

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC APPEAL NO. E029 OF 2024

PHILOMENA NZILANI MAUNDU:.....1ST APPELLANT

BENARD KIETI MUTUA:.....2ND APPELLANT

VERSUS

LUCIA MUTHEU MWONGELA:.....RESPONDENT

JUDGEMENT

The Appellants being dissatisfied with the Judgment and Orders of Hon. Daffline Nyaboke (PM) delivered on 27/5/2024 in Kangundo CM ELC No. E041 of 2021 appeals to this Honourable Court against the said Judgment on the following principal grounds that;

1. The learned Trial Magistrate erred in law and in fact by issuing court orders which can only be enforced by an Administrator of a deceased's estate when no application for grant has been made.
2. The Learned Trial Magistrate erred in law and in fact by issuing orders to be enforced in a matter respecting the estate of a deceased person whose estate is yet to be administered and the grant confirmed.
3. The Learned Trial Magistrate erred in law and in fact by making orders affecting the rights of beneficiaries of a deceased estate who were not

involved in an alleged transaction(s) involving the deceased's estate, the Appellants and the Respondent.

4. The Learned Trial Magistrate erred in law and in fact by entertaining a suit and issuing orders thereof in favour of the Respondent who was an intermeddler of a deceased estate which in law is untenable and unlawful.
5. The Learned Trial Magistrate erred in law and in fact by entering Judgment in favour of the Respondent who was not a beneficiary of the deceased's estate and neither a creditor thereof and who had no legal rights and or any valid claim against the deceased's estate.
6. The Learned Trial Magistrate erred in law and in fact by delivering a Judgment and awarding damages on the basis of a contract/land sale agreement which was null and void abinitio and therefore not binding.

The Appellants prays that;

1. The appeal be allowed.
2. The Judgment of Hon. Daffline Nyaboke Sure(PM) delivered on 27/05/2024 in Kangundo CM ELC No. E041 of 2021 be set aside in its entirety.
3. That the costs of the Appeal be borne by the Respondent.
4. Any other relief this Honourable Court deem fit to grant.

This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another vs Shah* (1968) EA 93 where it was held that;

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”

In the trial court the Plaintiff/Respondent stated that on various occasions between 17th June 2011 to 10th April 2017 she entered into a sale agreement with the 1st and 2nd Defendants for the purchase of portions of the plot number 3624, Syanthe Market. She paid total consideration of Kshs. 1,027,500/=. The land belonged to one John Mutua Kieti (deceased) who was the husband and father of the 1st and 2nd

Defendants/Appellants. That despite paying the full purchase price the Defendants have continued to trespass on her land and interfere with her quiet possession.

The Appellants' defence is that the property belongs to one John Mutua Kieti and not the Plaintiff. That the Plaintiff bought the property from them when they had no capacity to sell

The Law of Contract Act clearly stipulates the requirements for a valid instrument to convey an interest in land. Section 3 (3) of the Law of Contract Act (Cap 23 of the Laws of Kenya) stipulates 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 signing has been attested by a witness who is present when the contract was signed by such party:

While Section 38 (1) of the Land Act states;

Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land

(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 signing has been attested to by a witness who was present when the contract was signed by such party.

In Harris JA in *Garvey vs Richards* (2011) JMCA 16 the court in considering the essential components of a contract reflected the following principles;

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

The Respondent produced the sale agreement dated 17th June 2011, 16th January 2017 and 10th April 2017 between herself and the 1st Defendant for the sale of

portions of plot No. 3624 at Syanthy Market. She also produced 19 other handwritten sale agreements of the suit land which were all signed by the parties and witnessed. They indicated the Respondent as the buyer and 1st Appellant as the seller and is signed by the 1st Appellant and witnessed by the 2nd Appellant.

I have perused the documents adduced as evidence by both parties. It is not in dispute that the land belongs to one John Mutua Kieti. The Plaintiff produced a sale agreements signed by all parties transferring portions of the suit plot on various dates. The 2nd Defendant confirms signing the same but states that they did not have capacity to sell the plots as succession had not been done. The Respondent stated that the 1st Appellant held herself out as a beneficiary of the estate of her husband and promises to transfer the land after succession was done. The Appellants identified the suit plot and the Respondent took possession and developed it for over 10 years. One wonders why the Defendants did not attempt to evict her all this time but continued to enter into further sale agreements and receiving the purchase price in instalments only to turn around years later and say they did not have capacity to sell.

The Appellants submitted that the Learned Trial Magistrate erred in law and in fact by entertaining a suit and issuing orders thereof in favour of the Respondent who was an intermeddler of a deceased estate which in law is untenable and unlawful.

Section 45 of the Act provides: -

“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.

In the case of Francis Musyoki Kilonzo and another vs Vincent Mutua Mutiso (2013) EKLr the court held that where a beneficiary purports to sell a property of a deceased person before the grant is confirmed and in contravention of section 45 of the Act, it amounts to intermeddling and the court cannot protect the purchaser.

Be that as it may, in the circumstances of this case, the Appellants held themselves as beneficiaries of the deceased estate. They allowed the Respondent to take occupation immediately and the latter fenced and developed the suit plot. The 1st Appellant never gave oral evidence. the 2nd Appellant admits witnessing the said agreements for sale. I find that the Appellants are being fraudulent and he who comes to equity must come with clean hands.

I am guided by the case of Morris Mwiti Mburugu vs Denis Kimanthi M'Mburugu (2016) eKLR where the court held that;

“The court will not allow the provision of the law to be used as a vehicle for fraud. In my view, if the purchaser is shown to be acting in good faith, for the benefit of the estate, in conjunction and concurrence with all the beneficiaries of the estate and that such transaction does not prejudice either the estate or the beneficiaries of the estate, the harshness of the law should to be tampered with the equitable principle set out under Article 159 of the Constitution, that substantive justice is the principle behind any application of the law. In this regard, if the dealing with the property of the estate does not prejudice any of the beneficiaries and is supported by or concurred with those section 45 seeks to protect, such transaction should be saved.”

I find that the Appellants entered into the sale agreements willingly as beneficiaries of the deceased's estate and the same a valid and enforceable. No evidence has been adduced by the Appellants to prove otherwise.

Section 109 of the Evidence Act Cap 80 is clear that;

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The well-known mantra "he who asserts must prove." Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

"We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call
the

expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

In *James Muigai Thungu vs County Government of Trans-Nzoia & 2 others* (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the Evidence Act Chapter 80 Laws of Kenya succinctly states:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

I find that the learned Honourable Trial Magistrate did not err in law and in fact in finding that the Plaintiff had proved her case on a balance of probabilities. I find that this appeal is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF
APRIL 2026.**

N.A. MATHEKA

JUDGE