



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.244 OF 2009**

**PATRICK MBURU NJUKI.....APPELLANT**

**VERSUS**

**JOHN KARANJA MUIGAI.....RESPONDENT**

**(An Appeal from the Judgment/Decree of Hon. D. K. Mikoyan, Senior Resident Magistrate, in Nakuru C.M.C.C.No.2404 of 2002 dated 5<sup>th</sup> November, 2009)**

**JUDGMENT**

The appellant agreed by a written agreement to sell to the respondent a plot of land measuring 50 X 100 from NDUNDORI/LANET BLOCK 5/314 KIAMUNYEKI at a consideration of Kshs.135,000/=. Upon execution of the agreement on 22<sup>nd</sup> June, 2001, the respondent paid Kshs.100,000/= and parties agreed that the balance of Kshs.35,000/= would be paid:

**“.....after the green card is produced.”**

They also agreed that the respondent would take possession after the execution of the agreement.

One year later, the suit land had not been transferred as a dispute appears to have arisen. The respondent instituted C.M. Civil Case No.2404 of 2002 for specific performance. It was the respondent's case that he had paid the purchase price to the appellant who had refused to complete his part of the bargain.

The appellant for his part maintained that the respondent had not paid the balance of Kshs.35,000/= hence his (the appellant's) failure to sign the consent form; that the respondent presented a consent form which did not reflect the correct purchase price in order to underpay the stamp duty.

The respondent called Mr. Sammy Kamonjo Kiburi, an advocate of this court who drew the agreement. He also called Alfred Mwangi from Equity Bank, Nakuru to confirm that the respondent made payment of Kshs.35,000/= by way of a banker's cheque on 25<sup>th</sup> March, 2004.

The appellant gave his testimony and did not call any witness. The learned trial magistrate made a finding of fact that the appellant did not obtain the green card as agreed.; and that the respondent made the final payment of Kshs.35,000/= on 19<sup>th</sup> July, 2001. The learned magistrate entered judgment in favour of the respondent, thereby ordering the appellant to specifically perform his part of the agreement.

That aggrieved the appellant who has brought the present appeal on seven (7) grounds which can be condensed as follows:

- i) that the learned magistrate erred in framing the issues as whether Kshs.35,000/= balance was paid and whether the suit was filed prematurely;
- ii) that the respondent was not entitled to specific performance;
- iii) that the learned magistrate failed to consider the fact that the respondent attempted to forge the advocate's acknowledgment of receipt of the alleged payment of Kshs.35,000/=;
- iv) that the learned magistrate failed to find that the respondent was in breach of the contract.

I have considered these grounds, the submissions by counsel and the single authority cited by learned counsel for the respondent, **Gharib Suleiman Gharib V. Abdulrahman Mohammed Agil**, Civil Appeal No.112/1998.

The parties relationship was governed by a written contract and it is common ground that they agreed on the sale of a plot described and marked as H and is presently occupied by the respondent as agreed; that the consideration would be Kshs.135,000/= and Kshs.100,000/= was paid and acknowledged upon execution of the agreement.

What is in contention is whether the balance was paid and when it was to be paid. Starting with the last

question, it is plain that the parties agreed that:

**“(i) The balance in the sum of Kshs.35,000 to be paid after  
the green card is produced.....”**

**5. If the purchaser is not able to raise the balance after the**

**initial deposit, the sale shall be considered cancelled and the money be refunded.”**

(Emphasis mine)

There is evidence that it was for the appellant to ensure the completion of a transfer to the respondent. It was only after the transfer that the respondent was to pay the balance of Kshs.35,000/=. The respondent, argued, nonetheless, that he paid this figure on 19<sup>th</sup> July, 2001. The learned magistrate, as I have stated, agreed with him in that respect.

According to the respondent, he withdrew Kshs.40,000/= and on the same date, at the firm of Kamonjo Kiburi and Company Advocates paid the appellant Kshs.35,000/= before one John Kinyanjui. Mr. Kiburi testified and denied knowledge of such payment. John Kinyanjui was not called. Clearly there was no proof of payment of Kshs.35,000/= on 19<sup>th</sup> July, 2001.

There is no doubt that the relationship between the appellant and the respondent became hostile culminating with the former being charged in Nakuru C.M.CR.C.No.1944/2002. It became difficult to conclude the transaction within the six months requirement under **Section 6** of the **Land Control Act**. The following holding by the Court of Appeal in **Njamunyu V. Nyaga** (1983) KLR 282 is instructive. The court held *inter alia*:

**“2. Land Control Board consent does not make an agreement for sale of land binding. The agreement is only binding between the parties who make it, though it is not enforceable until consent has been given. If consent is refused, the dealing in agricultural land becomes void for all purposes under section 6 of the Land Control Act**

**3. ....**

**4. The giving of the consent of the Land Control Board does not impose any obligations upon the**

**seller or buyer to perform the agreement, though it cannot be performed without it. The parties are at liberty to cancel the agreement mutually even after consent has been given and not proceed.**

5. ....

6. ....

**7. Where completion does not take place as intended by the parties, the option open to the concerned party is to give notice to the party in default therefore making time of essence. Where there is no express agreement or notice making time of essence, the court will require precise compliance with stipulations as to time wherever the circumstances of the case allow.”**

It is apparent that the respondent made attempts to register the plot in his name but failed on account of the appellant’s failure to sign the consent forms. Similarly, it is apparent that subsequently the respondent made payment of Kshs.35,000/= in 2004 which was accepted by the appellant.

Indeed the appellant appeared to suggest that he had not refused to cooperate in the performance of his part of the bargain. He said:

**“It was in 2004, July that I got green card by which time he had come to court in this suit.....**

**I have not declined to transfer the land in question and he came to court before I got the green card and was already in the process of forgery to obtain title over my land.”**

It appears to me that what did not please the appellant is the respondent’s conduct of attempting to obtain registration, so to speak, behind the appellant and the fact that the respondent instituted an action. The respondent also caused the appellant’s arrest and prosecution.

Again, there was no definite time within which the appellant was to obtain the green card. The appellant having now received from the respondent the full consideration and bearing in mind that the respondent in accordance with the terms of the agreement took possession of the plot and has developed it, it was only fair and just that the appellant was ordered to complete his part of the contract.

I find no error in the final decision of the learned magistrate. The appeal is dismissed. As both parties contributed in the institution of the action which has given rise to this appeal, I make no orders as to costs.

**Dated, Signed and Delivered at Nakuru this 14<sup>th</sup> day of November, 2011.**

**W. OUKO**

**JUDGE**