Kimondo v Irungu (Environment and Land Appeal 2 of 2020)
[2023] KEELC 16680 (KLR) (30 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16680 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL 2 OF 2020

FM NJOROGE, J

MARCH 30, 2023

BETWEEN

DEBORAH WAMBUI KIMONDO ..... APPELLANT

AND

STEPHEN IRUNGU ..... RESPONDENT

(Being an appeal against the Judgment and Decree of Hon. E. K Usui, CM delivered 7/11/2019 in Nakuru CMC ELC No. 275 of 2018)

JUDGMENT

1. This is a judgment in respect of an appeal brought by way of a memorandum of appeal dated January 21, 2020 against the judgment and decree of Hon EK Usui, CM in Nakuru CMC No 275 of 2018. The appellant sought that the judgement of the trial court be set aside and/or varied and in its place judgment be entered in favour of the appellant. The appellant also sought costs of the suit and the appeal.

2. The background of the appeal is that on October 25, 2018 the appellant filed Nakuru CMC No 275 of 2018 against the respondent seeking an eviction order compelling him to vacate land parcel No Nakuru/Molo/KAPSITA/418, an order of permanent injunction against the respondent restraining him from remaining or entering the suit property and costs of the suit.

3. The respondent filed his Statement of Defence dated December 18, 2018 on 8/01/2019.

4. The suit was heard on August 28, 2019 when the appellant testified. Judgement was delivered on November 7, 2019. The trial court in its judgement held that the appellant had failed to prove her case against the respondent and dismissed it with costs.

5. Being dissatisfied with the court's judgment delivered on November 7, 2019 in Nakuru CMC No 275 of 2018, the appellant appealed to this court against the said judgment and set forth the following grounds of appeal:

    1. That the learned Magistrate erred in law and fact in holding that the Appellant had not proved her case as against the Respondent on a balance of probability.

    2. That the learned Magistrate erred in law and fact in finding that the Respondent's purported agreement was valid yet the same was unenforceable in law for having failed to comply with all the requisite ingredients of a contract involving land.

    3. That the learned Magistrate erred in law and fact in holding that there was a valid sale agreement between the Appellant and the Respondent whereas the said agreement produced was never executed by the Appellant and hence was never valid.

    4. That the learned Magistrate erred in law and fact in giving so much weight to the purported sale agreement, the Chief's letter and the letter written by B. W. Mathege & Co. Advocates and failed to give weight to the Appellant's testimony and where she stated in court that there was no such agreements and that the letter by B. W. Mathege & Co. Advocates was not written as per her instructions since she is an illiterate old lady and not able to read.

    5. That the Learned Magistrate erred in law and fact in failing to consider that the Respondent has never sought the consent of the Land Control Board and that it was already past six months and hence the said transaction was void.

    6. That the Learned Magistrate erred in law and fact in failing to consider the evidence adduced by the Appellant that she only allowed the Respondent to enter the land and stay until she found a place to stay with her family. It was a gesture of hospitality.

    7. That the Learned Magistrate erred in law and fact in failing to consider the weighty submissions of the Appellants and especially on the points of law raised.

    8. That the Learned magistrate erred in law and fact in applying her conscience rather than the law in evaluating the evidence as presented before the Court hence the findings are totally unsupported in law.

6. The appellant prays that the judgment of the trial court be set aside and/or varied and in its place judgment be entered in favour of the appellant and that the costs be in her favour.

7. On October 12, 2022 the appeal was admitted for hearing and the court gave directions that the same be canvassed by way of written submissions. The appellant filed her submissions dated October 26, 2022 on October 28, 2022 while the respondent filed his submissions dated December 22, 2022 on December 23, 2022.

Submissions

8. The appellant in her submissions compressed her grounds into four (4) clusters. The first being ground 1 where she relied on the case of *Kanyungu Njogu v Daniel Kimanu Maingi* [2000] eKLR submitted that the court has discretion to render judgment based on the evidence adduced. She submitted that the Respondent did not furnish the court with any evidence or witness to contradict the appellant's case. She further submitted that the Respondent presented an unsigned document as a sale agreement which failed to comply with the conditions and which thus cannot be relied on as sufficient evidence of a transaction.

9. The second cluster was in grounds 2, 3 & 4 where the appellant relied on Section 3 (3) of the *Law of Contract Act* and the case of *Leo Investment Ltd V Estuarine Estate Ltd* [2017] eKLR and submitted that the Respondent failed to comply with the formal requirements and therefore the said agreement he produced was unenforceable and invalid.

10. The third cluster was ground 5 where she cited Section 6 of the *Land Control Act* and the case of *Ngatia Kihagi V Paul Kaiga Githui* [2017] eKLR. She submitted that the Land Control Board consent needed to have been obtained and if not obtained in the said period of 6 months the transaction became void.

11. The fourth cluster was grounds 6, 7 & 8 where the appellant submitted that the Respondent approached this court with unclean hands by giving half-truths and misrepresentations in attempting to manipulate the court. She relied on the case of *Jackson Mokaya V James Onchangwa Macharia* [2014] eKLR and submitted that the Respondent produced documents which were therefore invalid for being marred with inconsistencies. She added that if any transaction did exist, then he had not made any move to finalize it.

12. The appellant submitted that the Respondent is not entitled to the prayers sought as he is acting on malice and he had knowledge of the proprietary history of the suit property. In conclusion, she urged this court to find that on the basis of her evidence she had substantially proved her case in the trial court against the Respondent and that her appeal has merit and should be allowed.

13. The respondent filed his submissions dated December 22, 2022 on December 23, 2022. He submitted that the trial magistrate properly dismissed the appellant's case after finding that she had not proved her case on a balance of probabilities. He further submitted that it is not in dispute that the appellant is the lawful owner of the suit property and that the respondent was in possession of a portion of the said property. He argued that the main dispute was the circumstances in which he occupied the suit land.

14. He relied on the case of *Daniel Otieno Migore V South Nyanza Sugar Co. Ltd* [2018] eKLR and submitted that the appellant's evidence disputing the sale was not in line with any of her pleadings. He submitted that the appellant was not candid in her evidence hence the failure to satisfy the court that she had proved her case. The respondent cited Section 107 (1) of the *Evidence Act* and submitted that it was the duty of the appellant to prove that the Respondent was a trespasser on her property.

15. It was his submission that the appellant wanted the court to believe that the respondent was a licensee on her property but the court was not convinced hence the dismissal of the suit. He submitted that the issue of the Land Control Board was not raised in the pleadings or evidence; that if the appellant had wanted to rely on the said legal requirement, it ought to have been specifically pleaded. He relied on the cases of Civil Appeal No 26 & 27 of 2011 *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* and *Cephas Odongo Sweta V Kenney Wimmsy & another* ELC Case No 234 of 2017. He submitted that no LCB consent was required in the circumstances of this case and that the appellant held the suit property in trust for him.

16. In conclusion, the respondent submitted that the trial court properly considered the evidence before it and urged the court to dismiss the appeal with costs.

Analysis and Determination

17. After considering the grounds on the Memorandum of Appeal, it is my view that the following issues arise for determination:

i. Whether the trial court erred in finding that the appellant had not proved her case on a balance of probability.

ii. Who should bear the cost of the appeal.

The issues are discussed herein below.

18. The trial court in its judgment held that the appellant had failed to prove her case against the respondent and dismissed it with costs. The appellant alleges that the trial court erred in the said finding as the respondent's documents produced during trial were marred with inconsistencies and therefore invalid. The court in the case of *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR held as follows:

> 11. The appellants, however had the onus of proving their case against the respondent whether or not the respondent adduced evidence. This is because appellant's case not being a liquidated claim ought to have been proved. Further this is because this was a defended claim and there was no interlocutory judgment entered against the respondent since the respondent had filed his memorandum of appearance and defence within the requisite period.
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> 12. The appellants as correctly stated by the trial court in its judgment failed to meet the standard of proof with regard to evidential burden. The appellants were required in order to succeed in their claim, to discharge an evidential burden in relation to the fact in the issue...Lord Nichol of the House of Lords in the case Re H And Others (minors) (sexual Abuse: Standard Of Proof) (1969) stated the Civil standard of proof to be: -
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> > "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probability, the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

19. From the court record, the appellant produced a copy of her title deed issued on 17/01/2000 as proof of ownership of the suit property. The said title was never challenged by the respondent, in fact it was his submission that the appellant was the lawful owner thereof and that the main dispute was the circumstances in which he occupied the suit land. This court is in agreement with the respondent that the burden of proof was on the appellant to prove her case on a balance of probability. The question now arising is whether the trial magistrate's finding that the appellant did not prove her case to the required standard was correct.

20. The appellant argued that the respondent presented an unsigned document as a sale agreement which did not comply with the requisite conditions to warrant it to be deemed a valid transaction. The respondent on the other hand did not dispute that the appellant is the lawful owner of the suit property. He argued that the main dispute was the circumstances in which he occupied the suit land.

21. The trial magistrate found that there was a sale agreement between the appellant and respondent for a portion of the suit property measuring 50 x 100 feet. She however found that she could not ascertain the purchase price as the said agreement was in Kikuyu language and there was no translated version provided.

22. This court has perused the record and noted that there is an agreement dated 3/05/2017 (DExh.2) which has the appellant's and respondent's names as seller and buyer respectively. The said document explains the amount of payment made as initial deposit as well as installments. The alleged agreement was signed by five witnesses and two chiefs. Both the appellant and the respondent did not append their signatures on the document. There is also another annexure, a small note (DExh.1) allegedly drafted by the appellant. The note was written in the Kikuyu language but was never translated. The appellant denied that she ever sold a portion of the suit property to the respondent. On cross-examination, the appellant also admitted that she did not know how to write.

23. The trial magistrate while concluding her judgment stated as follows:

> "...The parties must have agreed on a purchase price and the plaintiff received payments towards that. The court can thus not determine what the purchase price was on [as] the agreement before court is in Kikuyu language and it is not translated."

24. Section 3(3) of the *Law of Contract Act* provides as follows: -

> " 3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-
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> (a) the contract upon which the suit is founded:
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> (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;
>
> 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."

25. It is trite law that a contract consists of three fundamental elements; offer, acceptance and consideration. In an ordinary situation, a statutory interest would be established if the statutory requirements had been satisfied and the essential elements of a contract existed. In the present suit, apart from lack of execution by both the vendor and purchaser, whether or not there was consideration and whether the purchase price was paid can only be determined by a look at the documents produced in evidence. It is D. Exh 2 and D. Exh 3 that persuade this court that there was a sale between the two parties herein. D.Exh 2 is a document made before two chiefs. The appellant admitted that she knows the chiefs by their names. Those are the names that were written on D. Exh 2. That exhibit is dated 3/5/2017. It states that the appellant had received Kshs 100,000/= from the respondent. So does D. Exh 3, a letter from the appellant's advocate dated 5/4/2017. From D. Exh4 a letter from the Deputy Commissioner, Molo Sub County, it appears that the parties were thereby summoned to appear before the Chiefs in respect of the dispute over the land and I have reason to believe that the contents of D. Exh 2 reflect what transpired or was agreed at that meeting.

26. As observed by the learned trial magistrate land is a sensitive issue and it is doubtful that the appellant agreed that the respondent should live on her land without rent payments or a purchase agreement. The question about the purchase price has been answered by the documents produced by the respondent and I am convinced that it was paid. I find it more probable than not that the appellant later on after the agreement wanted more money for the land over and above that which had been agreed and paid.

27. The illiteracy claimed by the appellant is not proof that she was deceived. Many written and unwritten transactions have been entered into by illiterate persons in this country and taken through to their proper conclusions. It is improper for the appellant to hide under the cloak of illiteracy to denounce an agreement she had entered into with the respondent.

28. Though what the defendant calls a sale agreement was never translated, did not bear the appellant's or respondent's signature or the exact amount paid and received by the appellant as purchase price I find the other documentary produced as well as the physical occupation for a number of years to be proof on a balance of probabilities that there was a sale transaction. That being the case, I find that the trial court did not err in fact and law in finding that there was an agreement and that the respondent paid a consideration.

29. In the circumstances, I do find that the present appeal lacks merit and it is hereby dismissed. However, each party shall bear their own costs of the present appeal and of the suit in the Magistrate's court.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF MARCH 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU