



REPUBLIC OF KENYA



**Giuseppe v Falasconi & 2 others (Environment and Land Appeal
E004 of 2023) [2024] KEELC 14126 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14126 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E004 OF 2023
EK MAKORI, J
DECEMBER 20, 2024**

BETWEEN

ZAGO GIUSPPE APPELLANT

AND

GIANCARLO FALASCONI 1ST RESPONDENT

ALIASGAR SHABIR 2ND RESPONDENT

HUSSEIN S. KISSAMJI 3RD RESPONDENT

*(Being an Appeal from the Judgement delivered by Hon. D. Wasike
(SRM) on the 14th of December 2022 in Land Cause No. 99 of 2019)*

JUDGMENT

1. By an amended plaint dated 9th December 2019, the appellant sought the following reliefs:
 - a. A declaration that the plaintiff is the rightful purchaser for value of the property Chembe/Kibabamshe/520.
 - b. A permanent injunction restraining the 1st, 2nd, and 3rd defendants from evicting the plaintiff from the suit property Chembe/Kibabamshe/520.
 - c. A permanent injunction restraining the 1st, 2nd & 3rd defendants, their servants, agents, and his representatives from selling or dealing in the said parcel of land Chembe/Kibabamshe/520 in any manner whatsoever.
 - d. A declaration that the transfer of Chembe/Kibabamshe/520 registered to the 2nd and 3rd defendants was null and void.



- e. An order cancelling/revoking the title deed issued to the 2nd and 3rd Defendants regarding Chembe/Kibabamshe/520.
 - f. An order that the Deputy Registrar of the Environment and Land Court at Malindi process and execute the transfer of the suit property Chembe/Kibabamshe /520 in favor of the plaintiff.
 - g. Such other relief that this court may deem to grant. Costs of the case.
2. The 1st respondent denied the claim by his defence dated 26th August 2019. The 2nd and 3rd respondents filed their statement of defence dated 20th February 2020.
 3. After hearing the suit, the Learned Magistrate dismissed the appellants' suit with costs to the 2nd and 3rd respondents.
 4. The appellant now appeals against the judgment on the eight grounds of appeal set out in the Memorandum of Appeal dated 2nd February 2023.
 5. The appeal was canvassed through written submissions.
 6. From the materials and submissions presented by the parties, I identify the following key issues for the court's consideration: whether the agreement offended Section 45 of the [Law of Succession Act](#), whether the 2nd and 3rd respondents were parties to fraud, whether the 1st respondent should refund the appellant the purchase price or specific performance should be ordered, and the issue of costs for this appeal.
 7. This court's role is crucial, as it involves re-evaluating the evidence and making its independent conclusion. In the often-cited case of [Okeno v Republic](#) [1972] EA 32 at 36, the East Africa Court of Appeal stated the duty of the Court on a first appeal as follows. This thorough re-evaluation, which is a testament to the fairness and accuracy of the decision-making process, provides reassurance to all parties involved:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.”
 8. The appellant strongly argues that the Learned Magistrate's decision to validate the agreement between the appellant and the 1st respondent, without further orders, is unjust. The court should not condone the 1st respondent's unconscionable conduct, which led to his failure to fulfill his obligation and his subsequent benefit from his wrongdoings.
 9. After a finding that there existed a sale agreement indicating a commitment to the obligations of the parties therein after succession proceedings were over, the Learned Magistrate ought to have ordered a refund of the purchase price paid or given an order of specific performance. To that end, the appellant



avers he suffered injustice. The appellant prayed for ‘any other appropriate relief’ that the court should have considered.

10. The Appellant contends that the dispossession of the appellant of the suit property and further registration of the 2nd and 3rd respondents as the proprietors is unlawful and contravenes the appellant’s right to property. Therefore, an order of specific performance ought to be issued compelling the transfer of the suit property to the appellant.
11. The appellant reiterates that the agreement was made with the parties aware that completion would be after succession. The 1st respondent, as the sole beneficiary, committed, therefore, that, upon conclusion of the same, he would transfer the suit property. This reiteration of the appellant’s commitment to fulfill the agreement should evoke a finding toward the appellant’s situation. Based on that, the appellant fulfilled his obligation by paying the full purchase price to settle the decree against the estate.
12. The 1st respondent should, therefore, not be allowed to renege from the agreement and unjustly enrich himself by selling the exact property to another person and keeping the money already paid by a previous purchaser, as this is nothing but greed.
13. On this point, this Court agrees with the 2nd and 3rd respondents’ submissions that given the undisputed evidence that the initial registered owner of the suit property, Mei Santuzza Billiotti, was deceased at the time of the execution of the agreement for sale then the 1st respondent had no legal capacity to enter into the said agreement on behalf of the estate of the deceased in view of the provision of Section 45 of the [Law of Succession Act](#) Chapter 160 of the Laws of Kenya.
14. Section 45 of the Act prohibits any person not authorized by a grant of representation to the estate of a deceased person from selling any free property of the deceased person. The Act further provides that any person who contravenes that provision shall be guilty of an offence. It is clear from the agreement for sale dated 23rd March 2011 that the 1st respondent had no grant of representation to the estate of Mei Santuzza Billiotti - clause No.3 in the agreement for sale - as such, he had no power whatsoever to sell or transfer the suit property. It matters not that the agreement for sale was made in anticipation of the completion of a succession cause to be instituted by the 1st respondent. A contract that is illegal or null and void at inception does not get cured at a later date. The contract remains unlawful, null, and void.
15. As further submitted by the 2nd and 3rd respondents, and rightly so, it is trite law that the property of a deceased person constitutes the estate of the deceased person and vests in the personal representative of the deceased and that it is only the legal representative of the estate that has the power to deal with the estate of a deceased. As submitted by the 2nd and 3rd Respondents in the case of [Re Estate of Paul M’Maria \(deceased\)](#) [2017] eKLR, the court held as follows:

“The restriction provided in law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. accordingly, the acquisition of immovable property of the estate in contravention of the [Law of Succession Act](#) is tainted with killer poison and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under Article 40(6) of [the Constitution](#). See the claw back provision of [the Constitution](#) that - 40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. Therefore, applying the law and [the Constitution](#), the sale of Plot 18A MITUNGUU MARKET on 12th July 2004 was in contravention of the [Law of Succession](#)



Act and therefore vitiated by that illegality. It is thus an invalid, null, and void transaction. Such contract is ex facie illegal and is unenforceable. No person can maintain an action based on or recover on the basis of a contract which is prohibited by statute.”

16. Given the provisions of the Law of Succession Act, the 1st respondent had no legal capacity to sell the suit land to the appellant on 23rd March 2011. Consequently, the agreement for sale and the acknowledgment dated 21st March 2011 are null and void and did not confer any interest in the suit property on the appellant.
17. The agreement having been tainted with illegality and even forbidden by statute, the Learned Magistrate could not enforce the transaction. Having evaluated the evidence and the applicable law, I believe the Learned Magistrate did not err in law and fact in dismissing the appellant’s suit and finding that the 1st respondent had no property rights to transfer to the appellant.
18. It is trite law that no court should enforce an illegal contract or make itself an instrument of enforcing obligations arising from such a contract. See the decision cited by the 2nd and 3rd respondents, Domitilab Wanzila Muvanya v Jubilee Insurance Company Limited [2017] KEHC 9798 (KLR):

“Thus, it is manifest that what the Plaintiff is seeking to enforce, even if the Defendant were willing to pay, would be an illegal contract. Authorities abound to underscore the principle that the Court has no business lending the Plaintiff its aid in the enforcement of an otherwise illegal arrangement. Thus, in the case of Scott vs. Brown, Doering, McNab & CO, (3), [1892] 2 QB 724, Lindley LJ observed thus in connection with the principle:

“Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”

- [20] And in Pricilla Nyambura vs. Marathon Corporation Corporation Limited and 3 Others [2008] eKLR, whose facts are quite similar to the facts of this case, a similar conclusion was arrived at by Kimaru, J. In that case, it was the contention of the Defendant that, since the Plaintiff had pleaded in her plaint that she influenced the award of tender upon which she filed a claim for the payment of commission, the claim was a grave breach of the applicable laws and therefore contrary to public policy as it was grounded on an illegality and a breach of the Exchequer and Audit (Public Procurement) Regulations and the Anti Corruption and Economic Crimes Act, 2003. The Court was in agreement and proceeded to strike out the suit. The Learned Judge reasoned thus:

“It was common ground that the plaintiff is seeking to be paid commission by the defendants on account of her role in facilitating the award of a tender to the defendants. According to the plaintiff, if she had not “pushed” the defendants’ tender with the right persons in the ministry of defence, the defendants would not have



been awarded the tender. It was clear that the plaintiff's role in entire transaction was to facilitate or make smooth the path of the defendants in securing the said tender awarded by the department of defence...It was clear from the foregoing that the plaintiff was not an agent of the defendants in the said tender but was actually a broker on behalf of the persons who were awarding the tender. It was apparent that the plaintiff was intimately involved in the tender process with a view to influencing the award of the said tender to persons who in her view would pay her commission for her "industry" It was clear that the plaintiff was involved in the rigging of the tender which is specifically prohibited by Section 44 of the [Anti-Corruption and Economic Crimes Act](#)... What emerges from the said plaint is that the plaintiff is basically seeking the intervention of the court to enforce a contract which advances an illegality."

19. Given the foregoing, the Learned Magistrate cannot be faulted for not enforcing the sale agreement between the appellant and the 1st respondent.
20. Regarding the transaction between the 1st respondent and the 2nd and 3rd respondents, the evidence established that the 1st respondent agreed with the 2nd and 3rd respondents in which he decided to sell the suit land to them. The agreement was made on 24th December 2018. He could sell the suit property given that the 1st respondent was the registered owner of the suit land at that time. The evidence shows that the 1st respondent had applied for and obtained the relevant consent of the Land Control Board to the transaction and that the 2nd and 3rd respondents had paid the requisite stamp duty and were registered as owners of the suit land. There was no evidence that they had prior knowledge of the appellant's claim to the suit land. There was no restriction registered against the title to the suit land at the time of the agreement for sale on 24th December 2018. The green card shows that the restriction was registered on 18th February 2019.
21. No mention of the appellant's claim in the restriction is made. No evidence was adduced to establish that the restriction was registered against the title to the suit land, according to a complaint by the appellant. The restriction was withdrawn on 27th May 2019. The 2nd and 3rd respondents paid the stamp duty and registration fees on 29th May 2019 and were registered as owners of the suit land on 30th May 2019.
22. A perusal of the judgment from the appeal record shows that the Learned Magistrate evaluated the evidence adduced and arrived at the correct decision. The evidence adduced shows that they purchased the suit land in good faith and that they were bona fide purchasers for value without notice of any defect in the title of the 1st Defendant, and that upon the registration as owners of the suit property, they became the indefeasible owners of the suit land and that their title could not be challenged except as provided in Section 26(1) of the [Land Registration Act](#) No.3 of 2012, that is on the ground of fraud or misrepresentation to which they are proved to be party to or that the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme.
23. Regarding fraud, the appellant pleaded in the amended plaint that the 2nd and 3rd respondents had acquired the suit land through fraud. Still, he failed to set out the particulars of fraud relied upon contrary to the express provisions of Order 2 Rule 10(1) of the Civil Procedure Rules. See the decision cited by the 2nd and 3rd respondents in [Peter Owade Ogwang v Jared Obiero Ouya](#) [2014] eKLR for



the proposition that allegations of fraud must be specifically pleaded and proved beyond a mere balance of probabilities. The court held thus:

“The above provisions have received judicial interpretation in a plethora of authorities including the cases of Urmila w/o Mahendra Shah -Vs- Barclays Bank International Ltd and Another [1979] KLR 76, Jared Iqbal Abdul Rahman & Another -Vs – Bernard Alfred Wekesa Sambu & Another [Nairobi [CA No. 11 of 2001](#)] (UR), Virani t/a Kisumu Beach Resort -Vs – Phoenix of East Africa Assurance Company Ltd [2004] 2 KLR 269, among many other cases. Those decisions are unanimous that allegations of fraud must be specifically pleaded and that proof thereof is higher than mere balance of probabilities. In the Virani (supra) case, the Court went further to state that in the absence of such specific pleading, a party is not at liberty to agitate the allegations of fraud or fraudulent intention as fraud is a serious quasi criminal imputation and requires more than proof on a balance of probability though not beyond reasonable doubt.”

24. In the amended plaint, the appellant made generalized allegations of fraud without explicitly stating the facts upon which the fraudulent conduct could be inferred. There was no evidence that the 2nd and 3rd respondents were parties to any fraud perpetrated by the 1st respondent upon the appellant.
25. The appellant did not prove any fraud on their part, and the learned Magistrate cannot be faulted for not finding the 2nd and 3rd respondent parties to any scam.
26. Concerning the submission that the Learned Magistrate erred in law and fact in not ordering the 1st respondent to refund the appellant the purchase price received, that there was no such specific prayer in the amended plaint, the Learned Magistrate cannot be faulted for not ordering a refund of the purchase price.
27. Conversely, the Learned Magistrate went out of her way to hold that the appellant's remedy lies in pursuing damages for misrepresentation or breach of contract against the 1st respondent.
28. In a nutshell, the appeal lacks merit and is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 20TH DECEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Odhiambo for the Appellant.

Mr. Shujaa, for the 2nd and 3rd Respondents

Happy: Court Assistant.

