

REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 75 of 2002

JAPHEZA LONGINA APPELLANT

V E R S U S

MOSES SHISERO RESPONDENT

R U L I N G

The application dated 4.7.2011 is seeking an order that the Deputy Registrar of the court be empowered to execute transfer documents in respect of land parcel number **S/KABRAS/CHEMUCHE/256** in favour of the applicant. The application is supported by the applicant's affidavit sworn on the same date. The respondent filed a replying affidavit sworn on the 17.4.2012. Counsels for both parties agreed that the matter proceed by way of the documents on record.

The applicant's contention is that on 25.4.2007 a consent judgment was entered whereby he was to pay the respondent KShs.276,200/= being a refund of the purchase price and cost of the appeal. He deposited the money in court but to date the respondent has failed to transfer the land to him. On his part, the respondent maintains that he spent KShs.30,000/= as legal fees and paid KShs.27,000/= being the balance of a loan to the Agricultural Finance Corporation to discharge the land from the loan and further that the applicant agreed to pay him KShs.50,000/= as costs. According to the respondent's affidavit he is seeking over KShs.150,000/= from the respondent.

The court record shows that a consent judgment on the appeal herein was recorded on the 25.4.2007. The contents of the consent was to the effect that the applicant's appeal was granted with costs assessed at KShs.10,000/=. The appellant was to refund the respondent KShs.260,000/= being the purchase price and KShs.26,200/= being the cost of the transaction. Both parties were represented by advocates. On the 26.5.2007 the applicant deposited KShs.276,200/= in court. I believe the above amount took into account the sum of KShs.10,000/= that was to be paid to the applicant by the respondent. In essence the applicant did offset that amount and instead of topping up the refund with the transaction costs of KShs.26,200/=, he paid KShs.16,200/=. That action was in order. On the 23.5.2007 counsels for both parties sent a consent to the court to the effect that the money deposited by the applicant in court be released to the respondent's advocates M/S Amasakha & Company Advocates. The consent was endorsed by the Deputy Registrar on the 24.5.2007 and the money was released.

The annexure by the respondent relating to a loan of KShs.27,000/= does not represent that he paid that money to the Agricultural Finance Corporation. The receipt dated 17.12.1997 was for KShs.9,030/=. That amount was paid way before the consent was recorded in court on 25.4.2007. The respondent further annexed a document dated 4.9.2010 indicating that the applicant herein was to pay him KShs.50,000/= so that the respondent could release the title deed to the applicant. The applicant has not stated whether that information was correct or not. Since the document was signed before an advocate I do hold that the applicant has not fulfilled his part of the bargain. He should first comply with the agreement dated 4.9.2010 before seeking to have the land re-transferred back to him.

In the end, I do find that the application dated 4.7.2011 was premature as the applicant had not fulfilled his part. The same is hereby dismissed with no orders as to costs.

Delivered, dated and signed at Kakamega this 13th day of February, 2013

SAID J. CHITEMBWE
J U D G E