



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**CIVIL APPEAL NO. 39B OF 2011.**

SHABAN MATETE .....APPELLANT

VERSUS

LAWRENCE WANDERA ONGAMO.....RESPONDENT.

**JUDGMENT.**

**SHABAN MATETE**, the Appellant, being aggrieved with the judgment of Hon. M. W. Njagi, Resident Magistrate, delivered on 1<sup>st</sup> September, 2010 in Busia SPMCC. No. 399 of 2008 filed this appeal setting out four grounds in the Memorandum of Appeal dated 27<sup>th</sup> July, 2011 as follows;

“ 1. That the Learned Trial Resident Magistrate erred in law and fact by failing to appreciate that the Respondent frustrated the sale of land agreement between him and the Appellant.

2. That the Learned Trial Resident Magistrate erred in law and fact by finding that the appellant only paid Kshs.9,400/= as purchase price.

3. That the Learned Trial Resident Magistrate erred in law and fact by finding that the parties did not apply for consent of the Land Control Board.

4. That the Learned Trial Resident Magistrate erred in law and fact by arriving at a wrong decision that was against the weight of evidence on record.”

The Appellant prays for the Lower courts judgment to be quashed and an order of specific performance in respect of South Teso/Angoromo/4294 against Respondent be issued. He also prays for costs.

The Appellant was represented by M/S. Maloba & company advocates and Respondent by M/S. Bagonko, Otanga & company advocates . The Respondent counsel later filed the application dated 19<sup>th</sup> November, 2012 to cease acting for the Respondent and it was allowed on 29<sup>th</sup> May, 2013 but Mr. Bagonko and Otanga advocates from the firm of Bagonko Otanga & company advocates, continued appearing for the Respondent. On the 11<sup>th</sup> November, 2013, the court ordered that the appeal to be disposed off through written submissions. Thereafter M/S. Maloba & company advocates filed the Appellant’s submissions dated 9<sup>th</sup> June, 2014 and M/S. Bagonko Otanga & company advocates filed the Respondents submissions dated 23<sup>rd</sup> June, 2014.

This being a first appeal, the court is obligated to re evaluate the evidence, assess it afresh and make its own conclusions while remembering that the court neither saw nor heard the witnesses and

should therefore give allowance for that. This court is not bound to follow the trial court's finding of the fact if it appears either to have clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

I have looked at the evidence adduced by both Appellant and the Respondent and is as summarized hereinbelow:

1. That the Appellant and Respondent entered in a land sale agreement on 4<sup>th</sup> July, 1987. The agreement was in writing.
2. That under the sale agreement, Respondent was to sell to Appellant a piece of land measuring 108 feet by 200 feet.
3. That while Appellant claims he paid the whole purchase price albeit in instalment while the Respondent insisted that he received only Kshs.9,400/=.
4. That the Respondent applied for and received Land Control Board consent to subdivide the land parcel South Teso/Angoromo/4294.
5. That Respondent gave Appellant possession of the land upon making the sale agreement.
6. That though Appellant position is that Respondent has frustrated the sale agreement by declining to transfer the land to him, the Respondent contended that it is the Appellant who failed to pay the Kshs.600/= being the outstanding purchase price. The Respondent further stated that he filed SRM CC. No. 50 of 2004 to nullify the sale agreement dated 4<sup>th</sup> July, 1987 among others and that he had deposited the purchase price received from Appellant with his advocate for transmission to the Appellant. The Respondent did not however produce any documentary evidence to confirm the deposit.

This court has perused the judgment delivered on 1<sup>st</sup> September, 2010 and it is apparent the Learned Trial Magistrate considered the testimonies of both Appellant and Respondent when she made the following finding:

**“ The agreement produced by the Plaintiff as exhibit 1 shows he paid the Defendant a total of Kshs.9,400/= of his allegation that he paid Kshs.600/= before the Chief is not supported by evidence on record.”**

It was the duty of the Appellant to offer evidence of how he paid the Kshs.600/= which Respondent had disputed. He could have done so by availing documentary evidence as he did in respect of the Kshs.9,400/-, or calling witnesses who were present during the payment. The Learned Trial Magistrate was therefore entitled to come to the finding that she did which is that the Appellant had not paid the whole purchase price to the Respondent.

The Appellant's suit before the Lower court was for specific performance orders against the Respondent. However, the Learned Trial Magistrate after considering the evidence adduced found the orders could not issue as the Land Control Board consent for transfer had not been obtained. The relevant portion of the judgment reads as follows:

**“ There is no evidence on record that the parties sought the consent of the Land Control Board consent within the stipulated time orders of specific performance cannot therefore issue and the Plaintiff is only entitled to a refund of the purchase price paid.”**

It is important to remember that the land subject matter of this suit was agricultural land and that is possibly why the parties have raised the issue of Land Control Board Consent. The provision of Section 6 of the Land Control Act Cap 302 of the L.O.K states:

- “ 6 (1) Each of the following transactions –**
- a. **the sale, transfer.....**
  - b. **.....**

C. ....

**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 consent in respect of that transaction in accordance with this Act.”**

The application for consent is required under section 8(1) of the said Act to be made within six months of the agreement. The Appellant did not exhibit any consent to transfer in respect of the sale agreement he had with the Respondent. The only consent exhibited was consent for Respondent to subdivide his land and not consent for Respondent to transfer any land, leave alone South Teso/Angoromo/4294, to the Appellant. The finding of the Learned Trial Resident Magistrate that orders of specific performance were not available for the Appellant cannot be faulted as the sale agreement was void for lack of Land Control Board consent to transfer.

The Learned Trial Resident Magistrate was therefore in order when she found that the Appellant could only have refund of the purchase price he had paid to the Respondent. This decision is in conformity with the provisions of section 7 of the Land Control Act which states:

**“ 7. 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.”**

The Respondent’s counsel submitted that the Appellants right to recover the money had to be done within 6 years as provided for under section 4 of the Limitation of Actions Act Cap 22 of the L.O.K and asked the court to follow the finding in *SIMIYU –VS- WATAMBALA (1988) KLR 852* where Hancox JA at page 857 held;-

**“ The Appellants remedy, subject to the Law of Limitation was an action for damages coupled with the recovery of the purchase money under section 7 of the Act.”**

As the Respondent has not cross – appealed on the decision of the Learned Trial Magistrate that he refunds Kshs.9,400/= plus costs, this court finds no fault in the Lower courts judgment of 1<sup>st</sup> September, 2010.

For reasons shown above, the court finds the appeal filed herein is without merit and is dismissed with costs.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 30<sup>TH</sup> DAY OF JULY, 2014.**

**IN THE PRESENCE OF;APPELLANT,HIS ADVOCATE M/S. MALOBA AND MR.JUMBA FOR OTANGE FOR RESPONDENT.**

**JUDGE.**