



REPUBLIC OF KENYA



KENYA LAW
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**Kiany v Mutai (Environment and Land Appeal E002 of 2021)
[2023] KEELC 19993 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19993 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL E002 OF 2021
MN MWANYALE, J
SEPTEMBER 21, 2023**

BETWEEN

KIPKETER ARAP KIANY APPELLANT

AND

KIPRUTO MUTAI RESPONDENT

(Being an appeal from the judgment of Honourable J. A. Orwa (sic) Principal Magistrate delivered on 15/10/2021 in Kapsabet Magistrate Court E&L No. 5 of 2009)

JUDGMENT

1. Vide his Memorandum of Appeal dated 29th October, 2021, the Appellant Kipketer arap Kiany penned 7 grounds of Appeal against the entire judgment of Honourable J. A. Orwa (sic) Principal Magistrate delivered on 15/10/2021 in Kapsabet Magistrate Court E & L No. 5 of 2009 and sought orders that;
 - a) Entire decision of the Principal Magistrate in Kapsabet Magistrate Court E & L 5 of 2019 be set aside.
 - b) That a proper finding be made by this Honourable Court
 - c) That this appeal be allowed with costs.
2. The grounds of Appeal are as follows;
 - i) That the Learned Trial Magistrate erred in law and fact by determining issues that were not presented for her determination and by failing to determine the issues before her from the pleadings, evidence and the submissions.
 - ii) That the Learned Magistrate erred in law and in fact in disregarding the weighty evidence of the Plaintiffs' case, the Plaintiff's submissions and authorities cited.



- iii) That the Learned Magistrate erred in law and in fact in disregarding the fact that the Plaintiff is a blind man and could not have therefore received payment for his land sold to the Defendant without help of an independent witness.
 - iv) That the Learned Trial Magistrate erred in law and in fact in relying on forged acknowledgment notes in proof of the disputed payment of purchase price for sale of NANDI/KOIJAT/ [particulars withheld].
 - v) That the Learned Trial Magistrate erred in law and in fact in allowing the Defendants claim which taking into account the entire circumstances of the case were fraudulent.
 - vi) That the Learned Magistrate erred in both in law and fact in putting more weight to the Defendants evidence while disregarding the Plaintiffs/Appellant's evidence and submissions thus arriving at a wrong decision.
 - vii) That the Learned Magistrate's decision was against the weight of evidence adduced erroneous and untenable in law.
3. Parties were directed to canvass the Appeal by way of written submissions upon admission of the appeal. Both parties filed their submissions.

Appellants Submission:-

- 4. The Appellant has identified only one issue for determination, to wit, whether the Learned Magistrate erred in finding that the Respondent had proved payment of the purchase price vide acknowledgment notes thereby arriving at the wrong decision.
- 5. The Appellant submits that at page 5 of the Record of Appeal lines 28 - 33 the learned Trial Magistrate did find that the Defendant had enumerate payments of kshs 356,000/=.
- 6. The Appellant submits that the hand-written acknowledgment notes were introduced during examination in chief and were an afterthought having note been supplied to the Appellants Advocate before the close of pleadings and/or before the material day of the Respondents examination in chief.
- 7. The Appellant submits that only one acknowledgment of payment is typed and attested by S.K. Kitur Advocate while the rest are handwritten. The Appellant thus submits that he did not receive the payment of kshs 443,800/= as he did not sign the deed and neither was it signed by the Advocate S.K. Kitur.
- 8. In support of this submissions, the Appellant has placed reliance on the decision in the case of Stephen Ikiao v M'itaru M'thankari on the doctrine of non-est factum. The said question quotes the Learned author Treitel, in the book of contract who quotes

“ in Gallie vs Lee, Lord Reid said that the doctrine or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity ... and the these must be added persons who have been tricked into signing the document. The doctrine may thus apply not only to the blind or illiterate, but also to persons who are senile, of very low intelligence or ignorant of the language in which the document is expressed. But it will not normally protect literate persons of full capacity.”
- 9. On the strength of the above submissions the Appellant prays that the Appeal be allowed.



Respondent's Submission:-

10. In response, the Respondent in his submissions had equally framed the same issues as framed by the Appellant.
11. The Respondents submits and urges the Court to ignore the issue for determination as raised by the Appellant since the said issue was determined by the Trial Court.
12. The Respondent submits that any allegation of fraud was to be proved by the Appellants on a higher standard of proof. In support of this limb of submissions, the Respondent has cited the decision in the case of; Benson Wandera Okuku v Israel Were Wakho (2020) eKLR, as well as the decision in the case of Jeniffer Nyambura Kamau vs Humphrey Nandi (2013) eKLR).
13. The Respondent further cites Section 107 and 108 of the *Evidence Act*, in support of their submissions.
14. On the strength of the submissions the Respondent prays for dismissal of the appeal.
15. Having analyzed the Record of Appeal, the rival submissions of the parties the Court frames the following issues for determination.
 - i. Whether the Learned Trial Magistrate determined the issue of the acknowledgements in light of the doctrine of non - est-factum
 - ii. Whether the Appeal is merited
 - iii. What reliefs ought to issue?
16. In his submissions, before Court, the Appellant submits that he did not sign the deeds of acknowledgment amounting of kshs 443,800/= as the same were thumb-printed, were handwritten and were not witnessed by S.K. Kitur Advocate (now deceased).
17. This Court was denied a chance to examine the acknowledgement notes as the same did not form part of the Record of Appeal having been omitted.
18. As such the Court is not able to determine whether the acknowledgements were fraudulently and/or whether the Appellant was justified in denying the same under the doctrine of non-est-factum which the Appellant heavily relies on.
19. The Learned Trial Magistrate in her judgment equally did not frame the issue framed by the parties in this appeal as an issue for determination.
20. There is thus merit of the Appellant that his was a fundamental issue to be determined before any other issue could be determined.
21. In the circumstances of the Court finds merit in the appeal and remits the suit for a re-trial before the Chief Magistrate's Court at Kapsabet, who shall frame the issue canvassed by the parties herein as an issue for determination.
22. Costs of the Appeal shall abide by the outcome of the retrial.

JUDGEMENT DATED AND DELIVERED AT KAPSABET THIS 21ST DAY OF SEPTEMBER, 2023.

HON. M. N. MWANYALE

JUDGE



In the presence of:-

1. Mr. Cheruiyot for the Appellant
2. Mr. Wanjohi holding brief for Mr. Rotich for the Respondent.

