



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 162 OF 1998**

**KANGETHE NGURUNA ..... PLAINTIFF**

**VERSUS**

**KANGETHE GITHUA ..... DEFENDANT**

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

In a suit filed in the court of the Resident Magistrate at Thika on 16th March, 1996, the plaintiff Kangethe Nguruna sought refund of Kshs.110,894/= costs of the suit and interest on the principal amount and on costs.

He alleged he had, on 10th January, 1995 entered into an agreement with the defendant over the purchase of a portion of the latter's land known as L.R No. KINGONGO/NEMBU/984 measuring 2 acres at the agreed price of Kshs.120,000/=.

That though the said plaintiff had paid to the defendant a sum of Kshs.110,894/= and inspite of notice to sue, the defendant had refused to transfer the said portion of land to the plaintiff, hence the suit for the refund of the purchase price so far paid.

A defence filed herein on 28th April, 1995 denied the plaintiff's claim but in a counter claim stated that the defendant had in fact intended to sell to the plaintiff his piece of land known as KINGANJO/MUTATI/T.98 for Kshs.70,000/=.

That the parties had agreed that instead of the plaintiff paying Kshs.70,000/= he would construct a two roomed stone house for the defendant. But the plaintiff, had not to the date of the proceedings constructed the said house or paid Kshs.70,000/=.

That instead, the plaintiff had started cultivating parcel of land KIGANJO/MUTATI/T.98 and there was a likelihood that he would dispose of or charge the said property much to the disadvantage of the defendant's interest.

That the defendant had given the plaintiff notice of the intention to sue but the latter had neglected, refused or and failed to construct the two roomed house for the defendant or pay the sum of Kshs.70,000/=.

In the meantime, the same plaintiff was alleged to have collected title deed for plot number KIGANJO/MUTAT/T.98 from the defendant for safe keeping but that during January 1985 he had wrongfully transferred the same plot to himself without the defendants' consent and/or knowledge.

The defendant sought various prayers in the counterclaim including an injunction to restrain the plaintiff, his servants and/or agents from dealing in whatever manner, in the suit plot, otherwise known as KIGANJO/MUTATI/T.98, an order directing the plaintiff to construct a two roomed stone house for the defendant or alternatively the plaintiff be ordered to pay the sum of Kshs.70,000/= together with interest at the rate of 19% p.a. from 24th January, 1985 until payment in full, and, in the alternative the plaintiff be ordered to transfer back to the defendant the said parcel of land KIGANJO/MUTATI/T.98. There was also a prayer for the costs of the counterclaim.

The case came before the Resident Magistrate on 28th November, 1995, 30th November, 1995 and 5th December, 1995 when it was heard and judgement delivered and she dismissed the plaintiff appellants' case with costs.

On the other hand, she granted prayer (a) of the counter claim and that the plaintiff pays to the defendant Kshs.70,000/= or transfer plot number KIGANJO/MUTATI/T.98 to the said defendant, hence this appeal.

The plaintiffs evidence was that the defendant had agreed to sell him one acre out of land known as KIGANJO/NEMBU/984 at Kshs.60,000/= per acre and that if the plaintiff had more money the defendant could add him more land.

That the plaintiff paid the defendant Kshs.110,000/= for the land but that the latter had not transferred to him the 2 acres from the land. He claimed it or a refund of Kshs.110,000/= so far paid.

But that in the same agreement the defendant sold to the plaintiff plot number KIGANJO/MUTATI/T.98 for Kshs.30,000/= which the latter paid and the plot was transferred to him and registered in his name on 24.1.85.

He denied that he was supposed to construct a house for the defendant and stated that the defendant had given him titles to the land and the plot on 24.1.85 but that he returned the title to the land to the defendant when a dispute was taken to the assistant chief.

That he was paying the defendant the price of the land by installments and this is why he had been given the title to the land to keep as security.

The defendant, on the other hand stated that the plaintiff was his councillor sometime before and used to assist him.

That he had helped him to get a new identification card.

He said he wanted a person to construct a two roomed stone house for him and that in turn he would give that person the plot – KIGANJO/MUTATI/T.98 or sell the plot and pay that person the money.

That at the time the plaintiff assisted the defendant obtain a new identity card, he authorized him to change the title to plot number T.98 into his name but that the plaintiff had not paid for it.

That there were many rats in his house so he asked the plaintiff to keep his identity card as security.

That the dispute went to the area assistant chief because the plaintiff had refused to construct a house for him. The defendant denied that the plaintiff paid him any money and asked for Kshs.70,000/= if the plaintiff failed to build a house for him.

In cross examination, he said he went to Kiambu to change the identity card not the transfer of land and that he only gave titles to the plaintiff to keep after leaving Kiambu lands office.

He called one witness to support his evidence about a dispute held over this land at the Assistant Chief's home (office) and the plaintiff was ordered to return the title for the land to the defendant.

Any agreement for the sale of agricultural land as was the case herein, where the plaintiff wanted to buy 2 acres of land out of KIGANJO/NEMBU/984 he was to obtain the consent of the Land Control Board within 3 months – or longer period with leave of the court, from the date of the agreement – which was not done here – (see Section 6 of Land Control Act Cap 305 Laws of Kenya).

In any case, being an agreement for the sale of land evidence of sale of such land in writing is mandatory. See Section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya. No such agreement was produced in the case subject to this appeal.

However both parties agreed that the defendant handed over titles to both the plot and the land to the plaintiff.

The plaintiff's version was that the titles were handed to him because he had firstly bought the plot and paid the requisite price of Kshs.30,000/= for it, while title to the land (L.R No.984) was given to him because he had paid as much as Kshs.110,000/= to purchase 2 acres therefrom – hence he was keeping this title as security for his money.

The defendant said very little about this. He said he had given title to the plot to the plaintiff because he wanted the latter to construct a 2 roomed house for him on the land – but said absolutely nothing about why he gave him the title to the land.

Let's take it that the defendant had wanted to sell his plot so as to get money to build a home for himself on the land or that he did not get the buyer but got the plaintiff who agreed to put up the house with his own money and take the plot. They entered into no agreement over this and there are no plans drawn to show the type of house to be put up and that the plaintiff has not even started a foundation for the house; yet here is the defendant giving title to his plot and land to the plaintiff as security for the construction of the same!

Does this kind of action appeal to anybody? Or is it in accord with what a normal transaction of this nature could be?

To me the answer is in the negative.

To anybody in the rural area this is a big project and the intended contractor should be seen to have gotten involved in it for some form of payment to start.

The plaintiff is not shown to have been a builder to be given this project. He is not shown to have been prepared for it, say by starting the foundation and/or bringing materials, on site, if one had been shown to him, to be given title to the land as security.

Surely what happened herein was much more than what the defendant told the lower court and if the learned Magistrate cared to go deeper into it, the only proper inference to make of the evidence would have been to hold that the defendant had intended to sell part of the land and the whole plot to the plaintiff and to accept the plaintiff's evidence as true.

The defendant even accepted authorizing the plaintiff to change the title of the plot from his name to that of the plaintiff why would he do that if he had not been paid any money? It cannot be true that he did so because he expected the plaintiff to pay for it or to construct for him a house (2 bedroomed) on his land.

I would not say the plaintiff changed the title to the defendant's plot to himself by means of fraud because if this were so, the defendant would have done much more than only coming to the lower court with a civil claim.

In any event, no frauds or fraudulent acts were alleged and/or particularized in the counterclaim as would be required by law.

To my mind this dispute was a little bit complicated and required a little more investigation in order to reach to its root cause mainly because the defendant told the lower court half the truth or no truth at all.

In my mind the plaintiff appellant made out a case for a refund of his Kshs.110,000/= as I think there was ample evidence that there was an agreement for the defendant to sell him part of land L.R. No. KIGANJO/NEMBU/984 and the said plaintiff-appellant had paid some money on account thereof and that is why the defendant gave him title to this land as security. Security because the defendant – respondent had received part of the purchase price, to wit Kshs.110,000/=.

Such vital document as title deed could not have been given out for nothing or that because there were rats in his house. This issue of rats was just one of the stories made up to deny the plaintiff – appellant his rightful entitlement.

Of course there is the issue of the sale agreement having started in 1985 but as it was agreed the sum of Kshs.110,000/= was paid in installments some of these installments could as well have been made within the limitation period thus reviving those installments made outside it. No party specifically touched on this issue but I am of the view this is one coincidence of payments by installments.

The matter before the Magistrate was somehow difficult, made more so by the evidence adduced, thus making it difficult for her to come to grips with the real situation.

But given what I have outlined herein before, I feel the decision against the appellant in the lower court was against the weight of evidence.

I would allow the appeal, set aside the lower court order and replace it with one entering judgement for the appellant for Kshs.110,000/= with costs and dismissing the counterclaim with costs.

Costs of this appeal shall be paid to the appellant by the respondent.

Interest on Kshs.110,000/= will accrue from the date of the lower court judgement.

Orders accordingly.

Delivered this 15th day of March, 2002.

D.K.S AGANYANYA

JUDGE