



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELCA CASE NO. 39 OF 2019**

**WILSON MAKHISA LUSIMBO.....APPELLANT**

**VERSUS**

**EMMY N. SIGANGA..... RESPONDENT**

**JUDGEMENT**

The appellant being aggrieved by the judgment of the learned magistrate in Kakamega CMCC No. 541 of 2010 hereby appeals against the whole judgment on the following principal grounds:-

1. The learned trial magistrate erred in law and fact in entering judgment for the respondent as against the appellant when the respondent lacked locus standi to institute the suit.
2. The learned trial magistrate erred in law and fact in granting judgment in favour of the respondent as against the appellant for orders by relying on unpleaded nor proved facts.
3. The learned trial magistrate erred in law and fact by admitting a power of attorney when the donor had passed on.
4. The learned trial magistrate erred in law and fact in interpretation of the land sale agreement made on 13/9/2008.
5. The learned trial magistrate erred in law and fact by disregarding the appellant's evidence on record.

The appellant prays that the judgment and or orders of the learned trial magistrate made on 11<sup>th</sup> February 2011 be set aside and Kakamega CMCC No. 541 of 2010 be dismissed with costs. The appellant also prays for costs of the appeal. The appellant submitted that the respondent testified as PW1 and established that she had a power of attorney to transact on behalf of Nathaniel Siganga. (Plaintiff exhibit 2). It is established by plaintiff exhibit 1 (Letters of administration) that, on the 17<sup>th</sup> March, 2009 Nathaniel Siganga passed on. The power of attorney was executed on the 4<sup>th</sup> February, 2008. This suit was filed on the 23<sup>rd</sup> November, 2010, after the deceased had passed on. This means that the donor was deceased and therefore the power of attorney was defunct and the donee ought not to rely upon it in instituting this suit. Further, a power of attorney ought to be registered prior to the donee's effecting of its terms. From the face of it, the power of attorney was not registered and the Honourable magistrate erred in law and fact by determining that the plaintiff was the only authorized person to transact on behalf of Nathaniel Siganga as at the time of the sale. In the case of Francis Mwangi Mugo vs. David Kamau Gachango in the Environment and Land Court of Kenya at Nakuru ELC No. 320 of 2016 (2017) eKLR, the respondent herein likewise did not obtain a limited grant for the purposes of filing the suit. They relied on the case of Hawo Shanko vs. Mohamed Uta Shanko in the High Court of Kenya at Marsabit Civil suit No. 1 of 2018 (2018) eKLR and the case of Anastacia Wangui Muriithi vs. Jean Wamarwanyamu in The Environment and Land Court at Kerugoya ELC Case No. 144 of 2015 (2019) eKLR Cheromo J

They also relied on the determination in Hawo Shanko vs. Mohamed Uta Shanko (supra) and also state that in the pendency of the succession cause, the respondent shall still have the liberty of including the property or the interest of the appellant as a liability to the estate. They relied on the case of Rop Albert (suing as the representative of the estate of Francis Kiprop Sanga (deceased) & Another vs. Gladys Koskey & 3 others in the Environment and Land Court at Kericho ELC Case No. 35 of 2015 (2018) eKLR Onyango J.

The respondent submitted that she had a power of attorney to transact on behalf of Nathaniel Siganga. (Plaintiff exhibit 2). The plaintiff also had the letters of administration exhibit 1 (Letters of administration) and that, on the 17<sup>th</sup> March 2009 Nathaniel Siganga passed on. The respondent further submitted that the appellant produced a sale agreement between Bourne Wilson Lussimbo and one Christopher Nathaniel Waudu Siganga. However, the said Christopher Nathaniel Waudu Siganga never signed the said agreement. The same was signed on his behalf by his son Dave Lungaho Siganga. He was never called to testify neither was the deceased's wife Naomi Siganga.

This court has considered the appeal and the submissions therein. On ground one of the appeal, that is, the learned trial magistrate erred in law and fact in entering judgment for the respondent as against the appellant when the respondent lacked locus standi to institute the suit, from the evidence on record I find that, the sale agreement is dated 13<sup>th</sup> September 2008 (DEx1) the appellant took possession of the plot; the deceased died on the 17<sup>th</sup> March 2009 thereafter succession proceedings were instituted by the respondent prior to the case being lodged (Succession Cause No. 654 of 2009 and the plaint was filed on the 23<sup>rd</sup> November, 2010). I find that the respondent did have the locus standi to file this suit as per the letters of administration produced as PEx1.

On ground two to five which are on matters of evidence, the appellant testified that he purchased the plot and took possession thereto. The appellant in his testimony confirms that he bought the shop in the presence of the deceased and his wife. This in their evidence showed how the appellant came into occupation. The respondent further submitted that the appellant produced a sale agreement between Bourne Wilson Lussimbo and one Christopher Nathaniel Waudu Siganga. However, the said Christopher Nathaniel Waudu Siganga never signed the said agreement. The same was signed on his behalf by his son Dave Lungaho Siganga. He was never called to testified neither was the deceased's wife Naomi Siganga. This court is not clear as to why the seller one Christopher Nathaniel Waudu Siganga never executed the sale agreement. In these circumstances is this agreement valid and sustainable in law? Indeed I concur with the honourable trial magistrate who held that:

*“On the death of Nathaniel Siganga the suit plot formed part of the estate and the same is to be administered in accordance with the provisions of the Law of Succession Act and the probate and administration rules. The plaintiff told the court that she had applied for and obtained letters of administration to the estate of Nathaniel Siganga in Kakamega High Succession Cause No. 654 of 2009 and a copy of the grant was produced as exhibit 1 by the plaintiff if the defendant has a valid claim over the suit plot then he should make his claim for the same from the estate of the late Nathaniel Siganga in accordance to the law of succession Act and the probate and administration rules. The defendant having failed to make his claim in accordance with the law of succession Act and the probate and administration rules, I find that his occupation of plot No. 4 (suit plot) is unlawful as it amounts to intermeddling with the estate of deceased person and the defendant ought to be evicted to allow the administrator of the estate of Nathaniel Siganga gather and administer the estate according to the law.”*

In *Mwanasokoni v Kenya Bus Service* (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the judgement as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

It is so ordered.

**DELIVERED, DATED AND SIGNED THIS 30<sup>TH</sup> DAY OF APRIL 2020**

**N.A. MATHEKA**

**JUDGE**