



**Owino v Sala & 2 others (Environment and Land Appeal 36 of 2021)  
[2022] KEELC 4825 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4825 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 36 OF 2021  
GMA ONGONDO, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**CAROLINE ADHIAMBO OWINO ..... APPELLANT**

**AND**

**MOSES JUMA SALA ..... 1<sup>ST</sup> RESPONDENT**

**ELIDA OMOLO SALA ..... 2<sup>ND</sup> RESPONDENT**

**PETRONALA ACHIENG SALA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. J.S. Wesonga, delivered on 6th November, 2019 in Oyugis Senior Principal Magistrate’s Court Environment and Land Case No. 3 of 2018))*

**JUDGMENT**

1. This appeal arose from the trial court’s judgment delivered on the November 6, 2019 by the honourable J S Wesonga (Senior Resident Magistrate now Principal Magistrate) in Oyugis Senior Principal Magistrate’s Court Environment and Land Case No 3 of 2018 where she held, *inter alia*;  
  
“The sale agreement entered into by the plaintiff and the deceased did not satisfy the requirement of section 3(3) of the Law of Contract Act hence, rendered the said sale agreement invalid and unenforceable. In addition, the plaintiff did not prove her case to the standard required. As such, the plaintiff case is dismissed with costs to the defendants.”
2. The appellant namely Caroline Adhiambo Owino through the firm of Amondi and Company Advocates mounted the appeal by way of a memorandum of appeal dated March 25, 2021. The appeal is anchored on grounds 1 to 10 as set out on the face of the same and these include:
  - a. The learned trial magistrate erred in both law and fact in failing to hold that a draft agreement can have contractual force, although the parties do not comply with a requirement that to be



binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this.

- b. The learned trial magistrate failed to evaluate the evidence adduced before him on the basis of its strength.
3. So, the appellant has sought the order that the instant appeal be allowed.
4. On October 28, 2021, the appeal was transferred to this court from Migori Environment and Land Court for hearing and determination.
5. The appeal was heard by way of written submissions further to this court's directions of February 3, 2022.
6. In that regard, the appellant's counsel filed submissions dated February 28, 2022 on March 2, 2022. Counsel framed twin issues for determination thus: did the magistrate err to warrant this court to interfere with the decision and set it aside? And should the appellant be granted orders as prayed? In discussing the issues, learned counsel submitted, *inter alia*, that the learned trial magistrate erred in law and in fact by failing to hold that a draft contract can have contractual force where all terms are agreed to and complied with.
7. Counsel relied on various authorities including the case of *Estate of Peesub Premal Mahajan v Yashwant Kumari Mahajan* (2017) eKLR, to buttress his submissions. Therefore, it was urged that this appeal is merited and the same ought to be allowed with costs, amongst other things.
8. Learned counsel for the respondents filed submissions dated July 21, 2022 on even date. Counsel identified four issues for determination namely; whether there was a valid sale agreement between the appellant and Jacob Sala Nyandiko (deceased), whether the appellant was in possession of the suit property, LR No Kabondo/Kodhoch East/795, whether the appellant had legal capacity to institute the suit and whether the respondents were properly sued.
9. Counsel analysed the issues not in the affirmative and submitted that the appeal lacks merit and the same should be dismissed with costs to the respondent. Counsel relied on various authorities including the case of *Kukal Properties Development Limited v Tafazzal H Maloo & 3 others* (1993) eKLR, to fortify the submissions.
10. In light of the above, the issues for determination herein are as captured in the grounds of appeal and condensed as follows:
  - a. Whether the appellant has demonstrated that the appeal is tenable to warrant grant of the orders sought in the memorandum of appeal;
  - b. The orders to be made in this appeal to meet the best ends of justice.
11. It is important to note that the instant appeal being the first one from the trial court in the matter, this court is obliged to review the record of the trial court, evaluate it afresh and arrive at its own findings herein; see *Mwanasokoni v Kenya Bus Services Ltd* 1982-88 1KAR 278 applied in the case of *Titus Ong'ang'a Nyachico v Martin Okioma Nyauma and 3 others* 2017 eKLR.
12. Initially, the appellant sued the respondents before the trial court by way of a plaint dated January 31, 2018 and filed in the trial court on even date seeking the following orders;
  - a. General damages



- b. An injunction restraining the defendants, their servants, workmen and agents from entering on the plaintiff's land parcel number Kabondo/Kodhoch East/795, or from destroying or otherwise dealing in the land in an lawful (sic) manner, or in any way interfering with the plaintiff's use and enjoyment of the said property.
  - c. Forceful eviction of the defendants and/or demolition of all structures erected by the defendants and any other person from the suit parcel.
  - d. A court order to allow the plaintiff get the title to the suit property.
  - e. Costs of this suit and interest at court rates.
  - f. Any other relief the court deems fit to grant.
13. PW1, Caroline Adhiambo Owino (the appellant herein), testified on October 1, 2018, *inter alia*, that she purchased the suit property from Jacob Nyandiko Sala (deceased) in 2005. That transfer was not effected in her name. That she has been in possession of the suit property for 12 years. She produced in evidence a copy of sale agreement, copy of official search certificate and a copy of agreement for access road to the suit land (PExhibits 1 to 3 respectively). PW1, however, admitted in cross-examination and clarified in re-examination that she did not sign the agreement for sale. Also, that she did not have copies of the national identity cards of the vendors and witnesses to the agreement and as such could not verify whether the numbers as indicated in the agreement were genuine. PW1 also did not produce any photographs in evidence to show that she was in possession of the suit property.
14. PW2, Solomon Okendo, testified on the said date and adopted his witness statement on record as part of his evidence. He affirmed that he was a witness to the sale agreement regarding the suit property between the plaintiff (appellant herein) and one Sala Nyandiko. That the plaintiff who is his daughter-in-law, took possession of the suit property immediately following the sale and gave it to him to till. That he had been tilling the suit property for a period of 12 years until he was denied access thereto by the 1<sup>st</sup> defendant. On cross-examination, PW2 admitted that he did not have photographic evidence to prove that he had been tilling the land.
15. In their statement of defence dated March 16, 2018 and filed on March 19, 2018, the defendants (respondents herein) denied the claim. They sought dismissal of the suit with costs.
16. The evidence of DW1, Moses Juma Sala (the 1<sup>st</sup> respondent herein), was that the suit property belongs to his father Jacob Sala (deceased). That the deceased never sold the suit property to the appellant. In cross-examination, the witness recanted his witness statement dated July 4, 2018. He also denied entering into an agreement with the plaintiff for an access road to the suit property. Further, the witness stated that the sale agreement, to wit, PExhibit 1 was a forgery as his father died in May of 2005, adding that the identity card number indicated therein did not belong to his late father. He, however, did not adduce any evidence in support of the same.
17. It is noteworthy that the learned trial magistrate stated the parties' respective cases, framed one issue for determination, analysed it and arrived at her decision based on reasons. So, the impugned judgment complied with order 21 rule 4 of the [Civil Procedure Rules, 2010](#).
18. In arriving at the impugned judgment, the learned trial magistrate observed at page 5 of the judgment, *inter alia*;
- “...I hold that the agreement for sale of the suit property in this suit is invalid on the ground that it was not signed by the plaintiff. I similarly hold that the plaintiff's suit herein is a nullity to the extent that it seeks an order for injunction restraining the defendants from entering



the suit land, forceful eviction of the defendants based on unsigned sale of land agreement. It is also a nullity to the extent that the plaintiff is not the registered proprietor of the suit land...” (emphasis added)

19. This court is aware of the legal framework in section 3(3) of the *Law of Contract Act*, chapter 23 Laws of Kenya. Further, I am guided by the prevailing jurisprudence on the tenor and import of that legal framework. It is my considered view that a suit seeking to enforce an unsigned contract for the disposition of an interest in land is untenable as the unsigned agreement is void and unenforceable as a contract; see *Yaxley v Gotts & Anor* (2000) Ch 162 and *Sumaria and another v Alfred Industries Ltd* (2007) 2KLR 1.
20. Learned counsel for the appellant urged this court to give section 3(3) of the *Law of Contract Act* an interpretation that upholds and enforces an unsigned land sale contract since the appellant had apparently taken possession of the suit land for a period of 12 years. The court’s view is that such an interpretation will be contrary to the clear letter of the statute, would defy the prevailing jurisprudential principles of interpretation and would gravely undermine and frustrate the object for which the legal framework was enacted. Further, the appellant did not adduce any evidence to show that she has been in possession of the suit land for prescribed period of time for adverse possession doctrine (see *Salim v Boyd* (1971) EA 550) and constructive trust (see *William Kipsoi Sigei v Kipkoech Arusei and another* (2019) eKLR), to apply in this matter.
21. I therefore, endorse the learned trial magistrate’s reasoning, particularly her reliance on the case of *Kukal Properties Development Limited v Tafazzal H Maloo & 3 others* (1993) eKLR in which the Court of Appeal pronounced itself on a similar dispute where only one party had signed the agreement for sale of land; see also *Yaxley and Sumaria cases* (supra).
22. Sections 107 to 109 of the *Evidence Act*, chapter 80 Laws of Kenya stipulate that “he who alleges must prove”. On that account, did the appellant discharge this duty before the trial court as held by Madan JA (as he then was) in the case of *CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd)* (1978) eKLR?
23. Bearing in mind the entire evidence on record in this case, and applying the facts of the case as well as legal principles stated above, it is clear that the appellant who was the plaintiff before the trial court failed to prove that the suit property had been sold to her by Jacob Sala (deceased). She did not prove her claim to the requisite standard as noted in *CMC Aviation Ltd case* (supra). Thus, the grounds of appeal are untenable.
24. It is therefore, the finding of this court that the learned trial magistrate’s judgment is sound at law. I hereby uphold the same.
25. To that end, the instant appeal originated by way of a memorandum of appeal dated March 25, 2021 be and is hereby dismissed with costs to the respondents.
26. Orders accordingly.

**G.M.A ONG’ONDO**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 21ST DAY OF SEPTEMBER 2022.**

Present

Ms B. Nyakwana, holding brief for Ms Amonde for the appellant.

MS P. Odhiambo, holding brief for Mr. Ochuka for the respondents.



A. Okello, Court Assistant

