



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NUMBER 26 OF 85**

KUNA RONO 1ST APPELLANT

JOEL TOM 2ND APPELLANT

VERSUS

KIPSANG LANGAT RESPONDENT

JUDGMENT

The Respondent, Kipsang A. Langat, filed suit against the Appellants, Kuna A. Rono and Joel Arap Tum, seeking to have five acres excised from parcel number 34B Manaret Scheme registered in the name of 2nd Defendant and transferred to him (the Respondent). The Respondent claimed that he had purchased the said five acres from the 1st Defendant in the year 1980 and had paid the full purchase consideration of Ksh.43,500/-. The Appellants did file a defence. The 1st Appellant admitted that he had been paid Ksh.43,500/- by the Respondent for the purchase of five acres in his parcel of land known as plot number 30. The 2nd Appellant however denied that he had purchased nineteen (19) acres from the 1st Appellant. He (the 2nd Appellant) averred that he has purchased twenty four (24) acres from the 1st Appellant (which included the five acres claimed by the Respondent) which had been transferred to him by the 1st Appellant and therefore he was the registered owner of the said parcel of land. During the hearing of the case in the lower court, the Respondent was allowed to amend his plaint indicating the description of the parcel number in dispute to be 'Plot number 30' instead of 'Plot number 34B.'

After hearing the case, the trial magistrate found in favour of the Respondent and entered judgment for the Respondent. He found that the Respondent had proved his case on a balance of probabilities. He awarded the Respondent five acres from parcel number Kericho/Manaret/30. The Appellants were aggrieved by the said decision and duly filed their appeal to this court.

The Appellant raised several grounds of appeal in their memorandum of appeal. The grounds of appeal may however be summarized on two broad issues; the Appellants were aggrieved that the trial magistrate had entered judgment in favour of the Respondent contrary to the provisions of the Land Control Act which required that the requisite consent had to be secured for the purchase of agricultural and failure of which rendered such agreement null and void. The Appellants were further aggrieved that the trial magistrate had unilaterally called and admitted evidence after the parties to the suit had closed their cases and thereafter decided the suit against the Appellants.

At the hearing of the appeal, Mr. J. K. Rono, Learned Counsel for the Appellants indicated that he had served the Respondent for the hearing of this appeal. The Respondent did not however make his appearance in court. This court perused the affidavit of service filed and was satisfied that the Respondent had been properly served. This court ordered the Appellants to proceed with their appeal, the absence of the Respondent notwithstanding.

In his submissions before court, Mr. Rono for the Appellants submitted that the agreement for the purchase of land between the Respondent and the 1st Appellant was null and void due to the fact that the consent of the Local Land Control Board had not been obtained. It was contended on behalf of the Appellants that although it was stated that the sale agreement for the suit land was entered in October, 1980, no consent was obtained as is mandatorily required under the Land Control Act. Learned Counsel submitted that the suit filed by the Respondent in 1984 seeking to have the said parcel of land transferred to him could not succeed as the consent of the Land Control Board had not been sought and obtained. The Appellants relied on the decision of **Hirani Ngaitha – versus – Wanjiku Munge [1979] KLR 50** to support their argument. In the said case it was held that an agreement in respect of a controlled transaction where consent was not obtained was illegal, null and void for all purposes. The Appellants also relied on two other decisions where a similar holding was made i.e. **Kipkosge A. Yetge – versus – Chuchume Mogeso C.A. Civil Appeal number 90 of 1988 (unreported)** and **Mbuthia Charagu – versus – Kiarie Kaguru C.A. Civil Appeal number 88 of 1986 (unreported)**.

The Appellants further submitted that the trial magistrate had erred in finding for the Respondent without putting into consideration the fact that the sale agreement of the said parcel of land had been rescinded by the 1st Appellant. The Appellants were aggrieved that the trial magistrate had awarded the Respondent the suit land in violation of the law. The Appellants were further aggrieved that the trial magistrate had relied on the opinion of the Respondent's witness (PW2) who was not an expert witness. The Appellant further submitted that the said witness's evidence was not admissible in law. The Appellants further submitted that the verdict of the panel of elders who had made an award in favour of the Appellants was ignored.

Learned Counsel submitted that the proceedings before the trial magistrate were irregularly conducted in that the trial magistrate had admitted new evidence after the close of the Appellants' and the Respondent's case. It was contended that the trial magistrate had altered the judgment after it had been delivered and thus substantially changed the thrust of the finding made. It was further submitted that no evidence had been adduced to prove that there existed a conspiracy to defraud the Respondent as between the 1st and the 2nd Appellants. The Appellants urged the court to allow the appeal and set aside the judgment of the lower court and substitute it with a judgment of this court dismissing the Respondent's suit with costs.

This is a first appeal. As the first appellate court in civil cases, this court is mandated to re-considered and re-evaluate the evidence adduced before the trial magistrate's court and reach its own independent conclusion. In re-evaluating the evidence this court is required to consider both matters of facts and of the law but should always have in mind the fact that it neither saw nor heard the witnesses as they testified (**see Selle – versus – Associated Motor Boat Co. Ltd [1968] E.A.123**). In the instant appeal, the Appellants were aggrieved by the finding of the trial magistrate on basically two points, firstly, they were aggrieved that the trial magistrate had found in favour of the Respondent without putting into consideration the fact that the consent of the Land Control Board had not been sought and obtained. Secondly, the Appellants were aggrieved that the trial magistrate had irregularly conducted the proceedings and admitted new evidence after the parties had closed their pleadings and further after judgment had been read to the parties.

I will address the two aspects of the appeal, beginning with the first point stated hereinabove. In his evidence before the trial court, the Respondent testified that he had purchased five acres from the 1st Defendant sometime in October, 1980. The agreed purchase consideration was Ksh.43,750/-. The Respondent paid the 1st Appellant the said purchase consideration in full. The Respondent testified that after he had paid the said purchase consideration, the 1st Appellant showed him the portion of land on the ground. The said five acres was hived off from the 1st Appellant's parcel of land. The Respondent fenced it. He cleared the bushes and ploughed the land. Later he learned that the said parcel of land had been transferred to the 2nd Appellant. The said five (5) acres had been include in the nineteen (19) acres which had been purchased by the 2nd Appellant, making the total acreage purchased by the 2nd Appellant to be twenty four (24) acres.

The 1st Respondent did not deny selling the said five acres to the Respondent. He however stated that

after selling the said parcel of land to the Respondent, he consulted his family who rejected the said transaction. The 1st Appellant testified that he was ready to refund the purchase consideration to the Respondent. In any event, the 1st Appellant testified that he transferred the said parcel of land to the 2nd Appellant who was registered as the owner thereof. The testimony of the 1st Appellant was confirmed by the 2nd Appellant. He testified that he had purchased twenty four (24) acres from the 1st Appellant in 1980 for a consideration of Ksh120,000/-. The 2nd Appellant had paid the full purchase consideration to the 1st Appellant. The said parcel of land had been transferred to him and at the time of the hearing of the case, he was the registered owner of the same.

I have re-evaluated the said evidence adduced. The Respondent does not deny that consent of the Local Land Control Board was not sought and obtained. The Respondent confirmed as much in his testimony. The parcel of land that the Respondent purchased was agricultural land. Any sale of agricultural land is subject to the consent of the Land Control Board being secured. The decisions relied on by the Appellants, that is, *Hirani Ngaithe Githire – versus – Wanjiku Munge [1979]KLR 50, Muthia Charagu – versus – Kiarie Kaguru C.A. Civil Appeal number 87 of 1986 (unreported) and Kipkosge A. Yetge – versus – Chuchume Mogeso C.A. Civil Appeal number 90 of 1988 (unreported)* all confirm the correct position of the law, that is, any transaction in respect of agricultural land is null and void for all purposes if the consent of the Land Control Board had not been sought and obtained pursuant to section 6(1) of the Land Control Act (Cap 302 Laws of Kenya). It does not matter that the Respondent, in part performance of the agreement, took possession of the parcel of land in question. The only remedy available to the Respondent is the refund of the purchase consideration. In this regard, this ground of appeal filed by the Appellants must succeed.

On the second point, as stated earlier in this judgment, when the Respondent filed his plaint, he described the suit land as plot number 34B Manaret Scheme. During the hearing of the case, the Respondent's plaint was amended and the suit land was described as plot number 30 Manaret Scheme. The trial magistrate took the evidence of the Respondent and the Appellants. The parties to this suit then closed their respective cases. Judgment was reserved for the 13th of February, 1985. However before the said judgment could be delivered, the trial magistrate, on his own motion, summoned the Senior Settlement Officer Sotik, Mr. D. Y. Kamuren to come to court and give his testimony.

On the 29th of May, 1985, the said officer testified before court. The record does not show whether the parties to this suit were allowed to examine or cross-examine the said settlement officer when he testified in court. For all intents and purposes, it appeared as if the said officer gave his testimony at the prompting of the trial magistrate. The said witness was not even sworn. After the said officer concluded his evidence, the trial magistrate reserved the judgment for the 26th of June, 1985. The judgment was delivered as scheduled. In the last paragraph of the said judgment the learned trial magistrate ruled that;

“It appears that through treachery of the 1st Defendant, the Plaintiffs’ five acres bought from the 1st Defendant was included in plot number 34B and registered in the name of the 2nd Defendant Joel Arap Tum. This should be corrected by a sub-division of plot number 34B and the 5 acres therein should be transferred to the Plaintiff as I find the plaintiff has proved his case on a balance of probabilities.”

That ought to have been the end of the matter. However on the 31st of July, 1985, again, without any formal application being made by either party to this suit, the trial magistrate made the following order:

“On seeing further the file of the Senior Settlement Officer, Sotik, it is evident that plots number 34A and 34B have been amalgamated into title number Kericho/Manaret/30 and registered in the name of the 1st Defendant Kipngetch Kuna Arap Rono. In the circumstances it ordered that the subdivision mentioned in the judgment in this case be amended to accept plot number 30 Manaret Settlement Scheme presently on (sic) the name of the 1st Defendant from which five (5) acres be excised and registered in the name of the Plaintiff Kipsang Arap Langat. If the 1st Defendant refused to sign the sub-division, transfer and mutation forms, the court do so on his behalf.

This order be served on the;

(a) Land Registrar

(b) District Settlement Officer, Sotik

(c) Parties”

I have deliberately set out the orders issued by the said Learned magistrate to highlight the various errors that the trial magistrate fell into his zealous attempt to reach a particular finding in favour of the Respondent.

The trial magistrate amended his judgment without a formal application for review being made. He further entered judgment in favour of the Respondent for a parcel of land which he had not specified in his plaint. The trial magistrate went out of his way and summoned evidence from a witness even after the parties to this suit had closed their respective cases. It seems that the trial magistrate set out to achieve a particular finding in favour of the Respondent. In doing so, the trial magistrate threw the procedure established by the law out of the window; He literally took over the proceeding from the parties to the suit. He forgot that the parties had closed their respective cases and that what was expected of him was a judgment; not the summoning of a witness to clarify a certain point which he thought would assist him to reach a certain finding.

Courts are impartial arbiters of disputes. Courts are not supposed to enter into the ring of conflict and assist one party in the conduct of his case. Further, courts are bound to deliver judgments and rulings based on the evidence that the parties have chosen to present before it. It is not the duty of the court to address deficiencies of litigant's case by calling witnesses to fill up the gaps that became apparent during the trial. When a court does any of the above, it ceases to be a court and becomes an interested party. In the present case, the trial magistrate erred in calling a witness, without the consent of the parties after the case had been closed. He also erred in entering judgment for the Respondent contrary and beyond the pleadings that the Respondent had filed in court. In the circumstances therefore, I do find merit in the submission made by the Appellants that the trial magistrate irregularly and unprocedurally conducted the trial and thus arrived at the erroneous decision entering judgment against them.

For the reasons stated hereinabove, the appeal filed by the Appellants must succeed. The appeal is consequently allowed. The judgment entered for the Respondent on the 26th of June, 1985 and irregularly amended on the 31st of July, 1985 is hereby set aside and substituted by the judgment of this court on the following terms:

(i) The sale transaction of parcel number 34B (later amended to be part of Kericho/Manaret/30) being an agricultural land measuring five (5) acres or thereabout between the 1st Appellant and the Respondent is null and void for all purposes since the requisite consent was not sought and obtained as required by the mandatory provisions of the Land Control Act.

(ii) The sum of Kshs.43,750/- paid by the Respondent to the 1st Appellant as purchase consideration is hereby ordered to be refunded to the Respondent. The said sum shall be refunded together with interest at the usual court rates from the time the agreement was entered into (i.e. 1980).

(iii) Any Changes to the Land Register made pursuant to the said judgment of the lower court is set aside.

(iv) In view of the circumstances of this case, there shall be no orders as costs both in the lower court and on this appeal.

DATED at KERICHO this 8th day of June, 2005

L. KIMARU

JUDGE

8.6.2005

Coram: Before Kimaru – Judge (at Kericho)

Court clerk – Bett

Mr. J. K. Rono for the Appellant

N/A for the Respondent.

ORDER

Judgment read and delivered at Kericho in court.

L. KIMARU

JUDGE