



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 164 OF 2014

FAUSTINE OMWANDA KWEYU.....PLAINTIFF

VERSUS

CAROL MAJUMA WANYONYI..... DEFENDANT

AND

TERESA MUTENYO KWEYU.....THIRD PARTY

J U D G E M E N T

INTRODUCTION

1. The plaintiff and the third party are wives of the late **Remigius Kweyu Lubale** (deceased) who died on 18/7/2010. The deceased was the registered owner of **LR. No. Waitaluk/Mabonde Block 2(Machungwa) 119** measuring **1.73 hectares** (suitland). The suitland is now currently registered in the plaintiff's name with her son **Nicholas Lumbasa**.

2. On 7/1/2012, the third party sold two acres of the suitland to the defendant at a consideration of **Kshs.1,040,000/=**. The process of succession in respect of the estate of the deceased had not been carried out. The third party then transferred the suitland into her name. When the plaintiff discovered that the third party had transferred the suitland into her name, she went and coerced her into transferring the suitland into her name and that of her son Nicholas Lumbasa.

3. As the suitland had been sold to the defendant, the plaintiff moved to court and filed this case in which she claims the following reliefs:-

(a) A declaration that the sale agreement between the defendant and Teresa Mutenyo Kweyu is null and void for want of land control board consent and for violation of mandatory provisions of the Law of Succession Act Cap 160 Laws of Kenya.

(b) A declaration that the defendant is only entitled to a refund in respect of the abortive land sale transaction.

(c) A permanent injunction restraining the defendant from interfering with land parcel No. Waitaluk/Mabonde Block 2(Machungwa) 119 in any manner whatsoever.

PLAINTIFF'S CASE

4. The plaintiff testified that when she discovered that the third party who is her co-wife had secretly sold

two acres of family land to the defendant, a family meeting was held in which the third party agreed that she had indeed sold two acres of the suitland to the defendant. It was agreed that the third party was to transfer the suitland into the name of the plaintiff and her son and that the plaintiff was to refund the purchase price to the defendant.

5. The defendant demanded a refund of the purchase price with interest of 10% which was not acceptable to the plaintiff. The defendant persisted on having the land after the abortive negotiations forcing the plaintiff to file this suit.

DEFENDANT'S CASE

6. The defendant testified that she bought the suitland from the third party on 7/1/2012. This is after the third party had assured her that though the suitland was in the name of the deceased, the deceased had given it to her as her share. The third party even showed her a copy of the deceased's will showing how he had distributed his properties amongst his wives.

7. The third party promised to transfer the suitland into her name once the process of succession was undertaken. The defendant later discovered that the third party had transferred the suitland into her name. She went and reported the matter to the chief of Sirende who summoned the third party and the plaintiff's family. The plaintiff attended the first meeting where the parties failed to reach an agreement. This was because the defendant wanted refund of the purchase price together with 10% interest. The chief called two other meetings which the plaintiff did not attend. The chief then gave the defendant a go ahead to fence the suitland. The plaintiff's son started issuing death threats against her. She went and registered a caution against the title to the suitland.

THIRD PARTY'S CASE

8. The third party stated that when their husband died, the task of distributing the deceased's property was given to the plaintiff. The suitland was given to her. This is after she had given one acre of the suitland to the plaintiff. She had been given a property in Kitale town. The property was put up for sale due to rates arrears. She decided to sell two acres of the suitland to the defendant. She later processed transfer of the suitland from the deceased's name into her name. When the plaintiff discovered what she had done she came and forced her to sign transfer forms into the plaintiff's name and that of her son.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

9. This is an interesting case which shows the extent to which our institutions have rotten. Here is a property of a deceased which is transferred from his name into the name of someone else without succession having been carried out. I have gone through the submissions by counsel for the parties herein as well as evidence adduced and the exhibits produced.

10. There is no contention that as at the time the third party sold the suitland to the defendant, no letters of administration or probate had been taken out by any of the deceased's family. The third party admitted in her evidence that she went to the lands office where she was assisted by someone to change into her name. This is despite the fact that she had already sold two acres of the suitland to the defendant.

11. There is also no contention that there was no consent of the land control board which was obtained. A deceased person could not have come out of his grave to apply for such consent. The plaintiff was not privy to the contract between the defendant and the third party. The issue which then arises for determination is whether a person who is not a party to a contract can seek to benefit from the same or seek to enforce it. The other issue for determination is whether a party can seek to benefit from a transaction which is carried out illegally especially when such illegality is brought to the attention of the court.

12. The above two issues are intertwined and can be dealt with together. There is no doubt that the transaction between the defendant and the third party is null and void for want of consent of the land

control board. There are so many decisions of the Court of Appeal on this position. This includes the decision in *David Sironga Tukai and Francis Arap Muge & 2 Others [2014] eKLR* which was cited by counsel for the plaintiff.

13. The transaction between the defendant and the third party also violated the provisions of the Law of Succession Act. **Section 45 (1) of the Law of Succession Act** provides as follows:-

“Except as expressly authorized by this Act or any other written law or by 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”.

14. The third party had not obtained grant or probate in respect of the estate of the deceased. She therefore had no power to sell or transfer the suit property into her name. What she did is null and void and any consideration which the defendant paid to her can only be recoverable as a debt from the third party. The plaintiff cannot purport to ask the court to allow her to refund the purchase price as she was not privy to the contract between the defendant and the third party.

15. The transfer of the suitland into the name of the third party and thereafter to the plaintiff and her son was unprocedural. The plaintiff is the one who is now registered as owner of the suitland together with her son. The plaintiff is now seeking to derive benefits from a process which was flawed from the beginning. A court of law cannot allow a party to benefit from an illegal process especially the where illegality is brought to the attention of the court.

16. The transfer of the suitland from the third party into the plaintiff cannot sanitise the process which was a nullity ab initio. What the plaintiff is seeking to achieve through this suit cannot be sustained because she was not party to the contract between the defendant and the third party. She cannot seek orders nullifying the contract for which she was not a party to. In the case of *Rose Ayuma Musawa and Mathias Onyango Tabuche Civil Appeal No. 321 of 2014* the Court of Appeal Judges had this to say regarding the doctrine of privity of contract:-

“The doctrine of privity of contract proposes that a contract cannot confer rights or impose obligations on any person other than the parties to the contract and therefore it is not capable of being enforced by a third party. In *Dunlop Pneumatic Tyre Co. Ltd -vs- Selfridge & Co. Ltd [1915] ac 847*, Lord Haldane LC stated this:-

“My Lords, in the Law of England certain principles are fundamental, one is that only a person who is a party to a contract can sue on it”.

The case of *Agriculture Finance Corporations -vs- Lengetia 1982 - 1988 1 KAR 772* in addressing the issue stated thus:-

“As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party even if the contract is made for his benefit and purports to give him the right to sue or make him liable upon it. The fact that a person who is a stranger to the consideration of the contract stands in such relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract”.

17. It is clear from the prayers in the plaint that the plaintiff is seeking orders touching on a contract where she was not a party. She is also seeking to derive a benefit from the same contract where she was not a party. She cannot seek to nullify that which she was not party to or seek to refund money which was not paid to her. Equally she cannot benefit from an injunction flowing from a contract to which she was not a party.

DECISION

18. For the reasons given hereinabove, I find that the plaintiff's suit is misconceived. It is hereby dismissed with costs to the defendant only.

Dated, signed and delivered at Kitale on this **20th** day of **January, 2017**.

E. OBAGA

JUDGE

In the presence of Mr Khisa for defendant, Mr Chebii for Mr Samba for Plaintiff and mr Bororio for third party.

Court Assistant: Isabellah.

E. OBAGA

JUDGE

20/1/17