REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. 5 OF 2018

PETER OMONDI ....APPELLANT

VERSUS

WILFRIDA A. KUMBA ....RESPONDENT

J U D G M E N T

(Being an appeal from the Judgment and Decree of the Chief Magistrate's court at Kisumu in Kisumu CMCC No. 464 of 2011 delivered on the 23rd day of July 2015 by HON. THOMAS OBUTU – PM)

PETER OMONDI OPIYO (the Appellant herein) was the plaintiff in **KISUMU CHIEF MAGISTRATE COURT CIVIL CASE NO. 464 OF 2011** in which he sought Judgment against **WILFRIDA A. KUMBA** (the Respondent herein) in the following terms:-

1. **An order of specific performance to be issued compelling the defendant to transfer parcel NO KISUMU/MANYATTA 'B'/2522 to him and in default the Executive Officer of this Court be authorized to sign mutation forms and transfer forms authorizing the transfer.**

2. **In the alternative a refund of the purchase price and all expenses incurred.**

3. **Costs and interest of the suit.**

It was the Appellant's case that the Respondent is the registered proprietor of land parcel **NO KISUMU MANYATTA 'B'/317** which had been sub-divided into two parcels i.e **KISUMU/MANYATTA 'B'/2521 and 2522** and that by an agreement dated 15th September 2006, the Respondent agreed to sell to the Appellant a portion measuring 60 ft by 80 ft (0.08 Ha) for a consideration of Kshs. 120,000/=. The Appellant took possession of the portion which is parcel **NO KISUMU/MANYATTA 'B'/2522** and although the consent of the Land Control Board was granted, the Respondent has refused to sign the mutation forms and her children have instead threatened the Appellant with death and destruction of the structures erected thereon thus denying the Appellant his right of quiet possession of the said portion.

The Respondent filed a defence in which she admitted that she was the registered proprietor of the land parcel **NO KISUMU MANYATTA 'B'/317** which has been sub-divided to give rise to two parcels **KISUMU/MANYATTA 'B'/2521 and 2522** of which she had sold the former and only retained the parcel **NO KISUMU MANYATTA 'A'/2522** measuring 0.08 Ha. She added that by an agreement executed on 12th September 2006, she sold to the Appellant a portion measuring 44 ft by 88 ft at a consideration of Kshs. 80,000 only and denied the Appellant's claim that the portion sold was 60 ft by 80 ft or that the consideration was Kshs. 120,000/=. She pleaded further that she had only allowed the Appellant to occupy and fence off the actual portion reflected in the agreement dated 12th September 2006. She further asked the Court to find that the whole agreement is null and void for failure to obtain the consent of the Land Control Board within the stipulated period and the same should therefore be nullified and the Appellant's suit be dismissed with costs.

A reply to defence was filed reiterating the contents of the plaint and denying that the agreement is null and void.

The suit was heard by **HON. T. OBUTU (PRINCIPAL MAGISTRATE)** who by a judgment dated 23rd July 2015 dismissed the Appellant's claim with costs.

That Judgment provoked this appeal in which the Appellant seeks to have the trial magistrate's Judgment set aside and replaced with a judgment allowing the Appellant's case as set out in the plaint and award him costs thereof. He has put forward the following nine (9) grounds of appeal;

1. **The learned trial magistrate erred in law by delivering a judgment that did not clearly set out the issues for determination before him and also failed to give reasons for his decision on each issue in contravention of the mandatory provisions of order 21 of the Civil Procedure Rules.**

2. The learned trial magistrate misdirected himself on both law and facts by finding and holding that the only issue for determination before him was the question of which agreement was genuine between the one produced by the Appellant and that produced by the Respondent.

3. It was a tremendous misdirection on the part of the trial magistrate to fail to appreciate that the case before him presented several issues for determination which issues he did not touch upon and therefore the dispute between the Appellant and the Respondent remained largely un-adjudicated upon by the Court.

4. The learned trial magistrate erred in law and fact by delivering a judgment that was contradictory in it's reasoning and holding by finding that the agreement produced by the Respondent was genuine and hence believable and yet at the same time decreeing that the orders sought could not be granted even to the extent of the "genuine" agreement.

5. The trial Court erred by failing to find for the Appellant even in the face of the clear admission by the Respondent that she sold land measuring 44m x 88 m "(sic)" to the Appellant and received full payment for the same.

6. The learned trial magistrate failed to take into account the evidence of eye witnesses who testified before Court of their presence and witnesses to the payment of an additional Kshs. 40,000/= by the Appellant to the Respondent for purchase of an extra portion of land.

7. It was a grave error and misdirection on the part of the trial Court to fail to appreciate that the agreement between the parties herein was executed without the assistance of counsel and therefore a lack of counter-signature of itself should not be used to vitiate an agreement whose authenticity had been affirmed by eye – witnesses' accounts.

8. The learned trial magistrate failed in his appreciation of the evidence before him by failing to take into account the fact that the size of the land fenced and occupied by the Appellant corresponds to the increased acreage as set out in PEXH 1 yet the Respondent has never complained about such occupation and use by the Appellant.

9. The judgment of the trial Court is against the weight of evidence produced and has occasioned a tremendous miscarriage of justice.

When the appeal was placed before me on 7th November 2018 during the service week in Kisumu, it was agreed both by **MR. ONYANGO** Counsel for the Appellant and **MR. OUMA** Counsel for the Respondent that the appeal be canvassed by way of written submissions with the Appellant filing and serving within 10 days and the Respondent replying within 10 days of service. The appeal would then be mentioned on 6th December 2018 to confirm compliance and take a date for judgment. However, when the appeal was mentioned on 6th December 2018 to confirm compliance, **MR. OUMA** did not attend and **MR. ONYANGO** informed the Court that although he had filed and served **MR. OUMA** with his submissions, the Respondent had not done so. This judgment is therefore drafted without the benefit of the submissions by **MR. OUMA**.

This is a first appeal and the law is that this Court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Ordinarily, an Appellate Court will not interfere with the findings of fact by the trial Court unless they were based on no evidence at all or were arrived at on a misapprehension of it or the trial Court is shown to have acted on wrong principles in arriving at those findings **– MWANASOKONI V KENYA BUS SERVICE LTD 1982 – 88 I KAR 278.** This Court must also take into account the fact that I did not have the opportunity of seeing or hearing the witnesses and must therefore make due allowance in that respect – **SELLE & ANOTHER V ASSOCIATED MOTOR BOAT CO. & OTHERS 1968 EA 424.**

This Court will therefore be guided by the above principles as well as the applicable statutory provisions.

In ground No. 1, the Appellant takes issue with the trial Court for failure to set out the issues for determination and to give reasons for his decision in contravention of the provisions of order 21 of the Civil Procedure Rules. And in **ground No. 2**, the Appellant pleads that the trial magistrate misdirected himself both in law and in fact by finding that the only issue for determination was the question of which agreement was genuine between the one produced by the Appellant and that produced by the Respondent. Those two grounds may be considered together.

The basis of the Appellant's claim as is clear from his plaint dated 11th October 2011 and filed on 24th November 2011 was that by an agreement dated 15th September 2006, the Respondent agreed to sell to him the land parcel **NO. KISUMU/MANYATTA 'B'/2522** measuring 60 ft by 80 ft at a consideration of Kshs. 120,000/= which was paid and the Appellant took possession but the Respondent had refused to sign the mutation forms. The Respondent's case however was that the agreement was dated 12th September 2006 by which she only sold a portion out of the land parcel **NO. KISUMU MANYATTA 'A'/2522** at Kshs. 80.000/= but the Appellant is insisting on hiving off a portion that is in excess of what was sold to him hence her refusal to execute the mutation forms. I must at this point clarify that the land in dispute is **KISUMU/MANYATTA 'B'/2522** and not **NO. KISUMU MANYATTA 'A'/2522.** This is clear from the copy of the title deed which is part of the documents produced during the trial. In support of his claim, the Appellant produced a sale agreement dated 12th September 2006 (Plaintiff Exhibit 1). That agreement had erasures as to the size of the parcel of land which were not counter-signed showing that it measures 60 ft by 88 ft at a consideration of Kshs. 120,000/=. On the other hand, the Respondent produced a copy of the same agreement showing the size of the land purchased as 44 ft by 88 ft and the purchase price as Kshs. 80,000/=. It was her case in the trial Court that the Appellant altered the size of the portion sold to him and that although she later agreed to sell the larger portion to the Appellant at an extra Kshs. 60,000/=, the Appellant did not pay that additional sum and so she refused to sign the mutation forms. In my view, the trial magistrate was right in making a finding that the only issue for determination was which of the two versions of the agreement was genuine. This is because, it was on the basis of the said agreement that the Appellant hinged his case. And having found that the copy of the agreement produced by the Appellant had alterations which were not counter-signed, he was entitled, as he did, to make a finding that the agreement produced by the Respondent was the genuine one and not the one produced by the Appellant. This is what the trial magistrate

said with regard to the two agreements;-

> ***" ……………….. the agreement produced by the plaintiff appears to have been interfered with. The measurements of the parcel of land and the purchase price have been interfered with with no counter-signing by the parties. If the agreement was to be changed by the parties nothing could have been easier than doing another agreement or at worse acting and having the parties counter-sign the alterations".***

And with regard to the agreement produced by the Respondent, the trial magistrate said:-

> ***"D Exhibit 2 produced by the defendant appears genuine and not soiled"***

Having made that finding of fact, and I see no reason to depart from it, the trial magistrate rightly rejected the Appellant's version and accepted the Respondent's claim that what she sold the Appellant was a portion measuring 44 ft by 889 ft and not 60 ft by 88 ft as claimed by the Appellant.

Counsel for the Appellant appears to have taken issue with the fact that the trial magistrate confined himself only to determining which of the two agreements was genuine. Nothing turns on that because a dispute can be determined even on one issue alone so long as that issue is sufficient to resolve the conflict between the parties. If, as was found by the trial Court, the Respondent did not sign the altered agreement, then in law there was no contract as envisaged under **section 3(3) of the Law of Contract Act** for the transfer of a portion measuring 60 ft by 88 ft to the Appellant. The only contract that the Respondent signed was for the transfer of a portion measuring 44 ft by 88 ft and I agree with the trial magistrate that the alterations which were not counter-signed violated the contract which really requires that the parties must agree on all the terms.

With regard to the issue that there was no compliance with the provisions of order 21 rule 4 of the Civil Procedure Rules, as I have already found above, the trial magistrate narrowed down the issues to be determined as being which of the two agreements was genuine. He then decided that the Respondent did not counter-sign the agreement with alterations and therefore her version was the correct one. In my view, there was sufficient compliance with the provisions of order 21 Rule 4 of the Civil Procedure Rules.

Grounds No. 1 and 2 of the appeal are dismissed.

In **<u>ground No. 6</u>**, the Appellant's case is that the trial magistrate failed to take into account the evidence of eye witnesses to the payment of an additional Kshs. 40,000/- by the Appellant to the Respondent for the purchase of an extra portion of land. Section 3(3) of the Law of Contract Act requires that any contract for the disposition of the interest in land be in writing and signed by the party to be charged. As the trial magistrate had already found that the only genuine agreement was the one produced by the Respondent, then what the Appellant's eye witnesses told the Court about the additional Kshs. 40,000/= was really of no consequence and did not aid the Appellant's case. In any case, the Appellant had himself made the following concession during cross – examination by **MR. OUMA**:-

> ***"The agreement is dated 12/9/2006. It was for 44 feet by 88 feet. I paid Kshs. 80,000/= (Eighty Thousand Only) I paid cash to the defendant. She signed in the agreement. The land was portion 317. We all signed the agreement. Later, I altered the agreed figure in August 2007. I charged (sic) the measurements on the signed agreement. The agreement read 66 feet x 88 feet and the amount to read Kshs. 120,000/= (One Hundred and Twenty Thousand Only). I am aware that when a document is altered it has to be counter-signed. I did not sign the alteration. The defendant did not sign the alteration. The witnesses did not sign the alterations".***

There was therefore no agreement, as known in the law with regard to transfer of land, on which the Appellants witnesses could purport to testify. Certainly not on the altered agreement.

Ground no. 6 of the appeal is also dismissed.

<u>Ground 7</u> of the appeal takes issue with the trial magistrate in failing to appreciate that the agreement between the parties herein was executed without the assistance of Counsel and therefore a lack of counter signature of itself should not be used to vitiate an agreement whose authenticity has been affirmed by eye-witness accounts. The answer to that ground is that the law is the same for parties acting in person as well as those who act through their legal advisers. Therefore where the statute expressly provides that any form of agreement be in writing for example the Law of Contract Act (cap 23), the Hire Purchase Act (cap 507) etc, then the law must apply irrespective of whether the parties are acting in person or through counsel. That ground similarly fails.

In **<u>ground No. 8</u>**, the Appellant states that he has fenced the size that corresponds with the increased acreage yet the Respondent has never complained. This is contrary to the Appellant's own pleading in paragraph 9 of his plaint where he had pleaded that the Respondent's children have threatened him with death and destruction of the structures on the land in dispute. The Respondent's son **GORDON NYANJWA KUMBA (DW 2)** told the trial Court that they did not allow the Appellant ***"to fence the bigger portion of land."*** That is clear evidence that the Appellant's presence on the larger portion is not peaceful and is certainly not part of what the parties negotiated. That ground similarly fails.

<u>Ground No. 3</u> which accuses the trial magistrate of failing to appreciate that there were several issue for determination has also been considered above and for the same reasons discussed in grounds 1 and 2, this ground also fails.

<u>Grounds 4, 5, and 9</u> of the Memorandum of Appeal can also be considered together. The issues raised therein have merit in that the trial Court having found that the agreement produced by the Respondent was the genuine one, he nonetheless occasioned to the Appellant an injustice by sending him away without any remedy. It is of course true that in his plaint, the Appellant was claiming the whole of the land

parcel **NO. KISUM/MANYATTA 'B'/2522** or in the alternative, the refund of the purchase price and all expenses incurred. It is now common ground that the Respondent acknowledged receipt of the sum of Kshs. 80,000 from the Appellant for a portion measuring 44 ft by 88 ft. That is what the trial magistrate found and rightly so. The Respondent told the trial Court that she went to the Land Control Board and obtained consent to transfer to the Appellant the portion measuring 44 ft by 88 ft but the Appellant occupied a larger portion. The Respondent having acknowledged receipt of the Kshs. 80,000 from the Appellant for a portion measuring 44 ft by 88 ft, it was an injustice to send the Appellant back home empty handed. Even if the trial Court was not minded to give the Appellant the portion measuring 44 ft by 88 ft, then at least the Court should have ordered for a refund of the Kshs. 80,000 which was paid and acknowledged. Indeed when she was cross – examined, the Respondent said:-

> ***"I want to give him back his money."***

The Appellant of course could not have been awarded ***"all expenses incurred***" as pleaded in his plaint because that sum was not specifically pleaded yet it is in the nature of a special damages claim. It matters not that as part of his further list of documents, the Appellant produced an assortment of receipts showing what he had spent on the land in dispute. All the receipts were within the knowledge of the Appellant when he filed his suit in the trial Court and those expenses ought to have been specifically pleaded if the trial Court was to award them.

In my view however, the Appellant had placed before the trial Court enough evidence to show that he was entitled to either the transfer of portion measuring 44 ft by 88 ft from land parcel **NO. KISUMU/MANYATTA 'B'/2522** or in the alterative, refund of the Kshs. 80,000/=. By sending him away empty handed, the trial magistrate erred and in the process occasioned to the Appellant a miscarriage of justice. I intend to rectify that error because section 78 (2) of the Civil Procedure Act grants this Court

> ***"………… the same power and shall perform as nearly as may be the same duties as one conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein."***

Similarly, Order 42 Rule 32 of the Civil Procedure Rules provides as follows:-

> ***"The Court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decrees or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondent may not have filed any appeal or cross – appeal".***

As an Appellate Court and having re-evaluated the evidence that was before the trial magistrate, it is clear to me that whereas the Appellant was not entitled to the whole of the land parcel **NO. KISUMU/MANYATTA 'B'/2522**, he was entitled to a portion measuring 44 ft by 88 ft for which he had paid Kshs. 80,000 as per the parties agreement and taken possession. I have agonized on whether I should award him that portion or a refund of the purchase price. I find that the interest of justice will best be served if the Appellant is awarded the portion measuring 44 ft by 88 ft rather than the purchase price. This is because he had already put up some structures thereon pursuant to their agreement.

On costs, the interest of justice will best be served if I order that each party meet their costs both in this Court and in the Court below.

Ultimately therefore, the appeal is allowed in the following terms:-

1. The Judgment and decree of the trial Court is set aside and substituted with a Judgment awarding the Appellant a portion measuring 44 ft by 88 ft from the land parcel **NO. KISUMU/MANYATTA 'B'/2522**.

2. The Respondent shall within 30 days of this Judgment sign all the relevant documents to facilitate the transfer of that portion and in default, the Deputy Registrar of this Court to do so on her behalf.

3. Each party to meet their own costs in this Court and in the Court below.

Boaz. N. Olao.

JUDGE

21st March 2019.

Judgment dated, delivered and signed in open Court at Kisumu this 21st day of March 2019.

Mr. Olel for the Appellant - present

Ms Kagoya for Mr. Ouma for Respondent – present

Respondent – present

Boaz. N. Olao.

JUDGE

21st March 2019.