



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT CIVIL APPEAL NO. 25 OF 2009**

**CYRUS KOMO CHEGE.....APPELLANT**

**VERSUS**

**MINEH WAIRIGU MBUGUA .....RESPONDENT**

**(Being an appeal from the Ruling of Mrs. Mutoka Chief Magistrate delivered on the 28<sup>th</sup> day of January 2009 in SPMCC NO. 155 of 2006-Kiambu)**

**BETWEEN**

**CYRUS KOMO CHEGE.....PLAINTIFF**

**MINEH WAIRIGU MBUGUA .....DEFENDANT**

**JUDGMENT**

1. On the 2<sup>nd</sup> of December 2008 Hon. R. Mutoka delivered a ruling on a chamber summons dated 29<sup>th</sup> of September 2008 which had been filed by the Respondent under order XX1 rule 22 of the old Civil Procedure rules and section 3 (a) of the Civil Procedure Act. Aggrieved by the said ruling the Appellant filed a Memorandum of Appeal on the 28<sup>th</sup> of April 2009. The same was amended on the 3<sup>rd</sup> of March 2011. His grounds of appeal are as follows;
  - a. That the Learned Magistrate erred in law and in fact in failing to give the Respondent a chance to be heard in that;
    - i. The application filed on the 13<sup>th</sup> day of January 2009 was served on the 14<sup>th</sup> day of January 2009 and the same was received under protest since the advocate for the Appellant was engaged before another court.
  - b. That in spite the Magistrate appreciating the fact the application had been received under protest, she did not wait for the lawyer nor ask the Appellant who was present to proceed with the application and he has therefore been condemned unheard and she did not even consider the replying affidavit which had been filed.
  - c. The learned Magistrate erred in law and in fact in proceeding to set the value of the property at Kenya shillings one million, two hundred thousand without even considering the market price and/or the value of the land.
  - d. The Learned Magistrate erred in law and in fact in basing the value of the land on a consent order of 30<sup>th</sup> November 2007 which had lapsed after the Respondent failed to comply with the terms of the said consent and the same had not even been extended.

- e. The Learned Magistrate erred in law and in fact in that the ruling read in court bears a date of 28<sup>th</sup> day of January 2008 and 28<sup>th</sup> January 2009 and it is not the same one that was read before the parties since the one read in court on 26<sup>th</sup> day of January 2009 stated that the Respondent should not expect that he could get the land without making any form of a deposit towards the purchase and that the court could not set the price for the parties.
- f. The ruling read in court on the 26<sup>th</sup> day of January 2009 is different from the one in the court file which purports to be read on 28<sup>th</sup> January 2009 and which is dated and signed 28<sup>th</sup> January 2008.

The Appellant prays that this court be pleased to:-

- a. Reverse, vary, overturn and/or set aside the ruling of the learned Magistrate in Kiambu SRMCC No. 155 of 2006 delivered on the 26<sup>th</sup> day of January 2009 and dated the 28<sup>th</sup> day of January 2009.
  - b. Costs of the application in the lower court and of this appeal be awarded to the Appellant.
2. In considering this appeal I have gone through the amended record of appeal filed in court on the 25<sup>th</sup> of March 2011 together with the original court file. The Appellant sued the Respondent and sought an eviction order against the Defendant from plot no. LR. Ndumberi/Rabai/2234. He also sought mesne profits at Kshs. 10,000/- per month with effect from 1<sup>st</sup> June 2006. The Respondent filed a defence denying the Appellant's claim. In the plaint dated 2<sup>nd</sup> August 2006 the Appellant claims that he was the registered owner of the suit property after he purchased it from a public auction on the 28<sup>th</sup> of April 2006. The respondent in her defence avers that the said auction was conducted in a fraudulent manner between the Appellant and the Auctioneer and was null and void. She further claims that the property cannot be transferred to the Appellant as they erected on it a residential house which encroaches on title number LR. Ndumberi/Rabai/2376 the property of one David Ndirangu Githeiya which immediately neighbours the property which is the subject of this suit.

On the 30<sup>th</sup> of November 2007 parties recorded consent in Court as follows;

- i. By consent the suit land be and has been subdivided into 2 equal portion namely LR. Ndumberi/Rabai/3502 and LR. Ndumberi/Rabai/3503.
  - ii. By consent the Plaintiff herein do transfer to the defendant's husband David Ndirangu the portion known as LR. Ndumberi/Rabai/3502 which contains the residential house and the defendant do pay to the plaintiff a sum of Kshs. 1,200,000/- as follows;
    - a. Kshs.800,000/- on or before 30<sup>th</sup> November 2007
    - b. The balance of Kshs. 400,000/- to be paid in monthly installments of Kshs.100,000/- with effect from 10<sup>th</sup> January 2008 and on the 10<sup>th</sup> day of each succeeding month thereafter until payment in full.
  - iii. By consent the plaintiff and the defendant to execute an agreement to reflect the consent therein upon payment of the said Kshs.800,000/=
  - iv. By further consent the defendant to meet all expenses incurred in the subdivision, registration and transfer herein.
  - v. That in default of any of the terms of this consent the plaintiff be at liberty to evict the defendant and all those claiming under her from the suit land without further notice.
3. On the 8<sup>th</sup> of July 2008 an application for Notice to Show Cause was heard by Hon. Mutoka . Mr. Orege for the Respondent argued that there was consent between the parties and his client was to pay the value of the subject matter to the plaintiff. He informed the court that his client and her husband had approached equity bank for financing of the amount of 1.2million; that on the 2<sup>nd</sup> of July 2008 the bank had written to the appellant to avail a copy of the title and sale agreement so that the amount could be paid directly to the Appellant. He informed the court that they had

written to the Appellant's counsel requesting to be given a draft sale copy but they had not received. Mr. Orege sought an order that the Appellant furnish a copy of the title and sale agreement so that they could forward it to the bank. Mr. Charagu in response stated that the problem was the delay in honoring the consent; that they had received the letter from equity but their client had no time to act on the same and that the Respondent continues to reside at the property and that the court could give them a time limit. In response Mr. Orege argued that the delay alluded to could not be occasioned by the Respondent and that the post-election events affected his attempts to get a loan which the bank had then approved and that the Appellant would not be prejudiced at all and he requested the court to give them 90 days. The learned Magistrate in her ruling dated 8<sup>th</sup> July 2008 considered the reasons given by Mr. Orege and acceded to the request by the Respondent and ordered the Appellant to release a copy of the title and sale agreement to the Respondent for onward transmission to equity bank. The Respondent was also given 90 days within which to comply.

4. On the 29<sup>th</sup> of September 2008, the Respondent filed an application under order XX1 rule 22 of the old Civil Procedure Rules and section 3(a) of the Civil Procedure Act seeking the following orders;
  - a. That, any form of execution herein be stayed until the plaintiff/Decree holder complies with the consent orders recorded in court on 8/7/2008.
  - b. That, an order do issue directing the plaintiff /Decree holder to release copy of title of the suit property with sale agreement within fourteen (14) days and in default the Executive Officer of the court be authorized to execute all instruments of sale and transfer in place of the plaintiff. Upon such transfer the loan proceeds from equity Bank be paid directly to the plaintiff in satisfaction of the decree herein.
5. After hearing parties Hon. Mutoka found that the appellant failed to comply with the court order dated 8<sup>th</sup> of July 2008 to release the title document to the Respondent despite the various communications to him by the Respondent. She granted the Respondent's prayers staying any form of execution until the appellant complied with the consent orders recorded in court on the 8<sup>th</sup> of July 2008. She also allowed the 2<sup>nd</sup> prayer sought in the said application and stated that the court cannot give infinite orders. She further ordered that once the Appellant releases the title documents to the Respondent, Respondent should not later than 27<sup>th</sup> of January 2009 file in court any terms agreed between him and the bank and that before then the Respondent shall have entered into a valid sale agreement with the appellant and that if the Respondent did not meet the terms of the agreement the appellant would have grounds for legal recourse against the Applicant.
6. In the Appellant's submissions are that the learned Magistrate had no powers to vary the terms of the consent; that the terms of the consent were clear and after defaulting the Appellant was at liberty to evict the Defendant according to the order dated 18<sup>th</sup> December 2008. It was also argued that the Respondent having failed to honor the condition of consent order the Appellant is no longer legally bound by it and is at liberty to evict the Respondent or enter into a new and to vary the purchase price. That the court had no legal mandate to compel the appellant to proceed with the terms of the consent after the Respondent failed to honor its terms, and that by doing so the court was making a contract for the purchase. The Appellant relied on the following cases ***Eklr. Kassim Mbwana vs. Wilson Kamande Magua (2005) Eklr and Civil case No. 136 of 1992 Tiwi Beach Hotel ltd Vs. Gabriele Katheleen Brown.***
7. The Respondent in opposing the appeal submitted that the Applicant's submissions are misleading as follows; that it was misleading to state that during the hearing of the application dated the 21/2/12 the issue for determination was whether the learned Magistrate had powers to vary terms of the consent order of 29/11/07; that the Respondent did not breach the terms of the letter of consent, that the Appellant had not extracted a formal and certified copy of the order arising from the consent letter; that the Appellant frustrated and hindered the Respondent from complying with the said consent and as a result the Respondent filed the application dated the 29/9/08 and the court granted the orders sought; that the Appellant wanted full payment before the sale agreement was executed by the parties in order to frustrate the consent letter and block the Respondent from achieving terms and on account of the said frustration the Respondent moved the

court and that despite the court ordering the appellant to release a copy of the sale agreement and sale agreement the appellant has not done so; that in further breach and abuse of terms of the consent the Appellant changed goal posts by demanding a sum of kshs. 2,500,000/- as purchase price; that the consent letter, which was adopted as a court order, which forms the substance of the appeal has not been set aside, varied or in any manner expunged from the court record; that the appellant had failed to state or disclose what terms of the consent order was varied by the learned Magistrate; that this court should consider who breached the consent; that the appeal is technically meant to set aside the consent order of 30/11/07 and that the appellant's intention is intended to ensure that the court shields the appellant from obligations of rendering the sale agreement which will enable the Respondent to fulfill her obligations of honoring the terms of the consent.

8. I have considered all that has been submitted and the proceedings of the lower court. As corrected submitted it is apparent that the appellant abandoned grounds a, b, e and f of his memorandum of appeal. The issue in this appeal is whether the learned magistrate varied the terms of consent that parties had. The terms of the said consent were very clear, there was the consideration to be paid of Kshs. 1.2 million and there were certain things that were to be done. An agreement had to be executed on payment of Kshs. 800000/-. It is apparent that this didn't happen and the Respondent moved to court to seek the Court discretion to stop execution. This led to the ruling dated the 8/7/08. The Respondent was given 90 days to comply and the Appellant was ordered to release a copy of the title and sale agreement for onward transmission to the bank. The Appellant did not comply and this led to the subsequent application and a ruling given. In the ruling the subject of this appeal the learned magistrate ordered the appellant to comply with the orders she had given on the 8/7/08. The appellant has failed to show this court how the said orders varied the consent. The Respondent moved to court after noticing that the 90 days she had been given was running out. The learned magistrate never set the value of the property at 1.2 million as alleged in ground (c). The sum was a term of the sale agreement. The consent dated the 30/11/07 had specific terms that the parties needed to comply with, and in seeking to comply with his part of the sale the Respondent moved to court. The consent has not been varied or set aside by the parties. When the Respondent moved the court the appellant's advocate did inform the court that his client had not drawn the sale agreement. I tend to believe the Respondent's submission that the appellants actions did frustrate him and made it difficult for him to comply with his part of the sale agreement. I therefore find no merits in the appeal. It is dismissed with costs to the Respondent. The lower court file shall be returned to the chief magistrate's court for determination.

Orders accordingly.

Dated, signed and delivered this **19<sup>th</sup>** day of **December 2014**.

**R.E. OUGO**

**JUDGE**

In the presence of;-

.....For the Appellant

.....For the Respondent

M/s Charity Court clerk