IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NUMBER 11 OF 2018

BETWEEN

KADZO CHARO.....APPELLANT

AND

ALEX NZAI DZOMBO.....RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Malindi (J.O. Olola, J.) delivered on 15th November, 2017 ***in E LC No. 200 OF 2014 (OS)***

JUDGEMENT OF THE COURT

1. This appeal arises from a judgment of the Environment and Land Court at Malindi (***J.O. Olola, J***.) delivered on 15th November 2017, in which that court declared the respondent to be the legal/beneficial owner "*of 6 acres of land which is comprised in Plot No. Tezo/Roka/797*" on the basis that the respondent had purchased and acquired the same for valuable consideration. At the same time the Court permanently restrained "*the defendants or their assignees, agents, and or servants or any other person claiming under them*" from interfering with the respondent's enjoyment and quiet possession of the said 6 acres of land.

2. The background is this: The property known as Title Number Kilifi/Roka/797, which has also been referred to as Plot No. Tezo/Roka 797 is registered in the name of Charo Kinda. It measures approximately 12.4 acres. Charo Kinda, the registered proprietor, died on 4th April 1985. He was survived by his two wives (who coincidentally shared the name Kadzo Charo) aged 69 and 25 years respectively and four children who were aged 12, 9, 7, and 2 years at the time of his death.

3. On 4th April 1997, the deceased's first wife, Kadzo Charo Kinda, entered into an agreement with the respondent under which she agreed to sell to the respondent, who agreed to purchase 6 acres of the property for the price of Kshs.250,000. It would appear that an initial amount of Kshs.100,000 was paid at that time while the balance of the purchase price appears to have been paid on 5th December 1998. According to the respondent the appellant who is the deceased's second wife, had concurred in the sale.

4. The respondent asserted that to enable the deceased's first wife obtain letters of administration in respect of the estate of the deceased with a view to eventually transferring the 6 acres of property to him, he agreed to finance the succession proceedings and in that regard Probate and Administration Cause Number 9 of 2001 was commenced before the Senior Resident Magistrate's Court at Kilifi in which the first wife applied for letters of administration for the estate of the deceased.

5. The respondent claimed that the appellant frustrated the efforts to obtain the said letters of administration; that after the application for the grant of letters of administration had been lodged in court and a gazette notice published on 10th May 2001 to that effect, the appellant, "*started behaving queerly and failed to take final steps in the acquiring of the said grant in order to enable her effect the transfer of the subject six (6) acres of land.*" He asserted that he resisted efforts by the appellant to refund the purchase price.

6. Against that background, the respondent filed suit, by way of Originating Summons, before the Land and Environment Court at Malindi on 30th October 2014. Kadzo Charo Kinda, the deceased's first wife was named as the 1st defendant in the suit, while the appellant, Kadzo Charo, was named as the 2nd defendant.

7. In the Originating Summons, filed under Order 37 Rules 1 and 3 of the Civil Procedure Rules, the respondent claimed to be the beneficial owner of 6 acres of the property on the grounds that he acquired the same for "*valuable consideration from the Defendant.*" He sought determination of the questions whether he is the legal or beneficial owner of 6 acres on Plot No. Tezo/Roka 797 having purchased the same for Kshs.250,000.00; whether the respondent is entitled to proprietary or possessory rights over the said plot having purchased it; and

whether the widows of the deceased or their assignees, agents, servants or any other persons claiming under them are entitled to disrupt his enjoyment and quiet possession of the said property.

8. In response to the Originating Summons, the appellant filed a replying affidavit in which she denied that there was any such agreement; that the first wife had no capacity to enter into any agreement to sell the property of the deceased's estate "*without proper procedure being followed and all beneficiaries in put sought*."; that she did not consent to the sale and the respondent did not bother to involve her; that she did not frustrate the process of probate and administration "*but refused to be used to perpetuate an illegality*"; that the amount of Kshs.250,000 that was paid by the respondent was duly refunded to the respondent through the area chief.

9. The deceased's first wife, Kadzo Charo Kinda, with whom the respondent had entered into the agreement for sale died during the pendency of the suit before the ELC whereupon the respondent withdrew his suit as against her, leaving the appellant, as the only defendant in the suit. Upon an application by counsel for the respondent, the suit against the first wife was marked as withdrawn on 21st April 2015.

10. Thereafter, for reasons that will shortly become apparent, the hearing of the suit proceeded in the absence of the appellant and the impugned judgment was subsequently delivered on 15th November 2017 allowing the respondent's claim.

11. In light of the complaint by the appellant in this appeal that she was denied an opportunity to present her case before the ELC, it is necessary to set out the procedural history leading up to the hearing.

12. On 4th July 2016, the ELC directed that the Originating Summons

"*should proceed by way of viva voce evidence…"* and fixed the matter for hearing on 6th October 2016. On 6th October 2016, when the matter was scheduled for hearing, counsel for the respondent appeared and applied for adjournment. The respondent's counsel is recorded as having informed the Court: *"My client is not present. I am not able to proceed."* There was no appearance for the appellant on that day. The court adjourned the hearing and recorded that,

"*this shall be the last adjournment. The matter is stood over generally*."

13. On 19th January 2017, the record shows that a hearing date for 20th April 2017 was taken at the court registry by appellant's advocates in the absence of the respondent. On 20th April 2017, when the matter was scheduled for hearing, there was no appearance for the appellant and the court noted that on 6th October 2016 a final adjournment was given to the appellant and directed that the hearing would go on that day. The respondent testified after which the respondent's case was closed. The court directed written submissions to be filed and a mention date was fixed for 31st May 2017 for highlighting of submissions. The court ordered that the appellant should be served with a mention notice. *14.* On 31st May 2017, counsel for both parties appeared for the mention. The advocate for the appellant is recorded as having stated, *"the matter proceeded ex-parte on 20th April 2017. We pray that the defendants be granted the chance to re-open the case."* The court then directed that *"the defendants are at liberty to make a formal application to seek to re-open the case. In the meantime I shall deliver Judgment in this matter on 27th September 2017."*

15. On 20th July 2017, the appellant presented an application before the ELC under certificate of urgency seeking, principally, an order to set aside the ex-parte proceedings and *"an opportunity to be heard on merit"*. That application was based on the grounds that on 20th April 2017 when the hearing proceeded ex-parte, the appellant, who is illiterate, was in fact in court but could not follow the proceedings; that the appellant's advocate had requested another advocate to appear for him and seek adjournment as he was attending a funeral; that Ms. Nyaga, the advocate who was to hold brief failed to appear.

16. On 31st July 2017, the advocates for the appellant wrote to the Deputy Registrar, ELC requesting for a priority hearing date for the application filed on 20th July, 2017 so as to arrest the judgment to avoid the application being rendered nugatory. That letter appears to have been referred to the Judge with a remark, "*file to be placed before the Judge for direction. Judge will be back on 18th September 2017*". It would appear that that application was never heard, and the impugned judgment was delivered on 15th November 2017 with no mention of the pending application of 20th July, 2017.

17. In her memorandum of appeal, the appellant has challenged that judgment on the grounds that the judge erred by failing to give her a chance to be heard during the trial; that the judge wrongly applied the doctrine of estoppel; that the judge erred in failing to uphold her plea that the respondent's claim was barred by the Limitation of Actions Act; that the Judge failed to appreciate that land control board consent in respect of the transaction was not obtained and the entire sale transaction was therefore void; that the Judge failed to consider the affidavit evidence of the appellant; that the Judge failed to appreciate that at the respondent's actions were tantamount to intermeddling with the estate of the deceased; and that the Judge failed to take into account that the deceased's first wife, the first defendant in the suit, had died.

18. Expounding on those grounds, ***Mr. Omondi*** holding brief for ***Mr. Nyachiro*** for the appellant relied entirely on written submissions in which it was urged that the appellant was denied an opportunity to be heard, and for that reason a retrial should be ordered; that the Judge failed to appreciate that a previous adjournment of the suit had been occasioned by the respondent and not the appellant; that despite the appellant's application to set aside the ex-parte proceedings having been filed on 20th July 2017 seeking to reopen the case, the Judge proceeded to issue judgement without any reference to that application.

19. On limitation, counsel submitted that the respondent should have filed his claim within 12 years of the sale agreement in accordance with Section 19 of the Limitation of Actions Act; that the sale agreement having been entered into in 1997, the respondent should have filed his claim in 2009 at the latest; and that the Judge should therefore have dismissed the respondent's claim as it was time barred.

20. Regarding consent of the land control board, it was submitted that the suit property is agricultural land and the transaction was therefore a controlled transaction; that in the absence of consent of the relevant land control board, the transaction was void under Section 6 of the Land Control Act; and that the only remedy that was available to the respondent was for a refund of the purchase price.

21. On legal capacity to contract, it was submitted that Charo Kinda, deceased, the registered proprietor of the suit property died in 1985 and no beneficiary of his estate had applied for letters of administration; consequently the first wife of the deceased had no capacity, in the absence of letters of administration, to enter into a transaction with the respondent; that under Section 45 of the Law of Succession Act, dealings with the property of the deceased in the absence of letters of administration was tantamount to intermeddling with the property of the deceased.

22. Opposing the appeal learned counsel for the respondent ***Mr. Faraji*** also relied on written submissions and urged that the appellant was under an obligation to honour the agreement for sale which remained binding; that by her actions and by reason of the sale agreement the respondent was made to believe that all the parties had agreed on the manner of the disposal of the property and that the appellant would pursue letters of administration in order to transfer the 6 acres to the respondent; that in those circumstances the Judge correctly applied the doctrine of estoppel.

23. On limitation, it was submitted that the cause of action arose in 2004 as a "*result of breach of an expectation of a benefit that flowed from her promise to finalize the acquisition of the said grant of letters of administration of the estate of the late Charo Kinda"*; that by dint of Section 36 of the Limitation of Actions Act, the provisions of the Limitation of Actions Act do not apply in a claim for equitable relief such as specific performance of a contract as is the case here.

24. As regards land control board consent, it was submitted that under Section 42(3) of the Land Control Act, the court has power to grant relief to the purchaser and that on strength of the authority of ***Macharia Mwangi Maina & 87 others vs. Davidson Mwangi Kagiri [2014] eKLR*** possession of land by purchasers is an overriding interest and the respondent was entitled to rely on the doctrine of constructive trust; that in any event the Land Control Act is superseded by the constitutional provisions that have elevated equity as a principle of justice to a constitutional principle. In that regard the decision of this court in the case of ***Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR*** was cited.

25. Regarding the claim that the respondent intermeddled with the estate of deceased, it was submitted that this matter was not for consideration by the trial court as it was not pleaded; that the parties are bound by their pleadings and it was not open to the courts to determine the dispute on the basis of a matter that was not pleaded.

26. As regards the complaint that the appellant was denied an opportunity to be heard, it was submitted that the court granted a last adjournment on 6th October 2016; and that the hearing scheduled for 20th April 2017 had been fixed at the instance of the appellant but the appellant did not attend the hearing, and the court justifiably proceeded with the hearing; that the appellant was not vigilant and delayed in following up on her application of 20th July 2017 and consequently the court had a duty to determine matters before it expeditiously.

27. We have considered the appeal and the submissions by learned counsel. In a first appeal such as this, we are entitled to review the evidence and draw our own conclusions subject to the caveat that we have not had the opportunity, as the trial court did, to hear and observe witnesses as they testify. [See ***Selle vs. Associated Motor Boat Co Ltd [1968] EA 123***].

28. Mindful of that principle, there are two main issues for determination in this appeal. The first is whether we should accede to the appellant's prayer for a retrial on the basis that she was denied the opportunity to be heard. The second is whether the respondent established to the required standard, a case for specific performance of the contract of sale of land. Within the second issue are questions whether dealings with the property of the estate of the deceased without grant of letter of administration was tantamount to intermeddling with property under section 45 of the Law of Succession Act; whether the respondent's claim is barred by the Limitation of Actions Act; and whether absence of the land control board consent rendered the entire transaction void.

29. We begin with the complaint that the appellant was not given "*a chance to be heard during the trial*". We have already set out the procedural history leading up to the trial on 20th July 2017 when the hearing proceeded in the absence of the appellant's advocate although the appellant claims she was in court. Before proceeding with the hearing, the court noted: "*I note the hearing date was taken by the defendants. On 6th October 2016, Hon Justice Angote had given a final adjournment to the defendants who are again absent today. The hearing shall therefore proceed at 11:30 AM*." Thereafter the respondent testified on oath in support of the claim.

30. Although the observation by the Judge that a final adjournment had been granted to the defendants was not entirely correct, we do not think that the Judge can be faulted for having proceeded with the hearing in the absence of the appellant or the appellant's advocates having been satisfied that the hearing date had been fixed by the appellant's advocates. There was no application for adjournment that was made before the Judge on 20th July 2017 and the Judge cannot therefore be accused of wrongly declining to grant it.

31. That said, we observe in passing that on 31st May 2017, when the matter was scheduled for mention before the Judge for purposes of highlighting the written submissions, upon the advocate for the appellant applying for *"the chance to reopen the case"*, the court granted the appellant "*liberty to make a formal application to seek to reopen the case*" and intimated that, "*in the meantime I shall deliver judgement in this matter on 27 September 2017*."

32. As we have already seen, a formal application to re-open the case was subsequently filed by the appellant's advocate under certificate of urgency, on the 20th July 2017. Based on the appellant's advocates letter to the court dated 31st July 2017, the appellant advocates requested the Deputy Registrar:

"We kindly request that our certificate of urgency dated 20 July 2017which is coming up for hearing on 20th September be given a different hearing date on priority basis since the order sought are meant to arrest the judgement, otherwise the application shall be

rendered nugatory."

33. That letter was endorsed with handwritten remarks that, "*File to be placed before the charge for directions. Judge will be back on the 18th September 2017*." It is not clear from the record whether the application was ever placed before the Judge or what came of it. What is clear from the record is that Judgement was delivered in the presence of counsel for the appellant and in the absence of counsel for the respondent on 15th November 2017. In those circumstances, it seems to us that having granted the appellant leave to make a formal application, and a formal application having been made promptly after leave was granted, the court ought to have given directions as to its disposal. That however is a separate matter as we are not dealing with an appeal against a decision of the Judge refusing to entertain the application to arrest the judgement. As we have stated, the Judge cannot be faulted for having proceeded with the trial on 20th April 2017 having been satisfied that all parties to the suit had due notice of the hearing and when there was no request for the adjournment for the Judge to consider. There is therefore no merit in the complaint that the Judge denied the appellant a chance to be heard during the trial and there is therefore no basis for this Court to order a retrial. That ground of appeal fails.

34. We turn to the question whether the respondent established to the required standard, a case for specific performance of the contract of sale of land. The respondent's case as pleaded in his originating summon is that he purchased the property *"for valuable consideration of Kshs.250,000/= from the 1st defendant"*. The first defendant, as noted, is the deceased first wife, who is also deceased.

35. In his supporting affidavit, the respondent deposed that the agreement for sale, in respect of which he sought specific performance, was entered into "*between myself and the 1st defendant who was the 1st wife of Charo Kinda now deceased*." He was categorical throughout the supporting affidavit that he purchased the property from the 1st wife of the deceased, who according to him, assured him that the 2nd wife (the appellant herein) had consented to allow her to sell the property to him; that he decided to buy the property "*with an assurance and undertaking from the 1st defendant that she was to acquire letters of administration to enable her to change the title deed*" of the property "*to her name and thereafter transfer*" the property to him; that they (the respondent and the 1st defendant) "*mutually agreed that* [he] *was to cater for the expenses being court fees and other incidental fees to facilitate the process for the 1st defendant to acquire the letter of administration.*"

36. He deposed further that on 4th June 2001, the first wife, being sick and unable to continue with the process of acquiring letters of administration, consented to the appellant *"to inherit"* the property on behalf of all beneficiaries of the estate of the deceased and to acquire letters of administration to that effect which the respondent was to facilitate; that he facilitated the appellant to acquire the letters of administration and proceedings until the appellant "*started behaving queerly and failed to take final steps in acquiring the said grant in order to enable her effect the transfer*" of the property; that thereafter the appellant summoned him through the Chief for purposes of refunding the purchase price which he declined; that the "*1st and 2nd defendants together with their respective children made a commitment*" before the assistant chief to refund the full purchase price, which he also declined.

37. The essence of the respondent's case as pleaded in his Originating Summons and in his affidavit in support, therefore was that he entered into the agreement for sale to purchase the property with the first wife of the deceased. Indeed, the agreement for sale dated 4th April 1997 in respect of which he sought the relief of specific performance and the subsequent agreement of 5th December 1998 were entered into between the respondent and the first wife.

38. However, in his oral testimony before the trial court, conscious as he must have been that the 1st defendant was no longer alive and the case against her withdrawn, the respondent changed tact and stated that, "*I came to court because the defendants sold me the land*,"; he maintained that he purchased the property from "*the two defendants*", and that, "*they sold me land*", meaning the two widows of the deceased.

39. As already stated, the appellant in her replying affidavit distanced herself from the sale agreement and deposed that she was "*a stranger to the averments*" made by the respondent; that the property belongs to her "*deceased husband who passed on in the year 1985*" and "*no beneficiary had applied for letters of administration*" and that the first wife "*did not have the capacity to sell my husbands property without proper procedure being followed and all beneficiaries in put sought*."

40. The appellant denied that she was consulted or consented to the sale or that the respondent was to cater for the expenses of the succession cause. She stated that she refused *"to be used to perpetuate an illegality"* and that the purchase price that had been paid by the respondent to the first wife was refunded and the money left with the chief. She deposed further that her husband died intestate in 1985, more than 30 years ago and "*any transaction on his estate is void ab initio without the grant of letters of administration*" and further that "*this case is barred by the Limitation of Actions Act…*"

41. Based on the totality of that evidence, the following facts are established: that the property was at all material times registered in the name of the deceased; that the contract for sale was entered into between the first wife of the deceased, who was named as the 1st defendant in the Originating Summons, and the respondent; and that the appellant was not privy to that agreement; that no grant of letters of administration in respect of the estate of the deceased was ever obtained; and that the deceased's first wife, with whom the respondent contracted to purchase the property, died during the pendency of the suit and the case against her withdrawn.

42. On those facts, the learned Judge was persuaded that the respondent had established a case for specific performance. He held that, "*the two widows of the late Charo Kinda led* [the respondent] *to believe that they would pursue the issuance of letters of administration for their deceased husband's estate after which they would transfer 6 acres of land to him*". The Judge invoked Section120 of the Evidence Act in concluding that the appellant was estopped from asserting that due process in the acquisition of the property was not followed. Was the Judge right in reaching that conclusion and in granting the relief of specific performance?

43. To start with, Section 45 of the ***Law of Succession Act*** provides that:

> ***"(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.***
>
> ***(2) Any person who contravenes the provisions of this section shall—***
>
> ***(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and***
>
> ***(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."***

44. Under that provision, the property of a deceased person can only be dealt with in a manner authorized by law. ***Musyoka, J.*** of the High Court captured the legal position aptly in ***Veronica Njoki Wakagoto (Deceased) [2013] eKLR*** where he stated that:

> ***"The effect of [section 45]…is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence."***

45. In ***Trouistik Union International & another vs. Jane Mbeyu & another [1993] eKLR*** the Court characterized that principle, as an important principle of law of universal application, with respect to the right of a party to fulfil the role of an administrator of an intestate without obtaining letters of administration. The Court concluded that action taken by such party without letters of administration is incompetent at the date of its inception. In that case, the Court departed from its earlier decision in the case of ***Roman C Hintz vs. Mwangombe Mwakima [1988] 1 KAR 482*** where the Court had determined that a plaintiff could commence an action for the benefit of a deceased's estate under the Law Reform Act without a grant of representation. In doing so, the Court stated:

> ***"But by far, the highest judicial authority which, by necessary implication, repudiated the holding in the Hintz case is the oft cited Otieno v Ougo case decided in 1987. The question at issue in that appeal was the right of a widow to bury her intestate husband when she obtained no letters of administration to his estate. The Court gave vent to an important principle of law of universal application with respect to the right of a party to fulfil the role of an administrator of an intestate without obtaining letters of administration. The court, inter alia, observed:***
>
> ***"The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the action is incompetent at the date of its inception."***

46. In the present case, the respondent contracted with a seller who had no capacity to sell the property. Without grant of letters of administration of the estate of Charo Kinda, deceased, in whose name the property is registered, the deceased's first widow, or for that matter, the appellant, did not have the capacity to sell the property to the respondent or to any other person. In the case of ***Benson Mutumamuriungi vs C.E.O Kenya Police Sacco & another [2016]eKLR*** cited in the High Court decision in ***In re Estate of M'Ngarithi M'Miriti [2017] eKLR*** that:

> ***"Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so."***

47. Dealings with the property of the deceased in the absence of letters of administration is therefore intermeddling within the meaning of Section 45 of the Law of Succession Act and the respondent's claim to enforce a contract of sale in breach cannot therefore succeed. As this Court recently stated in ***Winnie Kinyua Kaburu vs Ali Juma Abdirahman & another [2018]eKLR***

> ***"A party who has no letters of administration has no legal capacity or authority to transact or deal with the estate of the deceased. In the words of Section 45 of the Act that is tantamount to intermeddling."***

48. Contrary to the claim by the respondent that the matter of legal capacity was not raised, the issue was as already noted, raised in the appellant's replying affidavit. The learned Judge did not however consider it. There is therefore merit in the complaint by the appellant that the Judge erred in failing to hold that purported sale of the property by the widow of the deceased to the respondent without a grant of letters of administration was intermeddling. An order for specific performance could not therefore be founded on a defective contract. As this Court stated in ***Bernard Nganga Ndirangu vs. Samuel Wainaina Tiras [2019] eKLR*** the jurisdiction to grant specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers some defect or illegality. See also ***Thrift Homes Ltd vs. Kenya Investments Ltd [2015] eKLR***.

49. The conclusion we have reached is sufficient to dispose of this appeal and a consideration of other issues would be academic. We accordingly allow the appeal and set aside the judgment of the High Court given on 15th November 2017. We substitute therefore an order dismissing the respondent's Originating Summons dated 30th October 2014 with costs to the appellant. The appellant shall have the costs of this appeal.

Orders accordingly.

Dated and delivered at Mombasa this 21st day of August, 2019.

HANNAH OKWENGU

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

A.K MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR