



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC NO 404 OF 2016**

**PETER WAHOME KAMWENGA.....PLAINTIFF**

**VERSUS**

**THOMAS AMANI KALAMA.....1<sup>ST</sup> DEFENDANT**

**HENRY PAUL MAGANGA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

**PLEADINGS**

1. The suit was instituted by way of a Plaint dated 16<sup>th</sup> December 2016 and filed on the same day by the plaintiff who prays for:-

- a) **A mandatory injunction directed to the defendants, from constructing, selling, alienating, disposing and/or dealing with the undivided portion of Plot No. 285 SD 8610/I/MN measuring 87 feet, 45 feet by 107 feet and 55 feet, the property of the plaintiff.**
- b) **A declaration that, the plaintiff is the owner of the undivided portion of land Plot No. 285 SD 8610/I/MN measuring 87 feet, 45 feet by 107 feet and 55 feet.**
- c) **Vacant possession of the undivided portion of Plot No. 285 SD 8610/I/MN measuring 87 feet, 45 feet by 107 feet and 55 feet.**
- d) **Costs and interest of this suit.**

2. The plaintiff averred that at all material times he was the beneficial owner of the undivided portion of Plot No. 285 SD 8610/I/MN measuring 87 feet, 45 feet by 107 feet and 55 feet within Bombolulu in Mombasa County. The plaintiff pleaded that he acquired the suit property from the 2<sup>nd</sup> defendant on 6<sup>th</sup> January 2004 after making a payment of Kshs. 350,000/=. He further pleaded that the 1<sup>st</sup> defendant without any color of right commenced construction on the suit property. He prayed court to desist the defendants from further construction, selling and any other dealing with the suit property.

3. The 2<sup>nd</sup> defendant entered appearance on 8<sup>th</sup> February 2017. He filed his statement of defence dated 7<sup>th</sup> February 2017 on 8<sup>th</sup> February 2017 and denied the plaintiff's ownership of the suit property. He averred that he inherited the suit property together with his sisters from the estate of his late father. He claimed that he entered into a lease agreement with the plaintiff on 28<sup>th</sup> July 2002 but the plaintiff failed to pay the agreed rent. He stated that his sisters leased the suit property to the 1<sup>st</sup> defendant and further to that he denied receiving any demand notice from the plaintiff. He concluded by asking court to dismiss the suit with costs.

4. The 1<sup>st</sup> defendant entered appearance on 5<sup>th</sup> April 2017. He filed his statement of defence dated 4<sup>th</sup> April 2017 and filed on 5<sup>th</sup> April 2017 and denied that the plaintiff is in actual or constructive possession over the suit property. He admitted to the ongoing construction on the suit property, but sought to clarify that he is constructing a perimeter fence around his portion measuring 50 meters by 100 meters on Subdivision No. 8610 from original No. 285/2 Section 1 Mainland North. The 1<sup>st</sup> defendant averred that he bought the suit property from the Administrators of the Estate of Henry Paul Maganga vide a sale agreement dated 1<sup>st</sup> March 2013.

5. The 1<sup>st</sup> defendant argued that the purported sale of the suit property to the plaintiff on 6<sup>th</sup> January 2004 was illegal ab initio, for the reason that, the suit property at that time was registered in the name of Henry Paul Maganga who passed away on 8<sup>th</sup> October 1994 and his legal

representatives were only appointed in 2<sup>nd</sup> July 2013 when the letters of administration were confirmed to the 2<sup>nd</sup> defendant, Lucy Eva Maganga and Christine Diana Maganga. The 1<sup>st</sup> defendant pleaded that the sale violated Section 45 of the Succession Act and was void ab initio by virtue of Section 80 (2) of the Succession Act and prayed for the suit to be dismissed with costs.

## EVIDENCE

6. On 23<sup>rd</sup> September 2019, PW1 Peter Wahome Kamwenga, the plaintiff herein was examined in chief. He adopted his witness statement filed on 16<sup>th</sup> December 2016 as his evidence in chief. He stated that he is the owner of the suit property Plot No. 285 SD 8610/1/MN having bought it from Cyprian M. Rintuara for Kshs 350,000/= and produced the sale agreement as Plaintiff's Exhibit No. 1. He stated that on execution of the sale agreement on 6<sup>th</sup> January 2004 he paid Kshs 270,000/= and on 22<sup>nd</sup> January 2004 he paid the balance of Kshs 80,000/=. He further stated that the 2<sup>nd</sup> defendant was present during the execution of the agreement as he was the landlord of the suit property. He further stated that before buying the suit property, the 2<sup>nd</sup> defendant showed him documents proving that he was the legal administrator and the only beneficiary to the estate of his late father. PW1 testified that while inspecting his fenced plot he found the gate had been removed and there was a borehole being dug. He stated that he went to the village elder who in turn directed him to the area chief who has refused to stop the construction.

7. On cross examination, by the 2<sup>nd</sup> defendant who acted in person, he stated that at the time of purchasing the lease from Cyprian Rintuara, he was not asked to pay monthly rent neither was he told the monthly rent was payable. On re-examination, he stated that he purchased the suit property absolutely and not on lease. With that the plaintiff closed its case.

8. The matter proceeded to defence hearing, and DW1, Paul Majaliwa Henry aka Paul Henry Majaliwa testified that he is the 2<sup>nd</sup> defendant and one of the administrators of the estate of his late father. He stated that in 2002 he leased a portion of Plot No 285 measuring 50 feet by 100 feet to Mr. Rintuara, who later transferred the lease to the plaintiff. DW1 testified that his two sisters had the initial letters of administration revoked and new letters were issued in his name and that of his two sisters. He further testified that his sisters were not aware of the lease to the plaintiff and they sold the plot to the 1<sup>st</sup> defendant without involving him.

9. On cross examination by Mr. Okanga, counsel to the plaintiff, DW1 stated that between 2002 and 2004 he had letters of administration to the estate of his father in his name. He clarified that the revocation was done in 2005-2006 and new letters were issued in his name and that of his two sisters. He sought to distance himself with the sale agreement with the 1<sup>st</sup> defendant though he stated that nothing happens in the estate of the father without his knowledge. DW1 further stated that the rightful lessee was the plaintiff and not the 1<sup>st</sup> defendant. With that the 2<sup>nd</sup> defendant closed his case.

10. The Court ordered that the 1<sup>st</sup> defendant's case is also marked as closed, for the reason that the 1<sup>st</sup> defendant was absent despite being aware of the hearing date. The Court then directed that parties to file submissions and plaintiff to serve the 1<sup>st</sup> defendant with the mention notice for 16<sup>th</sup> October 2019.

11. On 16<sup>th</sup> October 2019, the 1<sup>st</sup> defendant made application to have the proceedings of 23<sup>rd</sup> September 2019 and the consequent orders closing the plaintiff's case and the defendants' case set aside and the suit to be reinstated for hearing de novo. The Court ruled on the application on 30<sup>th</sup> July 2020 and found the application merited. The Court set aside the orders that closed the plaintiff's and defendants' cases and allowed the 1<sup>st</sup> defendant to cross examine the witnesses and tender his evidence.

12. When the matter came up for further hearing on 18<sup>th</sup> February 2021, Mr Kongere, counsel for the 1<sup>st</sup> defendant informed court that he does not wish to further cross examine the plaintiff or the 2<sup>nd</sup> defendant. He further informed court that he wishes to close the 1<sup>st</sup> defendant's case. The Court ordered that the case against the 2<sup>nd</sup> defendant is also closed since he was deceased and directed that parties file submissions.

## SUBMISSIONS

13. The 1<sup>st</sup> defendant filed his submissions on 25<sup>th</sup> March 2021. Counsel for the 1<sup>st</sup> defendant submitted that the plaintiff's suit violated Section 45 of the Law of Succession Act and Section 3 (3) of the Law of Contract. Counsel submitted that the only valid letters of administration that have been adduced into evidence are those issued on 27<sup>th</sup> April 2011. For the reason that though the 2<sup>nd</sup> defendant has not produced the letters of administration he claimed to have between 2002 and 2004. Counsel further submitted that the two lease agreements, one between the 2<sup>nd</sup> defendant and Cyprian Ntuara M. Rintuara dated 28<sup>th</sup> January 2002 and the one between Cyprian Ntuara M. Rintuara and the plaintiff dated 6<sup>th</sup> January 2004 were acts of intermeddling since the suit property was still owned by the deceased and Section 45 of the Law of Succession criminalizes any dealing with property without a grant. Counsel relied on the case of **Peter Ombui Nyangoto V Elizabeth Matundura & another (2013)eKLR** where it was held that:-

**“In law a requirement that on her demise, these properties would only be alienated or disturbed after letters of administration in respect of her estate is obtained and the grant is confirmed. The second respondent's active consent in the transaction that ended in complete violation of the Law of Succession Act did not and cannot make that transaction legal. It remains illegal and all who participated and/or could have participated in such illegality would still have taken part in an illegal activity.”**

14. Counsel contended that the agreement dated 6<sup>th</sup> January 2004 violated Section 3 (3) of the Law of Contract Act which requires contracts to be in writing, signed by all parties and each signature be attested by a witness. Counsel argued that since the contract was signed by Cyprian Ntuara M. Rintuara, the plaintiff and the 2<sup>nd</sup> defendant there should have been three witnesses to attest each party's signature.

Counsel submitted that the plaintiff's case is premised on contracts that violate the law and thus cannot be enforced by this court to his advantage. Counsel relied on the case of **Jane Catherine K. Karani V Daniel Mureithi Wachira (2014) eKLR** where it was held that:-

**“The signature of each party is required to be attested by a witness who was present during execution of the agreement. We have perused the agreement and find that it is only the appellant's signature that was attested by her husband. This was clearly contrary to Section 3 (3) of the Law of Contract. We therefore, concur with the learned judge's findings that the agreement was unenforceable.”**

15. Counsel argued that even though the two leases were valid, they both have conflicting information in terms of plot number and plot size. Counsel contended that the plaintiff had not proved his case to the required standard and prayed to court to find it devoid of merit and dismiss it with costs.

16. The plaintiff filed his submissions on 8<sup>th</sup> June 2021. Counsel for the plaintiff submitted that the evidence submitted by the 2<sup>nd</sup> defendant that in 2002 he had letters of administration has not been controverted. Counsel further submitted that the lease agreement dated 6<sup>th</sup> January 2004 was properly prepared and executed in line with Section 3 (3) of the Law of Contract Act, since all parties signed in the presence of the advocate who also appended his signature. Counsel argued that the plaintiff had proved his case on a balance of probabilities since his case has not been challenged by the 1<sup>st</sup> defendant.

### **ANALYSIS AND DETERMINATION**

17. I have considered the pleadings, evidence tendered as well as the submissions made herein. The issues before me for consideration are:-

*a) Whether the lease agreements dated 28<sup>th</sup> January 2002 and 6<sup>th</sup> January 2004 amounted to intermeddling.*

*b) Whether the plaintiff is entitled to vacant possession of the suit property.*

18. The plaintiff averred that he purchased the suit property from the 2<sup>nd</sup> defendant on 6<sup>th</sup> January 2004, while the 1<sup>st</sup> defendant averred that he bought the suit property vide a sale agreement dated 1<sup>st</sup> March 2013 from the administrators of the Estate of Henry Maganga aka Henry Paul Maganga (deceased). The 2<sup>nd</sup> defendant on the other hand contended that he entered into a lease agreement with the plaintiff on 28<sup>th</sup> July 2002 but the plaintiff failed to pay the agreed statutory rent. When cross examined by the counsel for the plaintiff, the 2<sup>nd</sup> defendant stated that between 2002 and 2004 he had letters of administration of the estate of his father, which were later revoked and the confirmed letters of administration were issued in the names of the 2<sup>nd</sup> defendant and his two sisters.

19. The 2<sup>nd</sup> defendant filed a Certificate of Confirmation of a Grant dated 2<sup>nd</sup> July 2013 which was granted in Succession Cause No. 264 of 2004. The confirmed grant listed Lucy Eva Maganga, Christine Diana Maganga and Paul Henry Majaliwa as the beneficiaries to the suit property which was described as Subdivision No. 8610 (Original No. 285/2 Section 1 Mainland North) measuring approximately 0.9722 ha. It is not disputed by any party herein that the suit property initially was in the name of Henry Maganga aka Henry Paul Maganga (deceased). Though the 2<sup>nd</sup> defendant claimed in chief that he had confirmed letters of administration to the estate of his father at the time he leased the suit property to Cyprian Ntuara M. Rintuara, the Succession Cause was filed in 2004 while the lease agreement was entered into in 2002. In the intervening period between the death of Henry Paul Maganga and 2<sup>nd</sup> July 2013 when the grant was confirmed, the 2<sup>nd</sup> defendant had entered into a lease agreement with Cyprian Ntuara M. Rintuara on 28<sup>th</sup> July 2002 for the lease of suit property while Lucy Eva Mganga and Christine Daina Mganga had entered into a sale agreement with the 1<sup>st</sup> defendant for the sale of the suit property on 1<sup>st</sup> March 2013 notwithstanding that no letters of administration had been applied for, obtained and confirmed as it is required by law.

20. No doubt, the actions of the 2<sup>nd</sup> defendant of leasing out the suit property to Cyprian Ntuara M. Rintuara on 28<sup>th</sup> July 2002 and that of Lucy Eva Mganga and Christine Daina Mganga of entering into a sale agreement with the 1<sup>st</sup> defendant on 1<sup>st</sup> March 2013 offended **Section 45 (1) of the Law of Succession Act** which states:-

**“except as 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.”**

21. In my view, both the lease agreement dated 28<sup>th</sup> July 2002 and the sale agreement dated 1<sup>st</sup> March 2013 did amount to intermeddling with the property of Henry Maganga aka Henry Paul Maganga (deceased). Clearly they had no legal right to have the property dealt with in any matter before the letters of administration were applied for, obtained and confirmed. Section 45 of the Laws of Succession Act prohibits dealing with properties belonging to a deceased person before obtaining grant.

22. Actions that may amount to intermeddling with the property of the deceased were defined in the case of **Benson Mutuma Muriungi v C.E.O. Kenya Police Sacco & another [2016] eKLR** where court held that:-

**“There is no specific definition of the term intermeddling provided in the Law of Succession Act. The Act simply prohibits taking possession of or disposing of, or otherwise intermeddling with, any free property of a deceased person by any person unless with the express authority of the Act, any other written law or a grant of representation under the Act. But in my understanding, the use of wide and general terms such as; “for any purpose” and “or otherwise intermeddle with” in the Act portends that the category of the offensive acts which would amount to intermeddling is not heretically closed or limited to taking possession and disposing of the property of the deceased. I would include in that category such acts as; taking possession, or occupation of, disposing of, transferring, exchanging, receiving, paying out, distributing, donating, charging or**

**mortgaging, leasing out, interfering with existing lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act or any other written law. I do not pretend to close the list either or make it exhaustive. The list could be long. However, any act or acts which will dissipate or diminish or put at risk the free property of the deceased are acts of intermeddling in law.**

23. The dealing with the immovable property of a deceased person without a confirmed grant has been prohibited by **Section 82 (b) (ii) of the Law of Succession Act** which provides that no immovable property shall be sold before confirmation of grant. Therefore the transactions that were entered into between the beneficiaries of the estate of the deceased and the 1<sup>st</sup> defendant and the plaintiff before the Grant of Letters of Administration was confirmed are invalid for offending the provisions of Sections 45 and 82 of the Law of Succession Act. The sale transactions are invalid, notwithstanding that they were by the administrators of the estate with letters of administration, so long as the letters were not yet confirmed they had no power to sell the suit property.

24. The actions of intermeddling are unlawful and cannot be protected by the law. The plaintiff's suit is premised on the lease agreement between the 2<sup>nd</sup> defendant and Cyprian Ntuara Rintuara, a transaction that I find as an act of intermeddling. The law prohibits the dealing with the estate of a deceased person without a confirmed grant, and this is exactly what the 2<sup>nd</sup> defendant did. He purported to lease the suit property to Cyprian Ntuara who in turn transferred the lease to the plaintiff with the consent of the 2<sup>nd</sup> defendant. A right of action cannot arise from the refusal to obey the law. The court will not lend aid to enforce that which is prohibited by the law, for crime and justice never dwell together.

25. The next issue we need to ventilate is whether the plaintiff is entitled to vacant possession. As I have stated above, the 2<sup>nd</sup> defendant intermeddled with the estate of his deceased father by purporting to sanction the transfer of the suit property to the plaintiff who purchased the suit property at his own peril. The origin of possession and title of the plaintiff is void and tainted with disobedience with the law. Consequently the title held by the 1<sup>st</sup> defendant is equally invalid since they purchased the suit property from the administrators of the estate without a confirmed grant.

26. The inescapable result is that the suit is dismissed with no order as to costs. I have declined to issue costs to the 1<sup>st</sup> defendant for the reason that his claim too arises from actions of intermeddling with the estate of the deceased.

Orders accordingly.

**DATED, SIGNED and DELIVERED virtually at MOMBASA this 13<sup>th</sup> day of July, 2021**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

**Yumna Court Assistant**

**Kongere counsel for the 1<sup>st</sup> defendant**

**N/A for the plaintiff**

**N/A for the 2<sup>nd</sup> defendant**