that he had the full blessings of his mother and that his sister, Lena Kasyoka Kinyumu had passed on about 2 years earlier and had not been survived by any child or other person other than their mother and himself. He therefore



- agreed to stand as a witness to the sale agreement, which he appended his signature thereto on the 8<sup>th</sup> of April 2000. He also witnessed the defendants append their signatures as well as another witness for the purchaser, Antony Mutia Ngonyi who has since passed on.
21. PW 2 noted in his witness statement that the purchase was free from any undue influence. He stated that consideration was paid in their presence and boundaries were properly set. He has known the Plaintiff to be the owner of the suit property and there has been no problem until he was informed of the Defendants' refusal to effect transfer.
  22. Upon cross-examination by the 2<sup>nd</sup> Defendant, PW 2 stated that he had not brought a document to show that the 2<sup>nd</sup> Defendant was working for him as a driver, but he had witnesses to that fact. He denied that the 2<sup>nd</sup> Defendant had been paid to be shown by the Plaintiff on how to do the Succession cause.
  23. Upon cross-examination by Counsel for the Interested Party, PW 2 confirmed that he knows the interested party as wife to the Plaintiff and has known her for a long time but did not know if she was involved in the purchase of the suit property.
  24. PW 3 John Musyoka Mwendwa gave his testimony, stating that he knew the Defendants and the Plaintiff and that he also knew the Plaintiff's father in 1995. In 2001, the Plaintiff's father called him to come to work at the Plaintiff's place on the suit land. He was told by the Plaintiff to do some work of brick-making, to put up the fence and to plant trees. He did not know of the said agreement to purchase the land, but the Plaintiff had told him that he had bought the land.
  25. He was hired by the Plaintiff in early 2013 on a full-time basis, where he constructed a corrugated iron sheet house which was used as his residence and also a store. In December 2017, other full-time members were hired where the recreational garden was open for the general public, where they would host various functions such as wedding reception parties, graduations etc. In 2020 during the COVID-19 pandemic, when it was advised that people aged 50 years and above should work from home, he requested an extended non-paid leave and was hoping to resume work once the situation normalized.
  26. He was called by the Plaintiff in August 2022 and informed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had refused to effect the transfer of his parcel of land to him when no one had ever approached him to tell him that either the plaintiff or his workers were on the parcel of land illegally.
  27. Upon cross-examination, by the 2<sup>nd</sup> Defendant, denied signing any confirmation that the 2<sup>nd</sup> Defendant had sold land to the Plaintiff and that he did not know in whose name the Title deed to the suit land was.
  28. Upon cross-examination by Counsel for the Interested Party, he stated that he had worked on the suit land for about 10 years, where he knew her as the wife of the Plaintiff.
  29. The Defence case proceeded on 18<sup>th</sup> July 2023 when DW1 Jeremiah Masaku Kinyumu who is the 2<sup>nd</sup> Defendant herein gave evidence before the court, adopting their joint Defendants' witness statement dated 27<sup>th</sup> October 2021 as evidence. In their statement, the Defendants stated that they know the Plaintiff herein but denied ever selling the land and that the purported sale agreement dated 8<sup>th</sup> April 2000 was not signed by them or their witnesses.
  30. DW 1 stated that in the year 2000, the Plaintiff came to their home and asked for land to cultivate from the 1<sup>st</sup> Defendant and himself. They told him that the land did not belong to them but belonged to Lena Kasyoka Kinyumu(Deceased), then the Plaintiff promised that he would show them how to have the land transferred to their names if he could cultivate the land. In 2010, the Plaintiff took



- him to the Court in Mwingi where the suit parcel was transferred to their names jointly with the 1<sup>st</sup> Defendant and they were issued with a certificate for confirmation of grant and in Succession Cause 11 of 2010 Mwingi. He then asked the Plaintiff for the title to the land but was told by him that there were government procedures that he needed to go through to get the title and they continued as good friends.
31. In October 2021, DW 1 stated that the Plaintiff took him to the Lands Office to get the title deed registered and on 14<sup>th</sup> October 2021, he was taken back to the Lands Office and was given the title deed DW 1 stated to the Court that the Plaintiff then told him that he needed time to vacate the land as agreed. He stated that he got the title on 14/10/2021 while the Plaintiff sued him in this case on 21/10/2021 only 7 days later. He stated that the said sale agreement was false and had false signatures. He states that he had agreed with the Plaintiff that when he got the title deed he would leave the 2<sup>nd</sup> Defendant the jembe for digging, the water tank, the fence and the flowers on the land as a thank you. He urged the Court to assist them since the Plaintiff is taking their land from them.
  32. During cross-examination by Counsel for the Plaintiff, the 2<sup>nd</sup> Defendant stated that the fence was put up to prevent cows from getting in as well as the concrete poles. He denied that there was an agreement for the cultivation of the land. He also stated to the court that he had not brought an expert witness to show that the signatures were not his.
  33. Upon cross-examination by counsel for the Interested Party, the 2<sup>nd</sup> Defendant stated that he did not know the interested party and that the Plaintiff had never brought his wife to him. He agreed that the signatures in court were his but the one on the sale agreement was not his. He also noted that the Plaintiff entered the land in the year 2000. He also denied that he had changed his mind on the sale agreement because the value of the land had increased and stated that he could not accept more money for it since their family had not agreed to sell the land.
  34. DW 2 Esther Muli Masaku also gave evidence for the Defence case and adopted the witness statement dated 21/6/2023 as her evidence in chief. She stated that she is the daughter of the 2<sup>nd</sup> Defendant and the first defendant is her grandmother. She knew the Plaintiff in this case as a friend to her father. She denied that the Defendants ever sold the suit land to the Plaintiff and the agreement dated 8<sup>th</sup> April 2000 was a fraud as she and her mother would have had to witness/sign the said sale agreement.
  35. She stated that she was born in the year 1990, and thus was 9 years old when the Plaintiff started occupying the suit land in the year 2000. She stated to the Court that at the time, she had the capacity to know about the transactions her parents were doing.
  36. Upon cross-examination, by counsel for the Interested Party, she stated that she did not know Tabitha Mutemi, the interested party. She noted that the Plaintiff had been on the suit land for over 20 years, with the agreement to cultivate the land until he was able to get the title deed for the Defendants, but she did not have a copy of such agreement. She denied that they agreed to sell the land and also denied that the Plaintiff paid them any rent for the land.
  37. Upon being re-examined, DW 2 stated to the court that the Plaintiff only stayed on the land for 20 years because he said that the government process to get a title deed takes long.
  38. DW3 Naomi Mwikali Masaku adopted her witness statement dated 21/6/2022 as her evidence in chief before the Court. In her statement, she had identified herself as the wife of the 2<sup>nd</sup> Defendant and that the 1<sup>st</sup> Defendant was her mother-in-law. She denied that the Defendants sold the suit property Mwingi/Mwingi/298 to the Plaintiff or the Interested party.



39. Upon cross-examination, DW 3 stated that she did not have any evidence in court to show that the agreement for sale was a fraud. She denied there being a sale agreement since the land belonged to Lena Kasyoka and one cannot sell the land of the deceased. She confirmed that the Plaintiff helped the Defendants with the succession proceedings.
40. The parties proceeded to file written submissions, which have been considered and are incorporated in the analysis and determination of this suit.

#### **Plaintiff's written submissions.**

41. Counsel for the Plaintiff summarized their case and what ensued during the trial. In their submissions, counsel for the plaintiff noted that the Plaintiff has made several improvements on the suit land such as fencing it off and putting up a gate, designing and landscaping the land and building 4 traditional grass-thatched Kamba houses and a water steel structure, where the Plaintiff has put up a 10,000liter plastic water tank, all of which cost a significant amount of money.
42. Counsel submitted that the sale agreement was valid, was executed by all parties thereto and was corroborated by one Mue Masila who witnessed the said agreement relying on Section 3(3) of the [Law of Contract Act](#) that all the elements of a valid contract were fulfilled.
43. Counsel for the Plaintiff also relied on the right of adverse possession, even without the Plaintiff having purchased the suit property, quoting from Section 7 of the [Limitation of Actions Act](#) CAP 22 and Section 13 as well.
44. On the issue of forged signatures, counsel quoted Section 109 of the [Evidence Act](#) on the burden of proof falling on the person who wishes the Court to believe in its existence and cited Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No.342 of 2010(2013)eKLR cited in the case of Nkuchiana Ngara v Joseph Kalunge Ekandi(2020)eKLR.
45. The Plaintiff therefore urges the court to find that the Agreement for sale dated 8<sup>th</sup> April 2000 satisfied the requirements of Section 3(3) of the [Law of Contract Act](#) and enforce the Plaintiff's right of ownership.
46. Counsel for the Interested Party stated that they would be relying on the Plaintiff's case.

#### **Defendants' written submissions**

47. The Defendants denied ever entering into such an agreement with the Defendants and stated that they only allowed the Defendant to cultivate on the suit land as he helped them with the succession process and obtaining title to the suit land. They state that the agreement relied upon by the Plaintiff is fraudulent.
48. The Defendants' position is that the Plaintiff and the Interested Party are both trying to grab their land.

#### **\*\*Analysis and Determination\*\***

49. Based on the pleadings filed, the evidence adduced at the trial and the submissions of Counsel for the parties, the following issues arise for determination:
  1. Is the Agreement for the sale of the suit land parcel Mwingi/Mwingi/298 dated 8/4/2000 valid?
  2. What orders should the Court make?



1)

**Is the Agreement for the sale of the suit land parcel Mwingi/Mwingi/298 dated 8/4/2000 valid?**

50. The plaintiff contends that he bought land parcel Mwingi/Mwingi/298 from the defendants for consideration of Ksh.200,000 in the year 2000. He states that they mutually agreed that he would help the defendants with the process of obtaining letters of administration to the estate of Lena Musyoka, in whose name the suit land was registered. It was also averred that they agreed to have the defendants registered as the joint owners of the land and then transfer the same to him.
51. The Defendants on the other hand denied ever entering into such an agreement with the plaintiff and stated that they only allowed him to cultivate the land as he helped them with the succession process and obtaining title. They state that the agreement relied upon by the Plaintiff is fraudulent.
52. In their submissions, counsel for the plaintiff noted that the Plaintiff has made several improvements on the suit land such as fencing it off and putting up a gate, designing and landscaping the land and building 4 traditional grass-thatched Kamba houses and a water steel structure, where the plaintiff has put up a 10,000-liter plastic water tank, all of which cost a significant amount of money.
53. Counsel further submitted that the sale agreement was incontrovertible, was executed by all parties thereto and was corroborated by one Mue Masila who witnessed the said agreement. He also stated that there were receipts and evidence from the 2<sup>nd</sup> Defendant indicating that the Plaintiff was involved in the process of succession as per clause 6 of the agreement for sale. The Plaintiff also submits that the Interested Party is a stranger to the said sale agreement as she was not part of it and that the suit land is not matrimonial property.
54. The Defendants on the other hand submitted that the agreement dated 8<sup>th</sup> April 2000 was a fraud and was written by the plaintiff himself without their knowledge and that this was a tactic to grab their land.
55. The interested party who is the Plaintiff's former wife states that the suit property constitutes matrimonial property that she contributed to, However, she did not annex evidence of an active matrimonial property cause in Court, or evidence that she was involved in the agreement for the sale of the suit land.
56. Counsel for the plaintiff quoted Section 3 of the Law of Contract Act which was in force at the time when the agreement between the parties herein was said to have been entered into on 8<sup>th</sup> April 2000. The said section amended Section 3 of the Law of Contract Act on 4<sup>th</sup> June 2002 which stated as follows;

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof is in writing and is signed by the party to be charged or by some person authorized by him to sign it.

Provided that such a suit shall not be prevented by reason only of the absence of writing, where the intending purchaser or lessee who has performed or is willing to perform his part of the contract.

- i. Has in part performance of the contract taken possession of the property or any part thereof; or
- ii. Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract”



57. The Agreement for sale dated 8<sup>th</sup> April 2000 was in writing and was said to have been signed by the parties thereto in the presence of witnesses though the defendants deny signing it.
58. One challenge to the said agreement that is quite glaring is the uncontested fact that at the time when the said sale agreement was entered into, the suit land was registered in the name of the deceased Lena Kasyoka Kinyumu. The said ownership is confirmed by the Certificate of Official Search dated 3<sup>rd</sup> June 2020 produced in evidence by the plaintiff and the Certificate of Confirmation of grant in the estate of the said Lena Kasyoka Kinyumu dated 25<sup>th</sup> January 2012.
59. This raises the question of whether the defendants had the legal capacity to enter into the sale agreement dated 8<sup>th</sup> April 2000 where the subject of the sale was land owned by a deceased person. The law that regulates the affairs and properties of deceased persons is the Law of Succession Act CAP 160 Laws of Kenya. Section 79 of the said Act provides that all the property of the deceased vests in the executor or administrator of an estate to whom representation has been granted who shall be the personal representative of the deceased for all purposes of the grant issued to him/her.
60. Further, Section 82 (b) (ii) provides for the powers of personal representatives and states that they 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 arising out of his death for his personal representative;
  - 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. 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.

61. The defendants were appointed personal representatives to the estate of the deceased by the grant of letters of administration issued on 16<sup>th</sup> August 2010. They therefore had no legal capacity to enter into an agreement for the sale of land belonging to the estate of the deceased Lena Kasyoka Kinyumu on 8<sup>th</sup> April 2010 four months before their appointment.
62. The above Section 82 (b) (ii) clearly limits the powers of the personal representative and prohibits the sale of immovable property of a deceased person before confirmation of the grant. As earlier stated the certificate of confirmation of the grant was issued on 25<sup>th</sup> January 2012.
63. Further to the above prohibition, Section 45 of the Law of Succession Act makes it a criminal offence to take possession or dispose of, or otherwise intermeddle with the free property of a deceased person and stipulates as follows:

“

“45. No intermeddling with the property of the deceased person

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 person.

(2) 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.”

64. From the foregoing, it is the finding of the court that the defendants lacked the legal capacity to enter into the transaction of sale of land parcel number MWINGI/MWINGI/298. It is also clear from the provisions of Section 45 of the *Law of Succession Act* that entry into possession of the suit land by the plaintiff was an illegal act in contravention of the said section of the law and is subject to the sanctions provided under the said section.

65. In Machakos HCC 256 of 2007 in re estate of John Gakunga Njoroge (deceased) [2015] eKLR, the court dealt with similar facts in which property was claimed by persons who had bought land from beneficiaries to the estate of the deceased. The court declared contracts made with beneficiaries to be void and stated as follows;

“ 15. 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 sections 45 and 82 of the *Law of Succession Act*.”

66. The Court in the case of Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina [2019] eKLR took note that:

“The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.”

67. Justice Nyarangi held in Patel vs Singh Court of Appeal in Nairobi Civil Appeal No. 64 of 1985 quoting Devlin L.J (as he then was) in Archbalds (Freightage) Ltd v S Spanglett Ltd [1961] 1 QB 374, at page 388 on the issue of illegality,

“The effect of illegality upon a contract may be threefold. If at the time of making the contract, there is intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract, he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab inito and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.”



68. In *Kenya Airways Limited versus Satwant Singh Flora* [2013] eKLR which authority was cited with approval by the Court of Appeal in *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR, the court in laying guidelines to be applied by the court when determining rights and obligations of parties where one party pleads alleged illegality of the contract as justification for refusal to be bound under such a contract held that; -

“.....(iii) No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.”

(iv) No Court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality”

70. This Court took the above position in *Kitui ELC Appeal No. E12 of 2021 Julius Kavili Muthengi vs Irene Susan Kavili* (unreported): where the administrators of the estate of a deceased person had sold the suit land belonging to the deceased before confirmation of grant, holding that:

“It is the court’s view that the validity of the sale agreement entered into between the Appellant and the respondent has been dealt with in the course of this judgment. The said agreement was illegal, null and void as it contravened the provisions of Section 45 (1) (2) and Section 82 (b) (ii) of the *Law of Succession Act* and Sections 6(1) and 22 of the *Land Control Act*. The said agreement was unenforceable and doctrines of equity could not be applied to save the said transaction.”

69. The court thus finds that the agreement entered into between the plaintiff and the defendants dated 8<sup>th</sup> April 2000 was illegal, null and void and thus unenforceable. Consequently, prayers 1 and 2 of the plaint are for dismissal.

2.

### **What orders should the Court make?**

70. Having found that the contract herein was void, the question that needs to be answered is; would money paid under the said contract be recoverable? The plaintiff prayed for an order for compensation for loss and damage, loss of business and additional costs incurred since then to be issued. The Defendants deny executing the agreement for sale and contend that the agreement pleaded by the plaintiff is fraudulent.

71. The court notes that the pleadings filed by the defendants were mere denials lacking in particulars of fraud as required under Order 2 Rule 10 (1) which states that “Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing— particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

72. Courts have held that allegations of fraud are subject to a higher standard of proof and fraud must not only be specifically pleaded, it must also be specifically proved. In *Moses Parantai & Peris Wanjiku*



Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR the court held that:

“Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities. No evidence was tendered to this end by the appellants. They did not call any witness from the land office to verify their allegations.”

73. The defendants in this case did not produce any evidence proving that the sale agreement was fraudulent and they did not prove that the signatures said to belong to them did not so belong by procuring evidence on handwriting outside of the statements made by the 2<sup>nd</sup> defendant.
74. On the other hand, the plaintiff did prove that the sale agreement dated 8<sup>th</sup> April 2000 was indeed entered into between him and the defendants. He called as a witness in court one of the witnesses to the said agreement PW 2 Mue Muinde Masila who happened to know the 2<sup>nd</sup> defendant well and was the one who introduced the plaintiff to the defendant. From the evidence, the court is satisfied that the said witness knew the plaintiff and the 2<sup>nd</sup> defendant well.
75. In the court's assessment, PW2 presented as a reliable witness and the court readily accepted his evidence that the sale agreement between the plaintiff and the defendants was entered into and executed. Further, the court accepts as a fact that the plaintiff did pay the defendants the entire purchase price of Kshs. 200,000/- a refund to which he is entitled since the defendants did not own the land which they purported to sell to the plaintiff.
76. On the question of recovery of money, I rely on the case of Root Capital Incorporated v Tekangu Farmers' Co-operative Society Ltd & another [2016] eKLR where Jailus Ngaah J in handling a similar issue held that; -

“According to Halsbury's Laws of England (supra) paragraph 883 a claim for the return of money paid over in these circumstances may take one of the four basic forms. It may be: (1) a personal action for a debt (for instance, on a loan); (2) a personal restitutionary claim for money had and received; (3) an action in tort for the return of identifiable coins or notes or their value; or (4) a proprietary claim in equity even where the money has been paid into a mixed fund. However, all the cases on recovery of money paid under illegal contracts concern actions in debt or for money had and received.”

77. The Court in the case of Joseck Ikai Mukuha v James Irungu Kanyuga [2021] eKLR quoted the following case while ordering a refund of the purchase price:

“The Court in Nelson Kivuvani Vs Yuda Komora & Another, Nairobi HCCC No.956 of 1991, opined that an agreement for the sale of land

“The agreement for the sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

To this stretch, the parties entered into a valid contract for the sale and transfer of the parcel of land hence validating the contract. However, the Court in Murang'a ELC No. 32 of 2017 found that “the 2<sup>nd</sup> Defendant did not possess a valid legal title neither did the 3<sup>rd</sup> Defendant on account of proven fraud, illegality and procedural improprieties on the part of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant” The Defendant herein, therefore, did not have a good title to transfer



the land to the Plaintiff thus was voided. It has been settled that a party cannot give that which he does not have; therefore, the Defendant could not have given title to land if he did not have it.

The remedy available for the Plaintiff is for compensation for breach of contract and therefore a refund of the purchase price, the contract having become incapable of being enforced thus putting parties to a position they were before the contract.”

78. Though the plaintiff claims loss of business and costs incurred, the court is of the view that the plaintiff did not tender any evidence to prove the claim. In any event from the evidence adduced in court, the plaintiff has been in possession of the suit land and carried on business since he was granted possession in the year 2000 till the time he claims the defendant started interfering with the said possession. Further, the court issued an order that the status quo be maintained pending hearing and final determination of the suit herein. The plaintiff has thus had possession of the suit land to the time of hearing and determination of the suit. The said possession and occupation of the suit land is one of the acts that the court has found was in contravention of the *Law of Succession Act*.
79. From the foregoing, the court finds that the suit herein partly succeeds and makes the following orders in the disposition of the suit;
1. Prayer 1 and 2 of the plaint is hereby dismissed.
  2. Judgement be and is hereby entered in favour of the plaintiff against the defendants jointly and severally for a refund of the purchase price paid in the sum of Kshs. 200,000/=
  3. Each party to bear his/her own costs of the suit

DELIVERED, DATED AND SIGNED AT KITUI THIS 9<sup>TH</sup> DAY OF NOVEMBER 2023

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

Judgement read in open court in the presence of-

J. Musyoki Court Assistant

Sichangi Advocate for the Plaintiff

Jeremia Masaku Defendants in person

Shadrack Wambui.for the interested party

Page 7 of 7

ELC E002 OF 2021

