



REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 31 of 2011

JOSEPH MBOGO MWANIKI.....APPELLANT

VERSUS

LUCY NJOKI NJUKI.....RESPONDENT

(Being an Appeal from the Judgment of M. WACHIRA Chief Magistrate Embu in CMCC No. 142 of 2010 delivered on 8/3/2011)

J U D G M E N T

JOSEPH MBOGO MWANIKI the **appellant** was the defendant while Lucy Njoki Njuki the **respondent** was the plaintiff in the Court before. The respondent was claiming for specific performance of the contract agreement dated 3rd March 2006 between the respondent and appellant involving land parcel No. GATURI/WERU/6475 which she wanted transferred and registered in her name.

The matter proceeded to full hearing and judgment was entered in favour of the respondent herein. And the appellant being dissatisfied with the judgment has appealed raising the following grounds:-

1. ***The learned Chief Magistrate erred in law by relying on a letter of consent by Embu Land Control Board which was not obtained within the period stipulated in law.***
2. ***The learned Chief Magistrate erred in ordering specific performance in support of an agreement that was void for non compliance within the provision of Land Control Board.***
3. ***The learned Chief Magistrate erred in law in not finding the agreement was made on 3rd March 2006 and Land Control Board was obtained 16/6/2009 a period of over 3 years and no application to High Court to extend the period was filed.***
4. ***The learned Chief Magistrate erred in ignoring the evidence which was undisputed that the letter of consent and all the proceedings of Embu Dispute Tribunal No.25 of 2008 were quashed by High Court with an order dated 24/5/2010.***
5. ***The learned Chief Magistrate completely ignored the defence by the appellant.***

Both counsels agreed to dispose of the appeal through written submissions. The appellant through his counsel the late Mr. Utuku submitted that no consent of the Land Control Board was obtained within 6 months as stipulated in Section 6 of the Land Control Act which is subject to Section 8(1) of the Act. And that the respondent obtained consent 3 years after the entry of the agreement, which consent was a nullity.

He therefore submitted that the Court erred in finding that the consent had been properly obtained. He cited the case of ***Cove Investment Ltd Vs Mathias Kimuyole Langat Nairobi HCCC No. 558/06 O/S*** as being similar to the present case. He added that the refund of the purchase price was

deposited in Court and the respondent should collect it.

Mr. Okwaro for the respondent gave brief facts of the case. He submitted that after the agreement and payment of Shs.46,000/= out of Shs.75,000/=, the land LR. GATURI/WERU/2492 was sub-divided and it created LR. No GATURI/WERU/6475 which was now the respondent's portion. Thereafter the respondent obtained consent for transfer of her portion. Mr. Okwaro further submitted that the decision of the Board to issue the consent is final and not appealable.

This is a first appeal and this Court is enjoined to review the evidence adduced in the Court below. The respondent testified as the only witness in the Court below. She explained that she entered into an agreement with the appellant in respect of land LR. GATURI/WERU/2492. She was buying land out of the above parcel at Shs.75,000/=. The agreement is dated 3/3/2006. The appellant applied for and received consent to sub-divide. He did the sub-division and the respondent was to get LR. GATURI/WERU/6475 while the appellant remained with No. GATURI/WERU/6474.

She took possession of the land. Later they obtained consent on 16/8/2009 (PEXB5) for transfer of the portion to herself. The appellant then refused to transfer the portion which made her place a caution. Along the line she filed the matter at the Land Disputes Tribunal and got orders plus even a judgment which were later reviewed by the High Court (PEXB10).

The appellant also testified and called no witness. He admitted that there had been an agreement between him and the respondent for sale of land at Shs.75,000/=. He received Shs.46,000/=. He got transfer to sub-divide the land. He however never applied to transfer the land to her. He did refund the money to the respondent through his advocate Ms. Rugaita. Njeru Ithiga was her advocate. He denied being present when consent to transfer was granted. He never challenged the consent. His evidence was that both of the parties had breached the agreement because she refused to pay the balance.

The learned trial Magistrate did find that the sale was proper and there consents were properly obtained. And since the respondent was willing to pay the balance which had been deposited in Court, the appellant had to complete the sale transaction. The undisputed facts are that both parties herein entered into an agreement for sale for land.

The appellant was selling to the respondent land measuring 0.39 hectares out of LR. NO. GATURI/WERU/2494. It is also not disputed that on the same date the appellant received Shs.46,000/= as deposit leaving a balance of Shs.29,000/=. On the same day of the agreement the appellant applied for consent to sub-divide the land into two portions measuring 0.39 Ha. 0.21 Ha. and 0.10 Ha. respectively. He got the consent on 21/3/06.

Thereafter things seem not to have moved on well causing the respondent to file a claim with the now defunct Land Disputes Tribunal. Orders in favour of the respondent were made resulting in a judgment and decree. However, the said orders and decree were quashed by the High Court in its Ruling in Judicial Review No. 14/2009 dated 10/5/2010.

The appellant in ground 4 of the memorandum of appeal states “***The learned Chief Magistrate erred in ignoring the evidence which was undisputed that the letter of consent and all the proceedings of Embu Dispute Tribunal No.25 of 2008 were quashed by High Court with an order dated 24/5/2010.***” Though the appellant elected not to include in his record of appeal the exhibits produced in the lower Court, I have managed to see the Ruling dated 10/5/2010 in the High Court Judicial Review No. 14/2009.

The High Court never at any point dealt with the issue of Consent and neither did it quash the consent. What was quashed was the Award and Judgment on the award. Therefore ground 4 cannot stand. A keen look at grounds 1, 2, & 3 reveals that the issue complained about is just one and the same thing. The issue is the validity of the consent that was issued on 16/6/2009.

I therefore propose to deal with ground 1, 2 & 3 together. It is true that when the appellant applied

for consent on 3/3/2006 he was only applying for consent to sub-divide the parcel into 3 portions and not for transfer to the respondent. The respondent in her evidence indicated that after payment of the deposit she was put in possession and started developing the portion. The appellant in his evidence also confirmed that the respondent is using the land.

It is true that consent to transfer was not obtained until 16/6/2009. And this is the consent that the appellant wants this Court to declare that as null and void. And the appellant also says he never applied for consent because the respondent was in breach of the agreement.

I also have had an opportunity to look at the said consent issued on 16/6/2009 (PEXB5). Apparently it is the appellant who applied for the said consent. Its addressed to him and it refers to his application dated 2/6/2009. He applied for the consent and the same was granted to him. He cannot turn around and say the consent is null and void.

Section 6(1) of the Land Control Act deals with controlled transactions which are subject to obtaining of a consent as provided for in the said section. Under Section 8(1) of the said Act the consent must be applied for within six (6) months of the making of the agreement of the transaction.

In the case before me it is clear that the consent was obtained outside the six (6) months period. In the cases below the Court of Appeal held that where an application for consent is submitted long after the expiry of a period of six (6) months and was made without seeking an order from the High Court for extension of time as required by the Land Control Act, there is no valid application pending before the Board.

And secondly that the agreement for sale was void for all purposes for lack of consent under Section 6 of the Land Control Act. The cases are:-

1. ***SHAMALLA VS CHIBEU [1988] KLR 251***
2. ***GITHUIA VS KATIBI [1990] KLR 634***
3. ***SITUMA VS CHERONGO [2007] 2KLR 84***

The above is the position in law. I however wish to review the facts herein. The agreement was entered into on 3/3/2006. Before the consent was obtained in 2009 the respondent had tried to establish her rights in this land but went before the wrong forum. The appellant himself applied for and was issued with a consent on 16/9/2009. The respondent has been in possession since 3/3/2006 and has paid to the appellant the deposit as agreed. The balance was deposited in Court as per a court order which was set aside but the money is still held in Court.

The appellant never explained to the Court why he never obtained consent within the six (6) months as is required by Section 6(1) of the Land Control Act. He does not deny selling the land and receiving the initial payment. He equally does not deny that the respondent is in possession and has developed the land.

Though he denies applying for the consent, the letter of consent (PEXB5) shows it is him who applied for it. It was issued by the Board. And Section 8(2) of the Land Control Act provides that the decision of the Board is final and conclusive and shall not be questioned in any Court.

I would wish to distinguish the present facts from the cases above. In the present case there is a consent which has been issued by the Board while in the case above no application had been made and neither had any consent been issued. And secondly these are provisions which were in force before the promulgation of the 2010 Constitution.

Under Article 159(d) of the Constitution, one of the key principles to be embraced in exercising judicial authority is administering justice without undue regard to procedural technicalities. The 6 months provision under Section 6(1) of the Land Control Act is one provision that has been abused especially by vendors after receiving payments.

I do find that declaring this sale agreement null and void because of the delay in obtaining a consent would do a lot of an injustice to the respondent who has long settled on this land. I do find that the learned trial Magistrate well considered the issues above including the defence of the appellant. The result is that the appeal is disallowed. Costs to the respondent.

Right of appeal explained.

DELIVERED, SIGNED AND DATED AT EMBU THIS 20TH DAY OF MARCH 2013.

**H.I. ONG'UDI
JUDGE**

In the presence of:-

Mr. Okwaro for Respondent

Appellant

Njue CC