



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 59 OF 2018**

**SALOME KAUNGA M'KUUBANIA..... APPELLANT**

**VERSUS**

**JOSEPH KIRUKI.....RESPONDENT**

***(Being an appeal from the judgment of D.O Onyango Ag. SPM-MERU delivered on 18/09/2014 in MERU CMCC 210 of 2007)***

**JUDGMENT**

1. The appellant being the defendant in the trial court was sued by the respondent vide a plaint dated 2/05/2007 seeking; an order of specific performance, in the alternative refund of the purchase price together with costs and interests.
2. It was the respondents' case that the parties entered into a sale agreement for land measuring 3 acres which was to be excised from parcel no. LR. No. ABOTHUGUCHI/IGANE/994 for a consideration of **(Kshs.450,000)**, of which the respondent paid **Kshs. 360,000** leaving a balance of **Kshs. 90,000** which was to be paid by the respondent upon official transfer of the land to him.
3. The respondent averred that the appellant actually subdivided the land parcel LR. No. ABOTHUGUCHI/IGANE/994 which gave rise to parcel LR. No. ABOTHUGUCHI/IGANE/1885 which was to be transferred to him. However, the appellant later changed her mind and refused, neglected or failed to transfer the said land and also refused to refund the purchase price already paid.
4. The Appellant filed her statement of defence dated 07/07/2007 denying that she ever received a single penny from the respondent, contending that the proceeds from the alleged sale were taken by her 3 children whom she would be seeking to enjoin in the suit. She added that it was an express condition of the agreement that the respondent would get his land from the said children after their shares had been transferred to them.
5. She further averred that the facts of the alleged sale agreement were not clearly explained to her by her children and thus they took advantage of her old age and ignorance of how to read and write. She was surprised that she sold the 3 acres, thereby depriving one of her sons a share of the family property.
6. The appellant did take out a third party notice to enjoin 3 of her children and a grandson to the suit. The 2<sup>nd</sup> interested party Ayub Kamundi filed his statement of defence dated 20/02/2009 where he joined issues with the plaintiff.
7. The 3<sup>rd</sup> interested party one Rebecca Kaimenyi filed her statement of defence dated 10/03/2009 averring that the appellant and the respondent did enter into an agreement for sale of land, however, only Kshs. 260,000 was paid by the respondent to the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> interested parties and she never got a cent. That she never agreed to have her share of the proceeds to be utilized by the 1<sup>st</sup> interested party for the education of the 4<sup>th</sup> interested party. She contended that only two acres should be transferred to the respondent and whatever exceeds the value of the two acres should be refunded back to the respondent by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> (*she must have meant 4<sup>th</sup>*) third parties. She also wanted the proceeds of the two acres shared in proportional terms.
8. The suit proceeded to hearing and on 18/09/2014 the trial court entered judgment in favor of the respondent: for an order of specific performance, the appellant to transfer 3 acres within 21 days to the respondent upon payment of the balance, failure to which the executive officer of the court was at liberty to execute all requisite documents to facilitate the transfer.
9. The appellant being aggrieved by the decision of the trial court filed her memorandum of appeal dated 14/12/2018 basing her appeal on four (4) grounds as follows:-

**i. That the learned trial magistrate erred in law and fact in the manner he analyzed the evidence on record, arrived at a wrong finding and therefore occasioned the appellant miscarriage of justice.**

ii. That the learned trial magistrate erred in law and fact by failing to find that the appellant being an old senior citizen was duped into selling her land without her knowledge.

iii. That the learned trial magistrate erred in law in failing to find that there was no consensus ad idem over the contract of 16/07/2005 and therefore the same was null & void.

iv. That the trial court findings were against the weight of evidence tendered.

10. It is noted that on 1.7.2020, the appellant sought leave to file an amended memorandum of appeal which leave was granted for the aforementioned document to be filed and served by 14/7/2020. However the amended memorandum of appeal was filed on 17/8/2020 going by the attached court issued receipt. As such, the same is disregarded.

11. The appeal was canvassed by way of written submissions. The appellant's submissions are anchored on the expunged amended memorandum of appeal. She avers that the respondent never adduced evidence to show that he had obtained consent for transfer from the land control board, that the learned trial magistrate erred in law and fact by failing to find that the only consent given was for subdivision and that no consent for transfer had been given. Further, that the learned trial magistrate erred in failing to order a refund of the purchase price. She relied on the cases of; Damson Muniu Njeru V William Kiptarbei Korir & 6 others [2014]eKLR, and Cecilia Nyambura Murunga V John Ndung'u Maina [2018]eKLR.

12. The Respondent on the other hand submitted that it is not in dispute that the parties entered into an agreement and that parties are bound by the terms of their contract, the appellant sub divided the land but later refused to effect transfer. The issue she raises that she is old and was duped has no consensus ad idem over the contract, since her intentions are discernible from the documents and the conduct of the parties. Further, that the onus is on the appellant to prove that the legal procedures were not followed as she is the one alleging so.

13. The respondent relied on the following cases; Emo Investments Ltd V Stephanus Petrus Kiinge [2010]eKLR, Storer V Manchester City Council [1974] 1 W.L.R. 1403, Mamta Peesh (Suing on behalf of the estate of the late Peesh Premal Mahajan) V Yashwant Kumari Mahajan (Sued personally and as executrix and beneficiary of the estate of the late Krishan Lal Mahajan [2017]eKLR, Willy Kimutai Kitilit V Michael Kibet [2018]eKLR, Elias Njue Ireri V Kubu Benson Nderi & 3 others [2019]eKLR and Gatobu M'ibuutu Karatho V Christopher Muriithi Kubai [2014]Eklr.

#### Analysis and determination

14. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and make its own determination having in mind that it did not have the advantage of hearing witnesses. See: Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123, Kenya Ports Authority vs. Modern Holdings (E.A.) Limited (2017) eKLR.

15. **Pw1** Joseph Kiruki Muriuki is the respondent. He testified that the appellant was to sell to him 3 acres at Kshs. 150,000 per acre, hence the total purchase price was sh. 450 000. He initially paid Kshs 100,000 to the appellant and later Kshs. 260,000 leaving a balance of Kshs. 90,000 which was to be paid upon transfer. The contents of the agreement were explained to them in Kimeru language and all parties including the appellant and her children who were also present understood and speak the language.

16. Pw1 stated that they obtained 2 consents in a period of 4 months after the agreement, the 1<sup>st</sup> consent was to subdivide the parcel, while the second one was for the transfer of the land. He produced the following documents in support of his case; The land sale agreement, the green card and mutation forms.

17. **PW2 Ayub Kamundi** averred that the appellant is his mother and during the signing of the agreement, the parties herein were present together with the appellant's children. Further, the contents of the contract were explained to them in kimeru and nobody complained of not understanding the same. The respondent first paid Kshs. 100,000 to the appellant upon execution of the first agreement at the firm of Mwenda Mwarania advocates, and a further Kshs. 260,000 upon execution of the second agreement before Kirima advocates, hence the appellant received a total of sh. 360 000.

18. Pw2 also stated that he actually saw his mother, the appellant receiving the money but they were all present. He is aware that the relevant consents were obtained within a period of 4 months from the date of the agreement.

19. **DW1 Salome Kiunga** is the appellant. She stated that she did not sell the suit parcel to the respondent, nor did she receive any money from him. She only recalls that her children escorted her somewhere though she cannot recall where they were going. That she was made to thumb/ sign documents but she did not know what was happening and she was crying. Further, that her son Samwel was not allowed into the advocate's office.

20. She averred that she was not aware that the parcel of land was sub divided. She has never reported to the police that she was conned by her children.

21. From the memorandum of appeal filed in this appeal and the submissions made in respect thereof, I find that the issue for the court's determination can be narrowed down to; **whether there was a valid sale agreement between the parties.**

22. I have gone through the evidence on record and I cannot help but notice that the appellant's testimony is full of holes, half-truths and loopholes. She averred that she could only recall that her children escorted her somewhere though she cannot recall where they were going, but then goes ahead to give details of the happenings in the office of not one but two advocates!. She claims that her son Samwel was not allowed into the office of the advocate but looking at the main agreement of 16.7.2005, the said Samwel Kubania is a witness to the sale

agreement.

23. She also stated in her statement of defence that if the 3 acres are transferred to the respondent, she will be depriving one of her sons a share of the family property. I do find it curious that the alleged son did not come to court or file any documents in court to try and protect his interest. Nor did the appellant avail the son known as Samwel as her witness to buttress her averments.

24. The appellant alleges that the Land Control Board Consent was never acquired. However, this was not an issue pleaded by the appellant before the trial court. It was therefore not a subject of contest in that court. In the supreme court case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2015] eKLR**, the court while dealing with a new issue not raised before the superior courts had this to say;

***“Suffice it to say that if this Court were to admit and determine such issues, the Court would be determining them in the first instance—which would be contrary to established principle, and to the design of the judicial system”.***

25. I have no doubts that the appellant is now a senior citizen. As per her ID Card availed during her testimony, she was born on 1938, which means she was around 67 years by the time she was entering into an agreement in year 2005. By then, she was aware of the happenings around her and was cognizant of events in her life, evidenced by the fact that she can recall the visits to the advocates. She thumb printed on documents. She even recalls that Samuel Kaberia was with her at the advocates’ office, and so was Luceto, Paul Kirimi Mbogo and Ayub Kamunde. She also comprehended the happenings in court and answered question in a clear and concise manner.

26. If indeed the appellant believed she was conned, the logical trend would have been for her to report the fraud. As the matter stands, she did not even plead that the agreement was unenforceable due to want of her consent. I am inclined to find that the appellant entered into the agreement willingly.

27. It is trite law that a court of law should not rewrite a contract between parties, See **Emo Investments Ltd V Stephanus Petrus Kiinge [2010]eKLR**. Thus the parties are bound by their agreement.

28. In conclusion, I find that the trial court made the correct findings in its judgment. In the circumstances, this appeal is found to have no merits. The same dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 14<sup>TH</sup> DAY OF APRIL, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 26.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**