



REPUBLIC OF KENYA



KENYA LAW
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**Awino v Langa (Environment and Land Appeal 15 of 2022)
[2023] KEELC 16351 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16351 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 15 OF 2022
GMA ONGONDO, J
MARCH 22, 2023**

BETWEEN

RICHARD OOKO AWINO APPELLANT

AND

LUCIA AKUMU LANGA RESPONDENT

(An appeal from the judgment and decree of the Honourable R. B. N. Maloba, Principal Magistrate, in Chief Magistrate's Court Homa Bay Environment and Land Case No. 20 of 2018, delivered on 24th September 2020)

JUDGMENT

1. The instant appeal arose from the judgment of the learned trial magistrate delivered on September 24, 2020 where the trial court entered judgment for the respondent who was the defendant against the appellant who was the plaintiff in the suit for orders that;
 - a. The suit is dismissed with costs to the defendant.
 - b. The plaintiff be and is hereby directed to vacate the suit premises within 90 days of this judgment failing which he be forcefully evicted from thereon upon expiry of the stated period.
2. The appellant was aggrieved thereby. As a result, he generated this appeal mounted by way of a memorandum of appeal dated October 13, 2020 and duly filed on October 15, 2020 based on grounds 1 to 17 set out on the face of it. The grounds include;
 - a. The learned trial magistrate erred in law in holding that there was no sale of land agreement when there was sufficient evidence to prove that.
 - b. That the learned trial magistrate erred in law by delivering judgment in favour of the defendant based on tenancy/lease agreement when there was nothing to prove the same.



- c. The learned trial magistrate erred in law by failing to consider the fact that the respondent had not attended any Land Control Board with a view to have the suit land transferred to her and that the period taken by her to do so was questionable.
 - d. The trial magistrate erred in law by purporting that the respondent filed a counterclaim seeking for reliefs listed in her judgment as (a)-(c) when the same was not part of court records or her defence/statement.
3. Wherefore, the appellant prays that this honourable court do quash the decision of the trial magistrate and order that:
 - a. The respondent through Johnson Oreje do transfer parcel no Kanyada/Kanyango/Kalanya/5375 to the appellant.
 - b. Alternatively, the respondent be ordered to refund to the appellant the purchase price at the current market value.
 - c. Costs of the appeal be granted to the appellant.
4. The property in dispute in the present appeal is land reference number Kanyada/Kalanya/Kanyango/5375 measuring approximately zero decimal one three hectares (0.13) Ha in area (The suit land herein). It is located within Homa Bay County.
5. The appellant, Richard Ooko Awino, is represented by the firm of HO Mimba and Company Advocates.
6. The respondent, Lucia Akumu Langa, is acting in person.
7. Initially, this appeal was lodged at Migori Environment and Land Court. On January 24, 2022, the same was transferred to this court, upon its establishment, for hearing and determination; see Articles 6 (3) and 48 of the Constitution of Kenya, 2010.
8. This is the first appeal from the trial court. So, this court is bound to revisit the evidence on record, evaluate the same and reach its own conclusion. However, it must be appreciated that the appellate court will not ordinarily interfere with findings of fact by the trial court unless they are founded on no evidence at all, or on a misapprehension of it, or the court is shown demonstrably to have acted on wrong principles in reaching the findings; see Mwanasokoni-vs-Kenya Bus Services Ltd (1982-88) 1 KAR 278 and Kamau-vs-Mungai and another (2006) 1 KAR 150.
9. The appellant originated the suit by way of a plaint (Fast Track) dated February 13, 2017 seeking the orders infra:
 - a. An order compelling the defendant to transfer the suit land sold to the plaintiff.
 - b. Refund of the purchase price at the current market value plus the refund of the money used to develop the said land (property value).
 - c. General damages for breach of contract.
 - d. Costs of the suit and interest.
10. The appellant (PW1) testified that the respondent sold him the suit land in 2010 for a consideration amount of Kshs 250,000, which was paid in installments. That the respondent never transferred the suit land, which is registered in the name of one Peter Johnson Oreje, to him. That he runs a school,



- Gates Academy, on the suit land and has constructed an administration block thereon. That he also put up a murrum road from Rodi to the school.
11. The appellant stated that initially, the respondent introduced him to the said Peter Johnson Oreje so that he could transfer the suit land to him but the appellant was not given audience when he attended the Land Control Board sitting as he was regarded as a stranger. That the respondent has in the past sued him for non-payment of rent in Homa Bay Environment and Land Case No 4 of 2014, which suit was dismissed for want of prosecution.
 12. The appellant lamented that in 2013, the respondent lodged a complaint at the Chief's office claiming that the appellant was a tenant who had failed to pay rent for the premises. That he was subsequently issued with notice to vacate the premises. He prayed that the court compels the respondent to transfer the suit land to him. That in the alternative, the respondent refunds the purchase value at current market rates or pay damages for breach of contract. He averred that the current value of the suit land together with the developments thereon amount to Kshs 6.5 million. He produced in evidence documents including a copy of the sale agreement dated September 24, 2006, a notice to vacate dated July 12, 2013, letter from SO Odingo Advocate dated September 19, 2013 and a letter from GS Okoth and Company Advocates dated February 14, 2014.
 13. During cross examination, PW1 admitted that he did not enter into agreement with the defendant/ respondent since the latter was not the registered owner of the land.
 14. PW2 was Julen Ngole, a parent at the plaintiff's school, Gates Academy. PW2 testified that during a graduation ceremony at the school, the defendant introduced herself as the person who sold the land to the plaintiff. That the land has classrooms, latrine for staff and an administration block. That there is also a murrum road. In cross-examination, PW2 stated that although parties entered into a sale agreement, the same was never put in writing.
 15. PW3, Mark Otieno Budi, a manager of the school Gates Academy, testified that he oversaw the construction of buildings on the suit land. That he also paid the purchase price to the defendant in various installments.
 16. PW4, Daniel Gumba, a watchman at Gates Academy testified that the defendant would often come to the school to collect installments of the purchase price from the director.
 17. By a statement of defence dated February 27, 2017 and filed in court on July 31, 2019, the respondent denied the appellant's claim and prayed that the honourable court do find and declare that:
 - a. The purported contract is in all the circumstances of this case against public policy, null, void and unenforceable against the defendant.
 - b. In the premises, this suit as against the defendant is incompetent, bad in law, unmaintainable and does not lie and should therefore be dismissed with costs.
 - c. Any other or further relief as this honourable court may deem just to grant.
 18. The respondent admitted to have filed Homa Bay Environment and Land Case No 4 of 2014 seeking to recover rent arrears from the plaintiff.
 19. The respondent (DW1) testified that she purchased a portion of land parcel number 872 measuring 50*100 in 2006 from one Peter Johnson Oreje. The parcel number of the portion purchased is 5375 which resulted from subdivisions of the original plot. That the same has not yet been transferred to her and is still in the name of the seller, Peter Johnson Oreje.



20. Further, the respondent stated that in January 2010, she entered into a lease agreement with the plaintiff. That the plaintiff was to pay her a sum of Kshs 10,000 per month. The lease term remained unfixed. That up to date, the plaintiff has paid her a cumulative amount of Kshs 213, 225. She averred that the plaintiff has not paid any rent since May 2013. She therefore, wished that the plaintiff would vacate the premises. She produced in evidence documents inter alia; a copy of sale agreement, a search in respect to parcel number 5375, approval for Land Control Board dated February 2, 2017 for plot number 5575, Schedule of payments and a letter from SO Odingo Advocate dated September 29, 2013 (DExhibits 1 to 5).
21. During cross examination, DW1 stated that she did not have a lease/tenancy agreement executed by the parties. That they never agreed that the appellant would put up structures on the land. She admitted that the appellant had appeared before the Land Control Board.
22. Salmon Onyango Babu (DW2) testified that the parties entered into a tenancy agreement for a rent amount of Kshs 10,000 payable monthly. That he was a witness to the said agreement.
23. Peter Johnson Oreje testified as a neutral witness following the court's directions that he be called as a witness. He stated that he sold land to the defendant in 2006 but a transfer had not yet been done. He averred that the defendant sold the land to the plaintiff, who has put up structures thereon. That the value of the buildings on the land is Kshs 3.5 m. He stated that he was unable to decide to whom the land should be transferred due to disagreements between the parties. That the land was underdeveloped when the defendant sold it to the plaintiff thus, there were no premises to be rented. He urged the court to direct the defendant to refund the plaintiff the purchase price together with the value of the structures developed on the land.
24. In cross-examination by the defendant, the witness denied that he was colluding with the plaintiff to take away the defendant's land. Notably, the trial court remarked in respect of the demeanor of the witness.
25. In reaching the findings, the learned trial magistrate made reference to the parties' respective pleadings, the testimonies of PW1, PW2, PW3 DW1 and DW2 as well as relied on Section 3 (3) of the Law of Contract Act Chapter 23 of the Laws of Kenya and Section 107 of the Evidence Act, Chapter 80 Laws of Kenya. She concluded that PW1 did not establish on a balance of probabilities that indeed, he entered into a land sale agreement with DW1 which was by law enforceable and/or that the circumstances under which the two transacted brought into force exceptions set out in the proviso to Section 3 of the Law of Contract Act (supra).
26. The appeal was heard way of written submissions pursuant to this court's directions given on October 4, 2022.
27. So, learned counsel for the appellant filed submissions dated October 27, 2022 on even date and urged the court to allow the appeal with costs to the appellant. Counsel submitted that the decision of the trial court purported that the respondent filed a counterclaim seeking the reliefs granted in the judgment, when that was not the case.
28. By the submissions dated February 3, 2023 and filed herein on February 8, 2023, the respondent urged this court to find that the appeal in its entirety must fail. She denied receiving any money from the appellant and averred that no evidence was presented before the trial court that there exists any contract between the parties. She therefore, urged the court to award her the costs of the instant appeal.
29. In the foregone, it is the duty of this court to determine;



- a. Whether there was a legal, binding and enforceable contract for disposition of the suit land between the parties herein capable of being enforced;
 - b. Whether the appellant is entitled to the orders sought in the memorandum of appeal
30. The appellant lamented that the learned trial magistrate erred in law in holding that there was no sale of land agreement. That there was sufficient evidence to prove the sale.
 31. The trial court noted that validity of the contract is paramount more so, where a prayer for specific performance has been made. The court further noted that the plaintiff proved that he was in possession of the suit land and the respondent admitted to receiving Kshs 213,225 from the plaintiff. That nonetheless, the plaintiff failed to prove that the amount so paid was the consideration for purchase of the suit land.
 32. Also, the court observed that the only documentation of the payments (PExhibit 2) titled 'cash given to the landlady' is silent on the purpose of the payments. That therefore, the plaintiff failed to establish that a constructive trust was created between the parties.
 33. In *Yaxley v Gotts [2000] Ch 162* where the court was dealing with the validity of an oral agreement for the sale of land, it was held that:

' An oral agreement whereby the purchaser of a house promised to grant another, in exchange for materials and services supplied an interest in the property, though void and unenforceable under Section 2 of the Act of 1989, was still enforceable on the basis of constructive trust and Section 2 (5) in circumstances where, previously, the doctrine of part performance or proprietary estoppel might have been relied upon'
 34. In *Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others [2015] eKLR*, the court stated in part:

' A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust.'
 35. Further, the appellant is not relying on part performance doctrine which was not pleaded in the suit; see *Sumaria & another v Allied Industries Limited [2007] 2KLR 1*.
 36. In the instant appeal, it is the court's view that the appellant did not prove the existence of a trust; see *Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR*. Therefore, the requirements of Section 3 (3) of the *Law of Contract Act* (infra) were applicable to him.
 37. Section 3(3) of the *Law of Contract Act*, Chapter 23 of the Laws of Kenya provides that:
 - (3) 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



- (iii) The signature of each party signing has been attested by a witness who is 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 auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

38. Notably, the appellant did not produce in evidence any agreement for sale of the suit land entered into by the parties. Therefore, it is my considered view that there does not exist a legal, binding and enforceable contract for disposition of the suit land between the parties herein capable of being enforced.
39. The appellant laments that the learned trial magistrate erred in law by delivering judgment in favour of the defendant based on tenancy/lease agreement when there was nothing to prove the same.
40. DW1 testified to the fact that the suit land had been rented out to PW1. This was affirmed by DW2.
41. It is trite law that the legal burden of proof in a case is always static and rests on the claimant throughout the trial. This is provided for in Section 107 to 109 of the [Evidence Act](#), Chapter 80 of the Laws of Kenya. The onus was therefore, on the plaintiff to adduce sufficient evidence in support of his claim.
42. The appellant stated that the learned trial magistrate erred in law by failing to consider the fact that the respondent had not appeared before the Land Control Board with a view to have the suit land transferred to her. That the period taken by her to do so was questionable. The defendant stated that Peter Johnson Oreje who sold her the land has not been keen on appearing before the Land Control Board. Indeed, the said Peter Johnson Oreje admitted in his viva voce evidence that he was unable to decide to whom the land should be transferred due to disagreements between the parties. This, in my view, explains the delay.
43. The appellant further contends that the trial magistrate erred in law by purporting that the respondent filed a counterclaim seeking for reliefs listed in her judgment as (a)-(c) when the same was not part of court records or her defence/statement. This court subscribes to the decision in *Odd Jobs -vs- Mubia [1970] EA 476* where the Court of Appeal for East Africa held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision. See also *Vyas Industries -vs- Diocese of Meru [1982] KLR 114*.
44. Besides, before arriving at relief (b) in the judgment, the trial magistrate observed and bore in mind prayer (c) in the statement of defence. Thus, she issued the order in paragraph 1 (b) hereinabove, in the best ends of justice.
45. In arriving at its decision, it is clear that the trial court took into account the nature of a contract for sale of land, evidence on record, relevant authorities thereof and the circumstances of the case.
46. To that end, it is the finding of this court that the judgment of the learned trial magistrate is founded on evidence on record and correct principles of law. Therefore, there is no reason at all to disturb the said decision and I hereby uphold the same in entirety.
47. A fortiori, this appeal generated by way of a memorandum of appeal dated October 13, 2020 and duly filed on October 15, 2020, is devoid of merit. The same be and is hereby dismissed with costs to the respondent.



48. It so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 22ND DAY OF MARCH 2023

G M A ONGONDO

JUDGE

Present

1. Appellant
2. Respondent
3. Ms. Mimba, Learned Counsel for the appellant
4. Okello, Court Assistant

