REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 98 OF 2007

(Being an appeal from the judgment of Hon. G. C. Mutembei C. M. delivered on 30th May 2007 in Nakuru CMCC No. 2032 of 2005)

MONICAH NJUGUNA.....APPELLANT

VERSUS

ROSE W. GITHUA.....RESPONDENT

JUDGMENT

In a suit commenced by a Plaint dated 17th August 2004 and filed on 6th October 2004, the Applicant sued the Defendant and sought judgment for -

(a) *Shs 400,000/=*

(b) *General damages for breach of contract*

(c) *Costs of the suit*

(d) *Interest*

2. The suit was on the evidence dismissed with costs in a judgment delivered on 30th May 2007. Aggrieved with that judgment the Applicant has come to this court by way of an appeal dated 15th June, 2007, and has cited six grounds -

1. *The learned magistrate erred in law and in fact by delivering a judgment which was contrary to provision of Order XX Rule 4 of the Civil Procedure Rules.*

2. *The learned magistrate erred in law and in fact in failing to appreciate that the agreement subject matter of the suit met therequirement of the Law of Contract Act Cap. 23 of the Laws of Kenya.*

3. *The learned magistrate erred in law and in fact in failing to consider the evidence of the plaintiff and that of the defendant in totality.*

4. *The learned magistrate erred in law and in fact by failing to appreciate that the defendant admitted having received the sum of Kshs 400,000/= and as such the only point for determination was whether the said land being sold was in existence or not.*

5. *The learned magistrate erred in law and in fact by holding that the agreement relied on was a forgery despite the overwhelming evidence to the contrary.*

6. *The learned magistrate erred in law and in fact by determining issues that were not before the court.*

3. Counsel for both the Applicant and Respondent filed written submissions for and against the appeal. The Respondent's Counsel's submissions are undated but were filed on 28th February 2011. The Appellant's counsel's submissions are dated 3rd July 2012, and were filed on 4th July 2012.

4. I have perused the submissions by both counsel. I do not propose to analyse all the grounds of appeal and arguments in support of each of the said grounds. The facts are not in dispute. There was an Agreement for Sale by the Respondent of a parcel of land, known as Ref. No. 16424/C/XII/99 Plan PDP 42/13/97 for *(the suit land)* the particulars of which are not germane for the purpose of this judgment. The parcel of land was situate in Eastleigh Area of Nairobi. The Respondent was an allottee of the said parcel of land under a Letter of Allotment dated 15th April 1998. That is the interest the Respondent entered into an Agreement/Agreements for Sale to the Appellant for the sum of shs. 400,000/= according to the evidence, of PW1 ***(Pastor William Njuguna, the husband of the Appellant)***. However the Respondent only acknowledges the Sale Agreement for shs 300,000/= between her and the Appellant. The Respondent denies signing the agreement showing a purchase price of shs 400,000/= although she admits being paid shs 400,000/=, by PW1, the extra shs 100,000/= being the necessary charges including payment for rates.

5. Though the agreements grant the Appellant immediate vacant possession of the land, the Appellant failed to take possession, and in the mists of time lost the plot to other *"developers"*. The Respondent says, *"she is not responsible"* for what happened to the plot after entering the Agreement for Sale dated 20/04/2000.

6. It is technical, but the law relating to contracts concerning land is clear. It is found in Section 3(3) of the Law of Contract Act *(Cap. 23, Laws of Kenya)*. It says -

"3(1)

(2)

(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 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.

(the exception is purchase in an auction).

7. In this case, PW4 *(an Advocate)*, testified on oath that it is the Appellant and the Respondent *(buyer and seller)* who attended his Chambers and signed the Sale Agreement "On 20/04/2000 -

"On 20/04/2000 Rose Githua and Monica Njuguna came to see me. In my career I have drawn many agreements. On p.2 has two signatures. One is for the purchaser and the other for the Vendor. It also has my signature. I would be surprised to learn that the signature purported to be of Monica is not hers. It was not signed by Pastor Njuguna. He never signed Agreement."

8. Now this is a strange tale. PW1 testified that he signed the Agreement on behalf of his wife

(PW2) who was then resident in London. The Respondent in her sworn testimony testified, *inter alia* that the Agreement with the consideration of shs 300,000/= is the genuine agreement. It is the Agreement between her and the Appellant, *(Monica Njuguna – PW2)*. She signed the Agreement, but the Appellant did not -

> ***"- I have signed the Agreement. Monica has not signed.***
>
> ***-I only know the agreement for shs 300,000/=***
>
> ***- I do not know who signed the second signature"***

9. Several things arise from this contradictory evidence. **Firstly** having disowned the agreement with the consideration of shs 400,000/= the probability suggested by DW1, *(the Respondent)* is that page 1 of the Agreement she signed was altered by persons unknown to her.

10. **Secondly,** the agreement for the consideration of shs 300,000/= having been signed by one party only, it is inchoate, or incomplete, and is unenforceable by virtue of Section 3(3) of the Law of Contract Act. **Thirdly**, the Agreement with the consideration of shs 400,000/= is equally unenforceable by the Appellant against the Respondent by virtue of the doctrine of privity of contract, *(a party who is not a party to a contract has no rights under it (unless clear basis of agency is established)*.

11. Whereas the Agreement with a consideration of Ksh 300,000/= had the ID Number 362119 of the Appellant, inserted by hand, the Agreement with the consideration of Ksh 400,000/= is typed and does not have the ID Number of the Vendor/Rose Githua *(the Respondent)*. It also has appended to it the signature of PW1 *(who PW4, the Advocate, says never signed before him)*, and DW1 says, the Appellant never signed. Though reflecting the figure of shs 400,000/= which the Respondent says, she received, the Agreement for the consideration of shs 400,000/= is patently a forgery in terms of Section 345 of the Penal Code, *(Cap. 63, Laws of Kenya)* and for that reason alone is unenforceable. The learned trial magistrate did not err in this regard.

12. **Fourthly** (PW1) the Pastor, had no power of attorney to sign the Agreement on behalf of the wife (PW2). The land in question was subject to the Government Lands Act *(Cap. 280, Laws of Kenya) (GLA) (repealed)*. Section 108 of the GLA required that -

> ***"Powers of attorney relating to or affecting land registered under this part, and the revocation of those powers, shall be registered in such manner as may be prescribed, and a registrar may refuse any document executed by an attorney whose authority has not been duly registered."***

13. Likewise Section 50 of the Registration of Titles Act *(Cap. 281, Laws of Kenya) (now repealed)*, required not only the Vendor of land but also the Purchaser thereof to be duly authorized to sign the contract for the sale and purchase of land.

14. In this regard Kenya law is in some respects different from, but in others, similar to the law in England. The law in England is different from our law as stated in Halsburys Laws of England, 3rd Edn. Vol. I paragraph 371 -

> ***"...that writing is not necessary in the case of an appointment of an agent to purchase land,***
>
> ***and similar to our law -***
>
> ***"..although contracts relating to land are not enforceable unless evidenced by writing."***
>
> and in para. 372 -
>
> ***".... even in cases where signature of a principal is required by statute, an agent may be***

appointed by word of mouth or other manner to sign for him, unless the statute expressly requires the agent, if any, to be authorized by writing or expressly or implied requires a personal signature, and so renders an agent incompetent to sign at all."

15. So even if there was no controversy over or denial of his signature, the law *(the Law of Contract Act) (supra)* and the Registration of Titles Act *(supra)*, required PW1 *(the Pastor and husband of PW2 – the Appellant)*, to have a duly registered power of attorney to enable him to sign the Agreement for Sale on behalf of his wife, the Appellant. Implied agency will not aid the Appellant.

16. For those reasons also, the Agreements for Sale, dated 20/04/2000, *(whether the consideration was shs 400,000/= or shs 300,000/=)* were void *ab initio*, as being contra statute, and are therefore unenforceable as such. On this account also the appeal should stand dismissed with costs.

17. However the Appellant raised the question of unjust enrichment in his submissions to this court. The question was never raised in his pleadings, *(the Plaint)*. On the general principle that parties are bound by their pleadings, and any departure therefrom should not be allowed except first amended, this question should not be addressed. The issue was however raised in his submissions before the lower court; on the general remedy in the event of failure of consideration, *"restituo in intergrum"* (restitution of the parties to the *status quo ante* and restore things between them, to the position in which they stood before the contract was entered – **ABRAHAM & CO. LTD VS. WESTVILLE & SCO [1983] AC 773 at 781,** cited in **"Cheshire & Foot Law of Contract".** It was however not addressed by the lower court.

18. Article 159(2) of the Constitution of Kenya enjoins all courts in exercising judicial authority to be guided by principles inter alia that justice shall be done to all, irrespective of status, without undue regard to procedural technicalities, and due regard to the purposes and principles of the Constitution, which also include equity.

19. Section 3A of the Civil Procedure Act *(Cap. 21, Laws of Kenya)* also donates to this court inherent power to make such orders as may be necessary for the ends of justice … or to prevent abuse of the process of the court.

20. The doctrine of unjust enrichment is neither contractual nor tort. It is in my view an equitable remedy for restoration of justice, and is premised on the following principles – which form the basis for restitutionary claims -

(1) non-voluntary confinement of a benefit, such as through mistake or on account of compulsion, necessity, or in ignorance, or due to an unequal condition between the payer and payee,

(2) voluntary confinement of benefit for total failure of consideration,

(3) benefit conferred in consequence of a wrongful act, such as where a trustee benefits from a breach of trust,

(4) ultra vires demand,

(5) abuse of power entrusted to the defendant by Parliament or by contractual instrument such as debenture or other agreement,

(6) illegitimate use of self-help sanction,

(7) vindication of equitable title to property,

(8) money had and received.

21. In the case of **CHASE INTERNATIONAL VS. LAXMAN KESHRA [1978] KLR 143,**

the Court of Appeal stated inter alia -

> ***"In Fibrosa Spolka, [1943] AC 61, Lord Wright said – it is clear that any civilised system of law is bound to provide remedies in cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man (or woman), from retaining the money or some benefit derived from another which it is against conscience that he should keep, such remedies in English law are generically different from remedies in contract or tort, and are not recognized to fall within a third category of the common law which has been called quasi-contract or restitution."***

22. **Goff** and **Jones** in their treatise, **Law of Restitution** at p. 11 says -

> ***"..most mature systems of law have found it necessary to provide outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a defendant may find himself or herself in possession of a benefit which in justice should restore to the Plaintiff ...".***

23. In my opinion, this is one such circumstance. The Respondent was a beneficiary of a *"Letter of Allotment"* by the Government of the Republic of Kenya. It was in a manner of speech an invitation to treat. It was subject to fulfilment of the conditions set out therein so that she could be issued with a title, evidence of land ownership. No authority is required for the proposition that a Letter of Allotment of land is neither evidence of ownership nor title. However in our mad hurry to get a piece of earth, Letters of Allotment are freely traded upon by way of sale as if they were titles. This was one such case. The parties entered or intended to enter into a binding Sale Agreement, coupled with a formal transfer of the parcel of land by the Respondent and the Commissioner of Lands, to the Appellant.

24. The Respondent admits that she received a sum of Ksh 400,000/= from PW1, though she does not acknowledge the Agreement for that sum which was signed by PW1, but acknowledges the Agreement for shs 300,000/= which she admits signing, but was not signed by the Appellant. Either way, the Respondent contends, once she had signed the Agreement, she was done, it was the duty of the Purchaser, whether PW1, or the Appellant to get on with the business of fulfilling the Conditions on the Allotment Letter and obtaining title.

25. The Respondent is and was obviously wrong. An Agreement for Sale is not a Transfer of her interest in the Letter of Allotment. She failed to execute an Instrument of Transfer to the Appellant after receiving the consideration therefor *(shs 400,000/=)*. The failure to transfer was entirely due to the Respondent's and not the Appellant's indolence. The Appellant was 8000 km away in England. The Respondent was in Kenya. They were family friends. The Respondent failed her friend, the Appellant. Equity and social justice will not allow her to keep the proceeds of sale.

26. In my judgment therefore, on the principles of the Constitution, the inherent power of this court to do justice, and not rely on technicalities of the law, I allow the appeal herein, and direct the Respondent to refund the Appellant the sum of Kshs 400,000/= together with interest at court rates from the date hereof until payment in full.

27. The Appellant will also have the costs of this appeal and the court below.

Dated, signed and delivered at Nakuru this 24th day of October, 2014

M. J. ANYARA EMUKULE

JUDGE