



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C.A CASE NO. 8 OF 2017

(FORMERLY EMBU CIVIL APPEAL NO. 44 OF 2015)

NAOMI MURIUKIAPPELLANT

VERSUS

BONIFACE NJUKI RUNJI.....RESPONDENT

JUDGEMENT

1. By a plaint dated and filed on 22nd July 2013, the Respondent, who was the Plaintiff in Siakago PMCC No. 36 of 2014 sued one, Lucy Muriuki whom he described as the “legal administrator and personal representative” of the estate of Francis Muriuki Njeru. The Respondent later on filed an amended plaint on 17th December 2014 in which Lucy Muriuki was removed as the Defendant and the Appellant, Naomi Muriuki was brought on board as the legal administrator and personal representative of the estate of Francis Muriuki Njeru.

2. In both the original and amended plaint, it was pleaded by the Respondent that sometime in 2009 he had bought about 2 acres of land out of the deceased’s *land parcel No. Mbeere/Kirima/1871* who had apparently died before transferring the 2 acres to the Respondent. The Respondent had, therefore, filed suit seeking the following reliefs in order to vindicate his rights;

a. A declaration that the Plaintiff is a bonafide purchaser of the land reference No. Mbeere/Kirima/1871 as per the agreement and Defendant (sic) should recognize the Plaintiff as a beneficiary and include his name in the intended succession to enable him acquire the benefit of his purchaser interest (sic).

b. Costs and interest of this suit at court rates.

c. Any further relief which this honourable court may find it just and expedient to grant.

3. The Appellant filed a statement of defence denying knowledge of any sale by the deceased of any portion of *Title No. Mbeere/Kirima/1871*. It was further pleaded that the parcel of land which was the subject of the sale agreement dated 23rd July 2009 was Kirima Land Adjudication No. 1871 and not *Mbeere/Kirima/1871*.

4. The said suit was ultimately heard before the Hon A.N. Makau SRM on 22nd October 2015 whereby he entered judgement for the Respondent as prayed in the plaint. It is that judgement which provoked the instant appeal.

5. In her memorandum of appeal dated 30th October 2015, the Appellant raised the following grounds of appeal;

- a. *The learned trial magistrate erred in law and in fact when she failed to find that the sale agreement dated 23rd July 2009 produced in court by the Plaintiff was for land parcel No. Kirima Land Adjudication number 1871 and not for the deceased's land parcel No. Mbeere/Kirima/1871 which are two different land parcels (sic).*
- b. *The learned trial magistrate erred in law and in fact when she failed to find that the appellant who was sued in a representative capacity as the legal administrator of the estate of the deceased Francis Muriuki Njeru was indeed not a legal representative of the estate of her late husband and did therefore not have capacity to be sued.*
- c. *The learned trial magistrate erred in both law and in fact by finding that the respondent had bought 2 acres out of land parcel No. Mbeere/Kirima/1871 which belonged to the appellant's husband whereas the respondent did not prove that there was such a sale and full consideration paid to the deceased Francis Muriuki Njeru.*
- d. *The learned trial magistrate erred in law and in fact by finding that the respondent who was the Plaintiff had proved his case on a balance of probabilities whereas it was clear that the deceased and the respondent had not attended any land control board for transfer to obtain consent to transfer the said land parcel and therefore the respondent was only entitled to recovery of the purchase price if any from the legal representative of the estate of the deceased Francis Muriuki Njeru and at this point there is no legal representative (sic)*
- e. *The learned trial magistrate erred in law and in fact by finding that the appellant was aware of the said sale whereas the respondent did not prove to court that the appellant was aware of the said sale as it was the respondent's burden to prove that the appellant was well aware of this sale between her husband and the respondent.*
- f. *The learned trial magistrate erred in law and in fact by granting the respondent prayers he sought in his amended plaint dated 27th November 2014 without making a finding that the respondent ought to have waited for the succession cause in respect of the estate of Francis Muriuki Njeru to be filed for him to file a protest thereon if indeed he had any claim from the said estate.*

6. It would appear that the parties herein agreed to canvass of the appeal by filing written submissions. The appellant filed her submissions on 8th June 2017 whereas the Respondent filed his on 27th July 2017.

7. The duty of the first appellate court is to conduct an independent assessment of the evidence before the trial court so as to draw its own conclusions. See **Selle Vs Associated Motor Boat Co [1968] EA 123**. On the 1st ground of appeal, it was submitted that the subject matter of the sale agreement of 22nd July 2009 was parcel No. Kirima Adjudication No. 1871 and not *Title No. Mbeere/Kirima/1871*. It was submitted that those were two different parcels. The Respondent, on the other hand, submitted that the property the subject of sale was parcel No. Kirima Adjudication No. 1871 during the adjudication process which was then registered as *Title No. Mbeere/Kirima/1871*.

8. The court has considered the totality of the evidence on the 1st ground and concluded that the two descriptions refer to one and the same property. The Appellant in her testimony stated that her deceased husband had only one parcel of land at Kirima. The processes which were undertaken by the

deceased in order to change his name in the land register reasonably point to the conclusion that we were talking about one parcel. The court therefore finds that the trial learned magistrate did not err in any respect. The court finds no merit in the 1st ground of appeal and the same is rejected.

9. The 2nd ground relates to the capacity in which the Appellant was sued in the magistrate's court. It was submitted on behalf of the Appellant that the Appellant was not the administrator of the estate of her deceased husband and had not been sued as next of kin. The Respondent submitted that the Appellant had admitted during cross-examination that she was the administrator.

10. The court has considered the pleadings and the evidence on this issue. Although the title of the amended complaint described the Appellant as the legal administrator and personal representative of the deceased, paragraph 4 thereof described her as "the wife/next of kin, beneficiary or assign" of the deceased. That description was somehow confusing but in paragraph 4 of the defence, the Appellant admitted her description as pleaded by the Respondent.

11. The real question in contention is who is a personal representative of a deceased person. ***Black's Law Dictionary (9th Edition)*** defines a personal representative as;

"A person who manages the legal affairs of another because of incapacity or death, such as the executor of an estate. Technically, an executor is a personal representative named in a will, while an administrator is a personal representative not named in a will."

12. ***Section 3 of the Law of Succession Act (Cap 160)*** states that a personal ***representative "means the executor or administrator of a deceased person."*** The said section further defines an executor as ***"a person to whom the execution of the last will of a deceased is, by the testator's appointment, confided."*** The same section defines an administrator ***as "a person to whom a grant of letters of administration has been made under the Act."***

13. From the evidence on record, it is not plainly clear whether or not the Appellant was the legal representative of the deceased. During her examination in chief, she stated that she had applied for letters of administration but the same had not yet been issued. However, during cross-examination by the Respondent's advocate, she was recorded as follows;

"I have filed a succession cause in this court. I am the administrator."

14. The court is of the view that issues for determination in a suit flow from the pleadings. Although the Appellant was described as the personal representative of the deceased in the amended complaint, she did not deny that description in her defence. Under the rules of pleadings, she was deemed to have admitted that capacity and description under ***Order 2 Rule 11 of the Civil Procedure Rules***. It was, therefore, not necessary for the Respondent to lead evidence to prove a matter which was not in issue. The parties were bound by their pleadings. The court therefore finds no merit in the 2nd ground of appeal and the same is rejected.

15. The 3rd ground of appeal relates to the adequacy of proof of the existence of the sale agreement between the Respondent and the deceased as well as full payment of the purchase price. The Appellant submitted that there was no sufficient evidence tendered to prove the Respondent's case on a balance of probabilities. The Appellant submitted that the payment vouchers were not signed and that the Respondent ought to have produced a formal acknowledgement drawn by an advocate.

16. The court has considered the evidence on record. The trial magistrate considered the Respondent

as a credible witness and accepted his evidence on the sale and payment of the purchase price. The sale agreement was drawn by an advocate who practices and resides at Embu. He was not called by either of the parties to either confirm or deny that he drew and witnessed the sale agreement. The actions and the steps the deceased took with respect to the suit property were quite consistent with his having sold a portion thereof to the Respondent. If there was a balance of the purchase still unpaid at the time of filing suit, that would not invalidate the sale. It would simply constitute a civil debt. The court is not aware of any law which requires that every payment instalment towards the purchase price must be witnessed by an advocate. The court is unable to find any error on the part of the trial court with respect to the 3rd ground. The same is accordingly rejected.

17. The 4th ground relates to the failure or the inability of the deceased to obtain the consent of the Land Control Board (LCB) for the transaction during his lifetime. Whereas the court accepts that the consent of the LCB is mandatory with respect to controlled transactions, the court is of the view that an inquiry in that respect should only be made if that issue arises from the pleadings of the parties either directly or by necessary implication see **Gandy Vs Caspair Air Charters Ltd [1956] 33 EACA 139**. I have perused the pleadings of the parties herein and noted that the issue of the consent of the LCB was not raised in the pleadings.

18. The issue of lack of consent of the LCB was raised in the Appellant's submissions before the trial court. The court is of the view that it was not open to the learned trial magistrate to consider and rule upon an issue which was not pleaded by the parties. The Appellant is also not at liberty to agitate that issue in this appeal when it was never pleaded in her statement of defence in the first instance. Accordingly, the court finds no merit in the 4th ground of appeal and the same is rejected.

19. The 5th ground of appeal faulted the trial magistrate for finding that the Appellant was aware of the sale by her deceased husband whereas the Respondent did not prove such knowledge. The court is unable to find any merit in this ground of appeal. A finding one way or the other would really be of no consequence since the sale in issue took place in 2009 when there was no legal requirement for either knowledge or consent on the part of a spouse of the vendor. The court agrees with the submission of the Respondent that the requirement of spousal consent was introduced by **section 93 (3) of the Land Registration Act in 2012**. The court consequently finds no merit in the 5th ground of appeal and rejects the same.

20. On the 6th ground of appeal, it was submitted for the Appellant that filing a civil suit was not the proper way of vindicating the Respondent's rights. It was submitted that the Respondent ought to have presented his claim to the succession court by way of a protest or else wait to sue the legal representative for a refund of whatever purchase price he may have paid. The Appellant, however did not cite any authority for such proposition. The Respondent, on the other hand, submitted that he was at liberty to file suit for a declaration and that there was no law confining his remedy to a protest before the succession court. The court has considered the ground and finds no authority to support the proposition that the Respondent's remedy was confined to succession proceedings only. This ground of appeal accordingly fails.

21. The upshot of the foregoing is that the court finds no merit in the appeal hence the same is hereby dismissed with costs to the Respondent.

22. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **29TH** day of **NOVEMBER, 2017**

In the presence of Ms Muriuki holding brief for Ms Muthoni for the Appellant and Mr Okwaro for the Respondent.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

29.11.17



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