



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL 877 OF 2003

JOEL MUTUNGA NGUNDO.....APPELLANT

VERSUS

THOMAS MUNGUTI NZENGU..... RESPONDENT

J U D G M E N T

On 23/11/04, the appellant herein, challenged the Judgment of Senior Principal Magistrate, dated 6/11/04, in CMCC 3662 of 2002, Milimani Commercial Courts, on the following grounds of appeal:

1. The Subordinate Court misdirected itself on the principles to be considered in controlled land transactions under Land Control Act, Laws of Kenya and thereby arrived at a wrong decision.
2. The Learned Magistrate erred in law in failing to consider the principles applicable to a claim of special damages.
3. The Subordinate Court erred in law and in fact in failing to consider and find that the contract between the Respondent and the Appellant being a controlled transaction was void by lack of Land Control Board consent, and that only money proved to have been paid could be recovered as civil debt, and in this case none was proved and hence could not award any.
4. The Subordinate court in general misdirected itself in the principles applicable and was wrong in the exercise of its discretion and as a result there was a miscarriage of justice.
5. The Lower court erred in awarding the Respondent the amounts awarded contrary to the law and against the weight of evidence.
6. The Learned Magistrate erred in law and fact in failing to consider the appellant's defence and dismiss the Respondent's case.

Wherefore, the appellant prays for setting aside of the judgment of the lower court; the appeal be allowed and the claims dated 6/5/02 be dismissed with costs to the appellant; the costs of the appeal and the court below be awarded to the appellant.

In his submissions, Learned Counsel for the appellant condensed the grounds of appeal into three: Grounds 1,2 and 5; ground 2 on special damages; then the rest, which dealt with controlled transactions. I wish to address the appeal in the sequence above.

Under ground of appeal No. 1, the gist of the contention is simply whether or not the land transaction falls within the ambit of the category where the consent of the Land Control Board is mandatory. If consent of the Board is necessary and is not obtained, then the transaction is null and void with all the consequences attendant thereto.

Before delving into the grounds of appeal, a brief, statement of the facts in the case is in order.

On 25/4/00 the parties entered into an agreement by which the Plaintiff, an allottee, through the Settlement Fund trustees, of L.R. no. 464/29, at Nguu Ranch Settlement Scheme, Makueni District, sold or assigned the said plot to the Defendant for K.Shs.250,000/- on the following terms and conditions: K. Shs. 30,000/- to be paid to the Defendant on execution of the Agreement, as deposit, which is alleged to have been duly done. The Plaintiff later paid the Defendant a further 10,000/- bringing the total payments to the Defendant to K.Shs.40,000/-. The completion date was agreed as 30/5/00 and in the event of breach, the guilty party to pay the innocent one a penalty fee of 25% of the purchase price. The Defendant did not procure the consent of the Land Control Board and began avoiding the Plaintiff and making false promises, which led to the completion period being overdue, and the sale agreement null and void.

The above are the facts that sparked the suit in the lower court and this appeal against the judgment of the Subordinate Court.

In the Plaint, the Plaintiff claimed K.Shs.102,500/- being the amount paid to the Defendant, together with 25% penalty on default of completion as agreed. He also claimed costs and interest at court rates.

In his defence, the Defendant avers that the said suit premises are a public utility and he is a stranger thereto. He further, even though later in the proceedings, denied entering into any agreement and that his signature was forged in the Documents presented by the Plaintiff.

With the above facts the grounds of appeal can be put into the proper perspective.

On ground of appeal No. 1, it is the appellant's contention that under Section 6(1) of the Land Control Act, Cap. 302, Laws of Kenya, the transaction from which the dispute arose is void because no consent of the Land Control Board was procured by the Defendant.

The submission presupposes that the suit premises fall within the controlled Transactions where consent of the Land Control Board is mandatory.

My perusal of the pleadings and the evidence on record, does not lead to the conclusion that consent of the Land Control Board for Nguu Ranch, Makueni District, was required, in the first place, leave alone the need for the same being procured. This is because of the following reasons: In the plaint, it is admitted that the suit premises had been allotted from a settlement scheme, by the settlement Fund Trustees.

If that be the case, then section 6 (1) (c) of Cap. 302, does not apply, and no Land Control Board consent is required. That is because of the provisions of Section 6 (3) (b) which stipulate as under:

“This section (that is section 6) does not apply to a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust Land) a County Council is a party.”

Further, this is a Superior Court of Record, and at this appellate level, the court goes by what is on the Record. Looking at the record, there is nowhere in the appellant's evidence, at the Lower court, that the issue of Land Control Board is raised. The point is coming up for the first time in this appeal. That is clearly irregular and as was held in the case of *ALWI A. SAGGAE V. ABED A. ALGEREDI [1961] E.A. 76 AT page 768*, a party cannot raise an issue at the appellate stage if it was not raised (and probably determined) at the lower court.

To reiterate, the validity of the Agreement herein does not, and did not, hinge on the consent or lack of

the consent, of the Land Control Board of Makueni District because no such consent was required under the applicable law in the transaction. Hence, the transaction was not void.

I now turn to ground of appeal No. 2, which raises the issue of special damages.

Law Reports are replete with authorities on Special Damages. It is thus trite law and learning that Special Damages must not only be pleaded – particularized – but also proved before the court can award the same. This is because special damages are, as this court has repeatedly held, a reimbursement for what a party has actually spent (paid) as a consequence of the acts [tortious or contractual breach] of the Defendant. **See ZACHARIA WAWERU THUMBI V. SAMUEL NJOROGE THUKU HCCCA No. 445 of 2003. Pages 6 – 7.**

In the appeal before me, it is the appellant's contention and submission that money paid under void transaction must be returned. For that, Learned Counsel for the appellant relied on Section 7 of Land Control Act, Cap. 302, Laws of Kenya. That section deals with **recovery of money or consideration paid in the course of a controlled transaction that becomes void under the Act (Cap. 302).**

I have already found and held that the transaction was not a controlled transaction and hence not void. Accordingly, any money or consideration paid must be pleaded and specifically proved, for it to be recovered, under Special Damages.

If the ground on special damages is to succeed, then those damages must be proved, as required by law. I have no evidence, on record, that what is claimed in the Plaintiff was ever paid. All there are are allegations as per the Plaintiff and the alleged Sale Agreement which, from the record, has been disputed.

All in all, and for the above reasons, the appeal is hereby dismissed with costs to the Respondent and against the appellant.

DATED and delivered in Nairobi, this 21st Day of June, 2007.

O.K. MUTUNGI

JUDGE