



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
OF KISII

Civil Appeal 163 of 2003

FRANCIS OPON OKONDO APPELLANT

VERSUS

DAVID OTUOMA OKELLO RESPONDENT

JUDGMENT

This appeal was heard in the absence of the respondent who was served with a hearing notice by registered post on 17th December 2009 and also physically by process server at Homa Bay Law Courts on the same day. There are affidavits of service on record to that effect.

The appeal arises from the judgment of J.A. Wanjala, RM in Homa Bay SRMCC No. 103 of 2001 where the learned magistrate ordered, *inter alia*, that land parcel No. 90 Kanyadier Adjudication Section, herein referred to as “the suit land,” be restored to the appellant herein. The respondent was also ordered to stop making claims and/or trespassing onto the suit land.

In the aforesaid suit which was filed by the appellant against the respondent, the appellant averred that on the 7th day of August 1995, he entered into a written sale agreement with the respondent vide which the respondent purchased from him the suit land measuring approximately 19 acres at a price of Kshs. 285,000/=. The respondent paid a deposit of Kshs. 47,000/= and undertook to pay the balance thereof amounting to Kshs. 238,000 by four instalments but he had failed to do so. The appellant therefore prayed for judgment against the respondent in the sum of Kshs. 238,000/= plus interest and costs.

The respondent filed a statement of defence and denied having entered into any sale agreement with the appellant in respect of the suit land or at all. He further stated that the appellant was the rightful owner of the suit land.

During the hearing, the appellant produced the sale agreement in respect of the suit land, the same is dated 7th August 1995 and is shown to have been signed by both parties in the presence of **Richard Nyakure Ngare**, the Chief East Kanyada Location, **Samuel O. Kaumba**, **James Omuga Ogalo**, **John Okuku Opon**, **Henry Owaka Otiak** and **Climent Onyuka Mwalo**. The appellant said that the respondent took possession of the land and the same was now registered in his name. He urged the court to order the respondent to pay the balance of the purchase price together with interest and costs as claimed.

The appellant called **Peter Juma Onyango, PW2**, as a witness. PW2 is a nephew of the respondent. He testified that in 1999 he ploughed a part of the suit land and the respondent stopped him from so doing saying that the land was his, having purchased the same from the appellant. PW2 went to the land’s office to file an objection and he was advised that the land had been purchased by the respondent at a price of Kshs. 285,000/= and that a deposit of Kshs. 47,000/= has been paid.

The respondent denied having entered into the sale agreement with the appellant and further denied having paid out a deposit of

Kshs. 47,000/- as alleged. He called **John Okuku Paul, DW2**, and **Omuga Ogola, DW3**, who are shown in the sale agreement as some of the people who witnessed the said agreement. The two denied having ever thumb printed the sale agreement.

In his judgment, the learned trial magistrate found that the suit land initially belonged to the appellant but he sold the same to the respondent. The suit land had been registered in the respondent's name although it had been given a different number, **Plot No. 86**. But having so found, the learned magistrate went on to conclude his judgment as hereunder:

“But since he seems to deny everything and admit in paragraph 5 of his defence that the land belongs to the plaintiff, the court orders that land parcel No. 90 be reverted to the plaintiff, David Otuoma. The defendant to cease any claim on it. The Land Registrar is hereby informed to have it changed and registered in the plaintiff's name. Costs to the plaintiff.”

The appellant was dissatisfied with the said judgment and preferred this appeal.

He stated that the learned trial magistrate erred in law by failing to enter judgment as prayed in the plaint, having reached a finding that the claim had been duly proved.

Mr. Otieno for the appellant submitted that parties are bound by their pleadings and the statement of defence had not been amended at all. The learned trial magistrate, having reached a finding that the appellant had entered into a sale agreement with the respondent as stated in the plaint and that the respondent had even taken possession of the suit land and registered the same in his name, he ought to have entered judgment in terms of the plaint.

As earlier stated, this appeal was not opposed. I am in agreement with the appellant's counsel that the appellant proved his claim on a balance of probabilities and in the circumstances, the learned trial magistrate was duty bound to enter judgment as prayed in the plaint. The appellant was not interested in getting the suit land back. All he wanted was payment of the balance of the purchase price together with interest thereon at court rates. The trial court could not purport to re-write the terms of the contract between the parties.

Consequently, I set aside the trial court's judgment and substitute therefor an order that judgment be and is hereby entered for the appellant against the respondent as prayed in the plaint filed on 21st May 2001. The appellant shall also have the costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF MARCH, 2010.

D. MUSINGA
JUDGE.

22/3/2010

Before D. Musinga, J.

Mobisa – cc

N/A for the appellant

N/A for the respondent

Court: Judgment delivered in open court on 22nd March, 2010.

D. MUSINGA
JUDGE.