Iminza v Kalya & another (Environment and Land Appeal 31 of 2020) [2022] KEELC 13756 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13756 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND APPEAL 31 OF 2020

EO OBAGA, J

OCTOBER 19, 2022

BETWEEN

MACTILDA IMINZA .... APPELLANT

AND

WILSON KIPLAGAT KALYA .... 1ST RESPONDENT

DISTRICT LAND REGISTRAR .... 2ND RESPONDENT

(An appeal from the judgement of Hon. N. Wairimu, Principal Magistrate dated 27th November, 2020 in ELdoret Chief Magistrate ELC No 73 of 2019)

JUDGMENT

Background;

1. The appellant was employed by the 1st respondent and his wife as their house help between the year 2001 and 2017. The 1st respondent who is an advocate of the High Court was the registered owner of LR. No Pioneer/Racecourse Block 2 (Kapmalel)/18 (Suit property). The 1st Respondent was jointly registered as owner of the suit property with Gerald K. Kalya.

2. In August 2007, the 1st Respondent entered into a sale agreement with the Appellant in which the Appellant agreed to purchase the suit property at a consideration of Kshs 150,000/=. On execution of the agreement, the Appellant had paid Kshs 20,000/=. The balance was to be paid by monthly instalments over a period of five years.

3. As at September 1, 2011, the 1st Respondent acknowledged that he had received Kshs 140,000/= and the balance was Kshs 10,000/=. The Appellant subsequently cleared the balance and the suit property was transferred to her and she obtained title on 13th June, 2011.

4. In the year 2015, the Appellant who had two children in school approached the 1st Respondent and offered to resale the suit property to the 1st Respondent. The Appellant then entered into a sale agreement with the 1st Respondent on 11th September 2015. The Appellant undertook to vacate the suit property in April 2016 after she had harvested the maize which she had planted on the suit property.

5. In the year 2017, the Appellant was accused of stealing Kshs 25,000/= from the house help of the 1st Respondent's son. When the Appellant was confronted with the issue of the theft, she agreed to refund the stolen money. As the relationship between the Appellant and 1st Respondent was strained, the Appellant opted to leave the employ of the 1st Respondent.

6. As the Appellant had been a royal worker until the theft incident, the 1st Respondent decided to mutually terminate the Appellant's services. The Appellant's services were terminated vide a termination agreement and mutual release dated 25th November 2017. The Appellant's dues upon termination were found to be Kshs 272,000/=

7. The 1st Respondent agreed with the Appellant that instead of being given cash of Kshs 272,000/=, the 1st Respondent was to give the Appellant his plot known as LR. No. Pioneer/Ngeria Block 1 (EATEC) 14895 measuring ¾ of an acre (The Ngeria plot).

8. Pursuant to the termination agreement, the Appellant went ahead to sell ¼ of the Ngeria plot to Winnie Jepchirchir at a consideration of Kshs 350,000/=. The Appellant was given Kshs 325,000/= and the balance went to offset the Kshs 25,000/= which she had stolen from the house help of the 1st Respondent's son.

9. By an addendum dated 8th January, 2018, clause 4(e) of the agreement of 25th November was rescinded. Clause 4(e) of the agreement dated 25th November, 2017 had provided that the 1st Respondent and his wife were to put up a semi-permanent structure, fence the property, dig a borehole and a pit latrine on the Ngeria plot.

Appellant's contention;

10. It is the Appellant's contention that she never signed the agreement dated 11th September, 2015. It is her contention that the 1st Respondent was assisted by the 2nd Respondent to fraudulently have the suit property registered in the 1st Respondent's name. The Appellant therefore contends that the trial magistrate was wrong in dismissing her claim against the two Respondents.

11. The Appellant raised twelve (12) grounds of appeal. The parties were directed to dispose of the appeal by way of written submissions. The Appellant filed her submissions on 9th March, 2022. The 1st Respondent field his submissions on 10th May, 2022. The 2nd Respondent filed submission on 10th May, 2022. The 1st Respondent filed supplementary submissions on 11th May, 2022.

12. This is a first appeal to this court. My duty as the first appellate court is to evaluate the evidence adduced before the trial court afresh and reach my own conclusion but of course keeping in mind that I did not see the witnesses testifying. See *Selle –Vs- Associated Motor Boat Company* (1963) EA 123.

Analysis and determination;

13. I have gone through the evidence adduced during the hearing before the trial court. I have also gone through the submissions by the parties filed in this appeal vis a vis the grounds of appeal raised by the Appellant. Though the Appellant raised twelve grounds of appeal, the same can be reduced to seven

grounds. Firstly, the Appellant faults the trial magistrate in making a finding that no fraud had proved. Secondly, that the consent of the Land Control Board was unprocedurally obtained. Thirdly, that the trial magistrate overemphasised the fact that the Appellant sold part of the Ngeria plot while the Appellant had no capacity to deal with the same. Fourthly, that the trial magistrate failed to appreciate the role of the 2nd respondent in transfer of the suit property in the face of glaring irregularities. Fifthly, that the trial magistrate was outrightly biased in considering the evidence adduced by the Respondents while ignoring the Appellant's evidence and submissions. Sixthly, that the trial magistrate ignored the Appellant's evidence on her eviction from the suit property while wrongly holding that if there was any eviction, then that was a matter for criminal prosecution. Lastly, whether the trial magistrate considered the evidence of the two advocates who were involved in drawing the agreements which were in issue before the trial court.

14. From the grounds of appeal as set out hereinabove, the issues which emerge for determination in this appeal are firstly whether the Appellant proved that the suit property was fraudulently transferred to the 1st Respondent with assistance by the 2nd Respondent. Secondly, whether the Appellant had proved that she was evicted from the suit property at the instance of the 1st Respondent. Thirdly, whether the trial magistrate was biased in her analysis of the evidence and submissions before her. Lastly, which order should be made on costs.

15. On the first issue, the Appellant had set out the particulars of fraud on the part of the 1st Respondent as follows:-

    1. Causing his name to be illegally registered as the absolute proprietor of all land parcel number Pioneer/ Racecourse Block 2 (Kapmalel)/18 measuring approximately 0.4046 (Ha) without consent and/or knowledge of the plaintiff.

    2. Failing to enter into a contract for sale of land with the plaintiff herein before the alleged sale and/or transfer.

    3. Failing to sign the relevant transfer forms with the Plaintiff and/ or obtain relevant consents before purporting to have proprietorship.

16. As regards of fraud against the 2nd Respondent, the Appellant listed the following particulars: -

    1. Causing the 1st Defendant's name to be illegally entered in the registry as the absolute proprietor of all land parcel number Pioneer/ Racecourse Block 2 (kapmalel)/18 measuring approximately 0.4046 (Ha) without consent and/or knowledge of the plaintiff.

    2. Causing the 1st Defendant's name to be illegally entered in the registry as the absolute proprietor of all land parcel number Pioneer/ Racecourse Block 2 (Kapmalel)/18 measuring approximately 0.4046 (Ha) without submission of the relevant transfer forms and taxes as required by law.

17. It has been held time and again by Superior Courts that fraud is a serious allegation which ought to be proved on a balance higher than a balance of probabilities but lower than beyond reasonable doubt. In the case of *Kibiro Wagoro Makumi –vs- Francis Nduati Macharia & another* (2018) eKLR which was cited by the Appellant in her submissions before the trial court, the court cited the case of *Walingford –Vs- Mutual Society* (1880) 5 App.(as 685a) 697, 701,709, *Garden Naptune –Vs- Occident* (1989) 1 Lloyd's Rep. 305, 308, *Lawrence –Vs- Lord Norreys* (1880) 15 App. C.s. 210 at 221 and *Davy –Vs- Gareel* (1878) ch.D 473 at 489 where it was stated as follows:-

> " where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the

facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and proved. "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice."

18. In *Vijay Morjaria –vs- Mansingh Mandhusingh Darbar & another* (2000) eKLR Tunoi J.A (as he then was) stated as follows:-

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from facts."

19. In *Ndolo –Vs- Ndolo* (2008) 1 KLR (C&F) 742 the Court of Appeal stated as follows:-

> " …we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases…"

20. The Appellant denied signing the agreement of September 11, 2015. This is the agreement in which the suit property was resold to the 1st Respondent. The 1st Respondent in his pleading and evidence has stated that the agreement of September 11, 2015 was made partly in writing, partly orally and partly by conduct.

21. The 1st respondent had stated that the Appellant who was his family's long standing house help approached him and informed him that she wanted to sell the suit property. The 1st Respondent agreed to buy it back. The appellant had two children who were school going. She needed the 1st Respondent to pay their school fees. The evidence which was adduced showed that the 1st Respondent had paid school fees for the Appellant's children to the tune of around Kshs 500,000/=

22. There was no evidence adduced to contradict the 1st Respondent's evidence. In the agreement of 11th September, 2015, it was clearly stated that the Kshs 150,000/= selling price had been received by the Appellant. This agreement was drawn by Joan Nasiloli Wanjala an advocate of the High Court who was then working in the law firm of the 1st Respondent.

23. An issue was raised during the hearing before the lower court that there was no consideration given. It is true that Joan Nasiloli Wanjala who testified before the court stated that there was no money which exchanged when the Appellant and the 1st Respondent appeared before her.

24. It was however clear that she was acting under the instructions of her two clients. The agreement clearly stated that the consideration of Kshs 150,000/= had been paid in full. There was therefore nothing wrong in the 1st Respondent failing to pay the purchase price before the Advocate who drew the agreement.

25. There was also an issue raised as to how a property which was sold at Kshs 150,000/= could be re-sold 8 years later at the same amount of Kshs 150,000/=. The 1st Respondent had clearly stated the context in which the suit property was re-sold back to him. The Appellant had approached her to buy the suit property and pay school fess for her two children. The 1st Respondent paid school fees for the Appellant's two children to the tune of over Kshs 500,000/=

26. The Appellant had undertaken to move out of the suit property by April 2016. Evidence on record shows that the Appellant delayed moving out of the suit property because the 1st Respondent had not found a suitable land to purchase for the Appellant. As the 1st Respondent was looking for a suitable land to buy for the Appellant, the Appellant was involved in a theft incident. This forced the 1st Respondent to mutually terminate the services of the Appellant.

27. The Appellant was given the Ngeria plot in lieu of her dues which were found to be Kshs 272,000/=. The Ngeria plot was worth Kshs 1,050,000/=. The Appellant accepted the Ngeria plot and went ahead to sell ¼ of it to Winnie Jepchirchir at Kshs 350,000/= The sale was with the express consent of the 1st Respondent in whose name the Ngeria plot was registered as he had not transferred it to the Appellant.

28. The Appellant took issue with the fact that the 1st Respondent had not included all the terms in the alleged agreement of 11th September, 2015 and that he could therefore not give oral evidence to vary or add anything to the written agreement. In the case of *Charles Muriungi t/a C.M Steel Erectors & General Building Contractors –vs- Elizabeth Kuher Heller* (2010) eKLR the issue of oral vis a vis written evidence was discussed from a quote on *Chitty on contracts* Vol 1 pages 624 – 626 paragraph 2 -094 where it was stated as follows:-

> " it is often said to be a rule of law that "if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given.... So as to add to or substract from in any manner to vary or qualify the written contract."

29. The court went on to quote from the same book as follows:-

> " In Gillepsie Bros. & Co. V Cheney, Eggar & Co., Lord Russell C. J stated:-
>
> "...although when the parties arrive at a definite written contract the implication or presumption is very strong and such contract is intended to contain all the terms of their bargain, it is presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to contribute to continue in force with the express written agreements."
>
> It cannot therefore be asserted that, in modern times, the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference in the document. "The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties."
>
> Scope of the rule: It follows that the scope of the parol evidence rule is much narrower than at first sight appears. It has no application until it is first determined that the terms of the parties' agreement are wholly contained in the written document. The rule "only applies where the parties to an agreement reduce it to writing, and agree or intend that the writing shall be their agreement." Whether the parties did so agree or intend is a matter to be decided by the court upon consideration of all the evidence relevant to this issue. It is therefore always

open to a party to adduce extrinsic evidence to prove that the document is not a complete record of the contract. If, on that evidence, the court finds that terms additional to those in the document were agreed and intended by the parties to form part of the contract, then the court will have found that the contract consists partly of the terms contained in the document and partly of the terms agreed outside of it."

30. A clear reading of the evidence on record and the agreement of September 11, 2015 shows that there were other terms of the agreement which the Appellant and the 1st Respondent had intended to be part of the agreement but which were not put down in writing. This is confirmed by the subsequent termination agreement and the attendant addendum thereof which expressly referred to the agreement of September 11, 2015. The 1st Respondent was therefore inorder in adducing evidence that the agreement of September 11, 2015 was partly in writing, partly oral and partly by conduct. This is because the Appellant had worked for his family for almost 18 years and there was trust in between the two as not to call for all what had been agreed to be reduced into writing.

31. The Appellant called DW 2 Martin Esekina Papa who examined the signature on the agreement of 11th September 2015 and came to the conclusion that the same was not made by the Appellant. During the course of hearing, it turned out that the said witness was not a fully qualified document examiner. The said witness was under the tutelage of DW2 Emmanuel Karisa Kenga at the CID Training school when he was sacked from the National Police Service for losing his pistol. He was sacked before he could complete his course of document examination.

32. Martin Esekina Papa's credibility was put to question in *Teresia Kamene Kingoo –Vs- Hurun Edward Mwangi & another* (2015) eKLR where the court rejected his evidence. In this case, Mr. Papa was testifying as an expert and DW2 Emmanuel Karise Kenga who is reknowned document examiner was also testifying.

33. The trial magistrate rejected the evidence of PW2 Martin Esekina Papa. The trial magistrate was perfectly inorder to reject the evidence of the alleged document examiner who did not complete his course. Evidence was further adduced that he has no credentials to act as a document examiner. His evidence in previous proceedings had been found not to be credible. A person who did not complete his course as a document examiner cannot purport to give evidence before a court of law.

34. To further demonstrate that the evidence of Mr. Papa cannot be credible, he was given a number of documents to examine but he only made a report touching on one of the documents that is the agreement of September 11, 2015 when there were other documents which had been denounced by the Appellant which required a report on the same. I therefore find that the report by Mr. Papa is of no use as he is not qualified as a document examiner. This is a dishonest person as shown from his conviction and sentence to imprisonment for continuing to draw salary from the government yet he had been sacked from the National Police service.

35. On the other hand, I find that the evidence of DW2 Emmanuel Karisa Kenga is credible. He is a reknowned document examiner who has been trained in and out of the country and as rightly observed by Mr. Papa who was his student he indeed is a reknowned document examiner of many years standing.

36. The Appellant had alleged that the 1st Respondent had had himself illegally registered as owner of the suit property. There were no allegations of forgery pleaded in the plaint. The allegation that the 1st Respondent illegally registered himself as owner of suit property were not proved. Contrary to the allegation by the Appellant that there was no contract between her and the 1st Respondent which preceded the transfer, the 1st Respondent produced a sale agreement dated 11th September, 2015.

Though the Appellant claimed that she did not sign the agreement, the evidence of DW2 Emmanuel Karisa Kenga was clear that she is the one who signed the agreement.

37. What followed thereafter goes to confirm that she signed the sale agreement of September 11, 2015. The Appellant had agreed to move out of the suit property in April 2016 but this was not possible as no alternative land had been found. When the Appellant was caught up in a theft incident, her services with the 1st Respondent and his family were terminated mutually. She was given the Ngeria plot in lieu of her dues.

38. Once she was given the Ngeria plot, she sold ¼ thereof to Winnie Jepchirchir and remained with ½ of an acre. The Appellant had confided in PW6 Victoria Saina that she was going to move to the Ngeria plot. The appellant had also sent a text message to the 1st Respondent on February 4, 2018 in which she requested the 1st Respondent to give her time upto November 2018 to allow her put up a house on the Ngeria plot so that she could leave the suit property to the 1st Respondent. If the Appellant had not sold the suit property to the 1st Respondent, she would not have been asking for time to move from her own property. She would not have even told PW6 that she was moving to the Ngeria plot.

39. The termination agreement was entered into on 25th November, 2017. She was to take possession of the Ngeria plot on 28th February, 2018. The termination agreement was signed by herself and her two children. Though the Appellant's children claimed that they did not sign the termination agreement, their signatures were not examined to confirm otherwise. It would not have been a mere coincidence that the termination agreement provided that she was to take possession of the Ngeria plot on 28th February 2018 and yet ask the 1st Respondent for more time to move on 4th February, 2018 if she had not sold the suit property.

40. The argument by the Appellant that the Ngeria plot was a gift for her long work for the 1st Respondent and his family has no basis. The Appellant had sold the suit property. The Ngeria plot was given to her in lieu of her terminal dues.

41. There was an argument that the agreement of September 11, 2015 was not signed by an independent witness. The *law of contract Act* stipulates under section 3(b) that the signature of ach party signing has to be attested by a witness who was present when the contract is signed by such party. In the instant case, the signature of the Appellant and the 1st Respondent was witnesses by Joan Nasiloli Wanjala an advocate in the office of the 1st Respondent.

42. The Appellant was working as an employee of the 1st Respondent who had a law firm where Joan Nasiloli Wanjala was employed. The Appellant and the 1st Respondent had a good relationship as employee and employer and it would not have made any sense to ask the Appellant to get her own lawyer. Besides this, there is evidence that in subsequent agreements, the Appellant had been informed that if she took another lawyer outside her employer's law firm, she was bound to incur expenses. The Appellant agreed to this arrangement. The issue of Joan Nasiloli Wanjala not being an independent witness does not therefore arise and in any case, the law of contract does not require that the signing of a contract be done by an independent witness.

43. The Appellant had pleaded in her statement of claim that there were no consents obtained or taxes paid by the 1st Respondent. Contrary to her allegations, the 1st Respondent proved that an application for consent of the Land Control Board had been made. The consent was duly given and the Appellant appeared before the Land Control Board. The mere fact that the consent did not have a land control reference number did not invalidate the consent. Equally, the fact that application for consent was made and granted on the same day does not indicate that there was fraud. If an application was made

and it happened that the board was sitting on the day of application and parties concerned are present, there is nothing barring the board from considering the application.

44. The fact that the Land Registrar DW6 Sheila Mwei while under cross examination stated that it is not possible to apply for consent of the Land Control Board and obtain it the same day is no pointer to fraudulent conduct. There is no law which says that one cannot apply for consent and obtain it the same day. What is paramount is that an application is made, the parties are present and the board is sitting at the time of application. The Appellant implied that there was no board meeting of the Land Control Board which sat to grant consent. If this was to be the case, the burden of proof lay on the Appellant to bring minutes of the Land Control Board to confirm that there was no sitting of the board. The Appellant cannot hide behind the supervisory jurisdiction of this court toc all for minutes of the Land Control Board when she had an opportunity to do so. The court would have only put in action its machinery for supervisory role if there was a serious contention that there was no board which sat or that the board had refused to give the minutes. As there is no basis for the court to invoke its supervisory role, I find that it will amount to the court aiding the Appellant in what the Appellant ought to have done in the first place.

45. The 2nd Respondent was accused of illegally causing the 1st Respondent to be registered as owner of the suit property. The Land Registrar was called as DW6. She testified that the suit property was registered in the name of the 1st Respondent after it was confirmed that there were all requisite documents which were required before registration. There was an application for Land Control Board and a consent. There was a duly signed transfer which had photographs of both the Appellant and the 1st Respondent and the required pin numbers. Stamp duty of 4040/= had been paid and there was evidence of the same.

46. There were no encumbrances registered against the title. This being the case, the 1st Respondent was registered as owner of the suit property. The Land Registrar said that if there was any serious doubts on any of the documents presented for registration, then the parties would have been called to clarify the same. As there was no doubt on the documents and there was no complaint, the registration was completed and according to the Land Registrar, the registration was validly done considering the documents presented to the registry for registration purposes. There is therefore no basis upon which the Appellant could fault the 2nd Respondent that there were no relevant transfer forms or payment of the requisite taxes.

47. As was clearly set out in the case of Francis Nduati Macharia and Vijay Morjaria as well as Ndolo (Supra) the Appellant failed to prove the particulars of fraud attributed to the Respondents. The alleged forgery of the Appellant's signature was not proved. The trial magistrate was therefore perfectly in order to make a finding that fraud had not been proved. What the Appellant tried to do was to ask the court to infer fraud from the facts which she set out to point as proof of the alleged fraud.

48. The evidence of the two advocates from the firm of the 1st Respondent that is Ms. Karen Chesoo and Joan Nasiloli Wanjala was not discredited. The two advocates undertook their professional duties carefully and were not influenced by their boss, the 1st Respondent. The 1st Respondent clearly stated that he did not influence any of the two advocates. The fact that the advocates acted for both the Appellant and the 1st Respondent but testified on behalf of the 1st Defendant did not prejudice the Appellant in any way. The two advocates did not have any confidential information which they received from the Appellant which would have prejudiced the Appellant given the fact that the Appellant had worked for the 1st Respondent and his family for close to 18 years and the 1st Respondent was doing everything possible to reward her for her royalty. This is why he gave the Appellant a property whose value was much higher than the Kshs 272,000/= due to her on account of terminal dues.

49. The trial magistrate was faulted for overemphasizing on the Ngeria plot when the Appellant had no capacity to deal with it. There is no contention that the Ngeria plot was in the name of the 1st Respondent. There is also no contention that the 1st Respondent was intent on giving the Appellant the Ngeria plot. Infact, even before the Ngeria plot could be transferred to the Appellant, the Appellant sold ¼ of an acre of it to Winnie Jepchirchir with the permission of the 1st Respondent. There is therefore no basis of faulting the trial magistrate for making a finding that the Appellant had agreed to take the Ngeria plot and had proceeded to sell a portion of it to Winnie Jepchirchir who was her neighbor. The Appellant had taken constructive possession and she cannot be heard to complain that she had no capacity to deal with the Ngeria plot. It is not uncommon for people to sell portions or even whole of land which is not in their names.

50. The Appellant had conceded that she sold ¼ of an acre of the Ngeria plot to Winnie Jepchichir and there was an agreement to that effect. She was paid Kshs 350,000/= less 25,000/= which she had been accused of stealing from the househelp of the 1st Respondent's son. The trial magistrate cannot therefore be faulted for making a finding that the Appellant had sold part of the Ngeria plot.

51. The trial magistrate summarized the evidence adduced by both the Appellant and her witnesses as well as that of the Respondents and their witnesses. The trial magistrate analysed the evidence of both parties as well as their submissions. She arrived at reasoned findings based on the law of evidence. The trial magistrate cannot therefore be accused of being biased and for failing to appreciate the role of the 2nd Respondent in registration of the suit property in the Appellant's name. The findings of the trial magistrate in as far as the role of the 2nd Respondent was concerned was based on law and evidence which was adduced. There was no bias exhibited in her analysis of the evidence adduced by the parties. The trial magistrate had summarised the evidence of Karen Chesoo and Joan Nasiloli Wanjala and considered the same in arriving her decision. There was no need for the trial magistrate to expressly state that she had considered the evidence of the two advocates when the record clearly shows that the evidence of the two advocates who were at the Centre of the agreements drawn had been summarized and considered in her analysis.

52. On whether there was evidence that the Appellant had been evicted from the suit property on February 12, 2018, it is the 1st Respondent's evidence that the Appellant voluntarily moved out of the suit property after her request for extension of time to move was turned down. The Appellant had testified that she was evicted by a group of goons who had been sent by the 1st Respondent. She testified that she lost money which she had been paid for the sale of ¼ of the Ngeria plot and that her house was demolished. She stated that she lost everything which was in the house. She testified that she went and reported the incident to Langas Police station.

53. The Appellant called PW3 Luke Muhanji and PW4 Beatrice Mwala who were her neighbours at the suit property. The two testified having seen a group of men armed with crude weapons who were demolishing the house on the suit property. Some were removing iron sheets while others were removing household items from the house. PW4 testified that she found the Appellant crying and when she asked her what was happening she told her they had been sent. She then boarded a motor bike and said she was going to report the incident to Police.

54. PW3 stated that he heard one of the men saying that they had been sent by the 1st Respondent to come and demolish the Appellant's house. On his part, Pw5 who is a brother to the Appellant stated that he worked as a mason in Nakuru. On 12th February, 2018, he received a call from the Appellant who informed her that her house had been demolished. He travelled from Nakuru and came to Eldoret where he found that the Appellant's house had been demolished and her household goods were scattered all over.

55. PW6 is the Appellant's sister in-law. She received a call from the Appellant who informed her that her house had been demolished. She left school where she was teaching and came to the scene where she accompanied the Appellant to the Police station where she went to record a statement.

56. PW9 is a brother to the Appellant. He testified that he received a call from the Appellant who informed him that her house had been demolished. He sent his wife to the scene and went there in the afternoon where he took photographs of the demolished house.

57. The trial magistrate made a finding that there was no evidence adduced that there had been demolition at the instance of the 1st Respondent. PW9 who had tried to produce photographs which he took at the scene was denied the opportunity to so do as he did not have a certificate accompanying the photographs as required by the *Evidence Act*.

58. The evidence of PW9's wife who testified as PW6 was not credible in that she lied that she accompanied the Appellant to Langas Police Station when one of the neighbours of the Appellant had testified that the Appellant went alone to the Police station. The trial magistrate having not found any credible evidence to show that the Appellant's house had been demolished at the instance of the 1st Defendant, she was right in making a finding that there was no demolition.

59. DW3 CPL David Sakwa is the one who investigated the incident. He produced the extract of the O.B, Investigation diary and the statements recorded by the parties concerned. When the Appellant first reported the incident, she claimed that her landlord had evicted her. She did not report that she had lost any money. The Appellant claimed that she had lost Kshs 280,000/= after three weeks of reporting the eviction by her landlord. When investigations were carried out, it turned out that the fraud which she was alleging was not proved. The office of the Director of Public Prosecutions ordered closure of the file.

60. There was no credible evidence adduced regarding the alleged demolition. Had there been demolition, the report in the occurrence book of 12th February, 2018 would have confirmed this. As the Appellant and her witnesses were not credible, the trial magistrate was right in making a finding that there was no demolition.

61. The trial magistrate summarized the parties cases and submissions and proceeded to analyze the same based on the issues which the parties had set out for determination. I have looked at the record and see no evidence of any bias against the Appellant by the trial magistrate. The allegation of bias is therefore without merit.

62. The trial magistrate was fair to the Appellant given the circumstances of this case. By an addendum dated 8th January, 2018, the 1st Respondent and his wife had rescinded clause 4(e) of the agreement of 25th November, 2017. In the rescinded clause, the 1st Respondent and his wife had undertaken to build a semi-permanent house, fence the Ngeria plot, dig a borehole and a pit latrine. By the addendum, the 1st Respondent and his wife had asked the Appellant to utilize the proceeds from the sale of ¼ acre of the Ngeria plot to purchase a separate property and build her own house. The trial magistrate took the liberty to direct the 1st Respondent to transfer the Ngeria plot to the Appellant within 30 days. The 1st Respondent did not file any cross appeal. The 1st Respondent must have complied with the order of the court. This is not a kind of magistrate who would be said to have been biased against the Appellant.

63. I notice from the judgment of the trial magistrate that she did not condemn the Appellant to pay costs for the dismissed suit. She ordered that each party do bear their own costs. I will for the same reason not condemn the Appellant to pay costs for this unsuccessful appeal.

Disposition:

64. From the above analysis, it is clear that the Appellant's appeal is devoid of merit. The appeal is dismissed with an order that each party do bear their own costs.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF OCTOBER, 2022.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Oduor for Ms. Anyango for Appellant.

Mr. Yego for 1st Respondent.

Court Assistant -Albert

E. O. OBAGA

JUDGE

19TH OCTOBER, 2022