



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: VISRAM, KARANJA & KOOME, J.J.A)**

**CIVIL APPEAL NO 95 OF 2017**

**BETWEEN**

**WINNIE KINYUA KABURU ..... APPELLANT**

**AND**

**ALI JUMA ABDIRAHMAN ..... 1<sup>ST</sup> RESPONDENT**

**REHEMA CHARO MUNGUMBA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Environment and Land Court at Malindi (Angote J., dated 5<sup>th</sup> day of October, 2017*

*in*

*Environment and Land Court Case No. 48 of 2014)*

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**JUDGMENT OF THE COURT**

[1] This is an appeal against the judgement and decree of **Angote J.**, in Malindi Environment and Land Court Case No. 48 of 2014 where in Winnie Kinyua Kaburu (appellant) was sued by Ali Juma Abdirahman and Rehema Charo Mungumba the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively. The suit revolved around a sale of a parcel of land known as Gede/Miombani/888 (suit premises). In the suit the subject matter of this appeal, the respondents sought inter alia a permanent order of injunction restraining the appellant, her agents or servants from constructing, interfering, disposing off, entering or in any way dealing with the suit premises. The core issue for determination is whether the learned trial Judge erred by holding that a sale agreement over the suit premises that was entered into by the deceased daughter (2<sup>nd</sup> respondent) without letters of administration was invalid.

[2] We shall give a brief background of the matter to place it in perspective and also this being a 1<sup>st</sup> appeal whereby we have a duty to re-evaluate the entire evidence. The dispute over the suit land is founded on a sale agreement dated 4<sup>th</sup> September, 2013 over the suit property that was executed by the 2<sup>nd</sup> respondent as the seller and the appellant as the buyer. According to the said agreement the 2<sup>nd</sup> respondent was paid through a firm of Advocates that was acting for her a deposit of Ksh.300,000. The balance of the purchase price was supposed to be paid after the 2<sup>nd</sup> respondent obtained the letters of administration and other completion documents. Consequently the appellant was given vacant possession. As the appellant was exercising her possessory rights and commenced construction on the suit property, the said suit was filed.

[3] The 2<sup>nd</sup> respondents alleged that on 4<sup>th</sup> September, 2013 she was duped by her uncle into signing the aforesaid agreement without full disclosure that she was selling her father's land. She claimed that she was cheated the documents she signed were meant to assist her in obtaining the letters of administration and subsequent transfer of the suit land in her name. Moreover she did not have the letters of administration to enable her transact a sale agreement over the suit premises that was still in the name of her late father. The 2<sup>nd</sup> respondent denied having received any money towards the purchase or having instructed the law firm of Katsoleh and Co. Advocates to act for her in the purported transaction.

[4] On the other hand the 1<sup>st</sup> respondent alleged that he purchased a portion of the suit land from the deceased; however after processing the application for the consent of the land control board, and before the transfer was effected the deceased passed away. The 1<sup>st</sup> respondent

contended that he was unable to transfer the suit premises owing to a caution that had been registered against the suit property by another family that also claimed purchaser's rights with which he had to negotiate a settlement regarding a deposit they too had paid the deceased.

[5] The suit was opposed by the appellant who stood by the sale agreement entered into with the 2<sup>nd</sup> respondent. The appellant had instructed a property agent one Martin from a firm known as **Watamu Real Estates Agents** to scout for her some land within Kilifi County. Martin met the 2<sup>nd</sup> respondent who was represented by the law firm of Katsoleh and Co. Advocates who prepared the sale agreement; a deposit of Ksh.300,000 was paid to the 2<sup>nd</sup> respondent to enable her process the requisite letters of administration in respect of her late fathers' estate. Meanwhile the appellant was given the go ahead to take possession of the suit premises and start development and consequently she begun construction and other developments. She was surprised when the 1<sup>st</sup> respondent whom she described as a stranger incited the 2<sup>nd</sup> respondent to interfere and file suit despite having had a cordial relationship with the rest of the family especially the 2<sup>nd</sup> respondent's uncle who was instrumental in getting for the appellant piped water in the suit premises.

[6] Upon hearing both sides and after weighing the evidence from both sides, the learned Judge found that the 2<sup>nd</sup> respondent had no legal capacity to enter into a valid sale agreement over the suit premises that belonged to her late father without letters of administration. This is what the learned Judge posited in his own words;

***“It is not in dispute that by the time the sale agreement of 4<sup>th</sup> September, 2013 was drawn, the registered proprietor of the suit land was already dead.***

***2<sup>nd</sup> plaintiff was to obtain the letters of administration in respect of her father's estate and have the said letters of administration confirmed.***

***It therefore follows that unless and until the 2<sup>nd</sup> plaintiff obtains the letters of administration and have the said letters of administration confirmed by the court, the 2<sup>nd</sup> plaintiff cannot be compelled by this court to transfer the suit land to the defendant...”***

[7] It is against the foresaid background that this appeal was filed. The 8 grounds of appeal challenge the decision of the trial court on the grounds that the Judge failed to adequately address his mind to the statutes and precedent in regard to succession and land law; that the appellant was allowed by the seller to take actual possession of the suit premises without restrictions; that the appellant had lawfully purchased the suit premises and made payments according to the agreement; finding the 1<sup>st</sup> respondent had purchased a portion of the suit premises without any evidence of payment of the purchase price. Failing to consider and evaluate the evidence and submissions and for granting a restraining order against the appellant who was already in occupation of the suit premises.

[8] This appeal was canvassed by way of written submissions, **Mr. Kurauka** learned counsel for the appellant filed written submissions and made some oral highlights during the hearing. The respondents were represented by the firm of **Gicharu Kimani** who filed written submissions but did not attend Court during the plenary hearing. In his oral highlights, Mr. Kurauka submitted that the suit by the respondents ought to have been dismissed for the same reasons that it was filed by strangers who did not have letters of administration in respect of the suit property that was registered in the name of the deceased. As regards the claim by the 1<sup>st</sup> respondent, the alleged contract of sale of land cannot pass muster in view of the provisions of the law of contract that any contract of sale of land must be in writing; there was no consent exhibited from the land control board rendering the alleged transaction null and void; moreover his claim if any persisted, it was time barred. The 1<sup>st</sup> respondent admitted that he did not execute any agreement of sale with the deceased, he therefore cannot be allowed to benefit from her own wrongdoing. Counsel cited the case of **David Sironga Ole Tukai v Francis Arap Muge & 2 Others** [2014] eKLR where this Court held that any sale of land that is governed under the Land Control Act is null and void unless the same is sanctioned by the land control board consent.

[9] On the part of the respondents, they submitted that the suit premises belonged to the deceased and despite the 2<sup>nd</sup> respondent being the only heir to the deceased estate, she lacked capacity to enter into the purported sale agreement. Moreover she was misled to signing an agreement which was consistent with the evidence of the appellant that she paid Ksh.300,000 which was to be used to process the letters of administration. In this regard the appellant knew the 2<sup>nd</sup> respondent was not the administrator of the estate and had no legal capacity to transact. Counsel also cited the provisions of **Section 82** of the Law of Succession and a persuasive authority by the High Court **Muriithi J.**, In the matter of **the estate of John Gakunga Njoroge** Succession Cause No. 256 of 2017. Where it was held that;

***“For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the grant of letters of administration (sic) to them and before the confirmed grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the Law of Succession Act. Even if the sale transactions were by administrators, the dealings with immovable property of the estate is restricted by the provisions on the powers duties of the personal representatives under section 82 (b) proviso (ii) which provides;***

***“No immovable property shall be sold before confirmation of the grant...”***

In conclusion counsel for the respondents also pointed out that the appellant failed to call the advocate whom she paid the sum of Ksh.300,000 as deposit despite the fact that the 2<sup>nd</sup> respondent had denied having received any money from the appellant or from the advocate. Counsel for the respondents urged us to dismiss the appeal

[10] This being a first appeal this Court is enjoined by law to proceed by way of re-appraising all the evidence and re-examine the same in a fresh and exhaustive way before arriving at its own independent conclusions. See **Rule 29** of the **Court of Appeal Rules**. The approach taken ought to recognize this Court's limitations and its deference to the factual findings by the trial Judge who had the advantage of hearing

and seeing the witnesses as they testified. The parameters of interference therefore are as aptly summed up in the case of **Selle vs. Associates Motor Boat & Co. [1968] EA 123**; where the predecessor of this Court put it thus:

***“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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan [1955], 22 E.A.C.A.270)”***

[11] We have considered the entire record of appeal, against the above summary that we have rendered, and the issue(s) that are discernible for determination is whether the learned Judge erred by holding that the sale agreement that was entered into by the 2<sup>nd</sup> respondent with the appellant was invalid for want of letters of administration and also an issue which seems to have been argued by the appellant only in this appeal as it was not an issue in the High court, that was whether the respondents had capacity to institute the suit, on the same grounds that they did not have letters of administration of the deceased estate.

[12] First we think it is prudent to isolate the issues that were common ground and were not at all contested. It was common ground that the suit premises belonged to and was at the material time registered in the name of the late **Charo Mungumba Kombe** (deceased) who died on 8<sup>th</sup> August, 1996. It was also common ground that the deceased is succeeded by his only heir the 1<sup>st</sup> respondent; that the letters of administration in respect of the deceased estate were not issued at the time the alleged agreement of sale of land between the 2<sup>nd</sup> respondent and the appellant was entered into and that fact was within the knowledge of the appellant. The appellant had taken possession of the suit premises and had begun construction and other developments.

[13] What was contested is whether the 2<sup>nd</sup> respondent knew that she was signing a sale agreement or she was signing a document to enable her process the letters of administration. Also the 2<sup>nd</sup> respondent denied having received the sum of Ksh.300,000 or any money from the appellant which was paid to the firm of Katsoleh and Company Advocates. According to the agreement that was exhibited, the said sum was to be held in trust by the advocate upon the execution of the agreement and was to be used to process the letters of administration. No letters of administration were processed and what compounded this issue was the appellant’s failure to call the said advocate to confirm whether he disbursed the said sum to the 2<sup>nd</sup> respondent, she having denied the receipt of the same.

[14] We now turn to the question of whether the learned Judge erred by holding that the 2<sup>nd</sup> respondent could not enter into an agreement of sale of her deceased father’s plot without letters of administration. This is an issue of law that is clearly answered by the various sections of the Law of Succession alluded to in the body of this judgement. 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. Incidentally the appellant and her lawyer were fully aware that the 2<sup>nd</sup> respondent did not have letters of administration. In another recent decision by this Court, dealing with an issue of transfer of certain shares in a company in **Civil Appeal No 14 of 2017** in **Nirmal Singh Dhanji v Joginder Singh Dhanji & 4 Others** it was held inter alia

***“On the face of it therefore, the transfers were undertaken prior to the confirmation of grant and thus offended section 55 aforesaid. Given this scenario where a party in blatant disregard of the requirements of the Law of Succession purported to transfer properties of the deceased before the grant of representation was confirmed, the learned Judge cannot be faulted for finding the transfers unlawful for having been executed by an unauthorized person. This much was held in the case of Musa Nyaribari Gekone & 2 others v Peter Mivienda & Another [2015] eKLR wherein any acts of distribution of the estate done prior to confirmation of grant were held to be void. The learned judge’s finding that the “settlement agreement” was void, thus sound and this Court has not been shown any cause to interfere”.***

[15] For ease of reference this is what **Section 55** of the law of Succession provides;

***“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, or to make any division of property, unless and until the grant has been confirmed as provided in [section 71](#).”***

We therefore find the learned Judge’s conclusion that the 2<sup>nd</sup> respondent could not have validly entered into a sale agreement is anchored in law, this ground of appeal fails as no amount of other evidence such as the alleged receipt of deposit and the appellant taking possession of the suit property would change the position of a null and void transaction. And as the Judge posited albeit obiter the appellants’ remedy lay in seeking refund of the alleged deposit which could not have been addressed in the said suit as there was no counter-claim.

[16] This now takes us to the next issue whether the respondents had *locai standi* to file suit for reasons that they did not have letters of administration in respect of the deceased’s estate. This matter was not raised during the trial court, it has just been raised in this appeal this therefore denies us an opportunity to re appraise the opinion of the trial Judge on the same issue. Be that as it may, we find that the 2<sup>nd</sup> respondent filed suit as a dependant, and beneficiary of the deceased to seek to preserve the estate of the deceased. While the 1<sup>st</sup> respondent alleged that he had entered into an agreement of sale of the suit property with the deceased and went as far as lodging a caution over the suit premises claiming purchaser’s rights. In so far as the suit was only meant as the order that was given was conservatory in nature, we are not persuaded that the respondents lacked the requisite *locai* standing to file the suit. **The Black’s Law Dictionary, 9<sup>th</sup> Edition** at page 1026 defines *Locus standi* as-

***‘The right to bring an action or to be heard in a given forum’***

What we discern from this record of appeal is that there are demonstrable rights at least by the 2<sup>nd</sup> respondent who had the right to protect her inheritance and also the 1<sup>st</sup> respondent who was claiming to have purchased the suit land and lodged a caution.

[17] In the upshot, we find no merit in this appeal, which we hereby order dismissed except on the issue of costs. Due to the circumstances of this matter we are reluctant to award costs to the respondents in particular because the issue of whether the 2<sup>nd</sup> respondent purported to deal with the deceased property without first obtaining letters of administration and executed a sale agreement albeit claiming that she was signing different documents remains obscure, it would not be right to reward her with costs. Also considering that perhaps the appellant was defrauded of her money it would not be fair to condemn her to pay costs also in regard to the suit in the High court. Accordingly we set aside the order of costs and order this appeal dismissed.

**Dated and delivered at Mombasa this 20<sup>th</sup> day of September, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**