REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 45 of 2007

CHARLES KIRIRA KIMANI ..... APPELLANT

VERSUS

KARACHU JAMES NJUGUNA ..... RESPONDENT

(Appeal from the Judgment of the Principal Magistrate's Court at Murang'a in Civil Case No. 461 of 2004 dated 30th May 2007 by Mr. S. B. N. Atambo – R.M.)

J U D G M E N T

This appeal was lodged on the 19th June 2007 and admitted for hearing on 11th March 2008. However, it would appear like once the appeal was admitted to hearing, the appellant did not bother to prepare and file a record of appeal as required. Instead the appeal was placed before **Kasango J** on 6th March 2009 for directions. The learned Judge duly issued directions that the appeal be fixed for hearing by way of written submissions. I do not think that the attention of the judge was drawn to the fact that no record of appeal had been prepared and filed as is the common practice. Pursuant to those directions, learned counsel for the parties filed their respective written submissions. However when the appeal came up for mention before the learned judge, she declined to handle it any further as she was proceeding on transfer to the High Court of Kenya at Meru. The learned judge then directed that the appeal be mentioned before me for further directions on 8th June 2009.

When the appeal was mentioned before me as aforesaid, parties agreed by consent that I should proceed with the same from where **Kasango J** had left. In other words I was to act on the written submissions and craft this judgment. Again I was not made aware that the record of appeal had in fact not been prepared filed and or served. So how should the court proceed in situations as these where there is no record of appeal? My reading and understanding of sections 65 – 79 of the Civil Procedure Act and Order XLI of the Civil Procedure Rules does not ipso facto insist that there must be a record of appeal filed before the appeal is ready for hearing. Indeed under Order XLI 8B(4) of the civil procedure rules provide that before allowing the appeal to go for hearing the judge is supposed to be satisfied that the following documents are on the court record; the memorandum of appeal, the pleadings, the notes of the trial magistrate made at the hearing, the transcript of any official short hand or Palaritypist notes, all affidavits, maps and other documents whatsoever put in evidence and the order (if any) giving leave to appeal. Thus, it can be seen that the filing of a record of appeal is not a legal requirement but a practice that has developed over the years in the High Court when exercising its appellate jurisdiction unlike the court of appeal. An appeal in the High Court will thus not be held to be incompetent merely because of want of a record of appeal.

In the circumstances of this appeal I have looked at the appeal file as well as the original record of the trial court. All the documents referred to in order XLI rule 8B(4) aforesaid save for the transcript of any official shorthand or palantypist notes and maps are available. Accordingly, the learned judge was correct to allow the appeal to proceed to hearing the absence of a formal record of appeal notwithstanding.

This appeal again brings to the fore how the provisions of the land control Act and in particular section 6 thereof have been used or misused often to perpetuate injustice leaving the court powerless to grant relief even where circumstances as in this case clearly demand that an order of specific performance would at most meet the ends and or exigencies of justice herein.

The genesis of this dispute was an agreement of sale of land dated 16th July 2002 entered into between the Respondent as a purchaser and the appellant as a vendor in respect of 1.4 acres out of the appellant's parcel of land known as **Loc. 19/Kiawambogo/995** at a consideration of Ksh.200,000/=. The respondent duly paid the full purchase price and was put in possession of the portion of the suit premises. In furtherance of the transaction, the parties sought within time, consent from Kangema land control Board to subdivide the said suit premises into 4 portions. The appellant notwithstanding the payment to him of the full purchase price and the consent to subdivide having been obtained, however refused to surrender the original title so that the subdivision could be effected and new titles created to enable him effect a transfer to the respondent the purchased portion of the suit premises.

It was then that the respondent instituted proceedings against the appellant in the principal magistrate's court at Murang'a. The relieves in the main sought were "**.....Transfer of 1.4 acres to the Plaintiff free from encumbrances or refund of pecuniary damages in default as indicated in the agreement.....**" Upon being served, the appellant entered appearance but failed to file a defence in good time. Accordingly an interlocutory judgment in default of defence was entered. Efforts by the appellant to have the interlocutory judgment set aside came to nought. Accordingly the matter proceeded by way of formal proof. The appellant's evidence was short and precise. It was in these terms:

"**My names are Karachu James Njuguna. Am a farmer I know defendant herein. He sold me land parcel NO. Loc. 19/Kiawambogo/1995. We entered into an agreement before an advocate. Agreement dated 16th July 2002 P. Exhibit 1. Defendant has failed to play his part after subdivision and refused to surrender old title deed. Chief even gave us a letter. We attended land control board. We were given consent to subdivide. Bundle of Chief's letter. Consent for subdivision – P. Exh. ii. To date he has the old title deed. Prayers (a) of my plaint, costs and interest. I have even planted tea trees – 3,000 I have been harvesting.**

The learned magistrate having considered the evidence tendered and respective written submissions by counsels found for the respondent holding:-

"**It is clear that the land control board already gave its consent to sale and transfer of 1.4 acres out of Loc. 19 Kiawambogo/1995 giving validity to the sale agreement under the land control Act. The defendant herein signed the agreement and is the party who sought consent of the land control board and obtained the same. He can then not be heard to say that the agreement contravenes provisions of the land control Act because the consent obtained validated the agreement in contention.**

It is therefore obvious that the party in breach of the valid contract for sale of land is the defendant. Authority relied on by the defendant clearly supports the plaintiff's claim on the contrary. Parties have clearly stated their wishes in the contract. As a result then, judgment is hereby entered in favour of the plaintiff against the defendant for transfer of 1.4 acres to he plaintiff out of Loc. 19/Kiawambogo /1995 free from any encumbrances or refund of pecuniary damages in default as per the agreement for sale entered into by both parties herein dated 16.7.02 marked as P. Exh. 1. Plaintiff shall also have costs and interest at court's rate."

That decision provoked this appeal. 3 grounds of appeal are alleged. These are:-

"**1. The learned magistrate erred in law in purporting to order specific performance of a contract, which was void owing to the provisions of the Land Control Board Act.**

2. The learned magistrate misdirected herself in law by allowing the respondent to produce as exhibit documents without paying regard to substantive procedural laws.

3. The learned magistrate misdirected herself in law in not appreciating the fact that all what could have been awarded, had the respondent pleaded it, was a refund of the purchase price.

As already stated when the appeal came up for hearing, parties agreed to argue the same through written submissions. I have had occasion to carefully read and consider those submissions.

The suit premises were agricultural land. Hence it was subject to the mandatory provisions of section 6 and 8 of the Land Control act. Section 6(1)(a) specifically provide that:-

a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area; ..... is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

Section 8:

(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto.

From the evidence of the respondent, it would appear that a consent to subdivide the suit premises was obtained. Once this was done, there was need for a further consent of the relevant land control board to

issue for the intended transfer of a portion of the suit premises to the respondent. This being a transaction affecting agricultural land and parties having been unable to apply and obtain consent from Kangema land control board for the intended transfer as required under section 6 of the Land Control Act, the transaction became void after the expiry of 6 months. To my mind and as correctly pointed out by **Warima**, learned counsel for the appellant, the learned magistrate failed to appreciate that the consent to subdivide was not synonymous with consent to transfer. These are totally different and distinct land and legal transactions. Each one of them requires the consent of the land control board concerned. The fact that the appellant obtained the consent to subdivide the suit premises did not oust the provisions of the land control board in so far as they relate to transfer of the portion of the suit premises concerned. In order for the trial court to have ordered specific performance the respondent should have been able to prove by cogent evidence that they had subsequently applied and obtained consent of the Kangema land control board to effect the transfer. In the absence of such consent, no order of specific performance could issue.

The learned magistrate grossly misdirected herself when she held that the land control board gave its consent to the sale and transfer of 1.4 acres out of the suit premises. No such evidence was led by the respondent. What the respondent said was that "**..... We attended land control board. We were given consent to subdivide ..... To date he has the old title deed .....**" Nowhere in this evidence did the respondent allude to the consent being given for the sale and transfer. It does appear to me that the learned magistrate misapprehended the evidence tendered with disastrous consequences.

Under section 7 of the land control Act, a purchaser of land the contract in respect of which has become void is entitled to a refund of the money paid by him. The learned magistrate had no option in the matter but to give effect to those statutory provisions pursuant to the alternative prayer in the plaint. However, the learned magistrate made a final order that was rather ambiguous. She decreed that:-

"**..... As a result then, judgment is hereby entered in favour of the plaintiff against the defendant for transfer of 1.4 acres to the plaintiff out of Loc. 19/Kiawambogo/1995 free from encumbrances or refund of pecuniary damages in default as per the agreement for sale entered into by both parties herein dated 16th July 2002.....**"

The learned magistrate granted two prayers that are distinct and irreconciliable. I want to assume that the two prayers were asked in the alternative. How then did the learned magistrate expect such a decree to be extracted and indeed executed? It does appear to me to be that she left to the respondent to choose which order commended itself to him better that would be the one that he pursue the execution for. That judgment was in clear violation of order XX rule 6(1) of the civil procedure rules.

On these grounds alone, this appeal should succeed. However I do not think that the appellant should be allowed to walk scot free. He cannot be allowed to retain the suit premises as well as the respondent's money. The appellant has challenged the veracity and authenticity of the exhibits tendered by the respondent in support of the case. This objection comes too late in the day. The objection ought to have been taken during the trial. The appellant had opportunity to challenge them but was locked out for his failure to comply with previous court orders. He is has himself to blame. He cannot raise the objection now. In any event the evidence of the respondent with or without those documents was unchallenged.

The agreement of sale had the following specific provision:

"**..... That should the vendor fail to honour this agreement, he shall refund all the money paid to him plus 100% interest on top .....**"

Confronted with a similar situation in the case of **Elizabeth Cheboo v/s Mary Cheboo Gimyigei C.A. No. 40 of 1978**, **Madan J.A.** delivered himself thus: "**..... Quite apart from the disability imposed by statute, the parties themselves provided an agreed remedy in the event of a breach of the terms of the agreement by the defendant. As far as possible and provided no illegality is involved effect must be given to the wishes of the parties as stated in a contract freely entered into by them.** I totally agree and associate myself with these sentiments." I do not see why the appellant should not be

called upon to honour that clause of the agreement that he voluntarily consented to. I do not detect any illegality in the requirement to refund the purchase price plus 100% interest thereon.

For all the foregoing reasons, I would allow the appeal, set aside the decree of the trial court and substitute therefor an order entering judgment for the respondent in the sum of Kshs.200,000/= together with interest at 100% from date of payment thereof to the appellant and costs of the suit also with interest thereon. I will however make no order as to the costs of this appeal.

Dated and delivered at Nyeri this 22nd day of July 2009

M. S. A. MAKHANDIA

JUDGE