



REPUBLIC OF KENYA



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**Ounda v Nyang’iendo & 3 others (Environment and Land Appeal
E006 of 2021) [2023] KEELC 18095 (KLR) (7 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18095 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E006 OF 2021
GMA ONGONDO, J
JUNE 7, 2023**

BETWEEN

VITALIS TITUS OUNDA APPELLANT

AND

MONICA NYANG’IENDO 1ST RESPONDENT

EZRA ODONDI ANYANG 2ND RESPONDENT

DISTRICT LAND REGISTRAR, RACHUONYO 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. B.O
Omwansa (PM now, SPM) rendered on the 22nd day of September,
2021 in Oyugis Environment and Land Case No. 45 of 2020)*

JUDGMENT

1. The instant appeal was provoked by the trial court’s judgment rendered on September 22, 2021 where the learned magistrate (Hon B.O Omwansa, SPM) held thus;

“.....I find that the plaintiff has not demonstrated before this court that he was and he is vigilant for the court to grant the remedies sought. The court at all times need not to appear as to assist the indolent. It follows therefore, that this suit is dismissed with costs.”

2. Being aggrieved by the said determination, the appellant through the firm of Sala and Mudany Advocates mounted this appeal by way of a memorandum of appeal dated September 30, 2021 premised on the grounds infra;



- a) The Learned Magistrate completely misunderstood the evidence before him, wrongly analysed the evidence thus dismissing the plaintiff's case with costs to the respondent.
 - b) The Learned Magistrate erred in law and fact by failing to appreciate the totality of the evidence before him and the submissions made on behalf of the Appellants thus reaching a conclusion that was contrary to the evidence before him.
 - c) The Learned Magistrate erred in law in failing to follow the law as established through judicial precedent.
 - d) The Learned Magistrate erred in law and in fact in by basis his judgment on facts not pleaded in court.
 - e) The Learned Magistrate totally misunderstood and wrongly evaluated the evidence before him and therefore arrived at a wrong conclusion.
3. So, the appellant has sought;
- a) That this appeal be allowed.
 - b) That the Judgment of the Learned Magistrate dated September 22, 2021 be set aside.
 - c) The appellant be awarded the costs of this appeal.
4. The land in dispute herein is LR No. Kabondo/Kodhoch East/831 measuring approximately Two (2) acres. Currently, it is subdivided into three different land parcel numbers Kabondo/Kodhoch/1601,1602 and 1606.
5. This appeal was heard by way of written submissions further to the orders of November 15, 2022
6. By the appellant's submissions dated December 5, 2022, five issues for determination including whether there was a valid contract between the parties in this appeal and whether the appellant is entitled to the orders sought in the plaint, were identified therein. The same are analysed in favour of the appellant. That there was a binding sale of land agreement between the appellant and the respondent and it ought to be enforced. To buttress the submissions, the appellant's counsel relied on section 3 (3) of the *Law of Contract Act*, the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and Another* [2002] E A 503 and *Mbogo v Shab* [1968] E A 93, among others.
7. In the submissions dated March 20, 2023 filed on March 21, 2023, the 1st and 2nd respondents' counsel set out brief background of the matter including the parties' respective pleadings. Counsel framed four issues for determination, inter alia, whether there was a valid contract of sale between the appellant and the respondents and whether there was breach thereof. In analyzing the issues in the negative, it was asserted that the appellant failed to prove payment of the purchase price. The case of *Consolata Anyango Ouma v South Nyanza Co. Ltd* 920150 KLR alongside the case of *Mwanasokoni v Kenya Bus Service Ltd* 91982-88) 1 KAR 278, among other authorities, were cited therein to fortify the submissions.
8. It must be observed that the appellant who was the plaintiff before the trial court initiated the original suit by way of a further amended plaint dated November 16, 2020 and lodged on even date for;
- a) An order of specific performance of the agreement dated December 7, 1998 for the sale and transfer of a portion of the land in dispute by compelling the 1st Defendant to execute the necessary transfer of the said land to the Plaintiff or the 4th Defendant to do transfer of the same in favour of the plaintiff.



- b) An order of injunction against the Defendant restraining them, their agents, representatives, assignees or any other person acting through them, from selling, disposing off, charging, transferring, pledging, leasing or by other means whatsoever dealing adversely with the portion of land arising from the subdivisions under the land in dispute unless and until the plaintiff gets his deed in line with the agreement dated December 7, 1998.
 - c) An order compelling the 4th Defendant to cancel any title deeds and entries issued pertaining to Land Parcels No. Kabondo/Kadhoch/East/1601, Kabondo/Kadhoch/East /1602 and Kabondo/Kadhoch East 1606 and the land to revert back to its original number being, the land in dispute.
 - d) In the alternative, an order requiring the 1st Defendants to compensate the plaintiff the consideration in the sum of Kshs. 90,000/- with interest at court rates from 7th December 1998 until payment in full.
 - e) General damages
 - f) Costs of this suit plus interest thereon.
 - g) Any other relief this Honourable court deems fit.
9. In an amended statement of defence dated January 13, 2021, the 1st and 2nd respondents who were the 1st and 2nd defendants before the trial court, denied the appellant's claim. They prayed that the same be dismissed with costs.
 10. The appellant (PW1) relied on his statement and PExhibits 1 to 8 which include; a copy of sale of land agreement (PExhibit 1) as part of his evidence. He testified in part that he appended his signature to PExhibit 1.
 11. On June 23, 2021, Mr Ayayo, learned counsel for the 1st and 2nd defendants relied on the documents filed therein. He then closed the defence case.
 12. It must be noted that the learned trial magistrate stated the parties' respective cases in brief, delineated two issues for determination discussed the same and reached the impugned finding with reasons. As such, he complied with Order 21 Rule 4 of the [Civil Procedure Rules, 2010](#).
 13. In light of the above, I bear in mind the mandate of this court as held in [Mwanasokoni case](#) (supra) and other authorities. Thus, I proceed to discuss the issues for determination as contained in the grounds of appeal bearing in mind that the issues are interrelated.
 14. Notably, the learned trial magistrate set out the appellant's averment in the amended plaint and analyzed his viva voce evidence as revealed in page 2 of the impugned judgment. The court noted that PW1 averred that he entered into a sale of land agreement with the 1st respondent's husband (deceased) on December 7, 1998 and took possession of the land in dispute. That when succession was carried out over the estate of the deceased, he was excluded from the distribution of the same hence, failed to get his portion.
 15. Also, the learned magistrate stated that the respondents denied the appellant's claim in the amended statement of defence. That the respondents never called any witness to rebut the appellant's assertion.
 16. Further, he remarked that this is a land matter; see also the observation made in [Mwangi and another v Mwangi](#) [1986] KLR 328 which is hereby approved unreservedly.



17. Moreover, the trial court took into account the totality of evidence on record and submissions of counsel for the respective parties. This is discerned in page 3 of the judgment.
18. The court held that PW1 did not produce any evidence relating to the death of the deceased vendor and an attempt to obtain consent from the land control board within the prescribed period. That the sale was void in the circumstances.
19. In *Kariuki v Kariuki* (1983) KLR 227, it was held that no general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent. That the only remedy open to a party to such a transaction recover money or consideration paid in the course of the transaction under section 7 of the *Land Control Act* (Cap 302 Laws of Kenya). In reexamination, PW1 stated that he is seeking a refund of the purchase price from the 1st respondent. However, the money paid and the manner thereof are not established as noted in paragraph 21 infra.
20. Regarding un-pleaded facts, I subscribe to the decision in the case of *Odd Jobs v Mubia* [1970] EA 476, where it was noted that a court may determine an issue if it appears in the course followed at the trial that it has been left to the court for decision. In the present matter, the trial court followed only facts pleaded including equitable remedies sought in the further amended plaint.
21. It must be noted that during cross examination, PW1 stated that;

“.....It is the same date the seller and I executed the agreement. There is no signature on the money paid later in instalment.....”
22. It was noted by the trial court that equity does not assist indolent. Undoubtedly, the learned trial magistrate followed the law including equitable principles anchored in Article 10 (2) (b) of the *Constitution of Kenya, 2010*.
23. In the circumstances, equitable remedies are not available to PW1 who neglected to show that he paid consideration in full to the deceased over the sale of the suit land in order for his claim to attract constructive trust and equitable estoppel as held in the case of *William Kipsoi Sigei v Kipkoach Arusei* [2019] KLR. Further, he exercised a great degree of indolence in the succession of the estate of the deceased.
24. It is abundantly clear that the learned trial magistrate correctly evaluated the evidence as he understood it. He analyzed the same in accordance with the law
25. It is therefore, the considered view of this court that the appellant failed to establish his claim against the respondent on a balance of probabilities at the trial court; see *Kirugi and another v Kabiya and 3 others* [1987] KLR 347.
26. To this end, the trial court’s judgment is quite sound at law. It is hereby upheld accordingly.
27. A fortiori, this appeal is devoid of merit. The same is hereby dismissed.
28. Cost of appeal and the original suit to be borne by the appellant.
29. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 7TH JUNE, 2023.

G.M. A ONG’ONDO

JUDGE

PRESENT



- a. Miss Amondi instructed by Sala learned counsel for the appellant
- b. Miss Ochieng instructed by Emmah Mawinda learned counsel for the 1st and 2nd respondents.
- c. Court Assistant, Okello.**

