



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO.800 OF 2013

NELLY WANJA NJIHIA (Suing as the Administrator of the Estate of

MOSES NJIHIA MUGO (deceased).....PLAINTIFF

=VERSUS=

DANIEL DUNGU NYUTU.....DEFENDANT

JUDGEMENT

1. By a plaint dated 15th May 2013 the Plaintiff prays for judgement against the Defendant for:-

a) An eviction order against the Defendant herein and/or his employees, servants and /or agents who are in occupation of all that land known as Title Number Gatamaiyu/Kagwe/1421 the property of the deceased.

b) A permanent injunction restraining the Defendant whether by himself, employees, servants and /or agents or otherwise, howsoever from interfering with, wasting, damaging, alienating, subdividing, selling, removing, disposing off and/or dealing in any manner whatsoever and howsoever with any part and/or portion of all that parcel of land known as Title Number Gatamaiyu/ Kagwe/1421.

c) A declaration that the purported agreement for the sale of all that parcel of land known as Title Number Gatamaiyu/Kagwe/1421 is invalid, unlawful and /or illegal and therefore unenforceable against the Plaintiff.

d) Special damages.

e) General damages.

f) Costs of this suit.

g) Any other or further orders that this Honourable court may deem fit and just to grant in the circumstances of the matter.

2. The Plaintiff's main claim against the Defendant is for the delivery of vacant possession of all that parcel of land known as **Title Number Gatamaiyu/Kagwe/1421** to the estate of the deceased by the Defendant who is currently in occupation of the same by virtue of a sale Agreement in July 2008 by the Plaintiff and her late mother without the authority of the court or the beneficiaries and before the grant of Letters of Administration had been issued.

3. The Plaintiff contended that the agreement for sale over the suit property is automatically vitiated by illegality and is void *ab initio* since the Plaintiff and her mother had no right to engage in such transaction in respect of the Estate of the deceased without the consent of the beneficiaries and proper letters of administration and/or permission of the court at the time of making the said agreement.

4. It was also the Plaintiff's case that the Defendant took possession of the suit property in or about July 2008 before completion of the purported transfer to him and he proceeded to uproot 205 mature tea plants planted on the suit property worth Kshs.37,000/=.

The Defendant's case

5. The Defendant entered appearance vide the memorandum of appearance dated 30th October 2012 filed by M/S Kalinga & Co. Advocates.
6. He filed a statement of defence dated 20th November 2013. He admitted that the Plaintiff and her mother offered to sell to him the suit property in July 2008 and that there was a clear intention on the part of both parties to enter into a contract and be bound thereby, and the attempt by the Plaintiff to avoid liability under that contract is unlawful and impermissible.
7. It was his case that he took possession of the suit property immediately. He contended that the Plaintiff is estopped from pleading lack of capacity when she now has full capacity to transfer the suit property to him.

The Plaintiff's evidence

8. PW1 testified on 2nd March 2021. She adopted her list of documents and her witness statement dated 6th May 2013; in which she stated that she is the Late Moses Njihia Mugo's daughter and one of the administrators of his estate.
9. She told the court that on 15th July 2008, her late Mother and herself entered into an agreement for sale of an acre of land excised from the suit land which was registered in her late father's name. She added that the purchase price was Ksh.340,000 but the Defendant only paid kshs.190, 000.
10. She stated that her prayer is for an eviction order against the Defendant. She further stated that she is ready to refund the purchase price paid by the Defendant as per the sale agreement as the sale was null and void.
11. She stated that she also seeks costs of the suit and mesne profits as the Defendant has been on the land for ten years.
12. The Plaintiff closed her case. She was not cross-examined as counsel for the Defendant was absent. The Defendant did not call any witness but tendered written submissions.

The Plaintiff's submissions

13. They are dated 24th May 2021. The Plaintiff submitted that her late mother and herself had no capacity to enter into the agreement dated 15th July 2008 since they lacked letters of administration and a confirmation of grant at the time of execution.
14. She further submitted that the Defendant's occupation and /or possession of the suit property is illegal since it is based on an invalid, unlawful and illegal contract that offends the provisions of Section 45 and 82(2) (ii) of the Law of Succession Act, cap 160 laws of Kenya.
15. She submitted that the doctrine of estoppel pleaded by the Defendant is misplaced since it cannot be founded on a defective, illegal and/or unlawful contract. He relied on the Court of Appeal's finding in **Henry Muthee Kathurima v Commissioner of Lands & Another [2015] e KLR** in that regard.
16. She also relied on the Court of Appeal's decision in **Attorney General v Halal Meat Products Limited [2016] e KLR** to plead with the court to award mesne profits even though the same were not specifically pleaded in the plaint.
17. She added that the Defendant's illegal occupation and/or possession of the suit property has caused untold suffering, mental anguish and financial strain to the beneficiaries of the estate of the Late Moses Njihia Mugo as they have been unable to deal gainfully in any manner whatsoever with the said property for a period of over 12 years now.

The Defendant's submissions

18. They are dated 4th November 2021. The Defendant submitted on the following issues.
- a) Legality of the contract.*
 - b) The doctrine of estoppel.*
 - c) The Plaintiff cannot benefit from her own immorality.*

19. On the issue of legality of the contract, the Defendant submitted that the submission by the Defendant that the contract offends Section 45 & 82 (b) of the Law of Succession Act does not apply to all cases. He cited the case of **Jerusha Wangari Mwangi v Beatrice Muthoni Karanja & 2 Others [2018] e KLR** where the court found that the agreement of sale therein did not offend Section 45 of the Law of Succession Act as there was never an intention of dealing with the estate of the deceased contrary to law.
20. On whether the Plaintiff is estopped from avoiding the obligations in the sale agreement, he relied on the decision of the court in **Benjamin Asiyo v Fozia Mohammed [2012] e KLR** where it was held that the Plaintiff was bound by the promises he made and cannot therefore revert to the previous legal relations as if no promise had been made.
21. He also relied on the case of **Holman v Johnson [1775] 1 Cowp** cited with approval in **Amir Lodges Limited & Another v Mohamed Omar Shariff [2021] e KLR** to submit that the court cannot lend its aid to a party who seeks to benefit from her own mischief and

immorality as no legal remedy or benefit can flow from an illegal act.

22. I have considered the pleadings and the evidence on record. I have considered the submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the sale agreement dated 15th July 2006 is valid.

(ii) Is the Plaintiff entitled to the reliefs sought?

(iii) Who should bear costs of this suit?

23. By a sale agreement dated 15th July 2008, the Plaintiff and her mother sold an acre of land hived off from Land Parcel No Gatamaiyu/Kagwe/1421 to the Defendant. The Plaintiff now wants the court to rescind the sale Agreement for want of capacity on the part of the vendors since they had not obtained letters of administration to the estate of Moses Njihia Mugo (Deceased) to whom the land is registered. The Plaintiff seeks that the Defendant be evicted from the land.

24. Clause 4 of the said sale agreement provides that:-

“That the balance of Kshs.270,000/- shall be paid once the vendors obtain Confirmation of Grant and are ready to transfer the land to the purchaser”.

It is the Plaintiff’s case that she and her mother were issued with Grant of Letters of Administration on 18th November 2008. The same were confirmed on 14th February 2011.

25. As per the agreement the Plaintiff ought to have transferred the land to the Defendant after 14th February 2011 and the Defendant would remit the balance of Kshs.270,000/-. In my view the sale agreement is valid as it was subject to vendor’s obtaining Letters of Administration to the estate of the deceased.

In the case of **Jerusha Wangari Mwangi vs Beatrice Muthoni Karanja & 2 Others [2018] eKLR** It was held:-

“...There is no dispute that the two agreements were executed after the deceased had passed away.....As I understand it, the plaintiff and the defendants were keenly aware that the agreements were subject to the defendants obtaining letters of administration. That is why “succession” is mentioned severally in the first agreement and clause 5 of the said agreement seems to anticipate the completion was to take place after succession.....The agreements were thus simply a commitment of what parties would be obligated to do once grant is obtained. Put differently, there was never an intention of dealing with the estate of the deceased contrary to the law. I do not see any way in which the agreement offends section 45 of the Law of Succession Act.”

26. I find that the Plaintiff is estopped from claiming that she did not have capacity to enter into the sale agreement with the Defendant. In the case of **Benjamin Ayiro Shiraku vs Forzia Mohammed [2012] eKLR** while citing Lord Denning in **Combe vs Combe** stated as follows:-

“the principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him....”

27. In conclusion I find that the Plaintiff has failed to prove her case against the Defendant on a balance of probabilities. There is no doubt that the Plaintiff and her mother had intended to sell the suit land to the Defendant and this did not amount to intermeddling with the estate of the deceased.

28. The Plaintiff’s suit is dismissed with costs to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF DECEMBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Nyaga for Mr. Nyachoti for the Plaintiff

Mrs. Kalinga for the Defendant

Steve - Court Assistant