



REPUBLIC OF KENYA



KENYA LAW
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**Irungu & 4 others v Mwanzia & 6 others (Civil Appeal 10 of 2018)
[2022] KECA 1175 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1175 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 10 OF 2018
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
OCTOBER 21, 2022**

BETWEEN

**LOISE WANJIRU IRUNGU 1ST APPELLANT
CHARITY NJOKI NJUGUNA 2ND APPELLANT
JANEROSE KIMANI 3RD APPELLANT
PURITY WANJOHI 4TH APPELLANT
FLORENCE MUCEMI 5TH APPELLANT**

AND

**JOEL NTHEI MWANZIA 1ST RESPONDENT
AGNES W GATIMU 2ND RESPONDENT
JEREMIAH NGIGI WAMAE 3RD RESPONDENT
CATHERINE NGINA KITHENDU 4TH RESPONDENT
HELLEN CYRIC MAUFI 5TH RESPONDENT
PETER MUINDI MUNYAO 6TH RESPONDENT
CHARLES TUTI NDUMA 7TH RESPONDENT**

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (L. N. Mbugua, J.) delivered on 3rd November, 2017 in E.L.C Cause No. 1890 of 2012)

JUDGMENT

1. Harun Katiku (the Deceased) was the beneficial owner of the suit property, being an unregistered plot measuring 0.4046 Hectares in the approximate and situate in the Kamulu area of Nairobi County,



- having purchased it from a co-operative society cum land buying company known as Drumvale Farmers' Cooperative Society Ltd (Drumvale) sometime in the 1990s.
2. The deceased, who died on 16th November 1997 was survived by, among others, Grace Maingi Katiku, also known as Grace Ngina Katiku (a widow of the deceased), and John Maingi Katiku (a son).
 3. Before his death, the deceased sold the suit property to Mbukoni Holdings Ltd (Mbukoni) in February 1997 soon after which Mbukoni subdivided the suit property into unregistered plots of ¼ and 1/8 Acre plots in March 1997 and sold them to the respondents, who immediately took possession and commenced development.
 4. Soon after his death in November 1997, the deceased's widow and son aforesaid purported to sell the suit property to one Dominic Musembi (Musembi) on 16th August 1998. Subsequently, Musembi allegedly sold the unregistered plots to the appellants in November 2000.
 5. It is noteworthy that the deceased's widow and son petitioned for letters of administration intestate to the estate of the deceased in the High Court of Kenya at Nairobi Succession Cause No. 598 of 1998. The two obtained a temporary grant of letters of administration intestate in May 1998. That grant was confirmed on 1st September 2000, whereupon they were constituted the administrators of the deceased's estate.
 6. On 7th July 2005, the appellants applied for and obtained a Certificate of Lease over the suit property, which was registered as Title No. Nairobi/Block 118/58, as tenants in common in equal shares.
 7. In 2006, the appellants instituted proceedings against the respondents in the High Court of Kenya at Nairobi, in HCCC No. 547 of 2006 seeking: a permanent injunction restraining the respondents from occupying, cultivating, erecting structures or in any manner whatsoever interfering with the appellants' quiet enjoyment of the suit property; an order of ejection from the suit premises and for the removal of all structures erected on the suit premises by the respondents; general damages; any other relief as the court may deem apt; and costs of the suit.
 8. The respondents defended the suit and raised a counterclaim, praying for: an order declaring that the respondents were the legal owners of the suit property; an order of cancellation of the certificate of lease dated 7th July 2005 issued to the appellants in respect of the suit property; an order of permanent injunction restraining the appellants from interfering in any way with the suit property; and any other relief the court may deem fit to grant.
 9. In its judgment delivered on 3rd November 2017, the High Court (L. N. Mbugua, J.) dismissed the appellants' suit and allowed the respondents' counterclaim. The learned Judge found that the appellants were not entitled to the suit property, having established that the acquisition of the land by the appellants was tainted with illegalities and, hence, unlawful.
 10. Aggrieved by the judgment of Mbugua, J., the appellants moved to this Court on appeal on 10 grounds set out in their Memorandum of Appeal dated 15th January 2018, most of which are argumentative, and which we need not replicate here. Suffice it to summarise and reframe them as follows, namely that the learned judge erred in fact and in law: by holding that the respondents had proved their counterclaim on a balance of probability, and by dismissing the appellants' case; by rendering her judgment without considering the entirety of the evidence adduced; by drawing her own inferences and deductions; by failing to find that the purported agreement for sale of land between the deceased and Mbukoni Holdings Ltd was a forged document, which gave Mbukoni no right to transfer the said property; for failing to find that the respondents merely trespassed on the suit property in 2006; for disregarding clear evidence adduced by the appellants; by relying on evidence not adduced; and by relying on various legal



provisions that were irrelevant to the circumstances of the case. They urge us to set aside the impugned judgment and substitute therefor the orders prayed for in the Amended plaint dated 20th March 2007 and direct that the costs of the appeal be borne by the respondents.

11. This being a first appeal, it is our duty, in addition to considering submissions by the appellant and the respondents, to analyze and re-assess the report and other evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co.* [1968] EA p.123.
12. In *Selle's* case (*ibid*), the Court held that:

“An appeal to this Court from a trial by the High Court (as well as the ELRC) 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”
13. Having considered the record of appeal, the written and oral submissions of learned counsel for the appellants and of the learned counsel for the respondents, we are of the considered view that the appeal herein stands or falls on our findings on four main issues, namely: whether, prior to his demise, the deceased had sold the suit property to Mbukoni; Whether the said widow and son were capable of transferring any interest in the suit property at the time of the alleged sale to Musembi; Who, as between the appellants and the respondents, are the rightful owners of the suit property; and what orders ought we to make in determination of the competing claims in this appeal, including orders as to costs.
14. On the first issue, it is not in dispute that the deceased purchased the suit property from Drumvale in the 1990s. It is the subsequent sale and transfer from him to Mbukoni in February 1997 that was challenged by the appellants at the trial in the superior court on the grounds that the sale agreement was executed by Kutonyi Mummo (a brother to the deceased) with express consent and authority of the deceased. In this regard, paragraph 6 of the sale agreement reads:

“The purchaser buys the said land undertaking that the vendor’s family has no objection to this contract and the vendor, because of his ill health has authorised his brother Mr. Kutonyi Mummo to collect and transmit the purchase price to the vendor.”
15. We call to mind the fact that the original sale and transfer of the suit property to Mbukoni, and the subsequent subdivision and transfer of the suit property by Mbukoni to the respondents was lawfully carried out during the deceased’s lifetime in March 1997. The agreement was signed by his brother, Katonyi Mummo with his express knowledge and consent. Having carefully examined the record of appeal, we find nothing to fault the learned Judge’s finding that the three transactions – as between Drumvale and the deceased; between the deceased and Mbukoni; and between Mbukoni and the respondents – were conducted during the life of the deceased. Accordingly, we find nothing in the record as put to us to suggest that those transactions never took place, or that they were unlawful or by any means irregular. That settles the first issue.
16. As to the second issue, the question is whether the deceased widow and son were capable of selling or transferring any interest in the suit property to Musembi (or to any third party for that matter) in August 1998 barely one year after the deceased’s death in November 1997. They were not capable of doing so.



17. Section 45(1) of the *Law of Succession Act* (Cap. 160) (the Act) provides:

“45. No intermeddling with property of deceased person

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a 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.”

18. In addition to the foregoing, section 55(1) of *the Act* places a restriction on distribution of any capital assets of the estate before confirmation of the grant. That section reads:

“55. No distribution of capital before confirmation of grant

- (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.”

19. Section 82 (b) (ii) of *the Act* goes further and provides that personal representatives shall not sell any immovable property before confirmation of the grant. The section reads:

“82. Powers of personal representatives Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b). to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

- (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- (ii) no immovable property shall be sold before confirmation of the grant;”

20. It is instructive that the deceased’s widow and son, having petitioned for letters of administration intestate to the estate of the deceased in Nairobi HCCC Succession Cause No. 598 of 1998, obtained confirmation of their Grant of representation on 1st September 2000. Before confirmation, the two had no power to deal in or dispose of any part of the deceased’s estate, including the suit property which, in any event, was not available for sale and transfer as claimed. That settles the second issue.



21. In *Peter Ombui Nyangoto v Elizabeth Matundura & Another* [2013] eKLR, where the property of the deceased was transferred before a grant was issued, the Court of Appeal held:

“We think what Daniel and the appellant did amounted to intermeddling with the property of Teresa. Clearly, they had no legal right to have the property sold and transferred to the appellant before Letters of Administration intestate were applied for, obtained and confirmed as they did in this matter... It is clear from the above, that even if Daniel had obtained grant of representation,(which in this case he had not even applied for and obtained) still he could not transfer Teresa's property to himself and thereafter to the appellant without that grant having been confirmed... The second respondent's active consent in the transaction that ended in complete violation of the *Law of Succession Act* did not and cannot make that transaction legal. It remains illegal and all who participated and/or could have participated in such illegality would still have taken part in an illegal activity.”

22. The deceased's widow's and son's inability to deal in or dispose of any part of the deceased's estate prior to confirmation of the grant on 1st September 2000 leads to the question as to how the appellants obtained a certificate of lease in respect of the suit property of which the respondents were already in possession. The learned Judge's holding that the impugned title document could not have been lawfully obtained defies challenge. The circumstances under which the certificate of lease was obtained raises more questions than answers. Accordingly, its cancellation remained the only option. Neither the deceased nor his widow and son had conveyed to the appellants any interest in the suit property capable of enforcement as sought in the superior court. That led to the inescapable conclusion that the respondents were the lawful owners of the suit property. Accordingly, we find nothing to fault the learned Judge's decision to dismiss the appellant's claim and allow the respondents' counterclaim.

23. Having carefully considered the record of appeal, the grounds on which the appeal is anchored, the written and oral submissions of the parties, we find that the appellants' appeal fails and, accordingly, hereby direct that:

- a. the appeal herein be and is hereby dismissed;
- b. the judgment of the High Court (L. N. Mbugua, J.) delivered on 3rd November 2017 be and is hereby upheld; and
- c. the costs of the appeal shall be borne by the appellants.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

H. A. OMONDI

JUDGE OF APPEAL

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DR. K. I. LAIBUTA

JUDGE OF APPEAL

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M. GACHOKA – CI Arb, FCIARB

JUDGE OF APPEAL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

