



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 83 OF 1997**

**PHILLIP MWENZE MUMO ::::::::::::::: APPELLANT**

**VERSUS**

**MWIVITHI KAKULA IVULA ::::::::::::::: RESPONDENT**

**J U D G E M E N T**

The appellant herein was the defendant in PMCC 212/95 Kitui Court. The respondent was the plaintiff in that case. Judgement was entered against the appellant when an award of Ksh. 20,000/- was made against him for breach of contract and the appellant is aggrieved by that judgement and has filed the appeal dated 19.11.1999.

The claim arose out of a contract of sale of land where the appellant agreed to sell a piece of land to the Respondent for a sum of 17,000/-. The respondent paid to appellant Ksh. 16,400/- as part of the purchase price leaving a balance of 600/-. The respondent blamed the appellant for failing to perform his part of the sale agreement and filed the suit in lower court claiming Ksh. 17,400/-, general damages for breach of contract, costs of the suit and interest. At the trial judgement was entered for plaintiff by consent on prayer 2 for the liquidated sum of 17,400/-. The case proceeded to hearing in the claim for general damages.

The appellant cites five grounds of appeal in his memorandum which are that the Magistrate erred and misdirected himself in awarding the general damages when in law such damages are not available, that the magistrate imposed his opinion in total disregard of the evidence and that there was no evidence to support the plaintiff's findings; there was no evidence to support the award of Ksh. 20,000/- and should have dismissed the respondent's case.

The appeal proceeded to hearing ex parte the court having satisfied itself that the respondent had been acting in person was properly served and did not show up for the hearing.

At the hearing in the lower court, the plaintiff/respondent said that they entered into a sale agreement with the appellant for Kshs. 17,000/-. This was in the year 1993. He said that he paid Ksh. 16,400/- leaving a balance of 600/- and the appellant sold the land to other people even before showing him exactly where the piece of land was. According to the appellant the respondent said he no longer needed the land and that is why he sold it to someone else and agreed to refund the respondents money. Each blamed the other for not fulfilling his part of the contract.

Though it is not specifically pleaded, it seems that this was agricultural land. The parties are farmers from Mbitini Location Kolwake sub location. The contract was allegedly entered into on 8.5.1993. This being agricultural land, any transaction relating to the land is governed by the Land Control Act. S. 6 of the said Act provides that the consent of the Land Control Board has to be sought within 6 months of the making

of the contract. In this case it is not clear when the sale was frustrated but there is no evidence that the parties to the contract ever sought the consent of the Land Control Board. Without the consent of the Board this sale agreement was null and void.

The same agreement being void, there was nothing that the respondent could enforce and claim damages for breach of contract. Under Section 7 of the Land Control Act in such a case, the only recourse the respondent had was to claim the amount paid to appellant as a civil debt. Indeed in the same case, the parties agreed on the liquidated damages and the issue was settled. The respondent was entitled to nothing more.

The Magistrate misdirected himself in awarding general damages for award of contract as the same were not awardable. The amount of damages awarded were also arbitrary. There is no basis for the award of Ksh. 20,000/-.

Accordingly the court quashes the lower court's judgement awarding Kshs 20,000/- to the respondent as damages for breach of contract and it is set aside. This appeal is allowed with costs to the appellant.

Dated, read and delivered at Machakos this 29th day of June, 2004.

**R. V. WENDOH**

**JUDGE**