



REPUBLIC OF KENYA



**Ngasi v Gor Construction & Hardware Ltd (Environment and Land Appeal
22 of 2019) [2022] KEELC 12644 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12644 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 22 OF 2019
A OMBWAYO, J
SEPTEMBER 22, 2022**

BETWEEN

RACHILO ENOKA NGASI APPELLANT

AND

GOR CONSTRUCTION & HARDWARE LTD RESPONDENT

*(Being An Appeal Arising From The Judgment of The Learned Hon. R. K. Ondieki
(SPM) Delivered on The 25Th June 2019 At Cmcc Kisumu Elc Case No. 85 Of 2018)*

JUDGMENT

1. The genesis of this appeal is the decision by the learned Magistrate Hon RK Ondieki (SPM) delivered on the 25th of June 2019 at Kisumu in Chief Magistrates Court Environment and Land Court Case No 85 of 2018. In that matter Gor Construction and Hardware Ltd (hereinafter referred to as the respondent) sued Rachilo Enoka Ngasi (hereinafter referred to as the appellant) in a plaint dated 13th of February 2018 claiming that the applicant being the proprietor of land parcel no Kisumu/Kapuonja/1004 (hereinafter referred to as the suit property) sold the property to the respondent *vide* agreement of sale dated 14/5/2014 for a consideration of Kshs 200,000 which sum was paid entirely but the appellant refused to transfer the land to the respondent and further sold the land to a 3rd party in breach of the contract. The respondent prayed for an order of specific performance of the agreement between parties for sale of the said property in dispute. The respondent further prayed for a permanent injunction restraining the appellant from making any disposition in respect of the said parcel of land.
2. The appellant on his part denied the averment in the plaint and statement that he was the legal owner of the suit property and that he never sold it to any party.
3. When the matter came up for hearing before the honourable Magistrate, the respondent through Gordon Oure Kaoko adopted the witness statement and produced the agreement and evidence of payment of the purchase price. He later realised that the appellant had sold the land to someone else.



The appellant equally relied on his statement in testimony and agreed that he had received the money but wanted to pay back the money. He claimed not to have signed any agreement. He claimed that the agreement was forged.

4. The honourable court found that the material before court showed that the sale agreement was signed by the appellant to sell a portion of the disputed land at a consideration price of Kshs 200,000. The full consideration was paid awaiting transfer. On the claim of forgery, the honourable Magistrate found that the same was not pleaded and that there was no report to the police that the appellant's signature had been forged. The honourable court further found that the statement of defence was full of mere denials devoid of any particulars of fraud.
5. The appellant has appealed to this court on grounds that the learned trial Magistrate erred in law and fact in allowing the plaint dated 13/2/2018 and failing to appreciate the evidence tendered. Moreover, that the learned Magistrate misdirected himself totally disregarding legal issues raised by the appellant that the transaction was devoid of the consent of the Land Control Board. That the learned Magistrate failed to exercise his discretion properly and judiciously. That the learned Magistrate failed to assess the evidence properly as there was no title before him.
6. This being a first appeal, this court is bound to consider and evaluate the evidence afresh. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The courts have held time and again that a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.
7. In *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, the Court of Appeal stated that;

“[A]n appeal to this court from a trial by the High 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 allowances in this respect”

In *Peters v Sunday Post Ltd* [1958] EA 424, the court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

8. Similarly, in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] e KLR, the same stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”



9. It is evident that both the appellant and respondent did not produce the extract of the registration of the suit parcel of land. There was no certificate of official search in respect of the property and that no certificate of title or title deed was produced before the lower court. It appears from the agreement for sale of land that the suit property was registered in the names of a deceased person Enoke Ngasi Achola and that the appellant was selling a portion of the land. This was out-rightly illegal.
10. Section 45 of the *Law of Succession Act* provides:- No intermeddling with property of deceased person
Except so far as expressly authorized by this Act, or
- (1) by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall-
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
11. I do find that the appeal is merited as the Learned Magistrate failed to assess the evidence before him which clearly indicated that the suit property was in the names of a deceased person and therefore the appellant did not have the capacity to sell the same.
12. It is very clear from the agreement that the suit property is not registered in the appellant’s name hence the question is how can the court grant specific performance by transferring a parcel of land of a deceased person to a living person without the due process of law that is succession.
13. It has been held in various authorities that remedy of specific performance is a discretion of the court and the court will grant it on well laid principles. Granting an order of specific performance will definitely cause hardship to the appellant who is not the registered proprietor of the suit land.
14. Though the extract of register was not produced by both parties, the agreement clearly shows that the parcel of land is in the deceased name.
15. The upshot of the above is that I find the appeal to be merited and the same is allowed and Judgment delivered on the 25th day of June 2019 is set aside and that the plaintiff’s case in the lower court is dismissed.
16. I do order that the parties do bear own costs for reasons that the appellant benefited from the illegal transaction and that he appeared to have been reluctant to disclose to the court that the property belonged to a deceased person. In fact in his pleadings he claimed to be the lawful owner of the suit property which was a misrepresentation.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22nd DAY OF SEPTEMBER, 2022

ANTONY OMBWAYO

JUDGE



This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020

