REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Civil Appeal 74 of 2007

MURIKI M'IMARA.....APPELLANT

VERSUS

KOBIA M'KANAKE.....RESPONDENT

J U D G M E N T

The appellant was the defendant at the lower court. The respondent through a plaint dated 28th September, 2006 sued the appellant seeking for judgment against the respondent for:

(a) A permanent injunction restraining the defendant, his agents, servants and or his employees from putting up any fence, or any manner of structure or any building or trespass or interfering with the plaintiff's Plot No.248C.

(b) An order that the plaintiff is entitled to Plot No.248C situate at Municipal Council of Maua measuring 0.05 acres.

(c) An order that the defendant do sign all the transfer form to effect transfer of plot NO.248C to the plaintiff.

(d) Costs of this suit at court rates.

(e) Any further relief this honourable court may deem fit to grant.

The appellant filed defence to the respondent's claim denying liability and prayed that the respondent's suit be dismissed with costs.

When the matter came for hearing the respondent gave evidence and called one witness. The respondent's case was that plot No.248A used to belong to the appellant. That in 1997 the appellant sold the plot to the respondent and both of them proceeded to Maua Municipal Council to effect transfer. That appellant made an application to which application the respondent had a certified copy of the application(Exhibit No.1). That the application was considered by Municipal Council and allowed. The respondent stated that he paid Kshs.50,000/= for the plot in presence of Benjamin Kiraa who has since passed on. The respondent produced certified copy of the minutes from the Council as (P.exhibit 2). The respondent further stated that he took over the possession of the plot and he has been paying the rates. He stated that he has the receipts to that effect from March, 2001, February 2006 and January, 2007. He stated the

appellant had made an application for sub-division of plot 248A and the same was sub-divided to 248B and 248C. The respondent testified his plot was 248C and it was the one for which he has been paying rates for. The respondent stated that he received a note from the appellant's advocate asking for 4 lorries of stones(P.exhibit 4). The respondent replied through his advocates M/S Ayub Anampiu stating that he knew nothing about the Lorriesthrough (P.exhibit No.5). Subsequently the respondent received another letter summoning him before elders to discuss the matter but he refused. The summons is marked as P.exhibit 6 and the respondent's reply is P.exhibit 7. The respondent stated that he constructed a shop on suit premises but transfer was not effected till in 2002. During cross-examination the respondent stated that the plot was sold to him in 1997 but they did not write any agreement but they were with elders who he named as Kimumu and Benjamin Kirara. He claimed that he paid money for the plot. He also stated he had building stones at the site valued at Kshs.21,000/- and he gave the stones to the defendant in 1997. That the application for transfer was taken to the Council by both the appellant and the respondent and the plan for the house was made by the appellant. The respondent stated he could not recall how much he spent in building the house. The respondent denied that he was given a room to be paying Kshs.3500/- per month as rent to the appellant till recovery of the costs of the stones he had given the appellant. In being re-examined the respondent stated that the defendant signed the application for transfer. He also stated he has never heard of a case by the defendant complaining about fraudulent transfer.

On the other hand PW2 M'Munoru K'Kaiga, testified that he knew both the appellant and the respondent. He stated that the appellant gave a small plot to the respondent. That the respondentconstructed houses which he leased them out. He stated that the respondent paid for the plot but he does not know how much. That the appellant never went for transfer of the plot to the respondentat the council. He averred that he is not aware whether respondent pays rates. During cross-examination PW2 stated that he could not recall how much the respondent paid for the plot but there was an agreement made before elders and respondent's wife is the one who gave out the money. That the witness averred he put a thumbprint on the agreement. He also recalled that the respondent gave the appellant building stones and that appellant did not pay for the stones. The witness averred that he did not go to the Council.

The appellant on the other hand denied the respondent's claim and called one witness. The appellant stated that he knows the respondent who he had leased some of his premises at Kaciongo in Plot No.248 at monthly rental of Kshs.3,500/- and which premises the respondent has been occupying for over 13years. The appellant stated that there are two plots of 0.5acres each, one of which he sold to Charles and he has a plan for the plot which was approved by the Municipal Council on 31.8.1995. The appellant stated that it is not true that he sold any plot to the respondent and denied knowing anything about the transfer as per P.Exhibit No.1. The appellant denied having signed the document. He also denied having made any agreement to transfer his property. He averred that he constructed his plot and leased it to the respondent. He however admitted borrowing bricks from the respondent worth Kshs.31,000/- The respondent was to recover his Kshs.31,000/- by occupying the appellant's premises without paying the rent and when the appellant went to ask for his rent which was due after respondent had stayed at appellant's premises for over 12years, the respondent refused to pay and instituted this suit. The appellant stated that he had acquired the plot from County Council of Meru in 1978 and had only leased one room out of the 10 rooms. That appellant had sold 0.5 acres to Charles and constructed on the remaining portion. The appellant stated that apart from the bricks, he had borrowed Kshs.30,000/- from the respondent on conditions that the respondent was to stay at the appellant's plot till he recovered back his entire money but the respondent later tried to defraud the appellant by going to Municipal council to effect transfer of appellants to his home. On being cross-examined the appellant denied having signed the transfer form Exhibit 1 in favour of the respondent. He also stated that he had not reported the case of fraud to CID. He averred that he sawthe form on 27/2/2007 when the matter proceeded on to a full hearing. He also stated that he did not see the minutes from the Municipality. The appellant admitted the respondent gave him Kshs.30,000/- and 4 Lorries of bricks valued at Kshs.30,000/- but they did not write down any agreement. He also admitted that he had confirmed the respondent was also paying the rates when he instructed his advocate in 2006. Appellant confirmed that he did not have any papers to show that the respondent used to pay rent to him. Appellant stated that in his defence it was stated that they had an agreement with the respondent but stated that was an error on part of his advocate and there was no agreement made between himself and the respondent. He also stated that PW2 was not involved in any

deal between the appellant and the respondent and he was just lying.

During cross-examination the appellant stated that he will go to CID to report the fraud because he had not known of it before. Beside the above, DW2 stated that he knows both the appellant and the respondent. That he is the one who built the houses on the disputed plot after being engaged by the appellant. He stated the plot belongs to the appellant. On being cross-examined, DW2 stated that the plot had two rooms at the back and two doors at the front, but today there are 8 rooms includingthe shops and that he constructed 5 rooms and that there has been no new rooms since he constructed the old ones. He stated he cannot know whether any agreement was entered into between the appellant and the respondent.

After hearing the parties the trial Magistrate entered judgment in favour of the respondent against the appellant in terms of prayer (a), (b),(c) and (d) of the plaint on 26th June 2007. The appellant being aggrieved by the trial court's judgment preferred this appeal against the trial court's judgment setting down the following grounds of appeal:

1. The learned Magistrate erred in law and fact in finding that the respondent was entitled to prayers (a), (b),(c) and (d) of the plaint.

2. The learned Magistrate erred in law and fact by finding that there was a written sale agreement between the parties in respect of the suit premises contrary to Section 2 of the Law of the Contract Act.

3. The learned Magistrate erred in law and fact by failing to consider in his judgment the pleadings and evidence adduced in court.

4. The learned Magistrate erred in law and fact by failing to consider in his judgment the pleadings and evidence adduced in court.

5. The learned Magistrate erred in law and fact by disregarding the evidence of the appellant.

6. The learned Magistrate erred in law and fact by misdirecting itself on the issues, facts and evidence before court.

7. The learned Magistrate erred in law and fact by failing to find that the appellant never sold the suit premises to the respondent who was his tenant.

8. The learned Magistrate erred in law and fact by failing to consider and investigate the evidence that the purported transfer documents tendered by the plaintiff were fraudulent.

9. The learned Magistrate erred in law and fact by failing to determine the issues herein judicially.

10. The learned Magistrate erred in law and fact by forming un illegal contrary in the evidence before it.

When the appeal came up for hearing Miss Nelima, learned Counsel, appeared for the appellant and the learned Counsel Mr. Kiambi appeared for the respondent. Miss Nelima relied on the appellant's Counsel written submissions and added that under Section 2 of the Contract Act in an agreement of sale of land the agreement must be in writing. She submitted there was no contract produced before the trial court. She referred to page 9 of the judgment second last paragraph of the trial court's judgment and submitted that the Magistrate erred in finding that there was an agreement when there was none.

The learned Counsel further submitted that the trial Magistrate misapprehended paragraph 3 of the defence in coming to his conclusion that there was an agreement between the appellant and the respondent.

Miss Nelima furthersubmitted that the trial court had no jurisdictionto try the suit filed before it. The counsel referred to appellant's defence and stated that the appellant is not barred from raising the issue

whether it had been raised at the trial court or not. The learned Counsel submitted that the plot is under Municipal Council and that Registered Titles Act was not repealed and only High Court has jurisdiction to entertain any claim to the land under the said Act.

The learned Counsel argued ground No.5 of the appeal that the evidence of the appellant was not considered. The appellant denied transferring the plot to the respondent and contented that the transfer document submitted was a forgery.The appellant denied ever thumb printing the same. Miss Nelima, advocate for the appellant submitted the appellant was capable of writing and that the document was not thereforethumb printed by the appellant.

Mr. Kiambi, appearing for the respondent on his part opposed this appeal and relied on his written submissions dated 12th April, 2011. He supported the trial Court's judgment. On grounds No.2 he submitted that the parties are bound by their pleadings. He submitted that Section 2A of the Law of Contract Act was not raised at the lower court in the appellant's defence. He stated that the appellant at the lower court admitted there was clause No.5 of the agreement as per paragraph 3 of the defence. He submitted that annextures showed that the appellant signed the contract and transfer form exhibit P.Exhibit No1. Mr. Kiambi stated that the appellant admitted the respondent had been in occupation for 13 years and the appellant had received Kshs.61,000/- from the respondent. He therefore submitted the trial court considered the evidence as a whole and came to the the correct decision.

On issue of jurisdiction of the court, the learned Counsel for the respondent submitted that the issue of jurisdiction cannot be raised at this stage having not been raised at the lower court. He further submitted there was no pleading at the lower court that the suit land fall under Registered Titles Act. Mr. Kiambi Advocate referred to Order 42 Rule 27 Civil Procedure Rules which bars a party in appeal from producing additional evidence which was not covered at the lower court unless with the leave of court.

Mr. Kiambi Advocate submitted as the issue of jurisdiction had not been raised in the defence and in the proceedings the same cannot now besuccessfully be raised in appeal.

Mr. Kiambi, Advocate submitted on ground No.5 of the appeal that the appellant never complained of the document being a forgery nor did he deny thumb-printing the same. He added that this court cannot be asked to compare the thumb-printing and signature and as such there is no issue as the same was not raised at the lower court.

The Counsel for the respondent submitted that there is no evidence that the respondent was a tenant to the appellant and that Kshs.61,000/- would have been recovered in 13 months and as the respondent had stayed in the premises for 13years. The amount of Kshs.61,000/- purchase price paid by the respondent to the appellants. He further submitted as the respondent was paying rents to the Municipality and as the appellant was aware of that fact yet he did not stop the respondent it can be concluded that the plot was therefore respondent's property. He submitted the plot was therefore not appellant's.

In response Miss Nelima Advocate contended that the issue of jurisdiction is a point of law and can be raised at any time. On Section 2 of the Law of Contract Act Miss Nelima Advocate submitted that it was upon the respondent to prove the existence of the contract, which he failed to proof.

I have carefully considered the submissions both by counsel both written and oral as well as the proceedings and pleadings in this matter and I have to consider now the grounds raised by the learned Counsel for the appellant and grounds in opposition of the same.

The appellant in his ground of appeal No.2 faults the trial Magistrate for finding that there was a written sale agreement between the appellant and the respondent in respect of the suit property contrary to Section 2 of the Law of Contract Act. In this appeal both counsel referred to Section 2 of the Law of Contract Act. The correct Section that I believe the counsel intended to refer this court to is Section 3(3) of the Law of the Contract Act.

Section 3(3) of the Law of Contract Act provides:-

(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:**

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust."

The above-mentioned section provides that in an agreement of sale of land there has to be an agreement in writing or some memorandum or a note thereof, in writing and signed by the party to be charged or by some person authorized by him to sign it. In this appeal the trial Magistrate held that an agreement was entered into between the appellant and the respondent and in doing so relied on paragraph 3 of the appellant's defence. The trial court contrary to the above held that none of the parties produced the agreement but the application forms.

The respondent in his evidence averred that the appellant sold his plot No.248A to him in 1997 and they proceeded to Municipality to effect transfer. He stated he paid Kshs.50,000/= for the plot and constructed on the plot in 2002. The respondent admitted that there was no agreement in writing but they had elders. He also stated that he is the one who took transfer application to the Council with the defendant. The respondent stated the appellant signed the application form to effect transfer.

PW2 testified that the respondent paid for plot but did not know how much. He also stated that appellant never went for transfer of the plot at Council.PW2 stated that Kobia(respondent's) wife is the one who paid for the plot and that he thumb printed even the agreement . The appellant denied selling his plot to the respondent. The denied having made agreement of sale of his plot to the respondent. He also denied having executed application for transfer of plot to the respondent. The appellant also denied having released any money towards purchase price of his plot and referred to transfer form as forgery. DW2 testified that the constructions on the disputed plot were done by him on instructions of the appellant and after such constructions nor other structures were put up.

In the case of **MAWJI –VS-INTERNATIONAL UNIVERSITY & ANOTHER(1976-1980)1 KLR 229** Hon. Madan J, as he then was, held:-

"Section 3(3) of the Law o of contract provides:"No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it……."

……..evidence of handwriting of the party to be charged until it is displaced by other evidence.

…….whatever may be the English law on the subject, there is no requirement that Section 3(3) of the Law of Contract must be expressly pleaded."

Besides the above, in the case of **MORGAN –V-STUBENITSKY(1976-80)1KLR** Court of Appeal held:-

"That there was no agreement in writing satisfying the requirements of Section 3(2) of the Law of Contract Act since(Per Wambuzi and Law JJA) the alleged agreement was ambiguous as to who was

intended to be the tenant and there was also uncertainty as to the duration of the lease, or (per Sir James Wicks CJ) it was impossible to state that the respondent had undertaken to pay the rent and, accordingly, he was not a party to the consideration."

In addition to the above in the case of **WAGICIENGO –V-GERRALD(1982) KLR 336** Court of Appeal held:-

1. The two unsigned documents constituted the memorandum or notes of an agreement between the parties, upon which the appellant's suit may have been founded as they satisfied the requirement in Section 3(3) of the Law of Contract Act (Cap.23) to charge the defendant for the disposition of her interest in the suit property.

2. A document, though it does not actually bear the signature of a party charged or of a person authorized by him, can constitute a valid agreement for purposes of Section 3 of the Law of Contract Act. The two documents, which were in the defendant's own handwriting were "signed" by them even though they did not bear the signature of each of them.

3. The sale agreement was in dispute and it was upon the plaintiff to establish that there was a memorandum or note thereof to charge he defendant which would satisfy Section 3."

In the instant appeal it was upon the respondent as the sale agreement was in dispute to establish there was a sale agreement or a memorandum or note thereof to charge the appellant. There is admission by the appellant there was no agreement in writing, though PW2 claimed to have thumb printed the agreement none was produced. Pw2 was not one of the elders mentioned by the respondent as being present. Respondent stated that the appellant signed the application form for transfer. He did not state that the same was written or was in the handwriting of the appellant or was authorized by the appellant so as to constitute a valid agreement for the purposes of Section 3 of the Law of Contract Act.

Further a quick look at the transfer form reveals that it was not signed but thumb printed and it is not indicated whose thumbprint that was. The application form is further not dated, neither does it have recommendation on part of the Town Clerk. Part C which required signature of Maua Town Clerk is equally blank. On exhibit II it does not show whether the parties were present or not. The appellant disowned both exhibit 1 and II.

The appellant stated that paragraph 3 of the defence which trial court relied upon was an error or mistake by his counsel, but that notwithstanding the respondent was under obligation to prove his case by producing the sale agreement which respondent had stated was non-existence. The trial court failed to consider the evidence by both appellant and respondent, which was very clear that there was no agreement in writing or memorandum or note in handwriting of the appellant. The issue of Section 3(3) of the Law of Contract Act, having not been pleaded in the pleadings was dealt with in the case of **MAWJI –VS-INTERNATIONAL UNIVERSITY AND ANOTHER**(supra) in which it was held that there is no legal requirement that Section 3(3) of the Law of Contract Act must expressly be pleaded before it can be raised and as such I find that the same was properly raised. In this appeal and the court is justified in considering the same.

In view of the foregoing, I find that the requirements of Section 3(3) of the Law of Contract Act were not satisfied in this appeal. I accordingly find ground No.2 of Memorandum of appeal to be merited and the same is allowed.

Miss Nelima, Advocate argued that trial Magistrate lacked jurisdiction to entertain the suit before it as only High Court has jurisdiction to entertain suits involving the land registered Registered Titles Act. The respondent counsel on his part submitted the issue of jurisdiction having not been raised at the trial court, it cannot now be raised on appeal.

He argued no pleadings werefiled challenging the court's jurisdiction and no defence had been filed stating the suit property fell under the provisions of Registered Titles Act. He also submitted that this is a

new ground of appeal and new evidence which the appellant was attempting to adduce before the court which cannot be adduced without court's leave under Order 42 Rule 27 of Civil Procedure Rules.

Under Section 16 of Civil Procedure Act it is provided:-

"16. No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice."

I find that the appellant having failed to raise an objection on issue of jurisdiction at the lower court, he cannot now raise the same on appeal. The appellant has further failed to demonstrate that there has been a consequent failure of justice in the matter having proceeded before the court. Further this court has gone through the record and has found no evidence that the property was registered under Registered Titles Act.

Further under Order 42 Rule 27 of Civil Procedure Rules it is provided:-

"27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause the court to which the appeal is preferred may allow such evidence or

document to be produced, or witness to be examined."

The appellant as I have stated never gave evidence at the lower court on whether the land was registered under Registered Titles Act or not nor has he sought court's leave to adduce for additional evidence before this court as per Order 42 Rule 27 of Civil Procedure Act. I therefore uphold the submissions by the respondent's counsel and find that the issue on jurisdiction cannot be raised at this stage having not been raised in the court at first instance.

On ground No.5 the appellant faulted the learned Magistrate for failing to consider the appellant evidence. The appellant denied effecting transfer and or executing transfer form and termed the document as forgery. The appellant denied thumb printing the document. The respondent evidence during re-examination is that the appellant signed the application form. The application form do not bear any signature of the appellant but is thumb printed and it is not indicated who thumb printed the document. There is no evidence on record that the appellant thumb printed the application form for transfer. The trial magistrate was influenced by the period the respondent had been in occupation of the appellant's premises and the appellant's failure to file a counter-claim. The appellant had given an explanation as to why the respondent had continued to be in occupation but the trial Magistrate failed to take into consideration the appellant's evidence and that of the witnesses including PW2 who testified that the appellant never went to Municipal Council to effect transfer of the suit plot to the respondent. The trial court failed also to consider the evidence of DW2 who testified that respondent never carried any construction on the said plot contrary to his assertion and the fact that the respondent never produced any building plans in support of his purported construction.

The trial Magistrate misapprehended the appellant's evidence when he stated that the appellant admitted that he was aware of an application to transfer his plot when the appellant clearly stated that he saw the transfer form on the day of the hearing of the case as he was being cross-examined. Further on issue of paying rates to the Municipality I find one cannot get good title through payment of rates in respect of third party's property.

In view of the foregoing I find that the trial Magistrate erred in failing to consider the appellant's

evidence and had the court done so it would have found for the appellant. Consequently this ground of appeal succeeds.

The upshot of the matter is that this appeal is allowed and I proceed to make the following orders:-

1. This appeal is allowed

2. The judgment and order of trial court dated 20th June, 2007and all consequential orders are set aside.

3. That costs of this appeal and lower court are awarded to the appellant.

DATED, SIGNED AND DELIVERED AT MERU THIS 25thDAY OF JULY,2012.

J. A. MAKAU

JUDGE

Delivered in open court in presence of:

1. Miss Nelima for appellant
2. Mr. Kiambi for the respondent.

J. A. MAKAU

JUDGE