Case Number:	Environment and Land Appeal 28 of 2019
Date Delivered:	16 Mar 2022
Case Class:	Civil
Court:	Environment and Land Court at Eldoret
Case Action:	Judgment
Judge:	Stephen Kibunja
Citation:	Enock Kiptutto Ngetich v Francis Kibor Kipkorir [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	Honourable H. M Nyaberi (SPM)
County:	Uasin Gishu
Docket Number:	-
History Docket Number:	M.C.E.L 30 of 2018
Case Outcome:	Appeal allowed with costs
History County:	Elgeyo Marakwet
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC APPEAL NO. 28 OF 2019

ENOCK KIPTUTTO NGETICH.....APPELLANT

VERSUS

FRANCIS KIBOR KIPKORIR .....RESPONDENT

(Being an appeal against the Judgement and decree of the Honourable H. M Nyaberi (SPM) delivered on 25th July, 2019 in Iten M.C.E.L No. 30 of 2018, between Francis Kibor Kipkorir vs Enock Kiptutto Ngetich)

JUDGMENT

1. The Appellant raised twelve (12) grounds in his memorandum of appeal dated the 19th August, 2019 in seeking to have the judgment delivered by the learned trial magistrate be set aside in its entirety. The grounds are inter alia that the learned magistrate failed to consider the principles of contract law; that evidence of witnesses were disregarded; that uncorroborated evidence was admitted; that express terms of the sale agreement were varied; that the sale agreement was converted into a commission agreement, and basing the judgement on presumptions and personal opinions.

2. The appeal was admitted on the 17th December, 2019 and the directions on filing and exchanging submissions were issued on the 24th June, 2021. The learned counsel for the Appellant and Respondent filed their submissions dated the 15th November, 2021 and 1st November, 2021 respectively.

3. That the court has to remind itself of the duty of a first appellate court, which is to reconsider the facts and law and to draw its conclusions from the same. This is captured by Section 78 of the Civil Procedure Act chapter 21 of the Laws of Kenya, which espouses the role of a first appellate court as to: ***'…… re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions***.' This was buttressed by the Court of Appeal in the case of ***Peter M. Kariuki v Attorney General [2014] eKLR*** where it was held that:

"We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See **NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002** (unreported).

Therefore, this court shall consider the pleadings and the evidence presented before the trial court and appraise the findings made thereof, and come to its own conclusions, while being aware it did not see the witnesses testify.

4. That this appeal before me arose from the original suit that was instituted before the Magistrates Court at Iten, being MCL&E No. 30 of 2018 wherein the appellant was the Defendant, and the respondent herein was the Plaintiff. The Plaintiff in Iten MCL &E No. 30 OF 2018 alleged through his plaint dated the 31st October, 2018, and filed on 1st November, 2018, that he was the proprietor of the parcel of land known as KAPCHELIMO CHEPSIGOT/742 measuring 1¼ acres. That he had through an oral agreement in 2017, agreed to pay the Defendant Kshs 100,000/- as a commission for services of an agent in the sale of the aforementioned suit property. That on the 22nd May, 2017, he sold one acre from the suit land to Joseph Kimutai Boit at a consideration of Kshs 1,000,000/=, and it was agreed the outstanding amount of Kshs 100,000/= was the Defendant's commission. That upon the Defendant seeking for security for the payment, the Plaintiff agreed that the remaining ¼ acre of the suit property was to be the security for payment of the Kshs 100,000/= to the Defendant. That understanding was put down in writing by both of them before the assistant chief Kabito Sub-

Location and other there were witnesses. That though no consideration had been paid by the Defendant, he had unlawfully and illegally taken possession of the ¼ suit land thereby prompting the filing of that suit. He thus sought for a permanent injunction against the Defendant to bar him and his agents and servants from interfering with his right as the proprietor of the suit property and costs of the suit. The Plaintiff also filed a witness statement dated 31st October, 2018 wherein he reiterated the averments in his plaint. He produced a letter from the Ministry of Lands, Sub-County Land Adjudication Officer in Keiyo, dated 18th January, 2018 where his claim to the property was confirmed. He also produced the agreement of sale dated 22nd May, 2017 in evidence of the sale of one acre of Land to Joseph Kimutai Boit.

5. The Defendant, who is the Appellant herein, filed a statement of defence and counterclaim dated the 22nd February, 2019, wherein he among others averred that he purchased ¼ of the suit parcel of land from the Plaintiff in 2016. That in 2017, the Plaintiff offered to sell to him the balance of 1 acre of the suit land, but as he was not able to, he instead introduced the Plaintiff to a third party who bought the entire balance of the suit property. He alleged that the only agreement that existed between himself and the Plaintiff was a sale agreement, and not a commission agreement, and that he had paid the purchase price in full in 2016, after which he took possession. He urged the court to dismiss the Plaintiff's suit, and enter judgement in terms of his counterclaim for permanent injunction, order compelling the Plaintiff to execute the transfer of Kapchelimo/Chepsigot/742, measuring 0.25 acres to his name, and costs. The Defendant also filed a witness statement for self and his wife Judith Kemboi. He also filed a statement of one Michael Kipkoech Tuitoek.

6. The Plaintiff thereafter filed a reply to defence and defence to the counterclaim in which he joined issue with the defence, denied the claim in the counterclaim, and reiterated the averments in the plaint.

7. The court has carefully considered the grounds on the memorandum of appeal, the record, submissions, superior courts decisions cited therein, and come to the following findings;

a. That the lower court record shows that the plaintiff testified as PW1 and after cross examination and re-examination closed his case, the Defendant testified as DW1 and called Judith Kemboi, Michael Kipkoech Tuitoek, and John Kiptalam Letio, who testified as DW2 to DW4 respectively, before closing his case. The court thereafter wrote and delivered its decision on 25th July, 2019, which is the subject matter of this appeal. The learned trial magistrate after summarizing the parties' claims, and evidence tendered in support and opposition identified one issue for determination being; *"whether D. exhibit 1 was to be treated as a collateral security for commission for procuring a purchaser to the Plaintiff to buy 1 acre of land""* The judgement shows that the learned trial magistrate proceeded to consider the evidence tendered, and concluded that the parties probably failed to disclose all the facts to the Assistant Chief when they went to his office. That the reason why the Defendant was the one who looked for a buyer of the land for the Plaintiff was because he was getting a commission. The trial magistrate then made the finding that *"I have come to the conclusion on a balance of probability that although the sale agreement, D. Exhibit appear to be a sale agreement of land, it is the finding of this court that it was a collateral consideration for a commission to the Defendant."* In the court's opinion, the circumstances under which the agreement was drawn, the probability that all material facts were not disclosed to the Assistant Chief, and the fact that the Assistant chief did not witness any money exchanging hands supported its assertion. Further, the court opined that if indeed 1 acre of land was sold at Kshs 1,000,000/=, it was improbable that ¼ acre could sell at Kshs 100,000/=. Therefore, the court concluded that in all probability, while the defendant's exhibit looked like a sale agreement, the court found that it was a collateral consideration for a commission to the Defendant. Therefore, the Court found in favor of the Plaintiff, and dismissed the Defendant's defence and counterclaim with costs.

b. The Defendant, now the Appellant, being aggrieved by that judgment, filed the instant appeal. The Appellant filed their written submissions dated the 15th November 2021, while the Respondent filed his submissions dated the 1st November 2021. I have considered the two submissions, the authorities cited therein, and taking into account the role of the first appellate court to re-examine the evidence tendered during the trial before the lower court, find that the sole issue for determination in this appeal is, what the import of the sale agreement between the Appellant and Respondent of 26th April 2016 was.

c. There are conflicting explanations for what the sale agreement of 26th April, 2016 was intended to serve. The Respondent claimed it was to serve as security for the commission of Kshs 100,000/= he was to pay the Appellant for finding a purchaser of the one (1) acre of the suit property. The Appellant on the other hand claims that the document was a proper sale agreement executed over ¼ acre of the suit property for a consideration of Kshs 100,000/=. I have taken not that, none of the parties has questioned the sale agreement's authenticity, and therefore all that is left for the court to consider is the implication of the document. This is to say, the question is to determine what the parties who signed the document intended the sale agreement to be. I have had the benefit of perusing the document in question and it is unambiguous on what it was to do. It provides that the Respondent, Francis Kibor

Kipkorir, of ID number 6597313, and proprietor of KAPCHELIMO CHEPSIGOT/742, measuring 0.25 acres wished to sell the $^{1}/_{4}$ acre of land to the Appellant herein, Enoch Kiptuto Ngetich for a consideration of Kshs 100,000/=. The document bears the names, identity card numbers, and signatures of the Respondent, Appellant, the Appellant's wife, and one Maria Kuntia Nagolet. The document has a stamp of the Assistant Chief, Kabito sub location and the date of 26th April, 2016.

d. That section 38 of the Land Act No. 6 of 2012 provides for the validity of contracts in sale of land as follows;

"38.(1) 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 to by a witness who was present when the contract was signed by such party.

(2) ……"

The question of what amounts to a valid contract of sale of land needs to satisfy the above requirements for it to be a valid contract. It has to be in writing, signed by all parties thereto, and with the signature of each party attested to by a witness. Ultimately, as it is a contract for sale of land, it also has to describe the property being sold. In this case, I wish to restate none of the parties, including the Assistant Chief in whose presence and office the agreement was drawn and signed disputed the authenticity of the said agreement. I am persuaded that the document dated the 26th April 2016 was indeed a sale, rather than a commission agreement. The document bears the names, identity card details and signatures of the parties, being the Respondent as the seller, and the Appellant as a purchaser. It also bears a description of the property, as KAPCHELIMO CHEPSIGOT/742, and the acreage being disposed of as 0.25 acres. It also bears two additional names, identity card details and signatures, of Judith Chelangat Kemboi, and Maria Kuntia Nagolet as witnesses. The Appellant claimed, and this was not disputed, that Judith Chelangat Kemboi was his wife, and witness in the sale agreement, and in the lower court case, where she testified as DW2. No explanation has been presented about the relationship of the second witness, Maria to the parties and there is, therefore no reasons to doubt her presence during the transactions in question. That having considered the foregoing, the court does not find any reasonable basis upon which the learned trial magistrate based his conclusion that the document dated the 26th April, 2016 was anything else, except a sale agreement between the parties.

e. But in the trial court's mind, the circumstances surrounding the execution of the document implied it was an agreement for commission. However, this is a hard sell. The fact that no money was allegedly exchanged at the Assistant Chief's Office does not invalidate the document as a sale agreement. Equally, the fact that the ¼ acre was selling at Kshs 100,000/=, whereas the full acre was selling at Kshs 1,000,000/= is not enough or conclusive to alter the nature of the agreement signed. The Respondent as the owner, was the one setting the price and it was upon him to sell it as he deemed fit. There was no rule binding him to sell the 1 acre at 4 times the price of ¼ acre. Therefore, the purchase price difference is not enough to alter the nature of the document. In any case, the two sale agreements, of the quarter acre of land to the Appellant on 26th April, 2016, and the one for an acre of land to Joseph Kimutai Boit on the 22nd May, 2017 were at least a year apart. Land prices in Kenya can hike for a number of reasons, and the fact that a year had passed between the two transactions, with the latter being higher, might just be a consequence of the ordinary way life works. I wish to note that the Evidence Act chapter 80 of Laws of Kenya, allows a court to presume likely facts. It provides under section 119 that:

"119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

The fact that it is likely that the price difference was purely a consequence of the common course of human, social and economic events means it is insufficient to invalidate the agreement of 24th April, 2016.

f. Conversely put, the trial court evidently ignored the testimony of the Appellant. The Appellant presented a witness, D2, Judith Kemboi, who confirmed that there was a previous relationship between the two families that led to the sale of the property to the Appellant. In fact, she was present as a witness in the signing of the Sale agreement. There is no apparent reason set out why the learned trial magistrate did not take her evidence into consideration in determining the parties' intent in the agreement in question. That the court accepts the statement of the witness as to what the document was meant to serve or to be. The Respondent was free to call Maria, the second witness present at the execution of the sale agreement in question, to testify and support his case of what the document was, but he did not. It is therefore more probable than not that had the said Maria testified, she would have said more or less what DW2 stated, that the document was indeed a proper sale agreement. That having come to the conclusion that the document dated the 26th April, 2016 was a proper contract, then its contents as a document should attests to its nature. Section 64 of the Evidence Act provides that:

"64. The contents of documents may be proved either by primary or by secondary evidence"

Further, section 67 of the said Act provides that:

"67. Documents must be proved by primary evidence except in the cases hereinafter mentioned."

Clearly, the law assumes that if the authenticity of a document is undisputed, then it should be the primary source of what its nature is. In fact, section 68 of the Evidence Act provides for strict circumstances where a document may be proved by secondary evidence. It provides as follows;

"68

(1) Secondary evidence may be given of the existence, conditions or contents of a document in the following cases;

(a) when the original is shown or appears to be in the possession or power of –

(i) the person against whom the document is sought to be proved; or

(ii) a person out of reach of, or not subject to, the process of the court; or

(iii) any person legally bound to produce it,"

……"

In the lower court suit, the document in question was produced by one of its executors, the Appellant. He was entitled to produce it. Having been so properly produced, the document was evidence proper and the court should not have admitted evidence to explain its nature. Therefore, the Respondent's claim, and or surprising finding by the trial court that the document was a commission agreement, while it was as a matter of fact a sale agreement falls on its head. It was not open for the trial court to admit secondary evidence on the nature of the document while it was clear on the intention of the parties, who executed it.

g. That even if the trial court for some reason was persuaded the nature of the agreement was different from what it provided, the document was still a proper contract whose authenticity was never in question. Therefore, unless grounds of fraud, illegality or misrepresentation were proven to oust the contract, then it bound the parties therein to what they contracted over. I wish to rely on the decision of Justice Odunga in ***Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling)*** wherein he coined the term 'perceptive restraint' which meant;

"According to the principle of, perceptive restraint a court had to exercise perceptive restraint when approaching the task of invalidating, or refusing to enforce, contractual terms. It was encapsulated in the phrase that a court would use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases. That principle followed from the notion that contracts, freely and voluntarily entered into, should be honoured."

In this suit, the trial Court did not exercise this restraint. There was a valid and unquestioned contract over the sale of the suit property in evidence. The parties were only disputing its nature, not what it actually provided. Therefore, but for the clearest of reasons showing that a party did not voluntarily sign the contract, it was meant to be honoured. I find that there were no reasons advanced by either party to invalidate their contract of 26th April 2016.

h. Therefore, the Court is inclined to find that the agreement executed between the Appellant and Respondent of 26th April 2016 was a valid contract of sale over KAPCHELIMO CHEPSIGOT/742, measuring 0.25 acres. That the court finds that the Appellant is entitled to 0.25 acres of KAPCHELIMO CHEPSIGOT/742. The Appellant has prayed for a permanent injunction restraining the Respondent from interfering with the suit property which I find is merited under the circumstances of this matter, especially considering there has been allegations of abuse of the criminal process to frustrate the ownership of the suit property by the Respondent, which support the grant of these orders. The Appellant is also entitled to costs of this appeal and in the lower court in terms of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya.

8. That in view of the foregoing, the court finds for the Appellant and orders as follows;

a. That the appeal is allowed with costs, and judgement of the lower court, and all consequential orders set aside.

b. That judgement be and is hereby entered for the Appellant/Defendant against the Respondent/Plaintiff in the counterclaim in the following terms;

i. That the Respondent/Plaintiff do execute all the relevant conveyancing documents to transfer a ¼ acre of land parcel Kapchelimo Chepsigot/742, the suit property, to the Appellant/Defendant.

ii. That a permanent injunction be and is hereby issued permanently restraining the Respondent/Plaintiff, by himself, his agents from evicting the Appellant/Plaintiff from the ¼ acre of land parcel Kapchelimo/Chepsigot/742, that has been in his possession, and is to be transferred to him as ordered above.

iii. That the Respondent/Plaintiff do pay the Appellant's/Defendant's costs in the lower court suit.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS *16TH* DAY OF *MARCH*, 2022

S.M.KIBUNJA,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

APPELLANT ……

RESPONDENT ……

COUNSEL: …… *Absent*

……

COURT ASSISTANT: ONIALO

S.M.KIBUNJA,J.

ELC ELDORET