



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 456 OF 2017

MARY WANJIRU IRERI.....PLAINTIFF

VERSUS

BERNICE KANINI NGOTHO.....1ST DEFENDANT

ELIZABETH MWENI NGOTHO.....2ND DEFENDANT

JAMES MUINDI NGOTHO.....3RD DEFENDANT

(Sued as the Administrators of the Estate of

ANTHONY ATHANAS NGOTHO (Deceased)

AND

CHARLSE MATOLO MAINGI & OTHERS.....THIRD PARTY

JUDGMENT

1. By a plaint dated 3rd November 2017, the Plaintiff pleaded that at all the material times land parcel numbers 2/3783, 2/3784 and 2/3908 all in Mavoko Town in Machakos County (herein after referred to as the three suit properties) were owned by the late **Anthony Athanas Ngotho**, whose estate Bernice Kanini Ngotho, Elizabeth Mweni Ngotho and James Muindi Ngotho, the defendants herein, are administrators. She averred that by agreements dated 21st February 2003, 5th October 2006 and 18th November 2006 respectively, she purchased the three suit properties from the late Antony Athanas Ngotho. She further stated that she paid Kshs. 10,000/-, Kshs. 10,000/- and Kshs. 8,000/- for the transfer of the three suit properties respectively.

2. It was the Plaintiff's assertion that Anthony Athanas Ngotho passed on on 9th November 2007. She further stated that the defendants herein were issued with grant of Letters of Administration for the estate of Anthony Athanas Ngotho on 11th September 2009 vide Milimani High Court Succession Cause No. 553 of 2007; whereof they were obligated to transfer the three suit properties to the Plaintiff. It was her contention that the defendants have refused and failed to transfer the three suit properties to her causing her loss and damage. Therefore the plaintiff sought for the following orders;

(a) An order of specific performance directing the defendants to transfer the titles in Land Parcel L. R. 2/3783, 2/3784 and 2/3908 in Mavoko Town, Machakos County to the Plaintiff.

(b) General damages for delayed completely, plus interest thereon at court rates.

(c) Costs of this suit plus interest thereon at court rates.

3. The defendants filed a statement of defence dated 31st May 2018 and filed in court on the same date. The defence was amended on 16th July 2019 and filed on 17th July 2019, pursuant to the order of this court made on 10th July 2019. In the amended Defence, the defendants denied the plaintiff's claim and averred that the plaintiff's suit was time barred by dint of Section 4(1) (a) of the Limitation of Actions Act Cap 22 Laws of Kenya. They conceded that the three suit properties were at one time owned by the late Anthony Athanas Ngotho. However, they denied there being any agreements between the late Anthony Athanas Ngotho and the plaintiff in respect of purchase of the three suit properties. They also denied the allegation that monies were paid for the purchase of the three suit properties as well as the transfer thereof. They further denied there being any written acknowledgment of receipts of payments by the late Anthony Athanas Ngotho as alleged by the plaintiff. On those grounds, it was their case that the plaintiff was not entitled to the orders sought.

4. The defendants also stated that the plaintiff did not participate in Nairobi Succession Cause No. 553 of 2007, neither was she entitled to be a beneficiary in the said estate in respect to the three suit properties. It was their case that property known as Mavoko Town/Block 2/3908 was registered in the name of a third party and therefore the court cannot issue orders affecting third parties who are not party to this suit. On 15th March 2019, the defendants filed a preliminary objection dated 15th March 2019 stating that the suit was time barred.

5. The plaintiffs filed a document christened "Amended Plaintiff's Statement of Plaintiff" dated 27th September 2019 and filed in court on 2nd October 2019, which basically responded to the amended defence, but did not have any semblance of an amended pleading as it neither contained the averments of the original plaint nor complied in any form, with Order 8 Rule 7 in so far as the mode of amendment is concerned.

EVIDENCE OF THE PARTIES

6. The plaintiff adopted her witness statement as her evidence in chief she testified that on 21st February 2003, she entered into a land sale agreement with Anthony Athanas Ngotho for the purchase of land parcel number 2/3908 at a consideration of Kshs. 150,000/-, which she paid in full, completing payments thereof on 18th August 2006, which was acknowledged in writing by the said Anthony Athanas Ngotho. She also testified that on 27th April 2008, she paid Kshs. 8,000/- for the transfer of the said parcel to herself which was allegedly acknowledged in writing by the third defendant Joseph Muindi.

7. She further testified that on 5th October 2006 she again entered into a land sale agreement with Anthony Athanas Ngotho in respect of the purchase of land parcel number 2/3784 at a sum of Kshs. 150,000/- which amount was paid in full on the date of the purchase and accordingly acknowledged in writing by the said Anthony Athanas Ngotho. She stated that she also paid a sum of Kshs. 10,000/- for purposes of transfer of the purchased parcel of land to her.

8. The last agreement, according to the plaintiff's testimony was entered between Anthony Athanas Ngotho and herself on 8th November 2006 for the purchase of land parcel number 2/3783 at a consideration of Kshs. 150,000/- which she paid in full together with Kshs. 10,000/- for transfer of the said parcel to her. It was her evidence that Anthony Athanas Ngotho died on 9th January 2007 and the defendants were issued with confirmed grant of letters of administration on 1st September 2009. She stated further that the defendants had refused to transfer the purchased parcels of land to her and sought for orders in the plaint. She produced the agreement dated 21st February 2003 as P exhibit 1, receipt for land sale for the sum of Kshs. 5,000/- dated 18th August 2006 as P exhibit 2, receipt for land sale for the sum of Kshs. 8,000/- as transfer fee dated 27th April 2008 as P exhibit 3, land sale agreement dated 5th October 2006 as P exhibit 4, a receipt dated 5th October 2006 for the sum of Kshs. 150,000/- being full payment for consideration as P exhibit 5, a receipt dated 5th October 2006 for the sum of Kshs. 10,000/- for transfer fees as P exhibit 6, land sale agreement dated 8th November 2006 as P exhibit 7, receipt dated 8th November 2006 for Kshs. 150,000/- for payment of consideration as P exhibit 8, receipt dated 8th November 2006 for the sum of Kshs. 10,000/- for transfer fees as P exhibit 9 and a demand letter dated 18th September 2012 as P exhibit 10.

9. In cross examination the plaintiff stated that Anthony Athanas Ngotho died in 2009. She also stated that the three agreements were not signed by Anthony Athanas Ngotho but by a lady, though she did not have any proof that the lady who signed the agreements was the agent of Anthony Athanas Ngotho. On being asked why exhibit 3 which is a receipt, had Alldays Limited as the entity that issued the receipt, she stated that Alldays was a company owned by Anthony Athanas Ngotho.

10. The plaintiff further alleged that the reference in paragraph 4 of her witness statement to Joseph Muindi as being the 3rd defendant was a typing error. She further alleged that instead of transferring title to her, the defendants sold the land she had purchased.

11. In re-examination, the plaintiff stated that the late Anthony Athanas Ngotho was not the one who used to sign the land sale agreements and that the receipts from Alldays Limited shows that the office of the person who sold her land is at Studio House, Hurlingham.

12. The Defendants presented one witness, James Muindi Ngotho who is the third Defendant in this matter. He adopted his witness statement dated 21st October 2020 in which he testified that he was one of the administrators of the estate of the late Anthony Athanas Ngotho, who passed away on 9th January 2007. He testified that this suit is statute barred by dint of Section 4(1) (a) of the Limitation of Actions Act. He maintained that the three suit properties were once owned by the late Anthony Athanas Ngotho.

13. The Defendant further testified that the deceased Anthony Athanas Ngotho never entered into any land sale agreement with the Plaintiff and no consideration or transfer fees was received by the deceased or the defendants; and as such the Plaintiff is not entitled to the orders sought in the plaint. The Defendant further stated that all documents produced by the Plaintiff did not bear the deceased's signature or the Defendant's signatures. He stated that all the receipts and sale agreements produced by the Plaintiff were forgeries, as it is only the deceased or the administrator of his estate who could receive the monies alleged to have been paid by the Plaintiff.

14. It was the Defendant's testimony that Land Parcel Number Mavoko Town/Block 2/3908 is registered in the name of one David Waweru Maina who is not a party to this suit. He wondered why the Plaintiff who alleges to have bought the suit properties between 2003 and 2006 had not bothered to ensure that the same were transferred to her for the years before she filed suit. DW1 stated that he had never met the Plaintiff before this suit was brought to court and that the Plaintiff had never approached him regarding her claim. He denied being the one who signed and issued P exhibit 3 and sought for the dismissal of this suit.

15. On cross examination, DW1 stated that the late Anthony Athanas Ngotho had offices at Studio House in Hurlingham, Nairobi, where he dealt in the business of purchasing and selling land. The witness claimed that on verification of the Plaintiff's documents he noted that the same were not authentic. He also stated that Alldays Limited's directors were the five beneficiaries of the estate of Anthony Athanas Ngotho. He produced a copy of the application for official search and certificate of official search in respect to Mavoko Town/Block 2/3783 as D exhibit (a), copy of application for official search and certificate of official search in respect of Mavoko Town/Block 2/3784 as D exhibit (b)

and copy of application for official search and certificate of official search for Mavoko Town/Block 2/3908 as D exhibit (c).

PARTIES SUBMISSIONS

16. Both parties filed their submission on 10th December 2021.

17. The Plaintiff submitted that at all material times Land Parcel Numbers 2/3783, 2/3784 and 2/3908 in Mavoko Town, Machakos County were all owned by the late Anthony Athanas Ngotho and that on 21st February 2003, 5th October 2006 and 18th November 2006 respectively she entered into land sale agreements with the deceased for the purchase of the three suit properties whereof she paid the entire purchase price together with transfer fees. The Plaintiff relied on Section 25 of the Land Registration Act for the proposition that a proprietor's obligation as trustee cannot be relinquished under Section 25 of the said Act. The Plaintiff further contended that a gift of registered land becomes effective upon execution and delivery of transfer and cannot be recalled thereafter even though the donee has not yet been registered as proprietor. The Plaintiff also placed reliance on the cases of *Mascall vs. Mascall [1984] 50 P & CR 119* and *The Registered Trustees Anglican Church of Kenya Mbeere Diocese vs. The Rev. David Waweru Njoroge Civil Appeal No. 108 of 2002*, both of which this court has considered.

18. The Plaintiff concluded that her case had merit deserving of the prayers sought.

19. The Defendants submitted that they were administrators of the estate of the late Anthony Athanas Ngotho and that the three suit properties were at one time owned by the deceased. They submitted further that all bona fide purchasers of part of the estate were allocated their property through the succession cause after verification and validation of documents in support of their respective claims. They maintained that no agreements were entered into between the deceased and the Plaintiff and no consideration or transfer fees was paid to the deceased.

20. The Defendants also argued that the Plaintiff's suit was statute barred by dint of Section 4(1) (a) of the Limitation of Actions Act Cap 22 Laws of Kenya as stated in their preliminary objection dated 15th March 2019 and filed in court on 18th March 2019. It was contended for the Defendants that actions founded on contract cannot be brought after the expiry of six years. Counsel placed reliance on the cases of *Gathoni vs. Kenya Cooperative Creameries Limited [1982] KLR 104* and *Hezron Kimeli Cheruiyot vs. Rusi Chepkemoi Chebochok & 3 Others [2021] eKLR* for the proposition that Limitation of Actions is intended to protect the Defendants from prosecution of stale claims.

21. The Defendants argued that 10 years, and 11 years had lapsed in respect of the agreements entered into on 8th November 2006 and 5th October 2006; while 14 years had lapsed in respect of the agreement dated 21st February 2003.

22. The Defendants contended that non payment of stamp duty in respect of the agreements in issue invalidates the said agreements. They placed reliance on Sections 5 and 19 of the Stamp Duty Act Cap 480 Laws of Kenya. Counsel relied on the case of *Francis Mwangi Mugo vs. David Kamau Gachago [2017] eKLR* for the proposition that under Section 19 of the Stamp Duty Act a document chargeable with stamp duty cannot be enforced or produced as evidence unless it is duly stamped.

23. The Defendants further argued that the land sale agreements were not witnessed contrary to Sections 3(1) (3) and (6) of the Law of Contract Act and therefore the same were inadmissible in evidence. Counsel referred the court to the case of *Kenneth Nyaga Mwige vs. Austine Kiguta & 2 Others [2015] eKLR*, which this court has considered. The Defendants also submitted that no consideration was paid by the Plaintiff and stated that the person alleged to be Joseph Muindi is not the third Defendant who is James Muindi Ngotho. It was also their contention that the Plaintiff was not entitled to the orders sought. The Defendants argued that parties are bound by their pleadings, and that the Plaintiff's amended plaint dated 27th September 2019 and filed in court on 2nd October 2019 only sought for dismissal of the Defendant's amended statement of defence with costs and therefore following the amendment of her plaint, the Plaintiff had foregone the prayers for specific performance and general damages.

24. The Defendants concluded that the suit should be dismissed as the same was filed out of time, is anchored on invalid and inadmissible land sale agreements and that this court cannot order specific performance in respect of Land Parcel Number Mavoko Town/Block 2/3908 which is registered in the name of a third party who is not party to this suit.

ANALYSIS AND DETERMINATION

25. I have considered the pleadings, evidence adduced by both parties and the submissions made in this matter. The main issues that emerge for determination are as follows;

(a) Whether this suit is statute barred.

(b) Whether the Plaintiff's claim is the one in the original plaint dated 3rd November 2017 and filed on the same date or the one in the amended statement of plaint dated 27th September 2019 and filed on 2nd October 2019.

(c) Whether the agreements dated 21st February 2003, 5th October 2006 and 8th October 2006 were entered into between the late Anthony Athanas Ngotho and the Plaintiff.

26. On the first issue, the Defendant argued that the Plaintiff's claim is statute barred by dint of Section 4(1) (a) of the Limitations of Actions Act. Section 4(1) (a) of the Limitation of Actions Act provides as follows;

“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

27. The Plaintiff’s claim is for an order of specific performance directing the Defendants to transfer the titles in Land Parcel L.R. 2/3783, 2/3784 and 2/3908 in Mavoko Town, Machakos County to the Plaintiff as well as damages. This claim is premised on agreements entered into on 21st February 2003, 5th October 2006 and 8th November 2006. The Plaintiff pleaded in the plaint and subsequently testified that the agreement made on 21st February 2003 was completed on 18th August 2006. This suit was filed on 3rd November 2017. Therefore all the agreements were completed 11 years before the suit was filed. Therefore the Plaintiff seeks to recover land from the Defendants.

28. In my considered view therefore though the Plaintiff’s claim is premised on land sale contracts, nevertheless the same is for recovery of land. A claim for recovery of land is governed by Section 7 of the Limitation of Actions Act. The said Section provides as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

29. In the instant suit, the Plaintiff’s agreements were completed 11 years before the suit was filed. I therefore find and hold that this suit was filed within time, and the same is not statute barred, having been filed before the lapse of 12 years as required under Section 7 of the Limitation of Actions Act.

30. On the second issue, the Defendant has argued that the Plaintiff’s prayers are contained in the Plaintiff’s amended plaint dated 27th September 2019 and filed on 2nd October 2019. I have perused the document in issue. I must point out that the same was filed after pleadings had been closed and without leave of court as required under Order 8 Rule 1(1) of the Civil Procedure Rules. The said provision provides as follows;

“A party may, without leave of the court, amend any of his pleadings once at any time before the pleadings are closed.

31. The statement of defence was filed on 31st May 2018 and therefore on 2nd October 2019 when the amended Plaintiff’s statement of plaint was filed, pleadings had long been closed. Since the said document was filed without leave of the court, the same is improperly on record and of no legal consequence. In addition, as earlier pointed out in this judgment, the purported amended plaint does not have averments of the original plaint, but is merely a reply to the amended defence, and therefore not in conformity with Order 8 Rule 7(2) of the Civil Procedure Rules that provides for the mode of amendment. The said provision provides as follows;

“All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.”

32. I therefore find and hold that the Plaintiff’s pleading validly on record is the original plaint dated 3rd November 2017 and filed on the same date.

33. On the third and last issue, the Plaintiff testified that she entered into the agreements dated 21st February 2003, 5th October 2006 and 8th November 2006 with the late Anthony Athanas Ngotho. She stated that the agreements were signed by the deceased’s agent, who was a lady working in the deceased’s office at Studio House Hurlingham, Nairobi. In cross examination she stated that she had no evidence to show that the lady who signed the three agreements was employed by the deceased, nor that she was his agent. As regards exhibit 3, which is a receipt for the sum of Kshs. 8,000/- being transfer fees in respect of Parcel No. 2/3908, the same was signed by one Joseph Muindi. Though the Plaintiff stated that it is the third Defendant who signed the said receipt and that there was a typographical error in respect of her averments in her statement in regard to the same matter, the third Defendant denied ever signing the said receipt and stated that his name is James Muindi Ngotho and not Joseph Ngotho.

34. It is a settled legal principle that anyone who lays any claim before a court against another is obligated and has the burden to prove it. Sections 107 and 108 of the Evidence Act provides as follows;

“107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

35. The Halsbury’s Laws of England, 4th Edition Volume 17 at paragraphs 13 and 14 states as follows;

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect to a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an

essential of his case. There may therefore be separate burdens in a case with separate issues.

16. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden.”

36. In the majority decision of the Supreme Court in Presidential Election Petition No. 1 of 2017 between *Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR*, the court stated as follows;

[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant through a trial with the Plaintiff, however, depending on their effectiveness with which he/she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

[133] It follows therefore that once the court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears on evidentiary burden to adduce “factual” evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.”

37. Similarly in the case of *Ahmed Mohammed Noor vs Abdi Aziz Osman [2019] eKLR* at paragraph 22 the court held as follows;

“...for clarity the legal burden of proof in a case is always static and rests on the claimant throughout the trial. It is only the evidential burden of proof which may shift to the defendant depending on the nature and effect of evidence adduced by the claimant.”

38. Essentially therefore the Plaintiff is the one who will always bear the legal burden of proof, to prove his allegations and claim; while the evidential burden may shift between the parties in the suit depending on the evidence adduced by one party and the import of such evidence.

39. Turning to the instant suit the Plaintiff pleaded that the arguments in issue were between the late Anthony Athanas Ngotho and herself. She maintained that payment of the consideration was made to the deceased. However she confirmed that the deceased did not personally sign the agreements or receive the consideration. She averred that a lady in the deceased’s office signed the agreements and received the considerations on behalf of the deceased and she was his agent. Therefore the legal burden of proof rested on her to prove that the lady signed the agreements in issue and received the consideration as the deceased’s agent. This in view of the fact that the defendants denied existence of such agency and maintained that the deceased neither signed the impugned agreements nor received consideration thereof from the Plaintiff.

40. In the case of *Gannac Grain Co. Inc. vs. H. M. Faure & Fair Dough Ltd* and *Bunge Corporation [1967] 2 All E.R 353* cited with approval in the case of *Lucy Nungari Ngigi & 4 Others vs National Bank of Kenya Limited & Another [2015] eKLR*, the court held as follows;

“The relationship of principal Agent can only be established by the consent of the principal and agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship even if they do not recognize it themselves and even if they have professed to disclaim it. ...the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct.”

41. As the Plaintiff in the instant case has not placed material before court to establish that there was a principal/agent relationship between the lady who signed the impugned agreements and received the consideration, I find and hold that she has failed to discharge both her legal and evidentiary burden to prove that she purchased the suit land from the late Ngotho. In any event the name of the lady is not disclosed in the Plaintiff’s evidence and does not even appear in the impugned agreements and receipts.

42. The upshot is that this suit lacks merit and the same is dismissed with costs.

43. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 9TH DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms Cherono for Defendants

No appearance for the Plaintiff

