REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Appeal 25 of 2006

JOHN MATUKU …… ……APPELLANT

VERSUS

ALICE WAITHERA ……..……..……RESPONDENT

JUDGMENT

John Matuku the appellant was sued by the respondent (Alice Waithera) who sought orders for vacant possession of plot No. 43 Malindi – Maweni.

(2) Mesne profits with effect from 17th November 2003 until vacant possession.

(3) Interest at court rates

The background to these prayers was pegged to the pleadings which stated that the respondent is the owner of plot No. 43 Malindi – Maweni, the same having been allocated to her by the Maweni Land Committee.

Sometime in the first quarter of the year 2000 the respondent met the appellant at Redeemed Gospel Church in Malindi and got impressed with his commitment in church. Since she had no natural child of her own, she bequeathed her estate vide a written commitment note dated 15th July 2000, on condition that the appellant builds himself and respondent a house each, on the plot.

Appellant accept the offer but failed to build a house for the respondent as they had agreed and he eventually ejected the respondent from the suit premises claiming that her interests were extinguished when she wrote a will in his favour. As a result of that action, respondent revoked the will dated 15th July 2000 and sought for vacant possession of the plot.

Appellant's defence was that there was no condition requiring him to build a house and that the commitment note was motivated by respondent's desire to obtain protection and security from him.

He denied ejecting respondent from the premises, saying she left out of her own free will after staying with him for a week, and he is not aware of any will made by respondent in his favour nor is he aware of its revocation.

In her evidence presented to the trial court, the respondent (PW1) described how she met the appellant and they became close – relating as a mother and son; and she eventually disclosed to appellant that she had a plot in Marereni on which he could stay with her until her death, when she would leave the plot to him. Appellant said he would construct, but he was hampered financially. Respondent helped appellant to dig holes, then let him to construct after showing him the portion on which he was to construct two rooms, - one for him and one for her and leave space for a church. She had stayed in the plot and even dug a toilet which appellant uses todate. However, respondent's house collapsed in 1999. Appellant completed construction using his own materials i.e wood and iron sheets, it was a small house fitting only a bed and sitting space.

He then constructed and completed a stone house, but failed to construct one for respondent, despite her many requests saying he had no money. They held discussion about the relationship in the presence of a church elder, but the minute he left, appellant threw out respondent and her property. On cross-examination respondent stated:

> ***"I also confirmed that if I die, he would remain with my property… to me he would be the owner of the plot after I die, not before I die. He would then take all my property and kept assuring me … kept saying he would construct me a mud house… He did not obey his obligations"***

She also sought to be paid Kshs. 3000/- per month for using her land from 1-11-03. She explained that the condition requiring appellant to build for her a house was not contained in the agreement. Due to his throwing her out of the premise, the respondent wants the appellant out together with his belongings and she is unwilling to compensate him anything.

She confirmed signing a document which was written by the appellant in which she confirmed that if she died, the appellant would remain with her property.

"John Wesley Sulubu Mamukuzo (PW2) who knew both appellant and respondent even before their differences arose testified before the trial court that he was requested to arbitrate between the two parties – he visited the suit plot when the two disagreed and saw respondent's property which were placed outside and the house was locked – he talked to them.

Appellant said he wanted to build for respondent a bit far but respondent had declined, saying that portion was for the church – they disagreed as respondent insisted on a particular spot. PW2 tried to persuade appellant to allow respondent back into the house but he declined.

The appellant in his defence stated that respondent had a vacant plot in Maweni and she requested him to go there and construct as she feared that someone would take it away - this was in June 2000. She explained that she had no husband or son to protect her and she offered to take appellant as her son. Appellant confirmed moving into the plot with his wife and constructed a semi-permanent a house on half the portion of the plot …..he constructed a permanent house. He left the other portion of the plot for respondent to either sell or construct on it – he only heard about the church in court.

As far as he was concerned, he was given the plot as respondent's son, and it was his to keep and respondent instructed appellant to write a note to that effect. He maintained that there were no conditions contained in the deal and there was no agreement that he would also build for her. Sometime in 2004, respondent informed appellant that she had been given notice to vacate the place she had been living at Kibiribiri and she had nowhere to go and appellant told her to go to his

house – so she, brought her property and kept them in appellant's house, except for her big bed which could not fit in there. She slept in a kitchen which had been used as a sore.

In the morning, she declined to take tea and said each one of them should stay on his/her own. Respondent then left and when appellant returned at 10.00am, he found the respondent had removed all his items from the kitchen. Appellant went to see a village elder one Kazungu Mandan, who directed him to put back his property – he did so, after letting respondent know about it.
He confirmed that Sulubu (PW2) tried to arbitrate on the matter but not much was achieved.

On cross-examination appellant stated as follows:

> ***"I have not inherited the plot from her. She has a daughter and she did not want her to disturb me. I have inherited the plot. In our Kamba customs, one can inherit even before the donor dies. His defence is that the plot was given to him without any conditions."***

DW2 Pastor Julius Munyambu simply gave evidence as to what appellant told him and the fact that there was a portion left vacant, reserved for respondent in case she returned.

In his judgment, the trial magistrate noted that the case was based on the effect of the agreement note dated 5th July 2000 and observed that the contents thereof were drawn by parties who were not professional draftsmen where respondent dictated her wishes and appellant wrote them down and that she then signed. He noted that respondent was illiterate and therefore could not verify the contents of the note by reading the same – the note seemed to state;

"I have given and registered him"

And ***"in case something happens he is the one to inherit this property"***

The trial magistrate correctly noted that whereas one part of the note suggested that appellant had been given and registered as holder of the land, the second part suggested that appellant would only inherit the land if something (probably death) of respondent arose. The trial magistrate considered the background leading to writing of the note, finding that it was prompted by respondent's worry that she would die and leave her plot bona vocantia or without its owner, and having had such a close relationship with the appellant, she found him to be the best placed person to be granted rights over that property written in anticipation of death, and the property would only pass on to the appellant upon death of respondent. The trial magistrate stated as follows;

> ***"….any items given during the life of the donor would not be an inheritance but rather a gift …I therefore find that plaintiff had intended that defendant inherit the property and not that the same was given as a gift inter vivos.***
> ***Consequently on the basis of this note, the defendant did not act properly by moving into the land and putting up his permanent house while plaintiff is still alive"***

The trial magistrate considered appellants' claims that there were further oral agreements between the two of them and was persuaded that the only reason why differences arose between them was because once appellant moved into occupation, he ejected the respondent from the land and left her with no place of abode.

Further that the purported oral agreements did not in any way negate or water down the written agreement dated 15th July 2000 and they constituted separate agreements which appellant breached by claiming inheritance rights over the

land.

As to why plaintiff (respondent) did not stop appellant carrying on with construction, the trial magistrate found that she had no mandatory duty to stop him as she still hoped that appellant would carry out his part of the bargain and put up a house for her, especially because for the land and he held that:

> ***"The issue of whether there is still an unoccupied part of the land does not offer the defendant any reprieve as his stay on the land is itself unlawful."***

With regard to refund for costs of construction, the trial magistrate absolved the respondent saying appellant was the author of his own misfortune by being in breach of the agreements and must bear his own costs and thus ordered for vacant possession. He found that the mesne profits sought by respondent were not proved and dismissed that prayer.

The appellant contests these findings arguing that the trial magistrate erred in not finding that respondent had validly given a gift to the appellant.

(2) The trial magistrate erred in not finding that a voluntary assignment of a gift as irrevocable.

(3) The trial magistrate erred in failing to appreciate hat the appellant already had a permanent structure on the suit premises.

At the hearing of the appeal, Mr. Mouko submitted on behalf of the appellant that respondent had given the plot out of her own free will – having invited him to go and occupy it. He pointed out that appellant constructed thereon a house worth Kshs. 98,000/- the note written by appellant and signed by respondent, sealed the basis of that letter and that the plot became an irrevocable gift and that the lower court erred in interpreting the contents of that note to mean that appellant would only possess and use the plot after respondent's death.

As regards construction of a house, for respondent, Mr. Mouko's contention is that those were oral agreements and the rules of evidence, especially section 97 of the Evidence Act, does not allow a party to challenge evidence that is in writing, with oral evidence and there is no evidence of conditions attached to the document.

He urges the court to find that respondent was not ejected from the plot, but moved out of her own choice. He further submits that appellant had permission, consent and authority of respondent to construct a plot on the premises and to allow respondent onto the plot with the house would be to unjustly enrich her and the option of demolishing it is unfair and if the court finds that respondent had rights to the land, then she should compensate the appellant by way of damages.

The appeal is opposed, and Mr. ole Kina submits on behalf of the respondent that, there is no dispute as to respondent owing that parcel of land or that it is the respondent who invited the appellant onto the land and that appellant did build on the land.

His argument is that appellant did not satisfy the conditions for occupying and using the land. He urged this court to take into consideration that the document forming the basis of this matter was not drawn by draftsmen and the essence of the respondent's action was to create a gift inter vivos as contemplated by section 31 of the Law of Succession. He explains that this is so because, if the intention was that the gift was to take effect and extinguish the rights of the respondent over the property, then it would not have been necessary for the gift to have been made conditional upon the death of the donor. Referring to the words *"Kama mwana wangu…kurithi mali yangu"* which showed that appellant would inherit

the property and that there is no doubt that appellant understood the meaning of inheritance.

Mr. ole Kina urges this court to consider provisions of section 31 f (II) and (III) which refers to lawful request for return of gift and terms the respondent action as lawful. It is Mr. ole Kina's contention that the document did infact contain a condition, being death of respondent and that made it a conditional gift.

Mr. ole Kina asks the court to take into consideration the provisions of section 87 of the Evidence Act and find that oral evidence can be called to contradict written evidence and infact the trial magistrate found that the oral evidence did not negate the written evidence but rather constituted separate agreements. He argues that since respondent was illiterate that it was proper for trial magistrate to make the observation that respondent was illiterate woman, not schooled in drafting documents and it was possible to call oral evidence to seal the gaps and that this is allowed under section 98(3) and (4) of the Evidence Act as well as section 99 – 101, and the conclusion of law which the trial made, were found.

It is argued that appellant is not entitled to any compensation because he did not complete his part of the bargain, and that a demand letter was ever written to him requiring him to perform his part of the bargain – so the condition was within his knowledge and having failed to honour it, then the contract was rescinded and so he must bear the loss.

In arguing for the dismissal of this appeal, Mr. ole Kina seeks to rely on two decisions, **Muraya v Waianina No. 5 (1982) KLR pg 51 at pg 59** – the dissenting judgment of Miller J, and the editor's note. He also refers to the case of **Wambugu v Njuguna (1983) KLR** which seemed to uphold Miller's views.

In response, Mr Mouko states that the cases cited do not apply in the present circumstances as Miller's dissenting views dealt with the situation of a licensee and adverse possession which is not in the issue here.

He seeks to distinguish this case from **Muraya's** case saying that in the later case, the rescion was based on failure of party to fulfill an act and also referred to specific performance, while here there is no contract and specific performance does not apply.

He urges the court not to impose conditions which were not expressed in the parties to the agreement and that no attempt should be made to introduce oral evidence here and there should be no reliance on section 31 of the Law of Succession.

Mr. Mouko urges the court to interpret the document as it is and give it the true meaning saying the words used were not technical rather they were plain Kiswahili words which must be given their plain meaning. As for the demand made to appellant to satisfy certain conditions, Mr. Mouko submits that, those were new issues, being raised in the demand letter and were never the basis at the beginning of the relationship and appellant cannot be found to be in breach of things not agreed upon.

Mr. Mouko urges the court to allow the appeal saying this is a court of law and not a court of sympathy and respondent initiated the whole thing, whether she was illiterate or not and she has not denied the contents of their agreement nor has she claimed, misrepresentation or fraud and if she now feels that the arrangement was improper then let the loss follow, and not the sympathy.

The real issue for determination is the content and meaning of the note which appellant wrote on prompting by

respondent and which respondent signed it reads as follows:

"Mimi Alice Waithera Kariuki….Leo nimepatia na kuandikisha John Matuku ploti yangu nambari 43 sehemu ya Maweni Malindi kuwa yake kama mwanangu. Kwa hivyo mtu yeyote asimsumbue (sic) kwa vyovyote kuhusu mahali hapa na ikiwa kutatokea jambo lolote ndiye atakayeiridhi hii mali yangu…"

Certainly this cannot be regarded as a will because certain conditions for making of a will were not met – however it expressed respondent's wishes, and as correctly observed by the trial magistrate, was it made in anticipation of death, so that in the event of death no one was to fight over the property with appellant. Did this then make it a gift inter vivos? Did the document confer ownership on the appellant during respondent's lifetime or would he only become the owner upon her death? Was the appellant expected to fulfill any conditions before the ownership could pass on to him?

Did the trial magistrate err in law by importing the purported oral agreements to vary the written agreements? Was appellant in breach of the agreement between the parties. Is the appellant entitled to compensation in the event that court makes a finding in favour of the respondent?

These are the issues arising to be taken into account in this appeal.

A plain reading of the document clearly reveals that there was no condition to the effect that appellant must construct a house for respondent if he wished to remain on the plot. The document gave him authority to occupy respondent's property as a son to respondent. Yet it seemed to take care of future events, that once he was on the property, should the inevitable (i.e death) take respondent away, then he would naturally be the one to inherit the property. Was this then a gift in contemplation of death as envisaged under section 31 of the Law of Succession.

Section 31 reds thus:

> ***"A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of title if;***
>
> ***(a) The person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present imminent danger.***
>
> (b) ***There is delivery to the intended beneficiary of possessions or the means of possession of the property of the documents or other evidence of title thereto.***
>
> (c) ***A person makes gift in such circumstances as to show that he intended it to revert to him should he survive the illness or danger***

Then there is a proviso under 31(II) that

> ***"The person making the gift, may at any time before his death, lawfully request its return"***

As for construction of documents should the court rely on the Law of Succession, or be guided by the provisions in the first schedule rule 9 which is to the effect that *"words in general shall be construed in their ordinary and grammatical sense unless a clear intention to use them in another sense can be collected….and that other sense can be clearly ascertained"*

I must consider the wording of that document produced in evidence and garner from it, the intention of the donor of the gift.

What about the general rule of construction and the use of language anticipated under section 103 of Evidence Act?

The document reads:

"Mimi Alice Waithera Kariuki nambari yangu ya kitambulisho 1227128, leo nimepatia na kumuandikisha John Matuku plot yangu nambari 43 sehemu ya Maweni Malindi kuwa yake kama mwanangu kwa hivyo mtu yeyote

asimusumbue kwa vyovyote kuhusu mahali hapa. Na ikiwa kutatokea jambo lolote ndiye atakayeiridhi hii mali yangu (ploti)"

It seems an English translation was not tendered in court. However using the services of the court interpreter Randu, this is the English equivalent:

> ***"I Alice Waithera Kariuki, holder of national identity card no. 1227128, have today given and registered my plot 43, located in Maweni Malindi, to John Matuku to be his like my son. So nobody should disturb him in any manner pertaining to this said portion. In the event something happens to me, he will be he one who ill inherit my property (this plot)"***

That language seems to address two situations – the existing one at the time and a future event and the trial magistrate convictly observed that the same appeared to be contradictory of one another – one suggesting the property was already registered in appellant's name and other that he would only inherit it upon an eventuality like death.

Clearly the land was not registered in the name of the appellant – my understanding of the document is that she had put it in writing that he would be the person entitled to use it, and inherit upon her death, and she wished to ensure that no one else came up from the wordworks to cause trouble for appellant.

What about his occupation of the land? Constructing thereon? Of course that was done with the permission of the respondent, but that did not transform the appellant into the legal owner – it conferred on him the status of licencee and indeed no consideration changed hands in that regard.
Even if one were to consider appellant's occupation on the land, I don't think that took away the respondent's rights under section 31 of the Law of Succession which recognizes that the donor can indeed request for the return of gift – which is what respondent has done.

But were there conditions attached to the whole arrangement – certainly the face of exhibit 1, the answer is in the negative. Were there subsequent oral agreements regarding use of that plot. Respondent says the condition was that appellants builds two houses – one for himself and one for her – he reneged and only built his, then threw her out. Appellant denied that there were any conditions or that he ever threw her out.

Appellant in his defence stated to the trial court that respondent requested him to put a structure on the plot so that no one would take the plot way as she did not have any money to construct and that he constructed only on half the plot and left the other half for her as she wanted to sell it or construct – now that was not part of what was in exhibit 1, if exhibit 1 is the only yardstick to use then why did appellant come up with the idea of only developing half the plot and leaving the other half for the respondent, and in fact on cross-examination he confirmed that he did not have a claim over the vacant portion!! This is why the trial magistrate went beyond the written document, considered the conduct of the parties and was persuaded that there were oral agreements, which did not negate or water down the agreement BUT created conditions which appellant was required to meet so as to continue enjoying rights over the land. In so doing the trial magistrate did not go against the spirit of section 97 of the Evidence Act regarding exclusion of oral evidence by documentary evidence.

This is because section 98 of the Evidence further provides as follows:

> ***"When the terms of any construct on grant or other disparities of***

property or any matter required by law to be reduced to the form of document according to section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to such instrument or their representatives in interest for the purpose of contradicting, verifying, adding to or subtracting from its terms: Provide that –

(ii) the existence of any separate oral agreement as to any matter on which document is silent, and which is not inconsistent with is terms, may be proved, and in considering whether or not this paragraph of this provision applies, the court shall have regard to the degree of formally of the document;

(iii)the existence of any separate oral agreement constituting condition precedent to the attaching of any obligation any….disposition of property may be proved."

I am persuaded that the trial magistrate was guided by the two cited provisions in allowing for the oral evidence unwell created separate agreement constituting a condition attached to the gift and properly held that the appellant having breached the conditions set, only had himself to blame and would not be entitled to any compensation by the respondent.

There is no reason for me to make a different finding.

The upshot is that the appeal has no merit and is dismissed with costs to respondent.

Delivered and dated this **1st** day of **March 2010** at Malindi.

H. A. Omondi

JUDGE

Mr. Ole Kina for respondent
Mr. Ekhubi holding brief for Mouko for appellant