



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. 653 OF 2017

(Formerly Machakos ELC Case No. 260 of 2014)

MEREINA TEKETI MUNENE.....APPELLANT

VERSUS

LEKENKE OLE TEKETI.....RESPONDENT

JUDGEMENT

INTRODUCTION

By a Memorandum of Appeal dated the 15th September 2014, the Appellant appeals against the Judgement and Decree of the Principal Magistrate's Court of Kenya at Kajiado (Hon. Mary . A. Ochieng (Mrs) dated the 3rd December, 2014 in the PMCC No. 293 of 2013 where she dismissed the suit.

The Appellant being dissatisfied with the said Judgment filed an appeal at the Machakos High Court of Kenya on 15th December, 2014.

The Memorandum of Appeal contained the following grounds;

1. The Learned Trial Magistrate erred in law and in fact in disregarding the contents of the agreement dated 30th May, 2013.
2. The Learned Trial Magistrate erred in law and fact finding that there is no part of the agreement dated 30th May, 2013 to be performed by the Respondent herein.
3. The Learned Magistrate erred in law and in fact in finding that the Defendant did not sign the agreement dated 30th May, 2013 on the basis of mere denials without any evidence in support.
4. The Learned Trial Magistrate erred in law and in fact in selectively applying the contents and import of the agreement dated 30th May, 2013.
5. The Learned Magistrate erred in law and in fact in believing the Defendant who did not lead evidence to show that he did not sign the agreement dated 30th May, 2013.
6. The Learned Magistrate erred in law and fact by relying on irrelevant and unpleaded issues in arriving at her decision.
7. The Learned Magistrate erred by wholly misapprehending the nature of the proceedings before her.
8. The Learned Magistrate totally misapprehended the law of the doctrine of Estoppel.
9. The Learned Judge erred in dismissing the Plaintiff's claim against the weight of evidence.

IT IS PROPOSED to ask the Court for orders that:-

- a) This appeal be allowed.
- b) The decision and Order of the Trial Court be set aside.

- c) Cost of this appeal be awarded to the Appellant.

I have considered the submissions of both parties in respect of this Appeal.

Analysis and Determination

Upon consideration of the materials presented in respect of the Appeal herein, the following are the issues for determination:

- Whether the Judgement and Decree in Kajiado PMCC No. 293 of 2013 dated the 3rd December, 2014 should be set aside.
- Who should bear the costs of the Appeal.

The Appeal has arisen from the judgment of the Kajiado Principal Magistrate Hon. Mary A. Ochieng (Mrs) dated the 3rd December, 2014 vide PMCC No. 293 of 2013. Upon perusal of the grounds of Appeal, I decipher that the Appellant's main issue of contention is the failure by the Learned Trial Magistrate to rely on the agreement dated the 30th May, 2013 and find that she was entitled to half share of land parcel number Kajiado/ Dalalekutuk/ 7116 measuring 50 acres. The Appellant in her submissions reiterated her claim as enumerated in the grounds of Appeal and contended that the Respondent breached the agreement dated 30th May, 2013 and that the trial Magistrate held the said Agreement invalid and totally disregarded the provisions of section 3(3) of the Law of Contract Act. She insisted the Agreement dated the 30th May, 2013 was a follow up of the meeting held on 29th May, 2013 which the Respondent attended by signing the minutes. She relied on the case of **Gatirau Peter Munya V Dickson Mwendwa Kithinji & 2 Others (2014) eKLR** to buttress her arguments. The Respondent opposed the Appeal and contended that the same lacked merit. He averred that he is the absolute proprietor of land parcel number Kajiado/ Dalalekutuk/ 7116 which he acquired from his father and the Appellant failed to prove fraud against him. He submitted that the agreement dated the 30th May, 2013 was drawn by Moinket & Company Advocates, who are advocates for the Appellant but the same was not witnessed and this created further doubt on the authenticity of the said agreement. Further, no evidence was tendered to confirm that the Respondent signed the said Agreement and the Appellant's Counsel failed to summon one Mr. John Sapur to confirm that the Respondent was indeed present in the said Advocates' offices.

From the proceedings in the lower court, it emerged that DW2 Teketi Ole Munene who is the Respondent's father and Appellant's husband, transferred to him land parcel numbers Kajiado/ Dalalekutuk/ 3381 and 1169 respectively. It was the Appellant's testimony that she moved from the matrimonial home because the husband did not like her adopted son. DW2 Teketi Ole Munene denied adopting a son together with the Appellant. He confirmed that he transferred the suit land to the Respondent when the Appellant had already deserted his home. In the lower court proceedings DW2 Teketi Ole Munene denied that the Respondent was present in the Advocates' office on 30th May, 2013 when the agreement was signed. DW2 Teketi Ole Munene confirmed that he signed the Agreement dated the 30th May, 2013 at the lawyers office as he was afraid the son would be cursed. The Appellant's main contention is that she wanted the Respondent to share with her equally land parcel number Kajiado/ Dalalekutuk/ 7116 which measures 50 acres in accordance with the Agreement dated the 30th May, 2013.

On the issue of the validity of the Agreement dated the 30th May, 2013, I wish to make reference to the relevant provisions within the Law of Contract. Section 3(3) of the Law of Contract Act provides that: '**(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—**

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.'

The Appellant including her witnesses in the lower court insisted that the Respondent signed the Agreement dated the 30th May, 2013. However, both DW1 Lekenke Ole Teketi and DW2 Teketi Ole Munene in the lower court denied that the Respondent signed the said Agreement. I note that one Mr. Sapur who was the crucial witness who purportedly witnessed the Respondent's signature failed to testify to confirm that he indeed signed the said Agreement. Further, the purported minutes dated the 29th May, 2013 which have been referred to, is actually an agreement between DW2 Teketi Ole Munene and the Appellant in respect of the various parcels of land. In the said Agreement there is no land reference number indicated. It was the testimony of the Appellant's witnesses that these minutes were the precursor to the Agreement dated the 30th May, 2013. To my mind, I wonder how DW2 Teketi Ole Munene could have entered into an agreement with the Appellant in respect of land he no longer owned.

Further, section 107 of the Evidence Act provides that: '**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'**

In applying these legal provisions to the current scenario, Insofar as there was an Agreement, I opine that the burden of proof was upon the

Appellant to prove that the Respondent indeed signed the Agreement dated the 30th May, 2013, however from the evidence tendered in the lower court, and my analysis above, I am unable to find clear evidence to this effect. I will proceed to uphold the finding of the trial magistrate that the Respondent was not present at the Advocates office to sign the Agreement. This in essence means that section 3(3) of the Law of Contract Act was not complied with.

On the issue that the Advocate who drew the Agreement dated 30th May 2013 is the same Advocate who is acting for the Appellant and failed to witness the said agreement; I wish to refer to the relevant provisions within the Advocates Practice Rules.

Rule 9 of the Advocates (Practice) Rules provides that: **‘ No advocate may appear as such before a court or tribunal in any matter in which he has reason to believe he may be required as a witness to give evidence whether verbally or affidavit; and if appearing in any matter, it may become apparent that he will be required to as a witness give evidence whether verbally or by declaration or by affidavit he shall not continue to appear.’**

In the case of **Serve In Love Africa (Sila) Trust v David Kipsang Kipyego & 7 others [2017] eKLR** the learned Judge observed that: **‘Conflict of interest can arise broadly where an advocate acts for both parties in a matters such as more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate’s may conflict with his client’s, such as where he may be a material witness in his client’s matter..... Rule 9 of the Advocates (Practice Rules)** basically prevents an advocate appearing as advocate in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the Court.’

In the instant scenario, I note the law firm of Moinket & Company Advocates who have acted for the Plaintiff in the lower Court and now the Appellant herein is the same firm that drafted the Agreement dated the 30th May, 2013 which is the foundation of the dispute herein. Further, I have perused the said agreement but I note it is not witnessed by the said advocate. In associating myself with the above cited judicial authority and applying it in this instant case, I note that the said Advocate could have been a potential witness as she is the one who drew the Agreement which was in dispute in the lower court as well as in this instant Appeal. It is my considered view that there was indeed a conflict of interest in respect of the said Advocates’ actions. I find that the Advocate’s failure to witness the said agreement created further doubt on its authenticity.

On the question of estoppel, since I already held that the Respondent did not sign the Agreement. Further, based on the evidence adduced by both DW1 Lekenke Ole Teketi and DW2 Teketi Ole Munene in the lower court that they transferred the land to the Appellant due to fear of a curse, I find that this doctrine cannot stand at this particular case as the said transfer had been made in duress.

On the issue of whether the Respondent should transfer part of the 50 acres of the suit land to the Appellant, I wish to make reference to section 26(1) of the Land Registration Act which provides as follows”

‘The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ’

Section 24 (a) of the Land Registration Act further stipulates as follows: **‘ subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....’**

In the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that **‘ the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law’.**

Further in the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** where the Court held as follows: **‘ the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.’**

Based on my analysis above as well as associating myself with the cited legal provisions, since the Appellant failed to demonstrate that the Respondent acquired the suit land through fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme, I find that he is the absolute proprietor of the suit land, and as Court, I do not find any legal basis to interfere with the said title to compel him to transfer a portion of the land to the Appellant.

In the circumstance, I will uphold the Judgement and Decree in Kajiado PMCC No. 293 of 2013 and proceed to dismiss the appeal with costs to the Respondent.

Dated signed and delivered in open court at Kajiado this 17th day of September, 2019

CHRISTINE OCHIENG

JUDGE