



Awuonda v Odero (Sued as the Legal Representative of the Estate of Philemon Odero Ondongo - Deceased) & another (Environment and Land Appeal E003 of 2021) [2024] KEELC 14000 (KLR) (17 December 2024) (Judgment)

Neutral citation: [2024] KEELC 14000 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E003 OF 2021
GMA ONGONDO, J
DECEMBER 17, 2024**

BETWEEN

ELISHA OCHIENG AWUONDA APPELLANT

AND

ERICK OCHIENG ODERO (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PHILEMON ODERO ONDONGO - DECEASED) 1ST RESPONDENT

ERICK OCHIENG ODERO 2ND RESPONDENT

(An appeal arising from the judgment and decree in Mbita Principal Magistrate’s Court Environment and Land Case 11 of 2019 by Hon. N. Moseti, PM on 18th August 2021)

JUDGMENT

1. On 18th August 2021, the trial court (Hon. N. Moseti, PM) rendered judgment in Mbita Principal Magistrate’s Court Environment and Land Case number 11 of 2019 (The original suit) wherein he held that the plaintiff/appellant had failed to prove his case against the 1st and 2nd defendants/respondents.
2. The said judgment attracted the instant appeal originated by way of a memorandum of appeal dated 10th August 2020 founded upon seven grounds, including;
 - a. That the Learned Trial Magistrate erred in fact and in law in finding and holding that the appellant herein had not proved and/or established his case against the respondents herein and thus, warranting judgment in their favour, notwithstanding the evident and apparent contradictions between the pleadings and the evidence on record.



- b. That the Learned Trial Magistrate erred in fact and in law in finding and holding that the agreements relied upon by the appellant fall short of the requirements of Section 3(3) of the Law of Contract Act Chapter 23 Laws of Kenya whereas the same was signed before the Chief and parties to the agreement affixed their signatures thereon.
 - c. That the Learned Trial Magistrate erred in fact and in law in that she disregarded the appellant's submissions and judicial authorities with the resultant miscarriage of justice to the appellant.
3. So, the appellant has prayed for the orders infra:
 - a. That the appeal be allowed.
 - b. That the judgment of the Learned Trial Magistrate dated 18th day of August 2021 be quashed and/or set aside and the same be substituted with an order allowing the appellant's suit in lieu of the reliefs sought in the original suit.
 - c. That the costs of this appeal and in the subordinate court be awarded to the appellant.
4. The appeal was heard by way of written submissions pursuant to the directions of this court given on 31st May 2023.
5. The appellant's counsel, H. Obach and Partners, filed submissions dated 7th June 2023 and identified two issues for determination thus: Whether there was a valid sale agreement between the appellant and the 1st respondent for Land Parcel No. Lambwe East/1621 (the suit land herein) that is enforceable and Whether the 1st respondent's actions of transferring land to the 2nd respondent amounted to fraud. Learned Counsel submitted, inter alia, that the 1st respondent did not dispute entering into two separate agreements for the sale of the suit land; firstly with the appellant's father who was transacting on behalf of the appellant and later with the appellant himself. That he also did not contest the fact that he was paid the agreed purchase price. That the respondents should not be allowed to take advantage of their wrongs/omissions at the expense of the appellant herein.
6. Further, Counsel stated that the 1st respondent's actions of transferring the suit land to the 2nd respondent, after selling the same to the appellant, amounted to fraud. To buttress the submissions, reliance was placed on various authorities including the case of *Aliaza vs Saul* [2022] KECA 583 (KLR), among others.
7. The 2nd respondent's counsel, Oduol Achar and Company Advocates, filed submissions dated 8th December 2022 and urged this court to uphold the trial court's judgment and dismiss the instant appeal with costs of this court and in the subordinate court to the respondents. Learned Counsel submitted that the appellant stated that he did not pay the agreed purchase price of Kshs.50,000 but only paid Kshs.40,000 which amount he sent through his father who was transacting on his behalf. That, however, the appellant did not witness his father paying the amount of Kshs.40,000 to the 1st defendant who is presently deceased. That therefore, the appellant failed to prove his claim on a balance of probabilities. Reliance was placed on various authoritative pronouncements, including *Selle and Another vs Associated Motor Boat Company Ltd. & others* [1968] IEA 123 and *Jane Catherine Karani vs Daniel Mureithi Wachira* [2014] eKLR, to reinforce the submissions.
8. 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 *Selle* (supra) and *Peters-vs-Sunday Post* (1958) EA 424 at 429.



9. Thus, the appellant who was the plaintiff at the trial court sued the respondents by way of a plaint dated 14th June 2019 over the suit land, Lambwe East/1621 for;
 - a. An order compelling the 2nd respondent to transfer the suit land to the appellant.
 - b. In the alternative, an order compelling the Executive Officer (currently Court Administrator) to sign all the transfer documents for the suit land on behalf of the 2nd respondent in favour of the appellant.
 - c. Costs of the suit and interest thereon as from the date of filing.
 - d. Any other relief the honourable court deems just and expedient to grant.
10. In his evidence, the appellant (PW1) relied on his statement on record which was adopted as part of his evidence and a sale agreement dated 5th January 2001, another sale agreement of even date and Minutes by the Assistant Chief dated 4th June 2019 (PExhibits 1 (a), (b) and 2 respectively). He implored the court to compel the respondents to transfer the suit land in his name but if they fail to do so, to direct the Executive Officer (now Court Administrator) to execute the transfer documents. He also prayed for costs of the suit.
11. Under cross-examination, he stated that he purchased the suit land from the 1st respondent in 2001. That the consideration amount was Kshs. 40,000/- which he settled in full, through his father. That the respondents acknowledged receipt thereof. That he was present when the sale agreements were drawn at the Chief's office and backdated to reflect the date when his father paid the purchase price to the 1st respondent herein. However, he admitted that he was not present when his father paid the respondents the purchase price.
12. PW2, Selemia Okiki Oguna, relied on his statement on record which was adopted as his evidence in chief. During cross-examination, he stated that his deceased brother (the appellant's father) purchased the suit land and handed it over to the appellant to complete the transaction. He admitted that he was not present when parties signed documents in respect to the transaction, before the Chief.
13. PW3, Mary Awino, relied on her statement dated 12th September 2019, which was adopted as her evidence in chief. On cross-examination, she stated that she witnessed the appellant and 1st respondent execute the sale agreement. That she also witnessed payment of the purchase price to the 1st respondent. That the appellant's father first paid Kshs.10,000/- and the appellant paid Kshs. 40,000/-.
14. The respondents opposed the claim vide separate statements of defence both dated 5th September 2019, wherein they urged the court to dismiss the appellant's suit with costs.
15. The 2nd respondent, Odero Eric Ochieng, (DW1) relied on his statement dated 5th September 2019 which was adopted as his evidence in chief. In cross-examination, he stated that he inherited the suit land from his father.
16. Philemon Odero (DW2) relied on his statement on record which was adopted as his evidence in chief. Upon cross-examination, he denied attending a meeting before the Chief on 4th June 2019 to execute a sale agreement. That he did not receive any money in respect to the dispute sale of the suit land.
17. 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. Just orders to issue herein.



18. It is worth to note that the learned trial magistrate stated the parties' respective cases, delineated two issues for determination, discussed them and reached his decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
19. The Honourable trial magistrate observed that:
- “...Pexhibit 1A and PExhibit 1B which are exhibits which were relied on by the plaintiff do not have the names of the witnesses who were present and attested the sale agreement on behalf of parties to this suit. The said documents which form the basis of the alleged contract of sale of land fall short of the requirements of Section 3(3) of the *Law of Contract Act...*”
20. The trial court further noted that:
- “...Additionally, no acknowledgement of payment was produced as evidence to confirm that indeed the 1st defendant acknowledged to have sold the suit land to the plaintiff...”
21. The appellant contends that the trial Magistrate erred in disregarding the apparent contradictions between the pleadings and the evidence on record. On that score, it is trite law that the legal burden of proof in a case is always static and rests on the claimant throughout the trial; see *Kirugi and another vs-Kabiya and 3 others* (1987) KLR 347.
22. Also, this is provided for in Section 107 to 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya. The onus was therefore, on the appellant to adduce sufficient evidence in support of his claim at the trial court.
23. The appellant laments that the trial court erred in holding that the agreements relied upon by the appellant fall short of the requirements of Section 3(3) of the *Law of Contract Act* Chapter 23 Laws of Kenya whereas the same was signed before the Chief and parties to the agreement affixed their signatures thereon. This court is cognizant of Section 3(3) (supra) which provides that:
- (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
- (iii) 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* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.
24. I have examined the sale agreements herein, PExhibit 1A and 1B, and note that the seller therein is the 1st respondent while the buyer is one Zakaria Awuonda Oguma. The appellant was not a party to that agreement.
25. The appellant explained that the transaction was carried out by his father, who is presently deceased, on his behalf. However, no power of attorney was produced in that respect.



26. The doctrine of privity of contract is premised on the existence of a valid contract which in principle only binds the parties thereto. In *Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakombe & Another* (2015) eKLR, the Court of Appeal rendered itself on the same as under:

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In *DUNLOP PNEUMATIC TYRE CO LTD v SELFRIDGE & CO LTD* [1915] AC 847, Lord Haldane, LC rendered the principles thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

...Thus, in *AGRICULTURAL FINANCE CORPORATION v LENDETIA LTD* (supra), quoting with approval from Halsbury’s Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.” (Emphasis laid)

27. Clearly, the appellant having instituted the suit on his own behalf and not in his capacity as a legal administrator of the estate of the deceased purchaser, is precluded from seeking enforcement of the sale agreements PExhibit 1A and 1B since he was not a party thereto.

28. Notably, the validity of PExhibit 1A and 1B is contested by the 1st respondent who denied executing the same. Further, I observe that the same are not properly attested to as required under Section 3(3) (supra).

29. The appellant lamented that the trial court disregarded his submissions and judicial authorities thereby resulting into a miscarriage of justice. However, I observe that the trial court evaluated the appellant’s submissions at page 4 of its judgment, before making a finding. Furthermore, I subscribe to the Court of Appeal decision in the case of *Daniel Toroitich Arap Moi and another-vs-Mwangi Stephen Murithi and another* (2014) eKLR that submissions are not and cannot take the place of evidence. That the same can be heard or dispensed with as they are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one.

30. This court is guided by Section 107 of the *Evidence Act* (supra) 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.

31. To that end, I find that the appellant who was the plaintiff at the trial court did not prove his claim on a balance of probabilities. In the premises, the trial magistrate’s judgment delivered on 18th August 2021, is not faulty at law. I hereby endorse the same.



32. Thus, the instant appeal lodged by way of a memorandum of appeal dated 10th August 2020, is devoid of merit. The same is hereby dismissed with costs to the respondent.

33. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 17TH DAY OF DECEMBER 2024.

G.M.A ONG'ONDO

JUDGE

Present

Ms. B. Ochieng', Learned Counsel for the appellant

Mr. Ochol Aluoch, Learned Counsel for the respondent

Mutiva, Court Assistant

