



REPUBLIC OF KENYA



**Wamai v Wamai & another (Environment and Land Appeal
9 of 2019) [2022] KEELC 3020 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3020 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 9 OF 2019**

EC CHERONO, J

JUNE 10, 2022

BETWEEN

JOHNSON KINYUA WAMAI APPELLANT

AND

ELIUD MWAI WAMAI 1ST RESPONDENT

JOHNSON MUGO WAMAI 2ND RESPONDENT

*(Being an Appeal from the Judgment by Hon. S.M.S. Soita, Chief
Magistrate in Kerugoya C.M.C.C. No. 420 of 2009 delivered on 12/4/2019)*

JUDGMENT

1. The Appellant was aggrieved and dissatisfied with the judgment of Hon. S. M.S. Soita, Chief Magistrate delivered on 12th April, 2019 in Kerugoya CMCC No. 420 of 2009, and preferred this appeal seeking the following orders :-
 - a. The appeal be allowed.
 - b. The judgment of the learned trial magistrate be set aside and be substituted with an order dismissed the Respondents' suit.
 - c. Any other or further orders that the court may deem to be fit, just and prosper.
2. The appellant raised the following grounds of appeal:
 - a. The learned trial magistrate erred in law and fact not taking into consideration the pleadings and the prayers sought in the plaint.
 - b. The learned trial magistrate erred in law and fact in making a finding based on a claim of trust when there was no such prayer.



- c. The learned trial magistrate erred in law and fact in not making a finding as to whether the plaintiff's claim was time barred or not.
 - d. The learned trial magistrate erred in law and fact in not considering the pleadings, the evidence and applicable laws.
 - e. The judgment was against the weight of evidence adduced.
3. When the appeal came up for directions on 9th November, 2021, the parties through their advocates on record agreed to canvass the appeal by way of written submissions.
 4. The appellant filed his submissions on 18th January, 2022 while the Respondents filed theirs on 25th February, 2022.

Appellant's submissions:

5. The appellant submitted that according to the Respondents pleadings, in particular the plaint, their claim was for the defendant to honour the agreement and therefore, the sole duty of the court was to interrogate the said agreements and make a determination on whether the basic requirements of a contract were met. However, the court deviated from the pleadings and made a determination on the issue of trust whereas the same was never pleaded in the first place.
6. He submitted that the trial court had no right whatsoever to admit into record evidence on trust as the same was never pleaded by the respondents, and thus he ought to have disregarded the evidence. He relied on the cases of *Independent Electoral and Boundaries Commission & Anor. Stephen Mutinda Mule & 3 others* (2014) eKLR and *Elijah Ouko Matagaro & another vs Roselyne Dola Ouko & 4 others* (2017) eKLR.
7. He submitted that the agreement in question had been entered into in 2009. However, the claim was filed 10 years later and thus the claim was statute barred under section 4 (1) (a) of the *Limitation of Actions Act*. He relied on the cases of *Gathoni vs Kenya Co-operative Creameries Ltd* (1982) KLR 104 and *Rawal Vs Rawal* (1900) KLR 275.
8. He submitted that the trial court acted outside the applicable laws when it admitted evidence touching on trust whereas the same was never pleaded, particularized and proved by the respondents.
9. He prayed that the appeal be allowed, the judgment by the trial court set aside and substituted with an order dismissing the respondent's suit with costs to the appellant.

Respondents' submissions: -

10. The respondent submitted that grounds 1, 2, 4 and 5 lack merit and ought to fail as the trial magistrate took into consideration the pleadings and the prayers sought in the plaint.
11. They submitted that the court directed its mind on the issue of trust as the issue appeared to have been the main bone of contention between the parties during trial. They relied on the case of *Odd Jobs vs Mubia* (1974) EA.
12. They submitted that the trial court acted within the applicable law in considering the evidence adduced during trial and making a decision on the issue of trust.
13. They submitted that the trial court addressed itself to the issue of time limitation and found that the said issue only arose at the stage of submission by counsel for appellant in the trial court.



14. They submitted that the trial court allowed one of the prayers in the plaint which sought sub divisions of the suit properties and that it didn't make any finding that it was giving effect to the agreement dated 22nd June, 1999.
15. He urged that the court dismisses the appeal with costs.

Analysis:

16. I have considered the Memorandum of Appeal, Record of Appeal, Supplementary Record of Appeal, the parties' rival submissions and the applicable law.
17. I will handle grounds 1, 4 and 5 combined as they involve a similar issue.
18. The Appellant has stated that he was dissatisfied with the fact that the trial magistrate did not consider the pleadings, the evidence and the applicable law.
19. I have looked at the impugned judgment which is at pages 124 – 126 of the Record of Appeal particularly at paragraph 5 where the trial magistrate stated that:-

“I have carefully appraised the evidence on record. I have also considered submissions filed by the defendant...”
20. From the foregoing, I find that contrary to the allegations by the Appellant, the trial court took into consideration the pleadings, evidence and prayers sought in the plaint.
21. I will now consider ground 2 which is challenging the trial court's finding based on a claim of trust when allegedly there was no such prayer.
22. From the plaint, it is clear that the dispute before the trial court was a family dispute. The parties seem to have attempted to solve the said dispute amongst themselves and clan elders which led to the parties agreeing on the subdivision of the suit lands.
23. From the said narration, it is evident that the agreements are not agreements within the meaning of contracts under the *Law of Contract Act*.
24. The said agreements are resolutions emanating from an alternative form of dispute resolution under Article 159 (2) (c) of *the Constitution* of Kenya which provides that: -

“Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute mechanisms shall be promoted...”
25. From the said agreements and evidence tendered, it is clear that the respondents were claiming the suit lands based on trust. The agreements were therefore meant to determine the trust.
26. I have also looked at the submissions by the Appellant before the trial court, which are at page 122 and 123 of the record of appeal. At paragraphs 30-37 of the said submissions, the appellant submitted on the issue of trust. It is therefore incorrect for the appellant to allege that the trial magistrate made a finding on the issue of trust which he was not aware as he submitted on it.
27. I therefore find that the trial magistrate did not misdirect himself when he held that there existed a trust in favour of the respondents.
28. The final ground of appeal faulted the trial magistrate for failing to make a finding as to whether the plaintiff's claim was time barred or not.



29. From the impugned judgment, the trial Magistrate found and held that the agreements emanated from an alternative dispute resolution meeting meant to determine the issue of trust. At paragraph 5 of the judgment, the trial magistrate also considered the issue of limitation of action.
30. Further, I find that the trial Magistrate properly directed himself in finding that the agreements referred to in the suit did not fall under the category of contracts falling within the *limitation of actions Act* on grounds that the same were resolutions from the traditional dispute resolution mechanism.

Conclusion:

31. In conclusion, I find that the appellants appeal is without merit and the same is hereby dismissed with costs.

JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 10TH JUNE, 2022.

.....

HON. E.C CHERONO

ELC JUDGE

In the presence of;

M/S Wambui H/B for Maina Kagio

M/S Muturi H/B for C.S. Macharia

Kabuta C/A.

