



**Too v Orchardson (Environment & Land Case 56 of 2014)
[2022] KEELC 12578 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12578 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 56 OF 2014
NA MATHEKA, J
SEPTEMBER 27, 2022**

BETWEEN

VERONICA CHEPWAMBOK TOO PLAINTIFF

AND

ELIZABETH CHEBET ORCHARDSON DEFENDANT

JUDGMENT

1. The plaintiff avers that in 1976 the plaintiff separated from her husband and moved back to Eldoret and reside with her grandfather Mr Kuto Chelule and father Kiptoo Kuto. That in 1985 thereafter, the plaintiff was involved in an accident that crippled her and making her wheelchair bound. Her father concerned that she would be unable to fend for her three children, gave her a piece of property situate in stigham farm Eldoret on which to build her house, farm and hold in trust for her children, Emma Too, Jane Too and Edwin Too. That it was agreed with the plaintiffs family that she would sell her portion of land in stigham farm Eldoret back to the family and purchase a property at the coast, an area that was warmer and better suited to her well-being.
2. That in November 1988, the plaintiff purchased LR No MN/111/1078 a property measuring 31.71 hectares situate in the Vipingo area, Kilifi on which she built a house. That to enable the plaintiff meet a loan due to Kenya Commercial Bank, her medical expenses, school fees for the three children, it was agreed between the plaintiff and her family, that she would subdivide LR MN/111/1076 into several portions, including LR 4311/111/MN Title No 41071. That the plaintiff, due to her handicapped nature, has with the consent of her children supported several charitable organizations, including The Kianda Foundation which assists disadvantaged women and girls from the Miji Kenda community.
3. That the plaintiff has since 1988 with the financial assistance of her daughter, Emma Too, developed the property and made it a viable commercial venture in which she has built a modern home, kept a guest house and kept animals. That in 2008 the defendant approached the plaintiff and informed/ her that she wished to start a charitable institution that would assist the disadvantaged people of



the local community. That it was agreed below the plaintiff and the defendant that: The two would be the trustees of the proposed charitable institution and that since the beneficiary was a charitable institution, the plaintiff would sell to the suit property at a vastly reduced price as opposed to the market price. That a sale agreement was prepared transferring the suit property to the defendant for Kshs 1,500,000/= which she duly paid. That in October 2008, the plaintiff sought to know from the defendant, particulars of the intended charity but was informed by the defendant that she had decided to abandon the charity and wanted to build a personal home on the suit property. That the plaintiff then sought legal advice and was informed that the sale agreement between her and the defendant vested the suit property absolutely to the defendant and would have to be annulled. That it was at this time that the plaintiff also informed the children, as beneficiaries of the property that she had sold the property without their consent. That the plaintiff now realises that as a trustee of the suit property on behalf of the family she could not sell it without the consent of the beneficiaries. She sold the property under the mistake that she could sell the property and wishes to rescind the sale. That the plaintiff also sold the property under representations that the defendant had made to the plaintiff which the defendant knew or ought to have known were false.

4. The defendant falsely informed the plaintiff the property would be acquired for the purposes of establishing a charitable home to assist disadvantaged people in the area. The defendant falsely bargained for a lower price for the suit property on the basis that it was intended for a charitable home when she knew all along that this was not the case. The defendant represented to the plaintiff that if she sold the suit property at a discount, the plaintiff would be a co-trustee of the intended charity whilst the defendant knew that this was not the case. That without prejudice to the foregoing, the plaintiff avers that the suit property which falls in a land control area was illegally transferred and registered in the name of the defendant without the requisite consent of the Kilifi land control board. That in the circumstances, the transfer of the suit property to the defendant is a nullity. That save for HCC No 287 of 2009, *Emma Too & Anor vs Veronica Too & Others* involving the sale of the suit property to the defendant, there is no suit pending between the plaintiff and the defendant involving the same subject matter. The plaintiff prays for judgment against the defendant for:-
 1. A permanent injunction to restrain the defendant, her agents or howsoever from occupying, developing or alienating LR No 4311/111/MN Title No 41071;
 2. A declaration that the transfer of LR No 4311/111/MN Title No 41071 to the defendant is a nullity by virtue of it being contrary to the provisions of the *Land Control Act*.
 3. That the transfer and registration of LR No 4311/111/MN Title No 41071 to the defendant be expunged and the property restored to the 1st defendant.
 4. Costs.
5. This court has considered the evidence and the submissions therein. The issue to be determined in this case is to what extent can pre contractual negotiations be relied upon in the interpretation of substantive agreement of sale dated March 14, 2008. On March 14, 2008 the defendant vide an agreement of sale purchased land parcel No 4311/III/MN from the plaintiff for a consideration of Kshs 1,500,000/=. It is the plaintiff's case that she had a pre-contractual agreement with the defendant prior to executing the agreement of sale, that the defendant would acquire the land for the noble cause of establishing a charitable institute. Further it was agreed that both the defendant and the plaintiff would be its trustees, it is on this basis that the plaintiff claimed that she then agreed to sell the suit property at a price lower than the market value.
6. The defendant denied the plaintiff's claim, she rejected being in a pre-contractual agreement with the plaintiff and contended that she bought the suit property to build her retirement home and a small



library on marine science for mijikenda children. The defendant argued that the plaintiff initially had offered to sell the suit property for Kshs 600,000 in 2003 but she did not have the funds, and in 2008 she was able to purchase it at Kshs 1,500,000 since the value had increased. The defendant dismissed the plaintiff's claim as hearsay and false and affirmed that she did buy the suit property under the terms and conditions under the agreement of sale dated March 14, 2008. She declared that she is a bonafide purchaser for value without notice and urged court to dismiss the plaintiff's suit with costs.

7. The question before court is to what extent does the pre contractual negotiations affect the interpretation of a substantive contract. Every agreement of sale of a parcel of land is preceded by pre contractual negotiations that can be either written or oral, with the intentions of facilitating the conclusion of a contract. The intentions of the parties are then reduced into a written contract, which puts to an end the bargains between the parties and binds the parties with its terms and conditions. The Court of Appeal in *Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited* (2017) eKLR, held that:

"So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

In *Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another*, Civil Appeal No 23 of 2005 the court citing a passage in *Odgers Construction of Deeds and Statutes* (5th edn) at p 106 emphasized that in construing the terms of a written contract;

"It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence."

The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing."(emphasis mine)

8. The plaintiff claims that the words and conduct of the defendant, that is, the suit property would be used to construct a charitable institution and the promise of being a trustee in that institution, led her to execute the agreement of sale and effect transfer of the title to the suit property. To best explain the position taken by the plaintiff I reply on the case of *Benjamin Ayiro Shiraku vs Fozia Mohammed* (2012) eKLR where Havelock J (as he then was) citing Denning LJ in the case of the *Combe vs Combe* (1951) 2 KB 215 stated that;

"the principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between



them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.”

9. The parole evidence rule is a common law rule that aims to uphold this premise and preserve the integrity of written contracts by excluding extrinsic evidence. Where parties have agreed contractual terms in a written document, it is rational that matters which have not been explicitly included should not be interpreted as varying the terms of that contract. The rule has exceptions as discussed in *Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited* (supra),

“The rule of exclusion of negotiations prior to entry of a contract as well as the parole evidence rule are subject to a number of exceptions. For instance, evidence of surrounding circumstances will be admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning, but not to contradict the language of the contract when it has a plain meaning. Extrinsic evidence of terms additional to those contained in the written document will be admitted if it is shown that the document was not intended to express the entire agreement between the parties. If the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement.”

10. In the case of *United Millers Limited vs Nairobi Java House Limited* (2019) eKLR it was held that:

“The rule of exclusion of negotiations prior to entry of a contract as well as the parole evidence rule are subject to a number of exceptions. For instance, evidence of surrounding circumstances will be admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning, but not to contradict the language of the contract when it has a plain meaning.”

11. The mere statements by the plaintiff that she had an oral agreement with the defendant prior to executing the agreement of sale, as a matter of law is inadmissible. The plaintiff must first establish to court, though evidence the existence of the oral agreement between herself and the defendant. There has been no evidence, presented before court that would warrant the plaintiff to seek refuge under the exceptions of the parole evidence rule. The court finds that by executing the agreement of sale dated March 14, 2008, the parties chose not to give their prior negotiations contractual force and instead they reached an agreement and documented it.
12. On the issue lack of consent from the land control board, the determination found in a similar case concerning the same parties that is, HCC No 287 of 2009, *Emma Too & Anor vs Veronica Too & Others* would apply *mutatis mutandi*. The court finds that the same was not agricultural land and the consent was not required. For these reasons, I consider no merit in the plaint dated March 12, 2014 and I dismiss the plaintiff’s case with costs to the defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2022.

N.A. MATHEKA

JUDGE

