Louren v Lomortum (Environment and Land Appeal 18 of 2022)
[2024] KEELC 1563 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1563 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 18 OF 2022

FO NYAGAKA, J

MARCH 14, 2024

BETWEEN

SOLOMON LOUREN ..... APPELLANT

AND

WILFRED P LOMORTUM ..... RESPONDENT

(Being an appeal from the judgment of Honourable M. M. Nafula, Principal Magistrate in Kapenguria ELC. No. 3 of 2019 delivered on 26 th of October 2022)

JUDGMENT

1. Before me is an appeal that raises two interesting questions of law. One, is whether an individual who was not a party to an agreement, that is to say, privy to the contract, or as it is put differently, subject to be affected or excluded by the doctrine of privity of contract can take over a contract and purport to continue with it and conclude it, when one of the (initial) parties to the contract is dead. The second is the whether when a gift is given under the presumption of advancement but the donor or person giving it dies before transferring the property the property should revert to or once again form part of the estate of the deceased.

Background

2. By a plaint dated 16/05/2019, the plaintiff sued three Defendants. But by an amendment which was effected on the 30/11/2017 through an amended Plaint dated 29/11/2017 the Plaintiff dropped his claim against two of the parties. In the amended Plaint, the plaintiff prayed for the following reliefs:

    1. At declaration that the defendant has no proprietary rights over one (1) acre belonging to the plaintiff out of land parcel number West Pokot/ Keringet "A"/393.

    2. A permanent injunction restraining the defendant from trespassing upon all or in any other way interfering with the plaintiff's peaceful use and occupation of the suit land.

3. Costs of the suit.

4. Any other relief the court deems fit and just to grant.

3. It appears from the record that after service of the Amended Plaint the Defendant did not amend his Defence. In the initial Plaint, the Plaintiff had laid claim over one (1) acre out of a parcel number West Pokot/Keringet "A"/2212. By the Amended Plaint, he changed the parcel to read West Pokot/Keringet "A"/393. That he bought the one (1) acre from Kedi Lokodiro. (The said Kedi Lokodiro had been sued as the 1st Defendant before the amendment). Further, he added to the amendment the averment that in the year 2016 the Defendant invaded the land and chase away the Plaintiff and prevented him from using the land and/or occupying the same, yet he was aware that the Plaintiff purchased it. He added the averment that he prayed for an injunction and a declaration against the Defendant.

4. When the amendment is looked at as against the Defence filed earlier, the Defendant had pleaded that parcel No. West Pokot/Keringet "A"/ 2212 did not exist but the parcel No. West Pokot/Keringet "A"/2393 existed, and that he (Defendant) owned the one acre thereof, having purchased it from one Lokorio Remetum in October, 2003 and taken possession and occupation thereof.

5. The Plaintiff testified and called two witnesses, PW2 and PW2, being the son to the owner of the original parcel and the area chief respectively. The Defendant testified and called one witness, a son to the alleged vendor of the one (1) acre to him. After hearing the evidence of the parties the trial court entered judgment for the defendant against the plaintiff for the reliefs as sought in the amended Plaint.

6. Following the judgment's delivery the Defendant filed this appeal on the grounds:

    1. That the trial magistrate erred in law and fact by failing to note that the appellant purchased one acre from Lokorio Remertum - the deceased owner of parcel number West Pokot/Keringet "A"/393 in the year 2003 and took possession.

    2. That the magistrate erred in law and fact by failing to note that the respondent lacked locus standi to sue the Appellant since the suit land was under the name of Lokorio Remertum - deceased.

    3. That the trial magistrate erred in law and fact by failing to note that the appellant's and respondent's portions of land were different from each other, though they form part of the land, West Pokot/ Keringet "A"/393 registered in the name of Lokorio Remertum -deceased.

    4. That trial magistrate held in fact and law by failing to consider the evidence of DW2, the legal Administrator of the Estate of Lokorio Remertum, who testified that the Appellant did not take away the respondent's portion of land.

    5. The trial magistrate held in law and fact by failing to consider the appellant defence.

    6. The trial magistrate Elden ruined Fat by failing to consider the relevant issues, hence arriving at a wrong conclusion.

Submissions

7. The appeal was disposed of by way of written submissions. I will consider the rival submissions as I analyze the grounds of appeal.

8. This Court reminds itself that its duty as an appellate one at the first instance is to evaluate the evidence and arrive at its own conclusion. This is position taken by the Court of Appeal in Gitobu Imanyara & 2 others v Attorney General [2016] e KLR., wherein the Court held that:-

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

9. It is the same position in many cases such as in Peters v Sunday Post Ltd [1958] EA 424, as quoted in the case of Jackson Kaio Kivuva v Penina Wanjiru Muchene (2019) eKLR where it was held as follows:-

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide."

10. Thus, the decision of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, is also on point when the court held:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

11. This position about evaluating evidence to arrive at its own conclusion as another Court has a good basis in that a court of first call in any appeal ought to satisfy itself whether the evidence was carefully analyzed in comparison with the law, was sufficient or otherwise in arriving at the finding that the trial Court did. With this, it is now apt to turn to the issues at hand.

12. I have carefully considered the appeal before me. The first ground of appeal is a simple one. It is that the trial Magistrate failed to note that the appellant purchased one acre of the suit land from Lokorio Remertum, the deceased owner of the parcel of land West Pokot/Keringet "A"/393 in the year 2003 and took possession.

13. I have looked at the evidence that was tendered in the lower court. He testified as much and produced as P.Exhibit 1 the agreement (written in Kiswahili). Although the agreement indicates that there were a number of witnesses to it when it was entered into, Benson Kedinyang Lokorio (PW2) and Atodosia Lokorio (DW2) whose names were written as such did not sign as witnesses. Indeed, there was an agreement which was entered into between the deceased person and the appellants, on 28/10/2003. In the agreement, which was produced as a defense Exhibit 2, the appellant paid a sum of Kenyan shillings 20,000/=, leaving a balance of 50,000/= to be paid at a time when it would be agreed upon. The agreement was written in Kiswahili. I note that after that the documents purports to indicate that a further payment or the sum of Kenya shillings 41,000/= was made and another of 29,000/=, making a total of 70,000/=. These two balances were paid apparently on various dates. The first one indicating to be on 02/04/2004 and the other one on 10/11/2008 although the latter date shows that only Kshs. 15,000/= was the sum signed against, perhaps as an acknowledgment.

14. In his submissions, the appellant relied on the document marked as D.Exhibit 2, which was an agreement dated 28/10/2003 to demonstrate that he purchased the land from the deceased. He submitted that after the purchase it was only transfer of the land that did not take place in his favour. Then he submitted that the respondent should have sued both PW2 and DW2 for appropriate orders. And that in any event, there was no contractual relationship between him and the respondent. Lastly, submitted that did DW2 was the legal administrator of the estate of the deceased.

15. The respondent began his submissions by summarizing grounds 1 and 3. He also summarized the prayers that were made in the lower court pleadings which this court does not wish to summarize at this stage. In his submissions, he stated that on 13/06/2017 the Appellant filed a defence and the Respondent did not file a counterclaim that the parcel of land claimed by the respondent is the same one he purchased from the deceased. That the appellant did not file a response to the amended plaint and neither did he deny the respondent's assertion that in 2016 he invaded the respondent's land and chased him away. He summarized the pleadings and the evidence which was given by Wilfred Lomortum and the evidence of PW2, one, Kedinyang Lokorio. He also summarized the finding of the court on the evidence of the two witnesses. He argued that it was a correct finding.

16. I have also looked at the Grant of Letters of administration, which was produced by the plaintiff as Exhibit 5, which indicates that the deceased Lokorio Remetum died on 18/02/2004. What that means from the evidence is that, the purported sale of the one (1) acre to the appellant was not completed in the lifetime of the deceased. And that means that the agreement was not completed at all. Because the purported recipients of the balance that was paid in 2004 and 2008, respectively, to make a total of Kenya shillings 70,0000/= were persons different from the seller who was dead by that time anyway. And the recipient had not taken out letters of administration to the estate of the deceased.

17. I have carefully analysed the evidence of DW1 and DW2. First, and going by the documents produced as D.Exhibit 1, the purported agreement of sale, written in Kiswahili, it is clear that there was a document purported to be an agreement of sale of one (1) acre of parcel No. West Pokot/Keringet "A"/393 between the Appellant as purchaser and Lokorio Remetum as the vendor. It was entered into on 28/10/2003. From its wording, it was not completed the same date. Upon payment of the sum of Kshs. 20,000/=, the parties agreed that "Ambayo imebaki, yaani balance ni Kshs Elfu Hamsini (50,000/=) ambayo hawa wenyewe watasikizana" (meaning: "The balance of Kshs. fifty thousand (50,000/=) which is left, these (parties) will agree").

18. Evidence was led in the trial court that the said Lokorio Remetum died on 18/02/2004. By that time. When I examine the agreement signed on the 28/10/2003 I find that he died before an agreement on the further balance would be reached. However, on 02/04/2004, there was a purported balance payment of Kenya shillings. 41,000/= and 29,000/=, giving total of Kshs. 70,000/=. And then there is an indication of Kshs. 15,000/= was paid on 10/11/2008. First of all, if these payments were in relation to the agreement entered into on 28/10/2003 then they demonstrate different agreements as between buyer, and between the children and buyer on the latter dates.

19. According to that agreement the sum for the one (1) acre was Kshs. 70,000/=. These three additional figures do not add up when compared with the Kshs. 20,000/= received at the time of signing. Moreover, the two sums of Kshs. 41,000/= and 29,000/= indicated on 02/04/2004 are not signed against to indicate that indeed they were payments received or made. Needless to say, that the alleged payments were made after the owner of the land had died. Thus, they were not made to the owner anyway. Such an agreement cannot by any means be said to be a continuation of the agreement which the deceased had signed before he died. It is not. So, therefore the claim by the appellant that he bought the land from the deceased is farfetched. It is my finding that the learned Magistrate did not err in

making a finding that the appellant did not buy the one acre as the appellant argues. Moreover, the agreement the appellant relies on does not in any way indicate that upon payment of the sum of Kshs. 20,000/=, he took possession of the parcel of land which he claims to have bought. And one is left to wonder whether he would have entered onto the portion of the one acre upon a payment a paltry of only Kenyan shillings 20,000/= leaving a balance of 50,000/= without a clue on when the balance would ever be paid as it appears that it was being paid five years later! I dismiss this ground of appeal.

20. The second ground of appeal is that the respondent did not have locus standi in bringing the suit against him. On this, the Appellant argued that the Respondent did not have the capacity to sue him because the land was registered in the name of the deceased Lokorio Remetum, and the Appellant should have waited for the confirmation of the Grant of Letters of Administration which the Respondent produced as P.Exhibit 5 before he would sue. He stated that the suit was therefore premature.

21. On his part the Respondent argued that he had locus standi to institute suit. He stated he bought the parcel of land from PW2 who had been given it by his late father during his lifetime. Further, the fact of PW2 having been given by his father during his lifetime two (2) acres of land of which he sold to the Respondent was confirmed by DW2 in cross-examination. DW2 stated that he was a sibling of four. That their father gave each of them their shares before he died. In his evidence in cross-examination, DW2 stated that it was ` (1) acre of their father's land known as West Pokot/Keringet "A"/393 that PW2 sold and not his. In further cross examination, DW2 confirmed that indeed, their father gave his brother and each of them two acres of land during his lifetime. In re-examination DW2 repeated that the 1st Defendant (the one against whom the Plaintiff had dropped the case by way of amendment) sold the part of the land that his father had given him.

22. I have carefully considered the evidence of PW1, PW2, DW1 and DW2 about the specific parcel of land, the one (1) acre that was said to have been sold to the Plaintiff and the Defendant. First, it is worth reminding the parties that I have found that the agreement between the Defendant (now appellant) and the late Lokorio Remertum, the deceased parent of both PW2 and DW2 was not completed in his lifetime. I have also found that the purported further payments towards the purchase of one (1) acre which was supposed to be sold by the deceased father of the two witnesses were illegal, null and void: they were made to persons who did not have capacity to finalize the agreement dated 28/10/2003.

23. The evidence of PW2 and DW2 points to one important principle in property law, one of the Presumption of Advancement. For this I refer the parties to Dyer v Dyer (1788) 2 Cox Eq 92, which in sum decided that where a father or a person in loco parentis gives during his lifetime a property to a child he has legitimately taken as his own it gives rise to the presumption of advancement. The presumption is rebuttable but unless and until it is rebutted, the property becomes absolutely owned by the transferee.

24. I am alive of the argument that the property was still in the name of the deceased father by the time the son sold it. Does that reverse the principle of advancement? In my humble view it does not. The property duly given as a gift to a son (or daughter) for that matter during the lifetime of the owner remains the property of the son or daughter subject to transfer thereof. It should not be affected by the death of the owner and it does not revert to the estate of the deceased. It only is listed as among the properties in the deceased's name but to be transferred to the real owner - the son or daughter to whom it was given as a gift - by the administrator of the estate. In so far as such a property is concerned, the process of obtaining letters of administration or confirmation of a will is only to be for transmission of the gift to the son or daughter. So, it should be for property transferred to a wife. Thus, in my humble view the ground does not hold water.

25. I am of the view, the third and fourth grounds of appeal refer to the same issue: the exact portion and position on the ground of the one (1) acre of land that both the Plaintiff and Defendant (now Respondent and Appellant respectively) claimed. Thus, turning to the two grounds of appeal combined, it was argued that the trial Court erred in law and fact by failing to note that the appellant's and respondent's parcels of land were different from each other, though they formed part of the land parcel number West Pokot/ Keringet/393 registered under the name of the deceased. The fourth ground which now becomes part of the third is that the learned trial magistrate did not consider the evidence of DW2, one Atodosia Lokorio to the effect that the Appellant did not take away the Respondent's portion of land.

26. Two points flow from the above ground of appeal. One, is that indeed, the Appellant moved onto a portion of land which, to him, he knew was not the Appellant's while the appellant claimed that it was him. Actually, DW2 testified that the 3rd Defendant (now appellant) did not take away the Plaintiff's land. Rather that he had his own land which their father sold to him. My understanding of the evidence of DW2 is that the Appellant moved onto the portion of land which is the same one claimed by the Plaintiff. As to when he did so, the appellant claims it was in 2003 while both the Plaintiff/ Respondent and PW2 locate the time to 2016 since PW2 states that the Plaintiff was chased away from the land after five years from 16/05/2011. When all that evidence is weighed it leads this Court to the inevitable conclusion that the Appellant entered the land claimed by both him and the Respondent in 2016. The other point or contention is, where on the ground is the one acre of land situate it relation to the spot claimed by the Appellant and Respondent?

27. I have considered the evidence on the issue that was before the trial court. The plaintiff led evidence to effect that the defendant invaded the land he bought from PW2 and chased him out of it, and kept him away from occupation thereof. Indeed, if the argument by the appellant is anything to go by, then it means that the land that he intended to buy from the deceased is not at the exact position on the ground as that which the Respondent claims. If so, then where is the issue between the two? There would be none as each person would be on a different location on the parcel No. West Pokot/Keringet "A"/393. But going by the evidence of DW2 that the Appellant took away land (but which was not the Respondent's) it means that the position on earth is the exact spot claimed by both. Since the Respondent had been in occupation for five years from 16/05/2011 to the time in 2016 when the Appellant chased him away it simply means that the appellant wrongfully entered onto his land (that he had bought), that is to say, the portion of land which was rightfully sold to the Respondent, while thinking that it was his rightful portion. That was an error. Indeed, the exact position of the acre was the dispute before the court.

28. During the analysis of the evidence the trial magistrate considered the evidence of DW2. At page 37 of the proceedings and judgment the magistrate found that going by the evidence of the two parties and given that of DW2 it means that the portions of one (1) acre of land are very different from each other. That is the deduction this Court has to made. But it has gone further to find that if they are far from each other, then there could be no dispute before this Court between the two parties by way of appeal and in there could have been none before the lower court by way of claim. Each could be occupying their separate portions.

29. The appellant submitted that since DW2 was the legal administrator of the estate of their father, by virtue of Section 2 of the *Civil Procedure Act*, it was him who had the legal authority to protect the estate of the deceased father and his evidence was crucial. He referred to D.Exhibit 5, the Grant of Letters of Administration. On his part the Respondent submitted that the trial court considered the evidence of the parties.

30. I have found as much as the Respondent's submissions: that the trial court considered the evidence. For the reasons above, I find that the ground of appeal does not hold water because the trial magistrate considered the evidence of the witness, and the suit land, being one acre, was the same one on the ground to the extent that the Appellant purported to lay claim to it as was sold to the Respondent. I dismiss the ground(s).

31. The fifth ground was that the learned trial magistrate erred in failing to consider the appellant's Defence. On this he submitted that the Appellant submitted that the trial magistrate did not note that as at the time of filing the suit, which this court notes that it was on 16/05/2017, fourteen years had passed since he took possession of the suit land. That in any event the appellant bought it from the registered proprietor (now deceased) and not from a beneficiary, which evidence he submitted was confirmed by DW2. His submission was that the trial magistrate did not consider this defence. In his submissions over this the Respondent submitted that it was captured on pages 3 and 4 of the judgment.

32. I have carefully analyzed the judgment. From pages 6 to 7 is where the learned trial magistrate considers the evidence of both the appellant and DW2. She looks at the evidence of the appellant which is that he bought the land from the deceased but did not complete the purchase price. That he completed it by paying a sum of Kshs. 29,000/= to the deceased's son. That he produced the agreement as D.Exhibit 2, and that DW2 confirms that Kedinyang Lokorio was given 2 acres by the father. From there the trial magistrate proceeds to make a finding that the two parties claim that each bought the one acre but that the appellant bought his in 2003 but transfer was not done to him.

33. When that finding is compared with the evidence on the Defence of the appellant and his witness, it is clear that DW2 does not in any part of his evidence indicate that the agreement between the appellant and his father was made in 2003. Even more pertinent is that DW2 does not in any way mention in examination in-chief, cross-examination or re-examination that the appellant took possession of the land immediately upon entering into the agreement in 2003. As for the evidence of the appellant, he testified that he bought the land in 2003 by paying Kshs. 70,000/=. That he paid the balance of Kshs. 29,000/= on 10/11/2008. Then he added that he was shown the parcel of land, fenced it and started utilizing it by planting trees.

34. My finding is that it is not clear from the appellant's evidence that he took possession immediately on signing the agreement on 28/10/2003 or on 10/11/2008 when he alleges he completed the balance. The agreement itself does not state that he took possession upon paying the Kshs. 20,000/=. This evidence when compared with the writings on the agreement they show that first, it was not Kshs. 29,000/= that was paid on 10/11/2008 but Kshs. 15,000/=. Secondly, that the money was paid to a son of the deceased, after the owner had died. This I have found to be illegal and not the process of completing the agreement of 28/10/2003. The appellant and Atodosia were, after the death of the father, doing their own crazy things which did not confer proprietary rights on the appellant over the land. Lastly, on that aspect, the argument by the appellant that for him he bought the land from Lokorio Remetum while the Respondent bought it from a beneficiary is self-defeatist in that he too purported to complete the agreement through a beneficiary. I do not see the where the 14-year period claimed to have lapsed began to run. If anything, I find that he moved onto the Respondent's claimed one acre in 2016. Therefore, even if the trial magistrate could have failed to consider the evidence and this appellate court did, it would have arrived at the same result, that the defendant's defence was not sufficient alter the finding of the Court.

35. The last ground is that the learned trial magistrate failed to consider relevant issues and arrived at a wrong conclusion. On this he submitted that the trial magistrate did not consider that the appellant was not the legal representative of the deceased. Also, that the respondents purchased the suit land from

a beneficiary who had no capacity to execute the sale agreement dated 15/05/2011, and the execution of the agreement amounted to intermeddling with the estate of the deceased person, contrary to Section 45 of the *Law of Succession Act*, Chapter 160, Laws of Kenya. Further, that PW2 sold the land after the death of their father without letters of administration.

36. I have considered the argument by the Appellant. I am of the humble view that the argument is misplaced in the sense that, first, I have found that PW2 had been given 2 acres of land by his father before his death, by way of presumption of advancement. This the Appellant's own witness, DW2, and the Plaintiff's witness, PW2, who were children of the deceased agreed on. Therefore, PW2 had capacity to sell any part of the 2 acres he was given. It did not form part of the estate of the deceased.

37. Secondly, PW2 and DW2 were in agreement that their father gave each of them the respective portions of land before he died. So, for that reason the portion of land that was sold by PW2 did not constitute part of the estate and there was no need for letters of administration to be issued before he would sell it or part thereof. Non-transfer or delayed transfer to his name, to the extent that it is sufficiently proven, does not affect the presumption of advancement. In an event it the appellant argues that that the agreement of 16/05/2011 was illegal, what then was legal about the agreement of 28/10/2003 as was purported to be furthered on 02/04/2004 and 10/11/2008, when the appellant purported complete it by making further payments against an Agreement a deceased person who died on 18/02/2004 executed before, but these latter payments being made with the son of the deceased? The latter agreement was the one, if anything, that was so illegal that it is obnoxious, and constituted proper intermeddling of the estate of the deceased. Therefore, I dismiss this ground also.

38. What is clear by now is that this appeal did not have merit. It is lost. I dismiss it with costs to the Respondent.

39. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 14TH DAY OF MARCH, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC. KITALE