REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 170 of 2002

JACOB MUTUA MUYA ..... APPELLANT

VERSUS

FESTUS MWANGI MUCHUGIA ..... RESPONDENT

(Appeal from the Judgment of the Principal Magistrate's Court at Murang'a in Civil Case

No. 206 of 1995 dated 11th February 2000 by Mrs. J. B. A. Olukoye – R.M.)

J U D G M E N T

On 5th February 1987, the parties to this appeal entered into a sale agreement wherein the appellant offered to sell and the respondent agreed to buy a portion of a temporary plot number **127** at Kambiti market for the sum of Kshs.8,200/=. The respondent duly paid the entire purchase price. Later when the appellant was issued with the title deeds in 1988 being **Makuyu/Kambiti/Block II/Mathengeta/763** he failed to transfer the half share therein due to the Respondent despite his several demands. It was then that the respondent opted to sue the appellant claiming:-

"**(a) An order that the Defendant do transfer half portion of land parcel No. Makuyu/Kambiti/ Block-II/Mathengeta/673 (on the side that the plaintiff has put up a structure to the plaintiff and for this purpose to execute all the necessary documents).**

(a1) An order that in default buy the Defendant to transfer the said parcel of land the Executive Officer of this Honourable court may do all that is necessary to effect the said transfer.

(a2) In the event that this suit is decided in favour of the defendant as regards the suit premises, the plaintiff be awarded damages for deceit.

(b) Costs of this suit

(c) Any other relief that the court may deem just to grant."

The appellant filed his defence and a counter claim. He admitted having entered into the sale agreement and received all the purchase price. He stated that he surrendered to the respondent a portion of the suit premises. He further averred that a survey was carried out and that the respondent got registered as the

sole proprietor of **Makuyu/Kambiti/Block-II/Mathengeta/673** and the appellant was registered as the sole proprietor **Makuyu/ Kambiti/Block-II/Mathengeta/673**. He therefore counterclaimed that the court do order the removal of the temporary structures put up by the respondent on his parcel of land **Makuyu/Kambiti/Block-II/Mathengeta/673**.

In support of the case the respondent called two witnesses including himself whereas the appellant did not testify at all but nonetheless called one witness.

In summary the evidence on record appears to be that the Respondent purchased from the appellant a "**temporary plot"** on 5th February 1997. By that time the plot was referred to as plot No. **127** situate at Kambiti market. Both the appellant and respondent later jointly applied for approval of change of ownership of the said plot from Murang'a county council. By then the respondent had paid the appellant the agreed consideration of Kshs.8200/= and was given possession thereof. The respondent then undertook temporary developments on the plot and on which he allegedly lives. In the course of time, the temporary plot was registered and a title deed issued. This is the time the appellant notified the respondent that his plot was elsewhere other than where he had been previously shown and had developed. The appellant threatened to evict the respondent from the plot. The plot the respondent occupied was registered as **Makuyu/Kambiti/Block-II/Mathengeta/673** hereinafter referred to as plot No. **673** while the appellant's contention was that the plot the respondent purchased and was entitled to was **Makuyu/ Kambiti/Block-II/Mathengeta/674** hereinafter referred as plot number **674**.

The appellant's sole witness **(Mr. James Mburu Mwangi)** testified that plot **673** belonged to the appellant and **674** belonged to the respondent. He produced an affidavit as an exhibit where he had deponed to in support of his facts. He went to explain that plot number **674** was actually a consolidated plot. That the respondent's wife had bought half of the said plot from one John Nzioka and the other one from the appellant and since they were adjacent to each other, the company Mathengeta farmers company in which he was he chairman, decided to consolidate them and form plot number **674.**

Having heard the evidence of the parties and evaluated the same, the learned magistrate found for the respondent holding thus:

"**Plaintiff called witness who told court that defendant showed the plaintiff the plot plaintiff was buying on the ground. He then allowed plaintiff to take possession and occupation of this plot. Plaintiff then constructed more temporary buildings on his plot. This plot ceased being a temporary owned plot. Ownership became permanent. It was then defendant being a committee member/director changed his mind as on paper the plot plaintiff bought became 674 while on ground it is 673. This is extremely unfair. Defendant is being very unfair. He showed plaintiff what he was buying. Today plaintiff does his business on the same plot. He can now change his mind. Plaintiff's plot on paper should be the same on ground. The defendant is hereby ordered to transfer ½ (half) of Makuyu /Bock-II/Mathengeta/673 to plaintiff and move (D) to his half in Makuyu/ Block-II/mathengeta/674. The plaintiff is also entitled to costs of this suit.**

This holding thus provoked this appeal. Through **Messrs Gacheru J. & Co. Advocates**, the appellant challenged the judgment of the learned magistrate on 7 grounds to wit;

1. The learned trial magistrate erred in law and fact in failing to hold that the appellant sold to the respondent part B of the Temporary plot No. 127.

2. The learned trial magistrate erred in failing to hold that when survey was carried out title deeds were issued part B of the temporary plot No. 127 was included in plot No. Makuyu/Kabite/ Block-1/Mathengeta 6674.

3. The learned trial magistrate erred in failing to hold that the temporary portion that was sold to the respondent was not included in plot No. Makuyu/ Kabiti/Block-II/Mathengeta/ 673.

4. The learned magistrate failed to consider the defence evidence and arrived to an erroneous

decision.

5. The learned trial magistrate wrote a judgment that is erroneously wrong without following the issues conversed in the pleadings.

6. The learned magistrate erred in importing her own version of evidence in the judgment which evidence was not adduced by any party thus favouring the respondent which evidence should not be in the judgment.

7. The learned trial magistrate failed to analyse the evidence adduced to support the issues involved and therefore arrived to an erroneous decision.

When the appeal came up for hearing **Messrs Gacheru** and **Mburu**, respective counsels for the appellant and respondent consented to having the appeal argued by way of written submissions. Subsequently they each filed their separate written submissions which I have carefully considered.

The starting point in this matter is the alleged sale agreement dated 5th February 1997. I note that it was written in Swahili. It was never translated into English as required. That being the case, the same should never have been admitted in Evidence. It cannot be assumed that the court was conversant and understood Swahili and could therefore interpret and understand the essence of the sale agreement. In any evenet the language of the court is English. Yes the parties may from their pleadings have agreed that indeed they entered into a such sale agreement. However such common ground cannot preclude the court from looking at the agreement to establish whether it is authentic, legal and or enforceable. Secondly, I note that the alleged sale agreement was neither registered and or stamp duty paid thereon. That alone should again have knocked out the admission of the said agreement into evidence. Finally is the issue of the property being sold. Both the appellant and respondent agree that the property being sold and transferred was temporary plot number **127** situated at Kambiti market. I doubt whether a property owned on a temporary basis is capable of being sold and transferred or the property therein if any, capable of being passed on. I am certain that a party who owns such property will not have title to such property as will enable him to sell and pass good title to the purchaser. Perhaps the only title he can be able to pass on is also but temporary. To my mind therefore the agreement fails short of the requirement of law that would have made it enforceable. Whatever is being sold and conveyed is unknown. One cannot tell with certainty which property is being sold. The description given to the property being sold is not certain. The property is thus not ascertainable. Further the property being sold is a temporary plot number **127** at Kambiti market. For all the foregoing reasons, the agreement of sale was incapable of enforcement.

How about the merit of the respondent's case? The respondent testified and called one witness. The appellant did not testify but did call one witness. Ordinarily a party to a suit is expected to testify in support of his case. He cannot testify by proxy. This requirement perhaps is more applicable to the plaintiff than the defendant. After all it is upto the plaintiff to prove his case on balance of probability. The defendant does not have such a burden unless of course there is a counterclaim. In the circumstances of this case, the appellant had counterclaimed. He was thus expected to testify in support of the counterclaim. He did not. Further the record does not give any reason why the appellant opted not to testify. However that election should not be held against him as the learned magistrate did not consider his counterclaim. Further the learned magistrate eventually found against him in any event.

Between the evidence of the respondent and the appellant, I would prefer to go by the evidence of the appellant. The appellant's sole witness was an independent and credible witness unlike the respondent's. From the record, it would appear that the respondent's evidence was self serving. I do not think that the appellant's sole witness had anything to gain by testifying falsely. He was after all the chairman of the farmers company which owned the land from which the plots aforesaid were curved from. It would appear that only a member or shareholder of the farmers company was entitled to get pieces of land or plots owned by the company at the said market. The respondent was neither a member nor shareholder of the company. That being the case, the respondent was actually at the mercy of the appellant in so far as the plot was concerned. The respondent's evidence was not at all corroborated. His only witness, **Peter Njoroge Maina** did not advance his case at all. All he knew was that the respondent bought some plot

from the appellant, he did not know where that plot was. He also conceded that the number of the plot was not indicated. In cross-examination by **Mr. Gacheru** he conceded that he did not know where the respondent's plot was and that the respondent had not told him that he had got a permanent plot.

The appellant's case did receive some boost from the respondent's testimony during cross-examination again by **Mr. Gacheru** the respondent admitted that he was in possession of plot number **674**, that indeed the said plot number **674** comprised of plot No. **127B**, and the plot bought from one **Nzioka** by his wife. As correctly submitted by **Mr. Gacheru** it would seem that the respondent wants plot **673** because of the temporary structures he has put up. However that cannot be. He actively participated in the consolidation of his plot with that of his wife to create plot **674**. I think that if the judgment of the court was to be allowed to stand, the respondent will have to end up with two plots viz **674** and **673** which would be not only unfair to the appellant but also unjust. Building temporary structures on the plot perse can and should never be the basis for conferring title to property.

The judgment of the trial court in the circumstances is not supported by the evidence on record and the same ought to be disturbed. Accordingly, I allow the appeal, set aside the judgment of the learned magistrate and in its place order that the respondent's suit be dismissed with costs. The appellant shall also have costs of this appeal.

Dated and delivered at Nyeri this 15th day of February 2008

M. S. A. MAKHANDIA

JUDGE