



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 209 OF 2003**

**ROSE ARAKA MBECHE** (Suing on her behalf and as  
representative of the estate of **ARAKA RACHIER MBECHE.....PLAINTIFF**

VERSUS

**DAVID MATHAI KIHUMBA.....DEFENDANT**

**AS CONSOLIDATED WITH**

**NAKURU HCCC NO. 61 OF 2001**

**DAVID MATHAI KIHUMBA.....PLAINTIFF**

VERSUS

**ROSE ARAKA MBECHE.....DEFENDANT**

**JUDGMENT**

1. **BRIEF BACKGROUND**

On the 21<sup>st</sup> February 2005, the court directed that the two above suits be consolidated.

The plaintiff **DAVID MATHAI KIHUMBA** became the plaintiff in both suits whereas **ROSE ARAKA MBECHE** became the defendant in both suits.

2. The suit concerns a dispute over land ownership over **Title No. Nakuru/Municipality Block 15/169**.

Before the promulgation of the Kenya 2010 Constitution, the High Court had both original and appellate jurisdiction over land and other matters. However Article 162(2) established a special court, namely the Environment and land Court with jurisdiction to hear and determine all disputes arising from Title, ownership, use and occupation of land. This was by an Act of Parliament No. 19 of 2011.

3. By **Gazette Notice No. 5178 of July 2014, the Hon. The Chief Justice** by his practice directions directed that all pending parheard cases before the High Court continue to be heard and determined by the said court.

It is upon such direction that as a High Court Judge I continued to hear this case which was parheard by several High Court Judges, Hon. L. Kimaru, M. Mugo, Anyara Emukule. JJ's up to June 2012 when the plaintiff concluded his case and the defendant's

evidence remaining to be taken.

4. On the 28<sup>th</sup> April 2016 when I took over the hearing of the case Mr. Clapton Advocate for the defendant indicated that he would not call any evidence, and closed case.

5. **THE PLEADINGS**

By an order of the Court (Kimaru J) dated 21<sup>st</sup> February 2005, HCCC No. 61 of 2001 was consolidated with HCCC No. 209 of 2003 and that plaintiff in 61 of 2001, DAVID MATHAI KIHUMBA for purposes of hearing of this suit becomes the plaintiff in HCCC No. 209 of 2003, and ROSE ARAKA MBEICHE became the defendant.

6. By a plaint dated 19<sup>th</sup> December 2003, (in HCC No. 209/03) ROSE ARAKA MBEICHE sued the defendant DAVID MATHAI KIHUMBA for the following reliefs:

a) Vacant possession of the suit property **Nakuru Municipality Block 15/169, House No. D18** and removal of the caution on the property and payment of all rents owing

b) Costs of the suit.

7. The plaintiff, (then Defendant in HCCC No. 209/2003) claims, by way of a counterclaim dated the **26<sup>th</sup> January 2004**, the following reliefs:

a) A declaration that **LR No. Nakuru Municipality Block 15/169 House No. D.18** belongs to him.

b) A perpetual injunction restraining the plaintiff from claiming ownership of the suit property.

c) Costs of the suit.

8. From the parties pleadings, it is evident that the suit in its entirety is a claim of ownership and use of the suit property by each of the parties. This will no doubt come out clearly in their respective evidence adduced in support of their respective claims.

9. **PLAINTIFF'S CASE**

**(Defendant in HCCC 209/03)**

**DAVID MATHAI KIHUMBA** testified that he bought the suit property from one Araka Mbeche(deceased) in November 1986 vide an agreement of sale dated 24<sup>th</sup> November 1986 and executed by the said ARAKA MBEICHE and for a price of Kshs.400,000/= where of a deposit of Kshs.180,000/= was paid on the **24<sup>th</sup> November 1986** out of which Kshs.150,000/= he paid to the vendor and Kshs.30,000/= to defray land rents and rates.

10. He testified that the agreement was drawn by Creswell Mann and Dudd Advocates. That the vendor had a debt with Housing Finance Corporation of Kenya(HFCK)and that he took over with an unpaid sum of Kshs.210,196/35– (PEXt 2) and monthly payments greed at Kshs.1,987/=:, and produced pay in slips to HFCK(PEXt 3). The vendor then signed a transfer of lease in his favour apparently as he had finalised the transfer from the vendor – PEXt 4 to himself.

11. It was his further testimony that upon the death of he vendor, his mortgage protection insurance settled the debt with HFCK and he continued to occupy as he had been given possession by the vendor soon after he signed the lease - thereof with the vendors blessings and authority and has since improved the property to a value of Kshs.6,000,000/= as at March 2005 – when he testified.

12. He produced a list of the deceased's assets as stated in Nakuru HCCC Succession Cause No. 23/1989(deceased's Estate) to show that the suit property was not shown as the deceased's assets – PEXt 8 as it had been sold to him.

He further testified that he was the owner and not a tenant and that the deceased never lived in the house before his demise, nor did his wife take possession thereafter.

13. Upon cross examination, the plaintiff testified that the agreement (PExt 1) had completion date of 28<sup>th</sup> February 1987 and that after the death of Araka, HFCK communicated to him vide several letters and that the parties joint Advocate Mr. Githua was to procure the consents for the transfer, but did not have the documents to show he paid the balance of purchase price to HFCK, a sum of Kshs.26,921/90 but that he did pay to HFCK - by monthly instalments.

14. He also confirmed that he had not paid rates and land rates for 18 years nor was he renting the house and that the defendant knew that the house had been sold to him hence the suit against her as the Administrator of the vendor's estate. He testified that he lodged a caution – PExt 7 – to protect his purchasers interest on the 7<sup>th</sup> June 1989.

He reiterated that the property belongs to him as a purchaser and was willing to pay the money paid by the mortgage insurance to the defendant to enable her release the Title documents released to her by HFCK upon payment of the balance of Kshs.124,000/= and some compensation.

15. **DW2 Nathaniel Githua** was an Advocate in the firm of Cresswell Mann & Dudd Advocates who were engaged in the conveyance of the suit property on behalf of both the deceased(vendor) and the purchaser, plaintiff. He confirmed witnessing the sale agreement for the suit property and payment of price (Kshs.150,000/=) by the purchaser, and balance confirmed by HFCK as Kshs.210,196/35 as at 14<sup>th</sup> November 1986 (PExt 1). He also confirmed the then outstanding outgoings as Kshs.3,710/65 and costs of discharge of charge as Kshs.2,066/=, and that the deceased was paid Kshs.26,921/90 in his office, and that the total payments by the purchaser to the vendor amounted to Kshs.400,000/=, the purchase price.

16. He confirmed that the two parties executed the transfer of lease, and produced the original PExt 10. It was his testimony that the matter was closed, and only HFCK was awaiting payment of the balance to facilitate execution of the discharge of charge as it was fully aware of the sale transaction.

He further confirmed that possession was given to the purchaser (plaintiff) on the 1<sup>st</sup> January 1987.

17. Upon cross examination, PW2 stated that the sale agreement had a completion date, but could not register the transfer as he was not put in funds by the purchasers to do so.

He stated that the vendor was fully settled upon full purchase price having been paid and purchaser put in possession, but the payments by purchaser to HFCK were not paid within the completion date, but paid later.

He testified that the transfer form was not dated as he would have done so after receipt of completion documents from HFCK and that he never dealt with the deceased's wife in the sale transaction.

#### 18. DEFENDANTS CASE

**ROSE ARAKA MBECHE** testified as DW3 in HCCC No. 209/2003, now the Defendant.

Her testimony was that the suit property was registered in her late husband's name but they were not in occupation by the time he died. She testified that the plaintiff David Mathai Kihumba was in actual occupation from January 1987 and was not aware of the sale of the house to him by her husband.

19. She further testified that upon his death, the mortgage to HFCK was paid through the mortgage protection insurance and title documents released to her as his widow. She testified that she believed the plaintiff was a tenant in the house and never saw the sale agreement as her husband used to deal with all family affairs. She confirmed that the suit property was not included as an asset to the estate in her succession cause, and did not demand rent payment from the plaintiff.

20. The defendant confirmed having received title documents from HFCK after death of her husband and some money Kshs.26,000/= and that she had no reason to disclose the sale of the house to HFCK. She told the court that the property is hers as it

is still in her late husband's names.

**21. DWI PASCHAL PETER OYUKO MBECHE**

Is an advocate at Nakuru, and a brother in law to the Defendant, Rose Araka Mbeche. He assisted her to file the succession cause and that the property in issue was not included, but had stated HFCK, as a liability to HFCK, but no title was mentioned, but that the mortgage was redeemed when his brother died.

Upon the above evidence, the parties filed written submissions and framed issues for determination, albeit separately.

**22. ISSUES FOR DETERMINATION**, being the courts re-edition of the parties framed issues.

1. Whether the plaintiff was a *bonafide* purchaser for value of the suit property prior to the vendor's death.
2. Whether none payment of the balance of the agreed purchase price within stipulated period but paid by the deceased's mortgage protection insurance amounts to a discharge payment of consideration, or a factor to terminate the sale agreement.
3. Whether the defendant has a *bonafide* claim over the suit property.
4. Whether the plaintiff is entitled to the prayer sought in the counter claim in HCCC No. 209 of 2003 (as defendant)

**ANALYSIS OF EVIDENCE SUBMISSIONS AND FINDINGS**

**23. ISSUE NO.1.**

There is no dispute that the deceased, being the registered owner of the suit property vide a sale agreement dated 24<sup>th</sup> November 1986 and attested to by the parties joint **advocate Nathaniel Githua** (PEX 4) sold the suit property to the plaintiff. The total purchase price of Kshs.400,000/= was confirmed as having been paid through the said advocates offices and upon payment of all outstandings, the balance of Kshs.26,921/90 was paid to the defendant (Vendor).

24. Evidence adduced is clear that HFCK was at all times aware of the transaction as there existed a mortgage over the said land parcel, and arrangements were in place as to future payments of the mortgage to HFCK by the purchaser (plaintiff). This is evidenced by payments made to HFCK by the plaintiffs (pay in slips PEX 3) and several correspondence between the plaintiff and HFCK (though their respective lawyers) - PEX 1, 2, 3 and 9.

25. The joint advocate of both vendor and purchaser (PW2) confirmed that he had prepared all the conveyance documents upon full purchase price being paid and was only awaiting registration fees from the plaintiff for him to register the transfer and further that possession of the suit property to the plaintiff was given on the 1<sup>st</sup> January 1987 to the plaintiff by the deceased.

**Section 3(3) of the Law of Contract Chapter 23 Laws of Kenya** makes it mandatory that a contract for sale of land must be in writing and signed. PW2, Nathaniel Githua Advocate confirmed compliance with the above legal provisions, including full payment of the purchase price. Knowledge of HFCK. See **Antoine Ndiaye -vs- African Virtual University (2012) e KLR** to the effect that a court to be able to construe the intention of parties to a contract the whole agreement ought to be looked at.

26. There is therefore not in doubt that the intention by the parties was that the suit property was to be sold to the plaintiff and upon payment of the purchase price, possession would be given to him, which was done on the 1<sup>st</sup> January 1987.

All the pay in slips (PEX. 3) on various dates by the purchaser were made in the deceased's name and Account No. 96059 at the HFCK bank. This was not challenged or disputed by the defendant, ROSE ARAKA MBECHE.

27. It is also evident that as the transfer was not registered in the plaintiff's name (though executed) by the time the vendor died, the intention had indeed crystallised, in my view. See **Antoine Ndiaye case above**.

This is the only reason that the suit property had not been registered, and was persuasively explained by the joint Advocate that transfer fees had not been paid by the plaintiff. In my opinion, this cannot be a factor to frustrate the clear intention of the parties as by this time the purchaser had complied with all the pre-registration conditions. I am also persuaded that the defendant ROSE ARAKA MBECHÉ may not have been involved in the sale transaction by way of giving her spousal consent. Indeed, she admitted not having known that her husband had sold the property to the plaintiff until after his death.

28. Issue of spousal consent under the **Land Act 2012 and Land Registration Act 2012** are a recent enactment. It does not bind transactions prior to their enactment. See **Fredrick Chege Ndogo -vs- Benard Njoroge Mbugua & Another (2016) e KLR**.

In the result, I find that the plaintiff **DAVID MATHAI KIHUMBA** was indeed a *bona fide* purchaser for value of the suit property prior to the deceased death, save that the transfer in his name had not been registered and the only reason stated by the joint Advocate was that the plaintiff had not put him in funds for the registration of the transfer, but full purchase price had been paid thus the purchaser's obligations to the vendor had been fully complied with.

## 29. **ISSUE NO.2**

The deceased's mortgage protection insurance through HFCK paid off the balance of the mortgage upon his death and released the title documents to his widow, the defendant.

The plaintiff explained that he could not continue to pay the instalments to HFCK when the deceased died as the insurance was in place, and it paid the balance.

30. The Sale Agreement had a completion date of 28<sup>th</sup> February 1987. It was stated that an oral agreement was made by the plaintiff with HFCK for payment of the balance in instalments. It is worth noting that as at 1<sup>st</sup> January 1987, a month before the completion date above, the plaintiff had already been put into possession of the property as he had already paid the total purchase price to the deceased.

In my interrogation of evidence, the balance to be paid to HFCK not to the vendor, the deceased. As far as the two contracting parties were concerned, they had both discharged their obligations under the agreement. It can therefore not be said that there was a breach of the agreement by non-completion of payments to HFCK, a 3<sup>rd</sup> party to the contract.

31. In **David Sejjaka -vs- Rebecca Mukose – Supreme Court Civil appeal No. 12 of 1985** (Uganda) the court rendered that:

*“Any person who puts up a defence of being a bona fide purchaser has the burden of proof to adduce that establishes that he or she is actually a bona fide purchaser for value without any fraud, and must prove that:*

*a) He has a valid title from a person registered as a proprietor.*

*b) Must have paid valuable consideration.*

*c) Must have acted in good faith without notice of fraud whether actual or implied.”*

32. No fraud has been alleged by any of the parties to this suit. The plaintiff, upon payment of the purchase price as he did, expected to be given the suit property with a valid title from the vendor to himself. What then stood between that was the fact that the duly executed transfer had not been registered in his name, for reason explained by PW2 – the Advocate for both parties, and the death of the vendor.

I have already made a finding that valuable consideration had been paid. There is no doubt that the vendor (deceased) and the plaintiff (purchaser) acted in good faith, a fact shown by the deceased act of putting the purchaser into vacant possession of the house before he died, and in any event, he had already received the full consideration.

33. The above conditions, in my opinion were fully complied with in utmost faith between the two parties. It is therefore clear in my mind why the defendant refused to do the honourable act, to transfer the property to the plaintiff. That she was not aware, as she

admitted, that the house had been sold to the plaintiff. This fact came out clearly when, as the administrator of the deceased estate she did not include the suit property as property to the estate.

She must have, by then, known that indeed the property was sold by the registered owner before his demise, and therefore did not form part of the deceased's estate, but to the plaintiff from the 1<sup>st</sup> January 1987.

34. In the foregoing analysis, the contract of sale between the parties cannot be said to have been terminated or breached by either, and no fraud or act in bad faith or influence were either pleaded by either of them or proved.

I am also of the view that there are special circumstances which may persuade me to invoke the law of equity to relieve the parties from a bad bargain but none was alleged. - **National Bank of Kenya -vs- Pipe Plastic Samkolit & Another (2001) e KLR**. In the absence of either fraud, coercion of undue influence, I find that the defendant, as the administrator of the estate cannot be permitted to resile from the contract of sale. She must honour the agreement and pass the title documents and legal ownership to the plaintiff.

See **Court of Appeal decision in Civil Appeal No. 278 of 2006 Fredrick Chege Ndogo** (Supra). This is my finding.

### 35. ISSUE NO.3

Following the above findings, does then the defendant have a *bona fide*. claim over the suit property"

The answer is in the negative.

The doctrine of Estoppel operates as principle of law which precludes a person from asserting something contrary to what is implied by an action or statement of that person.

See **Serah Njeri Mwobi -v-s John Kimani Njoroge C.A. No. 314 of 2009**.

36. It was not alleged that the defendant had beneficial claim over the property as that would have ably been shown in the application for letters of Administration. She failed to prove her entitlement thereof, on a balance of probabilities.

In the case **Miller -vs- Minister of Pension, cited in D.T. Dobie Company (K) Ltd -vs- Wanyonyi Wafula Chebukati(2014) e KLR**, it was stated that:

*“---thus proof on a balance of preponderance of probabilities means a win however narrow. A draw is not enough --- where both parties explanations are equally unconvincing, the party bearing the burden of proof will loss, because the requisite standard will not have been made.”*

37. There is therefore sufficient evidence to come to the finding that the defendant, ARAKA RACHIER MBECHÉ has failed to proof to the required standards that indeed she has a bona fide claim over the suit property. That in my opinion is a logical conclusion on the issue.

### 38. ISSUE NO. 4

I have carefully considered the plaintiffs claim as stated in the counterclaim (See Paragraph 7 above), and the evidence adduced before the court. The deceased received full purchase price of Kshs.400,000/= through the joint advocates save that part of it went to payments of outgoings well tabulated by the Advocate Nathaniel Githua (PW2).

Upon that payment, the deceased gave actual occupation and possession of the property to the plaintiff from the 1<sup>st</sup> January 1987. On that basis, evidence abound that the plaintiff proceeded to develop and improve the property and is still in possession of the same as confirmed by the defendant.

It would be an unjust enrichment to the defendant if she were to retain the sum of Kshs.400,000/= paid to her late husband the

vendor as well as entitlement to the same house/property for which it was paid.

39. In the **Court of Appeal decision in Civil Appeal No. 22 of 2013 Peter Mbiri Michuki -vs- Samuel Mugo Michuki (2014) e KLR** faced with similar issues for determination edging on the validity of a sale agreement for a property, and where the defendant in part performance of his part of the contract took possession of the property and proceeded to develop the same, the court rendered that:

*“the concept of unjust enrichment is an equitable concept ---and the appellant is seeking an equitable remedy to prevent unjust enrichment before this court.---”*

40. It would therefore be unjust to allow the defendant to retain both the money and the property, and to grant orders to the contrary would be enriching the defendant unjustly.

To that end, it is my findings, and I need not repeat the basis of the findings as it is well stated earlier in this judgment, that the plaintiff is entitled to the reliefs he seeks.

#### 41. CONCLUSION

Accordingly I am persuaded that the plaintiff has proved his case against the defendant to the required standards, upon a balance of probabilities. I therefore enter judgment for the **plaintiff, DAVID MATHAI KIHUMBA** against the **defendant ROSE ARAKA MBECHE**. (Suing on her behalf and as a representative of the estate of **ARAKA RACHIER MBECHE** as hereunder:

*(a) A declaration is hereby issued that L.R NO. Nakuru Municipality Block 15/169 House No. D.18 belongs to the plaintiff, as a bonafide purchaser for value.*

*(b) A perpetual injunction is issued restraining the Defendant from claiming ownership of the suit property.*

*(c) That the defendant ROSE ARAKA MBECHE is ordered and directed to release all the title documents including the original certificate of Lease to the suit property to the plaintiff DAVID MATHAI KIHUMBA to facilitate registration of a transfer of the said property to himself.*

*(d) Costs of the suit are awarded to the plaintiff.*

Dated and Signed this 29<sup>th</sup> Day of September 2017.

J.N. MULWA

JUDGE

Delivered this ...12<sup>th</sup> Day of October 2017

R. LAGAT KORIR

JUDGE



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)