



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC NO. 677 OF 2016

LOICE MORAA TONGI.....PLAINTIFF

VERSUS

WILLIAM TONGI MOGUSU.....1ST DEFENDANT

JUSTRY P. LUMUMBA NYABERI.....2ND DEFENDANT

RULING

1. The plaintiff is the wife of the 1st defendant (Now deceased) and she commenced this suit vide a plaint dated 17th January 2012 filed in court on the same date. The plaintiffs' claim was that the 1st defendant had contracted to sell their matrimonial property LR No. Kitaru Settlement Scheme/19 to the 2nd defendant without her consent and without any consideration of her proprietary interest in the suit property. The plaintiff sought judgment against the defendants jointly and severally for the following orders:-

1. A permanent injunction do issue restraining the Defendants from transferring, selling and/or alienating or doing anything prejudicial to the proprietary interests of the plaintiff in respect to L.R No. L.R No. Kitaru Settlement Scheme/19.

2. A Declaration that the purported sale between the Defendants in respect of L.R No. L.R Kitaru Settlement Scheme/19 is null and void.

3. Costs of this suit.

4. Any other further relief that this Honourable Court may deem fit and fast to grant.

2. The 1st defendant filed a statement of defence dated 10th February 2012 in which he set out the various properties that he had acquired during his working career as a civil servant. He admitted he had contracted to sell the suit property to the 2nd defendant to be able to raise funds that he required for medical treatment in India. He contended the plaintiff had no justifiable cause to object to the sale as she and the children were well provided for having regard to the other assets he had.

3. The 2nd defendant equally filed a defence dated 10th February 2012. He stated that the 1st defendant approached him and offered to sell him the suit property which he agreed to purchase at the consideration of Kshs.36 million. He stated the plaintiff was not a party to the contract of sale he had entered with the 1st defendant and had no proprietary interest in the suit property as the 1st defendant was the sole registered owner.

4. The 1st defendant died on 13th August 2012 before the instant suit was heard and determined and before the agreement of sale between him and the 2nd defendant dated 14th January 2011 was completed. Though as per the record the parties have endeavored to work out an amicable settlement of the matter, such efforts have been unsuccessful.

5. On 27th February 2018 the plaintiff filed a Notice of Motion application seeking inter alia an order to pay to the 2nd defendant a sum of Kshs.2.2 million being a refund of the deposit paid to the 1st defendant towards the purchase of the suit property. Before this application was heard and determined, the 2nd defendant on 18th June 2018 filed a Notice of Motion application seeking inter alia an order for specific performance of the agreement of sale dated 14th January, 2011; an order for the removal of the caution registered against the suit property by the plaintiff and an order that the 2nd defendant do deposit the sum of Kshs.33.8 Million being the balance of the purchase price in court within 120 days from the date the order is made.

6. Before the pending two applications were disposed of, the plaintiff on 14th March 2019 filed a notice of preliminary objection as relates to the proceedings in regard to

(a) The law of succession Act, Cap 160 laws of Kenya.

(b) That the suit against the 1st defendant has since abated.

7. The court on 8th May 2019 gave directions that the preliminary objection be canvassed by way of written submissions. The parties were to exchange their submissions within 30 days. On 25th June 2019 when the matter was scheduled for mention only the plaintiff had filed her submissions. The 2nd defendant requested and was granted leave to file his submissions within 15 days. The 2nd defendant did not file his submissions within the time allowed.

8. I have given the brief background to this matter to contextualize the preliminary objection by the plaintiff which is the subject of this ruling. In the preliminary objection as taken by the plaintiff the issues for determination are:-

(i) Whether the suit against the 1st defendant has abated, and if so whether the substratum of this suit has not dissipated /disappeared?

(ii) Whether the court can continue with these proceedings when the property the subject of the suit belongs to a deceased person and who has not been substituted?

9. It is not in dispute that the 1st defendant, William Tongi Mogusu (deceased) passed away on 13th August, 2012. It is further not disputed that the 1st defendant has not been substituted in these proceedings by his legal personal representative to represent his estate. The land the subject matter of the suit L.R Kitaru settlement Scheme/19 is registered in the name of William Tongi Mogusu (now deceased) and following his death the same forms part of his estate and cannot be dealt with otherwise than through the duly appointed administrator of the estate. No claim against a deceased person can be made and or prosecuted other than through a personal legal representative duly appointed.

10. In the present case there is no evidence of any person having been appointed as the administrator of the 1st defendant's estate and no substitution of the 1st defendant by his personal legal representative (administrator) has been done and therefore no valid legal proceedings can continue against the 1st defendant without such legal representative.

Order 24 Rule (I) provides:-

“Where one or two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or

sole surviving defendant dies and the cause of action survives or continues the Court on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit”

Order 24 Rule (3) Provides:-

“Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant”

11. Where a suit has abated the personal legal representative can under Order 24 Rule 7(2) apply for an order to revive the suit if he is able to demonstrate to the satisfaction of the Court that he was prevented by any sufficient cause from continuing the suit. The order for the revival of the suit can be made on terms that the court thinks fit.

12. In the instant suit the 1st defendant having died on 13th August, 2012 the suit against him abated on 13th August 2013 and as from that date no suit against him existed and the same could be brought back only through the process of revival as provided under Rule 7(2) of Order 24.

13. The suit against the 1st defendant having abated, the substratum of the plaintiff's suit disappeared. The plaintiff in the suit sought to block the sale of the suit property to the 2nd defendant by the 1st defendant who was her husband. As the sale had not been completed by the time the 1st defendant died, it means the 2nd defendant cannot also get the same completed without engaging with the person who eventually is appointed as the administrator of the 1st defendant. That would also be the person to whom the plaintiff would register her objections to the sale, if she would still be objecting to the sale to the 2nd defendant.

14. The proceedings in the present suit as from 13th August, 2013 when the suit against the 1st defendant abated were irregular and null and void to the extent that they related to the suit property which formed part of the 1st defendant's deceased estate. Under Section 82(a) & (b) of the Law of Succession Act, Cap 160 Laws of Kenya it is only the administrator of a deceased estate who has power or authority to represent the Deceased in Court proceedings. Sections 82 (a), (b), & (c) of the Act provides:-

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his

death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

(i) any purchase by them of any such assets shall be voidable at the

instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;

(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

15. In the case of *Kenya farmer's Co-operative Union Ltd Vs Charles Murgor (Deceased) t/a Kaptabei Coffe Estate (2005) eKLR H. Waweru J.* faced with a situation where a suit had proceeded to hearing and judgment rendered when one of the parties who had died had not been substituted and an application for substitution was made post judgment observed as follows:-

“...Does the court have jurisdiction to order substitution (except in an application to revive the suit) where the suit has already abated by operation of the law? Obviously not. Does the Court have jurisdiction to hear and determine a suit that have already abated by operation of the law? Certainly not. If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time”.

16. The Applications pending in this matter, which I referred to earlier in this ruling clearly cannot be prosecuted without the participation of the personal representative of the deceased estate as the two applications touch on the sale contract of the suit property which now forms part of the deceased estate? Hearing them or continuing with further proceedings in this suit in the present form would be an exercise in futility.

17. In the premises I find merit in the preliminary objections taken by the plaintiff and I sustain the same. On the basis of my determination in regard to the preliminary objections it follows that the plaintiffs application dated 23rd February, 2018 and the 2nd defendant's application dated 18th June 2018 are misconceived and constitute abuse of the court process. I accordingly order the same struck out but make no order for costs. Hopefully the parties will review their positions in regard to the present suit and determine whether it serves any purpose when the suit against the principal party, the 1st defendant has abated.

Ruling dated signed and delivered at Kisii this 9th day of October 2019.

J. M. MUTUNGI

JUDGE

Judgment delivered at Kisii this 23rd day of October 2019

J ONYANGO

JUDGE