



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 203 OF 2014

GEOFFREY MUTIE MUTUNGA.....APPELLANT

VERSUS

WILSON MUTUNGA MBAL.....RESPONDENT

(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos

in Civil Case No. 28 of 2013 delivered on 28th August, 2014 by

Hon. L. Simiyu, Ag. Senior Resident Magistrate)

JUDGMENT

1. The Appellant is challenging the Judgment of the lower court (*Hon. Ag. Senior Resident Magistrate L. Simiyu*) delivered on 28th August, 2014. The Appellant's Appeal is comprised in his Memorandum of Appeal in which he has averred that the learned Magistrate erred in law and fact by failing to appreciate that the burden of proof lay on the Respondent.
2. The Appellant has further averred that the learned magistrate erred by finding that the Plaintiff was illiterate and that the learned magistrate erred when he disregarded the evidence of the parties.
3. The Appellant has further averred that the learned Magistrate erred by finding that the Respondent was illiterate and that the learned Magistrate erred when she disregarded the evidence of the parties.
4. The Appeal proceeded by way of written submissions. In his submissions, the Appellant's counsel submitted that the Respondent sued the Appellant in Machakos CMCC No. 28 of 2013 for an order that Share No.1234 held at Konza Ranching & Farming Co-operative Society (*the Society*) be rectified by deleting the name of the Defendant (*Appellant*).
5. The Appellant's counsel submitted that the Respondent's case was that he was the original Member No. 1254; that he was entitled to parcel number 1190 and 1191; that he had given to the Appellant the membership card number 1254 as a custodian and that the transfer of the share to the Appellant was fraudulent.
6. According to counsel, the Appellant denied the Respondent's assertion and that the Respondent did not proof his claims. The Appellant's counsel submitted that it is the Respondent who signed the transfer forms to transmit Share No. 1254 to the Appellant; that the evidence of the Appellant and his witness on the execution of the transfer was not challenged and that the Respondent admitted in his evidence that he transferred to the Appellant agricultural plot number 1190.
7. The Respondent's advocate submitted that it is not in dispute that membership number 1254 originally belonged to the Respondent who is the Appellant's father; that the said share gave rise to land measuring 10 acres which he gifted to the Appellant and that the Appellant transferred share number 1254 to himself thereby disinheriting his siblings.
8. The Respondent's advocate submitted that the Respondent was duped to sign the transfer of shares disguised as the transfer of 10 acres that he had bequeathed to the Appellant; that the learned Magistrate correctly found that the Respondent is illiterate and that the Magistrate was right in invoking the doctrine of *non est factum* which is a plea that a written agreement is invalid because the Defendant was mistaken about its character when signing.
9. This being a first Appeal, it will be in order for the court to evaluate the pleadings and evidence that was tendered in the lower court and

arrive at its own conclusion.

10. In the Plaintiff that was filed in the lower court, the Plaintiff (*Respondent herein*) averred that he is the father of the Defendant (*Appellant*); that he was the original shareholder of share number 1254 and that the said share gave rise to parcel numbers 1190 and 1191.

11. According to the Plaintiff (*Respondent*), in the year 2000, he gave the Defendant (*Appellant*), who is his eldest son, the membership card number 1254 for safe custody; that in the year 2012, he found out that he was no longer a member of Konza Ranching & Farming Co-operative Society Limited and that he also discovered that the Defendant (*Appellant*) had been registered as a member of the Society using his card in the year 2005.

12. The Respondent finally averred that due to his age and illiteracy, he was duped to sign documents transferring his share and the entire land to one child, the Appellant; that he has more than ten (10) children and that the Appellant's actions have disinherited his other children. The Plaintiff (*Respondent*) sought for an order that the register of share number 1234 held at Konza Ranching and Farming Co-operative Society be rectified to remove the name of the Appellant and substitute it with the name of the Respondent.

13. In the Defence, the Defendant (*Appellant*) pleaded that on 16th August, 2006, the Plaintiff, of his own will and in the presence of one Nguku Mbai and the Chief voluntarily executed transfer forms transferring his Share No.1254, which transfer was approved by the officials of the Konza Ranching and Farming Co-operative Society Limited upon payment of the requisite fee to the Society.

14. In his evidence, the Respondent, PW1 told the trial court that the Appellant is his son; that his son fraudulently took his share number 1254 held at Konza Ranching & Farming Co-operative Society Limited and had it transferred in his name and that when he attended balloting at the Society in the year 2012, he learnt of the said fraudulent transfer of his share.

15. In cross-examination, PW1 stated that the Appellant is his first born son; that he only bequeathed the Appellant 10 acres out of share number 1254 and that instead of taking only 10 acres, he acquired the entire land.

16. It was the evidence of PW1 that the Society gave him 10 acres before adding him an additional 10 acres and that he believed that the transfer forms he was signing were in respect to only 10 acres and not the entire land.

17. The Respondent's brother, PW2, informed the court that the Respondent was denied from balloting for land by the Society in the year 2012; that by that time, his son, the Appellant, had become a member of the Society and that he was not aware if the Respondent had transferred the entire land to his son, the Appellant.

18. The Appellant's brothers, PW3 and PW4, informed the court that the Appellant had share number 1254 fraudulently registered in his favour. However, none of them was present when their father transferred the share to the Appellant.

19. The Appellant, DW1, informed the trial court that on 16th August, 2000, his father summoned him, together with his wife, to the Chief's office, Kola; that in attendance was his wife, his mother and Nduku Mbai (*deceased*) and that he (*the Respondent*) voluntarily executed transfer forms transferring the shares to him. DW1 stated that after signing the transfer forms, he surrendered the same to the Society whereafter he was registered as a member of the Society.

20. In cross-examination, DW1 stated that he became a member of the Society on 20th December, 2006; that he bought share number 1254 from his father; that the transfer forms were in English and that his father could not read English.

21. It was the evidence of DW1 that although his father has two wives, there was no representation from the second wife during the signing of the transfer forms and that the share was given to him as a gift.

22. The Appellant's mother, DW1 informed the court that she was present when her husband, PW1, transferred his share number 1254 to the Appellant. The Assistant Chief of Katangaini Kola Location, DW3, stated that he witnessed the signing of the transfer of share number 1254 by the Respondent to the Appellant and that he spoke to the parties before they appended their signatures on the transfer forms.

23. After evaluating the evidence before him, the learned Magistrate found, and correctly so, that the only contest in the matter is whether or not the Plaintiff's consent or signing of the transfer forms is vitiated by the illiteracy of the Plaintiff (*Respondent*) and as to whether *non est factum* can be pleaded. The doctrine of *non est factum* was defined in the case of *Saunders (Executive of the Estate of Rose Maude Gallie) vs. Anglia Building Society (1970)3 ALL ER 961* as follows:

“The plea of non est factum can only be really established by a person of full capacity and though it is not confined to the blind and illiterate any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of the meaning...”

24. In the case of *Gallie vs Lee (1969)2 Ch. 17 Lord Reid* held as follows:

“The doctrine may apply to those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular case.”

25. After analyzing the above two cases on the plea of *non est factum*, the learned Magistrate held as follows:

“... it is not denied that the Plaintiff is illiterate and could not have filled the forms of transfer by his hand and could only rely on interpretation as given to him by his son and DW3 given that the maker of the form was not called to testify and no evidence was called to show that the Plaintiff was accompanied by a literate witness who could ascertain that the Plaintiff benefited from an accurate interpretation of the deed... I have evaluated the evidence in total and find that the Defendant who is literate exploited the illiteracy of the Plaintiff to fleece him...”

26. It is not in dispute that the Respondent was member number 1254 of Konza Ranching & Farming Co-operative Society Limited. According to the membership card that was produced in evidence, the Respondent became a member of the Society on 27th February, 1982.

27. The Respondent admitted that he transferred the said share membership to the Appellant on 17th August, 2006. Indeed, before the said transfer, the Respondent had handed to the Appellant the membership card for safe keeping.

28. The evidence of the Respondent was that while signing the transfer form, he believed that he was transferring to the Appellant only 10 acres of land and not 20 acres, and that it was not his intention to transfer the entire land measuring 20 acres to the Appellant.

29. The Respondent further told the court that it was only in the year 2012, when he went to the Society to “ballot” for land, that he was informed that he was no longer a member of the Society.

30. The evidence before me shows that what the Respondent transferred to the Appellant on 17th August, 2006 was not land measuring 20 acres but his membership in the Society. Indeed, the transfer form that he signed did not show the acreage of the land that he was transferring to the Appellant.

31. From the Respondent’s own evidence, it was in the year 2012 that the balloting of land was undertaken by the members of the Society. It would appear that the Respondent realized in the year 2012 that all members of the Society were entitled to 20 acres of land in the Society, and not in the year 2006.

32. That being the case, it was dishonest on the part of the Respondent to state that all along, he only intended to transfer to the Appellant 10 acres of land within the Society. I say so because he did not know the amount of land the Society would distribute to each member in the year 2006.

33. In any event, the transfer forms clearly shows that the only issue that was being traded in the year 2006 was the membership of the Respondent in the Society. The Sub-Chief of the Area, DW3, informed the court that he witnessed the Respondent sign the transfer form, and that he explained to him the contents of the transfer. Having been explained about the content of the transfer form, which was only in relation of the transfer of his membership and not land, the doctrine of *non est factum* is not applicable.

34. Indeed, the doctrine of *non est factum* is only applicable where a person is misled into signing a document and not where a person signs a document without informing himself of the meaning of the document.

35. The evidence before the learned Magistrate shows that the Respondent was aware that he was transferring his membership number 1254 to his son, the Appellant. The Respondent also knew that the Appellant will be entitled to whatever acreage of land that the Society would give to its members. Having voluntarily transferred his share, he cannot, after more than six (6) years of the said transfer, claim that the Appellant was only entitled to a portion of the land that the Society was to allocate to each member.

36. Having voluntarily transferred membership number 1254 to the Appellant, and the said transfer having been explained to him by the area Assistant Chief, the Respondent was fully aware that he had ceased being a member of the Society. The issue of other children being disinherited by the Appellant does not arise, more so considering that the suit land is not ancestral land.

37. In the circumstances, and for the reasons I have given above, I allow the Applicant’s Appeal. The Judgment of the court in Machakos CMCC No. 28 of 2013 delivered on 28th August, 2014 is hereby set aside. The Respondent’s Plaint in Machakos CMCC No. 28 of 2013 is dismissed with costs. The Respondent shall also pay the costs of this Appeal.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020

O. A. ANGOTE

JUDGE