



**Ashiona v Ondere (Environment and Land Appeal E005 of 2022)
[2023] KEELC 18271 (KLR) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18271 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E005 OF 2022
GMA ONGONDO, J
JUNE 13, 2023**

BETWEEN

JANEODA KASIDI ASHIONA APPELLANT

AND

ELKANA GICHANA ONDERE RESPONDENT

(Being an appeal from the judgment and decree of Hon. Celesa Okore, Principal Magistrate, delivered on 3rd February 2022 in Oyugis Law Courts Environment and Land Case No. 4 of 2021)

JUDGMENT

1. This is an appeal that emanates from the trial court’s judgment delivered on the February 3, 2022 by the Honourable Celesa Okore, Principal Magistrate, in Oyugis Law Courts Environment and Land Case No 4 of 2021 where she held, *inter alia*;

“... I find and hold that the plaintiff has proved his case on a balance of probabilities against the defendant...”

2. The appellant namely Janeoda Kasidi Ashiona, acting in person, mounted the appeal by way of a memorandum of appeal dated February 14, 2022 and filed herein on even date. The Appeal is anchored on grounds 1 to 7 as set out on the face thereof and the same are:
 - a. The learned magistrate erred in law and in fact when she failed to find that the respondent’s suit was filed outside the limitation period and without the leave of court having first been applied for and obtained.
 - b. The learned trial magistrate erred in law and in fact when she failed to find that she had no jurisdiction to entertain the respondent’s suit for lack of such.



- c. The learned trial magistrate based her judgment on a sale agreement that was null and void and/or unenforceable.
 - d. The learned trial magistrate misunderstood and wrongly applied the principles governing the equitable relief of specific performance.
3. Wherefore, the appellant has sought the order that the instant appeal be allowed and the judgment of the trial court be set aside with costs to the appellant.
 4. The appeal was heard by way of written submissions pursuant to this court's directions of February 28, 2023.
 5. Accordingly, the appellant, through Kisaka & Associates Advocates, filed submissions dated February 3, 2023 on February 14, 2023 and urged the court to disregard grounds 1 and 2 of the memorandum of appeal. Learned counsel submitted, inter alia, that the trial court erred in law and fact by concluding that there was a second sale agreement, in contravention of Section 3(3) of the Law of Contract Act. That the respondent did not furnish the trial court with sufficient evidence to prove his claim to the requisite standard. Counsel urged the court to direct the appellant to refund to the respondent the purchase price paid by the latter, to wit, Kshs 390,000.
 6. With leave of court, the appellant's counsel also filed supplementary submissions dated April 21, 2023 on April 24, 2023. Counsel submitted that although the appellant did not comply with the orders of the court issued on May 17, 2022, the record of appeal which was filed on September 21, 2021 was admitted by the honourable court. That the respondent's counsel did not protest such admission. That therefore, the respondent ought not to have registered himself as proprietor of the suit land before hearing and determination of the instant appeal. To fortify the submissions, counsel relied on the case of Republic -vs- Director of Land Adjudication & Settlement and Anor; Deborah Ogendi and 3 others (Interested parties) ex parte Joseph Gebora Olum (2020) eKLR.
 7. The respondent, through B. N. Ogari and Company Advocates, filed submissions dated April 13, 2023 on April 17, 2023. Counsel submitted that the stay orders issued by this court were conditional. That the appellant herein was ordered to file and serve record of appeal within 45 days from the date of the said ruling, failing which the stay so granted would automatically lapse without further orders. That further, the respondent demonstrated that he satisfied all the terms of the contract hence, the trial magistrate granted the relief of specific performance. Counsel relied on the case of George Njenga Kagai -vs- Samuel Kabi Njoroge & another (2019) eKLR and Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR, to buttress the submissions.
 8. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to whether the appellant:
 - a. Has demonstrated that this appeal is tenable and
 - b. Is entitled to the orders sought in the memorandum of appeal.
 9. It must be noted that the instant appeal being the first one from the trial court in the matter, I am obliged to review the record of the trial court, evaluate it and arrive at own conclusions in this appeal; see Mwanasokoni-vs Kenya Bus Services Ltd (1982-88) 1KAR 278 applied in other cases, inter alia, Titus Ong'ang'a Nyachico-vs-Martin Okioma Nyauma and 3 others (2017) eKLR.
 10. At the trial court, the suit was commenced by way of a plaint dated January 13, 2021 mounted by the plaintiff/respondent against the defendant/appellant herein. The plaintiff sought the following orders;



- a. An order compelling the defendant to transfer part of land parcel number West Kasipul/Kasimba/1857 measuring 0.07 Ha (the suit land herein) to the plaintiff and a permanent injunction restraining the defendant whether by herself, her agents, servants and/or those working under her from accessing or entering upon the suit land, undertaking construction, alienating or committing any waste thereof or dealing in any way otherwise that would interfere with the rights of the plaintiff pertinent to the suit land.
 - b. Cost of the suit and interest thereon.
 - c. Any other relief that the honourable court may deem fit and just to grant.
11. The respondent, Elkana Gichana Onderi (PW1), adopted his statement as part of his evidence. He testified that via a sale agreement dated June 24, 2019, he purchased a portion of the suit land measuring 50 by 100 feet for a consideration amount of Kshs 450,000/= . That he paid a deposit of Kshs 300,000/- and later paid the balance by installment. That the defendant later sold him an additional portion of the land measuring 118 by 20 feet for a consideration of Kshs 200,000/=, which amount he paid in installments.
 12. PW1 lamented that although the defendant signed the mutation forms and appeared before the Land Control Board the first time, she declined to appear before the board for the second time, stating that her children were opposed to the sale. That the surveyor discovered that the suit land was subdivided into parcel numbers 2559 and 2560. That the suit land falls within the latter parcel. He relied on the initial sale agreement, a hand written acknowledgement dated October 24, 2019, a hand written acknowledgement dated July 7, 2021, M-pesa print-out, official search certificate, application for consent of the land Control Board, a copy of search certificate dated November 6, 2021 and a copy of search certificate dated December 24, 2020 (PExhibits 1, 2, 3, 4, 5(a), 5(b), 5(c) and 5(d) respectively).
 13. PW2, Margret Wamboi Odhiambo, adopted her statement as part of her evidence and corroborated the evidence adduced by PW1. In cross-examination, PW2 stated that the plaintiff was occupying the entire suit land.
 14. In her statement of defence dated June 2, 2021, the defendant denied the claim. She stated that the only agreement she entered into with the plaintiff was in respect of land parcel number West Kasipul/Kasimba/ 1856 and not the suit land. Hence, she prayed that the plaintiff's suit be dismissed with costs.
 15. DW1, Janeoda Kasidi Ashiona, the defendant/appellant herein, adopted her statement dated June 2, 2021 as part of her evidence. She produced in evidence a certificate of official search for land parcel number 1856, a certificate of official search for land parcel number 1857, title deed for land parcel number 1856, title deed for land parcel number 1857, sale agreement dated June 24, 2019 and National identity card (DExhibits 1 to 6 respectively).
 16. During cross-examination, DW1 averred that the agreement entered into was only for a portion measuring 50 by 100 feet. That the plaintiff only paid Kshs 390,000/= and not the agreed amount of Kshs 450,000/= . That she was willing to refund the plaintiff the amount paid as consideration.
 17. Kevin Ashioya, the defendant's son (DW2), adopted his statement as part of his evidence. On cross-examination, he stated that he neither witnessed the sale nor received the purchase price. He admitted that the plaintiff is ploughing the suit land.
 18. It is noted that the learned trial magistrate stated the parties' respective cases, framed six issues for determination, discussed them and arrived at her decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the [Civil Procedure Rules, 2010](#).



19. In arriving at the impugned judgment, the learned trial magistrate determined that the plaintiff entered into a land sale agreement with the defendant for land measuring 50 by 100 feet and paid the entire purchase price of Kshs 450,000/= as per the agreement for sale. On whether the parties entered into another agreement for sale of extra portion of land for a consideration sum of Kshs200,000/-, the learned trial magistrate observed, inter alia;

“...it is possible for one to argue that there was no written agreement for the second transaction. However, this is settled law, which provides expressly that an agreement/contract is an agreement/contract whether written or oral. This is explained in Section 5 of the *Sale of Goods Act*, cap 31 Laws of Kenya...”

20. Further, the learned trial magistrate noted that the conduct of the plaintiff of continuing to pay money to the defendant shows he was fulfilling the verbal contract entered into by the parties. That the plaintiff paid for the extra portion measuring 70 by 118 feet.

21. The appellant initially contended that the respondent’s suit was filed outside the limitation period and without the leave of court having first been applied for and obtained and that the trial court lacked jurisdiction to entertain the respondent’s suit. However, the said grounds were subsequently abandoned as stated in paragraph 5 hereinabove. Indeed, the suit at the trial court was not statute barred as it was filed within the prescribed time frame. The contract for sale that the plaintiff/respondent sought to enforce was executed on June 24, 2019 and the suit at the trial court was lodged on January 13, 2021. Thus, the trial court had jurisdiction to entertain and determine the suit.

22. The appellant maintains that the trial court erred in law and fact by concluding that there was a second sale agreement, in contravention of Section 3(3) of the *Law of Contract Act*. That the respondent did not furnish the trial court with sufficient evidence to prove his claim to the requisite standard.

23. This court is cognizant of Section 3(3) of the *Law of Contract Act* Chapter 23 Laws of Kenya, which 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. (Emphasis added)

24. It is not in dispute that the parties herein entered into an agreement for sale of land measuring 50 by 100 feet in area. This was confirmed by the parties who produced in evidence, sale agreement dated 24th June 2019 (PExhibit 1 and DExhibit 5). Further, although the defendant denied having received the entire purchase price of Kshs 450,000/= as stated in the agreement, the plaintiff produced in evidence,



- a handwritten acknowledgement note dated 24th October 2019, wherein he completed payment of the balance of the purchase price (PExhibit 2). Although, the defendant denied signing PExhibit 2, she did not provide sufficient proof that the signature was a forgery.
25. Regarding sale of the additional portion of land measuring 70 by 118 feet in area, I note that the plaintiff/respondent did not produce an agreement for sale of land at the trial court. Indeed, the defendant/appellant denied the existence of such contract. I, however, note that the respondent paid extra money to the appellant herein. In fact, the appellant admitted receiving Kshs 90,000/=, but denied that the same was payment for the second land sale.
26. On whether the extra portion of land could be sold without a written contract, it is this court's considered view that an oral agreement for sale of land is not valid for non – compliance with the provisions of Section 3(3) of the *Law of Contract Act* (supra). That the agreement being unwritten, unsigned and unattested is a contravention of the statutory requirement as to sale of land agreements and it therefore, does not confer any legal rights.
27. This court subscribes to the decision in *Yaxley v. Gotts* [2000] Ch. 162 where the court was dealing with the validity of an oral agreement for the sale of land, and in which 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 ...”
28. Further, in *Twalib Hatayan & another v Said Saggat 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.”
29. In that regard, I note that the respondent who was the plaintiff at the trial court proved the existence of a constructive trust over a portion of the land measuring 70 by 118 feet in area; see *Willy Kimutai Kitilit -vs- Michael Kibet* (2018) eKLR. Therefore, the requirements of Section 3 (3) of the *Law of Contract Act* (supra) were not applicable to him.
30. This court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:
- i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
31. Thus, I endorse the learned trial magistrate's considered finding that the respondent who was the plaintiff at the trial court, proved his case to the requisite standard.



32. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated February 14, 2022 and filed herein on even date is hereby dismissed with costs to the respondent.
33. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 13TH DAY OF JUNE 2023.

G.M.A ONG'ONDO

JUDGE

Present

Ms. Kisaka, learned counsel for the appellant

Mr. Ogari, learned counsel for the respondent

Okello and Mutiva- Court Assistants

