



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 6 OF 2018

JOSEPHAT PETER NGAHU.....APPELLANT

VERSUS

ANN WANGUI KIHONGE.....RESPONDENT

*Being an appeal against the Judgment of the Ag. Senior Resident Magistrate*

*(V.K KIPTOON) at Nyahururu Senior Principle Magistrate's Court (delivered on 20<sup>th</sup> August 2013)*

*in*

*PMCC No. 224 of 2010*

**JUDGEMENT**

1. What is before me for determination on Appeal is a matter which was heard by D.N MUSYOKA Resident Magistrate and decided by V. K KIPTOON SRM in the Principle Magistrate Court at Nyahururu in Civil Case No. 224 of 2010 where the learned trial Magistrate, upon considering the evidence of both parties, delivered judgment on the 20<sup>th</sup> August 2013 declaring that the Respondent be entitled to the current value of the property with the developments therein done on the property by the Respondent, thereby partly allowing the Plaintiff/Appellant's suit to the extent of declaiming the sale agreement between the Appellant and the Respondent null and void, by dint of Section 6 of the Land Control Act.

2. The Appellant, being dissatisfied with the judgment of the trial Magistrate has filed the present Appeal before this court.

3. The grounds which the Appellant has raised in his Memorandum of Appeal include:

i. The learned trial Magistrate erred in law and in fact by invoking the doctrine of equity to soften express provisions of the Land Control Act Cap 302 laws of Kenya in awarding the value of the development of a null and void contract.

ii. The learned trial Magistrate erred in law and in fact in awarding the value of the developments effected on the suit plot without any counter claim by the Respondent and in contravention of the law.

iii. The learned trial Magistrate erred in law and in fact in awarding the Respondent current value of the suit plot contrary to the agreement entered into with the appellant thereby making a new contract for the parties in contravention of the law.

iv. The trial Magistrate erred in giving a judgment that was against the weight of the evidence.

4. The Plaintiff thus sought for judgment against the Respondent for;

i. *An order setting aside award of the current value and developments of the suit plot to the Respondent.*

ii. *Costs of the suit in the subordinate court and this Appeal.*

5. The Appeal having been filed on the 21<sup>st</sup> May 2015, was admitted on the 30<sup>th</sup> October 2018 wherein directions were taken that it be disposed of by way of written submissions.

6. Service was thereafter effected upon the Respondent through registered post through her current address, documents which were returned

unclaimed.

7. On the 7<sup>th</sup> February 2019 when the matter came up for mention, none of the parties were present in court wherein the court gave a date for the delivery of the judgment with notice to issue.

8. The Appellant filed his submissions on 20<sup>th</sup> March 2019, the Respondent neither filed her Replying Affidavit nor written submissions to the Appeal. The Appeal is therefore uncontroverted and unchallenged both in terms of facts and the law. I shall therefore proceed to evaluate the same based on the above fact.

9. I have considered the record, the judgment by the trial Magistrate, the written submissions by learned counsel for the Appellant as well as the authorities cited on behalf of the Appellant and the law. Conscious of my duty as the first appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial magistrate, of seeing and hearing the witnesses as they testified. (*See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384*). I also remind myself that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (*See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278*).

10. The Appellant herein instituted suit against the Respondent vide a plaint dated 6<sup>th</sup> September 2010 where he had sought for the following orders;-

(a) A declaration that the sale agreement entered into between the Plaintiff and the Defendant on 8<sup>th</sup> August 2006 and 22<sup>nd</sup> December 2007 are null and void by dint of section 6 of the Land Control Act Cap 302, Laws of Kenya and the defendant is only entitled to a refund of the purchase price.

(b) Costs of this suit plus interest thereon at court's rate

(c) Any other relief deserved fit by the honorable court.

11. The Respondent filed her defence dated 20<sup>th</sup> September 2010 on the same day wherein she generally denied the allegations in the plaint, and admitted paragraph 3, 4, 5, 6, 7, 8 and 9 therein.

12. The matter had proceeded for full hearing before the trial Magistrate, wherein the Plaintiff testified as Pw1 had informed the court that he was the proprietor of parcel of land No. Nyandarua/Central 3929. That on the 8<sup>th</sup> August 2006, vide an agreement herein produced as Pf. Exhibit No 1, he sold 2 plots of land to the Respondent for a consideration of Kshs 75,000/= each, hence Kshs 150,000/=for both plots, which plots were to be excised from the said suit land.

13. That the Respondent had paid Kshs 133,000/= leaving a balance of Kshs 17,000/= That after the Respondent had taken long in payment of the full consideration, the Parties had entered into a second agreement on the 22<sup>nd</sup> December 2007, herein produced as Pf exh 2 wherein they had agreed that the Appellant would now sell to Respondent one plot instead of two, at the same consideration of Kshs 75,000/.

14. That the Appellant had then refunded to the Respondent a sum of 66,500/ out of the initial monies paid. He further paid Kshs 15,000/ for breach of the first agreement making it a total of 81,500/=

15. Pursuant to the terms of the new agreement, parties further agreed that any party who breached the contract was to pay a penalty of Kshs 20,000/= to the other party. The Respondent now owed the Appellant a balance of Kshs 8,000/= which was to be paid when seeking for a consent from the Land Control Board for transfer.

16. That 4 years later, when there had been no action by the Respondent in fulfilment of their agreement, the Appellant decided not to transfer the land to the Respondent but instead, rescind the contract by taking back his plot and returning her money comprising of Kshs 65,000/= plus the penalty of Kshs 20,000/=.

17. He thus wrote to her vide a letter dated the 9<sup>th</sup> April 2010, herein produced as Pf exh 3, asking her to collect her money, which was in the form of a banker's cheque herein produced as Pf exh 4.

18. That instead of picking up her cheque, the Respondent's Counsel had written a letter to him dated the 15<sup>th</sup> April 2010, herein produced as Pf exh 5, demanding that the Appellant gives the Respondent vacant possession of the agreed piece of land.

19. The Appellant testified that he had sought help from the court so that it could order the Respondent to go for her money in exchange for his plot. He closed his case.

20. In her defense, the Respondent had testified to the effect that indeed the Appellant had sold her two plots of land at Rurii- Olkalou wherein each plot was to cost Kshs 75,000/=. That she had paid him a deposit of Kshs 83,000/= in August 2004 for the two plots. That they had then reduced their negotiations into an agreement dated the 8<sup>th</sup> August 2006 which copy of the agreement she had produced as Df exh 1.

21. That later, the Appellant had rescinded their contract when he informed her that the one plot was on a public path. That it was later that she had found out that in fact the Appellant had actually sold the said plot, together with a pit latrine she had dug thereon at the time she had embarked on developing the plot.

22. It was her evidence that by the time the Appellant was selling the 1<sup>st</sup> plot, she had already paid him a total of Kshs 133,000/= which monies the Appellant refunded. Parties then entered into a second agreement for the sale of one plot instead, she produced the subsequent agreement as Df exh 2.

23. The Respondent testified that vide the second agreement, parties had agreed that the consideration for one plot would remain at Kshs 75,000/=. That parties had further agreed that she was to pay the Appellant Kshs 8,000/= after obtaining the Land Control Board Consent, which amount of money cancelled the debt the Appellant owed her of Kshs 8,000/=, for selling the first Plot upon which she had developed. She testified that she did not owe the Appellant any money

24. That later she had received information that the Appellant was no longer interested in selling the plot and that she should go to collect her money. She confirmed that although she had not developed this subsequent plot, yet she had been cultivating on the same.

25. In cross examination, the Respondent confirmed that although she was to pay Kshs 150,000/= for both parcels of land in the first agreement, she paid a deposit of Kshs 133,000/=. That further, vide the terms of the agreement, parties had agreed that whoever breached the contract was to pay a penalty of Kshs 15,000/= for each plot to the other party.

26. That in regard to the second agreement, the Respondent confirmed that parties had agreed to sell and purchase one plot respectively, at a consideration of Kshs 75,000/= and that whoever breached the contract would pay penalty of Kshs 20,000/=

27. She confirmed having been asked by the Appellant to go and pick her money which amounted to Kshs 86,500/= monies which she had refused to pick because she was interested in the plot upon which she was cultivating, and not the money.

28. She further confirmed that she was not willing to pay the Appellant any money for cultivating on the said plot and was categorical that she was not the one who had breached the contract. She thus closed her case.

#### **Analyses and determination.**

29. *Considering the evidence adduced in the trial court I find the issues raised for determination as;*

**i. Whether there was a breach of contract by the Appellant.**

ii. Whether failure to obtain consent from the Land Control Board rendered the sale agreement entered into between the parties null and void?

iii. Whether the Respondent was entitled to the current value and developments of the suit plot.

30. It is important, before proceeding to determine this matter, to note that parties in this matter had entered two different contracts. By their action of entering into a second contract entitled '**Change for the sale agreement of (2 plots) measuring (50 X 100) which was dated the 8<sup>th</sup> August 2006**', the first contract was thus automatically vitiated by this subsequent contract. This court shall now concern itself with the subsequent contract entered into by the parties on the 22<sup>nd</sup> December 2007.

31. *On the first issue for determination, as to whether the sale agreement entered into by the parties herein on the 22<sup>nd</sup> December 2007 was valid, the law of contract is application in the instant case where Section 3(3) of the Act is clear to the effect that:*

*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:*

32. A study of the contract that was entered into by the parties on the 22<sup>nd</sup> December 2007, reveals that the Appellant herein refunded money, which had been paid in the first contract, for one Plot to the Respondent who then proceeded to pay him Kshs 66,500/= as a consideration for purchase for one plot of land.

33. That the Appellant had also paid Kshs 15,000/ as penalty for breach of the first Agreement.

34. My understanding of paragraph 2 of the agreement hereto, is that parties had agreed that the balance of Kshs 8,500/= was to be paid upon parties going for a consent for transfer from the Land Control Board at Ol Kalou.

35. Paragraph 6 of the agreement carried the penalty clause, in case of default and/or breach of the agreement, for the amount of Kshs 20,000/=. The said contract was signed by both parties as well as witnesses.

36. I therefore find that there was a valid contract between the parties in compliance to the provisions of Section 3(3) of the Law of Contract Act

37. That pursuant to the signing of the said agreement and part payment of Kshs 66,500/= the said contract did not fall through because as the Appellant put it, after waiting for 4 (four) years, the Respondent failed to pay the balance of Kshs 8,000/= and was not co-operative with him so that they could obtain the consent from the Land Control Board to which he had decided to rescind the contract by refunding to the Respondent her part payment of the purchase price of Kshs 66,500/= plus the penalty fee of Kshs 20,000/=

38. Section 6 of the Land Control Act provides:

(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 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. The next issue for consideration

For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

(3) This section does not apply to—

(a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or

(b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.

39. From the above provisions of the Land Control Act, it is clear that there need to be five fundamental issues flowing from therein which include;

i. All transactions involving agricultural land situate in a land control area are void for all purposes unless the Land Control Board within that land control area has sanctioned them.

ii. Declaration of a trust in agricultural land situated in a land control area is also void without consent of the Land Control Board,

iii. Consent of the relevant Land Control Board must be obtained within six months of the making of the agreement relating to agricultural land. However, the High Court (read Environment and land Court) has power, for good reason, to extend the period for applying for consent.

iv. Where the transaction is ultimately void for lack of consent, any money or consideration paid by a would-be purchaser is recoverable as a debt.

v. It is a criminal offence punishable by imprisonment or fine or both to pay or receive payment in respect of a void transaction or to take possession or remain in possession of land, which is the subject of such void transaction.

40. According to the authors of **THE LAW OF CONTRACT, Butterworths Common Law Series (General Editor, Prof Michael Furmston), 3<sup>rd</sup> edition. 2007, p. 1000**, they state as follows regarding express statutory prohibitions, like those of the Land Control Act:

*“Where contracts of a specific type are expressly declared to be illegal by a particular statute, the contract is rendered void and unenforceable from its very inception or formation. There is no need to embark on any inquiry into the legislative intent as such for the very simple reason that the legislative intent is evident from the express language of the statute itself. In other words, while the legislative intent remains crucial, the plain language on the face of the statute itself saves the court the time and trouble of inquiring into the intention of Parliament in so far as that particular statute (or material provision thereof) is concerned.”*

41. Justice Nyarangi in the case of **Onyango & Another v Luwayi [1986] KLR 513 at P. 516** held as follows:

*“The appellants admitted that no consent for the proposed transaction concerning agricultural land had been given by the divisional Land Control Board. The transaction was therefore void for all purposes under section 6(1) of the Land Control Act, cap 302, because the transaction was not excluded by section 6(3). An application for consent in respect of the proposed sale of the material parcel of land had to be made to the appropriate Land Control Board within six months of the making of agreement*

*between Samson Luwayi and Javan Bulemi. No such application was made. That agreement therefore is of no effect and no question of specific performance can lawfully arise.”*

42. It therefore follows that once a transaction relating to agricultural land is held to be void, words ‘void for all purposes’ used in the statute must be interpreted to mean what they say.

43. Section 22 of the same Act stipulates as follows:

*Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6 of this Act, and any person—*

*(a) pays or receives any money; or*

*(b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.*

44. From the wordings of Section 22 of the Act, the same is clear to the effect that the sale of agricultural land is void for all purposes, unless the Land Control Board has given its consent to the sale and that any person who remains in possession of property in furtherance of an avoided transaction is in breach of the Act and is subject to a penalty.

45. The latest decision of the Court of Appeal on the import of failure to obtain the consent was stated recently in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** as follows:

*A contract for the sale of land to which the Land Control Act applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2)). The Land Control Act prescribes the time within which the application for consent should be made to the Land Control Board but does not prescribe the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined. The process from the time of the making the application to the time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement and the provisions of Section 7 of the Land Control Act for recovery of the consideration is an indication that Parliament intended that controlled land transactions should be concluded within a reasonable time.*

46. From the evidence adduced in the trial magistrate’s court, it is clear that no application for consent of the Land Control Board was made to the Land Control Board or if made. Further no application was made for extension of time within which to apply for the consent of the Land Control Board pursuant to the provisions of Section 8(1) of the Land Control Act, a provision which empowers the High Court to extend the period for applying for consent of the Land Control Board beyond the prescribed six months from the date of the transaction in question.

47. The Court of Appeal in the case of **Galaxy Paints Co Ltd vs Falcon Guards Ltd [2000] 2 EA 385**, held that

*The issues for determination in a suit generally flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination. The Court added that unless pleadings were amended, parties were confined to their pleadings.*

48. Further in the case of **National Bank of Kenya Ltd V PipePlastic Samkolit (K) Ltd and another (2002) EA 503** the court of Appeal held:-

***“This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause. As stated by Shah JA in the case of Fina Bank Ltd v Spares and Industries Ltd (2000) 1 EA 52: “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain.”***

49. Section 7 of the Land Control Act provides:

*If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.*

50. Granted the express, unequivocal and comprehensive provisions of the Act, there is no room for the courts to import doctrines of equity into the Act’. The Learned trial magistrate having found that the contract between the Appellant and the Respondent was null and void by dint of Section 6 of the Land Control Board, ought to have stopped at that.

51. Having considered the evidence adduced before the trial court, the above mentioned authorities and the provisions of the law, **I find that**

**the judgment delivered by the learned trial Magistrate was a misdirection based on the wrong decision in law and** against the weight of the evidence.

52. To this effect therefore, I find merit in the Appellant's Appeal and proceed to *set aside the award of the current value and developments of the suit plot issued to the Respondent, with costs of the suit in the subordinate court and cost at a lower scale this Appeal as the same was not defended.*

**Dated and delivered at Nyahururu this 28<sup>th</sup> day of March 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**