



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC APPEAL NO. 11 OF 2018

SAID MABRUK ABED.....APPELLANT

VERSUS

MARGARET MUMBUA MULI..... RESPONDENT

JUDGMENT

(Respondent filing suit to reclaim possession of a house that the deceased had developed after obtaining a lease from the landowner; house sold by a third party who subsequently sold it to the appellant; trial court holding that this sale was irregular; decision now challenged on appeal; argument that appellant was an innocent purchaser for value dismissed as sellers had no interest to pass; nemo dat rule in sale of goods also applicable to sale of property; decision of trial court upheld; appeal dismissed with costs).

1. The respondent commenced suit through a plaint filed on 26 February 2009. That plaint was amended several times resting with the Further Amended Amended Plaint that was filed on 20 August 2015 against two defendants, Faisal M. Ali as 1st defendant, and the appellant as 2nd defendant. The respondent pleaded to be the widow and legal representative of the late Patrick Nzuki Joel (the deceased). Though it was pleaded that the deceased was the registered owner of the Plot No. 217/I/MN, the reality of the matter is that the said property was registered under the name of the 1st defendant. Through an agreement entered into on 1 August 2005, the 1st defendant leased to the deceased a portion measuring 40 X 60 feet and permitted the deceased to develop a Swahili type house. The deceased prepared the building plans which were approved and it was pleaded that he commenced construction. He unfortunately died on 16 December 2005 before he could finish the house. The respondent pleaded that in 2008, she visited the property and found a man who identified himself as Hamza who had been contracted to undertake renovations on the property. Upon making enquiries she was informed that the property had been sold to the appellant by one Asma Swaleh Ahmed. She thought this to be fraudulent as there was still the lease to her late husband. In the suit, she asked for the following orders :-

(a) A permanent injunction against the defendants restraining them, or their agents, servants and or employees from interfering, trespassing or dealing in any way with the suit property.

(b) Declaratory order to the effect that Plot No. 217/I/MN and the house thereon standing belongs to the plaintiff absolutely.

(c) Loss of income at Kshs. 30,000/= per month from 1.1.2010 until the date when the defendants will cease from interfering with the plaintiff's enjoyment of the suit property.

(d) Costs of the suit.

(e) Interest on (b) and (c) at court rates.

2. The 1st defendant filed defence denying that the respondent was widow of the deceased and denied that she had locus to file suit. He pleaded that the deceased was the owner of a Swahili type house and that he died in the year 2005. He otherwise denied all the averments in the plaint. In the alternative and without prejudice, he pleaded that the Swahili type house was sold by the deceased's bona fide family members to support the children of the deceased and the respondent was a stranger with no rights over the same. He pleaded that the appellant was the lawful and bona fide purchaser for value without notice.

3. The appellant on his part only acknowledged that the deceased was the owner of a Swahili type house and that he died in 2005 but denied all the other contents of the plaint. It was denied that the respondent is the administrator of the estate of the deceased and it was contended that the deceased's true family and children were not aware or supportive of the respondent's attempt to meddle in the estate of the deceased. He pleaded that the Swahili house without land was sold by the deceased's bona fide family members to support the children of the deceased. He pleaded to be the lawful bona fide purchaser for value without notice.

4. Both appellant and respondent testified with each calling one other witness. The uncontested evidence shows that through an agreement dated 1 August 2005, the 1st defendant leased to the deceased the portion of 40 X 60 feet of the suit property in what all parties agree was on the basis of house without land. There was a premium of Kshs. 380,000/= that was to be paid and there was monthly rent of Kshs. 300/=. There was 12 months given to build the house and the tenancy was not transferable without the written permission or consent of the landlord. If there was any breach by the tenant, the tenancy would become void, and the landlord had a right to require the tenant to vacate the premises without any compensation. There is evidence that the deceased drew a building plan which was approved and he commenced construction of the house. He however died before he could complete it. On 16 December 2008, the disputed house was subject of a sale, where one Jacob Kilonzo Nzuki, sold it to Asma Swaleh Ahmed, for a consideration of Kshs. 1,000,000/=. The 1st defendant, as the land owner, did give consent to the transfer of the house. On 4 February 2010, Asma Swaleh Ahmed (Asma) sold the same house to the appellant for the sum of Kshs. 3,200,000/=. The plaintiff produced an exhibit doubting the existence of the person called Jacob Kilonzo Nzuki, for the records from the Registrar of Persons, show that the identity card used in the sale agreement of 16 December 2008, is not issued to anyone bearing the name of Jacob Kilonzo Nzuki, but belongs to a female person. The respondent testified that she does not know any Jacob. She thus contended that there could not have been any proper sale of the suit property from the estate of the deceased.

5. In his evidence, the appellant acknowledged that he purchased the house from Asma. He was also issued with the agreement between Asma and Jacob Kilonzo Nzuki (Jacob) and the consent from the 1st defendant. The house was complete when he purchased it. He never met Jacob. Asma testified as DW-2. Her evidence was that she purchased the house from Jacob, who she claimed to be a son to the deceased. When she bought the house, it was incomplete. She is the one who completed it and rented it out. Cross-examined, she testified that she did not see any document to the effect that the house was owned by Jacob. She also did not see any grant of letters of administration in his favour. She mentioned that when she bought the house, Jacob was with his mother, whose name she could not remember. She did not sign any new lease with the land owner.

6. In his judgment, the Honourable trial magistrate found for the respondent. Significantly, he found that there was no evidence that Jacob was a son of the deceased and no evidence that he held letters of administration in respect of the estate of the deceased. He held that Jacob was not an owner of the property to be capable of transferring title to Asma. He found that it could not be claimed that the 1st defendant had terminated the lease agreement yet allow the sale of it by a person claiming to be the relative of the deceased. He found that the only person who could legitimately deal with the property is the plaintiff who he found holds a grant of letters of administration. He thus declared that the house belongs to the plaintiff absolutely. He also issued an injunction against the defendants restraining them from the property. On the claim for loss of income, he found that there was no evidence that the deceased was earning any income from the property and dismissed the claim for it. He awarded costs to the respondent.

7. Aggrieved, the appellant filed this appeal which only has the plaintiff as respondent. The 1st defendant is not joined to this appeal. Several grounds of appeal have been raised as follows:-

- 1) That the learned trial magistrate erred in law and fact by failing to dismiss the respondent's suit against the appellant.*
- 2) That the learned trial magistrate erred in law and fact when he held that the respondent had the locus standi and/or capacity to institute the suit on behalf of the late Patrick Nzuki Joel.*
- 3) That the learned trial magistrate erred in law and fact when he held that the respondent has a better or superior title over the suit property than one Jacob Kilonzo Nzuki when the respondent had no capacity to represent the estate.*
- 4) That the learned trial magistrate erred in law and fact when he held that the 1st defendant did not formally terminate the lease agreement when the same was not an issue to be determined.*
- 5) That the learned trial magistrate erred in law and fact when he failed to hold that a house without land is not immovable property.*
- 6) That the learned trial magistrate erred in law and fact when he held that the deceased had erected a house on the land being plot no. 217/I/MN when there was no evidence on record to support such a finding.*
- 7) That the learned trial magistrate erred in law and fact when he issued a prohibitory injunction against the appellants who have always been in possession and occupation of the suit property.*
- 8) That the learned trial magistrate erred in law and fact when he failed to find that the appellant was an innocent purchaser without notice for valuable consideration and as such the remedy of injunction was not available to the respondent against the appellant.*
- 9) That the learned trial magistrate erred in law and fact when he held that the suit house belongs to the respondent absolutely when the suit had been brought on behalf of the estate of the deceased and/or on behalf of the dependents who were not named or particularized in the plaint as required by the law.*
- 10) That the learned trial magistrate erred in law and fact in failing to find that the respondent's claim, if any, was for damages against the 1st defendant in the suit and not otherwise.*
- 11) That the learned trial magistrate erred in law and fact when he failed to take into consideration the appellant's evidence and submissions on record thereby arriving at a wrong decision.*
- 12) That the learned trial magistrate erred in law and fact when he failed to find that the failure on the part of the respondent to*

enjoin Asma Swaleh Ahmed in the suit was fatal to the plaintiff's case since the appellant purchased the suit huse from her.

13) That the learned trial magistrate erred in law and fact in allowing the respondent's suit for injunction when there was no or no sufficient evidence on record to support such a finding.

8. In his submissions, Mr. Mutubia, learned counsel for the appellant, on grounds 1, 2 and 3, submitted that it is trite law that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. He submitted that from the proceedings, the issue as to who were the true heirs and dependents of the estate of the deceased arose. He further submitted that the respondent failed to provide particulars of the dependents as required under the Law Reform Act. Counsel submitted that the respondent was not properly before the court since she had no locus standi to sustain a suit for the estate of the late Patrick Nzuki Joel. He submitted that the respondent failed to prove that the other wife and children had consented to the respondent obtaining letters of administration on behalf of the estate of the deceased. To buttress his claim, counsel referred me to the case of *Tirus Mwaniki Njiru vs. Jane Igandu (2021) eKLR*. He submitted that the letters of administration were not properly acquired and therefore, the respondent did not have locus standi to institute the suit on behalf of the deceased estate. On ground 4, counsel submitted that the issue of termination of the tenancy agreement between the deceased and the 1st defendant was not pleaded. Counsel cited the case of *Veronica Gathoni Mwangi & another vs. Samuel Kagwi Ngure & another (2020) eKLR* and submitted that the trial court ought not to have determined on that issue as the respondent had no capacity to represent the deceased estate, and in any event, the deceased's interest in the suit property had been extinguished. On ground 5, counsel submitted that the suit by the respondent was about plot 217/I/MN and the house thereon. He submitted that the respondent alleged that the deceased bought land and constructed a house contrary to the averments in the plaint where it was pleaded that the deceased was owner of Plot No. 217/I/MN. He submitted that the deceased had no interest in the land and referred me to various authorities describing the house without land arrangement. On ground 6, he submitted that save for the approved plans there was no proof that the deceased had constructed a house capable of being occupied by tenants. On ground 7, he submitted that the Honourable Magistrate failed to take into account that the appellant was bound to suffer loss being an innocent purchaser for value without notice. On ground 8, he submitted that there was no evidence that the property was not lawfully purchased by the appellant and he maintained that he was an innocent purchaser for value. He relied on the case of *Miriam Njoki Gitonga & Another vs Musa Wambugu John (2017) eKLR* and *Lawrence P. Mukiri vs Attorney General & 4 Others (2013) eKLR*. He submitted that there was no evidence that his client was involved in any fraud. On ground 9, counsel submitted that the respondent did not sufficiently prove that the deceased had any substantive interest in the suit property and reiterated that there was no proof of any structure. On grounds 10 and 11 he submitted that there was no sufficient evidence to prove the deceased's interest on the suit property. He submitted that the respondent failed to prove payment of ground rent. He submitted that it was clear that the deceased failed to pay ground rent to the landlord. He submitted that any claim for damages ought to have been against the 1st defendant and not the appellant. On grounds 12 and 13, he faulted the Magistrate for failing to find that failure to join Asma to the suit was fatal to the respondent's case as the appellant had purchased the house from her.

9. For the respondent, Mr. Gikandi, learned counsel, submitted that the property which had been constructed on the suit land was property that belonged to the estate of the deceased. He submitted that the agreement of sale dated 16 December 2008 where Jacob sold the property, was one entered before issuance of a grant of letters of administration, and offended both Section 45 (i) and 82 (b) (ii) of the Law of Succession Act, Cap 160, Laws of Kenya. He submitted that there was no indication in that agreement that Jacob was acting as administrator of the estate of the deceased. He submitted that since it was null and void, the subsequent sale to the appellant would be null and void. He submitted that the *nemo dat* rule in sale of goods also applies to the property herein. Counsel relied on the case of *Kamiri Crispoh vs John Njeru Kahihu, Succession Cause No. 410 of 2015, Diamond Trust Bank Kenya Limited vs Said Hamad Shamisi & 2 Others (2015) eKLR, Arthi Developers Limited vs West End Butchery Limited & 6 Others (2015) eKLR*. He submitted that from her evidence, Asma knew that she was purchasing the property of a deceased person. On the contention in respect of the grant of letters of administration held by the respondent, counsel saw no issue and submitted that the appointment of the respondent as administrator has not been challenged. He submitted that the claim that the tenancy was terminated for non payment of rent was not pleaded and could not be subject of determination by the court. He relied on the case of *Herman P. Steyn vs Charles Thys (1997) eKLR*. He pointed out that the 1st defendant never testified and has filed no appeal and therefore the findings against him cannot be challenged in his absence. On failure to join Asma to the case, counsel submitted that the respondent had no claim over her and that it was the duty of the appellant to join her to the suit as third party. He submitted that had the appellant been diligent, he would have found that the building plans belonged to the deceased.

10. I have considered the matter.

11. I will repeat that there is no contest that there was a lease to a portion of the subject property to the deceased in the year 1995. The deceased embarked on construction but died before he could complete the house. In the year 2008, the house was sold to Asma by one Jacob Kilonzo Nzuki. This sale had the consent of the land owner. In the year 2010, the house was sold to the appellant. The contention of the respondent is that there could not have been any proper sale of the house since the same belonged to the estate of the deceased. The core finding of the trial magistrate was that the subject house was the property of the deceased and therefore the only person who could deal with it was the respondent. This is of course what has brought forth this appeal.

12. I observe that the appellant has first contended that the respondent had no locus to file suit and this point was addressed at length by Mr. Mutubia in his submissions. But I see no issue here. The plaintiff produced a limited grant of letters of administration ad litem issued on 6 February 2009. That grant permitted her to file suit in respect of the estate of the deceased. I am at a loss why it is seriously urged that the respondent had no locus. That grant speaks for itself. If any person had issue with that grant, then that person was at liberty to apply to the court which issued the grant, to have it set aside. I have no evidence of any attempt made to nullify the grant nor any evidence that the said grant has been nullified. The issue that the deceased had another wife or family, or that the other dependants of the deceased were not consulted, is neither here nor there. What is important for our purposes is that the respondent holds a grant of letters of administration and it follows, that pursuant to that grant, the respondent has locus standi to file suit in respect of the estate of the deceased and is properly before court. I really do not see the issue here. In the same vein, I really do not see the basis of ground 3 of the appeal, that the trial court erred in finding that the respondent had a better title than Jacob Kilonzo Nzuki. The fact of the matter remains that Jacob is unknown, but more importantly, he held no grant of letters administration. This is indeed the crux of the matter, but before I go too deeply into it, there was attempt by Mr. Mutubia to argue that there was no sufficient evidence that the deceased had built a house. There was indeed a wealth of evidence that the deceased had built a house, albeit it was incomplete. There must have been a house. Indeed, the subject of the sale agreement between Jacob and Asma is a Swahili house and the sale agreement goes further to say that the purchaser has seen and inspected the house and is purchasing it in its present condition. Asma herself, in her evidence, stated that what she bought was a house. I do not see

how it can now be argued that there was no house that the deceased built.

13. Let me now turn to the meat of the case. The appellant traces his title from the sale by Jacob to Asma. It is not clear who exactly Jacob is, for the identity card that is displayed in the sale agreement that he (Jacob) had with Asma identifies a completely different person. But let us assume that Jacob actually does exist. Could he pass a good title to Asma? My answer is no. The property that he was selling was the property of a deceased person. Jacob could not have had capacity to sell the property of a deceased person for he held no grant of letters of administration. His act of selling the property was an act of meddling in the estate of a deceased person which offends the provisions of Section 45 of the Law of Succession Act. It is only a personal representative, under Section 82 of the same Act, who has power to sell. Any sale by a person who is not the legal representative of a deceased person is null and void. This has been affirmed in many cases. I will only cite one, *Njoki Gicheru Ndiuni vs Dadson Githenji Wahome & Others, Nyeri High Court, Succession Cause No. 766 of 2010 (2016) eKLR* where the court cancelled title after it found that the share of the deceased in the land was transferred to another person before a grant of letters of administration.

14. The long and short of it is that Jacob could not purport to transfer the disputed house to Asma. He had nothing to sell or transfer to Asma. It follows that Asma could not obtain a good title to the house. In fact, it does appear that Asma was very much aware that what she was purchasing belonged to the estate of a deceased person. She never bothered to find out if the person who is selling the property to her had a grant of letters of administration. Indeed, the person who sold the house to her had no grant, and having no grant, had no title to pass to Asma. Asma could thus not have obtained any title to the property, and having had no good title, her sale to the appellant could not pass to the appellant any better title. Mr. Mutubia submitted that the appellant was protected as he was an innocent purchaser for value. I do not agree. The *nemo dat quod non habet* rule as applied in sale of goods has been given recognition in property law in Kenya. Mr. Gikandi referred me to the case of *Arthi Highway Developers Limited vs West End Butchery & Others (2015) eKLR* which I think is apt for our case. In the said case some rogues changed the particulars of a company and transferred to the appellant land belonging to the company. The appellant in turn subdivided the land and sold some of the subdivisions to the 5th, 6th and 7th respondents. The company filed suit to recover its property. Judgment was entered for the company and the appellant appealed to the Court of Appeal. Part of the arguments raised before the Court of Appeal related to the subdivisions that had been sold to other persons, who were not party to the fraud, and were, in all respects, innocent purchasers. It was argued by the purchasers that their titles to the subdivisions should not have been interfered with as they were innocent purchasers for value. The Court of Appeal did not agree. It held that since no valid title passed to the appellant, it followed that the appellant had no title to pass to subsequent purchasers. The decision of the trial court was thus upheld.

15. In his submissions, Mr. Mutubia referred me to the case of *Miriam Njoki Gitonga & Another vs Musa Wambugu John (2017) eKLR* and *Lawrence P. Mukiri vs Attorney General & 4 Others (2013) eKLR* and supporting the position that an innocent purchaser is protected. Unfortunately, counsel did not annex the latter case so I am unable to tell what the holding of the court was. In the former case, no issue regarding an innocent purchaser arose and indeed the suit was dismissed for being *res judicata*. Mr. Mutubia has not, in my view, shaken Mr. Gikandi's submissions, so as to have his client protected under the umbrella of an innocent purchaser for value. My holding therefore is that Jacob had no title to pass to Asma, and Asma could not have obtained good title to the property. She therefore had nothing to pass to the appellant. The trial court was correct in upholding this view and I am unable to disturb that finding.

16. There was a position taken that the lease to the deceased lapsed because the deceased did not comply with its terms. I do not agree. First, none of the defendants pleaded that the deceased never complied with the terms of the lease. I have gone through the defences of both the appellant and the 1st defendant and they never pleaded that the lease was forfeited for non-compliance with its terms. What they pleaded is that the house was sold by the deceased's bona fide family members to support the children of the deceased and claimed that the respondent is a stranger with no right over the house. Apart from there being no pleading to that effect, the person who would have been the one to forfeit the lease, that is the 1st defendant, never testified. He never came to court to say that he considered the lease to the deceased as cancelled for failure to pay the premium or the rent, or for any other reason. The appellant cannot purport to speak for the landlord and claim that the landlord was not paid, or that there was breach of the terms of the lease. He was certainly not privy to this transaction. This is a red herring being raised by the appellant and I refuse to be distracted by it.

17. It was also submitted that failure to join Asma to the suit was fatal to the case of the respondent. I do not agree. Though the respondent could as well have joined Asma to the suit, for reason that it had been claimed that the appellant purchased the house from Asma, the filing of suit against the person in possession, who is the appellant, was in the circumstances of this case sufficient. The respondent may not have been privy to all facts that led to the appellant being in possession of the house and you cannot blame her for not filing suit against the alleged persons claimed to have come in between. I agree with Mr. Gikandi's submissions, that if the appellant thought that Asma was a necessary party, he ought to have applied for her to be joined, or alternatively, he ought to have taken out Third Party proceedings against her. He did neither and he cannot now blame the respondent for that failure.

18. I think I have said enough to demonstrate that I am not persuaded to allow this appeal and it is hereby dismissed with costs.

19. Before I pen off, there is just one issue that I need to address, and that is the holding by the trial magistrate that "it is hereby declared that the house standing on the suit land belongs to the plaintiff absolutely." That finding is erroneous. It should be recalled that the respondent was pursuing this case on behalf of the estate of the deceased. She was recovering the property for the estate of the deceased and not for herself. The correct determination should be that the house is declared as belonging to the estate of the deceased and falls to be distributed following the provisions of the Law of Succession Act. I substitute the holding of the Magistrate with the words that the house standing on the suit land belongs to the estate of the deceased. Flowing from the judgment of the trial court and this judgment, the appellant must immediately give vacant possession of the house to the respondent, as the representative of the estate of the deceased, and no later than 14 days from today.

20. Judgment accordingly.

DATED AND DELIVERED THIS 2ND DAY OF FEBRUARY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.