REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. 49 OF 2015

(FORMERLY KISII HCCA NO. 60 OF 2010)

BETWEEN

JOSEPHINE OYATA AKECH ……................ APPELLANT

AND

MOSES OCHIENG ONSWAYO .... RESPONDENT

(Appeal from the Judgment and Decree of Hon. Z. J. Nyakundi, SRM Rongo delivered on the 27th April 2010 in Rongo Senior Resident's Magistrates Civil Case No. 138 of 2008)

JUDGMENT

1. The respondent in this case filed a suit in the subordinate court claiming that he entered into an agreement with the appellant whereby the appellant leased to him Plot No. 585 measuring 0.6 Ha at a cost of Kshs. 12,000/=. Before the lease could start running in 2008, the appellant without any reason denied him access to the land and evicted him. He therefore prayed for Kshs. 12,000/= being fuel costs paid to plough the land and a refund of Kshs. 12,000/=.

2. In response to the claim, the appellant initially filed a statement of defence in which she admitted that she leased 0.4 Ha of the plot, received Kshs. 12,000/= and was ready to refund the same. She accused the respondent of ploughing more land than they had agreed. Subsequently, the defence was amended by consent which the appellant denied that the agreement as alleged or that the respondent was entitled to enter the plot as a result of the lease. In the alternative, she claimed that the agreement was fraudulent on the ground that the lease was altered to read 1½ Hectares instead of 1 acre, that the agreement was signed and witnessed in her absence and that it was altered in a manner that did not reflect the true spirit of the intended agreement.
3. Both parties gave evidence in support of their respective positions and at the close of the case, the learned trial magistrate was convinced that that there was a lease agreement and in which the suit property was actually leased for consideration of Kshs. 12,000/=. He held that the respondent prevented the appellant from utilizing the land hence she had to refund Kshs. 12,000/-.

4. The appellant now appeals on the following grounds set out in the Memorandum of Appeal dated 6th April, 2010.
   1. *The trial learned Magistrate erred in law and facts by failing to corroborate the evidence of PW1 as the Agreement produced as exhibit 1 – entailed persons who could have confirmed the authenticity of the agreement.*
   2. *The learned trial Magistrate erred in law and infact that there was inconsistency in the*

evidence of PW1 in regard to the hectare and acreage and discrepancy in the dating of the agreement produced as exhibit 1.

3. *The learned trial Magistrate erred in fact and in law by failing to consider that the purported parcel of land No. 585 belonged to a deceased person whose estate had not been succeeded in law hence the suit lacked locus to proceed, court could have moved suo moto to dismiss it.*
4. *The trial Magistrate failed to observe that there were some alterations on the exhibit No. 1 produced.*

6. As this is a first appeal, I am required to evaluate the evidence and come to an independent conclusion as to whether to uphold the judgment bearing in mind that I neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

7. Mr Odero, learned counsel for the appellant, reiterated the grounds of the appeal set out in the memorandum. He submitted that the agreement relied upon was fraught with inconsistencies. It was dated 10th July 2006 yet it was signed on 26th October, 2006, that the plot subject of the suit was not identified or defined and that it belonged to the appellant's deceased's husband. Mr Ojala, learned counsel for the respondent, supported the judgment and submitted that the respondent had proved his case on a balance of probabilities and the appellant did not prove her assertions.

8. Both parties in this suit produced the agreement dated 10th July 2006. The only material difference is that the original version of the produced by the appellant had a hand written alteration showing that the deceased property was 1 ½ Ha as opposed 1 Ha to be leased for purposes of planting sugarcane for three (3) harvests. I agree with the appellant that the agreement was not the model of good draftsmanship. The appellant stated that she was the owner of a Plot No. 584 which comprising 0.6 Ha while the agreement referred to a lease to the respondent of 1 Ha. for planting sugarcane.

9. Despite the inconsistencies, what is clear is that the appellant intended to lease some land and the respondent paid for it and did not plough it. The agreement stated that the appellant acknowledged payment and it was the burden of the appellant to prove the facts, like fraud and lack of consideration, which would entitle her to avoid the agreement. The basis of fraud as pleaded is defence is embarrassing. On one part she claimed that the agreement was altered contrary to the true spirit of the intended agreement and on the other part she contends that the agreement was entered without her approval. Either there was agreement or there was not. Furthermore, it was her burden to call evidence to prove her case.

10. I find that the respondent proved on the balance of probabilities that there was an agreement in which the appellant acknowledged receipt of Kshs. 12,000/=. It is clear that the agreement was not implemented as the respondent did not take over the land as intended. Any deficiencies in the agreement must mean only that the appellant must refund what she received.

11. The appeal is dismissed with costs to the respondent.

DATED and **DELIVERED** at **MIGORI** this **19th day of June 2015.**

D.S. MAJANJA

JUDGE

Mr Odero instructed by Agure Odero and Company Advocates for the appellant.

Mr Ojala instructed by P. R. Ojala and Company Advocates for the respondent.