



**Mutai v Mutai & 2 others (Environment & Land Case
22 of 2022) [2024] KEMC 117 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEMC 117 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
ENVIRONMENT & LAND CASE 22 OF 2022
AT SITATI, SPM
MAY 17, 2024**

BETWEEN

ERIC MUTUMA MUTAI PLAINTIFF

AND

SUSAN KAIMURI MUTAI 1ST DEFENDANT

KATHENDU ANDERSON MWITI 2ND DEFENDANT

LAND REGISTRAR MERU 3RD DEFENDANT

JUDGMENT

1. By a Plaint dated 1st October, 2022 verified by an affidavit of similar date, the plaintiff prayed for:
 - a. a declaration that the 1st defendant was registered as trustee to hold land parcel number Abothuguchi/Kithirune/1824 in trust for the plaintiff and the other beneficiaries/dependants of the estate of the deceased.
 - b. Cancellation of the 2nd defendant's name from land parcel number ABothuguchi/Kithirune/1824 and an order that the suit land do revert back to the name of the 1st defendant and the same be registered in 1st defendant to hold in trust for the plaintiff and for the other beneficiaries/dependants of the Estate of Francis Mutai Karuntimi.
 - c. Any other better relief that the court deems fit to give.
 - d. Costs of the of the suit and interest at court rates.Accompanying the plaint were:
 1. List of documents dated 21st October, 2022 containing the following exhibits:
 - i. Certificate of the confirmed grant amended on 9th March, 2009.



- ii. Copy of the green card for Abothuguchi/Kithirune/1824
 - iii. Copy of certificate of official search of Abothuguchi/Kithirune/1824.
 - iv. An affidavit in support of petition for letters of administration of the Estate of Francis Mutai Karuntimi.
 - v. Plaintiff's copy of the identity card.
2. List of witnesses dated 21st October, 2022 – Eric Mutuma Mutai with written statement of Eric Mutai dated 13th February, 2023.
 3. Summons to enter appearance dated 25th October, 2022.
 4. Further List of documents dated 13th February, 2023 containing marriage certificate.
 5. Plaintiff's case summary dated 15th February, 2023.
 6. Issues for determination dated 13th February, 2023.
2. The suit was opposed by the 1st and 2nd defendants who filed a joint memorandum of appearance dated 10th November, 2022 through the firm of Kiautha Arithi & Company Advocates. They also filed:
 - a. 1st defendant's statement of defence dated 23rd November, 2022 pleading that the plaintiff was aware of the sale transactions and assented to the same and thus prayed for a dismissal of the plaintiff's suit with costs.
 - b. 2nd defendant's statement of defence filed on 24th November, 2022 in which the 2nd defendant pleaded that he was an innocent purchaser for value without notice of any defect and thus prayed for a dismissal of the plaintiff's suit with costs.
 - c. List of witnesses dated 10th February, 2023 containing the witnesses' statements of
 - i. Susan Kaimuri Mutai.
 - ii. Kathendu Anderson Mwitii.
 - d. 1st and 2nd Defendants' List of documents dated 10th February, 2023 containing a copy of an agreement dated 28th February, 2022;
 3. The court expedited with various interlocutory applications and the matter went for full hearing. The 3rd Defendant did not participate in the hearing despite service of pleadings.

The Plaintiff's Case

4. Eric Mutuma Mutai testified on 31st March, 2023 by adopting his written witness statement. In summary, he told the court that he was the son of Francis Mutai Karuntimi (Deceased) and a step-son of the 1st Defendant who was the widow of the deceased Karuntimi. He added that the court in Succession Cause No.2949 of 2001 had issued both the Letters of Administration Intestate and the Certificate of the Confirmation of Grant dated 25th September, 2002 to the 1st Defendant. He added that the 1st Defendant was ordered to hold the subject property Abothuguchi/Kithirune/1824 in trust for all beneficiaries including the Plaintiff herein.
5. The plaintiff testified that in breach of her trust and fiduciary duties, the 1st defendant secretly sold the property to the 2nd defendant without his consent or approval. He thus prayed for the revocation



of the resultant title deed to the 2nd defendant on the ground of illegality and fraud. In support of his claim, he produced all the above listed exhibits in evidence.

6. In cross-examination, the following came to light:
 - i. The 1st defendant had sold two other parcels whilst still an Administratrix but the said sales were with the consent of the court.
 - ii. To the date of his filing the suit, he had not known the details of the sale of other parcels between the 1st defendant and the third parties.
7. PW2 M'MBIJIWE M'KIRARA adopted his witness statement indicating that he is the grandfather of the plaintiff. PW2 confirmed that the plaintiff was entitled to a share of the deceased's estate.
8. In cross-examination, he affirmed that when the 1st defendant was appointed as the Administratrix, the plaintiff was still a minor and she was ordered to hold the estate properties in trust for herself and all other beneficiaries including the plaintiff herein.
9. In re-examination he affirmed that he only became aware of the sale after this case was filed to recover the subject parcel 1824. At the end of his testimony, the plaintiff closed his case.

The Defendants Case

10. DW1 Susan Mutai adopted her written witness statement of 10/02/2023 in which she told the court that she was the Administratrix of the estate of her deceased husband who was the father to the plaintiff herein. She stated that the court authorized her to sell Ngusishi/Settlement Scheme/377 and 378 to pay for the school fees of the plaintiff. She added that the sale of 1824 at Kshs 1, 500, 000/= was done with the full knowledge of the plaintiff but the defendant refused to take his rightful share of the proceeds of the sale.
11. In cross-examination, the following came to light:
 - i. DW1 denied having remarried to one Corsten Wuch in Denmark where she was resident and insisted that the marriage certificate produced by the plaintiff was strange to her.
 - ii. DW1 admitted that she was ordered to hold the subject property in trust for herself and all the children of the deceased including the plaintiff herein.
 - iii. She admitted to selling the subject parcel 1824 to the 2nd defendant and that the plaintiff was excluded from the same and she did so because she was in a hurry to emigrate from Kenya and fly out to Denmark.
 - iv. She affirmed that parcels 377 and 378 were sold to educate the plaintiff herein.
12. In re-examination, she admitted that she had a child with the said Corsten Wuch but was not his wife. She denied that the plaintiff was unaware of the sale transaction.
13. DW2 Anderson Kathendu Mwititi adopted his witness statement saying that he bought the subject land 1824 from the 1st defendant and her daughters who are step-sisters to the plaintiff and he paid the full price before obtaining the Land Control Board consent for transfer. The result was that he obtained the title deed as an innocent purchaser for value without notice of any defect.
14. In cross-examination, he admitted that during the sale by the 1st defendant, the 1st defendant never mentioned the plaintiff as one of the dependants of the estate and that he was not aware that the plaintiff was informed of the transaction.



15. At the end of his testimony, the defence closed their case whereupon the parties lodged written submissions.
16. On his part, the plaintiff submitted that the transaction was tainted with illegality and should be revoked with a cancellation of the title deed issued to the 2nd defendant. On their part, the 1st and 2nd defendants submitted that the plaintiff being aware of the sale and having changed his mind after the transaction should not prevail with his claim.

Issue For Determination

Undisputed Issues

1. The Plaintiff was a beneficiary to the estate of Francis Karuntimi while the 1st Defendant was the Administratrix.
2. The 1st Defendant was ordered to hold parcel Abothuguchi/Kithirune/1824 in trust for the beneficiaries to the estate.
3. The 1st defendant sold the parcel 1824 to the 2nd defendant for the consideration of Kshs 1, 500, 000/=
4. The Plaintiff did not participate in the land transaction where 1824 was sold to the 2nd defendant.
5. Neither the court nor the plaintiff authorized or consented to the sale of 1824.

Issue For Determination

17. The only issue to be decided is whether or not the transaction between the 1st and 2nd defendant was lawful and above board. Before making that determination, the court noted the following undisputed issues.

Determination

18. From the material placed before the court, it is clear that the 1st Administrator could only have legally sold the subject parcel either with the written consent of all the beneficiaries or if the beneficiaries unreasonably withheld the consent, then obtain the authorization of the court before proceeding with the sale. Having failed to obtain the consent of the plaintiff or authority of the court rendered the transactions a nullity in law because the property was trust property held for the benefit of the plaintiff and other beneficiaries.
19. The illegality cannot be cured as it totally obliterates the sale agreement between the 1st and 2nd defendants. In revoking the illegal transactions by an administrator In re Estate of Des Raj Gandhi (Deceased) [2021] eKLR the learned Judge L.A. Achode J (as she then was) held that:
 28. A duty to account arises both in Equity and under the Law of Succession. At the time the Administrator herein was appointed, the only asset available for distribution was the property known as L.R No. 209/1874. This being the entire estate, it was the duty of the administrator to present to the Court a comprehensive list of all the beneficiaries and ensure that each beneficiary receives a share of this property or in the alternative, if they consent to the sale, all beneficiaries receive an equal share in sale proceeds, unless a beneficiary voluntarily rescinded their share.....Indeed the applicant has made a good case for the removal of the administrator on account of obtaining a grant through concealment of material facts, the disposal of estate property after confirmation of grant without consent and failure to render accounts within the period appointed by law.”



20. The preceding view by the High Court was also the view of The Court of Appeal in *STEPHENS & 6 others v Stephens & another* [1987] eKLR (J.O. Nyarangi JA, F.K Apaloo J.A.& J.R.O Masiime Ag. JJA.) held as follows. Nyarangi JA.:

“That being so, it is plain to me that the 1st respondent in converting the trust property into his own and that of the 2nd respondent, he was guilty of a breach of trust. That equitable “wrong” is a mixed bag of many deviations from the duty of fair, efficient and honest dealing by a fiduciary and which consists of both commissions and omissions. At page 662 of *Nathan & Marshall Cases and Commentary on the Law of Trusts*, it is said:-

A trustee is liable for a breach of trust if he fails to do what his duty as a trustee requires or if he does what as trustee he is not entitled to do.”

21. On the facts, the 1st respondent did not only fail to do his duty of accounting to the beneficiaries and yielding up to them such part of the estate as they may be beneficially entitled to, but he wrongly converted the only substantial property in the estate to his own name and that of a confederate. In these circumstances, I should have thought that judgment in favour of the appellants for the relief they prayed for was a matter of course. They were entitled *ex debito justitiae* to the reliefs they sought on the plaint.”
22. The certificate of the confirmation of grant was a document registered on the estate property and with due diligence obtainable by the purchaser but the purchaser did not conduct due diligence. Furthermore, the court rejects the argument that the plaintiff was verbally informed of the transaction and he was aware of it. The rejection is based on the parole evidence rule which ousts the admission of extrinsic evidence to contradict the clear terms of a written document. From the sale agreement, it is patent on the document that the plaintiff did not sign to consent to the sale and transfer of 1824 and therefore by the parole evidence rule, the verbal assertion that he consented to the sale is legally inadmissible.
23. The parole evidence rule as a principle precludes admission of extrinsic evidence to contradict the clear written terms of a document. As can be seen from the sale agreement, the plaintiff never signed anywhere. A situation of relevance arose in the authority of *Universal Education Trust Fund v Monica Chopeta* [2012] eKLR the High Court had this to say:

“It is also clear that the defendant cannot seek to present extrinsic evidence when her relationship with the plaintiff is already spelt out in the written agreement. In the book by Treitel entitled ‘Law of Contract’, the learned author discussed parole evidence rule as follows:

“The parole evidence rule states that evidence cannot be admitted (or even if admitted cannot be used) to add to, vary or contradict a written contract. In relation to contracts, the rule means that, where a contract has been reduced to writing, neither party can rely on extrinsic terms alleged to have been agreed i.e. on evidence not contained in the document, although the rule is generally stated as applying to parole evidence, it applies just as much as to other forms of extrinsic evidence.

Of course, if a contractual document incorporates another document by reference, evidence of the second document is admissible, but the rule prevents a party from relying on evidence that is extrinsic to both documents.”



24. The learned Judge went on to hold:

“The defendant is forbidden by that rule from introducing, as she does in her defence and counterclaim, verbal representation to alter written agreement. This was also the holding in *Muthuri v National Industrial Credit Bank Ltd* [2003]KLR 145.”

25. Related to this is that it is the court’s finding that when the 1st defendant informed the 2nd defendant that she was an Administrator of the Estate, he was put on notice and he ought to have counterchecked on the Certificate of the Confirmation of grant which was presented to the Lands Registry as authorization for the sale. By failing to be diligent, the 2nd defendant willingly participated in the illegal sale to his own detriment. In the result, the court dismisses his submission that he was an innocent purchaser for value: equity aids the diligent, not the indolent.

26. In the final orders, the court hereby issues:

- a. A declaration that the 1st defendant was registered as trustee to hold land parcel number Abothuguchi/Kithirune/1824 in trust for the plaintiff and the other beneficiaries/dependants of the estate of the deceased.
- b. A declaration that the sale agreement between the 1st defendant and the 2nd defendant over parcel Abothuguchi/Kithirune/1824 was tainted with illegality and is unenforceable in law.
- c. Cancellation order of the 2nd defendant’s name from land parcel number ABothuguchi/Kithirune/1824 and an order that the suit land do revert back to the name of the 1st defendant and the same be registered in 1st defendant to hold in trust for the plaintiff and for the other beneficiaries/dependants of the Estate of Francis Mutai Karuntimi.
- d. Costs of the of the suit and interest at 14% court rates awarded to the plaintiff.

Right of appeal is 30 days.

DATED, READ AND SIGNED AT GITHONGO THIS 17TH DAY OF MAY, 2024

HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS

PRESENT

Miss Maore Advocate for the plaintiff

Mr. Mugambi Advocate for the defendant

Plaintiff

Ronny and Brian Court assistants

