IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MWERA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 128 OF 2008

BETWEEN

RUBO KIPNGETICH ARAP CHERUIYOT.....APPELLANT

AND

PETER KIPROP ROTICH.....RESPONDENT

(Appeal from the decision of the High Court at Eldoret (Nambuye, J) delivered on 28th April, 2004 at Eldoret by Honourable Mr. G. Dulu

in

ELDORET HCCC NO. 133 OF 1993)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of Nambuye J (as she then was) delivered on her behalf by Dulu J on 24th April 2004 in Eldoret HCCC No. 133 of 1993 in which she dismissed the appellant's claim with costs.

2. The factual background of the case according to the Appellant was that by an agreement in Kalenjin language dated 7th July 1972, Kiprotich Arap Mibei now deceased (the deceased) sold his piece of land situate in Turbo area comprisingninety six (96) acres or thereabouts and known as **Plot No. 207 Tapsagoi Settlement Scheme** (the suit land) to Rubo Kipngetich Arap Cheruiyot (the Appellant) for Kshs.13,700/=. On 20th July 1972, the parties went to the offices of Justice Philip K. Tunoi of the Supreme Court of Kenya who was then an advocate practising in Eldoret and got their agreement drawn in the English language. The agreement provided that Kshs.4700/= had been paid before the execution thereof and that the balance was to be paid on or before 15th December 1972. That is the amount that had been paid at the execution of the Agreement in Kalenjin language. It alsoprovided that the deceased was to pay the Settlement Fund Trustee (SFT) loan instalments for that year and thereafter the Appellant would take over the repayment of the balance of the SFT loan. On 6th November 1972, the Appellant paid the balance of the purchase price to the deceased in the presence of Justice Tunoi and in December 1972 the deceased gave vacant possession of the suit land to him. Consent of the Land Control Board to that transaction was granted on 24th February 1973.

3. In or about 1982/3 the deceased took the Appellant to the elders complaining that he had not been paid the full purchase price but the elders, no doubt in the light of the written agreement and the hand written note dated 20th November 1972 acknowledging payment of the balance of the purchase price dismissed that claim. The deceased, however, refused to execute the transfer which SFT had prepared for the parties. He died in 1987.

4. After obtaining a grant of the letters of administration to the deceased's estate, Peter Kiprop Rotich, the Respondent and son of the deceased, asked the SFT to transfer the suit land to him. The SFT, which was aware of the sale of the suit land alerted the Appellant who thereafter filed the suit giving rise to this appeal.

5. In his defence in that suit, the Respondent denied that the deceased had sold thesuit rubbishing the two sale agreements as forgeries and claiming that he had only leased it to the Appellant between 1972 and 1978 for Kshs.7000/=. On those averments he counterclaimed for the eviction of the Appellant from the suit land. The suit was heard by Lady Justice Nambuye who found that the deceased had indeed sold and not leased the suit land to the Appellant but nonetheless dismissed the suit on the grounds that the SFT had not granted its consent to the transaction and that the agreement between the deceased and the Appellant was null and void for failure to stamp it with stamp duty until 22nd February 1996. This appeal is against that decision.

6. In his presentation of the appeal before us, Mr. Nyairo, learned counsel for the Appellant, raised six points: the validity of the sale agreement; part performance; the SFT's consent to the sale; the defence of forgery and the weight of evidence.

7. On the first point, Mr. Nyairo submitted that the learned trial Judge erred in holding that the first agreement in Kalenjin language was invalid because it hadbeen prepared by the Appellant and that there is nothing on it to show that its contents had been explained to the parties before they executed it. He said that there is no basis for holding that an agreement prepared by one of the parties to it is invalid. There is also no legal requirement for a certificate that the contents of an agreement be explained to the parties before executing it. He said what is important in any agreement is that the parties executed it. In this case, the Appellant's evidence that the parties duly executed the agreement was corroborated by the evidence of Kiprop Arap Ruto, PW2, who testified that the contents of the agreement were explained to the parties including the witnesses before they executed it.

8. Counsel for the Appellant also submitted that the learned trial Judge having correctly dismissed the Respondent's claims that the deceased leased the suit land and that the two sale agreements were forgeries and held that the agreements were valid, she erred in invalidating the agreements on the ground of late stamping. He submitted that stamping, whether on time or late does not invalidate a document. Under **Section 19** of the **Stamp Duty Act,**[1]a document which is not stamped with the requisite stamp duty is inadmissible in evidence. There is a great distinction between inadmissibility and invalidity.

9. In this case the agreement was stamped before it was produced in court on 7th October 1996. In support of this argument, he cited the case of **Diamond Trust Bank (K) Ltd vs Jaswinder Singh Enterprises,**[2]and urged us to find that both the Kalenjin and English language versions of the agreement were valid.

10. Even if the agreements were, for any reason, invalid, Mr. Nyairo urged us to find that the Appellant having admittedly been in possession of the suit land since December 1972, the sale was valid on the doctrine of part – performance pursuant to **Section 3(3)** of the **Law of Contract Act**[3] which was in force at that time. On this proposition counsel also relied on this court's decision in **Mironda Arumba vs Miruka Mbega & Another**[4]

11. While admitting that one of the conditions of the SFT's allotment of the suit land to the deceased was that the suit land could not be disposed of by way of charge, lease or transfer without the prior written consent of the SFT, Mr. Nyairo referred us to the flip side of the transfer form that the SFT had prepared for the parties which has its consent endorsed on it. He urged us to overrule the trial Judge's

holding that the suit land was in any case owned by the SFT and the deceased could therefore have not been able to transfer it to the Appellant. He argued that the deceased had allotment rights in the land which were transferable.

12. Mr. Nyairo also faulted the trial Judge for holding that the Appellant should have lodged his claim in the deceased's succession cause file. He argued that succession causes are for the determination of deceased persons legal representatives as well as their heirs and their respective shares. Contentious claims to the deceased person's properties by third parties have and are always litigated in separate suits.

13. On the Respondent's claim that the sale agreements were forgeries and that the deceased did not sell but lease the suit land to the Appellant, Mr. Nyairo urged us to find that the Respondent did not tender an iota of evidence on either of them. In conclusion he submitted that there was overwhelming evidence in support of Appellant's claim and urged us to allow this appeal with costs both here and in the High Court.

14. In response to these submissions, Mr. Maritim, learned counsel for the Respondent started by conceding that the Respondent did not tender any evidence on his claims of forgery of the sale agreements or lease of the suit land. That concession notwithstanding, however, he submitted that the learned Judge cannot be faulted for finding that the two agreements were null and void. He argued that there was nothing in the first agreement in Kalenjin language to show that theparties were of the same mind.

15. Mr. Martim also dismissed his counterpart's contention that the SFT gave its consent to the sale. In his view, it was not enough to endorse the consent on the transfer it prepared for the parties. According to him the SFT should have writtena letter formally granting its consent to the sale. Had it done that it could not have written to the Appellant as it did on 12th August 1993 that unless the Appellant communicated within 21 days on the Respondent's demand to the SFT to transfer the suit land to him, the SFT was going to comply with the demand.

16. We have considered these rival submissions and carefully read the record of appeal. To start with, we agree with Mr. Nyairo that there is nothing in law requiring a formal acknowledgment on an agreement that its contents have been explained to the parties before executing it. That kind of acknowledgment was required on transfers and charges in respect of pieces of land registered under the now the **Registered Land Act**[5] and mortgages under both the **Government Land Act**[6] and the **Registration of Titles Act**.[7] Even if there was such requirement, the evidence of Kiprop Arap Ruto, PW 2 and that of Justice Philip Tunoi, PW 6, would have sufficed.

17. P.W.2 testified that he was a village elder in the deceased's home. He was present when the deceased and the Appellant met on 7th July 1972 and agreed on the saleof the suit land to the Appellant for Kshs.13,700/=. The Appellant wrote out the agreement in Kalenjin language and explained its contents to all present beforethe deceased thumb printed it and PW 2 also thumb printed it as a witness.

18. Justice Tunoi who testified as PW 6 also confirmed that he explained the contents of the agreement in Kalenjin language, which all the people present there understood well, before they executed it. He had known both the deceased and the Appellant. Both PW 2 and PW 6 were categorical that the deceased sold and not leased the suit land to the Appellant. On the basis of the evidence of these two witnesses as well as that of the Appellant and the two written agreements, we concur with the learned trial Judge that the deceased sold the suit land to theAppellant at the agreed purchase price of Kshs.13,700/=.

19. As we have already stated, the learned trial Judge invalidated the written agreement on account of late stamping. **Section 19** of the **Stamp Duty Act** does not invalidate an unstamped document. It only renders it inadmissible in evidence. It states that except in criminal cases or civil proceedings by a collector to recover stamp duty, *"no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever ....unless it is duly stamped."***Sub-section (3)** of that section permits late stamping. There is no dispute that the agreement in this case was chargeable with stamp duty and was stamped with the requisite stamp duty before it was produced in court. In the circumstances, we find that the learned trial Judge had no basis for holding that the agreement was invalid.

20. There is no dispute that the deceased gave possession of the suit land to the Appellant in December 1972 and the Appellant has been in possession since then. Even if the written agreements were for whatever reason invalid, the learned Judge should have found for the Appellant on the doctrine of part performance under **Section 3(2)** of the **Law of Contract Act** as it stood then. It provided:

"(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded or some memorandum or note thereof is in writing and is signed by the party to be charged or by some person authorised by him to sign it:

Provided that such a suit shall not be prevented by reason only of the absence of writing where an intended purchaser or lessee who has performed or is willing to perform his part of a contract.

(i) has in part performance of the contract taken possession of the property or any part thereof;"

See also the case of **Mirondia Arumba vs Miruka Mbega & Omwancha Mbega.**[8]

21. The other point raised in this appeal relates to the consent of the SFT to the sale by the deceased of the suit land to the Appellant. It is not in dispute that one of the conditions in the letter of allotment was that the suit land could not be transferred, leased or charged without the prior written consent of the SFT. The SFT not only dealt with the parties and allowed the Appellant to take over the loan repayment from the deceased but also prepared a transfer of the suit land forthe parties and endorsed its consent on it. As pointed out, it is actually the SFT which alerted the Appellant that the Respondent had requested it to transfer the suit land to him. The SFT could not have done all that if it had any objection to the sale. There is therefore no basis for Mr. Maritim's contention that the SFT should have granted its consent on a formal letter separate from the endorsement on the transfer, there being no provision anywhere on the form the SFT's written consent should take.

22. The Respondent's claim that the Appellant should have lodged his claim to the suit land in the deceased's succession cause has also no merit. There is no legal provision for it. We agree with Mr. Nyairo that deceased persons' succession causes are for purposes of determining and appointing the legal representatives of deceasedpersons and also for ascertainment of the deceased's heirs and their respective shares. Claims by third parties to deceased persons' properties, although sometimes lodged in the succession causes of such deceased person, are better litigated in separate suits. The Respondent's contention therefore that the Appellant's suit was incompetent for failure to lodge the claim in the deceased's succession cause has therefore no basis in law.

23. The last point argued in this appeal relates to the Respondent's claim that the written agreements between the deceased and the Appellant were forgeries. This claim had no basis at all. No wonder Mr. Maritim, learned counsel for the

Respondent never raised it in his submission before us. It is trite from **Section 107** of the **Evidence Act**[9] and several authorities including **Koinange vs Koinange**[10] that he who alleges a fact has the burden of proving it. In this case, it is the Respondent who alleged that the written agreements were forgeries but he did not tender an iota of evidence and we accordingly dismiss the forgery allegation.

24. This being a first appeal the law obliges us to treat it as a retrial and subject the evidence on record to a fresh scrutiny and reach our own conclusions thereon. This is how the predecessor of this Court expressed this point in **Selle& Another -vs- Associated Motor Boat Company Ltd & Others**[11]: -

"An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally …"

In discharging this mandate, we should never lose sight of the fact that the trial Judge having seen the witnesses testify, he was better placed to assess their demeanour. We should therefore be slow in reversing his finding of fact. In **Peters v. Sunday Post Ltd**[12]it was stated: -

> **"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide…."**

25. In this case the finding of fact that the learned trial Judge made, which we agree with, is that the deceased did not lease but sold the suit land to the appellant. She dismissedthe Appellant's case mainly on the ground that the sale agreement between him and the deceased was stamped late. We have already overruled her on that.

26. Having re-evaluated the evidence on record, we have no hesitation in finding that the learned trial Judge erred in dismissing the appellant's case. We therefore allow this appeal, set aside the learned Judge's order of dismissing the suit and substitute it with an order of specific performance as prayed in the Appellant's plaint dated 5th July 1993. The Appellant shall have the costs of this appeal and those ofthe High Court.

DATE and delivered this 15th day of October 2013.

D.K. MARAGA

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JUDGE OF APPEAL

J. MWERA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true Copy of the original

DEPUTY REGISTRAR

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[1] Cap 480 of the Laws of Kenya.

[2] [1999] 2 EA 72.

[3] Cap 23 of the Laws of Kenya.

[4] Kisumu Civil Appeal No. 114 of 1986 (CA).

[5] Cap 300 of the Laws of Kenya.

[6] Cap 280 of the Laws of Kenya.

[7] Cap 281 of the Laws of Kenya.

[8] Civil Appeal No. 114 of 1986 (unreported) (CA Kisumu).

[9] Cap 80 of the Laws of Kenya.

[10] [1986] KLR 23.

[11] [1968] EA 123.

[12] [1958] EA 424.