REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 50 of 2006

JORAM WAMBUGU…………………………….APPELLANT

VERSUS

DUNCAN KARIUKI KINYANJUI………...….RESPONDENT

JUDGMENT

This is an appeal from the decision of the Principal Magistrate Nyahururu which he delivered on 22nd February, 2006 in Nyahururu PMCC No. 247 of 2004 in which he found that the Appellant had not proved his case on a balance of probabilities and dismissed it with costs. The Appellant had in that case claimed that the Respondent had fraudulently transferred to himself the Plaintiff's two pieces of land situate in Oljoro Orok Salient and known as Title Nos. **Nyandarua/Oljor Orok Salient/8782** and **8783** (the suit pieces of land). He gave the particulars of fraud as including the Respondent's collusion with the Land Registrar to have the suit pieces transferred to him on a forged transfer and lack of the area Land Control Board consent. He therefore prayed for a declaration that the transfers were fraudulent and an order to have the Title Deeds issued to the Respondent cancelled and fresh ones issued in his name as well as an order to evict the Respondent from those pieces of land and costs.

In his defence, the Respondent averred that in 1996 he bought two pieces of land known as **Nyandarua/Oljor Orok Salient/7943** and **7944** from the Plaintiff and another for Kshs.110,000/- the whole of which he paid to the Plaintiff. In December 1999 when it became clear that the Plaintiff and his friend could not transfer those pieces of land to him the Appellant agreed to transfer to him the suit pieces of land as alternatives. He further averred that after that the Plaintiff applied for and obtained the requisite Land Control Board consent and executed a transfer of those pieces of land to him. He therefore denied the allegations and particulars of fraud as unfounded.

In the counter-claim, which is in the alternative to his defence, he claimed the refund of the purchase price of Kshs.110,000/- together with interest at court rates from October 1996.

It is trite law that, on a first appeal, an appellate court has power to examine and re-evaluate the evidence on record where that becomes necessary and will normally not interfere with the trial court's finding of fact unless it is based on no evidence, or on a misapprehension of evidence, or if the trial court is shown demonstrably to have acted on wrong principles in reaching that finding—**Mwanasokoni Vs Kenya Bus Services Ltd, [1985] KLR 931**. This is how the Court of Appeal stated these principles in **Butt Vs Khan [1982-88] KAR 1**:-

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a

figure which was either inordinately high or low."

In **Kemfro Africa Ltd & Another Vs Lubia & Another (No.2) [1987] KLR 30** at page 35 the Court of Appeal reiterated the principles in the following words:-

"The Principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account of a relevant on, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilanga vs Manyoka [1961] EA 705, 709, 713, (CA-T) Lukenya Ranching* and *Farming Co-operative Society Ltd V Kavoloto [1979] EA 414, 418, 419 (CA-K).* This Court follows the same principles."

Though the Court of Appeal was in these two cases dealing with the issue of assessment of damages, the principles enunciated in those cases equally apply to all cases regarding the re-evaluation on evidence by the first appellate court and they therefore apply to this appeal.

Turning now to this appeal, it is trite law that whoever asserts a fact has the burden of proving it. See Section107 of the Evidence Act and the case of Koinange Vs Koinange [1986] KLR 23 at p.43.

In this case the Appellant asserted that she did not transfer the suit pieces of land to the Respondent while the Respondent on his part asserted that she did. In the circumstances the Respondent has the burden of proving that the Appellant indeed transferred the suit pieces of land to him. The Appellant on the other hand had the burden of proving fraud.

The Appellant testified that he never applied for consent and he never attended the Land Control Board for consent. He called the area District Officer who testified that consent was given by his predecessor but the suit pieces of land did not appear in the minutes of 9th December 1999 when consent was allegedly granted and that the minutes of that day ran from Numbers 608/99 to 837/99. Minutes Nos. 975/99 and 976/99 quoted on the consents for the suit pieces of land are therefore not for that date.

The Appellant also called the District Land Registrar who produced Green Cards showing entries of the transfer of the suit pieces of land to the Respondent. He however did not produce the transfers. He said although he had been summoned to produce the letters of consent and the transfer documents for those pieces of land he could not trace them in his office. That in my view also lent credence to the Appellant's contention that he did not sign the transfer.

The Respondent testified and called one witness. In his testimony the Respondent said he first entered into a written agreement to purchase Parcel Nos. 7944 and 7945 for Kshs.110,000/-. When a problem arose between the sellers and the original owner of those pieces of land he was given alternative plots – Nos. 8781 and 8783. He did not say how he got 8782. He said they never entered into another agreement as those plots were to be transferred immediately. He said the Appellant signed the application for consent and they got consent from the District Officer Oljoro Orok. He denied forging either the consent or transfer documents. He also denied colluding with the Land Registrar and said he obtained the Title Deeds after presenting the Land Control Board consent and the transfer documents to him.

The Respondent's witness was David Wachira Macharia, the Chief of Gatimu Location who testified that in July 1999 the Respondent complained to him that the Appellant and another had sold two plots to him but a problem had arisen with the original owner. He called the original owner, the Appellant and his partner Walter and the buyers of several plots in that area including the Respondent and it was agreed that the Appellant would give alternative pieces of land to those who did not get the plots they had bought and that the Respondent was one of those. He also said that from 1996 to 2002 he was a member of Ol Joro Orok Land Control Board. On a date he could not remember the Appellant applied for consent and the special Land Control Board gave consent to transfer the lands which he did not specify to the Respondent.

I have already pointed out that the Appellant called the District Land Registrar who produced Green

Cards showing entries of the transfers of the suit pieces of land to the Respondent but did not produce the transfers because he could not trace them in his office. That in my view lent credence to the Appellant's contention that he did not sign the transfer. That together with the rest of the evidence as summarized herein above, I agree with counsel for the Appellant and find that the consents used to transfer the suit pieces of land were forgeries.

Besides the forgery of the requisite Land Control Board consents, I once again agree with counsel for the Appellant that this appeal has to be allowed on the additional ground of lack of a written agreement in respect of the suit pieces of land, that is Title Nos. **Nyandarua/Oljororok Salient/8782** and 8**783.**

As I have said the Respondent readily admitted that when he failed to get the original pieces of land he had bought, the Appellant agreed to transfer to him the suit pieces of land but no fresh agreement was entered into in respect of those pieces of land.

Section 3(3) of the **Contract Act Cap 23** of the **Laws of Kenya** is very clear. An oral contract for a disposition of an interest in land is unenforceable. It reads:-

"**No suit shall be brought upon a contract for the disposition of an interest in land unless –**

(a) the contract upon which the suit is founded –

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust."

There having been no written agreement in respect of the suit pieces of land I find and hold that the Respondent's assertion that the Appellant agreed and transferred the suit pieces of land to him is totally untenable.

For these reasons I allow this appeal, set aside the learned trial magistrate's order dismissing the Appellant's suit and substitute it with one entering judgment for the Appellant as prayed in the plaint and judgment for the Respondent for Kshs.110,000/= plus interest thereon at court rates from the date of filing the counter-claim. The Appellant shall have the costs of this appeal but each party shall bear its own costs in the lower court case.

DATED and delivered this 23rd day of April, 2009.

D. K. MARAGA

JUDGE.