



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC P&A. NO. 136 OF 2017

ESTATE OF MUTINDA KAMWATHI NGOYO (DECEASED)

BENSON MWANZUI KAMWANTHI PETITIONER

-VERSUS-

GEOFFREY MUTIE MUTINDA RESPONDENT

RULING

INTRODUCTION

1. The Petitioner lodged Chamber Summons dated 14/04/2014 seeking orders for grant of Letters of Administration intestate made on 12/07/2012 to be confirmed in terms of an annexed schedule.
2. The Petitioner filed a further affidavit sworn on 20/03/2017 and 03/08/2017.
3. The third Respondent filed a Replying Affidavit sworn on 17/10/2017 denying the existence of an agreement of sale of Nzai/Kawala/435 where it is alleged that the deceased gave to his daughter Esther Ndulu Nzioki.
4. On 17/05/2017, the parties agreed on the schedule of distribution save on parcel Nzai/Kawala/435.
5. The Respondent/3rd Administrator/Objector disputed clause of the schedule where it states that above parcel 435 (1.7 HA) devolves to Esther Ndulu Nzioki.
6. All other properties sharing was agreed.
7. Benson Mwanzui Kamwathi affidavit sworn on 03/08/2017 deponed that Esther Ndulu Nzioki had bought 435 from her late father lifetime. Same was replied to by affidavit of 17/10/2017.
8. Parties exchanged submissions.
9. The Petitioner submitted that through his affidavits states that the land parcel in question was sold to one ESTHER NDULU NZIOKI by the deceased during his lifetime. He annexed a copy of the sale agreement to attest his averment.
10. However, the sale agreement is disputed by the administrators. The 3rd Administrator through his replying affidavit stated that the sale agreement does not refer to the specific parcel of land and is it is void according to section 6 of the Land Control Act.
11. They submit on the three issues raised by the protester and others as hereunder. The Petitioner annexed a sale agreement dated 28/12/82.
12. The agreement is for sale of land by Abraham Kamwathi to Esther Ndulu for the land at Kwa Ngwele. The purchase price is Kshs.6,000/=. The same was paid on two installments. The same is dated and signed by the parties and witnesses.
13. The law of contract requires that a sale agreement for sale of land be evidenced in writing.
14. ***Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest of land can be entertained unless the contract is in writing, executed by the parties and attested.***

15. They rely on Civil Appeal 22 of 2013 Peter Mbiri Michuki –Vs- Samuel Mugo Michuki (2014) eKLR.

16. Section 6 of the Land Control act states as follows *inter alia*:-

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 for the time being apply.

c) The issue, sale, mortgage or any other disposal of or dealing with any share in a private company or cooperative society which for the time being owns agricultural land situated within a land control area,

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.

17. The land is an agricultural land. The same was sold on mutual trust between the father and the daughter. The expiry of the six months period provided by the Land control act may be extended under provisions of Section 8(1) of the Land control act which provides as follows:-

8. (1) an application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

18. It is important to note that the land sold is Makueni/Kawala/435. The agreement refers the land as the one at Kwa Ngwele. There is no other land at Kwa Ngwele belonging to the deceased apart from the land in question.

19. It is thus submitted that there was a valid sale agreement for the sale of land parcel no. NZAUI/KAWALA/435 between the deceased and Esther Ndulu Nzioki. The same should devolve to her to the exclusion of any other beneficiary.

OBJECTOR'S SUBMISSIONS

Legal Issues and Analysis

20. The objector submits that, the agreement states an unidentified person is selling his parcel of land located at "KWA NGWELE" to one Ndulu Nzioki at a price of Kshs.6,000/=. The seller acknowledges receiving Kshs.3,500/= and states that the balance is Kshs.2,500/=.

21. The clause does not state whether it is the whole parcel being sold or it is a portion of the same. The next clause thereafter is dated 16th December 1983 in which an unidentified person acknowledges receipt of Kshs.2, 500/= from Ndulu Nzioki.

22. Then there is a list of four (4) witnesses who were present and who signed the 'agreement.' These are Abraham Kamwathi who is identified as the father to Ndulu, sera Kamwathi (identified as mother to Ndulu Nzioki). Ndulu Nzioki (identified as buyer) and Benson Mwanzui (identified as son).

23. The land subject matter of the purported sale agreement is not identified. The sale remained a secret until several years before the father died, further, the issue of Land control board Consent is raised since the land was agricultural and no consent was given authorizing the sale.

24. From the foregoing, it is clear that what is being called a sale is a sham which cannot stand any legal test for a sale involving land. The sale agreement does not identify the seller or even the portion of land being sold. It does not even state whether it is the whole parcel of land or just a portion of the same.

25. Further, the two clauses in the agreement were made a year or so apart. The first clause is for 28th December 1982 and the second clause is for 16th December 1983. There are no signatures whatsoever to the first clause which can be said to be the sale agreement. There is nothing to show that the seller (though not identified was bound by any terms of the 'agreement'.

26. It is settled law that no action may be brought upon any contract for the sale or disposition of land, unless that agreement upon which the action is brought, or a memorandum or note of it is in writing and signed by the party to be charged or by some other person authorized by him or her.

27. This requirement is found in section 3(3) of the Law of Contract Act. There is no special form in which the memorandum or contract in writing needs to be in, and indeed it can be formed by more than one document. It is provided as follows in this regard in Halsbury's Law of England volume 42, 4th Edition at paragraph 33 as follows;

"There are three situations in which a memorandum may be constituted by two or more documents. First, if all documents are

signed by or on behalf of the party to be charged, and when laid side they can be seen to refer to the same transactions, then no further, evidence is needed to connect the documents and they may be read together”.

28. They rely on **Karanja Mbugua & another –Vs- Marybin Holding Co. Ltd (2014) eKLR** and submit that due to the lack of the seller or even his signature, the agreement is a sham and lacks legal force.

29. Further, the purported sale cannot be upheld for lack of Land Control board consent as provided by Section 6 of the Land Control act. The effect of lack of such consent in land transactions has been adjudicated upon by several courts and is now a settled matter.

30. The provisions of Section 6 of the Land Control act are clear the that consent of the Board must be obtained within six (6) months of the execution of the sale agreement for controlled transactions, like the present one.

31. The Act further states that if the consent is not obtained within the said period, then a controlled transaction becomes void for all purposes (See **Simiyu –Vs- Watambala (1985) KLR 852**). In **Kariuki –Vs- Kariuki (1983) KLR225 at 227, Law J.A** held as follows:-

“When a transaction is clearly stated by the express terms of an act of parliament to be void for all purposes for want of the necessary consent a party to the transaction which has become void cannot be guilty of fraud if he relies on the act and contends that the transaction is void. That is what the Act provides, and the statute must be enforced if its terms are invoked.”

32. The circumstances are very clear that no consent was obtained to authorize the transaction. The upshot of this is that the agreement is void and unenforceable. They submit that there was no sale of the aforesaid land and should therefore be subjected to subdivision for the benefit of the two families just like all other properties forming part of the deceased’s estate.

ISSUES, ANALYSIS AND THE DETERMINATION

33. After going through the pleadings and the parties’ submissions, I find the only issue is;

- Whether the agreement subject herein is legally valid and binding?

34. It is settled law that no action may be brought upon any contract for the sale or disposition of land, unless that agreement upon which the action is brought, or a memorandum or note of it is in writing and signed by the party to be charges or by some other person authorized by him or her.

35. This requirement is found in section 3(3) of the Law of Contract Act. There is no special form in which the memorandum or contract in writing needs to be in, and indeed it can be formed by more than one document. See **Halsbury’s Law of England volume 42, 4th Edition at paragraph 33 supra**, which states;

***“There are three situations in which a memorandum may be constituted by two or more document. First, if all documents are signed by or on behalf of the party to be charged, and when laid side they can be seen to refer to the same transactions, then no further, evidence is needed to connect the documents and they may be read together*”.**

36. Further, the purported sale cannot be upheld for lack of Land Control board consent as provided by Section 6 of the Land Control act. The effect of lack of such consent in land transactions has been adjudicated upon by several courts and is now a settled matter.

37. The provisions of **Section 6 of the Land Control act** are clear the that consent of the Board must be obtained within six (6) months of the execution of the sale agreement for controlled transactions, like the present one.

38. The Act further states that if the consent is not obtained within the said period, then a controlled transaction becomes void for all purposes. (See **Simiyu –Vs- Watambala (1985) KLR 852**). In **Kariuki –Vs- Kariuki (1983) KLR225 at 227, Law J.A** held as follows:-

“When a transaction is clearly stated by the express terms of an act of parliament to be void for all purposes for want of the necessary consent a party to the transaction which has become void cannot be guilty of fraud if he relies on the act and contends that the transaction is void. That is what the Act provides, and the statute must be enforced if its terms are invoked.”

39. The agreement subject herein does not meet the legal threshold stipulated in above legal instruments and treatise.

40. The sale agreement does not identify the seller or even the portion of land being sole. It does not even state whether it is the whole parcel of land or just a portion of the same.

41. The same never got a blessing of a land control board via consent to validate sale.

42. The court holds that the sale agreement between Esther Ndulu Nzioki and the deceased is invalid and void *ab -initia*. Thus parcel No 435 shall be shared just like other deceased properties.

DATED, DELIVERED, SIGNED THIS 4TH DAY OF OCTOBER, 2018, IN OPEN COURT.

.....

C. KARIUKI

JUDGE