



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: TUNOI, SHAH & PALL, J.J.A.)
CIVIL APPEAL NO. 249 OF 1996
BETWEEN**

PUBLIC TRUSTEE.....APPELLANT

AND

WACHIRA MURIUKI.....RESPONDENT

(Appeal from the judgment and decree of the High Court of

Kenya at Nyeri (Lady Justice Ang'awa) dated 5th

October, 1993 in H.C.C.C. NO. 312 OF 1982)

JUDGMENT OF THE COURT

By an agreement dated 5th July, 1981 the respondent as vendor agreed to sell to the deceased plaintiff, now represented by the Public Trustee in this appeal, all that agricultural land known as land parcel number Mutira/Kaguyu/938 comprising 2.87 hectares or 7.1 acres (the suit land) situated in Kirinyaga District, and registered under the Registered Land Act, Cap 300 of the Laws of Kenya, at the agreed consideration of Shs.100,000/- which sum was paid in full to the respondent through his acknowledged agent, Charles Gakuo. Thereafter both parties applied for and obtained the requisite Land Control Board consent for the transaction which involved "the whole parcel" of the suit land. The respondent immediately put the deceased plaintiff into possession and she remained in peaceful and uninterrupted possession until her death on 9th June, 1983. Her children continued in such possession after her demise.

It would appear that the respondent refused to formally transfer the suit land to the deceased plaintiff who on 4th November, 1982 instituted suit for specific performance. As fate would have it, she died before she could prosecute it. The Public Trustee who became the administrator of her estate, she having died intestate, was eventually substituted as the plaintiff and it is in that capacity that it prosecuted the suit leading to this appeal.

In his written statement of defence the respondent repudiated the agreement of sale and pleaded that it is unenforceable in law as the same is not in writing as mandated by section 3(3) of the Law of Contract Act. In the alternative, he contended that he had agreed to sell only five (5) acres of the suit land to the deceased plaintiff and was ready able and willing to transfer the said 5 acres to her estate. A disjointed and somewhat difficult to understand judgment wrongly entitled "ruling", the learned judge Ang'awa, J. held:-

"It is noted that the defendant received cash of 20,000/- on 16th July, 1981 and another

80,000/- on 23rd July, 1981, being part of the purchase price.

The court finds that he has kept these funds and the land at the same time. In fact in his para 3 and 5 of the defence he admit that he never "agreed to transfer all that said piece of land but agreed to sell 5 acres which she is willing to transfer to herself.

There are evidence in which the defendant admitted that he owed 100,000/=. This is through his letter of 3rd July, 1982 in which he is to transfer of 5 acres. He cannot be deemed to deny this through his correspondent of which the advocate of the deceased as he was then.

The court hereby enters judgment for the plaintiff deceased substituted representative. That 5 acres be hereby transferred to the estate of the deceased and as such, if the defendant fails to transfer the same the court orders that the executive officer does so."

The appellant appeals against that judgment mainly on the ground that there was sufficient evidence that the deceased plaintiff had purchased the whole suit land, paid the consideration in full, obtained the necessary Land Control Board consent and was put in possession. There was therefore no basis at all in law to award the appellant only five (5) acres and not the whole suit land.

The evidence tendered before the learned judge clearly established that the deceased plaintiff did make payment of the consideration to the respondent in full. This could only be disproved if the respondent called his agent, Mr. Gakuo, to testify on his behalf. This omission rendered incredible the respondent's testimony. Again, the application forms to the Land Control Board and its consent thereto referred specifically to the whole suit land and not to a portion of it. In such circumstances specific performance was correctly claimed in respect of the whole suit land. We agree with Mr. Waweru, for the appellant, that the learned judge had no basis in law to decree specific performance on only part of the suit land.

The respondent made certain admissions of fact in his testimony before the trial court. Those admissions related to the agreement, payment of the consideration and occupation of the suit land by the deceased plaintiff. The said admissions were clear and sufficient to entitle the appellant to specific performance.

The deceased plaintiff took possession of the suit property immediately after the agreement and has been in possession to date. Her occupation was in part performance of the agreement pending the transfer of title in her favour. In such circumstances her suit cannot be prevented by reason only of the absence in writing of the contract for the disposition of the suit land by the respondent in her favour. See section 3(3) of the Law of Contract Act, Cap. 23 of the Laws of Kenya.

For these reasons we would allow the appeal and set aside the judgment made by the learned judge. We order that the order of the superior court for transfer of only five (5) acres be set aside and substitute therefor for transfer of the whole suit land Mutira/Kaguyu/938 in favour of the appellant. The appellant shall have the costs of the appeal.

Dated and delivered at Nyeri this 31st day of October, 1997.

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR