



**(Dcd & another (As legal representatives of Hiram Gitari Gichohi - Dcd) v Kangethe
(Suing through his attorney Ann Nduta Kangethe) (Environment and Land
Appeal 11 of 2021) [2024] KEELC 13426 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13426 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 11 OF 2021
JO OLOLA, J
NOVEMBER 22, 2024**

BETWEEN

MARY WANGECHI GITARE 1ST APPELLANT

ELIZABETH WARUGURU 2ND APPELLANT

AS LEGAL REPRESENTATIVES OF HIRAM GITARI GICHOHI - DCD

AND

**GEORGE GATHU KANGETHE (SUING THROUGH HIS ATTORNEY ANN
NDUTA KANGETHE) RESPONDENT**

JUDGMENT

1. This is an Appeal arising from the two Rulings of the Hon. M.N. Munyendo, P.M delivered on 12th March 2021 in Othaya PMELC No. E2 of 2020.
2. By a Complaint dated 19th November 2020, George Gathu Kangethe, suing through his attorney Ann Nduta Kang'ethe (the Respondents herein) had sought for Judgment against the Appellants for:-
 1. A declarations that the late Hiram Gitare Gichohi held land parcel No. Mahiga/Munyang'e/1133 in trust for the Plaintiffs;
 2. A declaration that the trust is determined;
 3. An order compelling the defendants or any other person in his/her capacity as the Administrator of the estate of the late Hiram Gitare Gichohi to transfer Mahiga/Munyang'e/1133 to George Gathu Kang'ethe;



4. An order authorizing the Executive Officer Othaya Law Courts to sign all transfer documents to facilitate the transfer of Mahiga/Munyange/1133 to the Plaintiff should the Defendant refuse; and
 5. Costs of the suit plus interest at court rates.
3. Those prayers were the result of the Respondent's contention that prior to the death of the said Hiram Gitare Gichohi, the Respondent had bought the suit property through the late Hiram acting as his agent. The Respondent further pleaded that upon his return to the country, the late Hiram had commenced the process of transferring the property to his name but he passed away before conclusion of the transfer.
 4. Contemporaneously filed with the suit was a Notice of Motion dated 17th November 2020 wherein the Respondent sought for an order that the court be pleased to grant a temporary stay of further proceedings in Othaya Succession Cause No. 246 of 2018 pending the hearing and determination of his application and the main suit.
 5. In response to the application, Mary Wangechi Gitare and Elizabeth Waruguru sued as the Administrators of the Estate of the late Hiram Gitare Gichohi (the Appellants) filed a Replying Affidavit sworn jointly on 15th December 2020 wherein they urged the court to dismiss the application. The Appellants asserted that the Respondent had not exhibited any agreement between himself and the deceased before his demise and that hence there was no basis for the grant of the orders sought.
 6. In addition to the Affidavit in Reply, the Appellants instituted a Notice of Preliminary Objection dated the same 15th day of December 2020 wherein they objected to the Respondent's suit on the grounds that:
 1. There is no contract of land in writing (sic) pursuant to section 3 of the [Law of Contract Act](#);
 2. The Plaintiff suit does not disclose (a) reasonable cause of action pursuant to Order 2 Rule 15 of the Civil Procedure Rules;
 3. Without prejudice, pursuant to the provisions of Sections 4 and 7 of the [Limitation of Actions Act](#) Cap 22 Laws of Kenya, the entire Plaintiff's suit is statutory barred; and
 4. The Honourable Court has no jurisdiction over the suit.
 7. Having heard the Motion and the Preliminary Objection and in her Ruling delivered on 12th March 2021, the Learned Trial Magistrate found the objection unmerited and dismissed it with costs to the Respondent. She went on to allow the Respondent's Motion dated 17th November 2020.
 8. Aggrieved by the said determination, the Appellants moved to this court and lodged the Memorandum of Appeal dated 10th April 2021 wherein they urge this court to set aside the entire Ruling on the grounds framed therein as follows:-
 1. The Learned Trial Magistrate erred in fact and in law in failing to analyze all facts, evidence and law and hence took into account irrelevant factors thereby arriving at a verdict that was wrong and erroneous;
 2. The Learned Trial Magistrate erred in fact and law in failing to find the Notice of Motion dated 17/11/2020 and the accompanying suit were untenable as the Appellant's Preliminary Objection on point of law satisfied the pre-requisites for striking off/dismissal (of) both of them as they both abrogated the provision (s) of Section 3 (3) of the Law of Contract (Act) as there was no enforceable contract of land in writing (sic);



3. The Learned Magistrate erred in law and fact in assuming that there was a sale agreement in regards to the parcel of land known as LR. No. Mahiga/Munyange/1133 between Hiram Gitare (deceased) and George Gathu Kang'ethe without any proof thereof which falls foul of Section 3 (3) of the Law of Contract Act, thereby amounting to a fundamental misdirection and erroneous exercise of discretion as well as denial of the Appellants' right of access to justice;
 4. The Learned Trial Magistrate erred in fact and in law by arriving at a finding based on the Respondent's pleading in the Complaint without considering the evidence adduced by the Appellant whereby she went ahead stating that the dates when the transaction was done are not specified. This is a clear indication that there is no cause of action and the Magistrate ought to have struck out (the) pleadings instead of putting reliance on them as is a requirement under Order 2 Rule 15 of the Civil Procedure Rules 2010;
 5. The Learned Trial Magistrate erred in fact and law in assuming without jurisdiction that the cause of action arose after issuance of title deed on 1st October 2015 while the Respondent's had earlier alleged of the non-existing sale in the year 2001 and or 2006 which was without prejudice, there was any valid contract (sic) was not enforced (sic) within six years pursuant to Section 4 and 7 of the Law of Limitation Act (sic) hence would have yield to aiding relief on a sale claim (sic); and
 6. The Learned Trial Magistrate erred in fact and law in ignoring the Appellant's submissions and list of authorities in support of (the) Preliminary Objection on a point of law.
9. As a first appellate court, the duty of this court is to re-evaluate the evidence before the trial court as well as the Ruling and to arrive at its own independent Judgment on whether or not to allow the Appeal. (See *Selle & Another – v-s Associated Motor Boat Co. Ltd & Others* {1968} EA 123)
 10. In his suit as filed in the Lower Court, the Respondent had sought for a declaration that the late Hiram Gitare Gichohi who was the husband to the two Appellants herein had been registered as the proprietor of the parcel of land known as Mahiga/Munyange/1133 (the suit property) in trust for the Respondent. Accordingly the Respondent sought an order that the trust be determined and that the Appellants as the Administrators of the Estate of the said Hiram Gitare Gichohi be compelled to transfer the suit property to the Respondent.
 11. By the Notice of Motion application filed contemporaneously with the suit, the Respondent sought an order of stay of further proceedings in Othaya Succession Cause No. 246 of 2018 pending the hearing and determination of his application and the suit. The said Succession Cause had been filed by the two Appellants herein for the purposes of the administration of the Estate of the said Hiram Gitare Gichohi which, according to the Appellants herein, included the suit property.
 12. The Appellants were opposed to both the application and the entire suit. By their Notice of Preliminary Objection as filed in the Lower Court, they objected to the suit on some four (4) grounds all of which were dismissed by the trial court.
 13. The Appellants' first ground of objection was their contention that there was no contract of sale in writing between the Respondent and the deceased as required under the provisions of Section 3(3) of the Law of Contract Act. Having considered the first limb of the objection, the Learned Trial Magistrate did find that the obligations sought to be enforced were not based on a sale agreement between the Applicant and the deceased.



14. The said Section 3(3) of the Law of Contract Act, Cap 23 of the Laws of Kenya provides as follows:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- a). the contract upon which the suit is founded-
 - i). is in writing;
 - ii). is signed by all the parties thereto; and
- b). the signature of each party has been attested by a witness who was present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public action by an auctioneers within the meaning of the Auctioneers Act (Cap 526) nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

15. From the material placed before the court, I was unable to find the basis upon which the Appellants sought to rely on that provision. As pleaded in the Plaint, it was not the Respondent’s case that he had bought the suit property from the Appellants’ husband. His case was very clear, that he lived abroad and had sent the money for the purchase of the suit property to the Appellants’ husband to purchase the same on his behalf.

16. The claim by the Respondent was that even though the suit property was registered in the name of the deceased, such registration was in trust, for the Respondent was the real owner of the suit property. That being the case, the said objection was clearly misplaced and the Learned Trial Magistrate cannot be faulted for her findings that the same had no basis.

17. The second limb of the objection was the assertion by the Appellants that the suit does not disclose a reasonable cause of action and that the same ought to have been dismissed pursuant to the provisions of Order 2 Rule 15 of the Civil Procedure Rules. Having considered the same, the Learned Trial Magistrate made a finding that this ground was related to the first one and that the same did not hold water as the appellants had failed to demonstrate that there was no reasonable cause of action.

18. As we have seen from the pleadings, it was the Respondent’s case that he had sent money to the deceased to purchase land on his behalf and that prior to his death, the deceased was in the process of transferring the land that he had registered in his name to that of the Respondent. By his suit, the Respondent is stating that the suit property was registered in the deceased’s name in trust for himself. That is not an idle claim but one that requires to be proved by way of evidence.

19. As the Court of Appeal stated in *Yaya Towers Limited –vs- Trade Bank Limited (In Liquidation)* Civil Appeal No. 35 of 2000 [2000]eKLR.

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of court, it must be allowed to proceed to trial... It cannot be doubted that the court has inherent jurisdiction to dismiss that which is an abuse of the process of the court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”



20. In the matter herein, the Appellants have not demonstrated that the Respondent's claim was an abuse of the court process. The assertion that the suit does not raise a reasonable cause of action was therefore frivolous and misconceived and the trial court was right in its findings that the same does not hold water.
21. On the assertion by the Appellants that the suit was time-barred by dint of sections 4 & 7 of the Limitation of Actions Act, the Learned Trial Magistrate was of the view that the suit fell within the legal timelines and again dismissed the claim that it was time barred.
22. From a perusal of the Official Search dated 30th October 2020, it was apparent that the title for the suit property was issued on 1st October 2015. It was also apparent from the Grant of Letters of Administration issued to the Appellants herein that Hiram Gitari passed away on 30th November 2016. As rightfully determined by the Learned Trial Magistrate that was the time when the computation of time for purposes of Limitation would begin to run. This suit having been filed barely five years later could not therefore be said to have been time-barred as purported by the Plaintiffs.
23. Lastly, the Appellants' asserted that the trial court had no jurisdiction to try the suit. In support of this ground, the Appellants submitted that the Respondent's claim was contrary to Section 3 (3) of the Law of Contract Act and that the same being statute barred, the court ought to lay down its tools for lack of jurisdiction.
24. As we have observed herein, those assertions were without any basis. It follows therefore that the contention that the court had no jurisdiction was similarly without basis.
25. In the premises, I find and hold that this Appeal was misconceived and without basis. The same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 22ND DAY OF NOVEMBER, 2024.

J. O. OLOLA

JUDGE

In the presence of:

No appearance for the Appellant.

Ms. Wamuyu holding brief for Muthee for the Respondent.

Court Assistant: Kendi

