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Odero & 2 others v Gudka & 2 others (Civil Appeal 117 & 143 of 2018 (Consolidated)) [2024] KECA 1584 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1584 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 117 & 143 OF 2018 (CONSOLIDATED)

J MOHAMMED, F TUIYOTT & JM NGUGI, JJA

NOVEMBER 8, 2024

BETWEEN

KRISANTUS ODERO .... APPELLANT

AND

BRAVIN ASHWIN GUDKA .... 1ST RESPONDENT

ASHWIN RAMJI GUDKA .... 2ND RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 143 OF 2018

BETWEEN

BRAVIN ASHWIN GUDKA .... 1ST APPELLANT

ASHWIN RAMJI GUDKA .... 2ND APPELLANT

AND

KRISANTUS ODERO .... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Migori (Ongondo, J.) dated 11th April, 2018 in ELC Case No. 78 of 2017 formerly Kisii ELC Case No. 464 of 2015)

JUDGMENT

Judgment of Jamila Mohammed, JA

Background

1. The two (2) appeals (Civil Appeal No. 117 of 2018 and Civil Appeal No. 143 of 2018) arise out of the judgment of the High Court at Migori (Ongondo, J.). The 2 appeals were consolidated by an order of this Court dated 29th November 2022. Civil Appeal No. 117 of 2018 was designated as the lead file. In the High Court Krisantus Odero, (the appellant in the lead file), had sued Bhavin Ashwin Gudka and Ashwin Ramji Gudka (the 1st and 2nd respondents in the lead file) seeking orders: firstly, directing the respondent to remit the title deed in respect of LR Kanyamwa/Kabonyo/Kwandiku/1515 (the suit property), to him; and secondly an order directing the Land Registrar, Homabay to remove the caution placed by the respondents on the suit property. The appellant also sought costs of the suit as well as interest from the date of filing.

   Bhavin Ashwin Gudka and Ashwin Ramji Gudka are the 1st and 2nd respondents respectively.

2. The appellant's evidence in support of his claim was that sometime in 2013, as the registered owner of the suit property, he decided to sell it, apparently to allay some financial difficulties that he was facing. Through two agents, identified as George Opany and Omboi, he met the 2nd respondent who indicated a willingness to purchase the suit property. He attended a meeting with both respondents during which negotiations over the purchase price in respect of the suit property took place. The appellant however claims that during that meeting, the parties were unable to reach an agreement regarding the sale of the suit property as the 2nd respondent offered him a very low price. The appellant asked for additional time to consult his family members before agreeing to the terms offered.

3. The appellant further claimed that before he left the venue of the negotiations, he was asked to sign two documents, which he later realized were a sale agreement and a transfer form in respect of the suit property. It was his contention that at the time no one informed him nor took any steps to explain to him the import of the document despite the fact that he is illiterate. It was the appellant's contention that as he was leaving the venue, he decided to leave the title deed to the suit property with the 2nd respondent for safekeeping as he believed that the 2nd respondent had shown a genuine interest in purchasing the suit property.

4. The appellant further claimed that at some point after this meeting, he was picked up by the 2nd respondent's agents and taken to attend a meeting of the Land Control Board (the Board) in Ndhiwa. The appellant further contended that the Board declined to issue consent to transfer the suit property on account of the fact that there had been no payments made in respect of the suit property. According to the appellant, this happened a total of three times. In the end, the respondents did not make any payment to the appellant in respect of the suit property. The appellant contended that in the circumstances, he therefore decided to look for another buyer, entered into a separate agreement and eventually obtained consent from the Board to transfer the suit property to a different purchaser. The appellant further contended that the respondents refused to surrender the title document in respect to the suit property back to him and subsequently registered a caution on the suit property.

5. The respondents denied the averments in the plaint and filed a statement of defence and counterclaim to the suit through which they in turn, sought various reliefs against the appellant. These included:

a. A declaration that the appellant was bound by the terms of the sale agreement between the parties;

b. An order to compel the appellant to facilitate the transfer and registration of the suit property; and

c. A permanent injunction restraining the appellant from alienating or interfering with the title in respect of the suit property.

6. In their pleadings before the trial court, the respondents denied the claim by the appellant that the parties had not agreed on the purchase price, and stated that they had negotiated with the appellant and reached an agreement that the 1st respondent would purchase the suit property for the sum of Kshs.1,800,000.00, which was to be paid at the point of transfer and registration of the suit property. It was their contention that the agreement was reduced into writing in the sale agreement dated 4th March, 2015 which was executed by both parties, as well as the signing of the instrument of transfer by both parties. The respondents further claimed that the consent to transfer from the Board was indeed procured, and that the appellant properly surrendered the title document, but refused to surrender the other completion documents which necessitated them to register a caution over the suit property to protect the 1st respondent's interest. The 1st respondent therefore, counterclaimed for an order declaring that the appellant is bound by the terms of the Sale Agreement and for specific performance to facilitate the transfer and registration of the suit property in his favour.

7. The trial court rendered judgment in which it considered the rival arguments of the parties, and held that there was no meeting of the minds between the appellant and respondents, and as such, the appellant could not be forced to transact on the basis of the purported sale agreement between the parties. The trial court also found that the transaction between the parties was void for want of consent of the Board and on this basis, declined to grant the orders sought in the counterclaim. In the result, the trial court entered judgment for the appellant, allowing the main prayers sought in the claim. The trial court also entered judgment for the respondents on the counterclaim, ordering the appellant to refund the sum of Kshs.500,000.00 together with interest. Both parties were ordered to pay their own costs.

8. Both parties were dissatisfied with these orders, and appealed to this Court.

The appellant raised five grounds of appeal upon which he would have us set aside the judgment the trial court. The respondents on their part, faulted the holding of the trial court on ten fronts. The totality of the parties' issues can be summed up as follows: on the part of the appellant, his appeal revolves around two main issues: that, the trial court erred in finding that the 1st respondent was entitled to the sum of Kshs.500,000.00 together with interest at court rates despite the fact that there was never any evidence that there was payment of this sum of money. The appellant also faults the trial court for declining to grant an order of costs in his favour.

9. On the part of the respondents, it is their contention that the trial court ought not to have considered the arguments raised by the appellant, as there were evident contradictions between his pleadings and his evidence. They contended that this led to the trial court violating the doctrine of privity of contract by finding that the sale agreement between the parties stood rescinded for failure to perform in contradiction of Section 9 of the said agreement. The respondent's also challenge the interpretation by the trial court that the sale agreement was null and void despite the fact that the appellant had taken steps to obtain the consent of the Board and the order given directing the appellant to pay the sum of Kshs.500,000.00 despite this not having been pleaded. Lastly, the respondents take issue with the fact that the parties were ordered to pay their own costs.

Determination

10. I have duly considered the parties respective arguments in line with our duty as a first appellate court which was re-affirmed in Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212 where this Court stated that:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

11. The first issue for determination is whether or not the sale agreement dated 4th March, 2015 was valid and enforceable. The appellant contends that the sale agreement was not enforceable as he signed it without being aware what the implications of his signature were since no one present at the meeting took the time to explain the contents of the documents to him. Closely related to this is the question whether if the agreement was valid, could it be enforced as against the appellant?

12. Both the parties have opposing views on the validity of the sale agreement, with the appellant contending that he signed it in ignorance, and, therefore, there could be no meeting of minds between the appellant and the respondents. On the other hand, the respondents contended that the appellant was well aware of what he was signing and went on to leave with them the title document in respect of the suit property for safekeeping as well as provide copies of his identity documents for the purpose of facilitating the transfer of the suit property to the 1st respondent. The 2nd respondent further pointed out that the appellant also attended the convening of the Land Control Board at Ndhiwa and applied for consent to transfer, all of which pointed to his knowing and acquiescence to the agreement between him and the 1st respondent.

13. A consideration of the record points to certain aspects of the making of this transaction that seem suspect. First, both the appellant and the 2nd respondent contended that the meeting between the parties was with the intention that the sale be between them. There was also no agreement regarding the purchase price. The appellant's evidence was that he was dissatisfied with the amount of money offered to him by the 2nd respondent, as consideration, that is the sum of Kshs.1,800,000.00, and that after a discussion, the 2nd respondent had promised to add more money after the transfer had been registered. This begs the question, at what point was the purchase price to be paid, and how much was the agreed purchase price?

14. Secondly, throughout the proceedings, the parties have stated that the negotiations that occurred were between the appellant and the 2nd respondent. It is not clear then, how the sale agreement ended up being signed by the 1st respondent, who from the record is the son of the 2nd respondent. This fact, coupled with the fact that the appellant throughout maintained that he had never agreed to the purchase price of Kshs.1,800,000.00, leads me to the conclusion that the agreement between the parties was uncertain and in the words of this Court in Michira v Gesima Power Mills Ltd [2004] eKLR:

> " The fact that the agreement is uncertain on the fundamental term on the payment of the purchase price makes the entire agreement void for uncertainty."

15. It is common ground that the application for consent to transfer from the Ndhiwa Land Control Board was denied, in principle because of the fact that the Board decreed that the 1st respondent ought to pay an amount of consideration to the appellant prior to the grant of the Land Control Board

consent. The High Court found that the sale transaction between the parties was void for lack of Land Control Board consent.

16. Section 6(1) of the *Land Control Act* provides as follows:

> " Each of the following transactions, that is to say -
>
> a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
>
> b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;
>
> c. the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."

17. Section 8(1) of the *Land Control Act* provides as follows:

> " Application for consent
>
> (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:
>
> Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit."

18. This Court in the leading judgment of Mumbi Ngugi, JA in the decision of *Aliaza v Saul (Civil Appeal 134 of 2017*) [2022] KECA 583 (KLR) (24 June 2022) (Judgment) stated as follows:

> " I recognise that there is some conflict in the jurisprudence regarding the validity of a transaction for the sale of land where no consent from the Land Control Board has been obtained. I believe, however, that the reasoning and holdings in Macharia Mwangi Maina, William Kipsoi Sigei v Kipkoech Arusei & another and Kiplagat Kotut v Rose Jebor Kipngok best capture the spirit of the *Land Control Act* when interpreted through the prism of the *Constitution* of Kenya 2010, particularly section 7 of the Transitional and Consequential Provisions contained in the Sixth Schedule of the *Constitution*. I should observe at this point that these constitutional provisions were not cited and were therefore not the subject of consideration before the Court in the Ole Tukai decision."

19. In the same case, the learned Judge stated as follows:

> " As was recognized by this Court in the Macharia Mwangi Maina case, the *Land Control Act* is an old legislation, enacted in 1967. The public policy considerations underpinning the Act were well articulated in the Ole Tukai decision where this Court observed as follows:"What

is beyond doubt, the paternalistic nuances of its colonial origins notwithstanding, is the fact that the enactment of the *Land Control Act* in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land." (Emphasis added).

20. By parity of reasoning, I find that the learned Judge did not err in finding that the sale transaction between the parties herein was void. For this reason, the order of specific performance sought by the respondents could not issue. I, therefore, find that the learned Judge did not err in finding as he did.

21. This leads to the question whether the trial court erred in directing that the appellant refund the sum of Kshs.500,000.00 to the respondents. No claim was made for this sum of money, and this is what the appellant in his appeal has pointed out. In addition, during hearing, learned counsel for the respondent Mr. Wafula, conceded that the issue of this sum of money being paid was never pleaded, and was in fact only raised during the testimony of the 2nd respondent who claimed that he had paid the sum of Kshs.500,000.00 in two instalments: Kshs.45,000.00 as a deposit paid to an advocate, G.S. Okoth, in order to prepare the sale agreement and a further sum of Kshs.450,000.00 that was paid directly to him.

22. This amount was neither pleaded in the claim filed by the respondents, and neither was it proved as no evidence of actual payment was ever tendered. In addition, having been raised after the close of the plaintiff's case, the appellant had no opportunity to respond to this claim until it was raised during the 2nd respondent's testimony. The question of parties being bound by their pleadings is well settled. In the case of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR this Court held that:

> "In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."

23. Similarly, in Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR this Court stated as follows:

> "In our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles

that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. It also follows that a court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings."

24. It appears that the trial court accepted evidence from the dock that the sum of Kshs.500,000.00 had been paid by the 1st respondent to the appellant. An interrogation of the evidence demonstrates that the 2nd respondent testified that: "I gave PW1 (the appellant) Kshs.50,000.00 to pay the advocate to release the title document." Ostensibly, this was done because the advocate had been holding the title document pending a payment for a previous transaction between a third party and the appellant. The 2nd respondent further testified that he paid a further sum of Kshs.450,000.00 as a first instalment for the suit property in line with the sale agreement. However, these averments, made only orally during testimony were not backed by evidence. In the result, with respect, I find that the trial court erred in accepting this evidence as it was not specifically pleaded and therefore could not come up for consideration before the court. For this reason, as well, it is apparent that there was no payment made in fulfilment of the requirements of the Board, and therefore I cannot make an order for specific performance.

25. There is another reason I do not accept the claim that the sum of Kshs.500,000.00 was paid to the appellant. It was a term of the agreement between the parties that the purchase price was to be paid in equal instalments of Kshs.450,000.00 after the transfer of the suit property to the 1st respondent. It is common ground that this transfer has never occurred. It is incredible that the 2nd respondent would have paid this sum, contrary to the terms of the agreement, to the appellant. Taken together with the lack of evidence regarding payment, it leads me to the conclusion that the trial court erred in this regard. In the result, the appellant's appeal on this limb succeeds as well.

26. After consideration of the facts in the consolidated appeals as well as the positions taken by the parties, I come to the conclusion that the appeal filed by Krisantus Odero (the appellant in the lead file, Civil Appeal No. 117 of 2018) is successful. I find that the appeal filed by Bhavin Ashwin Gudka and Ashwin Ramji Gudka (the appellants in Civil Appeal No. 143 of 2018) has no merit and is dismissed. I would therefore vary the order of the trial court to the extent that the order entering judgment for the 1st respondent against the appellant for the refund of Kshs.500,000.00 is set aside. On costs, the order that commends itself to me is that each party will bear its own costs in this court and in the trial court.

27. It is so ordered.

28. The delay in delivery of this judgment is regretted and was occasioned by exigencies of work.

Judgment of Tuiyott, JA

1. I have had the benefit of reading, in draft, the opinion of J. Mohammed, JA. I am in full agreement with the reasoning and the conclusion arrived at by the learned Judge.

Judgment of Joel Ngugi, JA

1. I have had the benefit of reading the Judgment of Hon. Jamila Mohammed, JA. in draft. I entirely concur with her findings and conclusions and I have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF NOVEMBER, 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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F. TUIYOTT

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR