



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT EMBU**

**Civil Appeal 16 of 2007**

**FLORENCE WANGUI KIMANI.....APPELLANT**

**VERSUS**

**TERESA WAMBUI KARUMA.....RESPONDENT**

**J U D G M E N T**

Teresia Wambui was the Plaintiff in Murang'a Senior Principal Magistrate's Court Civil No.485 of 2003. She is the Respondent in this appeal while the defendant therein is the Appellant.

In her amended plaint dated 13/11/2003 the plaintiff sued the defendant for an order of sub-division and transfer to the plaintiff of 1.5. acres out of Land Parcel No. Loc.19/Gacharageini/1900 or in the alternative a refund of the consideration plus damages for breach of the agreement. She also prayed for costs of the suit. The defendant on her part filed a statement of defence dated 19/11/2003 in which she denied the sale of land to the plaintiff as claimed by the plaintiff. She denied having entered into any sale agreement with the defendant and urged the court to strike out the defence. She also counterclaimed for the removal of the caution filed by the plaintiff in respect of parcel No. Loc.19/Gacharageini/1900.

Even at this early juncture, I feel I should say something about this counterclaim as the same is the subject of ground 6 of the Appeal.

Counsel for the defendant submitted that ***“the learned trial magistrate failed to consider and give reasons if any why he did not either struck out (sic) or dismiss the counterclaim. He left it intact. We urge the court to consider that the prayers in the counterclaim should be granted as prayed.”***

Unfortunately, this was not the position. At page J3 of the Judgment, the learned trial magistrate did consider the counterclaim and actually dismissed it. It was not therefore left intact as submitted by counsel for the Appellant. The learned trial magistrate held that the defendant had denied any knowledge of the caution in her testimony. The Appellant had stated in the trial court.

***“ I do not know that the plaintiff has cautioned my***

***land. I do not know about the alleged caution.”***

The magistrate went on to find that the parties had not submitted on the caution and so at page J3- line 22-23 he stated ***“Therefore, I proceed to dismiss the defendant’s counter-claim.”***

The counter-claim was therefore considered and dismissed. Ground 6 of the Appeal therefore fails. Back to the rest of the suit. The plaintiff’s claim was that she and the defendant entered into a sale agreement for the sale of 1.5 Acres out of the land in question. She produced before the trial court 2 sale agreements spelling out the terms and conditions of the sale and the amounts to be paid. These agreements have nonetheless been objected to by counsel for the defendant on the basis that they had not been stamped or registered. It is noted that counsel for the defendant never raised the issue of the stamp duty before the learned trial magistrate and he therefore denied him the chance to make a ruling on that point. The 2 agreements were therefore admitted in evidence along with the acknowledgements for the money paid. The plaintiff further caused to be produced as exhibit the application to the Land Control Board for the consent to sub-divide the plot. The consent was given and the minutes of the Land Control Board that gave the said consent were also produced in evidence.

The defendant in her testimony denied the entire transaction and all the documents that were exhibited in court. She denied having agreed to sell the land and also denied having received or acknowledged receipt of any money from the Plaintiff/Respondent. After hearing the parties and their witnesses and after considering the submissions by both counsel, the learned trial magistrate as stated earlier on dismissed the counterclaim. He found that the plaintiff had indeed proved her case on a balance of probabilities and entered Judgment in her favour. He also found that the plaintiff was entitled to the agreed on liquidated damages of the 100% of the purchase price. The purchase price was 315,000/= and so the plaintiff was awarded Ksh.630,000/= plus costs of the suit and interest thereon.

Being aggrieved by that Judgment, the defendant filed this appeal. He relies on the 6 grounds of Appeal as hereunder and urges the court to allow the appeal and set aside the Judgment of the lower court and enter Judgment as per the Appellant’s counterclaim.

- 1. The learned trial magistrate erred in law and fact in failing to hold that exhibit No. 1 a booklet which was basis of agreement was not binding on the appellant as she had not acknowledged and or executed the same.***
- 2. The learned trial magistrate erred in law and fact by failing to adhere to provisions of Land Control Board while meting out the Judgment.***
- 3. The learned trial magistrate erred in law and fact in holding that a valid contract under law existed yet transactions in suit fell short of provisions of the law of contract and essentials of a contract thereof.***
- 4. The learned trial magistrate failed in law and fact in holding that a valid contract under law existed yet transactions in suit fell short of provisions of the law of contract and essential of a contract hereof.***
- 5. The learned trial magistrate failed in law and fact in failing to take cognizance of fact that both of exhibits No. 1 and 2 (agreements in question) were inadmissible in evidence for failure on part of respondent to comply with clear provisions of Section 19 of the Stamp Duty Act.***

6. *The learned trial magistrate failed in law and fact in failing to consider the defendant's evidence and counterclaim.*

Both counsel agreed to file written submissions because the appeal is generally based on points of law. I have considered the said submissions.

To start with, I would like to point out that according to counsel for the Respondent, this appeal has already been overtaken by events as the decree was executed in full and the land which forms the subject matter was sold to a 3<sup>rd</sup> party at a public auction 3 years ago. The hearing and determination of this appeal is therefore purely an academic exercise. Be that as it may however, I will nonetheless respond to the issues raised and render this Judgment for whatever it is worth.

On the issue of the Land Control Board, I do not need to say much. It is trite that a land transaction that lacks the consent of the Land Control Board to transfer the same is void and the only recourse a purchaser has is to claim for a refund of the purchase price. That was why the learned trial magistrate did not make any orders for specific performance but ordered that the purchase price be refunded. The extra amount was the 100% liquidated damages agreed upon in the sale agreement.

On the issue of the 2 agreements (i.e ground 5 of the memorandum of Appeal), Mr. Gacheru is not justified in submitting that the learned trial magistrate was “*a stranger*” to the Stamp Duty Act. The proceedings will show that Mr. Gacheru defended the Appellant before the lower court and he did not raise that issue himself. He could also have been a stranger to that Act then and saw the light subsequently. He should not therefore have used that tone in his submission. The court agrees that the 2 agreements were not stamped and should not therefore have been admitted in evidence. Mr. Gacheru should have raised that issue then and raising it here is rather belated given that execution in this matter was completed 3 years ago. Had he raised the issue then, I am certain that the learned trial magistrate could have considered the said submission and the law and arrived at the appropriate finding.

I also find that the acknowledgements of the purchase price in the note book were not admissible for the reason that they had not been signed by either party. These were just writings in a notebook and not acknowledgements of any payment. An acknowledgement must be signed by the person receiving or acknowledging receipt and preferably by the witnesses present.

That said however, I am satisfied that the acknowledgment of the 210,000/= by the Appellant before **Kimwera J.** Advocate was properly admitted as the same seems to have a revenue stamp on the top right hand side. This document does state that the 210,000/= was in full and final settlement of the purchase price and therefore sealed the issue of payment of the purchase price. This was in my view however, the only recoverable amount from the Defendant/Appellant plus the agreed interest.

Execution having been completed however, my findings in this Appeal should not be used to reverse the execution process since as at the time the execution was done, the same was lawful and sanctioned by the law as there were no orders of stay in place. As stated earlier on, this Appeal is just an academic exercise which should not affect the rights of the person who bought the land in question in any way.

In sum therefore, this appeal only succeeds in part in respect of the recoverable amount of the purchase price which as stated above should have been Ksh.210,000 plus the agreed interest. I therefore set aside the Judgment of the learned trial magistrate and in its place thereof substitute the amount of Ksh.420,000 plus costs in the lower court. I further order that each party bears its own costs of this appeal.

**W. KARANJA**  
**JUDGE**

In presence of:-  
Mr. Mwaniki for Mr. Gacheru for Appellant  
Respondent in person.