REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Civil Appeal 217 of 2003

JOHN ONYANCHA ZURWE .....APPELLANT

AND

ORETI ATINDA *alias* OLETHI ATINDA .....RESPONDENT

(Appeal from the judgment of the High court of Kenya at Kisii (Birech, C.A.) dated 26th November, 2002

in

H.C.C.C. No. 10 of 1996)

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JUDGMENT OF THE COURT

In a plaint dated 2nd January, 1998 and filed in court on 10th January 1998 the appellant as plaintiff, through his advocates, *Messrs Soire & Company Advocates,* sought from the superior court the following orders, namely:-

(a) A declaration that the plaintiff and defendant are equal partners in the purchase of one share in Ekerubo Farmers Co-operative Society.

(b) A declaration that the plaintiff is entitled to 23.5 acres being half share of *plot No. Ekurubo/54* ***in Ekerubo Farmers Co-operative Society.***

(c) An injunction restraining the defendant, his agents and/or servants from interfering with the quiet and/or peaceful possession of half share of *plot No. Ekerubo/54* ***in Ekerubo F.C.S. Farm.***

(d) Costs of this suit.

(e) Any other order this Court deems fit to grant.

The respondent, as defendant, through his advocates *Messrs Onyinkwa & Company Advocates,* filed a defence to the suit, dated 5th and filed in court on 6th February 1998 in which he averred *inter alia* that he only invited the appellant to join him in a deal involving parcel of land measuring 10 acres which had already been subdivided and the appellant had been given his 5 acres therefrom although the said

appellant had not paid the purchase price thereof in full. The case was heard by a Commissioner of Assize (*P.K.K.A. Birech*). In his judgment on 26th November, 2002, the learned Commissioner of Assize concluded:-

"***The plaintiff read too much into the title of the agreement which is written as "partnership Agreement" but when one scrutinizes the contents thereon it is nothing more than the purchase of five acres of land from the defendant.***

The defendant was candid enough in his testimony. He said he sold the plaintiff five (5) acres of land and gave him possession of the same, and that that is the plaintiff's entitlement and no more.

I have not taken into account the contents of exhibits D2 and D3 as these exhibits related to the court proceedings in *Kisii C.M.C.C.C. No. 54 of 1993* ***and the panel of elders proceedings and its award thereon as those proceedings were put on hold pending the finalization of the suit. The plaintiff has tried to stretch his luck too much, for he is lucky that the defendant has not made an attempt to take advantage of the provisions of the Land Control Act which could have made the transaction void for all purposes, three months after the transaction was entered into. However as the defendant has not seen it fit to raise that as an issue in this suit, I do not think it necessary to go into that point.***

The other point which has been raised by *Mr. Onyinkwa* ***is the application of the provisions of the Co-operative (sic) Societies Act. I do not think the application of the provisions of that Act are of any significance in this case because as stated by the parties themselves and witnesses, the plaintiff never became and is not a member of Ekerubo Farmers Co-operative Society Limited and as a non-member he cannot be subject of the provisions of that Act as they do not apply to him and neither can he take advantage of them. All in all the plaintiff has not been able to prove his case on a balance of probabilities and the plaintiffs suit is hereby dismissed with costs.***

The appellant was aggrieved by that decision and he lodged this appeal before this Court. In a Memorandum of Appeal dated 14th August, 2003. Four grounds of appeal have been raised, namely:-

1. The leaned Commissioner of Assize misdirected himself on the evidence in not finding that the agreement entered into between the parties herein was a partnership agreement for the one share the respondent had acquired in Ekerubo F.C.S. Limited and not for the 10 acres of land.

2. The learned Commissioner of Assize failed to address himself to the unchallenged evidence that if the value of one share of the society was Kshs.25,000/= and that the appellant herein paid Kshs.18,000/= and also made subsequent instalment payments what he paid for was for a share in the society and not a share in the 10 acres.

3. The learned Commissioner of Assize failed and/or neglected to address himself to laws governing partnership.

4. The learned Commissioner of Assize decided the case against the weight of evidence on record.

The appeal was placed before us for hearing on 26th March, 2009 when ***Mr. Soire,*** learned counsel for the appellant referred us to what he called the partnership agreement and said it was envisaged therein that whatever acreage of land was given to the respondent by the society would be subdivided and shared equally between the appellant and the respondent. In his view this agreement did not relate only to 10 acres mentioned therein. In reply, ***Mr. Onyinkwa,*** learned counsel for the respondent stated that the respondent as the landlord invited the appellant to share in his 10 acres of land at a price of Kshs.18,000. This written agreement was not altered. According to him the whole land was the property of Ekerubo Farmers Co-operative Society Limited from which the respondent was only allocated 10 acres at the time of the agreement and it is out of this acreage the appellant bought 5 acres. The appellant did not give evidence of any additional payment of money or services he rendered to the society to entitle him to more land. According to him the arbitration board considered the matter and awarded the appellant 5 acres. The receipts produced showed it was the respondent alone who repaid the loan to the Co-operative

Society. Counsel submitted further that since the appellant was not a member of the Co-operative Society he filed this dispute in the superior court. Otherwise the same would have been arbitrated upon under the Co-operatives Act.

This is a first appeal and that being the position our duty is to re-consider and re-evaluate the evidence in order to come to our own independent conclusion, of course, bearing in mind that this Court had no advantage of seeing and/or hearing the witnesses testify as the superior court did and/or to judge their demeanour and giving allowance for that, see ***Selle v. Associated Motor Boat Company Limited*** ***[1968] E.A 123***. The case of the appellant in the superior court was based on what was termed as the "***partnership agreement"*** dated 23rd March, 1978. The first paragraph thereof stated that:-

"***1. That the Landlord agrees to incorporate and the partner agrees to join the Landlord in the Landlord's plot measuring approximately ten acres being divided into two halves, i.e***. *five acres for the Landlord and five for the partner****."(***emphasis added***)***

Paragraph 2 of the agreement provided for the price of Kshs.18,000/= which the partner was to pay for his share. Paragraphs 3 and 4 showed how much of the purchase price had been paid by the partner and the remaining balance, while paragraph 5 provided for a penalty in the event of any party who might alter the agreement without the consent of the other party. Then paragraph 6 provided that:-

"***this agreement shall remain in force unaltered or change (sic) except that it can be modified by the consent of either party it shall therefore remain in force until further notice."***

This agreement remained so unaltered until the hearing of the case in the superior court. Paragraphs 1 and 6 which were crucial in the case were self-explanatory. Paragraph 1 provided for 10 acres which would be subdivided and shared equally between the landlord and the partner if the latter paid the agreed price, which he did. Each was to get 5 acres. Throughout the evidence in the superior court there was no suggestion that the appellant attempted to alter the partnership agreement to reflect that it related to the respondent's final entitlement from Ekerubo Farmer's Co-operative Society Limited which he put at 47 acres. His evidence was therefore, an attempt to alter or vary a written agreement by oral evidence, but this would be against the spirit of ***section 94*** of the Evidence Act. Moreover, a passage in ***Halsburys Laws of England 4th edition Vol. 12*** on interpretation of deeds and Non-Testamentary Instruments paragraph 1478 and quoted with approval in the case of ***Swiqippharm Ltd v. Awuondo & Another*** ***[2003] KLR 193*** at p.199 the learned authors state as follows:

"***Extrinsic evidence generally excluded:***

Where the intension of parties has been reduced to writing it is in general, not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the documents. ...

Extrinsic evidence cannot be received in *order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document****."*** Emphasis added.

Though the appellant's pleadings show that the respondent's share in the land owned by Ekerubo Farmers Co-operative Society Limited was 47 acres, there were no-pleadings that this share was worth Kshs.25,000/=; hence we do not understand the basis for ground 2 of the Memorandum of appeal.

We have considered the agreement and the evidence of the parties in the superior court and the submission made before us by learned counsel for the parties and are of the view and so hold that the agreement the parties entered into related to 10 acres out of which the appellant bought 5 acres and nothing more. We see no reason to fault the learned trial Judge's finding and we find this appeal without any merit. We dismiss it but direct that in the circumstances of the case each party should bear his own costs of this appeal and also of the proceedings in the superior court.

Dated and delivered at Nairobi this 8th day of May, 2009

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR