



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. E029 OF 2021

JULIUS MURIUNGI MAGIRI.....APPELLANT

VERSUS

ELIZABETH NDURU MAGIRI.....RESPONDENT

JUDGMENT

A. Pleadings

1. The appellant claim before the trial court was for an order barring the respondents from plucking and or benefitting from tea bushes on his LR No. Igoji/Kinoro/701 and a declaration of her indebtedness him to the tune of Kshs.150,000.
2. The respondents defence was that the suitland had been acquired by their father out of a sale of nine acres to a tea factory hence was family land and she was entitled to three thousand (3000) tea bushes as directed by their father.
3. In reply to the defence appellant denied the existence of any alleged trust in favour of his siblings since the respondent was bequeathed her share of land by their father elsewhere and settled therein. He insisted he had only allowed the respondent to use of his three thousand tea bushes on condition that the annual tea bonus would be shared between them while she educated her children.

B. Evidence

4. The appellant's testimony was that he owned the suitland measuring approximately 2.6 ha where he had planted tea. Out of agreement with her sister the respondent, the appellant told the court he allowed his sister to utilize three thousand tea bushes in 2013 on condition they would equally share the annual tea bonus but she had to send his share defaulted for two years.
5. He produced a sale agreement dated 3.1.2001, land transfer form dated 25.1.2001, a receipt dated 25.1.2001 as p. exhibit 1-3 respectively.
6. Further the appellant confirmed the respondent had occupied the land for 8 years. The appellant estimated the tea bonus as Kshs.300,000 hence was entitled to half of that amount.
7. The appellant admitted that the respondent was the registered permit holder with tea factory and that they did not enter into any tenancy agreement specifying the rental period. Additionally the appellant told the court the respondent initially would pay him the monies agreed but for the two years period she had defaulted hence the reason he had written to the bank to stop advancing any payment to her on account of the shamba.
8. PW2 told the court both the appellant and the respondents were his children. He testified the suit land was registered under him. He denied advancing any money to the appellant in order to purchase any land on his behalf and or knowing if the respondent had been given any money by the appellant on his behalf on account of a sale of land.
9. Further Pw2 confirmed that the appellant had allowed the respondent to harvest tea bushes on his Igoji land, as she educated her children.
10. In cross examination, Pw 2 denied any written agreement before the area chief dated 14.8.2017 that the respondent would be given some tea bushes so as to educate her children. He however told the court it was wrong for the respondent to refuse to handover the tea bushes especially after having been assisted by his brother the appellant to educate her children for about 10 years.
11. The respondent told the court that in 2003 PW 2 ordered the appellant to give her 3000 tea bushes to help educate her children on LR No. Igoji/Kinoro/701. She thereafter acquired a plucking no. 72 Gatugi. Her view was that her children were still in school and or college hence it

would be unfair to vacate the land before they completed college. Though she was willing to vacate the land after her children had their education as they had, she denied that she was supposed to share any farm produce proceeds as alleged or at all with the appellant.

12. In support of her claim the respondent produced a chief's letter dated 14.8.2017, demand letter dated 20.5.2015, letter dated 24.5.2016 from Tetu Sacco Ltd, school admission letters, growers registration confirmation letter and a letter dated 2.11.2017 from Kinoro Tea factory co. Ltd as D. Exhibit 1-6.

C. Grounds of Appeal

13. The appellant has appealed against the lower court judgment on the basis that:- the trial court was wrong both in law and in fact in failing to appreciate and or take into account the terms of the implied contract to share the farm proceeds of the harvested green tea, given the evidence in support thereof; failing to find there was a breach of the contract of business to the tune of Kshs. 150,000/- finding that the respondent was entitled to repudiate the agreement and lastly occasioning miscarriage of justice.

D. Written Submissions

14. The parties herein opted to dispose of the appeal through written submissions dated 6.12.2021 and 12.1.2022 respectively.

15. The appellant submitted he had proved to be the owner of the suitland where he voluntarily entered into a mutual oral agreement for harvest, sale and sharing of the profit from the plucking and the delivery of green tea to the processing factory out of his 3000 tea plants with the respondent.

16. Counsel for the appellant submitted that the aforesaid agreement was not disputed but the trial court had denied him justice by allowing the respondent to take up all the benefits yet the agreement was enforceable as held in *Patrick Njuguna Kimondo vs Geoffrey Vamba Mbuti*.

17. On grounds 4, 8 and 12 of the appeal, the appellant submitted that the trial court relied only on the respondents evidence yet his evidence was valid, credible and available particularly on his claim for Kshs.150,000 which consideration formed part of the oral agreement.

18. Lastly on grounds 10, 11, 14, and 15 of the appeal the appellant that submitted given the respondent never produced anything to prove that she owned the land or had a lease agreement so as to acquire 100% benefit from the harvest the trial court was wrong for failing to protect his interest in the mutual agreement.

19. This being a first appeal, the court is mandated under section 78 of the Civil Procedure Acts to re-examine, rehearse and re-hear the matter, come up with independent findings and conclusion while at the same time aware the trial court had the opportunity to see and hear the witnesses first hand.

20. It is trite law parties are bound by their pleadings and issues flow from pleadings. In line with order 15 civil procedure rules, parties herein filed separate list of issues at page 80 and 83 of the record of appeal.

E. Issues for Determination

21. Having gone through the pleadings, evidence, grounds of appeal and written submissions the issues for determination are:-

- (i) If the appellant proved the existence of any contract with the respondent to enter, use, harvest, sell and share the farm produce.
- (ii) What were the terms and conditions of the aforesaid contract.
- (iii) If the respondents breached the aforesaid oral agreement.
- (iv) Whether the appellant is entitled to any reliefs as claimed for the alleged breach.

22. A contract in law under the Black Laws Dictionary 11th Edition, Bryan A. Garner, Thomson Reuters 1995 at page 402 an agreement between two or more parties creating obligations recognizable in law. An informal contract is defined at page 407 as an agreement other than in writing that derives its force not from the observance of formalities but because of mutual assent and consideration. For an informal contract to exist, there must be mutual consent, consideration and parties with capacity to contract. An oral contract is defined as a contract that has not been reduced into writing, but expressed in oral words.

23. In *Bid insurance brokers ltd vs British United Provident fund (2016) eKLR* the court held an oral contract was subject to the common law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreement that might add to or vary a contract in writing.

24. Section 3 (3) of the Law Of Contract Act provides that no suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded is in writing and signed, provided such a suit shall not be prevented by reason only of the absence in writing where the lessee who has performed or is willing to perform part of the contract has taken possession or continues in possession in furtherance of the contract.

25. In this suit there is no dispute and evidence was tendered by both sides that the parties are relatives and mutually agreed to assist each other on specific terms and conditions.
26. Even though the respondent had pleaded trust in her defence, she abandoned that line of defence in her testimony and instead acknowledged that the suit property belonged to the appellant it shall revert to him once her license with her to access the premises and derive income from the farm produce for the education of her children, was over.
27. The bone of contention is whether the appellant was entitled to any share of the farm profits. In order to prove his claim the appellant had the duty to bring documentary evidence on the number of tea trees on his shamba at the disposal of the respondent and the details of the farm produce together with its expected income. The appellant did not produce any farm book the delivery details for the alleged tea for the eight years in general and or bank statement from the coffee factory which would have formed the basis for his claim for a declaration that the respondent was indebted to him to the tune of Kshs.300,000.
28. The claim was in a nature of special damages which must not only be pleaded but proved.
29. There was nothing produced to back the assertions that the tea bushes on the appellant's land was capable of producing farm produce/profits to the tune of Kshs.300,000 and that after the respondent was allegedly paid for that farm produce he breached the oral agreement by failing to remit the annual tea bonus.
30. The appellant called no evidence from the tea factory to confirm that indeed the respondent was constantly annually being paid such an amount but had failed to give him his share of the farm proceeds.
31. In absence of such evidence my finding is that the appellant failed to discharge his burden of proof in line with Sections 107-109 of the Evidence Act that there was first an agreement to equally share the farm produce proceeds and secondly that the respondent had consistently received such farm proceeds from the tea factory for the period in contention.
32. Whereas the appellant called his father Pw 2 to back his testimony that there was an oral agreement, witness seemed to deny several assertions by the appellant. That notwithstanding it is not in dispute that the suit land belongs to the appellant. PW 2 was clear that indeed the respondent had school or college going children but was also under an obligation to hand over vacant possession to the appellant once her children's education was over. The respondent tendered documents to support her defence that her children were still undergoing education at various levels. That evidence was not shaken by the appellant.
33. In my considered view therefore is clear that the respondent's occupation of the suit land has been with the consent of the appellant during the course of the respondent educating her children for the last eight years.
34. The appellant did not tell the court if he had given any notice to vary the initial terms and conditions of the oral contract alluded above. This court as per the case law cited above is not bound to rely on extrinsic evidence to vary and or set aside what parties have consented to.
35. The respondent expressed her willingness to continue with the oral agreement as per the terms and conditions made. The appellant did not call any evidence to indicate if he gave a termination rescission or variation notice to the respondent if at all she had breached any terms and conditions warranting termination.
36. In absence of such notice the court comes into conclusion that the trial court was right in finding the claim not proved. In the premises I dismiss the appeal with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 6TH DAY OF APRIL, 2022

In presence of:

Miss Kilesi for appellant

Mwirigi for respondent

HON. C.K. NZILI

ELC JUDGE