REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal 32 of 2007

JOB MURIITHI WAWERU ..... APPELLANT

VERSUS

PATRICK MBATIA ..... RESPONDENT

(Appeal from original Judgment and Orders of the Chief Magistrate's Court at Nyeri in

Civil Case No. 654 of 2006 dated 13th April 2007 by K. Sambu – R.M.)

J U D G M E N T

On 9th September 2006 in the Chief Magistrate's Court, Nyeri, the respondent herein commenced proceedings against the appellant seeking:-

"**(a) A declaration that the Defendant did not**

have good title over land parcel No. Mwerua/Kagio-ini/1658 capable of being transferred to the Plaintiff hence the cancellation of the resultant title Deed over land parcel No. Mwerua/Kagio-ini/1658

(b) An order for specific performance of clause 5 of the sale agreement dated 21st August 2002 in favour of the Plaintiff.

(c) Any other alternative or better relief which this court may deem fit to grant....."

For the record, the appellant was the defendant whereas the respondent was the Plaintiff in the suit before the subordinate court aforesaid. The genesis of this dispute is a sale agreement dated 26th August 2002. By that sale agreement, the appellant offered to sell and the respondent agreed to buy land parcel **Mwerua/Kagio-ini/1658** hereinafter referred to as "**the suit premises"** at a consideration of Kshs.495,000/=. The agreed purchase price was duly paid and the transaction concluded with the issuance of the title deed in respect of the suit premises in the name of the respondent.

However when the respondent attempted to take physical possession of the suit premises he was repulsed by one, **Francis Wachira** who laid claim to the suit premises. Frustrated by his inability to access the suit premises, the respondent sued the appellant in the Chief magistrate's court aforesaid claiming that the transfer of the suit premises to him by the appellant was fraudulent and void initio. That the appellant had obtained registration as proprietor of the suit premises unlawfully and did not therefore have good title capable of being passed over to the respondent. He therefore sought the nullification of the sale agreement aforesaid together with the resultant title and the reimbursement of the purchase price with interest thereon at the rate of 40% per annum in terms of clause 5 of the sale agreement.

The appellant as expected denied the respondent's claim insisting that the transaction was above board. That he did not commit any fraud on the respondent. That before the sale agreement was drawn, the respondent had inspected the suit premises. Thereafter the consent of the relevant land control board was obtained and soon thereafter the respondent acquired a title deed to the suit premises and was given vacant possession. He had remained in possession of the suit premises for 4 years before the commencement of the suit.

These were then the competing claims that came before the learned magistrate for haring and determination. In support of his case, the respondent alone testified. On the other the appellant also testified in support of his defence and called one witness. Having carefully listened to and evaluated the evidence tendered before him the learned magistrate reached this verdict:

"**I have carefully considered the entire evidence adduced in this case and the submissions made thereto by the plaintiff and the defendant respectively and I do find that the plaintiff has indeed proved his case against the defendant on a balance of probability particularly on the basis that the defendant at the time of entering into the land sale transaction with the plaintiff over the suit land parcel number Mwerua/Kagio-ini/1658 vide sale agreement dated 21st August 2002 had no good title to have transferred same to the Plaintiff as same was heavily encumbered by third parties laying their respective claims thereon, portably, (sic) Mary Machayo Migwi and Francis Mwachira the latter physically assaulting the plaintiff, over the suit land contrary to the express provisions of the clause No. 3 of the sale agreement dated 21st August 2002 aforesaid."**

That holding triggered this appeal. In a memorandum of appeal filed in person the appellant advanced four grounds upon which he felt that the judgment of the learned magistrate could be impugned. These are:-

a) The learned magistrate erred in law and fact by failing to recognise there was an existing contract of the said sale of land between the appellant and the Respondent.

b) The learned magistrate erred in law and fact by failing to consider the evidence adduced by the appellant herein and the written submissions filed then.

c) The learned magistrate erred in law when he misdirected himself when he ordered that the title deed issued to the Respondent be cancelled knowing very well that the powers of cancelling a Land Title are vested in the High Court.

d) The learned magistrate erred in law and fact in delivering judgment which was against the weight of evidence adduced by the appellant.

At the hearing of this appeal, **Mr. Gikonyo** appearing for the appellant and **Mr. Kiama** appearing for the respondent agreed to argue the appeal by way of written submissions. The written submissions were subsequently filed and exchanged.

I have carefully and anxiously considered this appeal and submissions of both counsel. I am alive to my duty as a first appellate court, to reconsider, assess and re-evaluate the evidence and come to my own conclusion about it. I should nevertheless be cautious and always bear in mind that the trial court had the advantage of seeing and hearing witnesses testify. As **O'Conner P.** said in **Peters v/s Sunday Post Ltd. (1958) E.A. 424.**

"**It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses.....**"

To my mind the key to the determination of this appeal either way lies in ground (c) of the memorandum of appeal. This ground raises the issue of jurisdiction. It is the contention of the appellant that the learned magistrate did not have jurisdiction to order the cancellation of the title deed. In support of this contention, counsel for the appellant referred this court to the provisions of sections 143 and 159 of the Registered Land Act. To buttress his point further, learned counsel referred this court to the case of **Kabitao Karanja v/s The Attorney General, C.A. Civil appeal No. 310 of 1997 (NYR)** (unreported).

Counsel for the respondent countered the above argument by submitting that cancellation of the title was never an issue for determination by the court. The cause of action was a contract for sale of land dated 21st August 2002. That the powers of the lower court to arbitrate on such matters is only limited by pecuniary jurisdiction of the court. Counsel went on to submit that the purchase price paid was Kshs.495,000/= whereas the pecuniary jurisdiction of the learned magistrate was Kshs.500,000/=. The learned magistrate therefore had the necessary pecuniary jurisdiction to entertain the matter. The above notwithstanding counsel further submitted that section 159 of the Registered Land Act confers jurisdiction to both the High Court and Lower Court to cancel titles. Save that the powers of the lower court have a pecuniary limitation of twenty five thousand pounds. To counsel, today one pound is exchanging for over Kshs.130/= meaning that the pecuniary jurisdiction of a Resident Magistrate under section 159 aforesaid is in the very least Kshs.3,230,000/= Finally counsel sought to distinguish the authority relied on by the appellant aforesaid on the ground that the said decision dealt with the rectification of title as set out under section 143 and not with jurisdiction of the lower court to cancel a title deed. Further the rectification in the said authority was done in criminal proceedings and not in a

civil forum where jurisdiction in the lower court is specifically conferred.

It has been said time and again that jurisdiction is everything. If a trial court smells a whiff of want of jurisdiction in a matter before it, it must immediately down its tools. As stated by the court of appeal in the case of Kabitao (supra) "**Any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order. What is a nullity remains a nullity ......"** This is exactly what counsel for the respondent has attempted to do in the circumstances of this case by claiming that the issue before court was solely on the question of a sale agreement and had nothing to do with the cancellation and or rectification of the register and secondly that rectification and cancellation of a title deed are distinct legal phenomenon. This is unnecessary legal sophistry that cannot advance the respondent's case any step further than where it has reached.

Section 143 of the Registered Land Act provides interlia:

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

Similarly section 159 of the same Act provides as follows:-

"**Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court or where dispute comes within the provisions of section 3(1) of the land disputes Tribunal Act in accordance with that Act."**

Reading through the above provisions of the law it is quite clear that the learned magistrate had no jurisdiction to make the impugned order, pecuniary or otherwise. Much as the respondent takes the view that cancellation of the title was never an issue, this submission cannot be possibly true. It is all there in black and white. In paragraph 11 of the plaint the respondent pleaded "**..... The Plaintiff's claim against the Defendant is for nullification of the sale agreement dated 21st August 2002, together with the resultant title thereof in terms of clause No. 5 of the said Agreement ....."** In one of his prayers, the respondent asked the subordinate court for "**A declaration that the Defendant did not have good title over land parcel No. Mwerua/Kagio-ini/1658 capable of being transferred to the Plaintiff hence the cancellation of the resultant title deed over land parcel No. Mwerua/ Kagio-ini/1658....."** Can the issue of cancellation of the title deed to the suit premises be any clearer. The respondent specifically asked for the cancellation of the title deed in his pleadings. He cannot now resile from that position by claiming that cancellation of the title was never an issue for determination before the trial. It was. A party is bound by his or her pleadings.

Rectification as may be gathered from the provisions of section 143(1) of the registered Land Act may involve cancellation or amendment of the title deed. For this reason the argument that cancellation and or rectification are totally different and distinct legal phenomenon flies in the face of the aforesaid specific provision of the law. Secondly, it would appear from the testimony both in the two criminal cases involving the respondent and one **Paul Wachira Migwi**, in the Resident Magistrate Court at Baricho that the suit premises were after subdivision a first registration. That being the case the title is not liable to cancellation and or rectification. Even if the title deed to the suit premises was not a first registration, section 143(2) of the registered Land Act provides a complete armour for the respondent against adverse claims over the suit premises. The title so issued cannot be rectified for so long as the registered proprietor was not party to the omission, fraud or mistake in consequence of which the rectification is sought. The evidence on record clearly shows that the respondent did not cause the omission, fraud or mistake or substantially contributed to it by his act, neglect or default. Indeed the respondent was an innocent purchaser for value. The learned magistrate thus could not have made an order cancelling his title as aforesaid.

Yes, Section 159 of the Registered Land Act confers pecuniary jurisdiction to the subordinate courts to hear and determine some of these disputes. The pecuniary jurisdiction for subordinate courts is however limited to Twenty five thousand pounds. The respondent's counsel takes the view that the exchange rate of the pound aforesaid must be at current market rates. That since today one pound exchanges roughly at the rate of Kshs.130, it means that the pecuniary jurisdiction of a Resident Magistrate under section 159 aforesaid is Kshs.3,230,000/= (25000 pounds multiplied by Kshs.130). That submission is erroneous and fallacious. If that was the intention there is no reason why parliament in

her wisdom would not have specifically stated. There is nothing in the said Act saying that English Sterling pound is the one applicable I believe that the pound referred to in the act is the equivalent to Ksh.20/=. If that be the case, and I have no reason to doubt that it is not then the learned magistrate had jurisdiction to entertain the matter since 25000 pounds would amount to Kshs.500,000/= if the rate is Kshs.20/= to a pound.

There is no doubt at all that the appellant had no valid title that he could have passed on to the respondent under the transaction. Accordingly, the learned magistrate having come to the same conclusion he should have limited himself to making the declaration and declined to make an order cancelling the title to the suit premises in favour of the respondent for want of jurisdiction. The other order requiring the price of Kshs.495,000/= together with interest at the rate of 40% per annum cannot be faulted.

To that limited extent therefore the appeal succeeds. The order for the cancellation of the title is hereby vacated and set aside. Otherwise the rest of the judgment of the learned magistrate remains intact. That is to say that the appellant had no good title over land parcel No. **Mwerua/Kagio-ini/1658** capable of being transferred to the respondent and secondly, the appellant should forthwith refund to the respondent the purchase price of Kshs.495,000/= together with interest at the rate of 40% per annum. I make no order as to the costs of this appeal as the appellant has succeeded in his appeal to a limited extent only.

Dated and delivered at Nyeri this 9th day of October 2008

M. S. A. MAKHANDIA

JUDGE