



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Civil Appeal 9 of 2001

JAMES ITHAGU KABUI APPELLANT

VERSUS

PETER MWANGI KIBUI RESPONDENT

**(Appeal from original Judgment in Senior Principal Magistrate's Court at Murang'a
in Civil Case No. 6 of 1999 dated 23rd January 2001 by Ms Wanjiku F. F. –S.P.M. –
Murang'a**

J U D G M E N T

James Ithagu Kabui, (hereinafter referred to as the appellant) is aggrieved by the judgment of the Senior principal Magistrate Murang'a which dismissed the appellant's suit against Peter Mwangi Kabui (hereinafter referred to as the Respondent).

The appellant's claim was that he entered into an agreement with the Respondent for the sale of 2 acres out of land known as Loc. 8 Theri/423, and that the appellant paid a consideration of Kshs.240,000/= leaving a balance of Kshs.40,000/= which it was agreed would be paid upon transfer of the 2 acres. Pursuant to the agreement, the appellant took possession of the suit land from 1st January 1996 and caused substantial developments thereon.

It was contended that in breach of the agreement the Respondent entered into the suit land commenced picking the appellant's tea and destroying other crops. The appellant therefore filed the suit against the Respondent seeking orders for either transfer of the 2 acres of land out of Loc. 8/Theri/423 or in the alternative an order for refund of all the purchase monies plus penalty agreed upon in the agreement.

The appellant and two other witnesses testified in proof of the appellant's case. Their evidence was briefly as follows:

The appellant testified that he entered into an agreement with the Respondent for the purchase of land in land parcel No. Loc 8/Theri/423. Initially the appellant was to buy 1 acre but following further negotiations it was agreed that the appellant was to purchase 2 acres of the land. The appellant paid the Respondent a total of Kshs.260,000/=. The appellant testified that he took possession of the land from 1995 when he started picking tea from a portion of about 2 acres. It was agreed that the land was to be transferred to the appellant after the finalization of a succession cause. Contrary to the agreement the Defendant prevented the appellant from using the land, and in fact threw the appellant out of the land.

Francis Waweru Mwangi the assistant Chief of Theri sub-location testified that the parties in the case went to his office on 20/12/96 they wanted to make an agreement for leasing of 3,000 tea bushes he testified that the parties had an agreement dated 11th December, 1995 for sale of the land. He testified

that the Appellant was to pay Kshs.20,000/= for the tea bushes and that he was to start picking on the 1st January 1997.

Samuel Kiurire Gichia a clerk at the firm of R.M. Kimani advocate also testified on behalf of the appellant. He testified that in 1995 both parties went to their offices seeking to have a sale agreement drawn. A sale agreement dated 15th February 1995 (produced as Exh. 1) was drawn in the office and both parties signed the agreement in the presence of the clerk. On 28/7/95 another agreement (Exh. 2) was signed and on 6/6/97 yet another agreement was signed in which the Respondent acknowledged receipt of Kshs.260,000/= for 2 acres of land. The witness testified that the Respondent received about Kshs.240,000/= in his presence.

In his defence the Respondent denied having entered into any agreement with the appellant for the sale of land or having agreed to put the appellant into possession of the suit land. The Respondent maintained that he had only leased 1800 tea bushes to the appellant which lease expired on 28th February 1999 and therefore the appellant had no right to use 2 acres in land parcel Loc.8/Theri/423.

In his evidence the Respondent testified that on 23/12/94 he entered into an agreement with the appellant for the appellant to lease 1800 tea bushes for 2 years at a fee of Kshs.36,000/=. On 13/1/97 the agreement was extended for a period of one year. There was another agreement for the year 1998 for another one year. Respondent maintained that the lease ended on 28/2/99 by which time the appellant had paid Kshs.60,000/=. The Respondent denied having gone to the offices of R.M. Kimani advocate or having signed any agreement there.

In her judgment the trial magistrate found that the appellant had failed to prove that there was any sale agreement for sale of land between him and the Respondent she therefore dismissed the appellant's case. I have carefully reconsidered and evaluated the evidence which was adduced before the lower court. The evidence adduced in proof of the appellant's case was rather disjointed and inconsistent. While in his plaint the appellant averred that he paid the Respondent a consideration of Kshs.240,000/= for the sale of the land leaving a balance of Kshs.40,000/=. The appellant's evidence was that he paid the Respondent a total of Kshs.260,000/=.

While the appellant in his evidence in chief only talked about buying the land he conceded under cross examination that he had in fact entered into a lease agreement with the Respondent for lease of 1800 tea bushes, though he maintained they were not in the same land which he was buying.

Francis Waweru Mwangi the assistant chief who testified on behalf of the appellant also testified that when the parties went to see him they wanted to make an agreement for leasing of tea bushes to the plaintiff, although the parties had a sale agreement from R.M. Kimani's office. The evidence of the assistant chief is consistent with that of the Respondent concerning the lease of tea bushes.

As regards the agreement of sale alleged to have been signed in the office of R.M. Kimani. The advocate was not called to testify to confirm that he actually drew the agreement. Moreover although the agreements are indicated as having been signed in the presence of R.M. Kimani (as per the rubber stamp) Samuel Kimirire Gichia who was a court clerk in Mr. Kimani's office testified that he is the one who witnesses the signing of the agreement. It is obvious that there was contradiction. The evidence adduced fell short of proving that there was a proper agreement executed by the parties, or that the appellant paid the Respondent Kshs.240,000/= as consideration.

It also appears from the evidence that the Respondent did not have title to the land purported to be sold and this was within the knowledge of the appellant. He did not therefore have a valid title to transfer to the appellant, nor was there any consent from the land control Board for any transfer or dealing in land known as Loc.8 Theri/423.

I find that the evidence adduced before the trial magistrate fell short of establishing the appellant's case. The order for dismissal was therefore justified. I therefore find no merit in this appeal and do dismiss it.

Since the Respondent did not attend court for the hearing of this appeal, I shall award no costs.

Dated signed and delivered this 8th day of December 2005.

H. M. OKWENGU

JUDGE