



**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**SUCCESSION CAUSE NO. 112 OF 2004**

IN THE MATTER OF THE ESTATE OF EDWARD MAGHANGA MWANG'OMBE (DECEASED)

MAHMOUD SHEE BWANA.....PETITIONER

VERSUS

THE PUBLIC TRUSTEE.....RESPONDENT

**JUDGMENT**

By this petition dated 21<sup>st</sup> April, 2004 the petitioner **MAHMOUD SHEE BWANA** seeks the following orders

**“(a) THAT this Honourable Court do adjudge**

**the petitioner to be the lawful owner of the**

**kiosk designated No. 52 Voi Stage aforesaid.**

**(b) THAT the petitioner do have the costs of this petition.”**

The case revolves around a dispute over the ownership of a **Kiosk No. 52** located at Voi Bus terminus in Voi town. The said kiosk is registered to one **EDWARD MAGHANGA MWANG'OMBE**. The said Edward Mwang'ombe passed away on 23<sup>rd</sup> July, 1990. Thereafter letters of Administration to his estate were issued to one of his five widows '*Christine Maghanga*'. However these letters were later revoked by the High Court and the estate was then handed over to the Public Trustee by way of letters of Administration issued on 26<sup>th</sup> July, 1995. **PW2 DANIEL MWINGI NGERA** the property manager in the office of the Public Trustee told the court that he set about consolidating the estate of the deceased. He ascertained by way of a letter dated 3<sup>rd</sup> June, 1996 written by the Voi Municipal Council that plot No. 52 was registered in the name of the deceased and therefore formed part of the estate of the deceased. However the petitioner **Mahmoud Shee Bwana** claims that this plot No. 52 belongs to him. He claims that the deceased sold the said plot/kiosk to him by way of a Sale Agreement duly written and signed by the deceased. The petitioner has come to this court seeking to have the court declare him as the true owner of the suit property.

**THE PETITIONER'S CASE**

The petitioner gave evidence on his own behalf and called one other witness in support. He told the court

that he purchased plot No. 52 Voi township from the deceased on 15<sup>th</sup> July, 1989 for an agreed sum of Kshs. 20,000/=. He states that the original sale agreement got lost/misplaced but he produces as an exhibit a photocopy of the same. The petitioner states that with the approval of the Voi Municipal Council he extended the kiosk which was situate on the said plot and states that he has been regularly paying ground rent to the council.

**PW2 SALESIO GITARI** claims to have witnessed the sale agreement between the petitioner and the deceased. He told the court that he was present when the petitioner paid the deceased the sum of Kshs. 20,000/= which money **PW2** claims that another witness 'Kiremba', counted. The said 'Kiremba' is now deceased.

### **THE RESPONDENT'S CASE**

The respondent being the Public Trustee as administrator of the Estate of Edward Maghanga Mwang'ombe did not file any reply to the petition but called witnesses in support of their case. **DW1 DANIEL MWINGI NGERA** a property manager at the Public trustee and **DW2 GRASMUS MWAMBURU MWANYASE** a prosecutor with the Voi Municipal council both testify that according to records held at the Council plot No. 52 is registered to the late Edward Maghanga Mwang'ombe as owner. No transfer to the petitioner has ever been effected in the council records. **DW3 ZACHAUS SHAFAT MARUMBA MAGHANGA** is one of the sons of the deceased. He confirmed to the court that the Public Trustee was the administrator of his late father's estate. He also told the court that the kiosk on plot No. 52 in Voi Township belonged to his late father. **DW3** categorically denies that the deceased ever sold this plot to the petitioner or to any other person prior to his death. He insists that the petitioner was merely a tenant in that plot. **DW3** further states that following the death of the deceased one of the widows of the deceased named 'Christine Pale' issued to the petitioner a notice of termination of this tenancy due to non-payment of rent. The petitioner then filed a case at the Business Premises Rent Tribunal in which case he described himself as a tenant (not as the owner) of plot No. 52. **DW3** also informed the court that the petitioner is no longer in occupation of the said kiosk. This is because due to a fire at the Voi Bus terminus in 2007 the kiosk burnt down. A new one was erected and was given out for rent by the Public trustee on behalf of the estate of the deceased.

Upon completion of oral evidence both parties submitted their written submissions to the court. Upon consideration of the oral testimony together with perusal of the written submissions I find that the following issues arise for determination.

- i. Whether the petitioner's claim is barred by statute.
- ii. If not whether the petitioner has successfully proved a case for his claim over the kiosk.

I will now proceed to consider each issue individually.

#### **i. Is the claim statute barred?**

The respondents in their written submissions argue that the petitioner's claim is time-barred by virtue of section 4(1) of the Limitation of Actions Act (Cap 22, Laws of Kenya). Section 4(1) of Cap 22 provides:

**"The following actions may not be brought after the end of six years from the date on which the cause of action accrued.**

- a. **Actions founded on contract**
- b. ...." [my own emphasis]

The petitioner's claim is founded on an alleged contract with the deceased thus it is an action falling within the ambit of section 4(1) (a). The sale agreement on which the petitioner bases his claim was allegedly executed on 15<sup>th</sup> July, 1987. The petitioner in his evidence states that after selling him the plot

**"The deceased dodged me for a while and later died before giving me the title to the land."**

Clearly by this suit the petitioner is seeking the completion of the contract by the estate of the deceased which is tantamount to seeking an order for specific performance. If as the petitioner has claimed the contract upon which he bases his claim was entered into in July, 1987 then his suit ought to have been filed no later than six (6) years after that i.e. on July, 1993. The present suit was actually filed in the High court in Mombasa on 27<sup>th</sup> April, 2004 being a full seventeen (17) years **after** the cause of action accrued. As such the petitioner's suit is clearly time-barred. There is no indication that he sought to mitigate his indolence by seeking the leave of the court to file his suit out of time. On the basis of being statute barred alone this suit is a non-starter and must fail.

ii. **Has the petitioner proved his claim?**

Even if the suit was not time-barred (which is not the case) the question would be whether the petitioner has sufficiently proved his claim to the property in question. The petitioner relies on a photocopy of a sale agreement allegedly executed by the deceased. I have closely scrutinized the photocopy produced in court and marked "A". Firstly the purported signature of the deceased '*Mzee Maghanga*' appears below the name of the deceased. A close look reveals that this signature is faded and is made in by different pen that was used by the witnesses to sign the same document. The suspicion raised by **DW3** that his father's signature may have been superimposed onto this document is quite plausible. Secondly the petitioner himself who is the purported purchaser of the land has not appended his signature anywhere on the document. Section 3(3) of the Law of Contract Act, Cap 23, Laws of Kenya provides that

**"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 has been attested by a witness who is present when the contract was signed by such party."**

In this case the petitioner has not signed the alleged contract at all thus it did not conform with the requirements of law.

The sale agreement relied upon by the petitioner is witnessed by two people '*Jeremiah*' (no surname) and '*Salecio Gitari*'. Neither was called as a witness. **DW2** Kiremba who claimed to have been present when the agreement was executed has not endorsed his name and signature on the document. This raises a doubt as to whether DW2 did witness this transaction as he alleged.

The petitioner claims to have purchased the plot from the deceased in July, 1987. However in his own documents filed before the Business Premises Rent Tribunal in 1995 the petitioner described himself as the '*Applicant/Tenant*'. If he had truly purchased the plot he would have described himself as the owner.

By a letter dated 3<sup>rd</sup> June, 1996 the Voi Municipal Council confirms that according to their records Kiosk No. 52 belonged to Edward Maghanga Mwang'ombe (the deceased). At no time did the petitioner make any application to the Council seeking to have these records altered to include himself as the owner of said kiosk.

Finally **DW3** the son of the deceased told the court that all the land at the Voi Bus Terminus belongs to the Voi Municipal Council. **DW3** clearly states that

**"We own only the structure [kiosk]. The land belongs to the County Government."**

The court was also informed that the original kiosk was burnt down and completely destroyed by fire in 2007. That being the case the property which the petitioner claims to have purchased no longer exists. What then is the petitioner claiming as his? Is it the original kiosk (which no longer exists) or the new

kiosk erected after the fire? Without clarity on exactly what he is claiming this suit cannot succeed. The court cannot be called upon to make orders in vain. Based on the foregoing I find that in any event the petitioner has failed to prove his claim to the kiosk in question. This suit is therefore dismissed with costs to the respondents.

**Dated and Delivered in Mombasa this 3<sup>rd</sup> day of November, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Maliro for Respondent

Mr. Magiya for Applicant

Court Clerk Mutisya