



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 468 OF 2013**

**PETER KAGUARA UIRU.....PLAINTIFF**

**VERSUS**

**PETER GITHUA CHEGE.....1<sup>ST</sup> DEFENDANT**

**PAUL NDUNGU GITHUA .....DEFENDANT**

**J U D G E M E N T**

1. The plaintiff instituted the instant suit vide a plaint dated 17<sup>th</sup> July 2013 filed in Court on 22<sup>nd</sup> July 2013. The plaintiff's claim is founded on sale agreement dated 25<sup>th</sup> September 1992 where the 1<sup>st</sup> defendant as beneficial owner of land parcel **Bahata/Bahati Block1/4319** ("the suit property") agreed to sell to him a portion of 1 acre to be excised therefrom for the consideration of Kshs70,000/=. The plaintiff averred that the 1<sup>st</sup> defendant did not honour the agreement and instead fraudulently caused the suit property to be subdivided and transferred to the 2<sup>nd</sup> defendant. The plaintiff prays for :-

*(a) A declaration that the transfer of the suit property to the 2<sup>nd</sup> defendant was illegal, null and void and of no legal effect.*

*(b) An order of injunction restraining the defendants from in any manner dealing with or interfering with the suit property or evicting or interfering with the plaintiff's quiet possession of the suit premises.*

*(c) An order nullifying and cancelling the title issued to the 2<sup>nd</sup> defendant and the rectification of the register by the Land Registrar, Nakuru.*

*(d) Costs of the suit.*

2. The defendants in their joint statement of defence dated 6<sup>th</sup> October 2013 denied the averments contained in the plaint and specifically contended that if at all there was an agreement of sale as pleaded, such agreement became null and void after the expiry of six (6) months for want of consent of the requisite Land Control Board. Regarding the contention that the Bahati Land Disputes Tribunal had made an award in favour of the plaintiff respecting the suit property, the defendants contended that the Tribunal lacked the jurisdiction to deal with the matter. Rendering its decision a nullity and of no legal effect.

3. The suit was part heard before Munyao, J before whom the plaintiff testified as the sole witness in support of the plaintiff's case. The 1<sup>st</sup> defendant testified before me on behalf of the defence and called no other witness.

4. The plaintiff's case was simply that he owned land parcel **Bahati Block1/231** owned by the 1<sup>st</sup> defendant's father. The plaintiff stated that he knew the 1<sup>st</sup> defendant in 1984 when the Ngwataniro Mutukanio Land Company was distributing land to its members. He testified that on 25<sup>th</sup> September 1992 the 1<sup>st</sup> defendant sold him one acre of his father's land. The plaintiff stated the 1<sup>st</sup> defendant's father had died 2 or 3 years before he entered into the agreement of sale with the 1<sup>st</sup> defendant. The plaintiff stated he bought the land for Kshs70,000/= and that the 1<sup>st</sup> defendant was to process title for the one acre, that he had purchased. The plaintiff further stated the 1<sup>st</sup> defendant did not file succession cause which would facilitate the transfer process.

5. The plaintiff further stated that on 30<sup>th</sup> September 2003 he and the 1<sup>st</sup> defendant entered into another agreement where he agreed to pay a further Kshs25,000/= towards the purchase as the 1<sup>st</sup> defendant said the cost of land had gone up. He stated that he paid Kshs6,000/= leaving a balance of Kshs19,000/= which was to be paid upon the transfer of the one acre to him. The plaintiff explained that the 1<sup>st</sup> defendant did not honour the arrangement but instead caused the transfer of one acre to his son, the 2<sup>nd</sup> defendant and sold the remaining

one acre to a third party.

6. The plaintiff consequently referred the dispute to the Land Disputes Tribunal who rendered an award in his favour which was adopted as judgment by the Magistrate's Court and a decree issued. The tribunal's award and the Court decree were exhibited as "PEX 3 & 4" respectively. The plaintiff testified that following the succession case respecting the 1<sup>st</sup> defendant's father's estate at Limuru Law Court the 1<sup>st</sup> defendant processed title to the property without the plaintiff's knowledge ignoring the existence of the agreement of sale of one acre that the plaintiff had purchased. The plaintiff contended that the 1<sup>st</sup> defendant acted fraudulently since he was aware that the plaintiff had purchased one acre out of the suit property.

7. In cross examination by counsel for the defendants, the plaintiff stated that the agreement had not provided any time frame for the transfer. The plaintiff further admitted the suit property was agricultural land and that they did not apply for the consent of the Land Control Board. The plaintiff stated that he had been cultivating the portion he bought since 1992. The plaintiff further stated he discovered the suit land had been subdivided and a portion sold while the other portion was registered in the 2<sup>nd</sup> defendant's name when he went to the lands office to have the award of the Tribunal executed.

8. The 1<sup>st</sup> defendant (DW1) in his evidence testified that the plaintiff owned the parcel of land that bordered his late father's land parcel **Bahati/Bahati Block 1/231**. He stated that his father, Chege Muthee died in 1986 and that succession proceedings in regard to his estate was done in 2009 vide Limuru SPM succession cause No.168 of 2004. The 1<sup>st</sup> defendant stated in his evidence that in 1992 he agreed with the plaintiff to exchange vehicle KLZ 966 Chevrolet with portion of the suit land but the plaintiff failed to avail the transfer documents for the vehicle. The 1<sup>st</sup> defendant stated that when the plaintiff failed to avail the documents for the vehicle they agreed he (the plaintiff) would lease the portion of land.

9. The 1<sup>st</sup> defendant stated the suit property belonged to his father and as he had not taken out any letters of administration for his father's estate, he then had no authority to deal with the suit property. He further stated the land was agricultural and the consent of the Land Control Board would have been required for any sale transaction. He affirmed that no application for the Land Control Board consent was made to the relevant Land Control Board. He further stated the suit land is now registered in the name of the 2<sup>nd</sup> defendant.

10. In cross examination the 1<sup>st</sup> defendant stated that the letters of administration to the estate of his late father were issued to his brother . He stated the plaintiff did not raise any objection in the succession proceedings. The 1<sup>st</sup> defendant further stated his family objected to any sale of the suit property.

11. The parties filed written submissions after the conclusion of the trial. I have reviewed the pleadings, the evidence adduced by the parties and I have carefully considered the submissions filed by the parties. The following issues arise for determination.

**(i) Whether there was a valid agreement for sale of a portion of land parcel Bahati/Bahati Block 1/231 between the plaintiff and the 1<sup>st</sup> defendant?**

**(ii) Whether the 1<sup>st</sup> defendant had capacity to enter into an agreement for sale of the suit property which was registered in his father's name property when he held no letters of administration to his late father's estate?**

**(iii) Whether the lack of Land board consent rendered the purported sale transaction null and void pursuant to section 6(3) of the Land Control Act, Cap 302 Laws of Kenya and therefore unenforceable?**

**(iv) Whether the decision of the Bahati Land Disputes Tribunal had any legal effect?**

**(v) What orders/reliefs should the court grant?**

12. The issues identified cannot easily be discussed and analysed in isolation as they are cross cutting and merge into each other. I will therefore condense the issues and discuss and analyse them together but will endeavor to illustrate how each of the issues has been resolved.

13. The plaintiff's case undoubtedly is predicated on the agreement for sale made on 25<sup>th</sup> September 1992 between the plaintiff and the 1<sup>st</sup> defendant. The content of the agreement was as follows:-

*An agreement Between Peter Kagwara and Peter Githua Chege*

*This is to certify that Peter Githui Chege has sold one Hectare of his shamba to Peter Kagwara; plot No.231 Bhti Block one, under the name of Chege Muthee at the cost of Kshs70,000/= (seventy Thousand shillings) cash money.*

*Transfer to follow as soon as possible.*

*I have received the cash in presence of the following witnesses*

*1. Geoffrey Gachii Njoroge – Signed*

*2. Stephen Kiragu – Signed*

**3. Kariuki Machari- Signed**

**4. Buyer – Signed**

**5. Seller - Signed**

14. On 30<sup>th</sup> September 2003 the parties signed a further memorandum of agreement where apparently the buyer agreed to pay a further sum of Kshs25,000/= towards the purchase price. A sum of Kshs6,000/= was paid to the seller, the 1<sup>st</sup> defendant on the day. Like the earlier agreement the memorandum of agreement acknowledged the land the subject of the sale was registered in the name of Benedit Chege Muthee who was deceased.

15. It is evident that the 1<sup>st</sup> defendant was not the registered owner of the land that he purported to enter into an agreement to sell portion of. It follows therefore he could not enter into a valid agreement that could be enforced against him in regard to the subject land. The only circumstance under which he could deal with the land, if he was not the registered owner, is if he had a lawful and valid power of attorney from the registered owner ;or if the registered owner was deceased as in the present matter, if he held grant of letters of administration to the estate of the deceased. I would on the first issue find and hold that the 1<sup>st</sup> defendant could not enter into a valid agreement for the sale of a portion of the suit property that was binding.

16. The second issue, as the first issue, relates to the capacity of the 1<sup>st</sup> defendant to enter into the agreement of sale when his father who was the registered owner was deceased. Section 82 of the Law of Succession Act Cap 160 Laws of Kenya makes it clear that, it is only the administrator of a deceased estate has power to deal with the estate of a deceased person.

Section 82 (a) (b) & (c) of the Act provide as follows:-

**82. Powers of personal representatives personal representatives shall, subject only to any limitation imposed by their grants, 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 arising out of his death for his personal representative;*

*(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:*

*Provided that—*

*(i) any 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;*

*(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;*

Section 45 (1) of the Act forbids any intermeddling with property of a deceased person and provides as follows :-

*(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.*

17. The father of the 1<sup>st</sup> defendant as is evident from the exhibited proceedings of the succession cause and more specifically from the copy of the certificate of death died on 17<sup>th</sup> July 1986. The copy of the certificate of search dated 6<sup>th</sup> May 2010 in respect of land parcel Bahati/Bahati/Block1/231 shows that Benedito Chege Muthee was as at that date the registered owner and was so registered on 4<sup>th</sup> October 1984. Consequently as at 25<sup>th</sup> September 1992 when the 1<sup>st</sup> defendant and the plaintiff purported to enter into a sale agreement, the property was in the name of the 1<sup>st</sup> defendant's father who was then deceased. The 1<sup>st</sup> defendant did not hold a grant of letters of administration which would have enabled him to deal with the property of the deceased.

18. The 1<sup>st</sup> defendant had no capacity to enter into any sale agreement affecting the property of his deceased father. The purported agreement was therefore null and void abinitio. The act by the 1<sup>st</sup> defendant constituted intermeddling with the property of a deceased person in terms of section 45(I) of the Law of Succession Act.

19. The plaintiff in his submissions has referred the Court to the court decisions in the cases of **Joseph Mathenge Kamutu -vs- Joseph Wainaina Karanja & Another (2019) eKLR; Willy Kimutai Kilibt -vs- Michael Kibet (2018) eKLR** and **David Sironga Ole Tukai – vs- Francis Arap Muge & 2 others (2014) eKLR** where the courts discussed the issues of enforceable trust and effect of lack of consent of the Land control Board. The present case would be clearly distinguishable from those cases. In the instant case the issue of capacity of the 1<sup>st</sup> defendant to enter into the contract giving rise to the cause of action is paramount. If the 1<sup>st</sup> defendant lacked capacity to enter into the agreement as I have found, the agreement he entered into was unlawful and illegal and the same could not give rise to any enforceable rights.

20. The third issue respecting the lack of consent of the land control board for the sale transaction under the provisions of the Land Control

Act would equally be dependent on the resolution of issues one and two discussed above.

21. If there was no valid agreement between the plaintiff and the 1<sup>st</sup> defendant, the issue of consent of the Land Board would be inconsequential. If the 1<sup>st</sup> defendant lacked capacity to enter the agreement, consent of the Land Board would not have validated the agreement.

22. Be it as it may be, the transaction related to agricultural land and therefore the consent of the land board was a prerequisite for the transaction to be completed. There is no dispute that no consent of the Land Control Board was applied for and none was granted. Section 6 (1) of the Land Control Act provides as follows:-

*(1) Each of the following transactions that is to say—*

*(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;*

*(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;*

*(c) deleted*

*is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.*

23. The requirement of consent of the Land Control board is mandatory and as no consent was obtained for the transaction under consideration which undoubtedly was a controlled transaction, the transaction became null and void for all purposes and was therefore unenforceable. The plaintiff in the present matter was faced with a double jeopardy in that, he firstly dealt with a party who lacked the capacity to enter into the transaction; and secondly the transaction was bound to fail for lack of the consent of the appropriate Land Control Board. The plaintiff has argued that he acquired an interest to a portion of the suit property that he had purchased from the 1<sup>st</sup> defendant and therefore he should be adjudged as the owner of the property on that basis. The plaintiff was aware that the property did not belong to the 1<sup>st</sup> defendant but to the 1<sup>st</sup> defendant's deceased father. The law is clear that only the administrator of deceased person's estate has authority to deal with the deceased property. The Court's duty is to apply the law and will not waiver in the application of the law even if in doing so an injustice could be visited on otherwise innocent party. In the present matter the plaintiff may genuinely have believed he had entered into a valid sale transaction with the 1<sup>st</sup> defendant but as I have demonstrated the transaction was a nullity from inception for the reasons I have discussed herein above and there was no way of salvaging the same.

24. As to whether the decision of the Bahati Land Disputes Tribunal would have any bearing or legal effect in these proceedings I would only reiterate what Ouko, J (as he then was) stated in his ruling in Nakuru HCCC No. 196 of 2012 where the 1<sup>st</sup> defendant in that suit had challenged the decision of the Tribunal. The judge in the ruling where he struck out the suit on the basis that it was an abuse of the Court process nonetheless observed as follows:-

***“ The dispute between the parties concerned an alleged breach of contract of sale of property and not any matters enumerated under section 3 of the repealed Act. The Tribunal clearly exceeded its jurisdiction in making a finding that was based on the contract; the respondent was entitled to one acre of the suit property. Having made that observation it is equally clear that the applicant, in bringing this action is sidestepping the procedure for challenging that decision”***

25. I agree with the learned judge that the Tribunal lacked jurisdiction to deal with the matter. In this suit the decision of the Tribunal would have no bearing or legal effect as the decision was clearly a nullity.

26. In the premises and on the basis of my evaluation of the evidence and the applicable law, it is my determination and holding that the plaintiff has not proved his case on a balance of probabilities and I accordingly dismiss the suit.

27. Having regard to the attendant circumstances and notwithstanding the norm that costs follow the event, I am persuaded that this would be a proper case to order that each party bears their own costs of the suit. It is so ordered.

**Judgment dated signed and delivered at Nakuru this 20<sup>th</sup> day of February 2020.**

**J M MUTUNGI**

**JUDGE**