



Ogola & another v Aketch (Environment and Land Appeal E004 of 2021) [2024] KEELC 3455 (KLR) (9 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3455 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E004 OF 2021
GMA ONGONDO, J
APRIL 9, 2024**

BETWEEN

WILKISTA AWINO OGOLA 1ST APPELLANT

EMILY ADOYO 2ND APPELLANT

AND

SEBASTIAN NENGOH AKETCH RESPONDENT

(An appeal arising from the judgment/decree in Homa Bay Chief Magistrate’s Court Environment and Land Case number E003 of 2020 by Hon. T. Obutu, CM on 23rd September 2021)

JUDGMENT

1. On 23rd September 2021, the trial court (Hon. T. Obutu, CM) rendered judgment in Homa Bay Chief Magistrate’s Court Environment and Land Case number E003 of 2020 (The original suit) declaring that the plaintiff/respondent had proved his case to the requisite standard and entered judgment for him as against the 1st defendant/appellant in the following terms:
 - a. A permanent order of injunction restraining the defendants either by themselves, agents, servants, employees, accomplices amongst others from encroaching, occupation, trespassing upon, developing, alienating, selling, transferring or in any manner whatsoever interfering with the plaintiff’s property, interest in and/or peaceful enjoyment of his portion of land containing by measurement 27m by 69m of Kanyada/Kanyango/ Kalanya/1019 is hereby issued.
 - b. There was no evidence led towards damages for breach of contract
 - c. Costs of the suit to the plaintiff.



2. The said judgment attracted the instant appeal originated by way of a memorandum of appeal dated 24th September 2021 founded upon eight grounds, inter alia;
 - a. That the Learned Trial Magistrate erred in Law and/or in fact by ignoring the Appellants evidence and treating it superficially.
 - b. That the Learned Trial Magistrate erred in Law and/or in fact when his findings were against the weight of the evidence as the case was not proved to the required standard.
 - c. That the Learned Trial Magistrate erred in Law and /or in fact in failing to hold that the Respondent's action was time-barred under section 4 (1a) and section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya and that no leave to file the suit out of time was brought by the Respondent despite that the cause of action arose in the year 1995 and that the suit herein having been filed on the 6th day of October, 2020 is barred by statutory Limitation.
 - d. That the Learned Trial magistrate erred in Law in failing to consider that the Hon. Court had no jurisdiction to entertain the suit as it had been filed out of time and was therefore time barred.
 - e. That the Learned Trial Magistrate erred in Law and in fact in failing to consider when the agreement was entered into, if at all it was breached, whether the balance of the purchase price was paid or not, and if paid, whether it was paid to the right people, the Respondents' behavior after breaching the agreement and whether the 1st Appellants' behavior affirmed or ratified the contract.
 - f. That the Learned Trial Magistrate erred when he failed to find that the Respondent the Appellant's submissions and judicia authorities with the resultant miscarriage of justice to the appellant.
 - g. That the Learned Trial Magistrate erred in law and fact in that the disregarded the Appellant's submissions and judicial authorities with the resultant miscarriage of justice to the appellant.
 - h. That the Learned Trial Magistrate erred in Law and fact by failing to evaluate the entire evidence on record and make a finding that the Appellant had proved her case against the Respondent on a balance of probability and thereby arrived on wrong findings on the issues before the court.
3. So, the appellant has prayed for the following orders:
 - a. That the Appeal be allowed.
 - b. That the Judgment of the Learned Trial Magistrate dated 22nd day of September, 2021 be quashed and/or set aside and the same be substituted with an order allowing the Appellant's defence in lieu of the reliefs sought in the ELC Suit No. E003 of 2020.
 - c. That the costs of this Appeal and in the Subordinate Court be awarded to the Appellants.
4. The appeal was heard by way of written submissions pursuant to this court's directions issued on 7th December 2023.
5. Accordingly, the appellants' counsel, H. Obach and Partners Advocates, filed submissions dated 14th February 2024 and identified three issues for determination thus:
 - i. Who between the 1st appellant and the respondent breached the contract?



- ii. Whether the trial magistrate ought to have entertained a suit of breach of contract filed outside 6 years without leave of court.
 - iii. Whether the appellant is entitled to the prayers sought.
6. Counsel submitted, inter alia, that the 1st appellant was not party to the contract entered into between the respondent and Japheth Ogolla Anyango (deceased 1) thus, ought not to have been sued in her personal capacity. That in any event, the suit was filed after the lapse of six years thereby contravening Section 4(1) (a) of the *Limitation of Actions Act*. That further, the trial magistrate misdirected himself in granting an equitable right to land yet the suit was filed outside the 12 years period stipulated by law. Counsel relied on various authoritative pronouncements to fortify the submissions, including the case of *Fidelity Commercial Bank Ltd. -vs- Kenya Grange Vehicle industries Limited* [2017] eKLR.
 7. By the submissions dated 1st March 2024, Quinter Adoyo and Company Advocates, learned counsel for the respondent identified four issues for determination inter alia: whether there was a valid and enforceable land sale agreement between the deceased seller and the respondent, who between the 1st appellant and the respondent breached the land sale agreement dated 16th February 1996, who between the 2nd appellant and the respondent is entitled to the portion of the suit land and whether the respondent's suit at the trial court was time barred.
 8. Briefly, counsel submitted that the agreement between the deceased seller and the respondent was valid and enforceable. That the 2nd appellant did not exercise due caution before purchasing the disputed portion of the suit land. That the suit was not time barred since all along, the respondent tried to enforce his rights as against the appellants. Reliance was placed on the case of *Katende -vs- Haridar & Company Limited* (2008) 2 EA 173, among others, to buttress the submissions.
 9. It is important to note that the instant appeal being the first one from the trial court, I have the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Peters-vs-Sunday Post* (1958) EA 424 at 429.
 10. It must be noted that the respondent who was the plaintiff sued the appellant by way of a plaint dated 6th October 2020 over a portion of the suit land, Kanyada/Kanyango/Kalanya/1019, measuring 27metres by 69 metres in area. He sought the orders infra:
 - a. A permanent order of injunction restraining the defendants either by themselves, agents, servants, employees, accomplices amongst others from encroachment, occupation, trespassing into, remaining upon, developing, alienating, selling, transferring or in any manner whatsoever interfering with the plaintiff's proprietary interest in and/or peaceful enjoyment of his portion of land containing by measurement 27m by 69m of Kanyada/Kanyango/ Kalanya/1019.
 - b. General damages for breach of contract
 - c. Costs of the suit to together with interest thereon at court rates
 - d. Any other or further relief that the Honourable Court may deem fit to grant.
 11. The 2nd appellant denied the claim in her statement of defence and counterclaim dated 26th October 2020. In that regard, she prayed for:
 - a. An order directing the directing the respondent to remove the caution on the suit land in the Lands Registry.
 - b. Costs of the suit and interest thereon as from the date of filing the suit until payment in full.



12. In his evidence, the respondent (PW1) relied on his statement on record as well as his list of documents dated 6th October 2020 serial numbers 1 to 10, to wit, a copy of the sale agreement dated 6th October 1995, a copy of the sale agreement dated 6th October 1995, a copy of an agreement dated 16th February 1996, a copy of search certificate dated 21st September 2020, a letter dated 21st March 2018, a letter dated 31st July 2018, a letter dated 14th May 2018, an agreement dated 16th September 2011, an agreement dated 21st September 2020, a caution dated 31st May 2010 and a payment receipt dated 31st July 2018 (PExhibits 1 to 10 respectively). He testified that he purchased the disputed portion of the suit land in 1995 from deceased 1 who was the husband to the 1st appellant herein, vide a sale agreement dated 6th October 1995. That the agreed purchase price was Kshs.14,000 was paid in installments. That, however, a transfer of the same was not done and following the demise of deceased 1, the 1st appellant obtained a grant of letters of administration to his estate and subsequently sold the disputed portion to the 2nd appellant herein.
13. PW2, Benjamin Mboya Ondiyo, relied on his statement on record and testified that he purchased a different portion of land from deceased 1 but following his demise, the 1st appellant refused to effect a transfer to him. That together with the respondent, they applied and had cautions placed on the portions so purchased.
14. PW3, Pascal Anthony Nyambok Aketch,, relied on his statement and testified that he witnessed payment of the 1st installment of the purchase price to deceased 1.
15. The 1st appellant (DW1) relied on her statement on record which was adopted as her evidence in chief. She conceded that she was aware of the sale of land agreement entered into by the respondent and deceased 1. That by the said agreement, the respondent was required to educate her children but he did not do so. That she sold the disputed portion to the 2nd appellant in 2020, but was not aware of the existing cautions placed on the parcel at the Lands Registry.
16. Silas Owuor Oyugi, former Assistant Chief Kalanya Kanyango Sub-location (DW2), relied on his statement on record. He acknowledged that he was aware of the sale of land agreement (PExhibit 1). During cross-examination, he stated that he directed the respondent to cease further utilizing the land in 1999 after being approached by the 1st appellant who alleged that the respondent had failed to educate her children. He admitted that the same did not form part of the terms of the sale agreement (PExhibit 1) presented to him.
17. DW3, Christine Akoth, relied on her statement which was adopted as part of her evidence. She averred that the respondent did not educate her, prompting her to report the same to the chief in the company of her mother and father, the 1st appellant and deceased 1 respectively.
18. The 2nd appellant, Emily Adoyo Ouma (DW4) testified that she was an innocent purchaser. That she conducted a search after payment of the purchase price, which revealed that the suit land was registered in the name of the 1st appellant but cautions had been registered against the title by the respondent and PW2.
19. In the foregone, the issues for determination herein are as set out on the grounds of appeal which crystallize to:
 - a. Whether the instant appeal is tenable?
 - b. Just orders to issue herein.



20. It is noteworthy that the learned trial magistrate set out the parties' respective cases, identified two issues for determination, analysed them and arrived at his decision based on reasons. So, the impugned judgment was consistent with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
21. In the impugned judgment, the learned trial magistrate observed, inter alia;
- “...From the evidence on record, this agreement of sale between the plaintiff and the 1st defendant produced as PExhibit 1 complied with the mandatory provisions ... the parties are therefore bound by the terms of the agreement...”
22. The appellants lament that the trial court failed to interrogate whether the sale of land agreement (PExhibit 1) was breached and whether the agreed purchase price was paid in full. I note the contents of PExhibit 1 in entirety.
23. It is well settled that parties are bound by the terms of their contract unless there is coercion, fraud or undue influence in regard to the terms of the clause; see *National Bank of Kenya Ltd. -vs- Samkolit Ltd. and another* (2000) EA 503.
24. From the evidence on record inclusive of PExhibit 1, the respondent purchased a portion of the suit land from deceased 1. There is no indication that the agreed purchase price was not paid in full.
25. In the circumstances, the said sale (PExhibit 1) was valid and enforceable by virtue of equitable estoppel and constructive trust; see *Willy Kimutai Kitilit-vs-Michael Kibet* (2018) eKLR.
26. Regarding the appellants' contention that the trial court failed to hold that the respondent's action was time barred under Sections 4 (1) (a) and 7 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya, it is clear that respondent's interest on the suit property was a constructive trust thus, the provisions of Section 20(1)(b) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya, is applicable herein. See also; *Stephens & 6 others -vs- Stephen & another* (1987) eKLR.
27. Besides, Article 10 (2) (b) of *the Constitution* of Kenya, 2010 has elevated equity as a principle of justice to a constitutional principle; see Willy Kimutai Kitilit case (supra).
28. In *Macharia Mwangi Maina & 87 others -vs- Davidson Mwangi Ragiri* (2014) eKLR, the Court of Appeal observed:
- “...The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property...”
29. The appellants further lament that the honourable trial court disregarded their submissions and judicial authorities, thereby occasioning a miscarriage of justice to the appellants. I take into account *Macharia Mwangi Maina case* (supra) on delivery of substantive justice.
30. It is trite law that submissions are not pleadings and as such, cannot take the place of evidence. In *Daniel Toroitich Arap Moi -vs- Mwangi Stephen Muriithi & Another* (2014) eKLR, the Court of Appeal pronounced itself in part that:
- “...Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”



31. In light of the foregoing, it is my considered view that the learned trial magistrate was guided by the evidence on record and applied correct principles of law in reaching the impugned judgment. There is no reason to disturb his reasoned judgment and I affirm the same.
32. To that end, I find that these grounds of appeal are untenable.
33. A fortiori, this appeal is devoid of merit. It is hereby dismissed with costs to the respondent.
34. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 9TH DAY OF APRIL 2024

G.M.A ONGONDO

JUDGE

Present

1. Ms. B. Ochieng, Learned Counsel for the Appellant
2. Respondent
3. F. Mutiva, Court Assistant

