



**Gambe v Okoth (Environment and Land Appeal E006 of 2023)
[2024] KEELC 3966 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3966 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E006 OF 2023
GMA ONGONDO, J
MAY 21, 2024**

BETWEEN

SAMWEL OWINO GAMBE APPELLANT

AND

PIUS OBUDHO OKOTH RESPONDENT

*(An appeal arising from the Judgment and Decree in Oyugis Senior
Principal Magistrate’s Court Environment and Land Case Number
63 of 2023 by Hon. B. Omwansa, SPM on 2nd August 2023)*

JUDGMENT

1. On August 2, 2023, the trial court (Hon. B. Omwansa, SPM) rendered judgment in Oyugis Senior Principal Magistrate’s Court Environment and Land Case number 63 of 2023 (The original suit) in favour of the respondent who was the plaintiff at that court in the following terms:
 - a. That the defendant is hereby compelled to transfer to the plaintiff a portion of land measuring approximately one acre carved out of parcel number East Kasipul/ Kojwach Kamioro/2050 (the suit land herein) within 30 days, failure to which the aggrieved party has the right to move the court appropriately.
 - b. Costs of the suit.
2. The said judgment attracted the instant appeal originated by way of a memorandum of appeal dated August 14, 2023 founded upon ten grounds, and the same include;
 - a. The learned trial Magistrate erred in fact and in law by failing to hold that the plaintiff having failed to plead particulars of breach of contract, failed to prove his case on a balance of probability.



- b. The learned trial Magistrate erred in fact and in law by failing to find that upon the plaintiff having been refunded his money, he was therefore not entitled to an order of specific performance.
 - c. The learned trial Magistrate erred in fact and in law by failing to hold that the said transaction offended Section 6 as read with Section 8 of the Land Control Board (I think meant Act in lieu of Board).
 - d. The learned trial Magistrate erred in fact and in law by failing to take note of the partial deafness of the appellant herein hence the appellant was not subjected to fair hearing.
3. So, the appellant has prayed that the instant appeal be allowed and the judgment of the trial court be set aside and substituted with an order allowing the appellant's suit with costs.
4. The appeal was heard by way of written submissions pursuant to orders of this court given on January 30, 2024.
5. The appellant's counsel, Omuthe and Company Advocates, filed submissions dated March 12, 2024 and submitted, inter alia, that the agreement between the appellant and the respondent was invalid thus, orders of specific performance could not issue. Reliance was placed on the case of *David Sironga Ole Tukai -vs- Francis Arap Muge and 2 others* (2014) eKLR, among others, to buttress the submissions.
6. By the submissions dated April 4, 2024, Onyango Owaka and Associates Advocates, learned counsel for the respondent, submitted that the purported second sale agreement between the appellant and a third party was in reference to another section of the suit land. That the two agreements are separate contracts and are enforceable separately.
7. It is important to note that the instant appeal being the first one from the trial court, this court has the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Peters-vs-Sunday Post* (1958) EA 424 at 429.
8. It is borne in mind that the respondent sued the appellant by way of a plaint dated October 19, 2022 over the suit land, East Kasipul/ Kojwach Kamioro/2050 for;
 - a. An order compelling the appellant to transfer to the respondent a portion of the suit land measuring approximately 1 acre.
 - b. Costs
 - c. Interest
9. The respondent's claim was that vide a sale agreement dated 9th June 2014, he purchased a portion of the suit land measuring approximately one acre in area from the appellant herein. That despite paying the total consideration of Kshs. 200,000, the appellant declined to transfer ownership of the said portion to his name.
10. The appellant opposed the claim vide a statement of defence dated November 15, 2022, wherein he urged the court to dismiss the respondent's suit with costs. He stated that on June 9, 2014, he sold the disputed portion of the suit land to the respondent herein. That on October 21, 2014, the respondent approached him with the intention of disposing the disputed portion to a third party. That since he had not transferred ownership of the disputed portion to the respondent, they agreed that he would sign as the vendor to the third party. That the respondent received the purchase price thereof.



11. In his evidence, the respondent (PW1) relied on his statement on record. He produced in evidence a sale agreement and title deed in respect of the suit land (PExhibits 1 and 2 respectively). He stated that he is not in possession of the disputed portion of the suit land. That he has not obtained a title deed in respect to the same.
12. The appellant (DW1) relied on his statement on record dated November 15, 2022 in entirety as part of his evidence at the trial court.
13. In the foregone, the issues for determination herein are as set out on the grounds of appeal which crystallize to:
 - a. Whether the instant appeal is tenable?
 - b. The orders to issue to meet the ends of justice herein.
14. In his judgment, the learned trial magistrate stated *inter alia*;

“...specific performance may not be ordered on an invalid contract but consideration shall be made of other available remedies...”
15. The trial magistrate held that the contract entered into between the parties was valid. Thus, he allowed the prayers sought in the plaint.
16. The appellant contends that the learned trial Magistrate erred in fact and in law by failing to hold that the plaintiff having failed to plead particulars of breach of contract, failed to prove his case on a balance of probability. It is quite clear that the respondent stated breach of the sale agreement at paragraph 4 of the plaint.
17. It is not in dispute that the appellant herein sold a portion of the suit land measuring one acre, first to the respondent herein and later to a third party. From the record, I note that there is a sale agreement dated June 9, 2014 between the parties (PExhibit 1). There is also a sale agreement dated October 21, 2015 between the appellant and a third party, Kennedy Ouma Odiko (as per the defendant’s list of documents dated November 15, 2022).
18. Clearly, the 2nd sale agreement dated October 21, 2015 is not in contention. The appellant explained that the respondent approached him with the intention of disposing the disputed portion to a third party. That since he had not transferred ownership of the disputed portion to the respondent, they agreed that he would sign as the vendor to the third party. That the respondent received the purchase price thereof.
19. This court is not unaware of Section 3(3) of the [Law of Contract Act](#), Chapter 23 Laws of Kenya. Further, I am guided by the prevailing jurisprudence on the tenor and import of that legal framework. It is my considered view that the sale agreement dated June 9, 2014 between the parties (PExhibit 1) is valid.
20. The respondent instituted the suit after the lapse of 6 years. Nonetheless, it is my finding that the sale (PExhibit 1) was valid and enforceable by virtue of equitable estoppel and constructive trust; see [Willy Kimutai Kitilit-vs-Michael Kibet](#) (2018) eKLR.
21. The appellant laments that the trial court erred in fact and in law by failing to find that having been refunded the purchase price, the respondent was therefore not entitled to an order of specific performance. That the respondent only attested to the execution of the second sale agreement, upon being refunded the entire purchase price of Kshs. 200,000. Notably, the appellant has not adduced



sufficient evidence in support of that assertion. Besides, the third party who is the purchaser in the 2nd sale agreement was not a party to the original suit or in this appeal.

22. The appellant avers that the learned trial Magistrate erred in fact and in law by failing to hold that the said transaction offended Section 6 as read with Section 8 of the Land Control Act, Chapter 302 Laws of Kenya. However, this court subscribes to the Court of Appeal's decision in Willy Kimutai Kitilit (supra) where the court held that the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust. The court noted that:

“...since the current Constitution has by virtue of Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board...”

23. Furthermore, in Macharia Mwangi Maina & 87 others -vs- Davidson Mwangi Kagiri (2014) eKLR, the Court of Appeal observed:

“...The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property...”

24. It is therefore, this court's considered view that the respondent proved, to the requisite standard, the existence of a constructive trust over a portion of the suit land measuring 1 acre in area.

25. This court is guided by Section 107 of the Evidence Act, Chapter 80 Laws of Kenya which provides as follows:

- i. 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.
- ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

26. Bearing in mind the entire evidence on record in this case, and applying the facts of the case as well as legal principles stated above, it is clear that the respondent proved his claim to the requisite standard at the trial court. Thus, I proceed to uphold the learned trial magistrate's judgment concerning the issue of the ownership of the disputed portion of the suit land measuring approximately one acre in area.

27. To that end, the instant appeal originated by way of a memorandum of appeal dated August 14, 2023 is devoid of merit. It is hereby dismissed.

28. The appellant to bear the costs of this appeal and the court below.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 21ST DAY OF MAY 2024

G.M.A ONG'ONDO

JUDGE

Present

1. Mr. Owaka- Learned Counsel for the respondent



2. Respondent

3. Mutiva- Court Assistant

