



**Ekiru & 4 others v Jillo (Environment and Land Appeal E052 of 2022)
[2024] KEELC 3253 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 3253 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E052 OF 2022**

CK YANO, J

MARCH 7, 2024

BETWEEN

**JOHN EKIRU 1ST APPELLANT
JOSEPH LOMALIA 2ND APPELLANT
PETER EKWAM 3RD APPELLANT
ALBINO LOJAO 4TH APPELLANT
JULIUS LOKUNYOKO 5TH APPELLANT**

AND

JUMALE MOLU JILLO RESPONDENT

JUDGMENT

1. By a plaint dated 21st January, 2022 the respondent sued the appellants in Tigania PMC ELC Suit No. E005 of 2022 seeking for a declaration that he was a entitled to exclusive and unimpeded right of possession and occupation of all that property known as P.No. 41511, a permanent injunction and costs of the suit together with interests thereon.
2. The respondent pleaded that he was the registered and absolute proprietor of the suit land which he bought from the 1st and 2nd appellants herein vide a Sale Agreement dated 5th October, 2020. That he paid the entire consideration and was granted vacant possession. That he then sought to have the land registered in his name.
3. The respondent averred that the appellants without any colour of right or consent from the respondent started laying a claim to the property to the detriment of the respondent. He listed alleged particulars of illegality on the part of the appellants.



4. The appellants filed a defence and a counterclaim dated 30th March, 2022 in which they denied the respondent's claim. The 1st and 2nd appellants, however partially admitted that there was an intention to sell the land to the respondent but denied that the size of the land was 38 acres or that the purchase price was Ksh. 350,000/= as indicated in the agreement of 5th October, 2020.
5. In the counterclaim, the appellants contended that the 1st and 2nd appellants only owned 3 acres of land in question and which they intended to sell to the respondent. They faulted the advocates who drew the agreement for taking advantage of their inability to read and write by fraudulently misrepresenting in the agreement that 38 acres was being sold. They denied owning the extra 35 acres and wanted the agreement rescinded and the registration of the suit land in the respondent's name cancelled.
6. The matter was heard by Hon. P. Wechuli (SRM) who vide a Judgment delivered on 25th August 2022 allowed the respondent's suit. The learned trial magistrate also found that the appellants did not prove their counterclaim. The appellants being aggrieved and dissatisfied with the said judgment filed this appeal and set out the following grounds of appeal.
 1. That the Learned Trial Magistrate erred in Law and fact by finding that the Respondent had established his case on a balance of probabilities.
 2. That the Learned Trial Magistrate erred in Law and in facts by disregarding the evidence of the Assistant Area Chief without regards that parties had embarked on negotiations in order to resolve the dispute.
 3. That the Learned Trial Magistrate erred in Law and in fact by failing to take cognizance of the number of signatures in the alleged Agreement which were more than the witnesses.
 4. That the Learned court erred in law and in fact by not finding that the 3rd, 4th and 5th Appellants were not parties to the said alleged agreement.
 5. That the Learned Trial Magistrate erred in Law and fact by failing to consider issues raised by the Appellants in their counterclaim and submissions hence arriving at the wrong conclusions.
 6. That the Learned court erred in Law and in fact by shifting the burden of proof to the Appellants.
 7. That the Learned Magistrate's findings were against the weight of the evidence.
7. The appellants are praying for this appeal to be allowed and have the finding of the lower court set aside with costs here and below.
8. This appeal was heard by way of written submissions. The appellants filed their submissions dated 14th December, 2023 through the firm of M/s Onyango Otunga & Co. Advocates while the Respondent filed his dated 29th January, 2024 through the firm of M/s Wario Minishi & Co. Advocates.

Appellants Submissions

9. On behalf of the appellants it was submitted that this being a first appeal, this court has its duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In this regard, the appellants relied on the case of Sele Versus Associated Motor Boat Company & Others (1968) EA 123 and Mbogo & Another Versus Shah (1968) EA 93. The appellants counsel identified the issues for determination to be whether there was a valid agreement for sale of land as alleged, whether the respondent breached the alleged Sale Agreement and whether the 3rd, 4th and 5th Appellants were parties in the alleged agreement of sale.
10. As regards the issue whether there was a valid agreement for sale of land, it was submitted that it is practice that parties only enter into an agreement upon agreeing on the terms and conditions without



duress and coercion which in turn would render the agreement null and void ab initio. That the respondent herein alleged that he entered into an agreement with the appellants on 5th October, 2020 for purchase of land measuring approximately 38 acres and produced the alleged agreement. It was further submitted that the appellant maintained that they indeed sold land to the respondent but only a portion measuring 3 acre, but there was no written contract between the parties. That it was the appellants' evidence that the only time they signed a document is when the respondent's advocate called them to the respondents house one evening and requested them to sign a certain document in order to support the respondent sue someone by the name Haron who had invaded the land that had been sold to the respondent. The appellants maintained that they were not informed whether there was an agreement.

11. On behalf of the appellants, it was submitted that the alleged agreement had glaring inconsistencies such as the number of witnesses their names and identity card numbers. It was pointed out that the witnesses who executed the said agreement were David Lorot, Julius Lokunyuko Losunyeni, Adam Todo and Peter Ekwam, and it was expected that the number of signatures that ought to appear under clause 11 are four signatures for the four witnesses, but in this case, there were a total of five signatures against the four witnesses. That the respondent in his evidence stated that only three people were there and witnessed the execution of the said agreement and whom he knew and named someone by the name Brian Mukwa who even does not feature anywhere in the said agreement. It was submitted on behalf of the appellants that if indeed there was an agreement and the parties met, the respondent would not have failed to remember the parties present considering that he claimed to know them by their names.
12. On behalf of the appellants, it was submitted that due to the foregoing inconsistencies, the trial court summoned the advocate who drew the agreement to clarify the issues raised. That the said advocate confirmed having drawn the agreement which was executed by the parties in his presence. That he stated that there were eight people present but only four witnessed the agreement. The appellants contended that when questioned on why there were five signatures against four witnesses, the advocate stated that he was not sure who had thumb printed, which explanation the appellants found to be absurd.
13. On behalf of the appellants, it was submitted that whereas the respondent claimed to have purchased 38 acres of land from the appellants, the appellants maintained that they only sold 3 acres. That one cannot sell what he does not own and argued that it was the duty of the respondent to do due diligence and ascertain the ownership and acreage of the subject matter. The appellants submitted that to address the said inconsistencies, the parties met before the area chief on 17th January, 2022 which was 14 months from the date of the alleged sale agreement when the issues arose.
14. It was pointed out that it is on record that the respondent testified that they had agreed to purchase 38 acres from the appellants at Kshs. 450,000/=, and averred that he first paid Ksh. 300,000/= and later Ksh. 50,000/= and that the balance had not been paid. That the respondent further stated that they had agreed for the balance to be paid once he gets money as per the proceedings before the chief.
15. It was further submitted on behalf of the appellants that the respondent called a witness by the name Adan Godo Wako who before the area chief stated that he gathered the whole parcel of land in dispute in 2005 and went away for 10 years. That when he came back he met Joseph Lomalia and others on his land and gave them Ksh. 450,000/= and they moved out of the land. That he contradicted himself and stated that again he gave them Ksh. 300,000/= at the advocates office and drew the agreement and the advocate indicted the remaining balance. That however, that agreement was not produced and that two documents were also produced to show that the said person had indeed gathered the land as alleged.



16. It was further submitted that the meeting before the area chief took place in 2022 while the alleged agreement was made in October, 2020. That this means that both the appellant and the witnesses were in possession of the said agreement and were also aware of the contents of the same and specifically the contents of clause 2 which reads that “ The purchase price was Ksh. 350,000/= and that the same had been paid by the respondent on the day of making the agreement. It was submitted on behalf of the appellants that this clause in itself is inconsistent with what the respondent stated before the area chief that he first paid Ksh. 300,000/= and later Ksh. 50,000/=. The appellants argued that this means that the said amount (if any) was not even paid at once. That it is also worth nothing that in the agreement produced before the trial court, there was no clause indicating the balance that allegedly remained which both the respondent and one Adan Godo Wako his witness were referring to.
17. On behalf of the appellant’s, it was further pointed out that another inconsistency was that the respondent and his witness Adan Godo Wako claimed to have paid Ksh. 350,000/= to the appellants. That the questions that arise are, who owned the said suit land between the appellants and Adan Godo Wako who claimed to have paid the appellants money to move out of the land after coming back from his 10 years long absence, land he alleged he had gathered, who bought the alleged 38 acres of land and was the land bought jointly by both the respondent and Adan Godo Wako, and if so why is the said position not indicated in the alleged agreement?
18. It was submitted on behalf of the appellants that these crucial matters that the trial magistrate did not accord proper look at and it is clear beyond peradventure that there was no agreement executed by the parties as alleged because if there was any, what was written in the agreement, what was stated before the area chief and evidence given in court would be consistent.
19. As regards the issue whether the respondent breached the alleged Sale Agreement, it was submitted on behalf of the appellants that clause 12 of the alleged Sale Agreement provided for an avenue of dispute resolution. That there arose a dispute on the acreage that the respondents bought from the appellants an issue that needed to be clarified for peaceful co-existence. That in a bid to try and have the dispute resolved, the appellants adhered to clause 12 of the alleged agreement and took their grievances to the area chief to assist them resolve the dispute, but the respondent rushed to seek legal redress through court even before the negotiations were concluded. That it is clear from the foregoing that the appellants were acting in good faith to try and have the dispute resolved as they maintained to have only sold 3 acres to the respondent. That the respondent who was not acting in good faith and without clean hands rushed to court to hinder the negotiations from being concluded and could therefore not come running to court seeking orders of permanent injunction against the appellants. It is the appellants submission that the respondent did not deserve such orders. That having demonstrated that the respondent breached the alleged sale agreement, it is only proper that the agreement should be rescinded.
20. On whether the 3rd, 4th and 5th appellants were parties in the alleged sale agreement, it was submitted on behalf of the appellants that the said agreement did not mention the 3rd, 4th and 5th appellants as parties to that agreement. It was submitted that as a general rule and what is recognized by law is that a contract only affects parties privy to it and cannot be enforced against persons who are not parties. In this regard, the appellants relied on the case of Agricultural Finance Corporation Versus Lengetia Limited (1985) KLR 756 and submitted that since the 3rd, 4th and 5th appellants were not parties to the alleged agreement executed on 5th October, 2020, the same can neither be enforced against them. That in light of the foregoing and the appellants demonstration that there was no agreement as alleged by the respondent, the appellants pray that this honourable court allows this appeal and set aside the findings of the learned trial magistrate in the judgment of the lower court.



Respondents Submission

21. On behalf of the respondent, it was submitted that litigation must come to an end. It is the respondent's submissions that this appeal is just an afterthought and only intended to prevent the respondent from having peaceful and quiet possession of his property and further enjoy the fruits of his judgment. That the current appeal is just a facelift to a dead counterclaim that had been dismissed with costs to the respondent and a delay to the respondent to enjoy his right to peacefully own property.
22. While commenting on the appellants submission that this court is bound to re-evaluate the facts afresh and come to its own independent findings and conclusions as held in *Selle Versus Associated Motor Boat Company & Others* (Supra), it was submitted on behalf of the respondent that the court must not nevertheless, interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of the law or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The respondent relied on the holding in *Mwanasokoni Versus Kenya Bus Service Limited* (1982 – 88) 1KAR 278 and *Kiruga Versus Kiruga & Another* (1988) KLR 349 and submitted that findings of the trial court was based on evidence, facts and is proper both factually and legally. That the decision of the lower court should not be disturbed owing to flimsy afterthoughts and aspersions by the appellants. That the appellants have not demonstrated that the decision of the trial court based on no evidence at all, or on a misapprehension of the law or the court acted on wrong principles in reaching the findings.
23. It was also noted and pointed out by the respondent that the appellants have made this appeal about the contract and its breach yet that is not the case. That the case before the trial court was based on the fact that the appellants had made false claim against the respondent's property number P. No. 41511 and had forcefully occupied and evicted the respondent from his parcel of land. That it was never about breach of contract and it was submitted that the appellants seem to misapprehend the gist of the suit before the trial court and have thus brought an appeal devoid of merit and substance.
24. As regards the issue whether the 3rd, 4th and 5th appellants were properly sued before the trial court, it was submitted on behalf of the respondent that the 3rd, 4th and 5th appellants were proper parties to the suit and were rightly sued. That in as much as they were not the sellers of the land, they invaded the suit land hence necessitating their inclusion in the suit. It was pointed out that the 3rd, 4th and 5th appellants never filed an application to be struck out from the proceedings because they were well aware of their wrongdoing. That they had made a false claim against the respondent's property and forcefully invaded and evicted the respondent from his parcel of land, making them proper parties in the suit. The respondent cited order 1 rule 3 and 9 of the Civil Procedure Rules and submitted that joining of a defendant to a suit is not limited to one being a party to a contract and that a suit shall not be defeated by reason of the misjoinder or non-joinder of parties and that the court in every suit will deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. That the suit was not in regards to a breach of contract but violation of the respondent's rights to property and therefore this ground is misinformed and unfounded as the appellants appeal.
25. On behalf of the respondent, it was also submitted that the appellants have submitted and argued on grounds of appeal that are not in the memorandum of appeal and omitted to submit on the grounds raised in the appeal. The respondent cited order 42 rule 4 of the Civil procedure Rules and relied on the case of *West African Foodstuffs Company Limited & 2 others Versus Kayser Investment Limited* [2022]eKLR.
26. On whether there was a valid agreement for sale of land, it was submitted on behalf of the respondent that contrary to the averments by the appellants, there was a valid and enforceable agreement for sale



- of land which led to registration of the respondent as owner of the land. The respondent cited Section 3(3) of the Law of Contract Act and relied on the case of *Urbanus Kyalo Wambua Versus Briggitta Ndhila Musau* [2019]eKLR . It was further submitted that it is clear from the appellants submissions that none of them who signed the agreement has refuted that they willingly and knowingly signed the agreement. The respondent argued that the issue of signature being more than four is unfounded and was properly explained before the court. That the allegations are an afterthought intended to defeat justice. That the claim that they only signed at the respondent's house is untrue and has not been substantiated.
27. The respondent also cited Sections 107, 108 and 109 of the *Evidence Act* and submitted that it is trite law that he who alleges must prove and the burden of proof befalls upon the appellants to show that the land was acquired fraudulently. It is the respondent submissions that the appellants have failed to prove this and the burden remains undischarged. Further, that fraud and misrepresentation ought to be pleaded specifically which was never done by the appellants. The respondent relied on *Kuria Kiarie & 2 others Versus Sammy Magera* [2018]eKLR. It was further submitted that the 1st and 2nd respondents (sic) are literate and can read and write and that the same was clear in the proceedings of the trial court.
28. The respondent further submitted that the 1st and 2nd appellants claims that they only sold 3 acres of land to the respondent is untrue and misleading as no agreement for the same was produced. In regard to the issue of price of the parcel of land, it was submitted on behalf of the respondent that the same is unfounded and untrue. The respondent relied on the Court of Appeal decision in *Nairobi Civil Appeal 155 of 1992 Kukal Properties Development Limited Versus Tafazzal H. Maloo & 3 Other's* [1993]eKLR and submitted that the issue of variance of the purchase price before and after the agreement is un-consequential and a failed attempt at hiding and running away from the truth. That the agreement was clear and the respondent and his witnesses testified that the purchase price was Ksh. 350,000/=. The respondent argued that the issue of the price before the chief is immaterial and an attempt to mislead the court. That in their counterclaim, the appellants were silent on the amount because they knew the correct amount and the acreage to be 38 acres. Further, that the suit was not based on breach of contract but infringement of the respondent's rights to property.
29. It was further submitted on behalf of the respondent that the appeal is not meritorious and is based on misapprehension of facts and law. The respondent urged the court to dismiss the appeal and award costs to the respondent.

Analysis And Determination

30. Being a first appeal, it is my duty to analyze and re-asses the evidence on record and reach my own conclusions always bearing in mind that I have neither seen nor heard the witnesses and hence I should make due allowance in this respect. However, I am not bound necessarily to follow the trial magistrate finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstance of probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. See *Selle Versus Associated Motor Boat Co* (Supra), *Abdul Hameed Sarif Versus Ali Mohammed Sholan* (1955), 22 EACA 270, *Kenya Ports Authority Versus Kunston (Kenya) Limited* (2009) 2 EA 212, *Abok James Odera t/a A. J Odera & Associates Versus John Patrick Machira & Co Advocates* [2013]eKLR and *Kiptum Versus Birir & Another* (civil Appeal 66 of 2020) [2023]KECA 482 (KLR).
31. In this case, there are certain uncontested facts. From the evidence adduced, there is no dispute that the respondent purchased some parcel of land from the 1st and 2nd Appellants. The points of divergence however, were the acreage that the 1st and 2nd appellants sold to the respondent. According



to the respondent, he purchased and acquired parcel of land measuring 38 acres which was later allocated number P. No. 41511. However, the appellants position was that they only sold 3 acres to the respondent. According to the appellants, there was no written agreement between the parties. The appellants alleged that the advocate who prepared the agreement, took advantage of their inability to read and write to make them sign a document which indicates the 38 acres on the agreement. The main issues for determination in my view, are whether or not there was a valid agreement for sale of land between the 1st and 2nd appellants and the respondents and whether fraud had been proved.

32. Section 3(3) of the *Law of Contract Act* provides that

“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*, nor shall anything in it affect the creation of a resulting, implied or constructive trust”.

33. From the material on record, the respondent testified as PW1 and adopted his witness statement dated 21st January 2022 wherein he stated that he acquired the suit land pursuant to an agreement of sale dated 5th October, 2020 between himself and the 1st and 2nd appellants. He produced the agreement as an exhibit. The 2nd appellant testified as DW1 and relied on his statement dated 30th March, 2022 in which he admitted having been one of the vendors during the execution of the agreement dated 5th October 2020. He stated that they had agreed to sell to the respondent 3 acres at a price of Ksh. 200,000/= per acre and the respondent paid them Ksh. 200,000/= with a promise to pay the balance of Ksh.400,000 in six months’ time. He denied that they agreed to sell 38 acres to the respondent as shown in the agreement that was produced by the respondent as an exhibit.

34. DW3 was the advocate who prepared the said sale agreement. He was summoned by the trial court and he testified that the parties executed the agreement in his presence after he had explained to them the terms and conditions therein.

35. From the evidence on record, there is no doubt that the parties entered into an agreement for sale of land. The only dispute was the size and the purchase price of the land. Whereas the respondent alleged he was sold 38 acres at a consideration of Ksh. 350,000/=, the appellants maintain that they only sold 3 acres at a price of Kshs. 200,000.= per acre out of which the sum of Ksh. 200,000/= was paid by the respondent at the execution of the agreement and that the outstanding balance was to be paid in six months’ time. It is therefore clear that the main issue in contention in this matter was the agreement for sale dated 5th October, 2020.

36. I have perused the said agreement for sale dated 5th October, 2020. I would have had no hesitation in agreeing with the trial court’s finding that the said Sale Agreement is valid. However, I note that there appears to be some discrepancies on the agreements on records. One of the agreements at clause II indicates that the same was signed in the presence of four witnesses. However, there appears to be four signatures and a thumb print. There are actually two signatures and one thumb print under the names of Adam Godo and Peter Ekwam. In addition, the agreement marked “AGG2” which is annexed to the



respondent's affidavit in support of the Notice of Motion dated 21st January, 2022, indicates that the said four witnesses only appended their signatures against their names and there was no thumb print against any of those signatures. It is not clear to me why one document would have such discrepancies as there was no explanation given. It is also apparent that the trial court did not address itself to this issue which to me was very crucial, considering that the document was highly contested. With respect to the trial court, when the agreement in question was questioned by the appellants, it would have been prudent for the trial court to consider the said discrepancy before arriving at a finding that the document was valid. Apparently, the two agreements are in the court record. One is found from page 29 – 34 of the record of appeal while the other is in the original file of the lower court. The big question is which of the two agreements did the trial court use in arriving at its decision. Similarly, at this stage, this court is at a loss on which of the two agreements it should rely on in evaluating the matter and in arriving at a finding. There is clearly an ambiguity with regard to which of the agreements was executed by the parties and which one was not. The sale agreement was in the heart of the dispute and it was upon the respondent to come out clearly on which of the documents was the right one to establish his case. In my considered view, the learned trial magistrate misdirected himself in holding that the respondent had proved his case on a balance of probabilities when it was not clear as to why the agreement which was in the dispute had discrepancies which had not been explained satisfactorily. It is not even clear which of the agreements was produced as an exhibit at the trial court.

37. In light of the complaints raised by the appellants with regard to the Sale Agreement allegedly made on 5th October, 2020 between the parties, and having perused through the record, it is my considered view that the issues in controversy between the parties require to be decided afresh at the trial.

38. I therefore find merit in the appellants appeal and issue the following orders:-

- i. The judgment of the learned trial magistrate delivered on 25th August, 2022 in Tigania PMC ELC suit No. E005 of 2022 be and is hereby set aside.
- ii. The matter is remitted for fresh hearing and determination by a magistrate other than Hon. P. M. Wechuli.
- iii. The Deputy Registrar of this court shall send this Judgment together with the original record to the Principal Magistrate's Court of Tigania for the appropriate directions to be made.
- iv. The respondent will meet the appellants costs of this appeal.

39. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF MARCH, 2024

HON. C. YANO

ELC – JUDGE

In the presence of:-

Court Assistant: Tupet

Ms. Otieno holding brief for Ms. Onyango for Appellants

Ms. Nyasani holding brief for Wario Mishi for respondent

