



REPUBLIC OF KENYA



**Kariuki v Tuyia (Environment and Land Appeal E001 of 2023)
[2024] KEELC 7031 (KLR) (24 October 2024) (Interim Judgment)**

Neutral citation: [2024] KEELC 7031 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E001 OF 2023
LC KOMINGOI, J
OCTOBER 24, 2024**

BETWEEN

SEERU OLE KARIUKI APPELLANT

AND

KIPISHI OLE TUYIA RESPONDENT

*(Being an Appeal against the Judgement of Hon. B. Cheloti in
Kajiado ELC Case No. 42 of 2020 delivered on 22nd December 2022)*

INTERIM JUDGMENT

1. The Learned Trial Magistrate Hononourable B. Cheloti in the judgement dated and delivered on 22nd December 2022 in Kajiado ELC Case No. 42 of 2020 found that the Respondent had proved his case and ordered that:
 - a. The Defendant (Appellant herein) do sign all requisite completion documents to effect transfer to the Plaintiff including surrendering the original title for property known as Kajiado/Kaputiei South/6602 within 45 days after delivery of this judgement.
 - b. In default, the Executive Officer of this court do sign all requisite completion documents to effect the transfer of property known as Kajiado/Kaputiei South/6602 in favour of the Plaintiff.
 - c. The Land Registrar Kajiado do issue a title deed of property known as Kajiado/Kaputiei South/6602 in favour of the Plaintiff.”
2. Aggrieved by the Judgement, the Appellant has appealed to this court seeking that the judgement be set aside on the grounds that:



1. The learned trial Magistrate erred in law and in fact in failing to consider the defence placed before her in advancement of the defence case, points of determination, decision thereon and reasons for her judgment rebuttal defence by the defendant and that the plaintiff had not discharged off the burden of proof.
 2. The Learned trial Magistrate erred in Law and in fact in failing to consider the mere fact that there was no evidence of flow of consideration from the alleged buyer to the alleged seller.
 3. The Learned trial Magistrate erred in Law and in fact for failing to appreciate the fact that the alleged contract presented before her is bad in law for being vague in that there was no land in existence at the time of the alleged contract, no identifiable land and the said contract could not be a binding document
 4. The Learned trial Magistrate erred in Law and in fact in failing to make a consideration that the alleged sale agreement was in a language alien to both the Appellant and the respondent and there was no evidence at all produced to the effect that the said agreement was read translated and explained to the parties before any commitment.
 5. The Learned trial Magistrate erred in Law and in fact in failing to consider the mere fact that there was no proof at all of payment of the alleged Ksh.300,000 to the appellant by the respondent and that there was no signatures against the alleged payments made either by the appellant, the respondent or their alleged witnesses. The appellant clearly stated that he did not sign as well as the respondent and this was all throughout the proceeding of the lower court but this suffered the unfair axe of oversight by the Learned Magistrate.
 6. The learned Magistrate erred in Law and in fact in failing to consider the mere fact that the said contract was controlled by the provisions of Section 3(3) of the [Law of Contract Act](#).
 7. The learned Magistrate erred in Law and in fact in failing to consider the fact that subject land was an Agricultural land whose disposal is regulated by Section 6 of the [Land Control Act](#).
3. This appeal was canvassed by way of written submissions.

The Appellant's submissions

4. On whether there was a valid sale agreement, counsel submitted that the trial court erred in terms of Section 3(3) of the [Law of Contract Act](#), because a sale of land could not be validly executed without signatures and the signatures being attested by witnesses. The sale agreement produced by the Respondent was in breach of those requirements. Further, the Appellant being uneducated only signs documents using his thumb print and not by pen as per the signature in the alleged sale agreement and his Identification Card was proof of this. Counsel added that the suit property being agricultural land, it was a requirement to get Land Control Board consent for the transaction to be valid, which was never done. Therefore, the alleged sale did not take place.
5. On lack of evidence for the alleged consideration of Kshs. 300,000 paid by the Respondent, counsel submitted that there was no evidence or acknowledgement of receipt of the consideration by the Plaintiff. Adding that at the time of the alleged sale in 2016, the suit property had not been excised and was still part of the Kiboko Group ranch. That it was until the year 2019 that the property was excised. Therefore, the sale in 2016 could not be valid since the property was held by the group ranch.
6. It was also submitted that the parties do not understand the English language which is the language used in the sale agreement and there was no memorandum executed showing that contents of the



agreement had been explained to the parties in a language they understand. As such, the said sale is void and the lower court's judgement should be set aside and dismissed with costs for lack of merit.

The Respondent's submissions

7. On whether there was a valid sale agreement, counsel submitted that as per Section 3(3) of the *Law of Contract Act*, the sale agreement produced by the Respondent met the required threshold. It was in writing having been drafted by the Appellant's brother Patrick Lesezia, it had been signed by all the parties and the signatures attested citing Nelson Kivuvani vs Yuda Komora & another. On the issue of the signature being that the Appellant does not sign using a pen but affixes his thumbprint, counsel submitted that the Respondent's witnesses testified seeing the Appellant sign the agreement. Therefore, the burden of proving that he did not sign lay with him as per Section 122 of the *Evidence Act* and he did not do so as was held in *Concepta Nyaboke vs Peter Muasya Wangaika & 2 others* [2019] eKLR. Counsel further submitted that the burden of proof shifted depending on who would lose if no further evidence was introduced as held by the Supreme Court in *Raila Amolo Odinga & another vs Independent Electoral and Boundaries Commission and 2 other* [2017] eKLR. The Appellant neither called a document examiner to contest the signature nor any witness to challenge the signature. Therefore, parties being bound by their contract, the sale agreement was binding.
8. On the issue of the land not being available for sale at the time of the execution of the agreement, counsel submitted that the sale agreement which was drafted by the Appellant's brother indicated that the sale was for one acre in Kiboko Group Ranch awaiting survey and issuance of title which was eventually subdivided and registered in the Appellant's name. On the payment of consideration, counsel also submitted that the Respondent paid the purchase price and called a witness to confirm the same.
9. On the issue of the LCB consent, counsel submitted that whereas this was not an issue raised at trial and the Appellant was introducing new evidence at trial, it was the Appellant's onus to obtain the consent to transfer the property to the Respondent had he not breached terms of the contract. The Appeal should thus be dismissed with costs to the Respondent.

Analysis and Determination

10. Having considered the grounds of appeal, the record of appeal, the rival submissions and the authorities cited. I find that the issues for determination are:
 - i. Whether the learned Magistrate erred in finding that there was a valid sale agreement;
 - ii. Whether the learned Magistrate erred in finding that the Respondent had proved his case;
 - iii. Whether the Appellant is entitled to the orders sought.
 - iv. Who should bear costs of the appeal?
11. This being a first appeal, it is the duty of the court to reconsider the evidence tendered at the trial court, re-evaluate it and draw its own conclusion bearing in mind that it neither saw or heard the witnesses. See *Gitobu Imanyara & 2 Others Vs. AG* (2016) eKLR.



12. Similarly in *South Nyanza Sugar Company Limited Vs. Leonard O. Arera* (2020) eKLR Mrima J observed thus;

“As the first appellate court it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter (see *Selle & Another Vs. Associated Motor Boat Co. Ltd.*”

13. By the Plaint dated 16th September 2020, the Respondent, who was the Plaintiff in the lower court, sought that the Appellant be compelled to transfer a one-acre parcel of land. The Respondent's case was that on 8th February 2016, he purchased the one-acre from the Appellant for Kshs. 300,000, which he paid in full. Despite being aware that the property was part of the Kiboko Group Ranch at the time of purchase, it was agreed that the Appellant would transfer the said portion to the Respondent once the land was subdivided. Following the subdivision of the ranch in 2019, the Respondent requested the Appellant to execute the transfer documents. However, the Appellant refused, prompting the Respondent to file the suit. In his witness statement, the Respondent stated that the Appellant's sons opposed the sale, claiming they had not received a share of the purchase price. The parties attempted to resolve the dispute through alternative dispute resolution, suggesting a subdivision of the land into portions, but the Appellant declined. Consequently, the Respondent sought specific performance, requesting that the court compel the Appellant to execute the transfer documents or, alternatively, refund the purchase price of Kshs. 300,000 with interest at court rates.

14. In his Defence, the Appellant denied the existence of an enforceable contract, alleging that the sale agreement was forged. He further claimed that he had never sold his property to the Respondent.

15. Upon conclusion of the hearing, the Learned Trial Magistrate held that there was a valid contract between the Plaintiff and the Defendant. The Appellant contested this, arguing that there was no valid contract between them on grounds that the signature on the contract was forged and it was in a language that he did not understand. He also claimed there was no payment of consideration.

16. Section 3 (3) of the *Law of Contract Act*, provides;

“(3) 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.”

17. The sale agreement dated 8th February 2016, which was produced as exhibit is signed by the parties and attested by four witnesses. The Appellant has however denied the same on the ground that he is illiterate and does not sign but affixes a thumbprint.

18. I have perused the said sale agreement, it is not clear whether the date is 8th February 2016 or 5th February 2016. There is what is called terms of payments where it has a schedule of several payments on various dates being 15th March 2016, 2nd August 2016, 11th December 2016 and 2nd February 2015. Though it is written received by Seeru Ole Kariuki, there is no acknowledgement to confirm receipt by the said Seeru Ole Kariuki.



19. PW2 Philemon Meritei, Confirmed that they did not sign on the alleged acknowledgements of payment to the Appellant.

The schedule of payments are on the same page as on the sale agreement. It is not clear whether it was done separately or on the same day.

The evidence by the Appellant that he only thumbprints has not been controverted. It was incumbent upon the Respondent to prove that it is the sale agreement was signed by the Appellant. There was no attempt to do so.

20. I find that the claim by the Respondent that he paid Kshs.300,000/= for the land was not proved. The burden to prove that he paid Kshs.300,000/= rested on him. I find that this burden was not discharged. The Appellant has denied receiving such monies. There was therefore lack of consideration for the contract which vitiated the contract hence the same was rendered null and void. In the case of Esther Kabugi Njuguna Vs. Martha Chebet & 3 Others (2020) eKLR Mutungi J observed thus;

“Having found and held that there was no proof of payment of the purchase price to the plaintiff and/or that the plaintiff had signed, the transfer of the suit land in favour of the 1st Defendant, it follows that the sale transaction was voidable on account of lack of consideration and that the transfer effected in favour of the 1st Defendant was ineffectual and could not confer any interest.....”

21. The Respondent did not adduce evidence to show that the Appellant had sought consent from the Land Control Board to transfer the portion of land to him. Section 6(1) of the Land Control Act Cap 302 provides that;

“

“(1) 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 [Rev. 2012] Land Control CAP. 302 L7-7 [Issue 1] 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.”

There is no evidence to show that consent from the Land Control Board was sought and obtained. The Appellant has maintained that he never sold the land to the Respondent.



22. I find the Learned Trial Magistrate erred in granting an order of Specific Performance of a Contract which was null and void.

In the case of Reliable Electrical Engineers Ltd Vs. Mantrac Kenya Ltd (2006) eKLR Maraga J (as he then was) stated;

“Specific Performance like any other equitable remedy is discretionary and the court will only grant it on well stated principles.

The Jurisdiction of Specific Performance is based on the existence of a valid enforceable Contract. It will not be ordered if the Contract suffers from some defect such as failure to comply with the formal requirements or mistake or illegality, which makes the Contract invalid or unenforceable. Even where a contract is valid and enforceable, Specific Performance will however not be ordered where there is an adequate alternative remedy.....”

23. I also agree with the Appellant’s submission that the suit land did not exist as an identifiable portion at the time of the sale agreement.
24. In conclusion I find merit in this Appeal and it is allowed.
25. Accordingly the Judgement of the lower court dated 22nd December 2022 is hereby set aside and substituted with an order dismissing the Respondent’s suit.

The Appellant shall have costs of the Appeal and of the suit in the lower court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24TH DAY OF OCTOBER 2024.

L. KOMINGOI

JUDGE.

In The Presence Of:

Mr. Kasyoka for the Appellant.

Ms. Wanjiku for the Respondent.

Court Assistant – Mutisya.

