



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.16 OF 2009

AGGREY GEORGE NAMENGE.....APPELLANT

=VERSUS=

CLAIRE MAKOKHA.....RESPONDENT

[From the Judgement and decree of Western Provincial Land Disputes Appeals Tribunal in Appeal Case No.9 of 2008 as adopted by Busia Principal Magistrate's Court Land Case No. 81 of 2009]

J U D G E M E N T

The facts of this suit indicate that the Appellant bought two acres of L.R. No. Bukhayo/Buyofu/51 at a purchase price of kssh70,000/= which was promptly paid. The Respondent failed to secure the Land Control Board consent as required within the period prescribed or at all.

The Appellant as a result filed a claim before the Nambale Land Disputes Tribunal for specific performance. She obtained an order of specific performance and on appeal the award was confirmed by the Provincial Land Disputes Tribunal. Then the Respondent/Seller appealed to this court challenging the jurisdiction of the two Tribunals to make a transfer of a substantive beneficial interest in registered land in the face of Section 159 of the Registered Land Act, Cap 300 of the Laws of Kenya and of many decisions of this and other courts in respect of lack of jurisdiction to make such order by the Land Dispute Tribunals.

As the record shows, the Respondent, the purchaser conceded that the Land Disputes Tribunals have no such jurisdiction as stated above. She then appealed to this court not to penalize her in costs considering the peculiar circumstances of this case. The Appellant on the other hand saw no peculiar circumstances in the case except ignorance of the law, and sought full costs.

I have considered the issue of where costs should lie. There is no doubt that the Appellant sold his land to the Respondent and received full payment of kshs70,000/= for two acres. He failed to apply for consent of the local Land Control Board to enable a transfer to be effected. Later he apparently reneged. He has never given good reasons for reneging, particularly after making use of the Respondent's money of kshs70,000/=. He has not on record offered to refund the purchase money, thus trying, in addition, to retain the funds unduly and without consideration, adding salt to the injury. He must have used the funds to create other greater wealth or earn interest on it if he put it in the bank.

This court is aware that indeed the Respondent always, to date, suffered from ignorance of the law. However, the appellant had no legal basis to keep the Respondent's money because he made it impossible for the Respondent to obtain the necessary consent which would strengthen the purchase. He clearly acted dishonestly from the beginning, took advantage of the Respondent's lack of education and ignorance of the law. He cannot now be seen to sneer at the poor Respondent.

In the above circumstances and carefully considering this court's discretion to grant costs, which of course should be exercised judicially, I would consider it proper to give an order which imposes some burden of the costs on the Appellant/Vendor to some extent. I allow the appeal. Each party shall bear own costs here and below. Orders accordingly.

Dated and delivered at Busia this 11th day of May 2011

D.A. ONYANCHA

JUDGE.