



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 52 OF 2013**

**ALEXANDER VINCENT MABONGA**

*(Suing as the legal representative of*

**JOSEPH WEKESA TULULA (deceased).....PLAINTIFF**

**VERSUS**

**HILDA WANJIRU TULULA.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MIENI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiff commenced this suit vide a plaint dated **17<sup>th</sup> September, 2013** and filed in court on **7<sup>th</sup> May, 2013** seeking the following orders:

- (a) **An eviction order against the 2<sup>nd</sup> defendant and his agents from KAPLAMAI/MOTOSIET/SINOKO/369.**
- (b) **A permanent injunction restraining the defendants and his agents, servants and or those claiming under them from entering and dealing in any manner KAPLAMAI/MOTOSIET/SINOKO/369.**
- (c) **Costs be provided for.**

2. The 2<sup>nd</sup> defendant filed a defence dated **29<sup>th</sup> July, 2013** on **30/7/2013** while the 1<sup>st</sup> defendant filed his defence dated **6/11/2013** on **8<sup>th</sup> November, 2013.**

3. In the pendency of these proceedings the 1<sup>st</sup> defendant met her demise. The court observed as much in the proceedings of **30/6/2017**. It also observed that the deceased sellers were part of the plaintiff's family and that they were survived by other kin. Only the 2<sup>nd</sup> defendant pursued his defence at the hearing. Indeed when asked on **4/10/2017** by this court as to how he wished to proceed Mr. Karani for the plaintiff submitted that the defendant should elect whether or not to join the legal representative of the deceased's estate. However by the time the hearing of the suit commence no substitution had been undertaken with regard to the suit against her. The suit against the 1<sup>st</sup> defendant is therefore considered to have abated.

**EVIDENCE OF THE PARTIES**

**The Plaintiff's Evidence**

4. **PW1** the plaintiff testified on **29/10/2018** and adopted his witness statement dated **5/5/2015** which is in the record. His evidence is that the deceased 1<sup>st</sup> defendant was his niece and the 2<sup>nd</sup> defendant his neighbour; that though the land is not titled, the share certificate thereof is in the name of his late father Joseph Wekesa Tulula who passed on in **1995**; that his mother Agnes Wambui is also deceased having passed on **October, 2013**; that the suit land is **14** acres; that his later mother was granted letters of administration to his late father's estate but she never sold any land out of that estate during her lifetime; that he received information that the land was being sold through an elder in the area who was in the process of confirming a rumour concerning whether the family was selling a piece of land; that his elder sister, the 1<sup>st</sup> defendant's mother passed on in **2012**; that by the time of her burial which the plaintiff attended **4** acres had been hived off from the land that formed part of his late father's estate; that he obtained a copy of the agreement which showed that the 1<sup>st</sup> defendant and her mother had entered into a

sale transaction with the 2<sup>nd</sup> defendant; that the plaintiff's mother consequently denied knowledge of the sale or having transacted with the 2<sup>nd</sup> defendant that at that juncture the plaintiff suspected a fraudulent transaction and informed his kin as much; that with the consent of his family he sought the services of an advocate to be substituted in the succession proceedings as an administrator and filed the instant suit. A demand notice (**P. Exhibit 3**) was issued to the 2<sup>nd</sup> defendant but it was not heeded; the 2<sup>nd</sup> defendant attended the burial and said that he had bought the land. The plaintiff avers that by the time of making of the sale agreement the administrator to his father's estate was still alive and therefore the vendors in that agreement had no authority to sell the land and it is therefore null and void. He admitted that his sister the 1<sup>st</sup> defendant's mother had 4 grown up children and that the 1<sup>st</sup> defendant had 2 children.

5. Upon cross examination the plaintiff stated that the agreement was entered into while he was abroad; that the time of sale his sister was healthy; that despite his protestation his sister and the 1<sup>st</sup> defendant proceeded to sell the land to the 2<sup>nd</sup> defendant; that his sister died **8** months after the transaction. However he admitted that there was no written complaint raised against the transaction and that the 2<sup>nd</sup> defendant took the possession of the land. He also admitted that when he came for the burial of his sister he found a house constructed on the land but he did not know who constructed it. He testified that his sister stayed in the house for a week and that before that he used to stay at 2<sup>nd</sup> defendant's house. He admitted that the 1<sup>st</sup> defendant had been unwell. His further evidence on cross examination was that Hilda the 1<sup>st</sup> defendant had lived with his mother since she was of tender age and as a member of the family; that he demolished the house built on the land when he came back home from abroad; that the documents in respect of the land including the agreement [**Exhibit 2(a)**] and acknowledgement of the receipt of **Kshs.990,000/=** [**Exhibit 2(b)**] were in his mother's house and that his mother had been living with the 1<sup>st</sup> defendant and her mother. He testified that his mother was affected by dementia and that she was placed in a care home in Nairobi and that later the family sold the house situate in Line Member Estate in Kitale in order to cater for her health. He admits having discussed the sale with his sister who dismissed his claim that the sale transaction was fraudulent; he admitted to knowing his sister's son one Teti Tulula. In his evidence he further averred that his mother was to hold the land in trust for herself and her children including his deceased sister and that his nephews and nieces are entitled to shares that the deceased would have obtained the estate. He faulted the transaction as lacking the consent of the Land Control Board. According to him he last sent his sister, money in the year **2011**. His further evidence is that if his sister her daughter and the 2<sup>nd</sup> defendant had followed the proper procedure he would have not raised any complaint regarding the transaction. He further testified that though his mother used to plough the land, his sister used to plough two out of the 5 acres which she had been given to work on for her subsistence. He averred that he would have no objection if his sister's children opted to let the defendant have the land. However he confirmed that those children had never lived on the land. With that evidence on the record the plaintiff closed his case.

### **The Defendant's Evidence**

6. **DW1, Joseph Mieni**, 2<sup>nd</sup> defendant, testified on **12/11/2018**. He adopted his statement dated **29/7/2013** and filed in court record as his evidence-in-chief. His evidence is that the 1<sup>st</sup> defendant was a niece to the plaintiff; that he had agreed with the sellers that he should take possession of the land upon completion of payment of the purchase price; that the share that he bought belonged to the 1<sup>st</sup> defendant and her mother; that the plaintiff was informed of the sale and he never opposed it; that he paid the full consideration and took possession of the land and there was no opposition from the plaintiff's mother; that the sale and taking of possession by the 2<sup>nd</sup> defendant occurred at a time when the 1<sup>st</sup> defendant's mother admitted in hospital when she was detained for failure to pay hospital bill and that the monies that he paid were applied to defrayment of that hospital bill; that after the land was sold Faith (the plaintiff's sister) left hospital and the rest of the consideration was used to build a house on their land and to pay for utility debts including electric power and water bills. He averred that after the house was built on the land, Faith fell ill again and was admitted to hospital and was later discharged; that at that time a house in which the plaintiff's mother Faith and Hilda and their children were living in was sold. When Faith died Hilda went to live on the house built on the land. Later she became blind and the 2<sup>nd</sup> defendant helped her. Later on the plaintiff came to the land and demolished the house Hilda was living in and burnt everything that it contained. It is his evidence that he was served with a demand requiring him not to utilize the land only after his sister Faith died.

7. Upon cross examination by Mr. Karani the 2<sup>nd</sup> defendant denied that the money he had paid to Hilda and Faith was merely a loan or that the land was security for the loan. He maintained that when the land was sold the plaintiff's mother was not unwell but Faith was in hospital. He also alleged that Hilda executed the agreement while in hospital and that she had informed him that she had a power of attorney from her mother who had entrusted everything to her.

### **DETERMINATION**

#### **Issues for Determination**

8. The issues that arise from the pleadings in this suit are as follows:-

*(a) Should the 2<sup>nd</sup> defendant be evicted from and be enjoined from the land known as Kaplamai/Motosiet/Sinoko/369?*

*(b) Who should bear the costs of this suit?*

9. It is common ground that the 2<sup>nd</sup> defendant was sold land by the 1<sup>st</sup> defendant and her mother, the latter who died before the instant suit was filed. It is also common ground that consideration was paid in full for that land. The plaintiff's discontent with the sale was that it was not conducted by his mother who was the administrator of the estate of his deceased father who owned the land in his lifetime.

10. This suit raises the issue of intermeddling with the property of deceased persons. The question that this court has to answer is whether the 2<sup>nd</sup> defendant should be evicted from and enjoined from interfering with land that was admittedly sold to him by persons who were admittedly beneficiaries to the estate of their late father though they held no letters of administration to the deceased's estate.

11. I have considered the provisions of **Section 45** of the **Succession Act**. It provides as follows:

**45. (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 intermeddle with, any free property of a deceased person.**

**(2) Any person who contravenes the provisions of this section shall-**

**(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**

**(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.**

12. In my view, the principal intent of the rule against intermeddling contained in **Section 45** of the Act is to preserve the estate of a deceased person from itchy fingers of unscrupulous persons who are not named as executors or administrators and who, whether beneficiaries to the same estate or not, may purport to carve out for themselves swathes of the estate for waste, use or disposal inconsistent with the benefit of the estate or other beneficiaries.

13. There being no dispute that the 1<sup>st</sup> defendant and her mother were the sellers, the court also notes that they are both deceased and that there has been established by way of evidence of the parties in this suit a history of their illness before the demise of each of them; it is also not lost on the court that there is no evidence to controvert the 2<sup>nd</sup> defendant's evidence that much of the consideration he spent on the land was directed towards settlement of the medical expenses of the two deceased as well as construction of their house.

14. The 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant were at one point in this litigation represented by the same advocate who filed their respective defences separately.

15. It is noteworthy that the defence of the 1<sup>st</sup> defendant made vital admissions as follows: that the portion that was sold to the 2<sup>nd</sup> defendant was part of their share as beneficiaries to the estate; that the sale was not done with secrecy in that all family members knew of it; that the proceeds thereof were used to construct a house for her mother and to settle her medical bills and that the land was sold before the plaintiff became and administrator. The same particulars were reiterated in the 1<sup>st</sup> defendant's written statement filed on **8/11/2014**. In that statement she maintained that there was no other source of income hence the sale of 4 acres to the 2<sup>nd</sup> defendant and that the proceeds were applied to settlement of her mother's medical expenses as well as construction of a house for her. She also avers that her grandmother who was the administratrix consented to the sale. The hearing of this suit comes long after the 1<sup>st</sup> defendant, her mother and her grandmother died before testifying in it.

16. However, based on the evidence on record, this court is inclined to believe that the 1<sup>st</sup> defendant's grandmother, if at all she was an administrator, consented to and was indeed involved in the sale of part of the estate land to the 2<sup>nd</sup> defendant, otherwise she would have raised a complaint while she was alive. It is therefore difficult to find that the 1<sup>st</sup> defendant and her mother intermeddled with the estate of their deceased grandfather and father respectively.

17. Further I do note that there was no reply by the plaintiff to the defence of the 1<sup>st</sup> defendant and the allegations therein must therefore be deemed as the truth and requiring no further proof.

18. The suit land was by virtue of that confirmation of grant vested in him to hold in trust for himself and for the other children of the deceased owner, his father. There was no documentary evidence led in this case to show that the plaintiff's mother ever held the letters of administration though in his evidence the plaintiff maintained that she was once held that position. However, while the plaintiff holds that grant from the succession court, it is this court that has the jurisdiction to determine if the 2<sup>nd</sup> defendant has interest in the suit land or not.

19. There is no reason provided for non-distribution of the deceased's estate while the 1<sup>st</sup> defendant was alive. It is noted that the while the instant suit was filed on **7/5/2013**, plaintiff was confirmed as administrator on **13/3/2013** in **Succession Cause Number 26 of 2004 - Kitale**. In lieu of applying for distribution, which should have ensured that the 1<sup>st</sup> defendant got her share, which had been ascertained on the ground, to enable her dispose of it as per the sale she has admitted in her defence, the plaintiff opted to hold the suit land in trust. I find that this practice was unfair to both the defendants in that they could not conclude any sale before the suit was filed. There being no complaint in this suit that the 1<sup>st</sup> defendant and her mother had disposed of what they were not entitled to on the ground by way of informal distribution, I am of the view that the holding of the land in trust by the plaintiff for whatever reason is the sole reason why this suit exists for had the land been distributed there would have been no basis for the plaintiff to institute it. The plaintiff never took action to transfer to the 1<sup>st</sup> defendant her mother's share of the land despite the 1<sup>st</sup> defendant's defence in this matter whose statements the plaintiff did not controvert.

20. In my view if the 1<sup>st</sup> defendant had died before the suit was commenced or if there was no such defence as that she filed on **8/11/13**, this court may have taken another perspective of the matter.

21. If the plaintiff is deemed in the circumstances of the confirmed grant to be holding the suit land in trust for the beneficiaries of his father's estate, then by virtue of the admission made by the 1<sup>st</sup> defendant to this suit, the plaintiff by extension holds the suit land in trust for the 2<sup>nd</sup> defendant who bought land from persons whose share on the ground had been identified, and who only lacked documentation thereof in their name, which lack was contributed to by deliberate non-distribution of the estate by the plaintiff.

22. I therefore find no basis for the plaintiff's prayers for eviction and injunction against the 2<sup>nd</sup> defendant in those circumstances. The plaintiff's suit is hereby dismissed with costs. The trust vested in the plaintiff in respect of the suit land is hereby ordered determined and the

plaintiff shall within **three (3) months** of the judgment herein subdivide the land so as to secure title in the name of the 1<sup>st</sup> defendant for the **four (4) acre** portion that the defendant was sold by the 1<sup>st</sup> defendant and her mother and which he is occupying to date.

**Dated, signed and delivered at Kitale on this 6<sup>th</sup> day of May, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**6/5/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

N/A for the defendant

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**6/5/2019**