



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 411B of 2012

SAMMY SOME KOSGEL.....PLAINTIFF

VS

GRACE JELEL BOIT.....DEFENDANT

(Suit filed by plaintiff seeking declaration that he is owner of certain land parcels by way of purchase; land allegedly purchased from deceased (husband to defendant); plaintiff submitting in evidence agreements and transfer documents duly executed; execution of these documents disputed; each party calling expert document examiners whose evidence is in conflict; what option to take when court is faced with conflicting evidence of experts; agreement not drawn and not witnessed by advocate with practicing certificate; whether witness needs to be advocate; previous suit by plaintiff based on adverse possession; whether plaintiff now barred from instituting suit claiming to be entitled through purchase; court convinced that deceased sold and executed transfer documents; plaintiff's suit succeeds)

J U D G E M E N T

A. INTRODUCTION

This suit was commenced by way of Plaintiff dated and filed on the 12th of March 2008. In it the plaintiff is seeking the following orders :-

- (a) *A declaration that the plaintiff is the owner through purchase of two portions of land measuring 0.0632 hectares and 0.0460 hectares from land parcel LR No. Eldoret Municipality Block 4/97 (designated as L.R No. Eldoret Municipality Block 4/342 and 4/343 but not registered).*
- (b) *An order of specific performance for the defendant to execute all the necessary documents including survey to vest into the plaintiff the two portions of land measuring 0.0632 hectares and 0.0460 hectares from land parcel LR No. Eldoret Municipality Block 4/97 (designated as L.R No. Eldoret Municipality Block 4/342 and 4/343 but not registered).*
- (c) *Costs of this suit.*

The defendant herein is being sued as the administratrix of the Estate of one Abraham Kimiti Boit (Deceased). The said Boit died on the 16th April 2004.

A. THE PLEADINGS

In his plaint, the plaintiff pleaded that by an agreement made in writing on or before 26th October 2001,

the deceased sold to the plaintiff two portions of land designated as L.R No. Eldoret Municipality Block 4/342 and Eldoret Municipality Block 4/343 which were two plots carved out of the larger land parcel L.R No. Eldoret Municipality Block 4/97. The plaintiff has further pleaded that the deceased executed the transfers before he died but the same were not registered owing to the disappearance of the relevant file at the Commissioner of Lands' Office. It is further the plaintiff's pleading that the defendant as administratrix of the estate of Boit has refused and/or neglected to recognize the plaintiff's said interest in the succession cause of the late Boit being Eldoret Succession Cause NO. 233 of 2004. It is for these reasons that the plaintiff has sought the prayers noted above.

The defendant upon being served entered appearance and filed Defence. In her defence, the defendant has denied that the late Boit sold the said parcels of land designated as Eldoret Municipality Block 4/342 and Eldoret Municipality Block 4/343 or any other parcel for that matter to the plaintiff. The defendant has denied that there was any agreement between the deceased and the plaintiff as alleged. The defendant has further pleaded that the two parcels of land Eldoret Municipality Block 4/342 and Eldoret Municipality Block 4/343, never existed in fact as the sub-division process for the original title number Eldoret Municipality Block 4/ 97 was never done to completion. She has pleaded that it is therefore unlikely that the deceased could have transacted over non-existent properties. The defendant has also denied that the deceased ever executed any transfer of lease documents in favour of the plaintiff. She has also denied the assertion by the plaintiff that the transfers of lease could not be registered owing to the disappearance of the relevant file at the Commissioner of Lands' offices at Nairobi. The defendant has further pleaded that the plaintiff has no claim over the two properties and that he has no interest capable of being recognized by the estate of the deceased. She has also averred in her Defence that the plaintiff's claim is based on fraud, misrepresentation and deceit. She has laid out in her pleadings the particulars of fraud , misrepresentation and deceit as being :-

- (a) Forging and affixing the signature of the deceased on the alleged agreement as well as the transfer of lease documents.
- (b) Misrepresenting to the deceased that he was capable of carrying out the subdivision of title number Eldoret Municipality Block 4/ 97 when he was incapable of doing that.
- (c) Purporting to carry out subdivision work for deceased when he knew that the whole effort was aimed at achieving personal gain.

The defendant has also stated in her Defence that the plaintiff's claims are without basis and brought mala fides especially in light of the fact that the plaintiff had previously sued the deceased vide civil suit Eldoret CMCC No.1000 of 2002, claiming adverse possession and making no mention of the documents sought to be relied upon by the plaintiff herein. She has pleaded that the plaintiff does not have a sustainable claim against the estate of the deceased and has prayed for this suit to be dismissed with costs.

In his Reply to Defence, the plaintiff denied the allegations of fraud, misrepresentation and deceit. He further averred that the suit Eldoret CMCC No. 1000 of 2002 abated and was discontinued as the Court had no jurisdiction and the same was never determined on its merit to enable the production of any document.

A. PRE-TRIALS

The pleadings having been closed, the parties complied with the pre-trial formalities by filing their lists of documents , witness statements and agreed issues. The issues as framed by the parties are as follows :-

1. Was there a written agreement of sale between the plaintiff and Abraham Kimiti Boit to sell land parcels No. Eldoret Municipality Block 4/342 and Eldoret Municipality Block 4/343 being sub-division from Eldoret Municipality Block 4/97.
2. Did the deceased Abraham Kimiti Boit execute any transfer in favour of the plaintiff in respect to Land Parcels Numbers Eldoret Municipality Block 4/342 and Eldoret Municipality Block

4/343.

3. Did the plaintiff forge and affix the signature of the deceased in the alleged agreement as well as transfer of lease documents as pleaded in paragraph 7(a) of the Defence ?
4. Is it true that the said Abraham Kimitei Boit is now deceased and if so is the Defendant Grace Jejel Boit the personal representative and Administratrix of the estate of the said Abraham Kimitei Boit.
5. If (1) above is answered in the affirmative , as Administratrix is the defendant now liable or not to honour the obligations on the said agreement.
6. Did the deceased obtain consent to sub-divide and transfer the said two parcels of land and also did the deceased execute and sign transfer documents relating to the sub-division from the original title Eldoret Municipality Block 4/97 and pay all rates and other charges before he died or he did not ? If the answer is in the affirmative, was it done to enable him transfer the two parcels of land to the plaintiff or not.
7. If issue number (1) is answered in the affirmative, is the plaintiff entitled to enforce agreement of sale against the estate of the deceased now being administered by the defendant.
8. Is the plaintiff entitled to the reliefs prayed in the plaint or not.
9. Is the plaintiff guilty of any fraud as alleged by the defendant.
10. Who will be condemned to pay the cost of this suit ?

This matter proceeded before me on the 21st November 2012 when the plaintiff testified. Owing to time the matter was adjourned to the next day, 22nd November 2012 when the plaintiff was cross-examined and his three witnesses testified after which the plaintiff closed his case. The matter was adjourned to 17th December 2012 for defence hearing. On the said date, the defendant testified and called one witness after which she closed her case. I then allowed the counsels to file their written submissions and also invited them to make oral submissions which they did on the 22nd January 2013.

A. THE PLAINTIFF'S EVIDENCE

The plaintiff in his evidence in chief testified that Boit (the deceased) sold to him the two parcels of land through an agreement made on 25th October 2001. The agreement was produced as plaintiff's exhibit No. 1. It is drawn as follows :-

25/10/2001

SALE AGREEMENT BETWEEN MR. ABRAHAM KIMITEI BOIT AND MR. SAMMY SOME KOSGEI

This sale agreement is to confirm I Mr. Abraham Kimitei Boit, ID No.7161877 of P.O Box 540 ELDORET, Have received Kshs.3 Million (three million) from Mr. Sammy Some Kosgei ID No.3317518 of P.O Box 3730 ELDORET and I therefore agree to give him 2 (two) Plots namely ELDORET MUNICIPALITY/ BLOCK 4/342 and ELDORET MUNICIPALITY / BLOCK 4/ 343 in return being subdivisions from L.R.. No. ELDORET MUNICIPALITY/ BLOCK 4/97.

Signed this day of 25/10/2001

Abraham Kimitei Boit (Seller) (signature)

Sammy Some Kosgei (Buyer) (signature)

It is discernable that the agreement was only made and signed by the two parties and was not attested. The plaintiff in his evidence testified that they made the agreement when they were just the two of them. They then attended to the Advocate of the deceased the following day (26th October 2001) to draw a formal agreement which was duly drawn. The formal agreement is dated 26th October 2001 and was produced as plaintiff's exhibit No.2.

The agreement of 26th October 2001 is between the plaintiff and the deceased. The subject matter is the land parcels Eldoret Municipality Block4/342 and 343 said to have been hived off the former Eldoret Municipality Block4/97. The purchase price is of Kshs. 3,000,000/=. The agreement notes that the purchaser has already paid the purchase price of Kshs.3 million and that the purchaser has already taken possession of the said pieces of land. The vendor undertook to prepare the necessary consent to transfer and put the purchaser into legal ownership of the two pieces of land. The agreement is signed by the two parties and their signatures are attested by one Isaboke M. Orina Advocate. The agreement does not set out who drew the same.

The plaintiff testified that the purchase price of Kshs.3 million had been paid earlier over a period of time. The first payment was in 1997 when a sum of Kshs. 800,000/= was paid on 10th June 1997. The second payment was on 8th September 1999 for Kshs. 600,000/=. The third payment was paid on 19th October 2001 when a sum of Kshs. 900,000/= was paid. The fourth payment was of Kshs.700,000/= paid on 25th October 2001. All these payments were receipted in separate petty cash vouchers which are apparently signed by both the plaintiff and the said Boit (deceased).These payment vouchers were produced as plaintiff's exhibits number 3 (a) – 3(d). The plaintiff testified that the agreement of 25th October 2001 was made on the date of the last installment of Kshs.700,000/=.

The plaintiff testified that he had known the deceased for a long time as he had been his tenant in the plot Eldoret Municipality Block 4/97. A copy of the Certificate of Lease and official search for the plot Eldoret Municipality Block 4/97 were produced by the plaintiff as Exhibits Numbers 4 and 5 respectively. These two documents show that the plot Eldoret Municipality Block 4/97 was registered in the name of Boit (the deceased). The plaintiff produced an Exhibit No.6, a letter from the Commissioner of Lands dated 1st November 2001, addressed to Boit (the deceased), asking for the surrender of the title to the plot Eldoret Municipality Block 4/97 for purposes of sub-division. The plaintiff testified that it was within his knowledge that the plot Eldoret Municipality Block 4/97 was sub-divided into five plots being plots number Eldoret Municipality Block 4/340, 341, 342, 343, and 344. The plaintiff stated that Plots Nos. 340, 341, and 344 are registered in the name of the defendant and he produced Official Search Certificates for Plots Nos. 340 and 344 as exhibits Nos.13 and 14.

The plaintiff further testified that consent to transfer two portions sub-divided from the plot Eldoret Municipality Block4/97 being Eldoret Municipality Block4/ 342 and 343 were given by the Commissioner of Lands. These consents to transfer were produced by the plaintiff as Exhibits 8 and 9. Thereafter, the deceased executed two transfer forms to the two plots Eldoret Municipality Block 4/342 and 343 dated 13th November 2001. These two transfer forms were produced as plaintiff's Exhibits 11 and 12. The plaintiff testified that the two transfer forms were signed by himself and Boit (deceased) at the Eldoret Law Courts before Lucy Gitari then Principal Magistrate at Eldoret. He averred that the deceased died on the 16th April 2004 by which time the two plots Eldoret Municipality Block 4/342 and 343 had not yet been transferred to him. After Boit died, the defendant filed Eldoret Succession Cause No. 233 of 2004. The proceedings of the succession matter were produced as plaintiff's Exhibit No.15. The plaintiff stated that he filed an objection in the succession cause but his objection did not succeed as he was advised to file a civil suit of which he then proceeded to file this suit.

In cross-examination, the plaintiff repeated that he was a tenant of Boit since the 1980s and he used to utilize a portion of the plot Block 4/97 to undertake the business of buying and selling of cars and as a garage. He testified that they started negotiating for the sale of a portion of the plot in 1997. Counsel referred the plaintiff to the exhibits 3(a) -3(d) and the plaintiff stated that when the payments were made, they were just the two of them and that the payments were made in cash in his office. He affirmed that when he started making payments, the plot No. Block4/97 had not been sub-divided and the two plots that

he was purchasing did not exist as separate parcels. There was no written agreement when he started paying for the plots. He asserted that he started paying for them because he trusted that the two plots would be carved out of the parent plot No. Block 4/97. He agreed that Exhibit No.1, their home-made agreement, was not witnessed and affirmed that when it was drawn, they were just the two of them. He confirmed that Exhibit No.2, the formal agreement, did not acknowledge the presence of the Exhibit No.1.

The plaintiff was referred to his own pleadings in a previous suit, Eldoret CMCC No. 1000 of 2002. The suit seemingly was seeking orders of adverse possession. He acknowledged that in his pleadings in the said suit, he had pleaded that the deceased had asked him to assist him in sub-dividing the Plot No. Block4/97 and that he had occupied the same for a period of 14 years. The said suit was filed one year after the agreement noted in Exhibits Nos.1 and 2. The witness was further extensively cross-examined on the contents of his pleadings in the said suit. He agreed that in the said suit, he did not plead that he had purchased the two plots and that he had based his pleadings on adverse possession. When referred to the Transfer Forms exhibits Nos. 8 and 9, he confirmed that the transfer forms did not contain the consideration. He denied that the deceased sub-divided the plot No. Block 4/97 out of his own volition and not for purposes of sale. It was his evidence that the sub-division was commenced because the deceased wanted to sell two plots to him. He denied that he has now alleged that he purchased the two plots because Boit is now dead.

In re-examination, the plaintiff testified that the suit Eldoret CMCC No.1000 of 2002 was withdrawn in 2007. It was his evidence that they had earlier agreed with Boit to have the said suit withdrawn and he withdrew it after Boit had died. He testified that he filed the suit after he differed with Boit on the purchase price as Boit wanted more money and had threatened to evict him from the premises.

I questioned the plaintiff and he stated that after the transfer forms were signed, they were kept in the custody of Mr. Isaboke Orina Advocate. He obtained the said transfer forms from Mr. Orina after Mr. Boit died. Questioned why the said transfer forms had not been registered, he testified that the leases for the new numbers had not yet come out.

PW-2 Hezron Wabomba Wamalwa testified that he is a private documents examiner. He pronounced that he was trained at The School of Questioned Documents Forensic Science Laboratory Bureau of Chief Postal Inspector, Washington D.C in the USA. He was trained in 1968. He thereafter returned to Kenya and was attached to the CID Headquarters in Nairobi as a full time documents examiner from 1969. He worked for the CID for 29 years and retired in 1987. After retirement, he started his own private practice. It was his evidence that he examined the authenticity of certain questioned documents relating to this matter being the Transfer of Lease forms (Exhibits 11 and 12), Sale Agreements (Exhibits 1 and 2), a letter from the Department of Lands (not produced as an exhibit), and a letter from the District Lands Officer (Exhibit No.8). He testified that he compared the signatures therein with signatures of certain undisputed documents. The purpose was to see whether Boit (who signed the undisputed documents) also signed the questioned documents. He answered that it was his opinion that the person who signed the undisputed documents also signed the questioned documents. It was his opinion that there was no evidence of forgery. His report was produced as plaintiff's Exhibit No.16.

PW-3 was Isaboke Mark Orina who testified that he is an Advocate of the High Court of Kenya. He asserted that he knew both the plaintiff and Mr. Boit (deceased). He affirmed that he signed the agreement Exhibit No.2 as a witness. The seller Mr. Boit, was his landlord and he knew him well. He also testified that after attesting the agreement, Mr. Boit asked him to draw a letter seeking consent to transfer. The Consents to Transfer (Exhibits 8 and 9) were therefore addressed to him. He testified that he was never given any instructions to complete the conveyance. On cross-examination, Mr. Isaboke Orina testified that in 2001 he was not practicing alone but was in a firm of advocates in Eldoret. He stated that currently he was not in active practice and does not hold a practicing certificate. A letter from the Law Society of Kenya on when he last took out a practicing certificate was put to him. The letter which is self explanatory and which the defendant produced as an exhibit, shows that Mr. Isaboke Orina last held a practicing certificate in the year 2000. Mr. Orina did not deny that at the time he prepared and attested the agreement Exhibit No.2, he did not possess a practicing certificate.

PW-4 was one Zadock Lihanga Andoyi, an Executive Assistant attached at the Chief Magistrate's Court in Eldoret. He testified that he has been in Eldoret since 1998. He stated that in 2001, there was a Principal Magistrate stationed at Eldoret by the names of Lucy Gitari and that he was familiar with her signature. He affirmed that Exhibits Nos.11 and 12 (the transfer forms) were signed by the said Lucy Gitari and that they contain the seal of the subordinate court at Eldoret. It was his evidence that signing of such documents was part of the official functions of Magistrates. In cross-examination, the witness testified that he was not present when the documents were signed.

B. THE DEFENCE CASE

The defendant in her evidence stated that he came to know the plaintiff as a tenant in their land Eldoret Municipality Block 4/97. She testified that the land was sub-divided in 2001 when the plaintiff was still a tenant. She asserted that she is not aware that her late husband (Boit) had sold two plots to the plaintiff as Boit never informed her of such sale. She also declared that she does not know Mr. Isaboke Orina and that she first saw the agreements (exhibit 2) after her husband had died. She was however aware of a dispute between her late husband and the plaintiff over the occupation of the premises when her husband asked the plaintiff to vacate. She only came to know of the suit Eldoret CMCC No.1000 of 2002 after her husband had died. She produced the pleadings in the said suit as Defence Exhibit No.2. She denied that the plaintiff bought the two plots.

On cross-examination, the defendant testified that the deceased, had only allowed the plaintiff to occupy the suit lands as tenant. She was aware that the plot No. Block 4/97 was sub-divided into several plots all of which are now in her name. She testified that the plot Nos. Block4/ 342 and 343 were hived off the parent Plot No. Block 4/ 97. She confirmed that she filed a succession cause but could not recall the number. She denied that in the succession cause she used the consents to sub-divide (Exhibits No.9). She denied that Boit (deceased) signed the transfer documents and pointed out that he (Boit) would not have sold the plots without informing her.

DW- 2 Daniel Gutu, is an Inspector of Police ; a forensic document examiner of more than 4 years based at the CID Headquarters. He testified that he holds a Bachelor of Arts Degree in Sociology from Kenyatta University (year 2000) and that he was trained as a document examiner in the National Ribat University Forensic Science Institute in Khartoum, Sudan. He affirmed that on 11/9/2012 he examined certain documents to prove their authenticity. These were transfers of lease (Exhibits 11 and 12), Sale agreements (Exhibits 1 and 2), Surrender (Exhibit No.4) , proposed sub-division plan (Exhibit 6), and petty cash vouchers (Exhibits 3(a)-3(d)). His task was to ascertain whether these documents were made by the same hand. To do so, he compared the signatures therein with the known and undisputed signatures of Mr. Boit. In his opinion, the signatures were made by different persons. His opinion was that the disputed documents were made by the same hand but not the hand of Boit (deceased). He prepared a report on 11th December 2012 which he produced as Defence Exhibit No.3. In cross-examination, he testified that in his opinion, the signatures in exhibits 3(a) and 3(d) are a replica of each other; in other words, one signature was scanned into the other and not made by hand. Put to him whether he has asked for further investigations to be made, the witness stated that he had not. He disagreed with the report of PW-2 and stated that the findings in exhibit No. 16 contradicted themselves.

C. SUBMISSIONS OF COUNSEL

Counsels made elaborate submissions on the evidence on record. In brief, Mr. Onyinkwa, learned counsel for the plaintiff, asserted that the plaintiff has proved his case on a balance of probabilities. He declared that the plaintiff has proved that he bought the two properties from Boit (deceased). He also stated that the agreement of 26th October 2001 was a proper agreement. He argued that neither the Advocates Act, nor the Evidence Act ,makes an agreement illegal or void because the advocate had no practicing certificate. It was his view that an agreement for sale of land can be signed by any witness and that such witness need not be an advocate. He also argued that Article 159 of the Constitution of Kenya, 2010 sets out the principle that technicalities should not be given prominence. He also referred me to Section 1A of the Civil Procedure Act. On the suit Eldoret CMCC No. 1000 of 2002, he contended that the plaintiff's former advocates failed to give proper attention to the plaintiff's instructions and "acted in

a hurry”. He attacked the evidence of DW-2 as unreliable. He pointed out that the deceased could not have gone to such great lengths if he did not wish to sell the two plots to the plaintiff. He referred me to the cases of *Kajwang vs Law Society of Kenya 1 KLR 846*.

On the other hand, Mr. Maritim, learned counsel for the defendant, was of the opinion that the plaintiff has failed to prove his case on a balance of probabilities. He argued that when the first installments were made, there was no sub-division of Plot No. Block 4/ 97 and therefore the two parcels of land Block 4/342 and 343, could not be available for sale. He pointed out that in the case Eldoret CMCC No.1000 of 2002, the plaintiff’s cause of action was different from this one. He maintained that the agreement (Exhibit 2) purportedly made between the plaintiff and Boit (deceased) was a nullity as it was prepared by an unqualified person. He referred me to Section 34 of the Advocates Act and the case of *National Bank of Kenya Ltd vs Wilson Ndolo Ayah (2009) eKLR* and *John Didi Omulo vs Small Enterprises Finance Company Limited & Another (2005) eKLR*. He also argued that the person who allegedly attested the transfer forms was not called as a witness and that I should therefore presume that her evidence would have been adverse to the plaintiff. He referred me to the cases of *Mingire vs AG (1990) KLR 250* and the case of *William Kandie vs Republic Nakuru Court of Appeal Criminal Appeal No.21 of 1996*. He submitted that the plaintiff fabricated his case after the deceased had died.

He also attacked the payment vouchers as suspicious as they were never tendered to the plaintiff’s expert witness for authentication. He referred me to the evidence of DW-2. He argued that no proof had been established of such payments nor was the source of such money shown. He argued that bank transactions showing the withdrawals ought to have been exhibited. He also contended that the payments in the petty cash vouchers were made by “Pentagon Auto Garage” and not the plaintiff and that there was no evidence to show the nexus between “Pentagon Auto Garage” and the plaintiff. He closed by arguing that no obligation had been left by the deceased given the evidence of the plaintiff and that it is probable that the plaintiff hesitated to present the documents for registration because he knew that they were forged.

D. CONSIDERATION AND DECISION OF THE COURT

I have considered the evidence on record and the submissions of the parties. I will determine each of the issues agreed by the parties in arriving at my final decision.

The first issue is whether there was a written agreement of sale between the plaintiff and Boit (deceased) for the sale of the land parcels Eldoret Municipality Block 4/342 and 343. It is the plaintiff’s case that there was an agreement. The first (Exhibit No.1) was homemade but the second (Exhibit No.2) was formal. Of course, there is contradictory evidence on whether these documents were ever signed by the late Boit, a matter that I think I need to dispose of first.

PW-2 the plaintiff’s documents examiner was of the view that the exhibits 11 and 12 (transfers of lease); exhibits 1 and 2 (agreements) ; and two letters, one dated 6th November 2001, and an undated one addressed to the Department of Lands and the District Lands Officer, were all signed by Boit. PW-2 did not examine the petty cash vouchers. On the other hand DW-2 was of opinion that all these documents were not signed by Boit (deceased).

Both PW-2 and DW-2 are experts in the field of document examination. The two gave conflicting opinions on whether the documents in question were signed by Boit (deceased).

This is not the first time, and I am sure it will not be the last, that a court is faced with experts who give conflicting evidence. The difficulty is what course to take faced with this conflict.

In the court of appeal case of *Amosam Builders Developers Ltd vs Betty Ngendo Gachie & 2 others (Nakuru Court of Appeal Civil Appeal NO.193 of 2001) (2009) eKLR*, the court of appeal assessed a situation where the evidence of experts was in conflict. It stated as follows where relevant.

“There is no doubt that the witnesses called by both sides as experts were each qualified in their respective fields. That notwithstanding, as a general rule evidence by experts being opinion evidence is

not binding on the court. The court has to consider it along with other evidence and form its own opinion on the matter in issue. The court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it... In the case before us there is a conflict of opinion by the experts called by both sides. It was the responsibility of the trial court to come to a decision one way or the other after analyzing all the evidence before it. In a case as this where evidence of experts is conflicting a decision one way or the other depends on the credibility of witnesses.”

In the trial of the above appeal, the trial judge opted to choose one opinion over the other and the court of appeal did not fault this decision. It would appear therefore that the court has discretion to make a decision on which expert it deems to be the more credible. In arriving at the decision of what expert opinion to take, the court in making the determination, ought to take into account the totality of the rest of the evidence tendered and the path that such evidence points at. In my view, the court should also be alive to the fact that experts are ordinarily paid by their clients and that it is not unusual for an expert to tend to incline to give an opinion that is more favorable to his client.

In the case of *Kaiza vs Kaiza (Mombasa Court of Appeal Civil Appeal No.225 of 2008) (2009)eKLR*, the court of appeal stated as follows on the opinion of an expert who happened to be a handwriting expert.

“We think the duty of the court in weighing the opinion evidence of an expert would be more onerous where such opinion is the only material for consideration, than where there is direct evidence on the author of the handwriting.”

In this case, the evidence of the expert witnesses is not the only evidence available as to whether or not the disputed documents were signed by the late Boit. PW-3 testified that he saw the late Boit append his signature to Exhibit No.2. He indeed attested to this signature and to the signature of the plaintiff in the said exhibit. He testified that the Boit (deceased) was well known to him. PW-4 also testified that Lucy Gitari appended her signature to the Transfer forms (Exhibits 11 and 12) . The transfer forms are noted to have been signed by the late Boit and the plaintiff. PW-4 authenticated the signature of the said Lucy Gitari. The import is that the said Lucy Gitari did witness the late Boit and the plaintiff sign the transfer forms. The defendant’s evidence was that the late Boit could not have signed the said documents without informing her. I found the defendant as being evasive at times and I made a note of this in the proceedings. The defendant appeared overly defensive when being cross-examined. Even if I were to believe that the late Boit never informed her that he had sold the two parcels of land, the failure by Boit to give such information to the defendant does not mean that he could not have signed the said documents.

I could easily have taken consideration of the fact that PW-2 is the more experienced of the two expert witnesses. He has been a documents examiner since 1969. On the other hand, DW-2 testified that he has 4 years of experience as a documents examiner. However, I choose not to take comfort merely in the experience of the expert witnesses for one could be the more experienced but the less credible. I opt to lean upon the evidence of PW-2 , more so because in my opinion, the demeanour of PW-2 was the more impressive. He appeared calm, honest and forthright in his evidence. DW-2 struck me as being overly defensive and even denied that he had been paid a cent to come give evidence an answer which did not strike me as candid for one, even if in public service, cannot be so charitable as to spend a day out of station, travel to give evidence and take care of his own subsistence. Given the above reasons, I make the decision to accept the opinion of PW-2 over the opinion of DW-2.

Back to the issue of whether there was a written agreement between the late Boit and the plaintiff, my answer is that yes, there was a written agreement between the late Boit and the plaintiff. There were actually two documents brought forth as agreements. In my view, exhibit 1 does not measure up to the standards of the agreement contemplated under the provisions of Section 3 (3) of the Law of Contract Act, CAP 23, Laws of Kenya. Section 3 (3) of CAP 23 provides that :-

S.3 (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

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

Thus it will be discerned that for an agreement for the disposition of land to be enforceable, the agreement must not only be in writing, but must be signed by the parties thereto and attested by a witness who must be present when the contract is signed. Exhibit No.1 was not attested and therefore it does not measure up to the standards of Section 3(3) of the Law of Contract Act. Exhibit No. 1 cannot therefore be regarded to be a valid and enforceable agreement for the disposition of an interest in land.

However, Exhibit No.2 in my opinion is a valid contract for the sale of land. It is in writing, it is signed and is attested by a witness.

In his submissions, Mr. Maritim, learned counsel for the defendant stated that I should not consider Exhibit No.2 as a valid instrument as it was not drawn and attested by a qualified advocate. He based his argument on the case of *National Bank of Kenya vs Ndolo Ayah* and the case of *Omulo vs Small Enterprise*. In the case of *National Bank* the instruments in issue were a Charge and Guarantee which were drawn by an advocate who did not hold a practicing certificate. The court of appeal held that such documents were invalid. The case of *Omulo* revolved around the attestation of a Charge. I have carefully looked at Exhibit No.2. It does not note who drew the document. However, Mr. Isaboke Orina confirmed that he was the person who drew it. I do not know of any law that provides that a person has to be an advocate with a practicing certificate to draw an agreement. There are many homemade agreements and I do not think it is in the contemplation of the law to have all of them disregarded because they were never drawn by advocates.

On the question of attestation, Mr. Onyinkwa, for the plaintiff was of the view that it is not a must for the instrument to be attested to by an advocate. On this point, I agree with Mr. Onyinkwa. Section 3(3) of the Law of Contract Act, does not stipulate that the agreement must be attested to by an advocate. The statute only mentions a witness. This witness in my view does not have to be an advocate. This case is therefore distinguishable to that of *Omulo* as in the *Omulo* case, it was a requirement that the charge be witnessed by an Advocate. In my opinion, Exhibit No. 2 is therefore a valid agreement capable of being enforced. On issue 1, I hold that there was a valid agreement of sale between Boit (deceased) and the plaintiff for the sale of the land parcels Eldoret Municipality Block 4/342 and 343.

Issue 2 is whether Boit (deceased) executed a transfer in favour of the plaintiff for the two parcels of land. I have already held in favour of the opinion of PW-2 as an expert witness. His evidence was to the effect that the transfer instrument was executed by Boit (deceased). The transfer instrument was properly signed. On the issue of attestation, I have no reason to doubt the evidence of PW-4 that the signatures were attested to by Lucy Gitari, then Principal Magistrate Eldoret who affixed the seal of the court to the instrument. There is no conflicting evidence that the attesting signature is not that of Lucy Gitari. In the premises, I have no material before me that would entitle me to doubt that the attesting signature is not that of Lucy Gitari. On issue No.2, I therefore hold that the transfer was properly executed by Boit (deceased) and the plaintiff and that it is a valid transfer instrument.

Issue 3 is whether the plaintiff forged the signature of the deceased and I have already held in favour of the opinion evidence of PW-2. My holding is that the plaintiff did not forge the signature of the deceased and indeed the signature of the deceased was properly appended to the documents.

Issue 4 is whether the said Abraham Kimitei Boit is now deceased and if so whether the Defendant Grace Jelel Boit is the personal representative and Administratrix of the estate of the said Abraham Kimitei Boit. This issue is not in contention and is indeed admitted in the Defence that the defendant is the Administratrix of the estate of Boit.

Issue 5 is whether, as Administratrix, the defendant is liable or not to honour the obligations on the said agreement. The short answer to this is yes. As administratrix, the defendant stands in the shoes of the deceased and any obligations that were to be performed by the deceased are to be performed by the Administratrix.

Issue 6 is whether the deceased obtained consent to sub-divide and transfer the said two parcels of land and also whether the deceased executed and signed transfer documents relating to the sub-division from the original title Eldoret Municipality Block 4/97 and pay all rates and other charges before he died or he did not? If the answer is in the affirmative, was it done to enable him transfer the two parcels of land to the plaintiff or not.

As stated earlier, I am of the view that the deceased signed all the disputed documents including the applications to sub-divide and the transfer forms. I believe the plaintiff's evidence that the sub-division was done inter-alia in order to transfer the two plots to the plaintiff.

Much was said about the suit Eldoret CMCC No.1000 of 2002 where the plaintiff filed suit for adverse possession. I think the plaintiff was perfectly entitled to file the said suit and found a claim on adverse possession. That does not mean that he could not later file suit on a different cause of action. I have discerned from exhibit No. 5 that as way back as 11th October 2002 the plaintiff had placed a caution on the parent title claiming a purchaser's interest. I do not hold the view that because he filed a suit claiming adverse possession, he by doing so, ousted his rights to claim the suit land as a purchaser. Arguments were also made that the deceased could not sell a plot that was not yet in existence. I have noted that the receipts Exhibits 3(a) and 3 (b) were drawn on the 10th June 1997 and 8th September 1999. The two receipts do not have the plot numbers 342 and 343. They only talk of two portions out of the plot Block 4/97. It is in exhibits 3 (c) and 3 (d) which are of 2001, that the two plots are identified as Plot Numbers 342 and 343. I think as at 2001, the plots were identifiable with their new proposed numbers but as at 1999 the sub-division had not been done and therefore the two plots could not be identified. There is no doubt in my mind that the four receipts taken as a whole refer to the same transaction. I do not give much weight to the submission of Mr. Maritim that the same are paid to "Pentagon Auto Garage". The plaintiff has explained that, that is where the acknowledgments were done and I think it is immaterial that the petty cash vouchers were those of Pentagon Auto Garage.

I think issues 7 and 9 have already been subsumed in my reasoning above.

On issue 10, I do hold that the plaintiff has proved his case on a balance of probabilities.

On the whole therefore I am of the view that the plaintiff is entitled to the prayers sought in his plaint. I therefore make the following final orders.

(a) That a declaration is hereby issued that the plaintiff is the owner through purchase of the land parcels Eldoret Municipality Block 4/342 and Eldoret Municipality Block 4/343 .

(b) That an order of specific performance is hereby issued directing the defendant to execute all the necessary documents to vest upon the plaintiff the land parcels Eldoret Municipality Block 4/342 and Eldoret Municipality Block 4/343 and in default the Deputy Registrar of this Court to execute the said documents.

(c) That the plaintiff shall shoulder all conveyance and transfer fees and all charges required for purposes of effecting the transfer of the two parcels of land to himself.

(a) Costs of this suit shall be borne by the defendant.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF FEBRUARY 2013.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Judgment delivered in presence of

Mr. Onyinkwa I.J of Ms Onyinkwa & Co for the plaintiff.

Mr. R. Kamau holding brief for Mr. Maritim of Ms Kalya & Co for the defendant.