



**Mbeche (Suing on her behalf and as representative of the Estate of Araka Rachier Mbeche) v Kihumba (Civil Appeal 55 of 2018) [2022] KECA 1056 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1056 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL 55 OF 2018  
DK MUSINGA, HM OKWENGU & MSA MAKHANDIA, JJA  
OCTOBER 7, 2022**

**BETWEEN**

**ROSE ARAKA MBECHE ..... APPELLANT  
SUING ON HER BEHALF AND AS REPRESENTATIVE OF THE ESTATE OF  
ARAKA RACHIER MBECHE**

**AND**

**DAVID MATHAI KIHUMBA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree and all consequential  
Orders of the High Court of Kenya at Nakuru (Mulwa, J.) delivered  
on 12th October 2017 in Nakuru HCCC No. 209 OF 2003)*

**JUDGMENT**

1. This appeal arises from a judgment in two consolidated suits: Nakuru HCCC No. 209 of 2003 and Nakuru HCCC No. 61 of 2001. The suits concerned a dispute involving land parcel known as Title No. Nakuru/Municipality Block 15/169 (suit property), which was owned by Araka Rachier Mbeche (deceased). In HCCC No. 209 of 2003, the deceased's widow, Rose Araka Mbeche (the appellant herein), on behalf of the estate of deceased, sued David Mathai Kihumba (respondent), seeking an order for vacant possession and removal of the caution placed by the respondent on the suit property.
2. The respondent filed a defence and counter-claim to the appellant's suit in which he maintained that he is in occupation of the suit property lawfully, having purchased the same from the deceased. The respondent maintained that the deceased transferred his interest in the suit property to him, and that he has improved the same and increased the market value of the suit property. The respondent's counter-claim which was also the subject of Nakuru HCCC No. 61 of 2001, was for a declaration that the suit property belongs to him, and a perpetual injunction restraining the appellant from entering into or claiming ownership of the suit property.



3. Following the consolidation of the two suits, the respondent was treated as the plaintiff. He gave evidence that he bought the suit property from the deceased through an agreement of sale which was duly executed by the deceased, paid a deposit of Kshs. 180,000 to the deceased, took over the outstanding mortgage which the deceased had with Housing Finance Company of Kenya (HFCK), and continued making monthly payments at the agreed rate. Upon the death of the deceased, the Mortgage Protection Insurance took over and settled the outstanding mortgage, as the respondent continued being in occupation. Thereafter he signed the Lease. He maintained that he was not a tenant in the suit property, but was the owner. The respondent explained that he lodged a caution against the title to the suit property to protect his interest. He was willing to refund to the appellant the outstanding mortgage money paid by the mortgage insurance, to enable her release the title documents for the suit property which had been released to her by HFCK.
4. Nathaniel Githua (Nathaniel), the advocate who prepared the conveyance documents for the suit property testified on behalf of the respondent. He confirmed that the total payments made by the respondent to the deceased was Kshs. 400,000 and that the two parties executed the transfer of Lease, but HFCK was awaiting the payment of the balance of the mortgage to facilitate execution of the discharge of charge.
5. On her part, the appellant testified that the suit property was registered in her late husband's name, and that although the respondent was in possession from 1987, she was not aware of the sale of the suit property to him, and she believed that the respondent was a tenant in the suit property. The appellant confirmed that the suit property was not included as an asset in the Estate of the deceased in the Succession Cause, nor had she demanded any payment of rent from the respondent from the time the deceased died.
6. Pascal Peter Oyuko Mbeche, an advocate who is a brother-in-law to the appellant, testified that he assisted her to file the succession cause and that the suit property was not included, but only stated as a liability to HFCK, though the mortgage was redeemed when the deceased died.
7. The learned Judge in her judgment found that the respondent was a bona fide purchaser for value of the suit property, except the transfer to his name had not been effected; that the property was sold by the registered owner before his demise, and therefore did not form part of the deceased's estate; and that in the absence of either fraud, coercion or undue influence, the appellant as the administrator of the estate cannot be permitted to resile from the contract, and must honour the agreement and pass the title document and legal ownership to the respondent. The learned Judge concluded that the respondent had proved his case against the appellant, and therefore, entered judgment in favour of the respondent on the counterclaim and issued the prayers sought.
8. Being aggrieved by that judgment, the appellant has filed a memorandum of appeal raising 11 grounds. In summary, she faults the learned Judge for making findings and conclusions that were against the weight of evidence tendered by the parties; misinterpreting and reading into the purchase agreement terms which were not explicit in the agreement; extending the performance of the purchase agreement beyond the completion date expressly stated and provided for in the agreement; making findings that were not supported by the evidence adduced; misinterpreting and coming to an erroneous conclusion on the applicability of special circumstances and the law of equity in relation to contract of sale and operation of doctrine of estoppel; imposing and interpreting the doctrine of unjust enrichment against the appellant, contrary to the evidence; and failing to properly evaluate and appreciate the law and the evidence on record.
9. Both the appellant and the respondent filed written submissions which they fully relied upon during the hearing of the appeal.



10. For the appellant, it was submitted that the learned Judge erred in granting the respondent the relief sought in his counter-claim as it amounted to extending the performance period of the agreement entered into between the respondent and the deceased, beyond the agreed completion date of 28<sup>th</sup> February 1987, after several years of non-compliance with the terms of the agreement.
11. It was submitted that the respondent paid a deposit of Kshs 180,000 to the deceased and promised to pay part of the purchase price to HFCK to offset the outstanding loan on behalf of the deceased on or before the completion date of 28<sup>th</sup> February 1987, and that the deceased executed a transfer form, transferring the suit property to the respondent, to be effected once the outstanding loan with HFCK was cleared and consents obtained. It was reiterated that there were undertakings in respect of acts to be done at a future date by both parties and therefore the consideration in the agreement was executory. It was argued that the learned Judge erred in coming to the conclusion that the full consideration had been paid, when it was evident that the loan arrears had not been paid.
12. With regard to the doctrine of estoppel, it was submitted that the learned Judge reached an erroneous conclusion in invoking the doctrine, as the respondent was in breach of the terms of the agreement. This was because contrary to the agreement, at the time of the death of the deceased, there was an outstanding loan of Kshs. 183,753. Moreover, the respondent did not show any evidence that he complied fully with the terms of the purchase agreement. The appellant maintained that there was no evidence to confirm that a sum of Kshs. 400,000 had been paid to the deceased vendor, nor any evidence to prove that the outstanding loan with HFCK had been cleared by the respondent as contemplated in the agreement. The issue of enriching a respondent who had admitted his failure to comply with the terms of the agreement did not therefore arise. The appellant urged that the learned Judge did not properly evaluate the evidence on record and therefore arrived at a wrong conclusion.
13. For the respondent, it was submitted on the issue of payment of the purchase price that the appellant was not present during the performance of the agreement and could not therefore ascertain beyond reasonable doubt that the money was not paid in full. It was noted that the appellant was not aware of the said transaction and her husband may not have informed her of the money that he had received from the transaction. The Court was urged to consider the evidence of the advocate who facilitated the conveyancing process, whose evidence it was, that the deceased was paid a total of Kshs. 400,000.
14. The respondent denied that the consideration was executory. He maintained that the appellant was not privy to the agreement between himself and HFCK, and that all the contractual obligations between him and the deceased vendor were finalized upon full payment of the purchase price. He referred the Court to the evidence of his advocate, Nathaniel Githua, and urged that the evidence and testimonies submitted in support of his case was enough to shift the burden of proof to the appellant.
15. With regard to whether the appellant was privy to the contract between HFCK and the respondent, and whether there was an obligation which extended from the deceased through to the respondent, it was submitted that the deceased had taken out a mortgage with HFCK, and at the time of sale of the property, the debt owing was about Kshs. 210,196.36; that during negotiations for the sale, it was agreed that the purchase price shall be Kshs. 400,000; and that part of the purchase price was supposed to cater for the land rates and rents for the suit property and other expenses. This included Kshs. 30,000 for land rates and rents, Kshs. 176,921.90 to the deceased; and Kshs. 2,066 as costs of discharging the property; and the remainder was to sort out the debt owing to HFCK, which stood at Kshs. 210,196.35, and therefore the deceased was paid his agreed amount and the balance was to repay HFCK and not the deceased.
16. In addition, the respondent argued that the appellant knowingly omitted the suit property from among the assets of her deceased husband in the succession cause, which was a clear indication that



the suit property no longer belonged to her deceased husband, and therefore she was attempting to unjustly enrich herself by having the purchase price and retaining the suit property. The respondent urged that the principles employed by the trial Judge were consistent with the law and achieved the realization of justice. Citing *Peters vs Sunday Post Limited* [1958] EA 424, the respondent urged the Court to consider the fact that the trial Judge had the benefit of seeing and assessing the demeanour of the witnesses and was able to discern from the testimony of the witnesses and the evidence presented that the appellant's claim was a mischievous attempt to unjustly enrich herself, and therefore properly adjudicated the matter by dismissing her claim. The Court was therefore urged to dismiss the appeal with costs.

17. This being a first appeal, our mandate is to analyse and re- evaluate the evidence on record and arrive at our own independent conclusion. That duty has been laid out in several decisions of this Court including *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA, 212.
18. In an effort to discharge this obligation, we have carefully and anxiously considered this appeal in light of the record of appeal, the submissions made before us, and the authorities cited. It is not disputed that the deceased was the owner of the suit property and that prior to his death, he entered into "an agreement" with the respondent. It is also not disputed that as at the time of the deceased's death the deceased had put the respondent in possession of the suit property. The issue is whether the respondent was in the suit property as a tenant or as an owner or prospective owner. In addressing this issue, other ancillary issues arise, which is, whether the agreement entered into between the deceased and the respondent was an agreement for purchase of the suit property. If so, whether the appellant was privy to that agreement; whether the contract was executory; whether the respondent paid the full consideration; and finally, whether the appellant is entitled to vacant possession of the suit property.
19. It is apparent from the evidence that was adduced before the trial court that the deceased was the registered owner of the suit property, having purchased it from the National Housing Corporation through a loan advanced by HFCK. The deceased had formerly rented the house to Shelter Afrique. The appellant was not party to that tenancy, but learnt about it from the deceased, who informed her that Shelter Afrique was paying the rent for the suit property directly to HFCK to meet the monthly payments for the loan that had been granted to the deceased.
20. The appellant conceded that the respondent moved into the house after Shelter Afrique left in January 1987. That was before her husband died in September 1988. This means that as claimed by the respondent, he entered the premises through an agreement with the deceased. Although the appellant maintains that the respondent was only a tenant in the premises, she was not party to the agreement between the deceased and the respondent.
21. Nathaniel, who witnessed the sale agreement executed between the deceased and the respondent, explained that it was a conveyance transaction and identified the documents which were duly signed by the parties. The agreement signed between the deceased and the respondent is dated 24<sup>th</sup> November 1986. Nathaniel explained that although the respondent paid some money, there was an outstanding amount which was to be paid to HFCK.
22. It is apparent that Shelter Afrique who were renting the premises left in January 1987 shortly after the agreement between the deceased and the respondent was executed. This seems to support the respondent's argument that the ownership of the property had changed hands.
23. The appellant maintained that the agreement between the respondent and the deceased was not fully executed. This is because according to the agreement, the respondent had to pay off the outstanding loan with HFCK by the completion date that is, 28<sup>th</sup> February 1987. Yet, as at the date of the deceased death, that is September 1988, the loan balance had not been fully repaid.



24. We find that the respondent had not paid off the loan with HFCK as agreed. First, Nathaniel testified that although the agreement was entered into, the transfer was not signed until much later. Secondly, the transfer was not registered because the respondent had not paid the debt due to HFCK. Thirdly, after the deceased died, the outstanding loan was repaid through the Mortgage Protection Insurance, confirming that the mortgage had not been fully repaid. Moreover, the respondent stated that he was ready and willing to repay the amount of the debt outstanding to HFCK which had been offset through the Mortgage Protection Insurance to the appellant, which was a clear concession that he had not fully repaid the loan.
25. The question is whether the failure to pay off the mortgage to HFCK would vitiate the sale agreement that was entered into between the deceased and the respondent. In her judgment, the learned Judge found that the respondent paid the full purchase price of Kshs. 400,000, which included payment of outstanding charges and the balance of Kshs. 26,921.90 which was paid to the deceased directly. In addition, the deceased gave the respondent vacant possession of the suit property. We are in agreement with the findings of the learned Judge. The fact that the deceased even signed the transfer is an indication that he was satisfied that the respondent had made full payment to him.
26. What was outstanding was offsetting the HFCK loan amount upon which the suit property was to be transferred to the respondent. It would appear that there was no other interest that the deceased had in the property. The only reason why the mortgage protection insurance paid off the outstanding loan was because according to the HFCK records, the property was still in the deceased's name, but in reality, the deceased had transferred his interest to the respondent.
27. We concur with the finding of the learned Judge that as between the respondent and the deceased, the obligations relating to the sale agreement had been discharged. The non-payment of the loan to HFCK did not in any way vitiate the agreement. Apparently, the respondent continued making the monthly payments in regard to the loan even though he continued to do this in the deceased's name. It was for this reason that the Mortgage Protection Insurance cover paid off the outstanding loan when the deceased died.
28. It is telling that when the appellant and her brother -in- law applied for letters of administration they did not include the suit property as an asset, but only included it as a liability. The only reason why the suit property was not included as an asset is because the deceased had already assigned his interest in the suit property to the respondent.
29. For these reasons, we find that the learned Judge was right in entering judgment for the respondent as the appellant and the estate of the deceased were bound by the agreement entered into between the respondent and the deceased for the sale of the suit property. Accordingly, we find no merit in this appeal. It is accordingly dismissed. Given the circumstances of this case, we find it appropriate to order each party to meet their own costs.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2022.**

**D. K. MUSINGA (P)**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**



**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

