



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C MISC. APPLICATION NO. 423 OF 2017**

**PETER KIRURI MUMBWA.....PLAINTIFF**

**VS**

**PAULINE MUTHONI KINYANJUI.....1<sup>ST</sup> DEFENDANT**

**SAMUEL GICHUHI KINYANJUI.....2<sup>ND</sup> DEFENDANT**

**JOSEPHINE WANJIRU NJUGUNA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff moved this Court by way of Plaint against the Defendants for Orders as follows; -

- a) The Plaintiff has a right to parcel number Loc. 5/Githunguri/T.172 as per the sale agreement as it was duly and legally sold to him.
- b) A permanent injunction restraining the Defendant from in any way interfering with the Plaintiffs land.
- c) An Order for the cancellation of the title with number Loc. 5/Githunguri/T.172 registered under the name Humphrey Kinyanjui.
- d) An Order for the Plaintiff for the immediate transfer of the said property to the Plaintiff to effect completion of the agreement.
- e) Interest and cost of the suit.

2. The Plaintiffs claim against the Defendants is in pursuance to an agreement of sale entered between the parties on 16/9/11 for the purchase and sale of a portion of 0.052Ha. of Loc. 5/Githunguri/T.172 at an agreed purchase price of Kshs. 120,000/= . That a deposit of Kshs. 80,000/= was paid leaving a balance of Kshs. 40,000/= payable on completion of succession proceedings and transfer of the title to the Plaintiff.

3. The Defendants are said to be beneficiaries of the estate of Humphrey Kinyanjui (deceased), the registered owner of the whole suit land measuring 0.13 Acres. A copy of the certificate of search dated 16/9/11 is enclosed.

4. It is the Plaintiffs case that despite notice and demand issued on 17/5/17, 3/4/17 and 22/3/16 the Defendants have refused, reflected and ignored to transfer the suit land to him and hence this suit.

5. That it was a term of the contract that upon receipt of Kshs. 80,000/= the Defendants would complete the succession process of their late father's estate which comprised the suit land. That thereafter they became reluctant to so initiate the process even with the intervention of the local chief. That instead the Defendants through the law firm of Wangari & Company purported to make a refund of Ksh. 80,000/= on 30/3/16 which he has declined to receive. He claims that the agreement has been breached by the Defendants.

6. The Defendants filed a defence and counter claim on 24/7/17 opposing the Plaintiffs claim. They aver that the Plaintiff introduced them to a fake Advocate whom they paid Kshs. 25,000/= yet he did not commence the succession proceedings. That they have no legal capacity to meet the obligations in the agreement of sale on account of lack of letters of grant of administration to deal with the deceased property. They have counterclaimed for Kshs. 41,360/= being expenses incurred in paying the unqualified lawyer inter alia, as well as mesne profits.

7. On 27/1/17 both the Defendants and their Advocate were absent in Court despite being served on 25/9/17. See acknowledgement by the firm of Wangari & Co. Advocates on record. The Plaintiff proceeded to testify solely and informed the Court that he was not calling his other two witnesses despite filing written witness statements.

8. At the hearing the Plaintiff stated that on 16/9/11 he entered into an agreement of sale with the Defendants for the purchase of 0.05 acres of the suit land. That the purchase price was agreed at Kshs. 120,000/= whereupon he paid Kshs. 80,000/=. That it was a term of the agreement that the balance would be paid upon obtaining letters of grant of administration for the estate of the Defendants father Humphrey Kariuki who was still the registered proprietor of the suit land. That the transfer process was also to be undertaken and completed before the final balance of Kshs. 40,000/= was paid. That the Defendants breached the agreement by failing to fulfil their obligation and instead sought to refund the deposit of Kshs. 80,000/= which he has declined severally to accept. He maintained that the Defendants have breached the agreement and urged the Court to grant his prayers in the plaint.

9. The Plaintiff filed written submissions which he reiterated his evidence in chief. On 14/12/17 when the matter came up for hearing the Defendants Advocate sought the leave of the Court for more time to file written submissions. The Court granted leave to file written submissions by 21/12/17. It is noted that there are no written submissions filed by the Defendants on record as I write the Judgement.

### **Determination**

10. From the record and the evidence adduced the following are admitted;

- a) That the parties entered into agreement on the 16/9/11.
- b) That Kshs. 80,000/= was paid and acknowledged by the parties being the deposit.
- c) That the suit land being purchased was a portion measuring 0.05 acres to be exercised from LR No. Loc. 5/Githunguri/T.172.
- d) That the land is owned by Humphrey Kinyanjui, deceased.
- e) That no letters of grant of administration have been obtained on the estate of the said Humphrey Kinyanjui.

11. It is also on record that the Plaintiffs case is undefended. Save for filing defence the Defendants did not defend their case and prosecute their counterclaim when the matter came for hearing notwithstanding service. He who alleges must prove. The onus of proof rests with the Plaintiff even in the face of ex parte hearing such as this one.

12. The issue for determination is one: is there a valid agreement for sale? It is on record and admitted by

the parties that the suit land is a portion measuring 0.05 acres of LR No. Loc. 5/Githunguri/T.172 registered in the name of the Defendants father (deceased). It is also admitted that the parties purported to enter into an agreement of sale before letters of grant of administration in respect to the estate of the deceased which comprised the suit land, was sought and obtained from the Court. Indeed, the Defendants stated in their defence that the reason they were selling the portion of the land to the Plaintiffs was to enable them obtain funds to finance the process of succession of their deceased father's estate.

13. Section 45 of the Law of Succession Act, Cap 160 is very clear. It states as follows:-

“No intermeddling with property of deceased person

(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”.

The Act criminalizes any intermeddling with the deceased assets and the person so guilty of intermeddling is liable to a fine not exceeding Kshs.10,000/= or imprisonment not exceeding one year or both fine or imprisonment. The purpose of this section is to protect of the deceased property from being wasted or dissipated by unauthorized persons before the legal representatives are appointed. It seeks to protect the rights of the true beneficiaries of the estate of the deceased.

14. Guided by the above section, it is clear that the parties dealt with the suit property in a manner not permitted by any law; that they held no letters of grant of administration over the administration of the estate of the deceased. Consequently my holding is that the Defendants had no legal capacity to enter into this agreement of sale. They are unauthorized. The agreement is therefore null and void for all purposes. It did not convey any valid interest to the Plaintiff.

15. It is on record that the Plaintiff had knowledge of the incapacity of the Defendants to so transact. Indeed it is the Defendants who have blamed him for misdirecting them to a quack Advocate to process the Succession proceedings. The Plaintiff on his part claims that the Defendants were reluctant to process the succession proceedings and he had to move the chief of the area to issue a letter to the Defendants directing them to file for Succession. In any event it was a term of contract on clause 3 that the vendors will file Succession Cause in respect to the deceased estate to facilitate the transfer of a good title to the Plaintiff. The parties knew they had no capacity and that at the time of the contract they did not have any good and proper title to pass to the Plaintiff.

16. The wording of Section 45 of the Succession Act is couched in mandatory language. Lord Denning in the celebrated case of **Majoy vs United African Ltd (1961)3 ALL ER 1169, 1172** had this to say;

“if an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad....And every proceeding which is founded on it is also bad and incurably bad. It will collapse”.

The agreement is invalid. It is incurably bad. This is very prevalent with most rural folks who as soon as the parent dies, begin selling the land before obtaining letters of grant of administration. It is intermeddling with the deceased estate. The law abhors it.

17. In view of the above the Plaintiffs prayer for specific performance falls on the face. **Chitty on contract 30<sup>th</sup> Edition, Vol. One on Para 27-003** states;-

“The jurisdiction to Order specific performance is based on the existence of a valid enforceable agreement.....it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality which makes the contract invalid or unenforceable”.

In view of my holding above, specific performance is not available to the Plaintiff. His claim fails. I note that the Plaintiff has not included an alternative prayer of refund of the purchase price. The Court can only grant orders prayed for.

18. Consequently, the counter claim of the Defendants also suffers the same fate as that of the Plaintiff's claim.

19. In the end the Plaintiffs claim fails in it's entirety and is hereby dismissed.

20. Each Party to bear their own costs.

**DATED, DELIVERED AND SIGNED AT MURANG'A THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2018.**

**J G KEMEI**

**JUDGE**