



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 307 OF 2017

WALLACE KAMAU MBUGUA.....PLAINTIFF

VERSUS

AZIZA FATUMA ATHUMANI.....1ST DEFENDANT

AMINA MUTHONI ATHUMANI.....2ND DEFENDANT

AZIZI MACHARIA ATHUMANI.....3RD DEFENDANT

SALIM NYAGA ATHUMANI.....4TH DEFENDANT

HUSSEIN ZAIDI ATHUMANI.....5TH DEFENDANT

FAUZIA KAREMI ATHUMANI.....6TH DEFENDANT

JUDGMENT

By a Plaint dated **15th February 2017**, the Plaintiff herein filed this suit against the Defendants seeking for orders that;

a) An order that the Plaintiff is the owner of three (3) acres in L.R THIKA/MUNYU/361 and the estate of the late Sophia Athumani transfers the same to him.

b) Costs of this suit and interest.

c) Any other or further relief that this Honourable Court deems fit to grant.

In his statement of claim, the Plaintiff averred that on **10th March 2000**, he entered into an agreement for sale with the Defendants' mother for purchase of the suit property at a consideration of **Kshs. 270,000/=**. He averred that he paid **Kshs. 135,000/=** upon execution of the said agreement and took vacant possession immediately and started cultivating it and that he has extensively developed the same. He further averred that the balance of **Kshs.135,000/=** was to be paid upon transfer of the **three acres** into his name. That he paid the Defendants the balance before the land was transferred after the demise of their mother.

It was his contention that prior to the filing of the Succession Cause, there was an agreement between him and the Defendants that the suit property would be distribute with him getting **three acres**, which he purchased from their mother and the remaining portion of land would be shared equally amongst the Defendants. However, the Defendants secretly filed Succession Cause **No. 1121 of 2012**, with the sole intention of unlawfully disinheriting him off the share he purchased from their mother. He further averred that the Defendants have threatened to sell the three acres he purchased to a third party even though he has extensively developed the same and constructed a permanent house. He urged the Court to allow his claim.

The suit is contested and the 1st Defendant filed a statement of Defence dated **28th March 2017**, and denied all the allegations made in the Plaint. She averred that the Plaintiff only came into possession of the suit property in **2016**, when he fenced off his alleged portion. It was her contention that that the Plaintiff had agreed with then mother that he would pay the deposit of **Kshs.135,000/=** and thereafter finance the subdivision and transfer of his portion of land to himself on account of the discounted purchase price of the property. She further averred that the Plaintiff was aware that the Succession Cause was being filed and that he had the obligation of financing the transfer of the 3 acres of land to himself, which he failed to do and which meant that the Plaintiff had frustrated the Contract for sale which was rescinded with due notice. She further averred that this Honourable Court lacks jurisdiction to hear the instant suit as the matter is a claim against the Estate of **Sophia Athumani (deceased)**, which claim falls under the purview of **Family Division** of the High Court.

The 2nd Defendant filed a Statement of Admission dated **21st July 2017**, and admitted all the allegations made by the Plaintiff in his Plaintiff. She averred that her mother had sold **three acres** of the suit property, but met her demise before effecting the transfer. She further averred that they jointly acknowledged receipt of **Kshs. 135,000/=** being the balance of the purchase price from the plaintiff after the demise of their mother. She averred that she will move the Court to issue an order directing the **Land Registrar**, to effect transfer of the suit property to the Plaintiff. She urged the Court to allow the Plaintiff's claim.

The 3rd, 4th, 5th and 6th Defendants filed their statements of Admissions dated **21st July 2017**, and reiterated the contents of the 2nd Defendant's statement of Admission.

The matter proceeded by way of Viva voce evidence wherein the Plaintiff testified for himself and closed his case while the Defendants gave evidence for themselves and called no witnesses.

PLAINTIFF'S CASE

PW1 Wallace Kamau Mbugua testified that Sophia and her mother **Fatuma Athumani** approached him because Sophia had a land to sell, which is the suit property herein. He further testified that 3 acres was to be carved out of the suit property and that the agreement was reduced into writing in the year 2000. He adopted his witness statement dated **13th March 2017**, as his evidence and further produced the documents in support of his claim. These documents were; the sale agreement, copy of the title deed, and the Succession Cause in relation to the Estate as exhibits.

It was his testimony that before **Sophia's** death, she had not transferred the suit property to him. Further that he had taken possession and he was to pay the balance of **Kshs. 135,000/=** upon the land being transferred to him. He further testified that upon the demise of **Sophia**, he paid the full amount to **Fatuma** as she was the owner of the suit land, but she had transferred it to Sophia and that the 1st to 6th Defendants had knowledge of the payments. He further testified that **Aziza**, the 1st Defendant, was present during the transaction and that they all agreed that the money be paid to Fatuma. That they dealt with the Succession Cause immediately as they went to the Chief and two Administrators were proposed being **Aziza** 1st Defendant and Hussein 5th Defendant. That the said Aziza filed the Succession Cause and disregarded the name of the 5th Defendant and as an Administrator, the 1st Defendant refused to grant the land to him. It was his testimony that the Land was **8 acres**, but his claim was for only 3 acres. It was his further testimony that the 2nd to 6th Defendants did not have any problem granting him the suit property and that he was ready to pay for the subdivision fees for the suit property.

He acknowledged that the Defendants were not paid any monies and that he paid the balance of the purchase price after the death of Sophia on **26th October 2005**. It was his testimony that Fatuma passed on, on **24th August 2012**, and that she was the original owner of the suit property. Further, that he was in possession of the suit property and that subdivision had not been done. He denied that he was to subdivide the land to himself. That he took steps towards subdivision of the suit property and that the Succession Cause was initiated by the Chief and he did not object to the Succession Cause as he did not foresee any problems. That **Aziza** showed him the confirmation of Grant much later and that is when he learnt that his name and that of the 5th Defendant had been omitted. That the two of them were not included in the Succession Cause.

He acknowledged that he did not seek for the revocation of the grant, but that he filed the instant suit. He further acknowledged that the 2nd and 6th Defendants were present during the **Confirmation** of the **grant**. That he is still in the suit property and the subdivision was to be done by the vendor. He further testified that between **2005** and **2012**, he took possession and built a home.

DEFENCE CASE

DW1 Aziza Fatuma Athumani, the 1st Defendant herein adopted her witness statement dated **15th March 2018**. It was her testimony that the 2nd to 6th Defendants were present when they filed the Succession Cause and signed all the documents. It was her evidence that the Plaintiff did not take possession immediately. She further testified that the Plaintiff had an Advocate but that her mother did not have one and that the title was taken by the Plaintiff's Advocate. That the Plaintiff took possession when she obtained letters of Administration and she did not know if the Plaintiff paid the balance of the purchase price. However, she was aware that the plaintiff bought the suit property.

Further that the sale agreement was later frustrated and the Defendants rescinded it. She stated that the sale agreement was never cancelled, as the vendor died and the Plaintiff had never given any money for subdivision. It was her evidence that the Plaintiff did not act on time and therefore had no right to get the **three acres** as the person who sold to him died. Further that she did not know if her grandmother was paid the balance of the purchase price.

DW2 Amina Muthoni Athumani, the 2nd Defendant herein testified that Sophia was her mother and that Fatuma was her grandmother. She further testified that their grandmother told them that the Plaintiff should get **3 acres** and they were to remain with the rest. Further that she was present during the Succession Cause and the Kadhi Court told the 1st Defendant to give the Plaintiff his share.

DW3 Aziz Macharia Athumani testified that their mother sold the land to the Plaintiff and that he should be given his part. He further testified that when their mother died, the balance of the purchase price **Kshs.135,000/=** was given to them by the Plaintiff and the 1st Defendant was present, However, that she refused to take the money

DW3 Salim Nyaga Athumani testified that the Plaintiff bought 3 acres from their mother **Sophia** and paid part of the purchase price and that when their mother died, their grandmother was given some money and the balance was given to them. Further that the 1st Defendant refused to take the money and refused to give the plaintiff the land. He stated that he was in agreement that the Plaintiff should be given the 3 acres.

He further testified that their grandmother was given the balance of the purchase price the Defendants were later given **Kshs. 65,000/=** and the person who facilitated the succession cause was paid **Kshs. 10,000/=**. He acknowledged that he was present during the Succession Cause and he did not object.

DW5 Hussein Saidi Athumani testified that the Plaintiff is entitled to **3 acres** from the suit land as he bought it from their mother. He further testified that the matter went to the Kadhi's Court, and the 1st Defendant was directed to give the Plaintiff his 3 acres. Further that he found when the Kadhi has already delivered his verdict and that he was given **Kshs. 20,000/=** of the purchase price.

DW6 Fauzia Karimi Athumani the 6th defendant herein testified that their mother sold 3 acres to the Plaintiff and that their grandmother was also present and that she told them that the Plaintiff should get his share. She further testified that at the Kadhis Court, the Kadhi ruled that **Aziza** 1st Defendant should give the Plaintiff **3 acres**. That she was given **kshs. 20,000/=** from the balance of the purchase price. It was her testimony that their grandmother called them and told them that the Plaintiff was entitled to 3 acres and that the 1st Defendant was present when they were given the balance of the purchase price.

After close of viva voce evidence, the parties filed written submissions which the Court has now carefully read and considered. The Court has also considered the pleadings by the parties, the evidence adduced and the testimonies of the witnesses and finds that the issues for determinations are;

1. Whether this Court has Jurisdiction to determine the matter

2. Whether the Plaintiff is entitled to the orders sought.

3. Who should bear the costs of the suit.

1. Whether this Court has Jurisdiction to determine the matter

The 1st Defendant has alleged that this court does not have jurisdiction to deal with the matter as certificate for confirmation of grant had already been issued and that the Plaintiff had locus to bring his grievances before the Probate Court on whether he was entitled to the **3 acres**, but did not do so. Further that as the matter is a claim against the Estate of **Sophia Athumani (deceased)**, which claim falls under the purview of the Succession Cause.

It is not in doubt that the issue in dispute is whether or not the Plaintiff is entitled to 3 acres of the suit property having entered into contract of sale. It is not in doubt that the ownership of the suit property is in dispute. Jurisdiction is everything and without it the Court has no option but to down its tools. See the case of **Owners of Motor Vessel "Lillian" ...Vs...Caltex Oil Kenya Ltd 1989 KLR**.

In re Estate of Dhirajlal Ratilal Soni (Deceased) [2018] eKLR the Court held that ;

"The question of ownership of or title to property as between two contending persons or entities is not for resolution by the high court. The Constitution 2010 has taken away that jurisdiction and vested it in the Environment and Land Court by dint of Articles 162 (2) and 165(5) of the Constitution.

"The primary mandate of the probate court is distribution of the estate of a dead person where a dispute arises over a property purported to belong to the estate, then the probate court ought to direct the parties to have the issue of ownership resolved at the ELC".

Further In the case of **Kimeu Mwanthi vs Rukaria M'twerandu M'iruingi (2013) eKLR** the Court of Appeal held:

"the litigation in this matter has seen parties litigate for the same subject matter both under Civil Procedure and the Law of Succession. We must state this is a procedure that causes confusion and there is a clear justification and sound reasoning why legislature separated both regimes. This case is a clear demonstration that when both regimes of law are applied interchangeably, a simple matter for example succession in a deceased's estate becomes protracted and parties keep hovering from civil court to succession case. The Law of Succession Act was envisaged as a complete regime of law if there is any claim of civil procedure against a deceased's estate, a claimant is supposed to file a civil suit against the administrators of the estate. Involvement of claimants of civil obligations or others in matters of administration of a deceased's estate causes delays and difficulties in resolving them within the regime of the law of succession".

From the above decided cases, it is not in doubt that where the issue in dispute relates to ownership over the ownership of property, then the **Environment & Land Court** has Jurisdiction to deal with the matter. Therefore, the Court finds that the instant suit is distinguishable from the case of **Raphael Kariuki Gichuki...Vs... Peter Muya Gichuki (2019) eKLR**, as the Plaintiff in the case of **Raphael**, was claiming that the transfer of the suit property was fraudulent, while the same had been sanctioned and done through a court process .

Consequently, the court finds and holds that given that the dispute in the instant mater relates to ownership of the suit property, it is well within the Jurisdiction of this Court as an Environment & Land Court.

2. Whether the Plaintiff is entitled to the orders sought

The Plaintiff has sought for an Order that he be declared as the owner of three (3) acres in **L.R THIKA/MUNYU/361** and that the estate of

the late **Sophia Athumani**, transfers the same to him. It is the Plaintiff's contention that he bought the suit land from the late **Sophia Athumani** and to this effect, he produced a Sale Agreement dated **10th March 2000**. The Court has seen the Sale Agreement and the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of Contract Act which states as follows:-

3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of **Nelson Kivuvani... Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

All the above ingredients are met in the instant sale agreement entered between the late **Sophia Athumani (deceased)** and the Plaintiff and therefore the sale agreement between the two is and was valid.

Therefore, it follows that the Administrators of the Estate of **Sophia Athumani** are bound by the contracts entered into by the deceased when she was alive. See the case of **Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR** where the Court held that;

“But before I close, the facts of this case bring me to the point where I feel I should state, albeit in passing, that, where the deceased had entered into some binding transactions, or where liability had attached against him or a right had accrued upon him, the death of the deceased does not discharge him from the obligations or liability, or obliterate his right under those transactions. The personal representative comes in to fulfil those obligation or liabilities, or to realize any right or benefit thereof for the estate of the deceased.”

Having analyzed the available evidence, the court finds and holds that the Administrators of the Estate of the late **Sophia Athumani** are bound by the Contract entered into between her and the Plaintiff. The Plaintiff has averred that he paid the whole of the purchase price and thus fulfilled his obligations as envisaged the sale agreement. Having perused the sale agreement, the Court notes that the Plaintiff was to pay **Kshs. 135,000/=** and that the balance of **Kshs. 135,000/-** was to be paid when the suit property was transferred to the Plaintiff. Though the 1st defendant has alleged that the plaintiff never paid the balance of the purchase price, the Plaintiff's contention that he paid the balance of the purchase price was corroborated by the evidence of the 2nd to 6th Defendants who also filed statements of admissions. The 1st Defendant acknowledged that before she was an Administrator, her grandmother stood in for the Estate of her mother. The evidence of DW2 to DW3 confirm that the balance of the purchase price was paid and the same has been confirmed by the minutes of the family meeting which required the Plaintiff to be given the suit land. Therefore, this Court is satisfied that the Plaintiff duly paid the whole of the purchase price.

Further it has been the 1st Defendant's contention that the Plaintiff frustrated the contract and consequently the said contract was rescinded. However, no such rescission of the Contract has been produced as evidence. Further, the Court having gone through the contract, has not seen any requirement that the Plaintiff was to pay for the transfer of the suit property. Parties are bound by the terms of their contract and therefore a court of law cannot rewrite a contract on behalf of the parties. See the case of **National Bank of Kenya Ltd ...Vs...Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503**, where the Court held that:-

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.

Having found that the parties herein are bound by the sale agreement that they entered, then the 1st Defendant could not introduce other conditions that were not expressly or impliedly provided for in the said Sale Agreement. See the case of **Kenya Breweries Ltd...Vs...Natex Distributors Ltd, Nairobi HCCC No.704 of 2000**, where the Court held that:-

“Parties to a written contract are bound by its terms and the invocation of nonexistent clause to terminate a contract is not legitimate even though there is a termination clause. However much a party resents the behavior of another party to the contract, it cannot terminate it without following the laid down procedure”.

As already held above by the Court, the Plaintiff duly fulfilled his obligations as per the agreement of sale and therefore he is the legal owner

of the 3 acres of the suit property. The Court must clearly state that it matters not whether the plaintiff took possession of the suit property immediately or later as the instant suit is not a claim of Adverse Possession. Therefore, the Court holds and finds that the Plaintiff is the legal owner of the suit property and the Estate of **Sophia Athumani** ought to transfer the said land to him.

3. **Who should bear the Costs of the suit?**

It is trite that cost always follow the events. Section 27 of the Civil Procedure Act gives the Court the discretion to grant costs, but the successful party is always entitled to the cost of the suit. In this instant suit, the Plaintiff is the successful party and he is therefore entitled to the costs of the suit. However, it is not in doubt that the 2nd to 6th Defendants filed statements of admission and from the evidence adduced, they have no problem even prior to filing of this suit to the Plaintiff getting ownership of the suit property. The 1s Defendant therefore being the person responsible for the filing of the instant suit should bear the costs of the suit.

Having now carefully considered the available evidence, the relevant provisions of law, the written submissions and cited authorities, the Court finds that the Plaintiff has proved his case on the required standard of balance of probability. Consequently, the Court enters Judgment for the Plaintiff against the Defendants jointly and severally in terms of prayers No.1 of the Plaintiff dated **15th February 2017**. The 1st Defendant will bear the costs of the suit.

It is so ordered.

Dated, signed and Delivered at Thika this 9th day of July 2020.

L. GACHERU

JUDGE

9/7/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With consent and virtual appearance of:-

Mr. Maina holding brief for Mr. Ndungu Mwaura for the Plaintiff

Mr. Mwangi holding brief for Mrs Mwandumbo for the 1st Defendant

No consent for the 2nd Defendant

No consent for the 3rd Defendant

No consent for the 4th Defendant

No consent for the 5th Defendant

No consent for the 6th Defendant

L. GACHERU

JUDGE

9/7/2020