



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC APPEAL 11 OF 2016**

**OMAR GULED.....APPELLANT**

**VERSUS**

**SAHAL ALASO**

**FAUZ ALASO.....RESPONDENTS**

**JUDGEMENT**

The appellant being aggrieved with the judgment of the Honourable D. Ogal – RM delivered on the 5<sup>th</sup> day of November, 2014 vide Kakamega CMCC NO. 480 of 2013 prefers an appeal against the said judgment as hereunder;

1. That the learned lower court erred in law and fact by dismissing the claim of the appellant on the ground that the same offended provisions of section 3 (3) of the Law of Contract Act.
2. That the learned lower court erred in law and fact by holding that the claim of the appellant was based upon a disposition of land as opposed to a management contract.
3. That the learned lower court erred in law and fact by making a finding that the alleged lease agreement adduced into evidence by the 1<sup>st</sup> respondent was registered under the repealed Registered Land Act.
4. That the learned lower court erred in law and fact by not making a finding upon the other issues posed by the appellant.

The appellant filed the suit in the lower court seeking orders to have the respondents compelled to pay to him income due upon the management of property known as Kakamega/Block 1/88 and also to be allowed to actively take part in the management of the said property.

This property belonged to one Abdi Said Musa who is the registered proprietor of the said suit property. It was the testimony of the appellant that together with the respondents they had rehabilitated the property and an arrangement was entered into with the owner to have the appellant and respondents run and manage the said suit property. The three were to make annual payments of Ksh. 1,260,000 and what remained was to be their profits to be shared among them. However the respondents neither shared the profit with the appellant nor allowed him to engage in the day to day operations of the property necessitating the filing of the lower court suit.

The 1<sup>st</sup> respondent denied entering into such an arrangement. Instead he stated that he took over the property courtesy of a lease agreement he executed with the registered owner known as Mohammed Ismail before the firm of Wilfred A. Osodo Advocate and Commissioner for Oaths. He adduced into evidence certificate of lease and a power of attorney alleged to have been donated by Abdi Said Musa to Mohamed Ismail.

In its judgment dated 5<sup>th</sup> November, 2014 (page 5 of the Record of Appeal) the lower court dismissed the suit upon provision of section 3 (3) of the Law of Contract Act. According to the ratio decidendi of the lower court the arrangement as described by the appellant amounted to a disposition of an interest in land and as such the same had to be in writing since it was not in writing then it offended the provision of section 3 (3) (a) (i). The disposal of this appeal turns on the proper understanding of the term 'disposition' as used in the section 3 (3) of the law of contract act. This term as it is submitted refers to the act of a person surrendering his interest in land to another.

However, in the case of the appellant Abdi never relinquished his interest in the said suit property. He merely assigned the appellant and the respondent as his agents/caretakers to manage the property considering that he was of poor health and thus unable to manage his property properly. Therefore this arrangement between the parties cannot be deemed disposition of land as alleged by the court.

By limiting itself to considering if the arrangement fell in the purview of section 3 (3) of the law of contract the lower court missed the opportunity to deal with issues raised in the submissions of the appellant, (page 6-7 & 10-11 of the Record of Appeal).

The lower court erred in the law and facts by concluding that the lease agreement was duly registered under the repealed registration of land Act. But clearly the lower court needed more concrete materials to arrive at such a holding after the appellant successfully pointed out in his submissions that the lease agreement was not registered since no evidence was demonstrated to show that the lease agreement adduced as D/Exh. 1 was registered. This the lower court failed.

The appellant decided to take this dispute between him, the appellant and the respondents (who are his cousins) to court of law as the last resort. This is after he tried all available alternative means or mechanisms such as councils of senior citizens, the so called councils of elders, and even Kadhi's court to solve this dispute but, this is because the respondents could not accept or recognize them stating that they had no jurisdiction and power to revoke the lease agreement he had with Mohammed Ismail (referred as landlord/lessor) despite the fact that the true owner is Mr. Abdi Said Musa.

The appellant urges the court to reject, revoke and/or declare the said controversial lease agreement between the 1<sup>st</sup> respondent and the Mohammed Ismail as null and void since it is not valid in law as no evidence of registration was tendered in order for it to be deemed as a legal document.

The 1<sup>st</sup> Respondent submitted that, this appeal lacks merit and ought to be dismissed with costs to the respondent. It is not in doubt that the appellant's claim is based on a contract which contract was about disposition of an interest in land and in particular L.R. no. plot b1/88 within Kakamega Town. It is trite law that any contract on disposition of an interest in land must be in writing and signed by both parties thereto and the said signatures be attested by a witness.

This provisions are clearly laid out in section 3 sub-section 3 of the Contract Act of Kenya. The appellant herein failed to produce such an agreement and alleged that the said agreement was oral. He further failed to avail any single witness who witnessed the alleged agreement. A clear indication that the allegations are far-fetched and a shot in the wild which ought to be punished with an order for costs. They therefore submit that the learned magistrate rightfully held that the appellants claim did not meet the provisions of section 3 (3) of the Contract Act.

Regarding ground number two, the parties are bound by their pleadings and a court is only invited to make a finding on the pleadings. The honourable magistrate therefore had no duty to make a finding on issues raised in submissions for the first time. The validity of the lease and power of Attorney produced by the 1<sup>st</sup> respondent were not subject of the suit and the honourable court was therefore not invited to look into the same. This appeal totally lacks merit, it is an abuse of the court's process and the same should be dismissed with costs to the 1<sup>st</sup> respondent.

This court has carefully considered the record of appeal, the appellant and the respondent's submissions. The appellant herein through his plaint dated 10<sup>th</sup> December 2015 approached the subordinate court for orders that;

- (a) The appellant be paid all the income due to him during the time the suit property has been in business until determination of the suit.
- (b) The appellant be allowed to be actively in the management and running of the business under the suit property, and
- (c) Costs of the suit.

Parties adduced evidence and submitted, thereafter the honourable court delivered its judgment and dismissed the appellant's case for lack of evidence. Being dissatisfied with the said judgment, the appellant launched this appeal on the following grounds.

1. That the learned magistrate erred in law and fact in dismissing the appellant's claim for offending provisions of section 3 (3) of the contract Act.
2. That the learned magistrate erred in law and fact by finding that the appellant's claim was based on disposition of land and not on a contract.
3. That the learned magistrate erred by finding that the lease agreement produced by the 1<sup>st</sup> respondent was registered under Registered Land Act (Repealed).
4. That the learned magistrate erred by failing to make a finding on issues raised by the appellant.

I have gone through the proceedings of the lower court and the appellant who is the plaintiff therein is seeking orders to have the respondents compelled to pay to him income due upon the management of property known as Kakamega/Block 1/88 and also to be allowed to actively take part in the management of the said property. This property belonged to one Abdi Said Musa who is the registered proprietor of the said suit property. It was the testimony of the appellant that together with the respondents they had rehabilitated the property and an arrangement was entered into with the owner to have the appellant and respondents to run and manage the said suit property. The three were to make annual payments of Ksh. 1,260,000 and what remained was to be their profits to be shared among them. However the respondents neither shared the profit with the appellant nor allowed him to engage in the day to day operations of the property necessitating the filing of the lower court suit.

However, in his evidence the plaintiff admitted that he never kept any receipts of payment he made towards the renovation of the suit property. He also admitted that he was not party to the lease agreement that was adduced by the defendant as DEx1. I find that, the learned lower court did not err in law and fact by dismissing the claim of the appellant on the ground that the same offended provisions of section 3 (3) of the Law of Contract Act. The learned magistrate did not err in law and fact by holding that the claim of the appellant was based upon a disposition of land as opposed to a management contract.

This provisions are clearly laid out in section 3 sub-section 3 of the Contract Act of Kenya. It is trite law that any contract on disposition of an interest in land must be in writing and signed by both parties thereto and the said signatures be attested by a witness. The appellant herein failed to produce such an agreement and alleged that the said agreement was oral. He further failed to avail any single witness who witnessed the alleged agreement. The learned magistrate rightfully held that the appellants claim did not meet the provisions of section 3 (3) of the Contract Act when he stated as follows;

*“the fact that the arrangement was not reduced into writing renders the plaintiff’s suit bad in law. It cannot succeed since it offends the provision of the law of contract act.”*

Disposition includes a transfer and a devise, bequest or appointment of property contained in a will. Transfer includes a lease. The appellant admits he was not party to the lease (DEx1).

In **Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870**, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the award as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 8<sup>TH</sup> DAY OF MARCH 2018.**

**N.A. MATHEKA**

**JUDGE**