REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO.12 OF 2017

(Appeal Originating from Nyahururu CM's Court Civ.No.116 of 2013 by: Hon. P. O. Muholi – R.M.)

JULIUS MWEMA NYUGUTO.....APPELLANT

- V E R S U S –

ANNE WAIRIMU GITHOGORI.....RESPONDENT

J U D G M E N T

This is an appeal from the judgment of Hon. P. O. Muholi(R.M.) dated 15/9/2015, in Nyahururu PMCC.116/2013. The appellant, **Julius Mwema Nyuguto** was the defendant in the lower court while **Anne Wairimu Githogori** now respondent, was the plaintiff.

The respondent filed a plaint dated 4/7/2013 seeking a refund of Kshs.166,000/=, Kshs.160,000/= being the purchase price of ***LR.Nyandarua/Karagoine/502*** (hereafter referred to as suit land) paid by the respondent to the appellant and Kshs.6,000/= agency fees paid by the respondent to a land agent. The respondent also claimed costs of the suit.

The plaint stated that the appellant represented himself to the respondent as the registered proprietor of the suit land, which he offered for sale and the parties entered into a sale agreement on 17/7/2009. The purchase price was agreed at Kshs.160,000/=. The respondent paid to the appellant Kshs.100,000/= on 17/7/2009 and the balance on 17/9/2019; that on 22/7/2009, the appellant transferred the suit land to Benjamin Nderitu Nyuguto, his brother, without informing her and the said transfer thus frustrated due performance of the agreement. The respondent claimed the refund of the purchase price.

In his defence and counterclaim dated 18/2/2014, the appellant denied liability of the Kshs.160,000/= or selling the suit land to the respondent. In the counterclaim, he sought the dismissal of the main suit with costs and a declaration that the respondent to the counterclaim is a trespasser in suit land ***LR.Nyandarua/Karagoine/600*** and sought for eviction and ejectment therefrom plus general damages for trespass and costs of the suit and the counterclaim.

PW1 Anne Wairimu Githogori testified that she wanted to buy land and was told by the appellant's brother, one Duncan, that the appellant wanted to sell land. She was given the appellant's number by Duncan which she called. She did a search and found the land registered in the appellant's name. They agreed to meet at Nyahururu. They met on 17/7/2009 at Imis Hotel, Nyahururu. She was accompanied by Salome Wambui Nderitu (PW2) whereas the appellant was with his brother Duncan. That that was the first time PW1 met the appellant but he knew his brother Duncan as a customer. They prepared and signed an agreement (Exh.1) whereby she paid Kshs.100,000/= and the balance was to be paid on 17/10/2009; that the agreement was signed by her and Salome, but Duncan did not sign; that she was given a copy of the title (Ex.2). PW1 got the balance of Kshs.60,000/= and called the appellant but he was not available. PW1 was given the transfer form and Pin Certificate. She was given an Equity Bank A/C.0250190027749 in which she deposited the money and the agreement was executed on 17/9/2009 by Sam Githongori, PW1's husband and Duncan Mwaniki and the respondent (Ex.7) witnessed. They went to the surveyor to effect the transfer and paid transfer fees of Kshs.6,000/= (Ex.8). Next day, the surveyor told them that the land belonged to Benjamin Nderitu. A search was done on 14/10/2009 which confirmed that Benjamin got the title on 22/7/2009 (Ex.9). PW1 demanded a refund of the money she had paid to the appellant but the appellant did not refund and the appellant's mother offered her Plot 600 where she resides to date.

PW2, Salome Wambui was with PW1 when one Duncan Mwaniki informed PW1 that the brother had land to sell. She was present when the respondent met Julius Munene (the appellant) at Nyahururu where a price was agreed on and PW1 paid Kshs.100,000/= to the appellant and they signed an agreement which she witnessed; that PW1 was given the title deed. PW2 did not know Munene before but knew Duncan Mwaniki.

The appellant, **Julius Munene (DW1) Nderitu** testified that he owns ***LR.Nyandarua/Karagoini/600*** and used to live on 502; that on 22/4/2009, he sold Plot.502 to his brother Benjamin for Kshs.200,000/= and they signed an agreement D.Ex.No.(a). He denied ever authorizing his brother Duncan to look for a buyer for his land nor did he meet the respondent. He denied ever receiving any money or that any money was ever deposited in his account. He denied that the Pin Certificate produced in evidence was his or that he ever signed a transfer form. He however admitted that the Identity Card number is his and he never sent any documents by G4S. He asked the court to

order the respondent to vacate his land, Plot 600 as he never permitted her to enter the land. He did not report to police about the use of his Identity card number and about the land transfer and Pin Certificate. He denied ever being arrested but that Duncan was but was released.

After evaluating the evidence, the trial court found in favour of the respondent and entered judgment in her favour. It is that judgment that has provoked this appeal on the following grounds:

(1) The learned Resident Magistrate erred in law in holding that there was a valid and binding contract between the plaintiff and the defendant for sale of L.R.Nyandarua/Karagoini/502;

(2) The learned Resident Magistrate erred in law in holding that the purported agreement dated 17/7/2009 was signed by the appellant while he was not a party thereto;

(3) The learned Resident Magistrate erred in law in shifting the evidentiary burden and burden of proof to the appellant whereas the burden rested on the respondent throughout the case;

(4) The learned Resident Magistrate erred in law in holding that the appellant was properly identified as the person who signed the disputed contract dated 17/7/2009.

(5) The learned Resident Magistrate erred in law in holding that the appellant frustrated the alleged contract, yet there was no valid binding contract capable of being frustrated;

(6) The learned Resident Magistrate erred in law in holding that the respondent paid to the appellant consideration of Kshs.160,000/= while no such consideration was paid;

(7) The learned Resident Magistrate erred in law in holding that the appellant instructed his brother, Duncan Mwaniki Nyuguto to sell L.R.Nyandarua/Karagoini/502 on his behalf whereas no admissible evidence was adduced in support of that holding;

(8) The learned Resident Magistrate erred in law in holding that the appellant had not bothered to evict the respondent from L.R.Nyandarua/Karagoini/600 while he filed a counter-claim for eviction of the respondent therefrom;

(9) The learned Resident Magistrate erred in law in holding that the respondent had proved her case on a balance of probabilities;

(10) The judgment was against the weight of evidence;

(11) The learned Resident Magistrate erred in law in making an order for payment of Kshs.160,000/= with interest at 12% from 17/9/2009, yet the respondent had not prayed for interest;

(12) The learned Resident Magistrate erred in law in awarding costs to the respondent.

The appellant therefore prays that the judgment, decree and orders made on 15/9/2015 be set aside, save for the order requiring the respondent to move out or be evicted from ***LR.Nyandarua/Karagoini/600*** within 45 days and costs of the appeal and costs of the lower court be awarded to the appellant.

This is a first appeal and it is required of this court to re-evaluate, re-assess and re-analyze the evidence tendered before the trial court and come to its own conclusion. I am guided by the decision in ***Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates CP.161/1999*** where the Court of Appeal said as follows:

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate; re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

The appellate court has the discretion to interfere with the lower court's findings if it finds that the lower court has misapprehended the law and evidence or took into account irrelevant or ignored relevant facts.

Both counsel on record filed written submissions which they highlighted. The issues that seem to emerge and for determination are:

(1) Whether the agreements dated 12/7/2009 and 17/9/2009 were valid and binding on the parties;

(2) Whether the respondent discharged the burden of proof;

(3) Whether there was an agency agreement between the appellant and Duncan Mwaniki;

(4) Whether the court erred in holding that the appellant failed to evict the respondent from Plot 600;

(5) Who is entitled to costs.

In addressing the issue of whether there existed a valid and binding contract for sale of the suit land between the appellant and respondent. Mr. Kariuki Mwangi argued that the respondent needed to establish that the requisite elements of forming a legally binding contract existed, that is: offer, acceptance, an intention between the parties to create binding relationship, consideration, legal capacity of the parties to contract, genuine consent of the parties and legality of the contract. It was also counsel's submission that Section 3(3) of the Law of Contract Act which requires that a contract for disposition of an interest in land be in writing and signed by the parties was not complied with. The appellant denied ever offering his land for sale or entering into an agreement for sale of land with the respondent.

After considering the evidence on record, the learned magistrate considered whether there was a valid contract between the parties and came to the conclusion that there was indeed one. For a contract of disposition of an interest in land to be valid, it must be in writing and in compliance with Section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya which provides as follows:

> ***"3(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 therein; 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."***

There are two documents that were relied upon by the respondent dated 17/7/2009 and 17/9/2009.

As regards the agreement dated 17/7/2009, the appellant has denied that he made the entries on the agreement or signed it.

I have read the evidence on record. Present at the Hotel where the agreement was purportedly signed were the appellant, the respondent, the witnesses PW2 and Duncan, the appellant's brother. It was never stated who made the entries in the agreement. It could have been the appellant or Duncan but PW1 and PW2 were categorical, that Duncan did not sign the said agreement. Neither party had the agreement submitted to a handwriting expert to determine who filled in the blanks of the agreement. Otherwise, the agreement was duly executed by the vendor and purchaser and witnessed by a witness as required by Section 3(3) of the Law of Contract Act.

Coming to the 2nd agreement dated 17/9/2009, PW1 and PW2 said that the appellant did not appear at the agreed venue as agreed but instead Duncan, his brother who had introduced the respondent to the appellant, was present and signed together with the respondent's husband while PW1 witnessed. According to PW1, she talked to the appellant on phone and he instructed her to deposit the balance of Kshs.60,000/= in A/C.0250190027749, Equity Bank. PW1 did not have the deposit slip for the said money but on 20/2/2015, the respondent's counsel caused a notice to produce to issue on the appellant to produce his Equity Bank Statement for A/C.No.0250190027749. This is the account where PW1 said she deposited the last installment of Kshs.6,000/= on 17/9/2009. Notice to produce is issued under Order 10 Rule 15 Civil Procedure Rules. What is the purpose of a notice to produce? In ***Elect.Pet.1/2017, Lesirma Simeon Saimonga v IEBC & 2 others (2018) eKLR***, this court said:

> ***"A notice to produce is a device by which a party to a litigation informs another of his intention to use the information contained in the document sought to be produced and therefore requires the party who has the original of that document as the primary evidence thereof to produce it, otherwise, the party giving notice will use secondary evidence."***

In this case, the respondent contends that she deposited Kshs.60,000/= on an account which she was told belongs to the appellant. The respondent no longer had the deposit slip. It is only the appellant, being the account holder, who could have access to his bank statement from the bank and disprove the respondent's testimony. In reply to the notice, the appellant relied on technicalities and generally denied having the documents. The reply states:

> ***"(1). The plaintiff has not identified under which procedural rule the "notice to produce" is issued;***
>
> ***(2). The defendant does not have in his custody or power the documents referred to in the notice to produce and his attempts to procure the same have failed;***
>
> ***(3). The plaintiff has the legal burden of proof that she deposited money into the defendant's account."***

Refusal to produce the Bank Statement for the said account number draws an adverse inference against the appellant that he had something to hide. The respondent does not have the capacity to produce the said Bank Statement which would have shown whether or not PW1 deposited money in the said account. Failure to honour the notice to produce the Bank Statement leads this court to presume that the respondent deposited the last installment of Kshs.60,000/= in the appellant's account in due performance of the contract. The fact that money was deposited in the appellant's account goes to confirm that the parties had earlier entered into the agreement dated 17/7/2009 for sale of land.

The appellant also complained that there was no valid binding contract between the appellant and respondent for want an offer, acceptance, intention by the parties to reach a binding contract, consideration and legal capacity to enter into a contract and legality of the contract.

Whether the appellant made an offer to sell land:

Cheshire and Fifoot's Law of Contract 8th Edition page 25 defines offer as:

> ***"An offer, capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound provided that certain specified terms are accepted. The offeror must have completed his share in the formation of a contract by finally declaring his readiness to undertake an obligation upon certain conditions, leaving to the offeree the option of acceptance or refusal. He must not merely have been feeling his way towards an agreement, nor merely initiating negotiations from which an agreement might or might not in time result. He must be prepared to implement the promise of such a wish of the other party."***

The respondent told the court that she intended to buy land and learnt from Duncan that the appellant wanted to sell land. The said Duncan linked the respondent to the appellant. PW1 took steps by visiting the land and they agreed to meet with the appellant which they did.

I find that even if Duncan had advertised the land for sale, once the appellant met the respondent, he made an offer to sale his land which the respondent accepted and their intention to enter into a contract culminated in their signing the agreement dated 17/7/2009 which was signed and attested. A consideration of Kshs.100,000/= was also paid on the same day. All the elements required to create a contract were fulfilled.

The appellant denied that his brother Duncan was his agent and relied on the definition of 'agent' in ***Industrial and Commercial Development Corporation (ICDC) v Patheon Ltd (2015) eKLR Para.17***. The Concise Dictionary of Law 2nd Edition page 17 defines an ***'agent'*** as ***'a person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third party.'***

Further, in the case of ***Garnac Grain Co Inc v H.M. Faure & Fair Dough Ltd and Bunge Corporation (1967) 2 ALL ER 353, Lord Pearson*** said:

> ***"The relationship of the principal and agent can only be established by the consent of the principal and agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it; the consent must, however, have been given by each of them, either express or by implication from their words and conduct."***

In the instant case, the respondent said that Duncan informed her that the appellant had land to sell and gave her his contact and connected them. The respondent and appellant met, discussed the terms that resulted in the agreement dated 17/7/2009. Of course, there was no written agency agreement between the appellant and his brother Duncan but it can be implied from the conduct of the parties. The appellant entered into a contract with the respondent and received money based on the contract.

There is no requirement in law that an agent produce a formal letter from the principal for him to be recognized as an agent.

In a case where the purchaser subsequently transacts with the seller the agency can also be deduced from the conduct of the parties. To buttress the fact that Duncan was the appellant's agent, he is the one who signed the agreement of 17/9/2009 in which the balance of the purchase price was paid to the appellant.

I found earlier in this judgment that it is the appellant who received the payment of Kshs.60,000/= and it follows that he must have received the first installment. Duncan fitted the definition of who an agent is as held in the ***ICDC case (Supra).***

The evidential burden of proving that a contract existed between the appellant and respondent rests on the one who alleges, that is, the respondent. Section 107(1)(1) of the Evidence Act provides: ***"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 the facts exist."*** See ***Evans Otieno Nyakwane v Cleophas Bwana Ongaro (2015) eKLR***.

From an evaluation of the evidence tendered before the court, I am satisfied that the respondent proved on a balance of probability that the parties did enter into a contract and the appellant failed to perform his part of the contract because he sold the land to another.

It is the appellant's contention that the sale transaction being a controlled one, required the consent of the relevant land Control Board under Section 6(1) of the Land Control Act. It was submitted that the application for consent is invalid since it only bore a signature and does not indicate for which piece of land and what kind of transaction it was applied for.

Section 6 of the Land Control Act provides as follows:

> ***"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 division of an area of less than 20 acres into plots in an area to which the development and use of Land (planning) Regulations, 1961 (LM.5/6/1961) for the time being apply;***

(c) …….”

The appellant relied on the decision of ***Rose Wakanyi Karanja and 3 others v Geoffrey Chege Kirundi and another (2016) eKLR*** where the Court of Appeal considered the effect of Section 6 of the Land Control Act when it said:

> ***“There is a long line of authorities on the effect of lack of consent of the Land Control Board. Initially, one had to obtain the consent within three months but this period was later enlarged to six months. In Hirani Ngaithe Githire v Wanjiku Munge (1979) KLR 50, Chesoni, J (as he then was) stated at page 52:***
>
> ***“Section 6 of the Land Control Act is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The court cannot do that; for it is not for us to legislate but to interpret what parliament has registered. So in this case that agreement between the parties having been entered in June, 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and since no consent had been obtained within that time, nothing can revise or resurrect such an agreement. Failure to obtain the necessary land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.”***

No doubt the subject land was agricultural land that was subject to the provisions of the Land Control Act. The respondent said that on the first meeting with the appellant on 17/7/2009, he gave her the title deed, application for Land Control Board, Pin Number and photocopy of identity card.

The respondent said that after she paid all the monies, they went to the surveyor only to be told that the land had been transferred to Benjamin, the appellant’s brother.

A Land Control Board consent must be obtained within 6 months of making the agreement. The agreement was first entered into in July, 2009. The balance of the purchase price was paid on 17/9/2009. The 6 months period for obtaining the Land Control Bard consent had not yet expired and so the agreement cannot be deemed to have been void. In any event, the respondent’s claim is for refund of her money now that the contract could no longer be performed because the land was not available, having been transferred to another and a title issued.

When the respondent found that the suit land had been sold to another, she demanded a refund of the purchase price and when it was not, she sought assistance from the Chief of Heshima who in turn called the appellant. The appellant allowed the respondent to enter and occupy the appellant’s other Plot No.600 in 2010 where she resides to date. There was no denial of this fact.

The trial court observed that the appellant has never sought to evict PW1 from the said land. I do agree with the trial court’s observation. If the respondent was a total stranger to the appellant, she would not have been allowed to enter on that land since 2010. It just goes to buttress the respondent’s case that indeed the appellant received money from the respondent as claimed based on a contract of sale of land.

The appellant has taken no steps to evict the respondent from the land for the last 9 years and his being in Mombasa cannot be an excuse. Mombasa is in Kenya. By his conduct, the appellant admitted to the existence of the contract for sale of land. The standard of proof is on a balance of probabilities. That threshold has been attained.

The appellant complains that the respondent did not pray for interest yet the trial court awarded interest of 12% as payable on the sum claimed. The prayers in the plaint did not include one of interest.

In making the award of interest, the trial court did not give reasons for making that award. Although the respondent prayed for any other relief, they did not demonstrate why a prayer for interest was not specifically pleaded. Besides, the respondent has been using the plaintiff’s land since 2010 and would not be entitled to interest.

I agree with the appellant that awarding interest that was not sought was a wrong exercise of discretion.

The trial court ordered that upon payment of the respondent, the respondent should be evicted from Plot 600. It is the appellant’s contention that by making that order, his counterclaim had been allowed and he should not have continued to pay costs. It is because of the appellant’s failure to perform his part of the contract, failing to refund the respondent’s money that propelled the respondent to file this suit. The award of costs to the respondent was in my view, a proper exercise of the court’s discretion.

In the end, I find no merit in the appeal save for the issue of interest.

I therefore uphold the decision of the trial court and make the following orders:

(1) That the appellant do refund Kshs.160,000/= to the respondent;

(2) That upon the appellant paying to the respondent the amount in full, the respondent do have 45 days within which to move out of Nyandarua/Karagoini/600; or be evicted therefrom;

(3) The respondent will have costs of the appeal and the lower court.

Dated, Signed and Delivered at *NYAHURURU* this *31st* day of *October,* 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Wanjiru holding brief for Mr. Kariuki Mwangi for appellant

Ms. Wanjiru Muriithi for Mr. Nderitu for respondent

Shihundu – Court Assistant