



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 23 OF 2010

MM.....APPELLANT

VERSES

ZEPHANIA KHISA SAULO.....RESPONDENT

(Being an appeal from the decision of Hon. E. Obina (R.M))

in Kitale SPMCC NO. 266 of 2005

(BETWEEN ZEPHANIA SAULO VS. MARY MAKIO)

JUDGEMENT

1. The facts leading to this appeal are clear and straight forward. The appellant is the administratrix of the estate of the late **PM** who was her husband. It was contented at the trial court that the deceased sold land parcel number **347 ZEA ADC** to the respondent on 24th April, 1999 for a total purchase consideration of Kshs. 260,000 which he paid in full. It was later discovered that the land did not belong to the deceased but to his son, one **DM**. The deceased unfortunately died thereafter before transferring the suit land to the Respondent.
2. The Respondent was in the process of utilising the land when he was stopped by the Appellant and he found someone else utilising the land. Efforts to have the land transferred to him were fruitless and this necessitated him to file the suit in court for the refund of the purchase consideration.
3. The Appellant filed her defence in which she denied that there was an agreement of sale between the deceased and the Respondent and that if there was one then the same was a forgery for the reason that the deceased could not enter into any agreement as he was critically sick from brain cancer which eventually led to his death.
4. The matter then proceeded to full trial where the Respondent testified and produced his exhibits including three sets of agreement in respect to land parcels numbers **347, 348** and **453** all at ADC ZEA. He said that he purchased the above parcels of land at the cost of kshs. 260,000 each. Each one of them was measuring 5 acres.
5. He went on to state that he paid the consideration in instalments and part of the amount of kshs. 50,000 was paid to the deceased through the Appellant.
6. **PW2 JACKSON NYONGESA** testified that he was aware of the transaction and he received part of the money from the Respondent and he transmitted to the deceased. He was present when they went to J. M. WAFULA Advocate to sign the agreement which he witnessed. He said that the deceased was in good health and did not raise any issue regarding his inability to sale the land.
7. The Appellant testified denying that the deceased sold land to the Respondent. She said that the deceased was so sick that he could not have been in a mental position to undertake any contract. She produced some medical documents to support her claim. She went on to state that the Respondent ought to have called Advocate Wafula to testify on the veracity of the agreement.
8. The court then ordered the parties to file written submissions so as to dispose the said appeal. The court ha perused the two opposing submissions and does not intend to re- produce the same.
9. The court shall disallow the appeal for the simple reason that having gone through the judgement by the trial court, the issues raised by the Appellant in her appeal stands no chance of success.

10 . First of all, the evidence on board showed that the agreement was among the other two agreements drafted on the same day namely that is 26th April, 1999 in respect to parcel numbers 348 and 357. The agreement has not been challenged in any process whether criminal or otherwise on its veracity. To simply state as she did in her defence and in her submission that the same was a forgery is too simplistic.

11 . There is no forensic evidence to indicate that the signatures of the parties were forgeries or at all. The Appellant at the time of filing her defence and prosecuting this case had sufficient time to undertake any forensic exercise. This is critical for the reason that the Appellant alleged that the deceased was too sick to have undertaken any contractual agreement.

12 . Although the late Wafula advocate was not called to testify and shed light on the agreement the same was produced without any objection from any quarters least of all the appellant.

13 . Neither was any evidence led to suggest that the deceased was incapacitated and thus unable to participate in the contract. It is noted that he died on 27th May, 2000 which was about a year after the agreement was signed. No medical report other than the receipts from the hospitals as well as the certificate of death were produced to support this assertion.

14 . The said agreement in my view squarely fell within the provisions of Section 3 (3) of the Law of Contract which states;

“No suits shall be brought upon a contract for the disposition of an interest in land unless

(a) The contract upon which suit is founded

(i) Is in writing

(ii) Is signed by all the parties hereto

(iii) The signatures of each party signing has been attested by a witness who was present when the contract was signed by such party”

15 . In a nutshell there was no fraud proved against the Respondent or at least the late Advocate Wafula who prepared the agreement.

16 . It was alleged that the agreement had been voided by effluxion of time, in other words it was time barred. That issue was well captured by the trial court which correctly found that the last instalment was paid before the expiry of 6 years and in fact the money was received by the Appellant, a fact which she has not denied.

17 . In the premises this appeal is not meritorious. The Appellant through her late husband received the sum from the Respondent with full knowledge that the land was in the name of their son. This has not been disputed. It is therefore unethical to hold the purchase consideration for all that time yet they are unable to perfect the contract.

18 . The appeal is disallowed with costs to the Respondent.

Dated, signed and delivered in open court at Kitale this 8th day of April, 2020.

H. K. CHEMITEI

JUDGE

8/04/2020