



REPUBLIC OF KENYA



KENYA LAW
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**Ngare v Ngare & another (Environment and Land Appeal 12 of 2018)
[2022] KEELC 14544 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 12 OF 2018
MN KULLOW, J
OCTOBER 19, 2022**

BETWEEN

JOHN ODHIAMBO NGARE APPELLANT

AND

JOSEPH AGORO NGARE 1ST RESPONDENT

MAURICE OWUOR AGORO 2ND RESPONDENT

JUDGMENT

1. This Appeal emanates from the Judgment and Decree of Hon. R.K. Lang’at in Rongo Senior Resident Magistrates’ Court Civil Suit No. 184 of 2014, delivered on 29th October, 2018. The grounds in the Memorandum of Appeal are that: -
 - i. The Learned Honourable Magistrate erred in law and fact in finding that the Respondents had proved their case on a balance of probabilities.
 - ii. The Honourable Magistrate erred in law and fact by relying on the wrong principle of law.
 - iii. The Honourable Magistrate erred in law by failing to give a chance to the Appellant to state his case in defence.
 - iv. The Honourable Magistrate erred in facts thereby arriving at a wrong decision.
2. A brief background to contextualize the Appeal herein; the Plaintiffs (now Respondents) sued the Defendant (now the Appellant) vide a Plaint dated 18/08/2014 seeking an Order of Specific Performance, in respect of an agreement of sale of the suit property between the 1st Plaintiff and the Defendant’s deceased father; seeking to compel the Defendant to sign all the necessary transfer documents to transfer the suit land No. 3135 & 3137 jointly measuring 2 acres in the name of the 2nd Plaintiff and in the alternative, an Order be directed to the Executive Officer the said documents on behalf of the Defendants.



3. The Defendant on the other hand filed a Statement of Defence dated 18.09.2014; wherein he denied jurisdiction of the lower court to hear and determine the dispute together with the allegations of sale made by the Plaintiffs. He maintained that there was no sale agreement and/or arrangement between the Plaintiffs and his late father Henry Omolo Ngareor himself. He further averred that no proof had been tendered to support the alleged sale from the Defendant's father. The matter proceeded for main hearing and subsequently judgment was delivered on the 29.10.2018 whose effect was to allow the Plaintiff's suit with costs hence the instant Appeal.
4. On 14.02.2022, I directed that the Appeal be canvassed by way of written submissions, to be filed and exchanged within 14 days for each party. Both parties filed their respective written submissions which I have taken into consideration in arriving at my decision.
5. Having looked at the Record of Appeal, the Memorandum of Appeal herein and the rival submissions in totality; I find that the main issue for determination is whether in the circumstances, this Court should interfere with the exercise of discretion by the trial court and set aside its Judgment delivered on 29.10.2018.
6. The Court of Appeal in *Selle v Associated Motor Boat Co.* [1968] EA 123) held as follows: -

“ this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
7. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. The issue before the trial court was the validity of the sale between the Defendant's deceased father and the Plaintiffs and consequently, whether the Plaintiff was entitled to the relief of Specific Performance as sought in the Plaintiff.
8. I will now proceed to re-evaluate and re-assess each of the party's claim from the trial court record and the resultant judgment in order to determine whether the trial magistrate rightly exercised his discretion in allowing the Plaintiffs' claim.
9. The Appellant maintains that the trial court did not put into consideration the validity of the said land sale agreement produced as PExhibit 2. It was therefore his contention that that the transaction that took place on 06.11.2001 and 06.12.2003 were null and void and further averred that the said agreement was a forgery.
10. The Appellant further stated that the trial court did not consider that the suit property was held in trust by his deceased father for the benefit of his children thus creating a legal trust and the parcel was therefore not available for sale to a third party. It was also his contention that the trial court did not put into consideration the documents he filed in support of his case.
11. The Respondents on the other hand maintained that the agreement for sale of the suit land was entered into sometimes in the year 2001 between the 1st Respondent and Defendant's deceased father and the said agreement was reduced in writing on 06.12.2003, a copy of the said agreement was produced as PExhibit 2. That the said sale agreement has not been challenged by the Appellant and was duly executed and witnessed as required in law.



12. Further, it is the Respondent's position that pursuant to the registration of the Appellant as the owner of the suit land by transmission, he has deliberately and advertently refused to transfer the lawfully purchased portion to the 2nd Respondent.
13. Section 3(3) of the Law of Contract provides that: 'No suit shall be brought upon a contract for the disposition of an interest in land unless—
 - (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto;
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:'
14. I have looked at the copy of the sale agreement dated 6/12/2003 and produced as PExhibit 2 between the Appellant's deceased father and 2nd Respondent and I note that the same fully complies with the provisions of section 3(3) of the Law of Contract Act stated above; the same was in writing, the same was signed by all parties and said signatures were attested by witnesses and the same is therefore a valid sale contract in my opinion.
15. It is trite law that he who alleges must prove. Section 107(i) of the Evidence Act provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
16. From a re-evaluation of the evidence adduced in support of each party's claim; I find that the Appellant did not adduce any evidence whatsoever to prove his claims of forgery. Further, I have looked at the List of Documents dated 18.09.2014 and I note that the documents produced by the Appellant were; a copy of a Notice from the Kenya Gazette in respect to Succession Cause No. 117 of 2011 and a copy of the Mutation Form, none of the said documents proves the claim of forgery as alleged. Without any proof, the claims of forgery are mere unsubstantiated allegations which do not hold any evidentiary and/or probative value.
17. I have noted with concern that the Appellant introduced the concept of customary trust and contended that the suit property was held in trust by his deceased father for their benefit and therefore the same was not available for sale to a third party. As earlier stated, this court's jurisdiction is limited to reappraising the evidence and issues which were before the trial court and make its own conclusion. The issue of customary trust was not raised at the trial court and has only been introduced by the Appellant in his submissions. This in my view is not the proper procedure in law and will therefore disregard the same.
18. I have also looked at the judgement of the trial court delivered on 29.10.2018 which is the subject of this Appeal and it is my considered opinion that the trial magistrate properly analysed the issue of sale of the suit parcel which was at the centre of the dispute between the parties. He considered the various evidence produced by the parties in support of their rival claims and it is on that basis that he found in favor of the Plaintiff.
19. In view of the foregoing, I find that the learned trial magistrate exercised his discretion properly in allowing the plaintiff's claim. The analysis and subsequent decision was purely made upon examination of the full facts of the case and the evidence adduced in support of each party's claim. I find no need to interfere with the said decision.



Conclusion

20. In conclusion, I accordingly find that the Appeal is not merited and is therefore dismissed with costs to the Respondents. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 19TH DAY OF OCTOBER, 2022.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Non-Appearance for the Appellant

Maurice Ager for the Respondents

Tom Maurice – Court Assistant

