



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 468 of 2004

MUGO GAKENGE.....APPELLANT

VERSUS

EPHANTUS KARANJA MWANGI.....RESPONDENT

J U D G M E N T

1. This appeal arises from the suit which was initiated by Ephantus Karanja Mwangi (hereinafter referred to as the respondent), against Mugo Gakenge (hereinafter referred to as the appellant). In his amended plaint filed on 30th October, 2001, the respondent prayed for an order to have the caution lodged by the appellant against Land Title No.Loc.8/Matharite/915 (hereinafter referred to as the suit land), removed forthwith.
2. The appellant filed a defence and counterclaim in which he denied the respondent's claim and maintained that the caution was lodged lawfully as the respondent entered into a sale agreement with the appellant for sale of 1½ acres of the suit land, and the appellant was put in possession of that portion of the suit land. The appellant raised a counter claim and prayed for orders as follows: -
 - (a) Transfer of one and half acres of the suit land to the defendant free from any encumbrances.
 - (b) Alternatively refund of the purchase price plus interest at bank rates till payment in full.
 - (c) Compensation for the development carried out in the land to be assessed by the court.
 - (d) Costs of the suit
3. The respondent filed a reply to defence and defence to counterclaim in which the respondent contended that the appellant's possession of a portion of the suit land was illegal under Section 22 of the Land Control Act. The respondent further denied that the agreement for sale between him and the appellant was binding. He maintained that the court had no jurisdiction to make the order for subdivision and transfer of the suit land. Regarding the claim for refund of the part-payment of the purchase price the respondent maintained that the claim was statute barred. As regards the developments the respondent contended that the same were effected in contravention of Section 22 of the Land Control Act. He therefore urged the court to dismiss the appellant's counterclaim.
4. During the hearing before the trial magistrate, the respondent testified that there was a sale agreement between him and the appellant which was executed before an advocate. He explained that although the parties signed an application for Land Control Board Consent to the sale, no consent of the Land Control Board was obtained as the suit land was charged to a bank. The respondent repaid the loan subject of the

Charge but was not able to obtain a Discharge of the Charge due to a Caution the appellant had lodged against the Title and also because the Chargor bank closed down. The respondent denied that there was any agreement that the appellant should take possession of the land which was being sold to him.

5. The respondent further denied having allowed the appellant to carry out any developments on the suit land. The respondent explained that the appellant paid him a total sum of Kshs.54,000/= out of the agreed price of Kshs.95,000/=. He maintained that the appellant was not entitled to refund of the amount which he had paid as he had been using the land. The respondent further maintained that he was not liable to the appellant for any developments carried out on the suit premises as the same were not done with his consent. He urged the court to order the appellant to vacate the suit land and also remove the caution. Under cross-examination the respondent conceded that the appellant was still on the suit land and that he had not prayed for the eviction of the appellant from the suit land.

6. The appellant on his part testified that he entered into an agreement with the respondent before an advocate. He paid an initial sum of Kshs.42,000/= which the respondent wanted to use to redeem his Title from the bank. Later, the appellant paid a further sum of Kshs.60,000/=. The respondent put him into possession of the suit property even though the 1½ acres he was buying was not transferred to him as the Title was not released the bank having gone into receivership. He has remained in possession of the suit property for about 14 years. He urged the court to order the respondent to transfer the land to him subject to him paying the balance of the purchase price as per valuation. In the alternative, the appellant prayed for an order that the respondent pays him the value of the land which he maintained was Kshs.650,000/=. The appellant conceded that under the written agreement he was entitled to refund of the sum of Kshs.54,000/= together with interest of 20% and the penalty of 25%.

7. In his judgment, the trial magistrate found that the parties entered into an agreement for sale of 1½ acres of the suit land. He found that the full purchase price of Kshs.95,000/= was paid to the respondent. He further found that the Land Control Board did not give its consent to the transaction and concluded that the transaction was void. The trial magistrate further found no basis for the appellant's claim for the market value of the suit land, but found that the appellant was entitled to a refund of Kshs.95,000/=. With regard to the Caution the trial magistrate found that the appellant had no lawful claim to the suit land. He therefore ordered the appellant to remove the caution within 14 days failing which the Land Registrar was to cancel it. The trial magistrate further ordered the appellant to vacate the suit land and give vacant possession to the respondent on or before the end of the month of December, 2004.

8. Being aggrieved by that judgment the appellant has lodged this appeal raising one ground as follows:

“That the learned magistrate erred in law by ordering the eviction of the appellant which orders were not prayed for in the plaint.”

During the hearing of the appeal, the respondent though served with the hearing notice did not attend court. Mr. Gacheru who appeared for the appellant submitted that there was only one substantive prayer made by the respondent in his plaint, which was a prayer for removal of the Caution. Although the respondent in his evidence before the trial magistrate urged the court to evict the appellant from the suit premises the respondent conceded that he had not sought such a prayer. Mr. Gacheru maintained that the trial magistrate was wrong in issuing an order which was not prayed for and which was also not based on evidence. Mr. Gacheru relied on *Mwai vs Kenya Tourist Development Corporation (1983) KLR 358*, in which the Court of Appeal held *inter alia* that the matter of agency was not an issue in the suit, as the appellant had not specifically pleaded it in the plaint and had not given evidence on it. Mr. Gacheru also cited the case of *Chalicha FCS Ltd vs Odhiambo & 9 others (1987) KLR 182*, in which the Court of Appeal held *inter alia* that cases must be decided on the issues on the record and that the court has no power to make an order, unless it is by consent, which is outside the pleadings.

9. I have carefully reconsidered and evaluated the evidence as I am expected to do in this first appeal. I find it evident from the pleadings that the respondent's substantive prayer was to have the Caution lodged by the appellant against the suit land removed, whilst the appellant's substantive prayers as per his counterclaim was for transfer of 1½ acres of the suit land (specific performance) or in the alternative

refund of the purchase price plus interest at bank rates and compensation for the developments carried out on the land. Although it was conceded by both parties that the appellant was in possession of the 1½ acres of the suit land, the issue of eviction of the appellant from the suit land did not arise from the pleadings. The respondent attempted to bring in the issue in his evidence before the trial magistrate. Although he conceded that he had not prayed for the eviction of the appellant, he did not amend his plaint to bring in that prayer. It was therefore not open to the trial magistrate to arbitrate upon an issue which was not before him. The two cases that were cited by Mr. Gacheru are clear that the court can only make orders relating to the issues pleaded before it. I find therefore that the trial magistrate was wrong in issuing the order for the appellant's eviction.

10. As regards the trial magistrate's finding that the sale agreement between the appellant and the respondent was void, I am satisfied that there was sufficient evidence to support this finding as it was not disputed that no consent of the Land Control Board was obtained for the transaction which therefore became void in accordance with Section 6 of the Land Control Act. On that basis the appellant has no lawful claim to sustain the Caution which he lodged against the Title. The order for removal of the Caution was therefore proper. Indeed, there was no appeal against that order. Further, I find it apparent that the respondent received Kshs.95,000/= for which there was no consideration and therefore the appellant is entitled to refund of this money as a civil debt under Section 7 of the Land Control Act. Accordingly, I would uphold that order. The upshot of the above is that I allow the appeal to the extent of setting aside the orders made by the trial magistrate for the eviction of the appellant from the suit property. Each party shall bear his own costs in this appeal. Those shall be the orders of this court.

Dated and delivered this 26th day of January, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Arum H/B for Maina for the respondent