



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO 390 OF 2017

CHARLES NJIHIA NDUNG'U.....PLAINTIFF

VS

MERCY WAMAITHA KABURI.....DEFENDANT

JUDGMENT

1. The Plaintiff claims a purchaser's interest over a plot measuring 100ft by 100ft out of parcel of land known as Loc.1/MUKARARA/638 (herein referred to as suit land). which he claims to have purchased for a sum value of Kshs.100,000/=.
2. The Plaintiff in his plaint filed in person dated 5/6/17 has sued the Defendant for the following reliefs;-
 - (a) The Defendant be ordered to transfer a plot measuring 100 X 100ft out of land parcel No. Loc.1/MUKARARA/1638.
 - (b) In the ALTERNATIVE the Defendant be ORDERED to pay the Plaintiff Kshs.100,000/= plus interest at 20% as from date of this agreement until the same is paid in full.
 - (c) Any other and further orders necessary in the circumstances of this suit in furtherance of fair justice.
 - (e) Costs of the suit.
3. The Plaintiff avers that the Defendant is sued in her capacity as the personal administrator or next of kin of the late Francis Muturi Muhia and also in her capacity as a co-vendor in respect of an agreement dated 3/12/09 between the Plaintiff herein and the Defendant's late husband.
4. In a nutshell the Plaintiff's claim is that on or about the 3/12/09 he entered into a sale agreement with one Francis Muturi Muhia (now deceased) for the purchase of the suit land at a consideration of Kshs.100,000/=which was paid in full albeit in installments. He claims that the Defendant herein was privy to the said contract and that she personally received some of the monies that were paid towards the purchase price. That the Defendant's husband passed on before the said plot (suit land) was excised from the main parcel of land and before the transfer to the Plaintiff had been done. That it was always the intention of the deceased to honour his obligations under the said sale agreement. The Plaintiff claims that the entire family of the deceased were aware of the said sale and it was his reasonable expectation that the Defendant herein would discharge the obligations of her husband after his death as the administrator of his estate, in an unexpected turn of events the Defendant has now refused to transfer the suit land to the

Plaintiff and or refund the purchase price to him. He avers that the suit has been arbitrated upon by the local authorities of their area and the Defendant was directed to honour the contractual obligations of her husband but has refused to do so.

5. The suit is opposed as the Defendant entered appearance on 20/6/17 and later filed her defence in person on the 5/7/17. In her defence the Defendant admits that she is the personal representative/next of kin of her late husband and denies that she was privy to the alleged sale agreement between the Plaintiff and her late husband and dismisses the sale agreement as a forgery. She claims that a caution had been placed over the suit land on 2/12/09 therefore there is no way the sale would have happened on 3/12/09 as alleged. She denies having received any share of of the purchase price as alleged. She avers that she was married to her late husband for 21 years before his demise and they were blessed with (8) eight children. That the suit land holds their matrimonial home and it is their only source of income and livelihoods for her large family. That the suit land is family land inherited by her late husband from her father in law and she never gave her consent to the alleged sale which is the reason she lodged a caution over the suit land.

6. The Defendant later instructed her advocates who entered appearance on 13/12/17 and filed a preliminary objection to the suit on the following grounds:-

(a) Prayer (a) of the plaint cannot be granted as no Land Control Board consent was obtained as provided for under section 8 of the Land Control Act before expiry of six (6) months from date of the sale agreement.

(b) Prayer (b) of the plaint is statutory time barred under section 4(1)(a) of the limitation of Actions Act the cause of action having arisen on 3/12/09 and the suit having been filed on 6/6/17.

(c) The Defendant lacks locus standi to be sued as she has been sued in her personal capacity instead of the legal representative and/or administrator to the estate of Francis Muturi Muhia.

7. At the time the Defendant's advocates came on record the Plaintiff's case had proceeded for hearing on 13/11/17 with five witnesses testifying, counsel then opted to canvas the preliminary objection in the hearing and written submissions.

8. The Plaintiff testified that the Defendant and her late husband were his relatives. That they had initially leased to him the suit land from the year 2007 – 2011 at rate of Ksh.12,000/= and that he later entered into an agreement with both the Defendant and her husband for purchase of a plot measuring 100 X 100ft from the suit land at the price was Kshs.100,000. That the purchase price was paid in installments of Kshs.5, 000/= on 30/12/09, Kshs.47,000/- on 5/1/10 and a balance of Kshs.53,000/= was paid on 3/12/10. That later he conducted a search and learnt that the land had been cautioned by the Defendant, he engaged the local chief to mediate on the dispute and the Defendant later refused to remove the caution. He claims that the sale agreement was executed before an advocate in the presence of the Defendant. He denied that he unduly influenced the deceased into making the sale and avers that there was no secrecy in the said transaction.

9. PW2 who is an uncle to the Plaintiff and brother to the deceased confirmed his knowledge of the sale agreement between the Plaintiff and deceased. He testified that the dispute arose when the Plaintiff realized the suit land had been cautioned and the Defendant refused to remove the caution. He denied having any interest on the Defendant's land, stated that he did not sell his brother's land and that all his siblings had been allocated land. He confirmed he was aware that the Plaintiff paid Kshs.27, 000/= to the Defendant's husband to facilitate subdivision which was to be incorporated into the purchase price.

10. PW3 the area chief testified that he was aware of the dispute. That the dispute had been handled by his predecessor who passed on. From the file at his office relating to this case there was a lease agreement dated 27/2/07 and a sale agreement dated 3/12/09. That the parties to this suit came to his office and they had promised to resolve the issue as the Defendant agreed to remove the caution but later refused to do so.

11. PW4 who was a member of the community paralegal network component confirmed that the dispute herein had been arbitrated upon by their group in an attempt to alternative dispute mechanism.

12. In defence the Defendant testified that she is the wife of Francis M. Muhia who died on 4/4/11 and that the suit land is registered in her late husband's name. That succession to her late husband's estate has not yet been done. That she was not aware that the land was sold and was not a party to the sale agreement neither did she receive any monies in respect to the sale of the suit land. She claims that the signature on the acknowledgement dated the 5.1.2010 is forged. She claims on learning of the intended sale she lodged a caution on the suit land to protect her interest in the family property. She relied on the official search certificate dated 4/1/17 which shows the caution was lodged on 2/9/09.

13. In cross examination she firmly denied having received any money for the sale agreement. That the signature on the acknowledgment was not hers. That she never appeared before the chief who testified.

14. In re-examination she confirmed that she is in occupation and use of the suit land. That she learnt of the alleged sale when it had already happened. That her husband was not involved in any land dispute during his lifetime. That her consent was never obtained.

15. The Plaintiff in his submissions reiterates that the Defendant was always involved in the transactions dealing with the sale of the suit land. That the Defendant was a party to the sale agreement. That the Defendant had agreed to refund the purchase price before the area chief. That he had produced documentary evidence in support of his claim in form of sale agreement and acknowledgment notes for the total purchase price.

16. The Defendant submitted that the sale agreement produced was between two individuals and that is the purchaser and the deceased Francis Muturi Muhia as the vendor, and executed by the two only. That the Defendant challenged the acknowledgement dated 3/9/10 bearing her signature and avers that she never appeared before the alleged advocate and never signed the agreement. She faults the Plaintiff for failing to call the advocate who testified to the sale agreement despite being listed as one of the witnesses in this case. That she never gave her consent to the sale of her matrimonial home. That the Defendant is not the legal representative of her deceased husband's estate and she was not party to the sale agreement therefore the Plaintiff has no locus standi to sue the Defendant. That consent of the Land Board was not obtained within the stipulated time hence the sale agreement is void. That the sale agreement relied on was made over 6 years before the suit was filed hence the cause of action is statutorily time barred.

Determination

17. There are issues of law that need determination. Does the Plaintiff have locus to sue the Defendant? The Plaintiff avers that the Defendant is sued in her capacity as the personal representative of her deceased husband and in her own capacity as the co- vendor in the alleged sale in its paragraph 3 and 4 thereof. In her statement of defence the Defendant denies that she is the legal representative of her late husband's estate and through her advocates she has raised a preliminary objection in that regard. There was no evidence tabled by the Plaintiff to show that the Defendant had been so appointed as the legal representative of the deceased's estate.

18. Section 2 of the Civil Procedure Act a "legal representative" is defined as

"a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued".

19. In addition, section 82 of the Law of Succession Act provides that ;

".....it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased."

Further a personal representative is defined under section 3 of the said Act as the ;

“...executor or administrator, as the case may be, of a deceased person”.

20. In **Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) (2016) eKLR A.C. MRIMA J.** was of the view that:-

“13. Under section 2 of the Law Reform Act and Section 4 of the Fatal Accidents Act, the person who is entitled to bring a cause of action in respect to the estate of a deceased person is a personal representative or an executor or administrator respectively. In that case such a person ought to first obtain an appropriate grant so as to have the necessary locus standi. (See the Court of Appeal cases of **Virginia Edith Wamboi vs. Joash Ochieng Ougo & Another (1982-88) 1 KAR** and **Trouistik Union International & Another vs. Jane Mbeyu & Another, Civil Appeal No, 145 of 1990**). The grant may be a full grant or a limited grant.

Further the learned judge held that:-

“ 28...Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

21. From the above a legal representative to an estate of a deceased must be appointed by a Court of law which must be proved by way of documentary evidence in form of grant of letters of administration ad litem or final. It is not automatic that the wife of a deceased person becomes a legal representative to the deceased husband. The Plaintiff herein seems to have made a presumption that the deceased's wife automatically became the legal representative of the deceased. She is therefore sued wrongly before the Court.

22. Secondly the Plaintiff avers that the Defendant is sued in her personal capacity as the co-vendor in regard to the sale agreement That the sale agreement was produced in evidence by the Plaintiff a close examination of the same reveals that the sale agreement was entered and executed by the Plaintiff and the late Francis Muturi Muhia. There is nowhere in that agreement that says that the Defendant herein was a co- vendor as alleged. The name of the Defendant only appears in an acknowledgement note for part payment of the purchase price in which she is named as the witness, it does not say that she received the payment on behalf of her husband as alleged. The Defendant has firmly denied any knowledge of the alleged sale and claims she never appeared before the said advocate to witness the said agreement neither did she receive any payment in respect to the alleged sale. The advocate who witnessed the making and execution of the said sale agreement did not appear in Court to confirm if at all the Defendant actually appeared before him and if she received any payment in respect to the said sale. There is certainly no sufficient evidence tabled before me to show that the Defendant was a co-vendor in the alleged sale.

23. Under the common law doctrine of privity of contract, rights and obligations under a contract are only conferred or imposed on the parties to that contract. This doctrine was stated as long ago as 1861 by Wightman, J. in **Tweedle V. Atkinson** (1861) EWHCQB57 in the following oft-cited words:-

“...no stranger to the consideration can take advantage of a contract, although made for his benefit.”

24. **Halsbury's Laws of England**, 4th Edn. Vol. 9 (1) Para. 749 quoted in the Court of Appeal decision in **Aineah Liluyani Njirah V. Aga Khan Health Services** [2013] Civil Application No. 194 of 2009

states as thus:-

“The general rule: the destine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose strangers to it. That is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuation.”

25. The facts of this case and having examined the agreement of sale between the Plaintiff and the Defendants husband does not disclose any clause to support any trust, agency, collateral contract or express or implied term on behalf or to include the Defendant in the agreement.

26. The holding of this Court therefore is that there was no privity of contract between the parties to this suit in relation to the aforesaid agreement.

27. It would appear from the documents and evidence on record that the claim is stale by dint of section 4 (1) of the Limitation of Actions Act which states that actions founded on contract may not be brought after six years. The contract of sale was entered into in 2009. No evidence has been tendered before this Court to support extension of time. It is claimed in evidence that the said Francis Muhia died in 2001. No letters of administration of the said deceased have been obtained according to the evidence on record.

28. The evidence on record shows that the transaction related to a piece of land measuring 100 feet by 100 feet being a portion of the suit property. According to section 6 of the Land control Act any subdivision and or transfer of agricultural land is void unless consent of the land control board of the area in which the land is situate have been obtained. It is on record that no such consent was obtained and therefore the transaction for all intents and purposes would be null and void.

29. By now it is obvious that the preliminary objection succeeds and the suit fails. It is hereby dismissed with costs to the Defendant.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF MAY 2018.

J G KEMEI

JUDGE