



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MAKUENI**

**ELC APPEAL NO. 07 OF 2017**

**AGNES MUTINDI NDETEI.....APPELLANT**

**VERSUS**

**MICHAEL KILUU MUNG'ATA .....RESPONDENT**

**JUDGEMENT**

1. Agnes Mutindi Ndetei, the Appellant herein, filed this appeal against the judgement of the learned Principal Magistrate delivered on 30<sup>th</sup> June, 2015 sitting in Makindu PMCC 84 of 2009. In the impugned judgement, the trial court declined to declare the Appellant as the lawful owner of land parcel number 1451, Mangelete Settlement Scheme in addition to dismissing the suit with costs to Michael Kiluu Mung'ata, the Respondent herein.

2. The Appellant, being dissatisfied with the said decision filed the memorandum of appeal on 28<sup>th</sup> July, 2015, the same being dated on even date.

3. There are seven (7) grounds of appeal namely: -

- 1. The learned trial magistrate erred in law and in fact when he found that the appellant had failed to prove her case against the respondent.**
- 2. The learned trial magistrate erred in law and in fact when he found that there was no agency relationship between the Appellant and the Respondent.**
- 3. The learned trial magistrate erred in law and in fact when he found that the suit land belonged to the Defendant.**
- 4. The learned trial magistrate erred in law and in fact when he failed to appreciate that there was a fiduciary relationship between the Plaintiff and the Defendant.**
- 5. The learned trial magistrate erred in law and in fact by failing to appreciate that issues of ownership as between the Appellant and the Defendant.**
- 6. The learned trial magistrate erred in law and in fact when he took into account extraneous matters.**
- 7. The learned trial magistrate erred in law and in fact when he disregarded the whole of the Appellant's evidence including the findings by the clan members.**

4. Arising from the above, it has been sought from this court the following prayers: -

- a. That the judgement delivered on 30/06/2015 be set aside in entirety and that this Honourable Court to make its own findings.**
- b. That the costs of this Appeal and the court below be borne by the Respondent.**

5. Pursuant to the directions of the court issued on 5<sup>th</sup> June, 2020 the appeal was canvassed by way of written submissions.

6. I have perused the records of appeal dated 9<sup>th</sup> May, 2018 and 11<sup>th</sup> October, 2019 respectively. The latter is a comprehensive record of appeal comprising of the record of appeal dated 9<sup>th</sup> May, 2018, supplementary record of appeal dated 3<sup>rd</sup> May, 2019 and the record of appeal dated 4<sup>th</sup> July, 2019.

7. This being a first appeal, the court's duty was best outlined in the case of **Selle and Another -Vs- Associated Motor Boat Company Ltd and Others [1968] E.A. 123[CAZ]** where the Court of Appeal set out the duty of an Appellant Court as follows: -

**“An appeal to this court from a trial by High Court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has matter seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judges’ findings of fact it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally [Abdul Hameed Saif -Vs- Ali Mohamed Sholan (1955), 22 EACA 270].”**

8. I have perused the record of the trial court, the pleadings and the evidence and I do note that the dispute revolves around the ownership of land parcel number 1451 Mangelete Settlement Scheme. According to the Appellant the said land parcel is hers since she was the one who sent the Respondent to purchase it on her behalf.

9. In her evidence in cross-examination before the trial court, the Appellant told the court that she gave the money to the Respondent in the presence of George Kisivo (DW5). She however did not tell the trial court how the Respondent was to earn on the process. She also alleged that the Respondent fraudulently had the parcel of land registered in his name.

10. The Appellant called Mulei Musyoki (PW1) Habel Munyao Kasyoka (PW3) and Daniel Makau Mutiku (PW5) who all told the trial court that the Amutei and Atangwa clan meeting of 17<sup>th</sup> February, 2005 resolved that the said land parcel number 1451 Mangelate Settlement Scheme belonged to the Appellant and that she had given money to the Respondent to purchase it on her behalf.

11. On the other hand, the Respondent who testified as DW1 before the trial court asserted that he bought the parcel of land in question for his own use. He denied having ever received any money from the Appellant to purchase the land. He pointed out that the seller of the land in question was Sella Mwangeli Munyao (DW4).

12. The Respondent's evidence is supported by the evidence of Sella (DW4) who told the trial court that she sold her parcel of land to the Respondent and no one else. This is also what her son, Reuben Nzioka Munyao (DW3) told the trial court.

13. The certificate of registration in respect of land parcel number 1451 Mangelete Settlement Scheme produced by Abednego Mutunga Maithya (DW6) shows that it is registered in the joint names of the Appellant and the Respondent. However, the Respondent having denied ever been sent by the Respondent to purchase the said parcel of land Sella Mwangeli Munyao (DW4) having categorically stated that she sold the land in dispute to the Respondent, it was upon the Appellant to tender tangible evidence on how her name came to be in the demarcation register. I say so because even though the Appellant accused the Respondent of having fraudulently registered land parcel number 1451 Mangelete Settlement Scheme in his name, as was correctly stated by the trial court, she did not plead the particulars of fraud in her plaint.

14. Was there agency relationship between the Appellant and the Respondent? In the case of **Heifer Project International -Vs- Forest City Export Services Ltd and Another [2017] eKLR**, Ogola, J. while observing that an agency relationship can be created in several way stated thus;

**“According to Halbury Laws of England 4<sup>th</sup> Edition Volume 1(2) paragraph 19 and 20 a principal agency is created by the express or implied agreement of principal and agent or by rectification by the principal of the agents acts done on his behalf. Express agency is created where the principal or some person authorized by him, expressly appoints the agent whether by deed, by writing under hand or orally. I replied agency arises from the conduct or solution of parties.”**

15. In her evidence before the trial court, the Appellant said that she sent the Respondent to buy the plot for her and that the latter declined to give her papers when she sought for them. As a principal she appears not to have taken any action against the Respondent's recalcitrant attitude raising doubts if he ever was her agent.

16. Having reconsidered the evidence before the trial court and having evaluated it, the only conclusion that I can draw while bearing in mind that I neither saw nor heard the witnesses and therefore I make due allowance in this respect, the Appellant did not on a balance of probabilities prove that she was the owner of land parcel number 1451 Mengelate Settlement Scheme. There was no evidence that she had given the Respondent money as her agent to purchase the said land on her behalf.

17. The above being the case, the trial court cannot be faulted for arriving at the decision that it made in its judgement dated 30<sup>th</sup> June, 2015. In the circumstances, I hereby proceed to dismiss the appeal with costs to the Respondent.

**SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 2<sup>ND</sup> DAY OF SEPTEMBER, 2021**

.....

**MBOGO C.G.**

**JUDGE**

**Court**

**Assistant:**

**Mr.**

**Kwemboi**