



**Omune (Suing as the personal representative of the Estate of Domnicus Omune Muga - Deceased)
v Oloo (sued as the Personal Representative of the estate of Lazaro Oloo Sewe - Deceased)
(Environment and Land Appeal 13 of 2021) [2022] KEELC 26 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 26 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 13 OF 2021**

AY KOROSS, J

MAY 12, 2022

BETWEEN

ROSE ANYANGO OMUNE APPELLANT

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
DOMNICUS OMUNE MUGA - DECEASED**

AND

ROSE AUMA OLOO RESPONDENT

**SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF LAZARO
OLOO SEWE - DECEASED**

*(Being an appeal from the judgment and decree of the Senior Principal Magistrate
Hon.J.Ongondo delivered on 25/03/2021 in Siaya SPM ELC Case Number 5 of 2018)*

JUDGMENT

Introduction

1. The genesis of this appeal can be traced to a plaint filed by the appellant who is the widow of Domnicus Omune Muga, the registered proprietor of land parcel numbers West Alego Komenya Kalaka/903 (suit property) and West Alego Komenya Kalaka/866. The dispute arose when the then defendant in August 2016 commenced construction on the suit property and West Alego Komenya Kalaka/866.
2. While the appellant contended that Lazaro Oloo Sewe (the defendant in the lower court, now deceased and represented by his Estate and hereafter “the then defendant”) had by an agreement for sale purchased only a portion of West Alego Komenya Kalaka/866 from her husband and had essentially trespassed on the suit property, the then defendant on the other hand in his defence, counterclaim and setoff asserted that though he had by an agreement for sale dated 1/10/2008 purchased West



Alego Komenya Kalaka/866, it had had been varied by an oral agreement in 2009 which in its very effect modified the shape of his purchased parcel of land thus essentially covering a portion of the suit property and West Alego Komenya Kalaka/866. The appellant prayed for permanent injunction, mesne profits, eviction and costs while on the other hand, the then defendant prayed for permanent injunction, specific performance and costs.

3. On hearing the parties, the court framed one issue for determination; whether the respondent had purchased the suit property. It found that the appellant's claim was not merited and entered judgement for the respondent; permanent injunction, specific performance and for the respondent to pay all the attendant fees for conveyance and transfer of 1.25 acres that was to be hived off from the suit property and West Alego Komenya Kalaka/866.

Appeal to this Court

4. Aggrieved and dissatisfied with the entire judgment of the lower court, the appellant filed an appeal to this court on 5 grounds which are a repetition of each other and they all boil down to one ground; the Learned Magistrate erred in law and fact by holding that the respondent was entitled to a portion of the suit property yet no documentary evidence was adduced thus arriving at the wrong conclusion.
5. The appellant prayed for; the appeal be allowed, lower court judgement be set aside, the appellate court do reassess the evidence and costs of the appeal.

The Appellant's Submissions

6. The appellant filed written submissions dated 9/02/2022. She contended that Domnicus's title could only be defeated by Section 26 of the [Land Registration Act](#) on grounds of fraud and that from the evidence adduced, Lazaro only purchased West Alego Komenya Kalaka/866.

The Respondent's Submissions

7. The respondent adopted one of the issues identified by the appellant; whether the respondent was entitled to a portion of the suit property. She submitted that there were exemptions to the provisions of Section 3 (3) of the [Law of Contract Act](#) which provides that contracts in land have to be in writing, signed by the parties and attested by witnesses. She submitted that though this was the position of the law, there were two exemptions; (i) oral agreements that had been partly performed. She relied on Section 3 (7) of the same Act and on the cases of [James Kendagor Simatei v Philip Kipruto Simatei](#) [2019] eKLR and [Patrick Njuguna Kimondo v Geoffrey Vamba Mbuti](#) [2019] eKLR and, (ii) constructive trust and to this end, she relied on the case of [Willy Kimutai Kitilit v Michael Kibet](#) [2018] eKLR.
8. She contended that the then defendant had proved his case and the decision of the trial court should not be upset and urged the court to dismiss the appeal with costs.

Analysis and Determination

9. Having considered the condensed grounds of appeal, the parties' submissions and authorities cited, this court has identified one issue for determination: Whether the then defendant proved that the agreement for sale of a portion of West Alego Komenya Kalaka/866 was varied to include a portion of the suit property. I will now consider the law and jurisprudence.
10. As was stated in the case of [Selle & Another v Associated Motor Boat Co. Ltd & others](#) [1968] EA 123, cited with approval in [Barnabas Biwott v Thomas Kipkorir Bundotich](#) [2018] eKLR, this court is alive



that its role as a first appellate is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial magistrate stand or not and give reasons either way.

11. The words of Sir Charles Newbold, P. were expressed in the often-cited decision of *Mbogo & Another v Shab* [1968] EA 98 which stated that an appellate court will not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion had misdirected himself.
12. In the trial court, the appellant produced the agreement for sale that was between Domnicus and the then defendant which was on parcel number West Alego Komenya Kalaka/866. 1.25 acres was to be excised from this parcel of land which was 1.3 hectares in size. The agreement was dated, executed and witnessed and met all the ingredients of Section 3(3) of the [Law of Contract Act](#). Part of the agreement had the following words; “The sale and purchase is final and will not be reversed and is hereby confirmed by the above witnesses”. The word “final” has been defined by Concise Oxford English Dictionary to mean; “Coming at the end of a series”.
13. Because the purchase of land is a process and bearing in mind the words “final” my understanding is that all the parties were satisfied with all events prior to the execution of the agreement such as due diligence, size of land being bought, its locality, boundaries, purchase price, modalities of payments and who their witnesses would be which were then reduced into writing.
14. Though the appellant testified that there was never an oral agreement to vary the written agreement, the then defendant disputed this and averred that he and Domnicus varied the written agreement with an oral agreement in 2009 when they realised that the sold portion included Domnicus extended family’s homestead and graveyard. He contended that the terms of the oral agreement were that though the size of the purchased portion would remain the same, the shape of the land would change to include a portion of the suit property.
15. Even if this court were to give the respondent the benefit of doubt that the terms of the agreement could be varied, is it plausible that barely a year after the written agreement was executed and around the same time the final payment of the purchase price was made in 15/03/2009 there would be drastic changes on West Alego Komenya Kalaka/866? If the parties had painstakingly taken their time to prepare a written agreement why would they not have prepared a subsequent agreement to vary the terms thereof?. The respondent testified that a surveyor effected the oral agreement by excising and demarcating his purchased portion from the suit property and West Alego Komenya Kalaka/866. Where are the mutation forms that surveyors prepare in accordance with the Survey Act.? The Survey sectional map for West Alego Komenya Kalaka Registration Section which was produced by the then defendant did not reflect such a demarcation. All these lead to the logical conclusion that there was never an oral agreement.
16. The trial magistrate similarly arrived at the same conclusion as this court when it stated on the oral agreement thus;

“ Although there was no agreement to that effect”
17. Despite this conclusion, the court found that that the appellant’s claim was not merited and upheld the then defendant’s counterclaim after reasoning thus;

“Equity will presume what ought to have been done as done...the intention of the parties was to avoid the homestead...the court had advantage of visiting the site wherein there was a homestead on lower part of 866 and to avoid demolishing the homestead, the parties moved



right to curve a portion of 903 which in my view makes sense...the absence of an agreement
...will not extinguish the defendant's rights..." [Emphasis added]

18. It can be deciphered that the finding of the trial magistrate was founded on an equitable maxim, parties' intention and his site visit.
19. This equitable maxim was explained by *the book of Snell's Equity*, by P.V Baker and P.st J. Langan, 29th Ed (1990) at p. 40 as follows;

“Equity treats a contract to do a thing as if the thing were already done, though only in favour of persons entitled to enforce a contract”
20. The import of this elucidation is that this maxim is applicable to contracts. I need not say more. In the absence of an oral agreement, it therefore follows that the trial court erred in applying this maxim.
21. The intention of the parties at the time of acquisition is of importance. From the conduct of the parties, there is no evidence to support the reasoning that there was a common intention at the time of acquisition that the then defendant was to have an interest on the suit property. Further, judicial officers as independent arbiters are ordinarily refrained from entering into the realm of litigation. The Ugandan Case of *E.Kangye v E Bwana Kampala* HCCS No.38 of 1989 stated that the role of courts in site visits was the check the evidence of the parties and not to fill gaps in their evidence.
22. In arguing his case, the respondent relied on several authorities which are distinguishable from this case. In the case of *James Kendagor Simatei (Supra)* the court found that the parties entered into an oral agreement prior to the commencement of Section 3(3) of the Law of Contract Act which came into effect on 1/06/2003. The written agreement that was the subject of trial court was executed in 2008 which was well after the commencement of this section. Section 38 of the Land Act buttresses this Section 3(3). In the case of *Patrick Njuguna Kimondo (Supra)*, the contract was purely on oral contract for the purchase of a tractor and sharing of a promotional price; the agreements never related to land. The last decision was that of *Willy Kimutai Kitilit(Supra)*. In establishing constructive trust, the court in this case stated that it was not in dispute that there was an agreement between the parties which is contrary to this case where the trial court found there was no oral contract varying the written agreement.
23. The question that begs to be answered is how courts have dealt with instances where the parties have if at all there was one varied a written sale agreement for land by an oral agreement?
24. The Court of Appeal in the case of *Peter Mujunga Gathuru v Harun Osoro Nyambuki & another* [2015] eKLR stated as follows.

“The claim that there was an oral agreement varying this amount later flies in the face of Sections 97 and 98 of the *Evidence Act* ...in this case, the oral agreement was never proved. Secondly, pursuant to Section 3(3) of the Law of Contract Act, the agreement for sale of land is required to be in writing”.
25. Justice Munyao Sila stated in the case of *Kiplagat Kotut v Rose Jebor Kipngok* [2014] eKLR that he could not allow the import of oral evidence to vary or contradict what was clearly put down in writing as that would be contrary to the provisions of Sections 97, 98 and 99 of the Evidence Act. This was similarly stated in the case *Grace Wambuku Kamau Peter & another v Business Shade Limited & 5 others* [2017] eKLR. I am not persuaded to depart from these decisions.



26. I find that the evidence on record supported the appellant's claim that the respondent had trespassed on the suit property and that the trial court erred in finding that her suit lacked merit and held that the then defendant had succeeded on a balance of probabilities.
27. I also find that the appellant had proved her claim before the trial on a balance of probabilities and was entitled to the orders sought and this appeal succeeds. It is trite law that costs follow the event and I award the costs of this appeal to the appellant. I hereby set aside the entire judgment and decree of the trial court and in its place I substitute it with a judgment in favour of the appellant in the following terms;
- I. An order of permanent injunction be issued against the administrators of the Estate of Lazaro Oloo Sewe and his beneficiaries by themselves, their agents, servants or any other person authorized by them from occupying, using, encroaching, constructing, dealing with and/or trespassing on land parcel number West Alego Komenya Kalaka/903.
 - II. An order of eviction is hereby granted ordering the eviction of the administrators of the Estate of Lazaro Oloo Sewe and his beneficiaries from land parcel number West Alego Komenya Kalaka/903.
 - III. The Estate of Lazaro Oloo Sewe and his beneficiaries are hereby granted 60 days from the date of service of the orders of this court to remove themselves and their developments from land parcel number West Alego Komenya Kalaka/903.
 - IV. The costs of this appeal and that of the trial court are awarded to the appellant.

It is so ordered.

Judgment delivered virtually

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MAY 2022

In the Presence of:

Mr. Okanda for the respondent

M/s Otieno for the appellant

Court assistant: Ishmael Orwa

HON. A. Y. KOROSS

ELC JUDGE

12/5/2022

