



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 104 OF 2014

OMAIKO MOMWAMU.....APPELLANT

VERSUS

JOHN OLE KILUSU..... RESPONDENT

(Being appeal from the Judgment/Decree in Kilgoris SPM Civil Case No. 69 of 2011) (Hon. B.O. Ochieng' Ag. SPM.)

JUDGMENT

1. This appeal arises from the decision and judgment of the Senior Principal Magistrate at Kilgoris in **CMCC No. 69 of 2011**, in which the appellant, **Omaiko Momwamu**, filed a claim against the respondent, **John Ole Kilusu**, for a declaration that he owns 50% of the investment in a farm described as Land No. 150 situated in Mapasha Location Keyani Division in Transmara District and for a permanent injunction restraining the respondent or his agents from denying him access to the said parcel of land and enjoyment of fruits of his labour.

2. The appellant also claimed a share of the investment between him and the respondent in equal measure as well as general damages coupled with costs of the suit and interest.

In the plaint dated 14th November 2011, the appellant pleaded that on the 28th April 1997, he entered into an agreement to do joint farming business in the respondent's land aforementioned. That, it was a term of the agreement that the respondent was to provide the land and he (appellant) was to provide farm input and labour through provision of capital for the venture and proceeds were to be divided in equal share.

3. That, based on the agreement, a total number of 5640 tea bushes, 3500 blue gum trees, 120 banana and 1400 coffee trees and 70 Avocado trees were planted and had matured. That, on several occasions in the month of May 2011, the respondent used his son to harvest mature trees and sold them without informing him (appellant) and without him receiving any money thereof. That, on the 23rd August 2011, the respondent instructed the assistant chief Mapasha sub-location to issue a notice to him (appellant) not to set foot to the material land thus attempting to terminate the agreement.

4. The appellant further pleaded that the respondent refused and/or failed to honour the agreement to pay to him equal share of the investment thereby causing him to suffer damages by loss of his 50% of the farm proceeds and investment. The appellant therefore prayed for judgment against the respondent as prayed in the plaint.

5. The respondent's statement of defence was a denial of the appellant's claim and in particular that he ever entered into an agreement for purposes of carrying out and/or conducting a joint farming business

with the appellant either on the 28th April 1997, or at all.

Alternatively, the respondent contended that if there was any agreement and/or relationship entered into between him and the appellant, then it was a license which has since been terminated thereby depriving the appellant of any interest and/or rights in the suit land.

6. The respondent denied that any tree bushes, blue gum trees, coffee trees, avocado trees and bananas were ever planted on the suit land by the appellant and contended that the appellant's suit against him was misconceived, bad in law and legally untenable. He thus reserved the right to raise a preliminary objection on the same.

Otherwise, the respondent prayed for the dismissal of the suit with costs.

7. The learned trial magistrate considered the appellant's suit in the light of the evidence adduced in support of each party's pleadings and eventually rendered his judgment on the 20th August 2014, dismissing the appellant's suit with costs to the respondent. The appellant was aggrieved by the said judgment and preferred the present appeal on the basis of the grounds in the memorandum of appeal dated 16th September 2014.

8. At the hearing of the appeal, learned counsel, **Mr. Ochang'**, appeared for the appellant while the learned counsel, **Mr. Oguttu**, appeared for the respondent.

In his oral submissions, Mr. Ochang', stated that an agreement was entered between the appellant and the respondent on the 28th April 1997, whereby the respondent was to provide land for which a joint farming venture would be carried out and proceeds therefrom be shared on a fifty-fifty basis. The appellant's role was to provide the necessary materials for the venture.

9. The arrangement or agreement had previously existed between the deceased parents of the appellant and the respondent and what the appellant and the respondent did was to continue with it and did so for more than ten (10) years. In the process farm implements and crops were provided by the appellant. Trees were grown and harvested and sold to Kenya Power Ltd but on the 20th August 2011, at the instance of the respondent, the appellant received a letter from the area chief asking him to vacate the farm land. It was after that, the appellant filed a suit against the respondent at the Kilgoris Magistrate's Court.

10. Mr. Ochang', continued to state that the appellant's suit was dismissed by the trial court and that is why they preferred the nine (9) grounds of appeal.

Learned counsel faulted the trial court in failing to find that the alleged agreement was a contract capable of being enforced yet it was properly drafted with proper description of the farm land which description was not disputed by the respondent and hence the need to produce a search certificate did not arise as it was a non-issue.

11. Learned counsel contended that the agreement was a contract which was special in nature such that its duration could not be specified as things like trees normally take long to grow. That, the agreement was a valid contract capable of being enforced.

Learned counsel stated that the respondent merely denied the existence of the agreement and also disowned it with a rider that he was away in Turkana when it was made.

12. Learned counsel further submitted that the trial court erred in finding that the respondent did not participate in the contract as the finding was against the weight of the evidence. That, the appellant could not pray for special damages as his claim was not for such damages but for a declaration.

Learned counsel contended that the appellant was denied his investment in the farm as a result of the errors of the trial court which was too strict in the application of the law thereby causing tremendous loss

to the appellant who remains stressed to this day.

Learned counsel urged this court to allow the appeal.

13. As for the respondent, it was submitted by Mr. Oguttu, that the document alleged to be an agreement was not a contract in terms of the Law of Contract Act (S.3(1)). Besides, any contract concerning the disposal of an interest in land must be in writing and must specify the agreed terms, but the material document fails to give description of the subject property and the agreed period of the agreement.

14. Learned counsel went on to state that the agreement was according to the respondent never executed and it was therefore correct for the trial court to find that the agreement was indeed not properly executed and was unlawful. That, the appellant's complaint that the court was strict in the application of the law was not fair as the role of all the judicial officers is to apply the law.

15. Learned counsel submitted that the consent of the Land Control Board was not sought as required by S.6 of the Land Control Act and therefore the document alluded to herein was untenable as a contract. That, this claim was premised on an alleged breach of contract by the respondent and hence, the claim of fifty fifty share. That, general damages are never awarded for breach of contract.

16. Learned counsel contended that the appellant's claim was untenable and that the claim for 50% of the shares was in the nature of special damages capable of being ascertained and quantified and in that regard, an agricultural extension officer (PW 2) was called to testify. That, the alleged loss showed that the damages were quantifiable and indeed ought to have been quantified before the suit was filed.

17. That, it was a misconception for the appellant to claim that this was not a claim for special damages.

Learned counsel contended that there was no legal agreement between the appellant and the respondent in view of the appellant's contention that the agreement was entered into between the father of the appellant and the father of the respondent and that it continued even after the death of both parents. That, the respondent indeed denied having signed any contract with the appellant.

18. It was also submitted by learned counsel, Mr. Oguttu, that there was no prove from the appellant that the agreement was signed by the respondent and indeed, the appellant did not prove his case before the lower court. That, the agreement never contained the number of the subject land yet the same was indicated in the pleadings which are not a party's evidence.

Learned counsel contended that this appeal lacks merit and urged this court to dismiss it with costs.

19. In the rejoinder to the respondent's submissions, the appellant through his counsel indicated that the agreement between the fathers of the parties was not in writing and this was rectified by the parties reducing it into writing. That, the agreement did not have to be in writing as there was no interest in the land being transferred. That, although the claim for 50% was quantifiable this was not done, but the court could award the claim on the basis of the evidence availed.

20. The appellant contended that the terms of the contract were clearly ascertained in that the parties were to share on a fifty fifty basis. That, strictness in the application of the law sometimes leads to injustice as it has done in this case.

The respondent indicated that the chief who drafted the agreement could not be availed to give evidence because he was since deceased.

21. This court has given due consideration to the rival submissions in the light of the grounds in support of the appeal and being the first appellate court its duty was to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Selle Vs. Associated Motor Board Co. (1968) EA 123** and **Mwanasokoni Vs. Kenya Bus Services Ltd (1985) KLR 931**).

22. In that regard, the evidence led by the appellant **Omaiko Momwamu or Omichael Mwinamu Ombaso (PW 1)** and that of his witnesses, **Charles Mathew Ngugi (PW 2)**, and **Henry Nyabuto Mbera (PW 3)**, was reconsidered along that given by the respondent, **John Oke kilusu or John Kalusu (DW 1)**, who did not call any witness.

23. In considering the evidence in its totality, the trial court arrived at the conclusion that the appellant's case was not proved and was therefore suitable for dismissal.

In so concluding the trial court found that the alleged agreement (P.Ex 1) appeared to be a contract but was invalid for enforcement as it lacked the basic ingredients of a contract such as duration clause, the description of the contractual undertaking and perhaps the respondent's signature.

24. The trial court also found that general damages are not awardable for breach of contract and that the claimed special damages were not pleaded nor quantified by credible evidence nor proved by appropriate evidence.

Further, the trial court found that the property or land subject of the contract was not identifiable in terms of description, measurement and ownership.

25. In the opinion of this court and from the pleadings and the evidence in support thereof, it was apparent that the appellant's claim was based on an arrangement which one may call a gentleman's agreement but which was not reduced into writing and if it was the necessary ingredients of a valid enforceable contract were not incorporated therein.

The agreement was essentially for sharing of profits in a joint business venture rather than for an interest in land. The requirements for a valid contract in such interests did not apply in the circumstances of this case. Neither did the requirements of the Land Control Act.

26. The agreement could therefore be oral or in writing. Herein, it was said to have been in writing (P.Ex 1) and was made on 28th April 1997 by the Chief of Enoosaen Location in Kilgoris.

The respondent disowned the agreement and denied that he affixed his signature thereon. It thus became incumbent upon the appellant to prove by necessary evidence that the signature on the agreement presented as being that of the respondent was actually and truly that of the respondent.

27. However, no such evidence was availed by the appellant. The chief who made the agreement and had it signed in his presence was not called to testify. The appellant explained that the said chief passed away, but even then, the appellant did not call the chief's representative to testify. It is instructive to note that the stamp appearing on the agreement is an official stamp from a public office. Any other official from that office should have been called to represent the deceased chief in confirming as alleged by the appellant that the agreement was indeed signed by the respondent.

28. In the absence of evidence to show that the agreement was meant to be a contract valid for enforcement, the appellant's claim based on it was clearly untenable. There was doubt as to whether the respondent was privy to the agreement. He could not therefore be affected by the rights and duties arising therefrom.

The doctrine of privity demands that only parties to a contract may be affected by the rights and duties arising from it.

29. It is therefore the finding of this court that there was no proper agreement between the appellant and the respondent and the document (P.Ex 1) represented as the said agreement was not valid for enforcement. It was not binding on nor enforceable against the respondent.

30. Further to all the foregoing factors it was apparent that the appellant's claim was also for special damages in as much as the appellant pleaded that he suffered loss of 50% of the proceeds of the alleged

business venture and in as much as he led evidence through an expert in agriculture (i.e PW 2) in an attempt to establish the monetary value of the bananas, coffee trees, tea bushes and fruit trees said to have been planted in furtherance of the alleged business venture.

The special damages could not be awarded by the trial court as intended by the appellant for the simple reason that they were neither specifically pleaded nor specifically established.

31. It was far-fetched for the appellant to expect the trial court to award him unpleaded and unproven special damages as a matter of charity or sympathy.

At times, justice may be blended with sympathy but the circumstances of this case did not call for that as all along the appellant had the advantage of being represented in this matter by a legal counsel who ought to have known the proper claim to lodge against the respondent good cause allowing.

32. Suffice for this court to hold that none of the appellant's grounds of appeal were sustainable in view of all the factors foregoing.

In the end result, this court upholds the judgment of the trial court dismissing with costs the appellant's claim against the respondent. This appeal is clearly devoid of merit and is hereby dismissed with costs to the respondent.

Ordered accordingly.

J.R. KARANJAH

JUDGE

[Delivered and signed this 12th day of May 2016].