

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 167 of 2003

MARY NJOKI KIBAARA.....APPELLANT

VERSUS

STANLEY NJOROGE MUNENE.....RESPONDENT

J U D G M E N T

This is an appeal from the decision of the Senior Resident Magistrate Nairobi (T.W.C. Wamae) in Civil Case No. 24 of 2001 in which the court entered judgment in favour of the Respondent and ordered the Appellant to refund to the Respondent a sum of Sh. 400,000/= being the amount the Respondent had paid to the Appellant as deposit for the purchase of 10 acres which was to be excised out of LR No 5805/2 which transaction was declared void for lack of Land Control Board consent the suit land being agricultural land.

The Appellant was aggrieved by that decision and appealed against it to this court.

The facts which gave rise to this appeal briefly may be stated. By a Sale Agreement entered into between the Appellant and the Respondent on 4th November 1995 the Appellant offered to sell and the Respondent agreed to purchase 10 acres which was to be excised out of LR No 5805/2 situated at Kiambu Municipality at an agreed price of Sh.4,000,000/=.

The Respondent paid Sh.400,000/= being 10% of the purchase price. The Sale Agreement was signed by both the seller and the purchaser and the seller acknowledged receipt of Sh.400,000/= being the 10% deposit. It later transpired that the Appellant had no capacity to transact the sale as the suit land had not been transferred from the name of her late husband to herself and hence there was breach of contract

The Respondent on realizing this sued for the refund of his deposit and hence this litigation. The Respondent listed particulars of breach of contract as follows.

- (a) Failure to have part of LR No 5851/2 registered in her name to enable her to meet her obligations under the Agreement.
- (b) Failure and/or refusal to obtain all relevant consents including consent from the Land Control Board to validate the Agreement of the Sale and facilitate transfer of the said piece of land to the Plaintiff.
- (c) Failure and/or refusal to execute any relevant documents to facilitate transfer of the said piece of land to the Plaintiff.
- (d) Failure and refusal to deliver vacant possession of the said piece of land to the Plaintiff.

The parties appeared before the trial court and testified. The trial Magistrate found as a fact that the Sale Agreement was prepared by an advocate who did not have a practicing certificate which contravened Section 34 of the Advocates Act. She also found that the transaction was not enforceable because the consent of the Land Control Board in terms of Section 6 of the Land Control Act was not obtained.

The Appellant was to subdivide the land LR No 5805/2 which is agricultural land and excise 10 acres to sell to the Respondent. Section 6 of the Land Control Act provides that the subdivision or sale of Agricultural land without the consent of the Land Control Board of the area is void for all purposes. It also provides that the application for the consent shall be made within 6 months of the making of the agreement for the controlled transaction.

Section 22 of the Act makes it an offence for any person who pays or receives any money or enters into or remains in possession of any land in such circumstances as to give rise to reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement.

Section 7 of the Act provides that if any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under the Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid.

For the foregoing reasons I find the Appellant's appeal lacking in merit and I would decline to interfere with learned trial magistrate's decision and dismiss the appeal with costs.

Dated and delivered at Nairobi this 23rd day of June 2009.

J. L. A. OSIEMO

JUDGE