



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC LAND CASE NO. 165 OF 2013**

**AURTHUR NGUGI MBUGUA**

**SAMSON KAMAU MBUGUA**

**MICHAEL MURIITHI MBUGUA (Suing as the administrators  
of the estate of the late JOTHAM MBUGUA MWENJA...PLAINTIFFS**

**-VERSUS-**

**SAIDI JADI KONGO**

**ESHA HARUN KINGUNGE.....DEFENDANTS**

**JUDGEMENT**

1. The three plaintiffs filed this suit against the two defendants vide their plaint dated 2<sup>nd</sup> August 2013. In the plaint, they sought for judgement to be entered against the defendants in the following terms:

- a) For a declaration that plot Title No. MSA/MS/I/1537 forms part of the estate of the late JOTHAM MBUGUA MWENJA and that it was therefore not available for sale until succession is completed.
- b) For a declaration that the sale agreement between the 3<sup>rd</sup> plaintiff and the Defendants as far as it relates to Title No. MSA/MSI/1537 does not affect any rights enjoyed by the beneficiary to that property.
- c) For a declaration that the sale of Title No. MSA/MS/I/1537 by the 3<sup>rd</sup> plaintiff to the Defendants was illegal, unlawful and therefore null and void.
- d) For a declaration that the Defendants remedies (if any) arising from the sale of Title No. MSA/MS/I/1537 lies against the 3<sup>rd</sup> plaintiff.
- e) A permanent injunction restraining the Defendants or any of them either by their servants, agents or employees from constructing, developing, trespassing, occupying or in any other manner dealing with plot Title No. MSA/MS/I/1537.
- f) An order compelling the Defendants to demolish the improvements they have put on plot

**Title No. MSA/MS/I/1537 and carry away the debris and building materials at their cost.**

**g) Damages and interest against both Defendants.**

**h) Costs of and incidental to this suit.**

2. Upon being served with the plaint, the defendants filed a joint statement of defence dated 16<sup>th</sup> August 2013. In it, the defendants denied the plaintiffs' claim stating inter alia that the 3<sup>rd</sup> plaintiff had indicated to them that he was the sole beneficiary of the suit property which belonged to his late father. That the 3<sup>rd</sup> plaintiff undertook to pursue the letters of administration and subsequently transfer the property to them as per the terms of the sale agreement. Further that the defendants were unaware of other beneficiaries to the suit property until they started building in the year 2010. According to the defendants, the 1<sup>st</sup> plaintiff and another beneficiary has in mind a buyer who has offered to purchase the suit property for a huge sum of money. They urged the Court to dismiss the plaintiffs' case with costs.

3. After pleadings closed parties proceeded to present their oral evidence. The 1<sup>st</sup> plaintiff is the one who testified in support of the suit. The defendants on the other hand called three witnesses two of whom were the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs. The evidence adduced in summary is as follows. The suit property MSA/MS/I/1537 is registered in the name of Jotham Mbugua Mwenja – deceased.

4. The 1<sup>st</sup> plaintiff testifying on 7.7.15 stated that Jotham Mbugua Mweja is his father and he died intestate in 2005. He gave his evidence as an administrator of the estate of his father having authority of his co – plaintiffs. He produced the consent signed by the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs as Pex 1, certificate grant of letters of administration as Pex 2. The 1<sup>st</sup> plaintiff continued that his father died leaving 20 siblings and 2 wives as listed in the petition made in the succession case which he produced as Pex 3.

5. The 1<sup>st</sup> plaintiff continued that after his father died, they took a while before sharing his properties. During this period, the 3<sup>rd</sup> plaintiff sold the suit property to the defendants. That he learnt of it but could do nothing because they had not taken the grant of his father's estate. On 18.7.2010, they sat as a family with minutes of that meeting being recorded and produced as Pex 4. The 1<sup>st</sup> plaintiff states that the sale by the 3<sup>rd</sup> plaintiff was fraudulent because; of lack of letters of administration, they were not informed nor was the money shared to them. The witness continued that they tried to resolve the matter amicably by offering to refund the defendants but the defendants rejected the offer. It is the 1<sup>st</sup> plaintiff's case that this property should be inherited by the 3<sup>rd</sup> house. He asked the Court to declare that the suit property was not available for sale and grant the orders in the plaint.

6. Put to cross – examination by Ms Jadi advocate for the defendants, the 1<sup>st</sup> plaintiff said the consent signed by the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs was for purposes of filing this suit. Sampson is the son to the 1<sup>st</sup> wife while Michael is the son of the 2<sup>nd</sup> wife. The suit property is separate from where their homestead is. He learnt of the sale through his mother in 2009 and asked Michael to confirm. That Michael confirmed he had sold except he had received partial payment. That at the time of filing the succession cause in 2012, they were aware the property had been sold. That in their meeting of July, they agreed the suit property be given to the 3<sup>rd</sup> house although in the certificate of grant it has not been distributed the reason being the pendency of this case. That they offered to refund the money because it was against their wishes. He denied consenting to the sale. The plaintiff's case was closed with this evidence.

7. The defendants began their testimony on 23<sup>rd</sup> January 2017. The 1<sup>st</sup> defendant Said Jadi Kongo testified as DW 1. He adopted his statement filed in Court on 16<sup>th</sup> September 2013. He told Court that Michael (3<sup>rd</sup> plaintiff) was taken to his house by Rahab on 19.12.09. Michael said he had a property he wanted to sell. DW 1 went to the plot and viewed it. Thereafter accompanied by Rahab and village elders they went to see Michael. That Michael's children and step-mother were present with the step-mother confirming the plot belongs to Michael.

8. DW 1 continued that they entered into a sale agreement which he produced in evidence as Dex 1. The agreed price was Kshs 850000 which he paid in two installments. DW 1 said he was given the original title which bore the name of Jotham Mbugua Philip Mwenja – deceased. He was told that Michael had been given plot No 1536 which he exchanged with his step-mother for plot No 1537. He began to develop the plot in 2010 but his fundis were stopped by the sep-mother. He produced copy of the title to the suit property as Dex 2.

9. He reported the matter to the village elder who summoned the step-mother & Michael. During this meeting Michael assured him that after they finish the succession process, the transfer would be made to him. Later he heard the case was finished and DW 1 went on with the construction but was again stopped by a call from Michael's brother (1<sup>st</sup> plaintiff) in July 2013. Subsequently in August of 2013 he was served with these pleadings. He asked the Court that he be given his plot. That the person disturbing him from using the plot is Hawa Jotham Mwenja – the step mother.

10. In cross – examination by Mr Wachira advocate for the plaintiff, DW 1 admitted Philip Mwenja was already dead when the meeting was held. That he was not shown any document of exchange of plots Nos 1536 & 1537. DW 1 said he knew he was buying the land of a deceased person and knew the deceased had 3 wives. That not all the beneficiaries attended their meeting with Michael and he did not know Michael had no capacity to sell. He paid Michael through his account and Hawa did not allow him to develop the plot.

11. DW 2 is Michael Mureithi Mbugua. He is the 3<sup>rd</sup> plaintiff but gave evidence in support of the defendants' case. He said that his father had 3 wives and 21 children. His father used to live with the 3<sup>rd</sup> wife. DW 2 said that he was working in Nairobi but left work to come to Mombasa when his father became very ill in 1987. In 2003 he was given plot No 1536 by his father in the presence of family members of the 3<sup>rd</sup> house. DW 2 continued that plot No 1536 had a pig house and in 2007 when he wanted to develop it, they agreed instead of demolishing pig house an exchange be made with 1537 which only had a foundation that was unused.

12. DW 2 said he built the foundation to the lintel level and later decided to sell the plot. That he informed his family members. He was paid the purchase price in full. The 1<sup>st</sup> defendant continued building but was stopped and he went and informed his uncle called Samuel Mwenja. The uncle said that the plot should be left to the 1<sup>st</sup> defendant. He denies being aware of filing of this case. His evidence is that the 1<sup>st</sup> defendant should be given the plot as he was paid in full.

13. In cross – examination, DW 2 said his father never left a will. That his father never gave out any property except this one. That 1537 was given to his sister who had bought it from his father. His father had many plots and was buried on plot No 1538. He had no letters of grant but acted in good faith. That he did not share the Kshs 850000 because the property was his. Lastly that the 3<sup>rd</sup> house was given a plot in Lunga Lunga & the Likoni plot. In re – examination he said no plot was sold during his father's lifetime.

14. DW 3 is the 2<sup>nd</sup> plaintiff. He said he is a security consultant. He is a co-administrator of his late father's estate. He adopted his statement filed in Court. He added that when informed about this case, he advised the 1<sup>st</sup> plaintiff to withdraw it. That he only gave the 1<sup>st</sup> plaintiff authority to withdraw the case. DW 3 said he was aware the plot was given to Michael. DW 3 said that Michael explained to him how the exchange of the plot took place. As far as he is concerned, they are not laying a claim to this plot. He produced the certificate of grant as Dex 4. DW 3 said the matter should be resolved by the administrators so that the 1<sup>st</sup> defendant can continue with his developments.

15. The parties filed written submissions which I have read and considered. Taken together with the pleadings I find that it is not in dispute that the suit property is still in the name of the deceased Jotham Mbugua. The same was sold to the 1<sup>st</sup> defendant before letters of administration was taken out. Consequently the twin issues for my determination are:

**i) Whether the sale was valid.**

**ii) Whether this suit is defective for lack of consent of the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiff.**

16. DW 2 said the property “given” to him by his father before he died was plot No 1536. Thereafter they had family discussion on which they reached an understanding with the 3<sup>rd</sup> family who had been “given” plot No 1537 for an exchange. All this was done orally. Not all the family members (The three houses) were involved in this discussion. This Court is not sitting as a succession Court so that it is incumbent on me to verify the authenticity of this “gifting” by the deceased. DW 2 is one of the administrators of the estate of his father. He therefore had and still has opportunity to present this issue to be determined in the succession cause. For the purposes of this case, I will proceed on the basis that the property belongs to the estate of Joham Mwenja – deceased who died intestate. All the plaintiffs agreed that their father did not leave a will.

17. So what is the law as regards dealing with the property of deceased persons? The 1<sup>st</sup> plaintiff has in his submissions quoted section 55 of the law of Succession Act Cap 160 which aptly provides thus;

***“No grant of representation whether limited or not shall confer power to distribute any capital assets constituting a net or make any division of property unless and until a grant has been confirmed as provided by section 71.”***

18. The certificate of grant of letters of administration was confirmed on 21<sup>st</sup> May 2014. The sale agreement was entered into on 21<sup>st</sup> December 2009 between DW 1 & DW 2. DW 2 described himself as the beneficiary and the terms of the agreement was to include his personal/legal representatives and successors. At clause 10 is stated that “*the parties had capacity to enter the agreement.*” Clause 12, both parties said they willingly entered into the sale agreement without misrepresentation. No where does the agreement give provisions for the estate of Jotham Mbugua – deceased.

19. The 1<sup>st</sup> defendant conceded that he was aware that Jotham Mwenja was deceased at the time the agreement was drawn. This is also confirmed by clause (a) in the special conditions thus DW 2 did not have legal capacity to deal with the suit property and was to pursue obtaining the same. The defendants submitted that they were purchasing the property innocently for valuable consideration. However being aware that of the owner of the said property was deceased before churning out his money, the 1<sup>st</sup> defendant cannot get the protection of an innocent purchaser. He did not do due diligence by waiting for the grant to be taken out first.

20. The reference of the provisions of section 31 of Cap 160 that “*gift made in contemplation of death is valid...*” was not supported by any evidence other than the 3<sup>rd</sup> plaintiff’s word. The actions of the 3<sup>rd</sup> plaintiff amounted to intermeddling with the deceased estate according to the provisions of section 45 of Cap 160. In any event that is not a mandate for this Court to deal with. The long and short of this matter is that the 3<sup>rd</sup> plaintiff had no capacity to sell the suit property to the 1<sup>st</sup> defendant or any other party in 2009 and such sale whether accompanied with good intentions is null and void. Even if I was to apply the doctrines of equity to assist the defendants, my hands are tied as equity follows the law.

21. The second issue is whether the suit should be struck out for want of consent of co-administrators. This was raised in the submissions and the defendants have cited the two cases of Michael Chole Lugalia (suing as the administrator of the estate of **Ezekiel Mayani Lugalia**) vs **Jonathan Ligure Ayodi (2016) eKLR** and **Research International East Africa Ltd vs Julius Arisi & 213 others (2007) eKLR**. In the Michael Chole Lugalia case, Justice Obaga E.J. quoted **Majanja J in Misc Civil application No 103”b” of 2013 – R vs Nairobi City Council** that; “*capacity to agitate any suit on behalf of the estate inheres in the administrators duly appointed by the Court. They act jointly at all times ... One administrator out of the others lacks capacity to bind the estate or any of the administrators or file suit alone on behalf of the estate.*” While in the Research International the suit was struck out for non-compliance with the mandatory provisions of Order VII rule 1 (2) of the then Civil Procedure Rules.

22. In this case, the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs (DW 2 & DW 3) did not deny signing authority to the 1<sup>st</sup> plaintiff. The heading of the document read in bold capital letters **“authority to appear, plead or act.”** The parties to the suit are also named. Nothing has been changed in this authority. All the 3 administrators were also listed as plaintiffs. The authority is as follows:

***“Take notice that we Sampson Kimani Mbugua and Michael Muriithi Mbugua the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs respectively in these proceedings, have today appointed Arthur Ngugi Mbugua the 1<sup>st</sup> plaintiff in these proceedings to plead, appear or act for***

23. Both DW 2 & DW 3 are literate persons from their introductions and they are assumed to have read the document before signing it. From their own evidence there was no suit existing between them and the defendants as at 22<sup>nd</sup> July 2013 when they signed this document. Their evidence on oath especially of DW 3 that he signed the document to enable the 1<sup>st</sup> plaintiff withdraw the suit sounds to me as an afterthought and is a white lie. He is a security consultant. He signed the document voluntarily and he has not filed any document to revoke the authority he gave the 1<sup>st</sup> plaintiff. The facts of this case are therefore distinguishable from the cases cited by the defendants as this current case was filed by the involvement of all the administrators of the estate. The authority is dated 22.7.2013 & the suit filed on 5.8.13.

24. In spite of the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs giving evidence in favour of the defendants, it does not in my opinion change the fact that the suit as commenced was properly done in accordance with order 1 rule 13 of Civil Procedure Rules. The same cannot be struck out for lack of authority of co-administrators. The 3<sup>rd</sup> plaintiff stated that this matter should be resolved by the administrators so that the 1<sup>st</sup> defendant can continue with his development. Because the dispute was not resolved during the pendency of this suit, I am satisfied that the plaintiffs' suit is proved on the scales required by the law. Consequently I enter judgement as per prayer Nos. (a) – (f) of the plaint. No damage was proved to have been suffered and therefore I award none as prayed in paragraph (g). However given the circumstances of this case I order each party to bear their costs of the suit.

**Dated, signed and delivered at Mombasa this 9<sup>th</sup> day of May 2017.**

**A. OMOLLO**

**JUDGE**