



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 23 OF 2011

FATUMA H. GONJOBE.....APPELLANT

VERSUS

HALIMA FARA ABDI.....1ST RESPONDENT

MOHAMED FARA ABDI.....2ND RESPONDENT

MOHAMMUD FARA ABDI.....3RD RESPONDENT

CELTEL KENYA LIMITED.....4TH RESPONDENT

(An appeal from the judgment and decree in Isiolo

Civil Case No. 38 of 2017 dated 25/1/2011)

JUDGMENT

The Appellant's Case

1. The appellant filed a memorandum of appeal dated 23/2/2011 in which he raised the following grounds:-

1. The Learned Trial Magistrate erred in law and fact in not finding that the 1st respondent lacked capacity to institute suit and the grant of letters limited to filing suit on 21/01/2008 could not render valid the suit instituted on 3/10/2007. The suit was incompetent ab initio and proceedings a nullity.

2. The trial court erred in law and fact in not finding that the appellant was an innocent buyer without notice and for value and therefore to nullify sale was tantamount to depriving her property without prompt and adequate compensation

3. The court erred in law and fact in that holding that the 2nd and 3rd respondents were the rightful heir and rightful to dispose their shares and therefore the sale should not have been nullified to deprive the appellant interest she bought from the heirs.

4. The Learned Trial Magistrate erred in law and fact in not holding that the 2nd and 3rd respondents were colluding with their mother (3rd defendant) of the plaintiff to subvert justice.

5. The Magistrate erred in law and facts in accepting the alleged fraud while the complainant/1st respondent did not plead or prove the same.

6. The Trial Magistrate erred in law and fact in not holding that the 1st respondent's claim was an afterthought and conspiracy by 1st, 2nd and 3rd respondents to deprive appellant her rightful plot just because she purportedly refused to share proceeds from the 4th defendant/respondent.

7. The court failed to hold that the 1st respondent took ten (10) months from sale to the filing of the suit and after 4th defendant had already entered and developed the subject plot after the appellant leased to them six (6) months before on 1/02/2007.

8. The Trial Magistrate erred in law and fact in only ordering the 2nd and 3rd respondent to refund purchase price while the 2 are children of the 1st respondent and with no property save subject herein and also without considering the development by appellant therein contrary to law, constitutional and equity and sense of justice.

2. The appellant prayed for the appeal to be allowed with costs in this Court and the subordinate court.

3. The genesis of this appeal is the judgment and decree of the Principal Magistrate's Court at Isiolo in **Isiolo Principal Magistrate's Court Civil Case No. 38 of 2007.**

4. The facts of the dispute in the court below were as follows: the plaintiff (who is now the 1st respondent) filed a suit against the 1st defendant (who is now the appellant and the 2nd defendant (who is now the 4th respondent on the 3rd October 2007.

5. Subsequently an amended plaint was filed on 23/1/2008 in which the plaintiff named the 2nd respondent, the 3rd respondent, the appellant, and the 4th respondents as defendants in that order. The plaintiff also filed a further amended plaint. The only main addition to that further amended plaint is that the name of the 4th defendant changed from Celtel K Ltd to Zain K Ltd.

6. In that amended plaint the plaintiff sought a permanent injunction against the defendants their servants agents and or legal representatives from in any way interfering with the plaintiff's peaceful and quiet occupation of the premises known as **Plot No. 26 Modogashe Township Sericho Division Isiolo District**, a declaration that the sale of that plot by the 1st and 2nd defendants to the 3rd defendant and eventually to the 4th defendant was fraudulent, null and void and the same be cancelled and costs of the suit.

7. The plaintiff expressed herself to have brought the suit as "**the legal representative of the deceased Farah Abdi**" who was survived by the plaintiff and eight children and who left behind the suit land which is a plot measuring 50 feet by 100 feet which was developed with residential houses thereon. The plaintiff alleged that the 1st and the 2nd defendant illegally and fraudulently attempted to sell the suit land to the 3rd defendant by at the time of the filing of the amended plaint it was said that the sale had fallen through due to opposition by the family members. The plaintiff averred that under *sharia* law she was entitled to inherit the suit land for her benefit and also for the benefit of her children.

8. The 1st and 2nd defendants filed a joint defence on the 6th October 2003 and later filed an amended defence on 23/3/2010 in which the name of the 2nd defendant was omitted. Thus the defence was only in respect of the 1st defendant. In that amended defence the 1st defendant averred that the suit land belonged to their father. She also admitted that the sale transaction had fallen through and that the plaintiff and her children were entitled to the suit land as an inheritance. The 1st defendant denied that the sale of the land by the 3rd defendant was illegal and averred that the agreement for sale was entered into out of ignorance of the law and that the 1st defendant would be ready to rescind it and have the 3rd defendant refunded the purchase price.

9. The 3rd defendant filed an amended defence on 15/12/2009 in which she pleaded as follows: that the 1st and 2nd defendants are brothers and sons of the plaintiff; that the suit land belonged to the deceased, that there were no residential houses on the suit land as at the date of the deceased's demise, that she purchased the suit land from the 1st and 2nd defendant who she states were the rightful heirs under Islamic law and custom, that the sale to her was approved by the plaintiff and her other children, that the sale was approved by the County Council of Isiolo, that the plaintiff applied the proceeds of the sale by the 1st and 2nd defendants to construction of a house elsewhere, that she has renovated the dilapidated houses on the suit land at great expense and that the plaintiff and her children only objected to the sale out of envy after the 3rd defendant leased the land to the 4th defendant and refused to share the proceeds of that lease with the plaintiff. She denied that the plaintiff is entitled to the land under *sharia* law and added that the suit land had already been inherited by the plaintiff and her children and that the plaintiff and her children had willingly agreed to sell the land to her. She defended her lease of the land to the 4th defendant saying that it was borne out of the 4th defendant's ascertainment that the land was hers. She also averred that the 4th defendant is using a telecommunications mast erected by Celtel Kenya Ltd unlawfully and without any lease agreement and the 4th defendant's use of the land should be terminated. It was her view that the joinder of the 1st and 2nd defendants was merely a smokescreen to conceal the falsity of the plaintiff's claim, that the plaintiff has not come to court with clean hands and that the suit should be dismissed with costs.

10. It is with the above detailed history of the pleadings in the trial court that the appeal now before this court should be considered.

11. The grounds of appeal can be summarized into the following:

a. That the 1st respondent did not have capacity to institute the suit in the trial court for want of letters of administration.

b. That the sale by the 2nd and 3rd respondents was proper as the 2nd and 3rd respondents were the rightful heirs and the nullification of the sale was therefore wrong;

c. That there was collusion between the 1st 2nd and 3rd defendants in order to subvert justice due to the appellants refusal to share the proceeds of the lease with them;

d. That the trial court erred in ordering a refund of the purchase price in view of the fact that the 2nd and 3rd respondents are children of the 1st respondent who own no property.

e. That there was no pleading or proof of fraud yet the trial court ruled that there was fraud.

In my view, the first ground alone, if found to have merits, is sufficient to dispose of this appeal.

Determination

12. It is evident that though the trial court dwelt on the issue of whether the 2nd and 3rd respondents herein had good title to transfer the land to the appellant, I believe that the issue of jurisdiction looms larger than the issue of title, for a court of law can only delve into the other matters after ascertaining that it has jurisdiction to determine them.

13. It is now clear that letters of administration were not obtained by the 1st respondent before the filing of the claim before the trial court. The appellant's submissions on this issue in the trial court were that the plaintiff sued as the legal representative of the plaintiff and that she had never obtained a grant of letters of administration in respect of the deceased's estate either from the High Court or from the Kadhi's court.

14. It was the submission of the appellant at the trial that letters were necessary. The grant was only obtained in the year 2008 after the suit was filed. The appellant submitted that the suit must fail for this reason.

15. Ironically it is the 1st respondent herein who accused the 2nd and 3rd respondents of intermeddling with the estate of her deceased husband, and who submitted that **"...it is clear law that section 45 of the succession act (sic) prohibits any dealings with the estate of a deceased person without first taking out succession proceedings. (sic)"** It is this same issue of want of grant of letters of administration which has come to haunt the 1st respondent in this appeal.

16. In **Emilio Mputhia Mutiria v Basilio Gitonga Kirimi Sebastian & 4 others [2017] eKLR** the court was faced with an objection to a suit on the basis of want of letters of administration. The plaintiff responded by stating that he had brought the suit to court on behalf of himself and not on behalf of his deceased father. He, therefore, told the court that the plaintiff had no duty to take up letters of administration before filing this suit. The court considered the matter and found that the suit was incompetent. It stated as follows:

"22. By law and by precedent as has been eruditely elaborated by the case of TROUSTIK UNION INTERNATION & ANOTHER (APPELLANTS) AND MRS JANE MBEYU & ANOTHER (RESPONDENTS) (op.cit) for a litigant to file a suit concerning the property of a deceased person, letters of administration must be obtained. In this case, the plaintiff has not done so. It, therefore, means that this suit is improperly before this court. This finding confirms that the defendants' Preliminary Objection has raised a pure point of law.

23. I do find that ground 2 of the Preliminary Objection raises a pure point of law which requires this court to dismiss this suit outrightly. I do not find the need to deal with the other grounds of opposition."

17. Emphasis of the fact that a grant of letters of administration is required to enable a plaintiff to file a suit on behalf of a deceased's estate was made in **Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR (Migori Civil Appeal No. 119 Of 2015)** observed as follows:

"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."

18. In contradistinction with the situation herein where no grant of letters were obtained before suit, the Court in the **Julian Adoyo Ongunga** case dealt with the issue of whether a grant that was issued for the purpose of **"....only of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same and until further representation be granted"** could enable the holder to institute a claim on behalf of a deceased person and held that it could not be so used. I think the last cited case underlines the importance not only of obtaining a grant, but of obtaining the proper grant for a certain purpose.

19. In the light of the above analysis, I am of the view that there is merit in the ground and the submission that the 1st Respondent lacked the *locus standi* in the suit in **Isiolo Principal Magistrate's Court Civil Case No. 38 of 2007**.

20. Had the merits of this ground been explored by the trial court there would have been no need to rule on the rest of the issues as the court would have realized and ruled that it had no jurisdiction.

21. I therefore find that this appeal has merit and order as follows:

a). The appeal be and is hereby allowed;

b). The judgment and decree of the trial court in Isiolo Principal Magistrate's Court Civil Case No. 38 of 2007 be and is hereby set aside and is substituted with an order striking out the said Isiolo Principal Magistrate's Court Civil Case No. 38 of 2007

c). The 1st and 2nd respondents shall bear the costs of this appeal as well as the costs of the suit in Isiolo Principal Magistrates Court Civil Case Number 38 of 2007.

It is so ordered.

Dated and signed at Kitale this 15th day of June 2018.

MWANGI NJORGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 28th day of June, 2018.

MWANGI NJORGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

In the presence of:

C/A Janet/Galgalo

Muchiri holding brief for Ms. Kiome for Appellants

1st and 3rd respondent present in person

N/A for the 2nd respondent

N/A for the 4th respondent