

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII
ELC NO. 27 OF 2020

KEPHA MARITA OKEMWA (Suing as the personal representative of the estate of
JOHNSON OKEMWA NYAKUNDI – Deceased) PLAINTIFF

VERSUS

MEGA CHOICE LIMITED 1ST DEFENDANT

INVESTMENTS & MORTGAGES BANK LIMITED 2ND DEFENDANT

KISII COUNTY LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

1. The suit herein was commenced by way of plaint that was filed on 19 August 2020 and amended on 3 July 2023. The plaintiff claims to sue as the legal representative of the estate of Johnson Okemwa Nyakundi (deceased) who owned the land parcel Kisii Municipality/Block II/16 (the suit property). He has pleaded that on 18 June 2014 the defendants engaged in a series of fraudulent acts which led to the alienation of the suit property and registration into the name of the 1st defendant. He contends that in 2013 the deceased was an old man of 77 years and suffering from a terminal illness and that he had been hospitalized since 2013. He contends that the transfer of the suit property to the 1st defendant was through fraud and misrepresentation on the part of the defendants inter alia that they prepared documents without the consent of the deceased; that they purported that the deceased appeared before Mbarak Ogari Nyanhoga Advocate knowing it to be false; that they uttered 4 different agreements purporting them to have been executed by the deceased; forged a transfer instrument and consent to transfer; presented to the Kisii Land Registrar a fake transfer; transacting in absence of the deceased; and failed to disclose that the deceased was not in a position to transact. He pleads that the 2nd and 3rd defendants (respectively Investments & Mortgages Bank Limited and the Land Registrar, Kisii) knowingly accepted fraudulent documents for registration. He states that the 1st defendant has now taken possession of the suit property and mortgaged the same to the 2nd defendant for Kshs. 9,000,000/=. In the suit, the plaintiff seeks the following orders :

- (i) A declaration that the suit property belongs to the estate of the deceased.
- (ii) A declaration that the transfer and registration of the suit property in the name of the 1st defendant on 18 June 2014 was fraudulent, illegal, null and void.
- (iii) A declaration that the legal charge registered on the suit land for Kshs. 9,000,000/= and any other subsequent charge is fraudulent, illegal, null and void.

- (iv) An order cancelling and nullifying the title and the charge in favour of the 1st and 2nd defendants.
 - (v) Eviction of the 1st and 2nd defendants from the suit property.
 - (vi) A permanent injunction to restrain the defendants from the suit property.
 - (vii) General damages and mesne profits.
 - (viii) Costs of the suit.
 - (ix) Any other relief that the court may deem fit and just to grant.
2. The 1st defendant appointed counsel and filed defence. She pleaded that the plaintiff lacks locus standi and that the suit has been filed without the consent of the plaintiff's co-administrators namely Dinah Bosibori Okemwa, Mary Kerubo Okemwa and Jane Bosibori Okemwa, and is therefore invalid. It is admitted that the deceased was intermittently ill but denied that he was an invalid. She pleaded that the deceased entered into a sale agreement with the 1st defendant and the family members and close relatives of the deceased were aware of the sale and participated in it. She pleaded that the suit property was purchased at Kshs. 16,000,000/= and that part of the purchase price was applied towards purchase of two housing units at Saika Estate Nairobi by the deceased. She pleaded that these two houses were shared out in the distribution of the estate of the deceased and that the inventory of his estate did not include the suit property. She pleaded that the plaintiff has filed suit to extort the 1st defendant as none of the dependants of the deceased have complained about the acquisition. She asked that the suit be dismissed with costs.
 3. The plaintiff testified and called one witness, Emmanuel Karisa Kenga, a document examiner. The document examiner's evidence doubted that the deceased signed the various documents related to the transaction in issue.
 4. The defendants on the other hand called 6 witnesses. The first defence witness was David Onchari Nyakundi a brother to the deceased. He confirmed that he was aware that his late brother was selling the suit property and confirmed his signature in the transaction documents. DW – 2 was Jared Opande, a nephew of the deceased. He used to work for Investments & Mortgages Bank (I & M Bank) in Kisii and was fully aware of the transaction undertaken by the deceased. DW-3 was Mr. Barack Ogaro Nyanchoga, an advocate of the High Court of Kenya, and his evidence was to effect that he is the one who prepared the sale agreement and attested the signature of the deceased. He also explained how come there appeared to be two different sale agreements for the suit property. DW- 4 was Olga Onyango Otani, the Branch Manager, I & M Bank, Kisii Branch. She confirmed that they loaned the 1st defendant money to buy the suit property. DW – 5 was Alice Kerubo Okemwa, a step-sister of the plaintiff. She confirmed that the suit property was sold by the deceased and that the deceased used the proceeds thereof to

purchase two houses in Saika Estate Nairobi. The suit property thus never featured in the distribution of his estate. DW – 6 was Alkesh Lalji Shah, a representative of the 1st defendant. He confirmed that the 1st defendant purchased the suit property from the deceased at Kshs. 16 million. He gave an elaborate account of the documents signed and how the money was paid.

5. At the close of the hearing, counsel filed their submissions and I have taken the same into account. My disposition is as follows.
6. In his plaint, the plaintiff claims that the deceased never sold the suit property and that the transfer to the 1st defendant was a product of fraud. This is of course denied by the defendants. After analysing both the oral and documentary evidence tendered, I am completely at a loss as to why the plaintiff filed this suit, and it can be for no other purpose other than to pursue an ulterior and nefarious motive.
7. The evidence is stark that Johnson Okemwa Nyakundi (the deceased) wished to sell the suit property which was registered in his name. He had his reasons for doing so, but it appears that mainly he wished to raise some funds for his own treatment. DW -5, his daughter, did elaborate that he was being treated at Nairobi and at some point a fundraiser to raise money for his treatment was held. He was also staying at the house of his nephew, a brother to DW-2, in Nairobi. The fact that he had no money for his own treatment and that he was staying in his nephew's house seems to have made him uncomfortable and he made the decision to sell the suit property. He had an elaborate plan on how the money will be spent. He wanted to buy a house in Nairobi where he could stay while getting treatment and also have some income. Thus, he decided to purchase two houses in Saika Estate, Nairobi. As elaborated by DW-2 and D-5, he wanted to have one for his residence and the other would be rented out so that he can get some money for his medication. He thus sold the suit property for Kshs. 16,000,000/= to the 1st defendant. This is evidenced by the sale agreement dated 27 May 2014.
8. It is true that there is a second sale agreement dated 28 May 2014 bearing a different figure of Kshs. 12,000,000/= as the purchase price. The plaintiff tries to make a meal out of this agreement to try and demonstrate fraud but this sale agreement was well explained by DW-4, Mr. Nyanhoga, who is the advocate that prepared the same. He testified that the correct sale agreement is that dated 27 May 2014. He prepared the second sale agreement to help the 1st defendant obtain finance from the 2nd defendant as there was some disconnect from the amount that the 1st defendant wished to get from the bank when compared to the amount in the sale agreement. It is of course not good practice to do what Mr. Nyanhoga did, but it was well explained, and I am convinced that the correct sale

agreement is that of 27 May 2014 bearing the amount of Kshs. 16 million as the purchase price.

9. It happened that about the time of the sale of the suit property, National Bank of Kenya Limited was selling some houses in Saika Estate that they held as security for monies advanced to a third party. The two houses were being sold for Kshs. 8,000,000/= and this is exhibited in the sale agreement between the deceased and National Bank dated 11 June 2014. That sale agreement shows that 10% i.e Kshs. 800,000/= is paid as deposit and the balance will be paid within 30 days. The availability of the two houses was perfect for the deceased, because he would be able to get the residence that he wished for and rent the other unit so that he can have some money for his upkeep and treatment. The transaction by National Bank to the deceased is therefore closely intertwined with the sale of the suit property to the 1st defendant.
10. It will be recalled that the 1st defendant was buying the suit property for Kshs. 16,000,000/= but she did not have all the money and was to be financed by the 2nd defendant to the tune of Kshs. 9,000,000/=. It will also be recalled that the deceased was buying two houses for Kshs. 8,000,000/= from National Bank. Out of the amount of Kshs. 9,000,000/= that I & M Bank was going to advance to the 1st defendant which would be forwarded to the deceased, Kshs. 7,200,000/= of it was paid to National Bank to clear the balance on the two houses that the deceased was purchasing. That left Kshs. 1,800,000/= (i.e Kshs. 9,000,000/= less Kshs. 7,200,000/=) as the balance due from I & M Bank, and this was paid on 11 July 2014 by I & M Bank into the account of the deceased which he held at Barclays Bank. The transaction slip for this transfer was exhibited. Thus the deceased benefited and/or directly received the sum of Kshs. 9,000,000/= from I & M Bank which was the money that the 1st defendant was receiving as a loan from I & M Bank, which money was to pay part of the purchase price.
11. The manner in which the rest of the money was paid was demonstrated through deposit slips into the bank account of the deceased and some money paid directly to the hospital to cater for his treatment. In fact, the plaintiff does not deny that the money was paid. It is however urged that the deceased was too ill to transact. There is no evidence to that effect. If so then you would expect some sort of medical report to say that he was incapacitated but there is none. In fact, as far as I can see, this was a man within his faculties and who knew exactly what he was doing. The fact that a person is close to 80 years and suffering from cancer does not mean that he is incapable of transacting. Indeed, the sale of the suit property was to his full benefit; the transaction catered for his treatment and also gave him two houses in Nairobi.

12. The estate of the deceased, and his eventual beneficiaries, benefited from the two houses bought by the proceeds of sale of the suit property. The two houses indeed form part of the estate of the deceased that is to be distributed to the beneficiaries of the deceased. The suit property was never put in the inventory of the estate of the deceased in his succession matter because the family was fully aware that the deceased had sold the suit property. What was put in the inventory is the two houses which the deceased purchased out of the proceeds of sale of the suit property. When he testified that plaintiff stated that he is intent that the two houses in Nairobi are retained by the estate. He wants to keep the benefit of the sale proceeds for the suit property yet again wants the sale nullified. How can you allege that a sale is fraudulent yet at the same time wish to benefit from the proceeds of the sale ? It completely does not make any sense.
13. I am aware that the plaintiff brought a document examiner who alleged that the deceased did not sign the agreement. I am afraid that I am not persuaded by the document examiner's evidence. His alleged expert evidence is completely not supported by the wealth of other evidence presented. I disregard that evidence.
14. The long and short of it is that I am not persuaded that there was any fraud in the sale herein. The plaintiff is clearly on some sort of a fishing expedition that he knows himself. He did not file this case in good faith for the benefit of the estate of the deceased. In fact, the whole of his family is against him on this litigation, and that is why even the other administrators of the estate of the deceased have not joined him in his futile pursuit. The whole family is aware that the deceased sold the property and they have no problem with the sale. The plaintiff is a lone ranger and he cannot purport to be acting for the sake of the estate of the deceased. There is no substance in his case and it is hereby dismissed with costs. For the avoidance of doubt the costs are to be paid personally by the plaintiff from his own pocket and not by the estate of the deceased.
15. Judgment accordingly.

DATED AND DELIVERED THIS 18 DAY OF NOVEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Nyamari for the plaintiff (plaintiff also present)

Ms. Kebungo for the 1st defendant

Ms. Owuor for the 2nd defendant

Mr. Wabwire, State Counsel, for the 3rd defendant

Court Assistant – Michael Oyuko.