



REPUBLIC OF KENYA



**Nyambura v Gichia (Civil Appeal E173 of 2022)
[2024] KEHC 8632 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8632 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E173 OF 2022**

**AC BETT, J
JULY 12, 2024**

BETWEEN

SUSAN NYAMBURA APPELLANT

AND

FRANCIS NGURU GICHIA RESPONDENT

*(Being an appeal against the judgement and orders of Thika by
Honorable R. Otieno (Mrs.) Adjudicator/Resident Magistrate delivered
on 28th June 2022 in Thika SCCCOMM case no. E169 of 2022)*

JUDGMENT

1. This is an appeal from the Small Claims Court. The grounds for the appeal are set out in the appellants memorandum of appeal filed in this honorable court on 27th July 2022. There are seven grounds of appeal that are set out but the same can be summarized as follows:
 - a. That the learned trial Adjudicator erred in law and in totally disregarding the provisions of the Law of Succession Act in respect to the sale and transfer of immovable assets of a deceased person and therefore finding that the contract between the appellant and the respondent was lawful and enforceable in law.
 - b. That the learned Trial Adjudicator wrongly exercised his discretion in allowing payment of the undisputed sum of ksh.231,000/= by way of monthly installments of ksh.30,000/=.
 - c. That the learned Trial Adjudicator erred in law in awarding costs and to the respondent notwithstanding prompt admission and absence of a formal demand for the said sum prior to filing of suit.
2. It was not disputed that the appellant owed the respondent the sum of ksh.231,000/= arising from an agreement for sale of land that was registered in the name of the appellant's deceased husband and



which sale failed to materialize. It is also not in dispute that the appellant had not taken out succession proceedings in respect of her deceased husband's estate at the time she entered a contract to sell the land comprised in Title number Thika Municipality Block 17/475 to the respondent at an agreed consideration of ksh.350,000/= which she received in full.

3. The bone of contention arises from Clause 7 of the Agreement which states that:

“If any of the parties herein is in breach of any clause of the agreement, he will pay the innocent party 30% penalty of the agreed purchase price.”

4. Under Section 38(1) of the *Small Claims Court Act*, an aggrieved party can appeal from a decision or order of the court on matters of law. I am satisfied that the present appeal raises matters of law.

5. Both parties filed written submissions. In her submissions, the appellant urges the court to find that the contract that she entered for sale of her deceased husband's immovable property in absence of certificate of confirmation of Grant was ex facie illegal and unenforceable for being in contravention of Section 55 and 82 of the *Law of Succession Act*. She argues that since the agreement of sale was null and void ab initio, then the penalty clause could not be enforced and therefore only money had and received could be deemed due as a civil debt.

6. The appellant further submitted that since there was no evidence of demand either formal or otherwise made to the appellant to refund the balance of the purchase price, the respondent was not entitled to an award for costs, The Appellant's Advocate did not cite any authorities in support of the appeal.

7. On the other hand, the respondent narrowed the issues for determination into two;

1. Whether the respondent is entitled to the 30% interest as claimed.

2. Whether the respondent is entitled to costs herein.

With respect to learned counsel, the first issue is mis-framed and ought to have read:

“Whether the respondent is entitled 30% penalty.”

8. The several authorities cited by the respondent's counsel in support of this first argument, although illuminating were not of much assistance to the court. However, I note that the Adjudicator did allude to the issue of interest in her judgement, and I totally agree with the appellant that even if the debt herein were treated as a civil debt, interest would still be payable.

9. Looking at the contract as it is framed, the respondent was aware at the time he paid for the property that the appellant lacked capacity to sell the property. In the circumstances, the appellant and the respondent were both intermeddlers in the estate of a deceased person. Section 45 of The *Law of Succession Act* provides protection for a deceased person's estate and stipulates:-

(1) Except so far as expressly authorized by this *Act*, or by any other written law, or by a grant of representation under this *Act*, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

10. Section 82 b(ii) of the *Law of Succession Act* states:-

“No immovable property shall be sold before confirmation of grant.”

Faced with the express provisions of the *Law of Succession Act*, the inevitable conclusion is that any agreement for sale of land belonging to a deceased person without certificate of confirmation of grant or leave of the court is null and void.



11. To that extent, I find that the Adjudicator erred in law in finding that the agreement of sale of land between the appellant and the respondent was valid. The appellant lacked capacity to enter into any agreement with respect to her deceased husband's land and hence the agreement was tainted with illegality. However, can the appellant benefit from this illegality?
12. In the case of *Kenya Airways Limited -vs- Satwant Singh Flora* [2013]eKLR the court set out the following guidelines in determining the rights and obligations of parties where one party pleads alleged illegality of the contract to justify a breach of contract:-
 - i. No person can claim any right or remedy whatsoever under an illegal transaction which he/she participated. The court is bound to veto the enforcement of a contract once it knows that it is illegal whether that knowledge comes from the statement of the guilty party or from outside.
 - ii. If the statute prohibits the contract, it is unenforceable whether the parties mean to break it or not.
 - iii. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves illegality, the court ought not to assist him.
 - iv. No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.
 - v. In order for the doctrine to act as a defence to the claim, there must be illegal performance of the contract by one party to the contract and knowledge of that illegal performance and participation in it by the other party to the contract.”
13. Upon consideration of the above guidelines, I find that the contract between the parties herein, having been illegal from the start, is incapable of enforcement by this honorable court as to do so would be to abet the illegality. The appellant was privy to the illegality when he entered into the contract between him and the appellant and he ought to have forewarned himself of the danger of entering into such a contract. The adjudicator erred by declaring the contract enforceable and ordering the appellant to pay the respondent the agreed penalty of 30%.
14. In her grounds of the appeal, the appellant faults the trial magistrate for awarding costs and interest notwithstanding prompt admission and absence of formal demand. I find that the Appellant is inviting this court to interfere with the Adjudicator's discretion and like the other grounds the same cannot be said to be a ground of law.
15. However, it is trite law that any consideration paid in pursuance of an illegal or void contract becomes recoverable as a debt by the person to whom it was paid. In *Neville -vs- Wilkinson* [1782] 1 Bro Cc 543 at page 547, Lord Thurlow LC said that:-

“In all cases where money was paid for unlawful purposes, the party, though particeps criminis, might recover at law; and that the lesson was, that if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state which they were before.”



16. In this instant, if Section 45 of the Law of Succession Act were to be strictly observed, both parties herein would be deemed 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 (See Section 45(2)).
17. Relying on the Neville case(supra), I find that the Adjudicator was right in ordering a refund of the balance of the purchase price plus costs and interest. Costs often follow the event save under exceptional circumstances.
18. In the end, I find that the appeal partially succeeds. I set aside the order directing the appellant to pay the respondent 30% penalty. Instead, the appellant shall pay the respondent the balance due of ksh.231,000/= plus costs of the claim and interest.
19. With respect to interest, the claim was for a liquidated sum. I therefore set aside the adjudicator's order for payment of interest from the date of judgement and substitute it with an order that the award shall attract interest from the date of filing of the claim till the date of payment.
20. I order each party to pay their own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 12TH DAY OF JULY 2024.

A. C. BETT

JUDGE

In the presence of:

Ms. Waithera for the appellant

No appearance for the respondent

Court Assistant: Polycap Mukabwa

