



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 112 OF 2019**

**JUSTER GATWIRI MURIITHI.....1<sup>ST</sup> APPELLANT**

**JANE TIRINDI M' ITIRI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**EMMANUEL MUCHOMBA KINOTI.....RESPONDENT**

***(Being an appeal from the Judgment and Decree of the Honourable***

***J. Irura (PM) in Nkubu – PM ELC No. 9 of 2018 dated 11<sup>th</sup> September 2019)***

**JUDGMENT**

1. The respondent initiated the suit in the trial court against the appellants vide a plaint dated 23/1/2018 seeking an Order of specific performance directing the appellants to transfer one (1) acre from resultant subdivisions of parcel no. NKUENE/KITHUNGURI/663 and damages for breach of the Sale Agreement.

2. The appellants filed their statement of defence claiming that the respondent did not conduct due diligence and that the 2<sup>nd</sup> appellant was not privy to the contract.

3. The decision of the trial court in favour of the respondent reads as follows;

***(i) “That the plaintiff is entitled to an order for specific performance.***

***(ii) The defendants shall obtain the relevant consents in order to transfer the said one acre of land to the plaintiff and execute all the relevant transfer documents and hand them over to the plaintiff for purposes of registration within 30 days failing which the Executive Officer of this honourable court shall execute all the relevant documents to effect transfer of the said one acre of land from the resultant parcels of suit land to the plaintiff.***

***(iii) The 1st defendant shall receive the balance of the purchase price within 30 days which shall be deposited in 1<sup>st</sup> defendant’s bank account. Should the 1<sup>st</sup> defendant fail to avail her account details, the said amount shall be deposited in court for her collection.***

***(iv) The plaintiff is awarded damages of breach of contract as clearly stated in clause 7 of the said sale agreement dated 13<sup>th</sup> April 2011.***

***(v) The costs of the suit shall be borne by the defendants.***

***(vi) The plaintiff is further awarded interests of 4 and 5 above”.***

4. Aggrieved by the aforesaid decision the appellants filed their memorandum of appeal on 20. 9. 2019 raising ten grounds of appeal which can be summarized as follows;

**(a) The Learned Trial Magistrate erred in law and fact by failing to find that the parcel of land L.R. Nkuene/Kithunguri/663 and the resultant subdivisions were not registered in the names of the 1<sup>st</sup> appellant hence the 1<sup>st</sup> appellant had no locus standi to enter into the Agreement with the respondent and sell the land to him.**

(b) The learned Trial magistrate erred in law and fact in that she failed to find that the parcel of land L.R. No. Nkuene/Kithunguri/663 was registered in the name of the 2<sup>nd</sup> appellant and that there was no privity of contract between the 2<sup>nd</sup> appellant and the respondent hence the dealings between the 1<sup>st</sup> appellant and the respondent could not be imposed upon the 2<sup>nd</sup> respondent.

(c) The learned Trial magistrate erred in law and fact that she failed to find that the agreement for sale of land dated 13/4/2011 which was entered into between the 1<sup>st</sup> appellant and the respondent was not enforceable since the said land was the subject in Meru Succession Cause No. 114 of 1995 and therefore the 1<sup>st</sup> appellant could not sell the land before the distribution of the estate of the deceased was finalized by the court.

(d) The learned trial magistrate erred in law and fact by making an order for specific performance against the 2<sup>nd</sup> appellant, yet she did not sell the land to the respondent.

(e) The trial magistrate erred in law and fact by failing to find that the agreement which was entered into between the 1<sup>st</sup> appellant and the respondent was not enforceable in law and that the same was null and void as it was not blessed with the mandatory consent of the relevant land control Board and therefore the respondents remedy was the refund of the deposit of Kshs. 300,000/=.

(f) The learned trial magistrate erred in law and fact by awarding the respondent damages for breach of contract without any justification and contrary to the provisions of the Land Control ACT CAP 302.

5. On 9/12/2019 this court directed the parties to canvass the appeal through written submissions. The appellants submitted that **L.R.NKUENE/KITHUNGURI/663** (the suit premises herein) was not in existence at the time the Sale Agreement was being entered into. That the same was also the subject of Succession Cause hence the agreement resulted to inter-meddling with the estate of the deceased. Thirdly that the respondent did not show that he obtained consent to the Land Control Board hence the Agreement became null and void within 6 months from 13/4/2011. Fourthly, the 2<sup>nd</sup> appellant was not privy to the Agreement and was thus not bound to the doctrine of privity of contract. The appellants relied on the case of **Aineah Likuyani Njirah v Aga Khan Health Services [2013] eKLR**.

6. The respondent submitted that the trial court considered the Succession Cause. That the 1<sup>st</sup> appellant was in collusion with the 2<sup>nd</sup> appellant to deny him his interest in the suit premises despite him paying a colossal sum. He cited the case of **Reliable Electrical Engineering (k) Ltd vs Mantrac Kenya Limited (2006) eKLR**.

#### Analysis and Determination

7. It is the duty of a first appellate court to re-evaluate the evidence and draw its own conclusions – See **Selle-Vs- Associated Motor Boat Co. Limited 1968 E.A. 123**.

8. **Pw1 Emmanuel Muchomba Kinoti** testified that he entered into a Sale Agreement on 13/4/2011 for the purchase of the 1 acre out of the suit premises at a sum of Kshs. 850,000/=. That the Agreement was reduced in writing and he paid Kshs 300,000 which was acknowledged. He made the payments to the 1<sup>st</sup> appellant and her sisters, but the 2<sup>nd</sup> appellant was not present. That at the time he entered into the agreement with the 1<sup>st</sup> appellant, he was aware of the ongoing succession cause. When pw1 sought to reduce the agreement into writing, the 1<sup>st</sup> appellant became reluctant. On conducting a further search of the suit premises, he realized that the suit premises had been subdivided into two portions i.e. Parcel No. 858 and Parcel No. 859. That parcel No. 859 was to be transferred to him but was later subdivided into several portions and registered in the name of the 2<sup>nd</sup> appellant. That is when he issued a demand letter to the appellants but the appellants in turn demanded more money from him.

9. **Dw1 Jane Tirindi** testified and adopted her replying affidavit sworn on 12.2.2018 as her evidence. She stated that the 1<sup>st</sup> appellant is her niece. That her brother, **Patrick Murithi (now deceased)** owned parcel No. 663. A Succession cause was filed in respect to the aforesaid parcel and she was appointed as the administrator of the estate. That Parcel No. 663 was divided into two portions i.e. Parcel No. 858 and Parcel No. 859. Parcel No. 858 is registered in the name of her husband whereas parcel in Parcel No. 859 (now Parcel Nos. 2372-2383) are registered in her name. That the 1<sup>st</sup> appellant is to get a portion consisting of 1 ½ acres from the parcels already registered in the name of the 2<sup>nd</sup> appellant.

10. It was also her testimony that at the time the agreement was entered into, she was still the registered owner of the suit premises, but she was not aware of the agreement between the 1<sup>st</sup> appellant and the respondent nor was she party to the same.

11. The issues arising for determination herein concern; **Dealings in property of a deceased person, nature of land interests, Privity of contract, the application of provisions of the land control board and What remedies are available.**

12. On the first issue regarding dealings in the properties of a deceased person, I have looked at the Sale agreement entered into between the 1<sup>st</sup> appellant and the respondent. The same fully acknowledges there being an ongoing Succession cause. The agreement was entered into by the 1<sup>st</sup> appellant on virtue of her being a beneficiary in **Meru Succession Cause No, 114 of 1995 Estate of Patrick Murithi (deceased)**.

13. **Section 45 of the Succession Act** 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 inter-meddle with, any free property of a deceased person”.*

14. **Section 55 of the Law of Succession Act** further Provides that:

*(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed.....”.*

15. **Section 82 (b) of the aforementioned Act** also provides that;

*“(ii) no immovable property shall be sold before confirmation of the grant”*

16. What resonates from the aforementioned provisions of law is that the contracting parties were inter-meddling with the estate of the deceased and the 1<sup>st</sup> appellant had no locus standi to enter into the agreement. See my decision in **Loise Wanjiru Irungu & 4 others v Joel Nthei Mwanzi & 6 others [2017] eKLR (Nairobi)**.

17. The appeal certainly succeeds in so far as the issue of inter-meddling with the estate of a deceased person is concerned.

18. The second issue to analyse is the question; *What is the nature of the interest in the suit land that 1<sup>st</sup> appellant possessed enabling her to transmit the same to the respondent?* The registration records of the green card (found on page 49 of the record of appeal) indicate that, the land parcel no. Nkuene/Kithunguri/663 was initially registered in the name of Patrick Muriithi on 31.8.1993 and was then transmitted to Robert Muturi and the 2<sup>nd</sup> appellant on 13.8.1996 where the title deed was issued the following day.

19. On 13.1.1997, the title to parcel 663 was closed upon the partition of the said parcel into parcels 858 and 859. Thus by the time the respondent was entering into an agreement with the 1<sup>st</sup> appellant on 13.4.2011, the land parcel 663 was no longer in existence. Further, the 1<sup>st</sup> appellant was never the registered owner of the former parcel no. 663 or its resultant subdivisions 858 and 859. This is not a case where the true status of the land was concealed from the respondent. In his own evidence, he admitted that he was aware that the vendor was not the owner of the suit land as at the time they were making the agreement.

20. I am therefore in agreement with the submissions of the appellants that the 1<sup>st</sup> appellant had no locus to sell the suit land as she had not acquired any defined interest in the said land capable of being alienated. The appeal succeeds on this ground.

21. I now come to the issue of privity of contract. Again as rightly submitted by the appellants, the 2<sup>nd</sup> appellant was not a party to the agreement dated 13.4.2011 and was therefore not bound by the terms and conditions set out therein. To this end, the case cited by the appellants **Aineah Likuyani Njirah vs. Aga Khan Health Services (2013) eKLR** is relevant on this point.

22. In **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR**, the Court cited **Halsbury’s Laws of England, 3rd Edition, Volume 8, paragraph 110** as follows:

*“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract Emphasize added).”*

23. The contract between the parties herein was not enforceable at the time of institution of the suit. The 2<sup>nd</sup> Appellant was not party to the agreement. The resultant remedies against parties to the agreement can therefore not lie as against the 2<sup>nd</sup> appellant. The fact that the 1<sup>st</sup> appellant is a niece to the 2<sup>nd</sup> appellant did not in any way give the respondent the leeway to sue the 2<sup>nd</sup> appellant. The appeal succeeds on this point.

24. The fourth issue for consideration touches on the application of the provisions of the land control board. The sale agreement herein was entered into on 13/04/2011. The suit herein was filed on 11/01/2018. Clearly at the time of instituting the suit, 6 months had lapsed.

25. **Section 6 of the Land Control Act** provides as follows;

*“(1) Each of the following transactions -*

*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;.....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.”*

26. **Section 8(1) of the Land Control Act** also provides as follows;

*“(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”.*

27. In **Moses Kamande Nyambura v Francis Munyua Ngugi [2018] eKLR** the court held that once a transaction relating to agricultural land is held to be void, no complaints of any nature, such as trespass, remained to be resolved and that the words “void for all purposes” used in the statute must be interpreted to mean what they say, See case of **Hirani Ngaithe Githire V Wanjiku Munge [1979] Klr 50.**

28. The claim for specific performance clearly did not arise in this instance. The respondent did not adhere to the provisions of the land Control Act and the agreement was void at the time of filing the suit. The trial court therefore erred when it held that the respondent had satisfied his claim for specific performance. The appeal therefore succeeds on this point.

### **Remedies**

29. This is a case where by the contract between the two parties (respondent and 1<sup>st</sup> appellant) was clearly not enforceable, but the trial court was attempting to rewrite the contract for the two parties. In the case of **Fina Bank Ltd Vs. Spares and Industries ltd [2000] 1EA 52**, Shah JA, stated that :

*“..the function of the Court is to enforce what is agreed between the parties and not what the court think ought to have been fairly agreed between the parties...”*

30. The respondent was not entitled to an order of specific performance and damages. The available remedy was clearly a refund of the purchase price in line with the provisions of **Section 7 of the Land Control Act** which stipulates that;

*” if any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid....”.*

31. The respondent had presented an acknowledgement receipt clearly showing that he had paid Kshs. 300,000/= to the 1<sup>st</sup> appellant. The respondent is entitled to a refund of the same as a debt. The appeal herein is therefore merited and I proceed to give final orders as follows;

**1) The decision of the trial court is hereby set aside and substituted with an order of refund by the 1<sup>st</sup> appellant to the respondent in the sum of Kshs. 300,000 and interest at court rates, of which the said interests shall run from 30 days after the date of delivery of this judgment.**

**2) Each party shall bear their own costs of this appeal and costs before the trial court.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

### **ORDER**

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 29.6.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to 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.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**