Mulu & another v Muka Mukuu Farmer Co-operative Society Limited & another (Environment and Land Appeal 4 of 2019) [2022] KEELC 3838 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3838 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 4 OF 2019

JO MBOYA, J

JUNE 16, 2022

BETWEEN

MARY NDILA MULU ..... 1ST APPELLANT

MUKA MUKUU FARMER CO-OPERATIVE SOCIETY LIMITED .... 2ND APPELLANT

AND

MUKA MUKUU FARMER CO-OPERATIVE SOCIETY LIMITED .... 1ST RESPONDENT

TABITHA MUTHOKA ..... 2ND RESPONDENT

JUDGMENT

INTRODUCTION

1. The 2nd Respondent herein filed and/or lodged a Statement of Claim before the Cooperative Tribunal against the Current Appellant and the 1st Respondent, wherein the 2nd Respondent sought various Reliefs pertaining to and/or concerning a parcel of land known as Plot No 12-053, situated at Donyo -Sabuk, within Machakos county.

2. Following the lodgment of the Statement of Claim, which is contained at pages 4-13 of the Record of Appeal, the Appellant herein, who was the 1st Respondent duly entered appearance and thereafter filed a Response to the Statement of claim, wherein the Appellant denied and/or disputed the sale of the suit property to the 2nd Respondent.

3. Subsequently, the dispute between the Appellant and the 2nd Respondent was referred to the 1st Respondent herein for purposes of mediation/arbitration. For clarity, the 1st Respondent herein undertook the mediation between the Appellant and the 2nd Respondent and thereafter rendered an

award whereby the 1st Respondent confirmed that indeed the Appellant sold to and in favor of the 2ND Respondent 4 acres in respect of the suit property.

4. Besides, it was also confirmed that the sale by the Appellant was duly reported to the 1st Respondent who proceeded to and amended her records to conform with the transaction between the Appellant and the 2nd Respondent.

5. Notwithstanding the foregoing and the Mediation by the 1st Respondent herein, the award was contested by the Appellant and therefore same was neither ratified nor adopted by the Cooperate Tribunal.

6. Owing to the foregoing, the dispute between the Appellant and the 2nd Respondent was therefore set down for hearing, where upon the 2nd Respondent testified and called two witnesses, in support of her case.

7. On the other hand, the Appellant herein also testified and called two Witnesses, in support of her Statement of Defense. For clarity, the Appellant herein maintained that though same had sold land to and in favor of the 2nd Respondent, what was sold was a portion thereof, which was measured by strides and not in acres.

8. Following the conclusion of the hearing, the Tribunal proceeded to and rendered a Judgement, which was delivered on the January 7, 2019 and in respect of which the tribunal found in favor of the 2nd Respondent herein. For clarity, the tribunal found and held that the Appellant herein indeed sold to and in favor of the 2nd Respondent 4 Acres of the Suit property.

9. Pursuant to the foregoing, the Tribunal proceeded to and ordered the Appellant to vacate the portion of the suit property, which was under her occupation and thereby grant vacant possession. For clarity, the Appellant was to vacate and grant vacant possession within 90 days and in default, same was to be evicted therefrom.

10. Upon the delivery of the judgement by the tribunal, the Appellant herein, who was the losing Party, felt aggrieved and/or dissatisfied with the Judgement and the decision of the tribunal. Consequently, the Appellant proceeded to and filed a Memorandum of Appeal dated the February 5, 2019.

11. Subsequently, the Appellant herein proceeded to and amended the memorandum of Appeal and in this regard, the operative document driving the Appeal is the Amended Memorandum of Appeal dated the March 18, 2019.

Grounds Of Appeal:

12. Vide the Amended Memorandum of Appeal dated March 18, 2019, the Appellant has impleaded the following Grounds of Appeal;

    a. The Co-operative Tribunal erred in fact and in law in upholding the Respondent's claim when there was no sufficient evidence to support the same.

    b. The Co-operative Tribunal erred in fact in failing to appreciate the Respondent's evidence and her witnesses and thereby arriving at the wrong decision.

    c. The Co-operative Tribunal erred in law and in fact in holding that the Respondent herein is the proprietor of the property known as plot No 12-053, which is not the correct fact .

    d. The Co-operative Tribunal erred in law and in fact in failing to attach the due wait to the Appellant's evidence on submission on the primary suit.

e. The Co-operative Tribunal erred in law and in fact in finding that the Appellant failed to prove their defense and thereby dismissing their defense.

f. The Co-operative Tribunal erred in law and in fact in failing to consider that the 1st Appellant has been residing and in occupation of the Suit property since the year 1965.

Submissions By The Parties:

Appelant's Submission:

13. The Appellant herein filed written submissions dated the August 8, 2019 and in respect of which the Appellant has contended that though same entered into and executed a sale agreement between herself and the 2nd Respondent herein, the sale was in respect of a portion of the suit property and the portion was measured vide footsteps and not in acres.

14. On the other hand, the Appellant has also contended that though an Agreement was signed between herself and Boniface Kavita Mutiso, the said Boniface Kavita Mutiso, went with all the copies of the Agreement that was executed on the farm.

15. Besides, the Appellant has further submitted that the fact that same only sold a portion of the suit property was communicated to the 1st Respondent herein, who proceeded to and indeed generated an Application for Land Control Board consent in respect of a portion of the suit property and not the whole thereof.

16. Based on the foregoing, the Appellant has thus submitted that the Tribunal erred in law in finding and holding that what had been sold to and in favor of the 2nd Respondent was 4 Acres as opposed to a portion thereof, which was measured in footsteps and a boundary demarcated.

17. Secondly, the Appellant has further submitted that the Tribunal erred in failing to find and hold that following the sale of a portion of the suit property, the 2nd Respondent herein entered upon and took possession of a portion of the suit property, whereas the Appellant and one of her sons remained in occupation of the other portion of the suit property.

18. In the premises, the Appellant has further conceded that the 2nd Respondent was only entitled to a portion of the suit property and not to 4 acres, which constitutes the entire of the Suit property.

19. Thirdly, the Appellant has further submitted that the Tribunal also erred in fact and in law in finding and holding that the 2nd Respondent is entitled to the entire property, despite the fact that the 2nd Respondent and the Appellant have lived together and co-existed by living on their respective portions of the suit property.

20. Finally, the Appellant has submitted that in arriving at the decision and/or judgement, the tribunal failed to take cognizance and/or otherwise pay due attention to the evidence tendered by the Appellant and her witnesses, as well as the submissions offered by the Appellant.

21. In support of the foregoing submissions, the Appellant has relied on various decisions, inter-alia, Serah *Njeri Mwobi Versus John Kimani Njoroge* [2013]eKLR and *Hussan Zubeidi versus Patrick Mwangangi Kibaia and another*[2014] eKLR

2nd Respondent's Submissions:

22. On her part, the 2nd Respondent herein submitted that the transaction between the Appellant and the 2nd Respondent, relating to the sale of portions of the suit property, were reduced into writing and were duly signed and executed by the respective Parties and witnesses.

23. Further, the 2nd Respondent has submitted that the Appellant herein knowingly and voluntarily entered into and executed the sale agreement dated the May 8, 2005, wherein same agreed and covenanted to sell to and in favor of Boniface Kavita Mutiso and Tabitha Muthoka Mwikali, a portion of Plot No 12-053, measuring 3 Acres, at the agreed price of Kenya shillings Two Hundred Thousands (270,000,000) Only.

24. On the other hand, the 2nd Respondent has also submitted that the said Agreement was duly executed and/or signed by the contracting Parties and same was similarly witnessed by the Assistant Chief, namely, Joseph Kiambua, who thereafter fixed his official rubber stamp.

25. Besides, the 2nd Respondent has further submitted that though the said sale Agreement was tendered and/or adduced in evidence, the Appellant herein did not challenge and/or impeach her signature, which was contained and reflected therein.

26. Other than the foregoing, the 2nd Respondent has also submitted that the Appellant herein further entered into a sale Agreement on the February 25, 2009, wherein same sold to in favor of the 2nd Respondent a further portion of the suit property measuring 1 Acre and the said sell was reduced into writing and was dully signed by the Parties.

27. Based on the foregoing, the 2nd Respondent has submitted that the Appellant herein knew and was aware of the nature, size and/or extent of the suit property that was being sold to and in favor of the 2nd Respondent.

28. Further, the 2nd Respondent has also submitted that upon the entry into and execution of the sale agreements, the Appellant herein duly informed and notified the 1st Respondent of the sale transaction between herself and the 2nd Respondent, including the acreage of what was sold.

29. On the other hand, the 2nd Respondent has further submitted that based on the information and the communication that was relayed to the 1st Respondent, same proceeded to and amended her records to show that the entire property measuring 4 acres now belonged to the 2nd Respondent.

30. In view of the foregoing, the 2nd Respondent has submitted that having entered into and executed the sale Agreements, whose terms were clear and explicit, the Appellant herein cannot now choose to renege from the clear terms of the Agreement, which she freely and voluntarily executed.

31. Besides, the 2nd Respondent has also submitted that having executed the Sale agreement and having covenanted on the acreage of what was being sold to and in favor of the 2nd Respondent, the Appellant herein cannot be allowed to alter and/or vary the terms of the Agreements, by seeking to substitute acreage with strides.

32. In support of the foregoing submissions, the 2nd Respondent has relied on the decisions in the case of *Mithika M'inoti Versus Eusabia Nkuene Julias* [2013]eKLR and *Joseph Arap Ngok versus Moijo Ole Keiwuaand others* [1997]eKLR.

Analysis And Determination:

33. The Grounds of Appeal which have been raised by and/or on behalf of the Appellant herein can be grouped and/or categorized into two clusters. Consequently, I propose to deal with the Grounds as hereunder:

    i. Grounds 1, 4, 5 and 6 together.

    ii. Grounds 2 and 3 together.

Grounds 1, 4, 5 And 6 Together:

34. The Appellant herein has contended that the tribunal did not properly evaluate and/or appreciate her evidence and that of her witnesses and that because of the failure to appreciate her evidence, the tribunal arrived at an erroneous factual conclusion.

35. Based on the foregoing complaint, this Court being the first Appellate Court, is obligated to review and re-evaluate the evidence tendered by the Parties and upon such evaluation, to ascertain and/or authenticate whether the Tribunal properly appreciated the evidence tendered and reached the correct conclusion arising from the totality of the evidence.

36. Nevertheless, by virtue of being the first Appellate Court, it is also common ground that though the Court is bound to conduct independent appraisal, evaluation and scrutiny of the evidence and to form an independent conclusion, however, the Court must bear in mind that same did not see the witnesses and therefore due allowance must be made in that regard.

37. Be that as it may, the yardstick and/or benchmark which guide this Court while exercising its Judicial responsibility in exercise of its Appellate jurisdiction, is well established and/or delienated. In this regard, it suffices to take cognizance of the decision in the case of*Selle versus Associated Motor Boat Limited* [1968] EA 123, where the Court observed as hereunder:

> " ...This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

38. Having taken into account the foregoing observation, it is now appropriate to review the evidence that was tendered by the Appellant herein and which the Tribunal was obligated to analyze and/or evaluate.

39. For clarity, the Appellant herein conceded that same entered into a land sale Agreement with the 2nd Respondent and Boniface Kavita Mutiso and that an Agreement was duly signed and/or executed at the farm. However, the Appellant further stated that the said Agreement which was executed at the farm went with CW2 and that same did not bring back and/or handover a copy of same to the Appellant.

40. On the other hand, the Appellant also testified that same sold a portion of the suit property to the 2nd Respondent and Boniface Kavita Mutiso, but that the portion which was sold was measured in strides as opposed to acreage.

41. Other than the foregoing, the Appellant also testified that upon the sale of a portion of the suit property, the 2nd Respondent entered upon and took possession of a portion thereof and that same has been residing thereon, without any protest or otherwise.

42. Despite the evidence tendered by the Appellant herein, it is worthy to note that the 2nd Respondent tendered and/or adduced in evidence the two sets of Agreements, which were entered into and duly executed by the Parties, including the Appellant herein.

43. It is imperative to note that the two sets of Agreements contained the terms of the sale, *inter-alia*, the acreage of the suit property that was being sold, the price per acre, the total price as well as the scheme of payments of the purchase price.

44. Other than the foregoing, it is also apparent that the sale agreement contained the signatures of the Parties chargeable with the same, namely, the Appellant, as the vendor and the 2nd Respondent and Boniface Kavita Mutiso, as the Purchasers.

45. From the two Agreements which were tendered, one would have expected the Appellant herein to deny and/or contest the signature affixed there to and which signature is stated to belong to the Appellant.

46. However, despite the existence of her signature on the two sets of Agreements, the Appellant herein neither challenged nor contested the signatures. In any event, there was even no allegation that her signatures had been forged and/or manipulated, in any manner whatsoever.

47. Besides, it is also worthy to note that the Appellant herein, did not contend and/or allege that her signatures on the two sets of Agreements, had been procured and/or obtained by coercion, undue influence, misrepresentation or otherwise. For clarity, the statement of Defense which was filed by the Appellant also did not allude to such vitiating factors, or at all.

48. In the premises, the totality of the evidence that was tendered by the Appellant and her witnesses, fell short of negating and/or controverting the documentary evidence, which was tendered and which forms part of the record.

49. Having calibrated on the totality of the evidence adduced by the Parties, the Honorable Tribunal formed the opinion that indeed the Appellant herein had sold to and in favor of the 2nd Respondent a total of 4 acres out of the suit property and not strides, as the Appellant purported and/or alleged.

50. On my own and having reviewed the evidence by the Appellant and her witnesses, I come to the conclusion that indeed the Appellant sold to and in favor of the 2nd Respondent a portion of the suit property, which was computed and reckoned in acreage. For clarity, the portion sold measured 4 acres and not otherwise.

51. In view of the foregoing, I come to the same conclusion as the Tribunal and do hereby hold and find that the Tribunal properly analyzed, evaluated and appreciated the evidence by the Appellant and ultimately arrived at the correct conclusion.

52. Suffice it to observe that it is the Appellant who had contended that same did not sell 4 acres out of the suit property and therefore it was incumbent upon the Appellant to tender before the Court credible and believable evidence to show that indeed what was sold was not 4 acres. However, the Appellant failed to discharge the Burden of proof, as pertains to the disputed acreage which was sold.

53. In the premises, the Appellant's contention on the issue of the acreage and for which she bore the Burden of proof, failed and was duly dismissed by the Tribunal.

Grounds 2 And 3 Together

54. In respect of the foregoing grounds of Appeal, the Appellant has contended that the Tribunal erred in believing, trusting and thereby adopting the evidence of the 2nd Respondent and thereby arriving at a wrong conclusion.

55. Before venturing to interrogate the complaint by the Appellant, it is imperative to note that the 2nd Respondent's case was premised and/or predicated on the basis of two sets of written agreements, which were duly signed and executed by both the Parties chargeable therewith, namely, the Appellant ant the 2nd Respondent.

56. On the other hand, it is also worthy to recall that the two sets of Agreements, contained explicit terms, inter-alia, the acreage which was being sold as well as the total consideration, due and payable at the foot of the Sale Agreement.

57. Besides, it is also worthy to take into account, that the two sets of Agreements, which bely the evidence of the 2nd Respondent, were duly signed by the Appellant, who did not challenge and/or impeach her own signatures on the two documents.

58. To the extent that the Sale Agreements between the Appellant and the 2nd Respondent, were reduced into writing and were similarly executed by the Parties, it is sufficient to note and underscore the fact that the said Agreements were/are therefore binding on the Parties thereto.

59. In any event, having signed and/or executed the two sets of Agreements, it it's taken that the Appellant herein had read and understood the content thereof and same agreed to be duly bound.

60. In the premises, the Appellant herein cannot now be heard to seek to challenge and/or otherwise vary the terms of the agreement, unilaterally, by alleging that same did not agree on acreage, yet the agreements are so explicit insofar as the agreement underscores that what was being sold was defined in terms of acreage and not otherwise.

61. Suffice it to note, that having executed the Sale Agreements, the Appellant must be held by the terms, which she accepted and inscribed to, by signing the said Agreements, unless there exists proof of any vitiating factors, including, coercion, undue influence and misrepresentation, none of which was impleaded or proved.

62. To buttress the foregoing observation, the Court adopts and restates the holding in the case of *National Bank of Kenya Limited versus Pipeplastic Samkolit Kenya Limited And Another*[2001]eKLR, where the Court of Appeal held as hereunder:

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
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> As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):
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> "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

63. Flowing from the jurisprudence emanating from the foregoing decision, it is sufficient to note and underscore the fact that the Appellant herein, cannot be allowed to alter, vary and/or endeavor to unilaterally review the terms of the Agreement, which same freely and voluntarily executed.

64. Other than the foregoing, it is also appropriate to state that where the intention of the Parties was reduced into writing and thereafter executed by both Parties, the Court is obliged and/or obligated to give meaning and effect to the Intention of the Parties and not otherwise.

65. To amplify the foregoing position, it suffices to adopt and endorse the holding of the Court of Appeal in the case of *The Speaker of Kisii County Assembly And Two others versus James Omariba Nyaoga*[2015]eKLR where the Court observed as hereunder:

> The 1st Appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the *Evidence Act*, Chapter 80 Laws of Kenya, which attempt we must reject. . This is not the first time we are doing so. In the case of *John Onyancha Zurwe v Oreti Atinda alias Olethi Atinda* [Kisumu Civil Appeal No 217 of 2003] (UR), we cited, with approval, *Halisbury's Laws of England* 4th Edition vol 12, on interpretation of deeds and non Testamentary Instruments paragragh,1478 as follows:-
>
> '' Extrinsic evidence generally excluded:
>
> Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions ,drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.
>
> Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."

66. Based on the foregoing, I am compelled to come to the conclusion that the terms of the two sets of Agreements which were entered into and executed by the Appellant and the 2nd Respondent herein, were explicit, clear-cut and unequivocal.

67. In the premises, the decision of the Tribunal was well informed and legally sound. Consequently, I do not find any fault with the exposition of the Law by and ultimately the decision of the Tribunal.

Disposition:

68. Having reviewed the Grounds of Appeal raised by the Appellant and having similarly, considered the submissions by and/or on behalf of the Parties, the Court comes to the conclusion that the Appeal herein is devoid and/or bereft of merits.

69. Consequently and in the premises, the Appeal be and is hereby Dismissed with costs to the 2nd Respondent only. For clarity, the 1st Respondent was removed from the proceedings vide Consent order adopted by the Court on the October 23, 2019.

70. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16 TH DAY OF JUNE 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Muasya for the Appellant.

N/A for the 2ND Respondent.