REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Appeal 92 of 2002

(Appeal arising from the decision of A. O. MUCHELULE ESQ. in Kakamega C.M.CIVIL

CASE No. 787 of 1998 delivered on 20th September, 2002)

FRANCIS AMONI NAVIE……...……..…….APPELLANT

VERSUS

HANSON OTUNDO……...……RESPONDENT

JUDGEMENT

This is a judgement against the decision of the Chief Magistrate, A. O. Muchelule Esq., made in his judgement delivered on 20TH September 2002 in Kakamega Chief Magistrate Civil Case No. 787 of 1996 in which judgement the trial magistrate found in favour of the Respondent herein, HANSON OTUNDO, who had sued the Appellant and his agent seeking payment of Shs.195,000/= as the price of 2.3 acres which the Respondent alleged the Appellant had failed to transfer to the Respondent when the Respondent purchased from the Appellant 9 acres at an agreed price of Shs.85,000/= per acre but only got transferred to him 6.7 acres. The trial magistrate found that the appellant "provided insufficient consideration" and ordered that the Appellant do "refund the balance of the purchase price to cover 2.3 acres", that is to say Shs.195,000/=.

Aggrieved by this decision, the Appellant filed appeal and put forward 5 grounds of appeal as follows:-

1. The learned trial magistrate erred in law and in fact in making a finding in favour of the Respondent when his case was not proved on a balance of probabilities.

2. The learned trial magistrate erred in law and in fact in making a finding that the Appellant admitted in his defence that the Respondent got only 6.7 acres when there was no such admission in the Appellant's defence.

3. The magistrate erred in law and in fact in admitting hearsay and uncorroborated evidence of the Respondent.

4. The learned magistrate erred in law and in fact in making a finding contrary to the documentary evidence furnished to court by the Respondent.

5. The learned magistrate erred in law and in fact in making a finding that Arch Surveyors were independent contractors contrary to the evidence on record.

When the appeal came up for hearing before me on 23-5-2007, Mrs. Osodo, learned counsel for the Appellant, argued the grounds of appeal together and her submissions can be summarized as follows:

That the trial court erred:

(i) in holding that there was insufficient consideration as a result of which he ordered refund of Shs.195,000/= for 2.3 acres.

(ii) in failing to hold that the Respondent produced no evidence to prove that he got less land.

(iii) in failing to appreciate that the Respondent had failed to call a surveyor as an expert to prove the amount of land sold to the Respondent by the Appellant was less than the contractually agreed 9 acres.

(iv) in holding that the Appellant made an admission that he got more money for less land than he had contracted to sell.

(v) in holding that the Respondent proved that he got less than 9 acres he had contracted to by.

(vi) in not appreciating that the District Surveyor was not called to testify.

(vii) in not appreciating that the Appellant produced proof that he had sold 9 acres.

On her part, Mrs. Lusinde, learned counsel for the Respondent, opposed the appeal and contended that the decision of the trial magistrate was correct as he considered all the evidence and correctly found that the Appellant had transferred to the Respondent only 6.7 acres instead of the 9 acres agreed on. She contended that Mutation Forms were produced as evidence to prove this point. It was also her contention that the Appellant did not adduce evidence to show that the land was not less.

I have perused the record of appeal and given due consideration to submissions of both counsel. The suit in the trial court whose judgement gave rise to this appeal was commenced by the Respondent against the Appellant. The Respondent made allegations in paragraphs 4, 5, 6, 7 and 8 of the Plaint against the Appellant as follows:

4. At all material times, the first Defendant was the proprietor of Title Number AKAMEGA/LUMAKANDA/301 and the second Defendant was the agent and or servant of the first Defendant.

5. On or about the 11th February 1995 the first Defendant through the second Defendant entered and or caused to be entered with the plaintiff, an agreement for the sale of that property known as KAKAMEGA/LUMAKANDA/301.

6. It was an express term of the said agreement that the plaintiff would pay to the first Defendant a sum of Kshs.85,000/= for each acre of land and that he would purchase 9 such acres. Accordingly the plaintiff did pay unto the Defendants a sum of Kshs.765,000/= being full and final settlement of the purchase price and obtained possession of the land.

7. Upon subsequent surveys it was established by the plaintiff that the land delivered to him as purchaser was indeed 6.7 acres and not 9 acres as intended out of the said title.

8. Despite demand made and notice of intention to sue given the Defendants have neglected and or refused to deliver unto the plaintiff the remaining 2.3 acres or to reimburse the plaintiff that part of the purchase price relating to the said 2.3 acres being Kshs.195,500/=.

These allegations were denied by the Appellant in paragraps3, 4, 5 and 6 of the Statement of his defence as follows:-

3. In reference to paragraph 5 of the plaint the 1st defendant admits that he entered into an agreement with the plaintiff for the sale of only nine acres of Kakamega/Lumakanda/301 but denies that he did so through the 2nd defendant or that he ever caused to be entered into an agreement between him and the plaintiff.

4. The 1st defendant admits the contents of paragraph 6 of the plaint. The 1st defendant will add that subsequent to the sale the plaintiff either himself or through his agents hired a firm of surveyors who came to the land to survey, sub divide and eventually gave out nine acres of land to the plaintiff. The plaintiff did not in any way interfere or hinder in the survey but instead gave the surveyors his maximum co-operation.

5. As regards the contents of paragraph 7 the 1st defendant will aver that he has no knowledge of the allegations therein as he had long disposed of the remaining part of Kakamega/Lumakanda/301 to other subsequent buyers and had no land remaining thereof.

6. In reference to paragraph 8 of the plaint the 1st defendant states that at the time demand was being made he had long disposed of the remaining piece of land to other buyers having believed that through the survey and sub division the plaintiff had gotten his 9 acres.

It cannot be said that the Respondent admitted the allegations made by the Appellant. The latter had to prove them.

The burden of proving the allegations in the plaint in absence of admission lain squarely on the Respondent who asserted the facts therein. Section 107 (1) of the Evidence Act, Cap 80 places the burden on the Respondent. The section states:-

S.107 (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

What issues were before the trial magistrate for determination? It was not denied by the Appellant that there was a contract for sale by the Appellant to the Respondent of 9 acres of the land comprised in the title No. Kakamega/Lumakanda/301 at a price of Shs.85,000/= per acre. The issue before the trial court was whether the Appellant transferred 9 acres to the Respondent for which the Respondent had paid and if not whether the Respondent was entitled to a refund for the shortfall on the acreage. The burden of proving this on the balance of probabilities lain on the Respondent who had brought the suit against the Appellant.

The record of the evidence in the trial court shows that the Plaintiff testified but called no witnesses and the defence testified and also called no witnesses. In his evidence, the Plaintiff told the court that he got title for the land he had contracted to buy which bore title No. Kakamega/Lumakanda/2580 but when he conducted a search, the search revealed that it was 3.6 hectares only which translated to 6.7 acres. He produced the Search certificate as exhibit No. 2 and Mutation Form as Exhibit No. 3. He demanded refund of Shs.195,000/= which he had paid towards 2.3 acres which he said he never got. It was the Appellant's failure to refund this money that gave rise to the suit. The Respondent did not call a surveyor to testify as to the acreage of the land comprised in title No. Kakamega/Lumakanda/2580 transferred him.

Did the search and/or the Mutation Forms produced as exhibits prove that the Respondent got less land than he had paid for? Under section 37 (2) of the Registered Land Act Cap 300 under which land title No. Kakamega/Lumakanda/2580 was registered, a certified copy of official search is **prima facie evidence** of the contents of the document. It is patent that the Respondent established a prima facie case that he got 3.6 hectares which amounts to less than 9 acres through production of the official search. The title Deed was under section 32 (2) of the Registered Land Act also prima facie evidence that the land transferred to the Respondent was 3.6 hectares but it was not produced. Was the prima facie evidence sufficient to establish the claim? Did it amount to evidence on the balance of probabilities?

The Appellant gave evidence. Did he confirm that the land he transferred to the Respondent was less than 9 acres? If he did, the prima facie evidence established by the Respondent would not need to be reinforced because in absence of denial, it would be sufficient to prove the claim on the balance of probabilities. But the Appellant denied the allegation. In examination in chief he said:

"*…...Surveyor surveyed my piece of land and that of the Plaintiff (Respondent). He excised 9 acres. The plaintiff got 9 acres and title deed ……. It is not true I gave the plaintiff (Respondent) 6.7 acres only. I gave him 9 acres."*

In cross-examination, the Appellant stated, inter alia,

"*…….it is not true I sold less land. I cannot refund part of the purchase price. ……. I do not know he said Plaintiff (Respondent) got only 6.7 acres. I first learnt of the claim by the plaintiff (Respondent) that he got 6.7 acres when he filed the case……"*

As the production of the documents as exhibits produced by the Respondent amounted to prima facie evidence of the allegation that he got less than 9 acres, and as the Appellant refuted it, it behoved the Respondent to adduce further evidence to prove the claim beyond the prima facie standard. He failed to call the Surveyor who would have testified that he measured the acreage appearing in the Mutation Form and consequently in the Official Search. He left lose ends. The proof fell short of the standard in civil suit, namely on the balance of probabilities. On the basis of the prima facie evidence which was not admitted, it cannot be said he was entitled to judgement.

The trial magistrate fell into error when he observed that the Respondent was short changed. He erred also in his finding that the Appellant "provided insufficient consideration." He failed to find that the Respondent adduced insufficient evidence to establish his claim. The learned trial magistrate seems to have been influenced by his observation that the Appellant "kept-quiet" when the Respondent made demand for refund.

I have given due consideration to the record of appeal and the submissions of counsel. It is my finding that although the Respondent established a prima facie case in support of the fact that he got less land than he had paid for, he did not adduce sufficient evidence to prove the claim on the balance of probabilities because the prima facie evidence did not

amount to evidence on the balance of probabilities in the face of the denial by the Appellant who had no burden or obligation to show that he did not sell less land as contended by the Respondent. Accordingly, I allow the appeal. The judgement of the trial court is set aside. In its place the suit is dismissed with costs to the Appellant. It is so ordered.

Dated at Kakamega this 8th day of November, 2007.

G. B. M. KARIUKI

J U D G E