



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 78 OF 2019

PETER KIAMBI MANYARA.....APPELLANT

VERSUS

GIDION M'ITHIMA.....1ST RESPONDENT

JOHN KIOGORA MUGAMBI.....2ND RESPONDENT

MORRIS KIRUJA ITHIMA.....3RD RESPONDENT

JUDGMENT

Introduction

This Appeal arises from the judgment of HON. J. IRURA - PRINCIPAL MAGISTRATE in ELC Case No. 39 of 2007 (NKUBU) dated 15th May 2019. By a plaint dated 14th August 2012, the Respondents M/S Gidion M' Ithima and John Kiogora had sued the Appellant Peter Kiambi Manyara and Morris Kiruja Ithima for the following orders:-

- (a) A declaration that the transfer of land parcel No. NKUENE/L-MIKUMBUNE/1760 from the 1st plaintiff to the 1st defendant on 2nd March 2012 and the subsequent transfer by the 1st defendant to the 2nd defendant on 22nd March 2012 were unlawful ab initio.*
- (b) A declaration that the title held by the 2nd defendant over land parcel No. NKUENE/L-MIKUMBUNE/1760 was unlawful and fraudulently obtained.*
- (c) An order cancelling the title held by the 2nd defendant over land parcel No. NKUENE/L-MIKUMBUNE/1760 and the same to revert to the 1st plaintiff.*
- (d) An order directing the 2nd defendant to surrender the title deed to land parcel No. NKUENE/L-MIKUMBUNE/1760 to the Land Registrar, Meru Central District for physical cancellation and in default its production be dispensed with.*
- (e) An order of permanent injunction restraining the defendants, either by themselves, their assigns, agents, employees or assigns or anybody else acting on their behalf or behest from entering, occupying remaining or in any other way interfering with the 2nd plaintiff or the 2nd plaintiff's family, employees, servants, agents or assigns user, occupation and enjoyment of land parcel No. NKUENE/L-MIKUMBUNE/1760.*
- (f) The 2nd defendant to execute all the necessary instruments to transfer land parcel No. NKUENE/L-MIKUMBUNE/1760 to the 1st plaintiff and in default this Honourable Court do authorize its Deputy Registrar to execute the same.*
- (g) Any further or better relief that this Honourable Court might deem necessary and appropriate to grant.*
- (h) Costs of the suit.*

The defendants/appellants filed a statement of defence denying the plaintiffs/respondents claim. In her judgment delivered on 15th May 2019, the trial magistrate gave judgment in favour of the plaintiffs/respondents against the defendants/appellant. Aggrieved by the decision of the trial Court, the appellant appealed to this Honourable Court on the following 13 grounds:-

- (1) That the learned magistrate erred in law and fact by failing to appreciate that the plaintiff had failed to meet the requisite standard of proof to prove their case.*
- (2) That the learned magistrate erred in law and fact by failing to recognize the probative value of the agreement between the 1st and 2nd defendants dated 4th March 2012 and which agreement had been produced in evidence.*
- (3) That the learned magistrate erred in law and fact by failing to recognize the probative value of the acknowledgment of receipt of money by the 1st defendant from the 2nd defendant dated 26th April 2008 and which document was witnessed by the 1st plaintiff and had been produced into evidence.*
- (4) That the learned magistrate erred in law and fact by failing to recognize the probative value of the 2nd defendant's testimony and documents produced into evidence.*
- (5) That the learned magistrate erred in law and fact by failing to consider the 2nd defendant's submissions.*
- (6) That the learned magistrate erred in law and fact by failing to recognize the demise of the 1st defendant and the abatement of suit against the 1st defendant.*
- (7) That the learned magistrate erred in law and fact by proceeding to make conclusions on the documents filed by the 1st defendant despite the demise of the 1st defendant and subsequent abatement of his suit.*
- (8) That the learned magistrate erred in law and fact by failing to recognize that failure by the plaintiff to enjoin the Land Control Board and Registrar of Lands as parties to the suit or call them as witnesses rendered their suit as unproven.*
- (9) That the learned magistrate erred in law and fact by considering extraneous issues that were not pleaded by the plaintiff.*
- (10) That the learned magistrate erred in law and fact by failing to appreciate that the 2nd plaintiff only took possession of the suit land after filing of the suit and obtaining of interlocutory orders against the 2nd defendant.*
- (11) That the learned magistrate erred in law and fact by delivering a judgment that was against the weight of evidence.*
- (12) That the learned magistrate erred in law and fact by misinterpreting the law hence delivering a judgment that was contrary to the law.*
- (13) That the learned magistrate erred in law and fact by only considering the plaintiff's evidence and therefore misdirected herself on the conclusions in the judgment.*

Submissions by the Appellant

The appellant through the firm of M/S Mutembei & Kimathi Advocates submitted on the 13 grounds of Appeal as follows:-

Ground No. 1

On Ground No. 1, the appellant submitted that the plaintiffs pleaded fraud in the way the appellant (2nd defendant) obtained title to the suit land. However, they failed to prove the alleged fraud. He further submitted that on the tort of fraud, the standard of proof is higher than that of a balance of probability and cited the case of *Gichinga Kibutha Vs Caroline Nduku (2018) e K.L.R.* He also cited *Kinyanjui Kamau Vs George Kamau Njoroge (2015) e K.L.R.* The appellant submitted that on the alleged fraud against the 1st defendant, the Court will note that the 1st defendant MORRIS KIRUJA ITHIMA passed away sometime in the year 2013 and an application dated 20th March 2017 seeking substitution of the deceased 1st defendant and the revival of the abated suit by operation of the law as against the 1st defendant was lodged by the plaintiffs. The appellants also submitted that the said application was never prosecuted and at the conclusion of the suit, the 1st defendant remained unsubstituted and the suit as against him remained abated. Hence, the claim as against the 1st defendant having abated, no findings ought to have been made as against him. The appellant also submitted that with the above in mind, the Court ought to have found that the allegations of fraud made as against the 1st defendant had abated and the suit having abated, no findings ought to have been made based on documents filed by him or otherwise.

Secondly, the appellant submitted that the plaintiff failed to prove any fraud as against the 2nd defendant/appellant as the particulars made by the plaintiff remained unproven. He submitted that no demonstration was made by the plaintiffs showing how the 1st defendant's title was defective so as to render transfer to the 2nd defendant fraudulent. He submitted that no demonstration was made of how the consent of the Land Control Board to transfer the suit land to the 2nd defendant were defective. He said no officials of the Land Control Board were called to testify and/or disown the consent to transfer. No indication was made of how the transfer documents were fraudulent. The appellant further submitted that the advocate who prepared the transfer documents was never called to testify by the plaintiffs and no officers from the Land offices were called to testify and no forensic expert report was presented regarding lack of authenticity of documents. He submitted that it was not demonstrated that the 2nd defendant forged any document to have the suit land registered in his name or that any steps were skipped. He submitted that the judgment in Criminal Case No. 978 of 2013 (Nkubu) which acquitted the 2nd defendant found that, the 1st respondent (Gideon M' Ithima) had freely transferred the suit land to the 1st defendant (Morris Kiruja) and the said judgment has never been appealed against.

The appellant contends that even in the absence of any defence filed by him, the plaintiffs failed to prove their claim and that the burden of proof lay with the plaintiffs and never shifts to the defence. He urged that even in undefended cases where formal proof is required, parties

still need to prove their cases to the required degree failure to which such matters would be dismissed even without any defence from the opposite side. He cited the case of *Wilberforce Asiapi Ongoru & 2 Others Vs Margaret OndesoOpio & 3 Others HCCC No. 1484 (Nairobi) of 2000* and *Simon ThukuKandiu & Another Vs Lilian Wathithi Muigai (2019) e K.L.R.*

Ground No. 2 & 3

On the 2nd and 3rd grounds, the appellant submitted that one of the plaintiffs' main areas of contention was that the 1st plaintiff was never aware of any sale of land transactions over the suit land between the 1st and 2nd defendant. However, the testimony of the 2nd defendant (DW1) and the documents in his list of documents was the acknowledgment receipt dated 26th April 2008. The said acknowledgment receipt for further payments dated 26th April 2008 was witnessed and signed by the 1st plaintiff Gideon M' Ithima and that the 1st plaintiff was aware of the said sale of land transaction between the 1st and 2nd defendant.

The appellant submitted that the trial magistrate failed to put the above into consideration when arriving at the decision that fraud must have been involved in the 2nd defendant's purchase of the suit land which was a wrong conclusion given clear evidence that the 1st plaintiff was well aware of the said sale of land transaction. The appellant further submitted that all the agreements between him and the 1st defendant over the suit land which was initially in the 1st defendant grandfather's name pending succession culminated in the last agreement dated 4th March 2012 which was done because the suit land was finally definable and had moved to the 1st defendant's name after conclusion of succession proceedings. He submitted that this last agreement dated 4th March 2012 was also meant to confirm the earlier agreements. He said that the agreements of 4th March 2012 and other documents relied upon by the 2nd defendant were adopted as his exhibits.

The appellant submitted that the learned trial magistrate made a serious error by failing to consider this agreement of 4th March 2012 when the Court concluded that the only agreement for consideration were those dated 14th October 2006 and 21st March 2009. If the Court had considered the final agreement dated 4th March 2012 and which agreement consolidated/confirmed all earlier agreements, the Court would have found that the suit land was existent and in the names of the 1st defendant and that the said agreement dated 4th March 2012 was legally enforceable and has passed proper rights over the suit land to the 2nd defendant (appellant).

In a nutshell, the appellant submitted that the 1st and 2nd defendants had entered into several agreements over the suit land culminating in the last agreement dated 14th March 2012 and which agreement confirmed all the previous ones and made the subject matter (suit land) definable and in the 1st defendant's name and hence the agreement dated 4th March 2012 was legally binding and enforceable and passed proper rights over the suit land to the 2nd defendant.

Ground No. 4 & 5

The appellant submitted that the absence of statement of defence by the 2nd defendant (appellant) did not discharge the plaintiff's burden of proof and that the plaintiffs failed to prove their case to the required standard. The appellant also submitted that the trial Court ought to have been properly guided by the 2nd defendant's evidence and documents contained at pages 149 – 150 of the record of Appeal which include an acknowledgment receipt witnessed by the 1st plaintiff.

Ground No. 6 & 7

On these two grounds, the appellant submitted that the 1st defendant Morris Ithima passed away before the hearing of the lower Court case and was never substituted. He submitted that the learned trial Court erred in considering issues related to allegations against the 1st defendant (Morris Kiruja Ithima) in its judgment particularly the assertion that the 1st plaintiff never applied for consent of the Land Control Board to transfer the suit land to the 1st defendant, assertions of not transferring the suit land to the 1st defendant or surrendering his PIN, National I.D. Card, photographs etc and that all these issues had abated. The appellant also submitted that the trial Court erred in considering the particulars of fraud alleged by the plaintiffs against the 1st defendant solely and as against the 1st defendant jointly with the 2nd defendant (appellant) as these issues had similarly abated.

Ground No. 8

The appellant submitted that despite making serious allegations of fraud specifically on alleged forgeries made on applications for consent of the Land Control Board, transfer forms etc, the Land Control Board and the Registrar of Lands were not enjoined and neither were their officers called to demonstrate how the above cited documents were fraudulent. He submitted that the advocate who attested the above cited transfer forms was never called to testify and that the allegations remained mere assertions devoid of any supporting evidence.

Ground No. 9

The appellant submitted that the trial Court went ahead to consider issues regarding the succession cause of the Estate of the grandfather to the 1st defendant which were extraneous issues that were never pleaded by any of the parties. He submitted that the proceedings to the succession cause to the Estate of the said grandfather were never produced in evidence by the parties. He further submitted that the trial Court failed to consider the agreement between the 1st and 2nd defendants dated 4th March 2012 and which agreement came well after conclusion of the said succession cause and the suit land having come into the 1st defendant's name.

Ground No. 10

On this ground, the appellant submitted that during cross-examination of one John Kiogora Mugambi (2nd plaintiff) and also 2nd respondent in this Appeal) in Criminal Case No. 978 of 2013 (Nkubu) the witness admitted that his father (1st plaintiff) had given notice to the accused person (2nd defendant) to vacate the suit land. He submitted that that confirms that the 2nd defendant had possession of the suit land.

Ground No. 11, 12 & 13

The appellant referred to the three last grounds and submitted that the trial Court failed to find that the plaintiffs had not proved their allegations of fraud and failed to carefully consider the 2nd defendant's evidence and submissions particularly on the abatement of suit as against the 1st defendant.

Respondents Submissions

The respondents through the firm of M/S Kiautha Arithi & Co. Advocates submitted that the 1st respondent is the father of both the 2nd and 3rd respondents while the appellant is their immediate neighbour. They submitted that the 1st respondent inherited land parcel No. 1860 from his father. He sub-divided it into parcel No. 1760 and 1761. They submitted that the 1st respondent transferred parcel No. 1761 to his daughter and parcel No. 1760 to his son the 2nd respondent. The respondent further submitted that it was the uncontroverted testimony of the 1st respondent that he never sold the suit land to the 3rd defendant and that he has never attended any Land Control Board meeting seeking consent to transfer the suit land to the 3rd respondent.

As to whether the transfer of land parcel No. NKUENE/L-MIKUMBUNE/1760 to the appellant was fraudulent, the respondents submitted that there were glaring disparities in the documents produced in Court during trial especially with regard to the consent, transfer and the green card – they submitted that despite the fact that the appellant had the audacity to deceive the Lands Registry officers that the purchase price is Ksh. 100,000/= instead of Ksh. 650,000/= as alleged should not endear him to the seat of justice as he comes with unclean hands based on his gratuitous deception. They submitted that from the analysis of the evidence on record, it is clear that the appellant was involved in a corrupt scheme to dispossess the 1st and 2nd respondents.

The respondents further submitted that the sale agreement dated 14th October 2006 and 21st March 2009 are not enforceable as the 3rd respondent had no capacity to transfer property that belonged to his deceased grandfather which is criminal and tantamount to intermeddling with a deceased person's property. The respondents also submitted that the purported agreements and acknowledgment thereof did not specify the property that was being sold and therefore the same are void ab initio. As regarding the sale agreement dated 4th March 2012, the respondents submitted that the same refers to payments made by the appellant to the 3rd respondent through previous agreements. On that, they submitted that it is trite law past consideration is not good consideration in law and a contract based on such consideration is unenforceable void and illegal. They cited the case of *Lawrence Mukiri Vs Attorney General & 4 Others (2013) e K.L.R.*

Legal Analysis

This is an appeal from the judgment of Honourable Principle Magistrate J. Irura in PMCC No. 39 of 2017 (Nkubu). Before getting down on the substance of the Appeal, it is imperative to remind myself the duty of first appellate Court. In the case of *Sella Vs Associated Motor Boat Co. (1968) E.A 123*, the Court rendered itself as follows:-

“The appellate Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a re-trial and the principles upon which the Court of Appeal acts are that the Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the Court is not bound necessarily to follow the Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”.

Turning to the appeal herein, I now examine the thirteen (13) grounds as hereunder:-

Ground No. 1

The appellant on this ground is faulting the trial magistrate on grounds that the respondent/plaintiffs had failed to meet the requisite standard of proof to prove their case. The claim by the respondents/plaintiffs in the primary suit was for *inter-alia* a declaration that the transfer of land parcel No. NKUENE/L.MIKUMBUNE/1760 from the 1st plaintiff to the 1st defendant/appellant and subsequently to 2nd defendant/appellant were unlawful ab initio. The plaintiffs/respondents had also sought a declaration that the title held by the 2nd appellant/defendant over land parcel No. NKUENE/L-MIKUMBUNE/1760 was unlawfully and fraudulently obtained. The respondents/plaintiffs further sought an order cancelling the title held by the 2nd defendant/appellant in respect of the suit property described herein above and the same to revert back to the 1st plaintiff/respondent.

The plaintiffs testified on oath on 30th October 2018. They adopted un-dated witness statements filed on 14th August 2012. The plaintiff also produced Exhibits in terms of their list of documents marked Plaintiffs Exhibits No. 1 – 13 respectively. According to the 1st plaintiff/respondent Gideon M' Ithima, he is the father to the 1st respondent Morris Kiruja Ithima. He stated that his father is one M' Mutea M' Kanana and has one brother namely William Gituma. Their father owned a land parcel No. NKUENE/L-MIKUMBUNE/119. When his father died, he filed a succession cause and sub-divided the land and he got parcel No. NKUENE/L-MIKUMBUNE/1680 measuring 0.525 Ha. he sub-divided the same into two portions being NKUENE/L-MIKUMBUNE/1760 and 1761. He sought and obtained consent to transfer the first parcel No. NKUENE/L-MIKUMBUNE/1760 to the 2nd plaintiff/respondent and the 2nd parcel No. NKUENE/L-MIKUMBUNE/1761 to his daughter Catherine Kagwiria Mugambi. He executed the respective transfer forms and gave each of his new Generation Identity Card and PIN Certificate and recent passport size photograph. His daughter Catherine Kagwiria Mugambi got her portion transfer in her name. however, the 2nd plaintiff delayed in transferring his portion into his name due to financial challenges. However, the 2nd plaintiff has always lived on land parcel No. NKUENE/L-MIKUMBUNE/1760 with his family and has developed the same extensively including building a permanent three bed-roomed house.

The 1st plaintiff further stated that sometimes on or about 25th June 2012, he was shocked when a clerk from Kigora Ariithi & Associates

served the 2nd plaintiff with a letter demanding that he vacates the land within thirty (30) days. They immediately proceeded to the Lands office, Meru Central District and upon purchasing a copy of the green card, they realized that the land had allegedly been transferred to the 2nd defendant by the 1st defendant on 22nd March 2012 and that he had allegedly transferred the same to the 1st defendant on 2nd March 2012. He denied ever applying to Nkuene Divisional Land Control Board to transfer land parcel No. NKUENE/L-MIKUMBUNE/176 to the 1st defendant or executing the transfer forms or even attending the said Land Control Board. He stated that that was a case of pure forgery and sought to have the title deed in the name of 1st and subsequently 2nd defendants cancelled and the land revert back to his name to enable him complete the transactions he had started towards effecting the transfer in favour of the 2nd plaintiff.

On being cross-examined, the 1st plaintiff stated that currently, the land in question is in the name of Peter Kiambi Manyara (2nd defendant). Before the transfer, the land was in the name of his late father. From the green card, the land shows it was from Morris Kiruja Ithima, the 1st defendant/appellant before being transferred to the 2nd defendant. He said that the land was never transferred to him at any one time. He admitted having seen a transfer form and consent between the 1st defendant and the 2nd defendant. He said that he did not see a sale agreement between the two. He confirmed he was aware of a Criminal Case No. 978/2013 (Nkubu) where he was a witness. He did not see the sale agreement during the hearing of that case. He stated that the accused in that case was the 2nd defendant Peter Manyara who had been charged with obtaining title to the suit land by fraudulent means. He confirmed that they had made a report to the CID offices in Nkubu. They took all the relevant documents to the CID offices where they were forwarded for Forensic Examination. He said that the 2nd defendant was not found guilty. They did not appeal against the decision.

PW2 was John Kiogora Mugambi who also gave sworn testimony and confirmed that the 1st plaintiff Gideon M' Ithima is his father and immediate neighbour. He stated that on 10th May 2011, he attended the Nkuene Divisional Land Control Board where the Board gave consent to his father, the 1st plaintiff to transfer a portion of his land and his sister Catherine Kagwiria Mugambi being land parcels No. NKUENE/L-MIKUMBUNE/1760 and 1761 respectively. He stated that his father duly signed the transfer form in his favour complete with his recent passport size photograph and gave him a copy of his National Identity Card and Personal Identification Card (PIN). However, due to financial challenge, he was unable to register the transfer into his name. He said that on or about 25th June 2012, he was shocked to receive a notice by M/S Kiogora Ariithi & Associates acting for the 2nd defendant demanding that he vacate the land given to him by his father being parcel No. NKUE/L-MIKUMBUNE/1760 within thirty (30) days failing which he was to be forcefully evicted. He immediately visited the Lands office where he conducted an official search and was shocked to discover that indeed the land in question had been transferred to the 2nd defendant by the 1st defendant on 22nd March 2012 who had in turn gotten it transferred to him allegedly by the 1st defendant on 22nd March 2012. He contacted his father the 1st plaintiff herein who vehemently denied knowledge of the alleged transfer. He reported the matter to the Criminal Investigation Department (CID) Imenti South who commenced their investigations. He stated that he has lived on the suit land for 38 years with no interruption and he has exclusively and extensively developed the same. He stated that the 1st defendant is his brother while the 2nd defendant an immediate neighbour. On cross-examination, PW2 confirmed that he was aware of the criminal case against the 2nd defendant in Nkubu Law Courts. He also confirmed that he testified in the criminal trial at Nkubu Law Courts as a state witness and that the 2nd defendant was acquitted of the criminal charges. The 2nd plaintiff denied that he gave his brother Morris who is also the 1st defendant his land voluntarily. He stated that he was not aware that Morris Kiruja Ithima was the one who transferred the land to the 2nd defendant. He denied that he was present when his brother Morris allegedly sold the land to the 2nd defendant.

Though the 1st defendant did not testify in the case, he filed his statement of defence on 24th August 2012 in which he admitted the contents of paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14. The 1st defendant however denied ever applying or attending the Nkuene Divisional Land Control Board either to have land parcel No. NKUENE/L-MIKUMBUNE/1760 transferred to him by the 1st plaintiff or to transfer the same to the 2nd defendant. The 1st defendant further denied ever causing to be thumb printed or signed any transfer form to have the suit property land parcel No. NKUENE/L-MIKUMBUNE/1760 transferred to himself or to the 2nd defendant or ever appearing before Kaimenyi Kithinji Advocates or at all. He therefore denied committing or perpetuating any acts of fraud either by himself or jointly with his co-defendant in the primary suit. The 1st defendant further averred that between January 2011 and June 2012, he was a farm hand of the 2nd defendant. He also averred that in January 2011, the 2nd defendant took and confiscated his original New Generation Identity Card allegedly as a security for his Employment with him and in addition also took his three coloured passport size photographs allegedly with a view to have him (1st defendant) registered with the National Hospital Insurance Fund (N.H.I.F).

He averred that despite several demands, the 2nd defendant refused. He stated in his defence that he now has reasonable believe that the 2nd defendant could have used his New Generation National Identity Card and Passport size photographs to commit the fraudulent transfer forms, and utter the same to Kaimenya Kithinji Advocate and the Land Registrar Meru Central to cause land parcel No. NKUENE/L-MIKUMBUNE/1760 transferred from the 1st plaintiff to himself and subsequently from him to the 2nd defendant.

The 2nd defendant gave sworn testimony and sought to adopt his witness statement dated 15th February 2013. In his evidence, the 2nd defendant stated sometime in the year 2006, the 1st defendant Morris Kiruja Ithima approached him to buy a portion of land. The 1st defendant found him in the company of one Raphael Gikunda and Victor Karimi who had gone to assist him at his farm. At the time the 1st defendant was selling to him the land, it was registered in the name of his grandfather. He said that he asked the 1st defendant whether his father had any objection and he answered in the negative. He requested Raphael Gikunda and Victor Kirimi to join him as they went together with the 1st defendant to see the 1st plaintiff. Upon arrival, he met the 1st plaintiff at his gate and he inquired if he had any objection to a land transaction Morris Kiruja Ithima wanted to sell him and the 1st plaintiff answered in the negative. He said that he further negotiated with the 1st defendant and on 14th October 2006, they entered into a written land sale agreement for the sale of a $\frac{3}{4}$ acre piece of land. The agreement was witnessed by Victor Kirimi and Raphael Gikunda. On the purported 14th October 2006, he paid Morris a sum of Ksh. 202,000/= and agreed on the settlement of the balance in 4 instalments.

On 3rd July 2007, he paid the 1st defendant a further sum of Ksh. 160,000/= in the presence of the same witnesses. On 26th April 2008, he paid the 1st defendant another sum of Ksh. 180,000/= this time round in the presence of one Jona Mwenda Kimathi. On 11th October 2008, he made a further instalment of Ksh. 20,000/= in the presence of Victor Kirimi and Raphael Gikunda. On 21st March 2009, they formalized their sale agreement with the 1st defendant in the firm of Nyamweya Mosota & Co. Advocates.

On 8th July 2009, he paid the 1st defendant the balance of Ksh. 88,000/= in the firm of Nyamweya Moseta & Co. Advocates. He stated that since the year 2006, he took possession and use of the $\frac{3}{4}$ acre piece of land awaiting formal transfer into his name. He said that in the meantime, the 1st plaintiff was pursuing a succession cause for his late father's Estate so that he could distribute the same. He said that he

made a request to the 1st plaintiff to transfer the portion directly into his name but he insisted that he would have to transfer the portion directly in the name of the 1st defendant who would in turn transfer to him.

The 2nd defendant further stated that sometimes in the month of March 2012, the 1st defendant informed him that he had gotten the land registered in his name and that his portion was L.R. No. NKUENE/L-MIKUMBUNE/1760. On 4th March 2012, they wrote yet another agreement to confirm their earlier agreements. They subsequently executed transfer of land forms in his favour and on 22nd March 2012, the land was registered in his name and that he is now the registered owner of land parcel No. NKUENE/L-MIKUMBUNE/1760 having bought the same for valuable consideration.

On cross-examination, the 2nd defendant confirmed that 1st plaintiff is an elder in the village. He said that they entered into a sale agreement with the 1st defendant on 14th October 2006. He confirmed that as at the 14th October 2006, the registered owner of the land was the grandfather to the 1st defendant who was deceased. He said that they entered the second agreement on 21st March 2009. From the testimony by the 2nd defendant and the documents produced in evidence, he entered into the first agreement for the sale of the suit land on 14th October 2006 and the second agreement on 21st March 2009. A casual glance of these agreements does not follow a sequence of events. The agreement entered on 21st March 2009 does not show that it was a further agreement to the one entered on 14th October 2006. The other issue of concern is that in the agreement entered on 14th October 2006, the seller was to receive a sum of Ksh. 202,000/= as deposit upon the signing of the same. A further sum of Ksh. 160,000/= was to be paid on or before 12th May 2007 and another sum of Ksh. 100,000/= was to be paid on or before 11th October 2007. It was a term of the said agreement that the sum of Ksh. 120,000/= was to be paid on or before 26th April 2008 and finally the sum of Ksh. 88,000/= was to be paid on or before 20th October 2008. In the subsequent agreement dated 21st March 2009, the same does not reflect as a further agreement to the one entered on 14th October 2006. It is also a matter of grave concern that the subject matter of the sale was a property registered in the name of a deceased person. The attempts by the parties to deal with the property of a deceased person before succession is undertaken is tantamount to a criminal offence. **Section 45 of the Law of Succession Act, Cap. 160 Laws of Kenya** provides:-

“45 (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.

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

(a) 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

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payment made in the due course of administration”.

On the other hand, **Section 82** of the Act provides:-

“82. Personal representatives 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 arise out of his death for his estate;

(b) To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any of the assets vested in them, as they think best; provided that –

(i) The 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” (Emphasis mine)

In the case of **Morris Mwiti Mburugu Vs Denis Kimathi M’ Mburugu (2016) e K.L.R** when faced with a situation of sale of property belonging to an estate before succession was undertaken, the Court held:-

“ Where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of Section 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the Court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same”.

The holding by the Court in the above decision is perfectly obtained in the present case. The sale agreements purported to have disposed the suit property and the payments made were done when the property was registered in the name of a deceased person. The 2nd defendant in my view committed a criminal offence by intermeddling with the free property of a deceased person. Any transaction done contrary to the provisions of **Section 45** as read with **Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya** is liable to be nullified and set aside at the instance of the plaintiffs in this case who are bonafide beneficiaries and who were not involved in the purported transaction.

The trial magistrate made observation at page 9 of her judgment where she stated as follows:-

“It was very clear from the 2nd defendant’s evidence that he didn’t conduct proper due diligence and if he did it, it was clear that in the year 2006, the land was registered in the names of the deceased, being the 1st plaintiff’s father. He was then aware that the

alleged agreement he entered into with the 1st defendant of the suit land, which was non-existent at the time. This is because land parcel No. NKUENE/L-MIKUMBUNE/1760 was a sub-division of land parcel No. NKUENE/L-MIKUMBUNE/1760 and the succession cause had not been conducted. Again, the degree of consanguinity provided for by the Law of Succession Act clearly indicates that a grandchild of the deceased cannot be a beneficiary therein in total disregard to the children of the deceased, in this case being the 1st plaintiff herein.

Further, the 1st defendant was not the administrator of the deceased's Estate hence had no right whatsoever to enter into the alleged agreement with the 2nd defendant and more so, it would have and still amounted into intermeddling of the deceased's estate as provided for under Section 45 of the Law of Succession Act. The same applied to the further alleged agreement entered into by the defendants herein on 4th March 2009 for the suit land was non-existence and the original parcel of land was still registered in the names of the deceased. This clearly shows that the suit land which was transferred to the 1st defendant and thereafter to the 2nd defendant was done fraudulently and illegally”.

I find the analysis by the trial magistrate to be well reasoned and that the learned magistrate properly directed her mind to the facts and the applicable law. In the final analysis, I find this appeal lacking merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

DATED, DELIVERED Virtually and SIGNED at GARISSA this 28th day of July, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Kimathi for Appellant
2. M/s Murithi for Respondent
3. Fardowsa-Court Assistant