**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC APPEAL NO. 49 OF 2014**

ALICE WAGUAMA MURIITHI……..……1ST APPELLANT

GRACE WAMBURA NJUE……..2ND APPELLANT

VERSUS

ALLAN NJUE RUBICHO…….…….…….RESPONDENT

***(Being an appeal from the judgment of the Principal Magistrate Kerugoya Hon. S.N. Ndegwa delivered on 20th September 2012 in Kerugoya Civil Case No. 243 of 2010)***

**JUDGMENT**

The appellants herein are daughters to the respondent and on 30th September 2011 they filed Kerugoya Senior Resident Court Civil Case No. 243 of 2011 seeking that judgment be entered against him in the following terms:-

> ***1. The defendant (respondent herein) do transfer 5 acres to the plaintiffs (appellants herein) from the parcel No. MWEA/NGUCWI/1193 within 7 days and in default, the Executive officer of this Court do sign all relevant forms to facilitate the transfer.***
>
> ***2. Costs and interest.***

The basis upon which the suit was premised is not entirely clear and so it is important that I reproduce the relevant portion of the pleadings which are found in paragraph 3 to 9 of the plaint.

> ***3 The plaintiffs claim against the defendant is for transfer of 5 acres from land parcel No. MWEA/NGUCWI/1193.***
>
> ***4 The plaintiffs aver that on 6th March 2005, the defendant gave a gift to the plaintiffs of 2 ½ acres each out of the suit land and on 3rd July 2005 they supplied him with the consideration he demanded being 2 kg sugar, 1 hen and Ksh. 400.***
>
> ***5 The plaintiffs aver that on 3rd July 2005 they supplied the defendant with 2 kg sugar, 1 hen, Ksh. 400 and showed the plaintiffs their portions of 2 ½ acres each which were already surveyed.***
>
> ***6 The plaintiffs aver that on 19th March 2006 the defendant showed the plaintiffs their portion again in the presence of Pauline Muriku and he received Ksh. 60,000 from the plaintiffs which he demanded from them as survey fee.***

***7 The plaintiffs aver that on 27th April 2006 the defendant accompanied them to a surveyor's office in Kutus (Muchiri Survey) where they paid Ksh. 450 each and were given receipts indicated (sic) the registration of their portions where the plaintiffs got Mwea /Ngucwi/937 and 939 respectively.***

***8 The plaintiffs aver that on 14th July 2011, they found the defendant transferring their portions to other parties and on that date, he obtained Land Control Board consent to transfer a portion to Peris Wakuthii.***

***9 The plaintiffs aver that they requested the defendant to transfer their portions to them and he refused.***

The defendant filed a brief five (5) paragraph defence in which he simply denied all the averments in the plaint adding that he has never given the plaintiffs any portion of land.

The case was heard by S.N. Ndegwa Principal Magistrate who after hearing the parties and their witnesses delivered her judgment on 20th September 2012 dismissing the claim with costs. That resulted in this appeal which was promptly filed at the High Court Embu before being transferred to this Court.

The Memorandum of Appeal raises the following ten (10) grounds (8 is repeated) being:-

***1. The learned magistrate erred in fact and in law in failing to give reasons for her judgment.***

***2. The learned magistrate erred in fact and in law in failing to make a finding that the appellants had proved they had paid the respondent money/consideration for the land when there was evidence to that effect.***

***3. The learned magistrate erred in fact and in law in failing to appreciate that the respondent had expressly given the appellants land and shown them the portions on the ground and even surveyed the land when there was evidence adduced to this effect.***

***4. The learned magistrate erred in fact and in law in holding that the appellants ought to have called surveyor by the name Muchiri as a witness in this case when the fact that he had surveyed the land was admitted by the respondent herein and the respondent admitted that the surveyor was deceased and when there was evidence that the said surveyor has issued the appellants and other members of the respondent family with receipts as evidence of payment of survey fees which receipts were produced in evidence.***

***5. The learned magistrate erred in holding that the appellants had called a witness who had grudge with the respondent being his brother and in failing to note that the evidence the said witness adduced was similar to that of other witnesses to the effect that the respondent had given and shown the appellants their portions of land.***

***6. The learned magistrate erred in fact and in law in holding that the respondent was free to do what he wished with his land without considering his action of collecting consideration from the appellants and showing them and even surveying the same and then selling the same.***

***7. The learned magistrate erred in fact and in law in failing to make a finding as to how the suit land was acquired and to consider that the 1st appellant is the one who balloted for the land.***

***8. The learned magistrate erred in fact and in law in failing to consider the documents from the chief and assistant chief to the effect that the respondent had admitted giving the appellants land.***

***8. (This should have been 9)***

***The learned magistrate erred in fact and in law in failing to consider the evidence of all the appellants witnesses in making her judgment.***

***9. (This should be ground 10)***

***The learned magistrate erred in dismissing the appellants' suit with costs.***

Wherefore the appellants prayed that the appeal be allowed and the decision of the learned Principal Magistrate delivered on 20th September 2012 be set aside and judgment be entered as per the plaint together with costs and interest.

At the hearing of the suit in the trial Court, the appellants were represented by Anne Thungu Advocate and the respondents by Murigu Advocate who have also appeared for them and filed submissions in this Court.

I have considered the record of appeal and the submissions of counsels. As this is a first appeal, it is my duty to analyze and re-evaluate the evidence on record and reach my own conclusion bearing in mind that I neither saw nor heard the witnesses – ***SELLE VS ASSOCIATED MOTOR BOAT CO. 1968 E.A 123***. And as was held in the case of ***JABANE VS OLENJA 1986 K.L.R 661***, this Court will not lightly differ from the findings of fact of the trial Court and will only interfere with those findings if they are based on no evidence – see also ***EPHANTUS MWANGI VS DUNCAN MWANGI WAMBUGU 1982-88 1 KAR 278.***

I shall consider grounds 1 and 6 together as they seem to suggest that the appellants gave the respondent consideration in terms of money and other items and that the respondent thereafter even showed the appellants their respective portions of land and had them surveyed but he later proceeded to sell the said portions. At the start of this judgment, I indicated that it was not clear what the appellants claim in the subordinate Court was founded upon.My understanding of these two grounds is that the appellants were attempting to enforce a contract for sale of land. According to the appellants' case in the trial Court, the respondent summoned his children on 6th March 2005 and said he wanted to give the children 1 ½ acres each and his son 4 acres. The portion of land had been surveyed out of the respondents land parcel No. MWEA/NGUCWI/252 measuring 20 acres. Later on in July 2005 and March 2006 the appellants gave the respondent 2 kg sugar, 1 hen Ksh. 400 and Ksh. 30,000 and he took them to the surveyor to have the land portion registered. The respondent continued to receive various sums of money from the appellants and were even allocated their parcels being No. MWEA/NGUCWI/937 and MWEA/NGUCWI/939 respectively. On 14th July 2011, they went to the Land Control Board but nothing seems to have transpired there and finally they learnt that infact there was no land for them and the respondent dared them to go to Court. The receipts of money by the respondent was confirmed by the appellants' witness PAULINE MURIKO (PW5) who was present when the respondent received a total of Ksh. 60,000 for land that he was to give the appellants. NDAMBIRI RUGICHU (PW3) a brother to the respondent also testified that he heard him say he would give his daughters 2 ½ acres each and his son 4 acres out of his land parcel No. MWEA/NGUCWI/252. He was also present when the respondent was pointing out the boundaries to the respective portions. STEPHEN NJANJA KIURA (PW4) a member of the respondent's Unjiru clan told the Court that the respondent acquired land parcel No. MWEA/NGUCWI/252 from the clan through casting of lots and that it was the 1st appellant who attended during the exercise and the land was registered in the respondent's names as she had no Identity Card. This evidence was supported by ESTON NGARI GITUTO (PW7) also a member of the respondent's clan.

The respondent's response to that evidence was to inform the Court that the land parcel No. MWEA/NGUCWI/1193 (the suit land) is registered in his names and he produced a Certificate of official search adding that the said suit land was excised from land parcel No. MWEA/NGUCWI/252. He denied having sold any land to the appellants adding that the appellants were ordering him to give them a portion so he lodged a complaint with the Chief who told them to give the respondent a sheep and be humble if they wanted him to give them land. The respondent's son and appellants' sister JANE WANJIRU CHOMBA (DW3) also testified and denied that their father sold land to the appellants. The respondent's wife CHARITY KARIUKO NJUE (DW2) also gave evidence in support of the respondent.

It would seem therefore that the appellants' case in the trial Court hinged both on contract, trust and gift at least going by the evidence adduced at the trial. The pleadings however cannot be described as elegant because, as is clear from the paragraph of the plaint referred to at the beginning of this judgment, the causes of action were not entirely clear to discern. Indeed the trial magistrate expressed the same view because at page eight (8) of her judgment, she wrote as follows:-

> ***"I will also add that the plaintiffs don't seem to know on what basis they are claiming the land. As trustees having balloted for it during land demarcation? As a gift promised to them by their father or as consideration paid for the land"***

If the appellants' case was based on enforcement of a contract for sale of the suit land to the appellants, then it was bound to fail. I have no doubt in my mind that the respondent received Ksh. 60,000, a hen and sugar from the appellants as consideration for the suit land which is registered in the respondents names. This transaction took place between 2005 and 2011 when the appellants finally discovered that the respondent had intention of transferring any land to them and even a visit to the Land Control Board on 14dth July 2011 aborted. ***Section 3 (3) of the Law of Contract Act*** provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing executed by the parties and attested. That was the law as at 1st June 2003. Prior to the amendment of **Section 3 (3) of the Law of Contract Act in 2003,** the failure to reduce a contract for sale of land in writing was not fatal where the purchaser has, in performance of the contract, taken possession of the property or any part therefore and being in possession has done some other act in furtherance of the contract. In this case, there was no contract in writing executed by the appellants and the respondent either on 3rd July 2005 when the appellants first gave the respondent 2 kg of sugar, a hen and Ksh. 400 or even on 19th March 2006 when, in the presence of PAULINE KARIUKO (PW5), the appellants gave the respondent Ksh. 30,000 to add on a similar sum received by the respondent on 3rd July 2005. In the circumstances, the appellants' claim, if at all it was based on any contract, could not be enforced. No doubt the fact that the respondent received money and other goodies from his daughters in exchange for the suit land but failed to keep his part of the bargain, depicts him in very poor light as a callous, dishonest and wicked old man. The appellants, if they are believers, can take solace in the knowledge that another judgment awaits him elsewhere. However, on the evidence and the law, and although the trial magistrate did not specifically refer to the Law of Contract in her judgment subject of this appeal, it is clear that the appellants' case was for dismissal and the trial magistrate cannot be faulted on that.

Connected to the issue of the Law of Contract, it would also appear that the transaction involving the suit land was subject to the consent of the Land Control Board. That is why both the appellants and respondents made a visit to the said Board on 4th July 2011 and obtained the relevant forms before the respondent reneged on his promise. As no Land Control Board consent was subsequently obtained as required by ***Section 6 of the Land Control Act,*** any agreement would have been void and un-enforceable – see ***DAVID OLE TUKAI VS FRANCIS ARAP MUGE & OTHERS C.A CIVIL APPEAL NO. 76 OF 2014 (NBI***).

Grounds 7 and 8 can be considered together. They are suggestive of some elements of trust. However, parties are bound by their pleadings and it is clear from the plaint filed in the subordinate Court that the appellants' case was not premised on any trust and infact no evidence was led to that. Therefore, the fact that it was the 1st appellant who balloted for the suit land (ground 7) or that the respondent admitted giving the appellants land (ground 8) cannot assist the appellants. Besides, whether or not a trust exists is a matter of evidence. In ***MBOTHU & OTHERS VS WAITIMU& OTHERS 1986 K.L.R 171*** it was held as follows:-

> "***The law never implies, the Court never presumes a trust but in a case of absolute necessity. The Court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied"***

In the circumstances, grounds 7 and 8 similarly fail.

Ground 3 of the appeal faults the trial Court for failing to appreciate that the respondent had expressly given the appellants the suit land and shown them their portions which were surveyed. The appellants are therefore claiming that the suit land was a gift to them. The respondent however denied that in his testimony. He said:-

> ***"I also told them that they couldn't force me to give them land"***

***Section 37 (1) of the Land Registration Act*** provides as follows:-

> ***"A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve"***

***Section 37 (2)*** then goes ahead to provide how such transfer shall be done which is by:-

> ***(a) Filing the instrument; and***
>
> ***(b) registration of the transferee as proprietor of the land, lease or charge.***

***Section 85 (1) of the repealed Registered Land Act*** under which the suit land was registered contained a similar provision in the following terms:-

> ***"A proprietor may transfer his land, lease or charge to any person (including himself) with or without consideration, by an instrument in the prescribed form".***

***Section 85 (2) of the repealed Registered Land Act*** provided as follows:-

> ***"The transfer shall be completed by registration of the transferee as proprietor of the land, lease or charge and by filing the instrument"***

If there was any gift to the appellants by the respondent, then there ought to have been compliance with the provisions of ***Section 85 (1) and (2) of the Registered Land Act*** which was the law then. In the case of ***CHURCH OF KENYA MBEERE DIOCESE VS THE REV DAVID WAWERU NJOROGE C.A CIVIL APPEAL NO. 108 OF 2002 (NYERI***), the Court addressed itself as follows with regard to a gift of agricultural land:-

> ***"For a gift of an agricultural land as in this case to be completely constituted, the donor must comply with both the substantive law and statutory procedure relating to the transfer of agricultural land. For instance, the consent of the Land Control Board must be applied for and obtained as required by the Land Control Act. Thereafter, the disposition must be effected on a transfer in the prescribed form (Section 108 (1) of the Registered Land Act) and executed, stamped and lodged for registration as prescribed in the Registered Land Act".***

The respondent may have promised the appellants the suit land after he received money from them. However, he did not do anything towards fulfilling that promise as required in law. In ***HALSBURY LAWS OF ENGLAND 4th EDITION at paragraph 67***, it is stated as follows with respect to incomplete gifts:-

> "***Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the Court will not compel the intending donor, or those claiming under him, to complete and perfect it except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise"***

It is clear from the evidence herein that even if there was an intention by the respondent to grant the appellants the suit land as a gift, which the respondent has denied, that intention or promise was not perfected as required in law. The appellants cannot therefore mount any valid claim on the basis of a gift.

Grounds 1, 5 and 9 can also be considered together. On the ground that the trial magistrate failed to give reason for her judgment or failed to consider the evidence of the appellants' witnesses, the record is clear that in her eight( 8) page judgment, the trial magistrate duly considered all the evidence adduced before her and after analyzing it, she believed the respondent and his witnesses rather than the appellants and their witnesses. She was entitled to do that. And with regard to the complaint that the trial magistrate held that the surveyor should have been called to show that he had issued the appellants with receipts, nothing really turns on that because the issue before the trial magistrate was whether or not the respondent had promised the appellants the suit land in consideration of the money received or as a gift. Even if the surveyor had testified his evidence would not have advanced the appellants' claim.

Finally, in ground ten (10), it is claimed that the trial magistrate erred in dismissing the appellants' suit with costs. From the evidence before the trial magistrate and from my own assessment, the dismissal of the appellants' case in the subordinate Court was inevitable.

On the issue of costs, this dispute involves a father and his daughters and it would not be in the interest of justice to burden the appellants with an order for costs which will only serve the purpose of widening the rift between them. While costs are in the discretion of the Court, the order that commends itself to me in this case is to order that each party meet their costs both in this Court and the Court below.

Ultimately therefore, this appeal is dismissed with an order that each party meet their own costs both here and in the Court below.

**B.N. OLAO**

**JUDGE**

**26TH FEBRUARY, 2016**

Judgment delivered in open Court this 26th day of February 2016.

Ms Thungu for Appellants present

No appearance for the Respondent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**26TH FEBRUARY, 2016**