REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 49 OF 2008

JOSEPH NGUNJIRI MACHIRA …… APPELLANT

VERSUS

MICHAEL RUKENYA ……..... RESPONDENT

(Appeal from the judgment of the Resident magistrate's court at Karatina in Civil Case No. 22 of 2007 dated 1st day of February 2008 by B. M. KIMEMIA – R.M)

J U D G M E N T

By a plaint dated 14th March 2007 and filed in the Senior Resident Magistrate's Court, Karatina, **Joseph Ngunjiri Wachira** hereinafter referred to as "*the appellant*" sued **Michael Rukenya** hereinafter referred to as "*the respondent*" for:-

"**(a) Specific performance, failure to which the executive officer of this court do sign and execute all transfer and or conveyancing documents in favour of the plaintiff.**

(b) Costs of this suit plus interest at court rates.

(c) Any other, further, alternative or better relief as this Honourable court may be pleased to grant.

The appellant's claim was premised on an alleged sale agreement dated 24th July 2004 entered into between himself and the respondent wherein the respondent agreed to sell and transfer to the appellant ¼ acre out of his land reference **Muhito/Thiha/709** hereinafter referred to as "*the suit premises*" at a consideration of Kshs.165,000/=. That it was an express term of the said agreement that upon payment of ¾ of the purchase price aforesaid, the respondent would book the relevant land control board for its

consent to the transaction and sign all the conveyancing documents. As of 29th May 2006, the appellant had paid to the respondent Kshs.162,901/= towards the purchase price and was left with a balance of Kshs.2,099/= yet the respondent had blatantly, flatly and in breach of the agreement failed, neglected and or refused to book an appointment with the relevant land control board for its consent and or sign the relevant conveyancing documents, hence the suit.

Upon being served with the plaint, the respondent duly entered appearance and subsequently filed a defence. It was his defence in a nutshell that he did not know what the appellant was talking about. In essence, he denied all the allegations of the appellant contained in the plaint. The only admission he made was in respect of the description of the parties to the suit, the fact that he was the registered owner of the suit premises and the fact that there were no previously instituted legal proceedings between the parties. Otherwise he maintained that any alleged sale agreement if at all was null and void for want of consent of the land control board.

On 12th October 2007, the hearing of the dispute commenced before the learned magistrate. Both the appellant and respondents testified but called no other witnesses. The appellant's evidence in brief was that on 8th June 2000 the respondent came to his home and intimated his intention to sell to him the suit premises at Kshs.170,000/=. They negotiated and agreed. An agreement to that effect was executed on the same day. He tendered in evidence the said agreement. He paid him initially Kshs.70,000/= by instalments records of which he kept and which he also tendered in evidence. By the time he was coming to court he had so far paid Kshs.160,000/=. However the respondent turned around and claimed that he had only leased and not sold the suit premises to him. Since then the suit premises have not been transferred to him. On 24th July 2004, the appellant paid him Kshs.10,000/= for stones that the respondent failed to deliver as well. That amount is included in the purchase price aforesaid. He had reported the dispute to the elders who arbitrated over the same and returned a verdict that the respondent should transfer the suit premises to him failing which he should be taken to court. Otherwise the respondent admitted having received Kshs.160,000/= from him. He had since incurred Kshs.50,000/= in pursuing the claim. The respondent also cut trees and coffee trees that he had planted on the suit premises without his consent and permission. Each tree was valued at Kshs.1,500/= which too he was claiming from the respondent.

The case for the respondent was that he never sold any land to the appellant. The agreement dated 24th July 2004 was for stones that he was selling him. It had nothing to do with land. On 5th June 2005, he was in police custody and could not thus have received further instalments towards the purchase price from the appellant. He was only released on 4th August 2005. They had never gone to the land control board. Whilst in prison the appellant had moved into the suit premises and put up a house without his permission. He therefore prayed that the court do dismiss the suit and the appellant be ordered to move out of the suit premises.

The learned magistrate having carefully considered and evaluated the evidence tendered as aforesaid found the case for the appellant not proved and proceeded to dismiss the same with costs. In doing so, she delivered herself thus

"**I have considered the said submission of both parties. I do note paragraph 3 of the plaint this suit is based on an agreement of 24th July 2004. I note that the agreement before the court P.Exh. 4'a' of 24th July 2004 is an agreement between the plaintiff and defendant is for delivery of stones and there is no mention of the suit land. I also note the agreement dated 8th June 2000 for ¼ acre of land from 578. The said agreement to be for the sale of 709 is not before the court and no evidence has been called to show there was any such agreement. The defendant admits that there was an agreement for 8th June 2000 for the sale of ¼ portion of the land from 578 and in which the parcels 708 & 709 were derived and that the defendant transferred the portion 708 to the plaintiff. The law is clear that there has to be a valid agreement between the parties for the purchase/sale of land and I do note that parties are bound to their pleadings. The plaintiff's claim is based on an agreement dated 24th July 2005 for land parcel 709. No such agreement has been adduced or produced before**

this court as an exhibit.

And for the sale of land, parties must first obtain consent from the land control board. No consent was obtained, no agreement has been produced hence the claim for specific performance by the defendant does not arise. This is a measure (sic) of law to ensure that parties do not fraudulently claim parcels of land without any color of right. There being no valid agreement then its clear that no specific performance can be enforced. I therefore find that the plaintiff has not proved his case on a balance of probabilities and I consequently dismiss the suit with costs."

That holding provoked this appeal. Through **Messrs Kebuka Wachira & Company Advocates**, the appellant faulted the judgment on 6 grounds to wit;

"**1. The trial magistrate erred in law and fact by**

delivering a judgment secretly SEVEN (7)

days earlier than the date fixed and without

informing and or notifying the parties.

2. The trial magistrate erred in law and fact by

delivering a judgment based on the wrong

ratio descendedi and/or lacking a reasonable

and/or discernible ratio descendedi.

3. The trial magistrate erred in law and fact by

holding that no evidence was produced to

prove the sale agreement while the same was

properly produced and gone on record.

4. The trial magistrate erred in law and fact by

delivering a judgment contradicting the record

of proceedings.

5. The trial magistrate erred in law and fact by

wrongly and erroneously interpreting

statutory provisions and erroneously using

the said wrongly and erroneously

interpreted statutory provisions as a basis for

the judgment.

6. The trial magistrate erred in law and fact by

delivering a judgment against the weight of

the evidence.

When the appeal came up for hearing before me on 18th May 2009, parties agreed to argue the same by way of written submissions. Those written submissions were subsequently filed and exchanged. I have carefully read and considered them.

Being a first appeal, the principles upon which this court acts are well settled in that the court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect – **Selle v/s Associated Motor Boat Company (1968) E.A. 123**.

The appellant in his claim was seeking for an order for specific performance that would result in the transfer of ¼ acre of the suit premises registered in the name of the respondent to him. He hinged his claim on an alleged agreement of sale between himself and the respondent to that effect. However no cogent evidence was tendered to show that indeed there was an agreement for the sale of the suit premises involving the two. The appellant did tender into evidence an agreement purportedly dated 24th July 2004 in a bid to prove that their indeed existed an agreement for the sale of the suit premises to him by the respondent. However the date of the alleged agreement is contrary to what the appellant stated in his evidence. It was his evidence that "**..... On 8th June 2000 Michael came to my house and said he wants to give me ½ acre to enable him get money and he said its (sic) Kshs.340,000/= and I said it was expensive and he said I take ¼ to help him (sic) for Kshs.170,000/=. We settled for the price. We wrote an agreement on the same day. I have the original in Swahili and translation in English......"** Now if the agreement going by the above evidence was on 8th June 2000, it cannot be the one entered into on 24th July 2004 as pleaded in the plaint. Even if we were to accept the agreement of 24th July 2004 as the genuine agreement, the same does not refer to the sale of land. Rather it is in connection with sale of stones. There is no mention at all of sale of the suit premises. It was merely an agreement between the appellant and respondent that the later will supply the appellant with a lorry of stones worth Kshs.10,000/= in the month of September. Thereafter between 5th July 2005 and 21st August 2005, the appellant paid the respondent amounts totalling Kshs.89,000/=. It is not however clear whether those amounts were in respect of supply of stones or sale of the suit premises. I note though that there was also another agreement dated 8th June 2000 tendered in evidence and signed by both parties. That agreement however refers to land reference 578. It talks of the respondent having received Kshs.70,000/= for ¼ acre from land reference 578. The outstanding balance then was Kshs.100,000/=. Perhaps this is agreement that the appellant was referring to in his evidence. However parties are bound by their pleadings. As far as pleadings go, the agreement was that of 24th July 2004. Despite the variance between the pleadings and the evidence tendered by the appellant in support of his claim, did not see the need to amend the pleadings so as to bring them in tandem with the evidence so tendered by himself. I would have understood the appellant's predicament had he been acting in person. However this was not the case. The appellant had on record an able counsel by the name of **Gacheche wa Miano**. Further the total amount shown on the agreement dated 8th June 2000 equals Kshs.179,500/=. This again runs counter to the testimony of the appellant that he had so far paid to respondent Kshs.160,000/= in respect of the transaction. To my mind there were far too many transactions involving the appellant and the respondent than meets the eye. I do not think that the appellant was candid to court with regard to this claim. Since the appellant pleaded that the sale agreement was the one dated 24th July 2004, the learned magistrate had no reason to go by any other agreement, the one of 8th June 2000 notwithstanding. She was also right in holding that the said agreement had nothing to do with the sale of the suit premises. It would then appear that the said agreement ran foul of the mandatory provisions of section 3(3) of the law contract Act. That section of the law provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract is writing, signed by the parties, and the signature of each party signing has been attested by a witness. Clearly the agreement dated 24th July 2004 does not meet the above strict requirements. Of course the agreement dated 8th June 2000 did meet the above requirements. However as already indicated, the appellant's claim was not anchored on that agreement.

And even if it had been, the appellant's claim would still have failed since that agreement was in respect of sale of land parcel 578. However the said transaction is not in dispute as the appellant did admit in evidence that the said transaction went through. The land involved then was **Muhito/Thiha /578**. The transaction herein however was in relation to the suit premise – **Muhito/Thiha/709**. The appellant admitted that the earlier transaction based on the agreement dated 8th June 2000 was successfully completed and he obtained title being **Muhito/Thiha/708**.

Assuming however that the agreement dated 24th July 2004 was valid, the transaction would still have been impugned courtesy of section 6 of the Land control board. The Section provides that where the consent of the relevant land control board to a land transaction involving agricultural land is not obtained within 6 months of the agreement such transaction thereof is void for all intents and purposes. There is no denying that the suit premises herein were agricultural land. The appellant acknowledges that fact since in his plaint and evidence he alludes to the fact of the consent being sought and obtained from the relevant land control board. The purported agreement was entered into on 24th July 2004. The latest that the consent to the transaction should have been sought and obtained from the relevant land control board should have been 23rd January 2005. However by the time the suit was being filed in March 2007 no such consent had been obtained. Accordingly an order for specific performance cannot issue to enforce a void transaction. As correctly submitted by **Mr. Kahiga**, learned counsel for the respondent, the only remedy is for the purchaser to pursue the purchase price paid as a civil debt from the vendor. See the case of **Kariuki v/s Kariuki (1983) KLR 225**. However in the circumstances of this case, that remedy is not even available to the appellant as he did not pray for it. And even if he had done so, there is no credible evidence that the appellant paid the amount stated towards the purchase of the suit premises.

The appellant has complained that the judgment was delivered in the absence of the parties. The record of the trial magistrate does seem to support this contention. Initially the judgment was to be delivered on 21st December 2007. However that was not to be as it was subsequently delivered on 1st February 2008. The appellant claims that the magistrate's action of delivering judgment in the absence of the parties was in violation of order XXV rule 1 of the civil procedure rules. That may be so. However the judgment was delivered in the absence of both the respondent and the appellant. I do not see what prejudice or injustice was suffered by the appellant following this action of the magistrate. He has ended up appealing to this court in respect of that judgment. If injustice was caused, it must have been remedied by him coming to this court by way of appeal. In any event there is nothing on record to show that the parties had not been notified of the date for judgment.

For all the foregoing reasons, I find no merit in this appeal which is accordingly dismissed with costs to the respondent.

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

M. S. A. MAKHANDIA

JUDGE