REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 58 of 2004

BETWEEN

JACOB GITONGA ……..…….. APPELLANT

AND

KIRAMBURI M'NABEA …….. RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate's Courtat Maua dated

19.8.2004 in
Maua PMCC No. 14 of 2003 (Mr. G. Oyugi, R.M.)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the Resident Magistrate (Mr. G. Oyugi) delivered on 19.8.2004. In the case in the lower court, the appellant and respondent were plaintiff and defendant respectively. I shall refer to them as plaintiff and defendant for ease of this judgment.

By the plaint dated 23.1.2003 and filed in court on the same day, the plaintiff sued the defendant claiming the following reliefs:-

(a) Kshs. 15,000/= being refund of purchase.

(b) Costs of this suit and interest

The plaintiff's case was that the defendant who was well known to the plaintiff offered to sell to the plaintiff one (1) acre of land for Kshs. 15,000/=. The land is situated in Muringene. That the plaintiff paid the sum of Kshs. 15,000/= after the parties entered into a written agreement which was executed before the Assistant Chief of Itulu sublocation.

The agreement for sale was produced as P exhibit 1. The agreement, dated 2.2.2002 provided that the one (1) acre fallow piece of land situated at Neirene was to be sold for Kshs. 15,000/= which payment was acknowledged by the defendant. The agreement was duly witnessed by Jacob Ngolua, Zakaria and Geofrey Kithia M'Munjuri. The plaintiff testified that despite the fact that he had met his part of the bargain, the defendant had declined to transfer the one acre to the plaintiff.

The plaintiff called one witness Jacob Ngolua who testified as PW2. PW2 testified that he witnessed the agreement for sale of land between the plaintiff and the defendant during which the defendant was paid

the sum of Kshs. 15,000/= being the purchase price. PW2 was not aware that the defendant had transferred the land to the plaintiff.

The defendant filed a statement of defence, admitting that he agreed to sell to the plaintiff one (1) acre of land at the agreed price of Kshs. 15,500/= which amount he also acknowledged receipt of. The defendant however denied that he had refused to transfer the land to the plaintiff. He averred that the land was awaiting to be given numbers before he could effect the transfer. At paragraph 5 of the statement of defence, the defendant averred as follows:-

> **"The defendant went to visit the land before making the agreement before the assistant chief Itulu sub location and he agreed to purchase the same."**

I note that though the averment at the above quoted paragraph refers to the defendant as having visited the land, it is clear to me that the reference should have been to the plaintiff because it is the plaintiff who agreed to purchase the land.

The defendant also denied that the plaintiff was entitled to the refund. He averred that he had sold the land to the plaintiff and proceeded to show him the actual portion on the ground for cultivation.

The plaintiff did not file a reply to the defendant's statement of defence.

The learned trial magistrate dismissed the plaintiff's claim against the defendant and found that the defendant was not in breach of the agreement between him and the plaintiff.He also found that since there was no time frame within which the sale transaction was to be completed the defendant could not be held liable in breach particularly because the plaintiff had been shown the land which the learned magistrate found he could take up pending issuance of the title deeds.

The defendant's evidence was brief. He testified that after he had sold the land to the plaintiff, the plaintiff declined to take it. He testified further in cross-examination that the one (1) acre was supposed to be lived off from the main land which measured more than three (3) acres. He also testified that no beacons were placed on the land to mark out the one (1) acre that was sold to the plaintiff but that, that notwithstanding, the land was not being tilled.

DW2, Zechariah M'Munyi testified that he is the one who took the plaintiff to the defendant's shamba before the deal was clinched. That the plaintiff agreed to buy the land after he had been shown his portion but that after a while, the plaintiff made a demand for the refund of the purchase price. As far as DW2 was concerned, the defendant had not refused to transfer the land to the plaintiff. The plaintiff appealed against the whole of the learned trial magistrate's judgment and set out six (6) grounds of appeal, namely:-

> 1. That the learned senior resident magistrate erred in law and infact in failing to find that the appellant is entitled to refund of the purchase price as Kshs. 15,000/= despite having found that the same was paid by appellant to the respondent.
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> 2. That the learned senior resident magistrate erred in law and fact in failing to order that the respondent do transfer the contentious land parcel when available after having found that the purchase price had been paid by the appellant.
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> 3. That the learned senior resident magistrate erred in law and infact in failing to follow substantial justice rather than being guided by undue regard to technicalities against the appellant.
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> 4. That the learned senior resident magistrate erred in law in failing to find that there is a dispute between the appellant and the respondent and thus directing what ought to happen to the land subject matter and consideration.

5. That the leaned senior resident magistrate erred in law and in fact in being guided by extraneous factors before dismissing the appellant's suit with costs.

6. That the judgment of the learned magistrate is against the weight of the evidence adduced.

I have myself carefully considered the evidence on record and the submissions by both counsels for the appellant and respondent during the hearing of the appeal. Taking all the circumstances of this case into account, I am satisfied that the learned trial magistrate was perfectly right in dismissing the appellant's claim against the respondent. It is not in dispute that the plaintiff bought one (1) acre of land out of the unmarked and undemarcated portion of land owned by the respondent. The uncontroverted evidence by the respondent is that the appellant was taken to the ground and shown the portion of the land that he was to buy from the respondent and that he agreed to pay for the same after this visit. The appellant was asked to take up that portion and to start working on the same. He has not done so. The appellant's contention that the respondent has refused to sell the land is not supported by evidence.

I find no evidence of fraud on the part of the respondent as against the defendant. As correctly observed by the learned trial magistrate no particulars of fraud were pleaded by the appellant. Further, I find no evidence on record that the learned trial magistrate considered any matters extraneous to the case before him. Having visited the land in an area that was not alien to the appellant, I have no doubt in my mind that the appellant knew exactly what he was buying – a portion of land which had no title deed and which was yet to be demarcated. The appellant contended that it had been a year since the agreement for sale between him and the respondent was made and that for that reason according to Mr. Kirima who appeared for the appellant both in the lower court and at the hearing of the appeal, then the appellant was entitled to sue.

I find that the appellant had no basis for filing the suit and further that by virtue of the provisions of the Law of Limitations Act, Cap 22 Laws of Kenya, and in view of the very vague terms of the agreement of sale which the appellant contended had been breached by the respondent, I find no reason to interfere with the judgment of the learned senior resident magistrate. I would only add that the appellant should take up possession of his one acre of land. I further order that as soon as the titles are available in respect of the whole land from which the one (1) acre was to be lived the respondent should then effect transfer of that one acre into the appellant's name.

In the result, I dismiss the appeal with costs to the respondent.

It is so ordered.

Dated and delivered at Meru this 28th day of July 2005.

RUTH N. SITATI

JUDGE

28.7.2005