



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT MOMBASA

CIVIL APPEAL NO. 72 OF 1997

JUDITH OKOKI (EUNICE HINGUKI).....APPELLANT

=VERSUS=

JAMES MUREITHI NGIRIRI.....RESPONDENT

(From the Judgment of Senior Resident Magistrate J.D.C. Kombe in the

S.R.M.C.C. No.57 of 1996 at Lamu)

J U D G M E N T

The Respondent filed a civil claim in Lamu Senior Resident Magistrate's Court in 1996, claiming inter alia, for specific performance of an Agreement of Sale of Land dated the 29.5.1999. He as well prayed that the court executes all the transfer documents to effect a legal transfer of the piece of land to him. He further asked for a Discharge of Charge which had been created by the Defendant in favour of Settlement Fund Trustee where a sum of Kshs.20,000/- still remained unpaid. The Respondent also sought prayers that the court do sign application for consent of the Land Control Forms in case the Defendant fails to do so as well as prayed for vacant possession of the land the subject of the Sale Agreement aforesaid; General damages of Kshs.2000/- per annum with effect from 1.12.1991; Special damages of Kshs.1,500/-; costs and interest at 3% per annum on general damages from the judgment date and finally, any other relief.

The facts, in brief, are that the Respondent herein (Plaintiff in the lower court) entered into an Agreement of Sale dated 29.5.1991 for the purchase from the Defendant (now deceased) a piece of land known as Plot No.115 on Lake Kanyatta Settlement Scheme in Lamu, at an agreed purchase price of Kshs.60,000/-. He paid Kshs.40,000/- immediately and remained with a balance of Kshs.20,000/- to pay on 30.11.1991. The Plaintiff claimed that he could not pay the said sum of kshs.20,000/- because the Defendant refused and/or failed to go for it despite many requests from him. It is in evidence also that before the Respondent filed his claim, some things happened between the original defendant and the Respondent herein that need a mention. It is therefore common ground that in September 1991 the original defendant (now deceased) who is the son of the Appellant, became difficult and refused to accept the balance of the purchase price. He also refused to give vacant possession of the land to the Respondent. He refused to apply for the Local Land Control Board consent as well as refused to sign the Transfer of Land forms, despite the fact that he was strongly requested to do so by the District land Adjudication Office and the Settlement Officer, Lamu. In 1995, the original Defendant offered to refund to the Respondent the sum of Kshs.40,000/- earlier received by him as part of the purchase price. It would appear that the original defendant had decided not to go on with the fulfillment of the contract. It is significant to note also that the Respondent herein also appears to have decided to receive back his money. He received the refund of Kshs.45,000/- by a Barclays Bank cheque No.301694 dated 28.4.1995.

However, when the cheque was presented to the bank, it was dishonoured. It was after the dishonour of the cheque that the Respondent decided to file his claim in court. He did not seek for the refund of his money as would be expected but sought for specific performance of the original contract, i.e. claim for the specific piece of land Plot No.115 Kenyatta Settlement Scheme, together with the other reliefs aforementioned. The original defendant filed his defence through Nyamu Nyaga & Co., Advocates. He denied the sale of his land and denied entering into the agreement of sale pleaded. He admitted receiving the sum of Kshs.46,000/- but explained that he was getting a refund from the Respondent of a similar amount he had earlier lent to him. He accordingly denied the alleged contract or breach thereof or any loss or damage whatsoever. He put Plaintiff into strict proof.

It is at this stage in time i.e. on 30.4.1996 that the original defendant, George Gitonga, died, leaving his mother in occupation of the piece of land, the suit property herein. He left behind pending in court a case from which this appeal arises.

On 4.11.1996 when the lower court case came up for a hearing, the Defendant's mother called Judith Ikoki (but the correct name appears to be Eunice Hinguki), attended court and appears to have declared that she wanted to stand in the place of her dead son; whereupon the trial Magistrate Hon. J.D.C. Kombe, decided to fix 3.2.97 as a fresh hearing date. On the hearing date the said (Eunice Hinguki, from the notes of the lower court), told the court that she would wish to go back home to Meru to summon people who would come to court to defend the case. As the Hon. Magistrate notes, the said lady did not explain in what capacity the relatives she was going to bring from Meru would end up appearing in court. But the Hon. Magistrate allowed the said Eunice Hinguki to "stand as the defendant in place of her late son" but refused her adjournment to enable her to go to Meru to bring those who would defend the claim. He straight away treated her as the defendant and proceed to hear the case. The Respondent gave evidence supported by the evidence of his wife. Then Eunice Hinguki gave her evidence defending the claim. It is not on record whether she did so as a personal representative of her deceased son or as a defendant in her own right. She called no other witness as she had not been given an adjournment to bring witnesses.

The Honourable Senior Resident Magistrate's Judgment is dated the 25.9.1997 and it is the subject of this appeal by the new Defendant the said Eunice Hinguki who then lost the case to the Respondent, the original Defendant.

The Appellant attacks the appeal on several grounds some of which were argued together. The main grounds as I understand them are as follows:-

- a) That the learned trial Magistrate erred in joining Eunice Hinguki as a legal representative of the original Defendant her son George Gitonga (deceased) without following the law and without ensuring that she was a legally appointed legal representative of George Gitonga.
- b) That having allowed her to join as party he erred in not allowing her to file independent defence and thus proceeding to hear the case before pleadings were closed.
- c) That the court had no jurisdiction to hear and determine the case.
- d) That the Sale Agreement was null and void for lack of the Land Control Board Consent.
- e) That he admitted inadmissible evidence in form of unstamped documents and admitted evidence without calling the makers.
- f) He erred in striking out the Defendant's defence after the trial was complete without giving the defence opportunity. g) The trial Magistrate erred in not allowing Appellant to call witnesses or those who would legally defend the case.
- h) That the trial Magistrate failed to notice that the Sale contract was invalid, repudiated and could not be specifically enforced.

i) That the trial Magistrate's finding was not proved on the balance of probability.

I will now examine these grounds of appeal.

When the Defendant died, the Appellant was joined into the case by the trial court as the new defendant. She happened to be in court on 4.11.1996 because the case of her deceased son was due for a hearing. The Plaintiff's lawyer sought that she be joined to defend the case because she was in occupation of the suit premises and because she was mother to original Defendant and was willing to be joined.. And thereupon the trial Magistrate joined her in the case as the new defendant. He did not make a finding as to whether she would act as a legal representative or as a defendant on her own right. There is no evidence on the record that after the original defendant George Gitonga died, steps were taken to appoint a legal representative as by the law provided. A "legal representative" is defined under S.2 of the Civil Procedure Act as:-

*"a person who in law represents the estate of a deceased person, .....*".

Appointment of such representative is an elaborate legal process. It is not herein shown to have taken place. It is not a process which the trial Magistrate should have taken for granted. The process of appointment is provided for in Cap.160 of the Laws of Kenya. Under Order XXIII Rule 4(1) the trial Magistrate was entitled to appoint the legal representative of George Gitonga, upon a formal application being made to him, to make her a party. It would only be after such action in compliance with O.23 Rule 4(1) that he would then proceed with suit. It is the finding of this court that merely picking the Appellant in court, whether with the latter's wish or not, and making her a defendant without first establishing that she was a legal representative, as defined above, was not sufficient. His act was an effort in futility in so far as the person he purported to appoint was not already a legally appointed representative. Furthermore, even if it were to be assumed that honourable Magistrate's act was lawful and effective, he was nevertheless under obligation as provided under Order 23 rule 4(2) to give the Appellant as such legal representative, an opportunity to file a fresh appropriate defence suitable to her character as such legal representative, before proceeding with the suit. Also assuming he allowed her to act as a defendant in her own right as the then occupier of the suit property, he similarly needed to allow her an opportunity by explaining to her the import of the new development and would then give her opportunity to amend the defence, if necessary, before the court could proceed. It turned out that the court denied the Appellant both these opportunities and even refused her an adjournment to travel to Meru to bring to court the people who could support her in the case. The court's conduct clearly fatally prejudiced the Appellant in whatever capacity she was joined in the case. Furthermore, as earlier pointed out the appointment of a legal representative of a deceased person is an elaborate process whose jurisdiction is given to the High Court except where special jurisdiction is also given to the lower court by the Chief Justice. The trial Magistrate did not establish that he had the jurisdiction and even if he would establish so, he did not show that he followed the procedure laid down of appointing the Appellant such legal representative under the Law of Succession Act, Cap.160. This disposes of grounds 1 – 3.

It was also argued by the Appellant that the Sale Agreement was void for not being given the consent of the Local Land Control Board. The Land Control Act, Cap.302 requires that any transaction such as Sale of Land must be given consent by the Local Land Control Board within 6 months. The failure to do so would render the transaction void. The evidence adduced before the trial Magistrate was that the original Defendant, George Gitonga refused to apply for the consent and that none had been granted by the time the trial Magistrate heard the case. The Magistrate was aware of this situation. He tried to solve the problem by himself signing the application forms for such consent. He did not even request the Appellant as the new 'Defendant' to do so because he clearly appreciated that upon the death of the original owner of the land in question and in the event that a legal representative had not been appointed no one else had legal authority to do so. Be it as it may, the basic finding of fact was that the Sale Agreement was never given consent by the Local Land Control Board and under S.6 of the Act, it became voidable at the instance of the original Defendant. It was therefore rendered unenforceable in the circumstances of his death. That alone nullified the contract under consideration. The trial Magistrate erred in not reaching this conclusion.

Another ground of appeal was that the trial Magistrate erred in extending the time to go the Land Control Board. It is not disputed that he applied to the Land Control Board several years since the original Sale Agreement was executed and not within the 6 months prescribed. He certainly had no jurisdiction to extend the prescribed period.

A further ground of appeal was that the trial Magistrate erred in law in purporting to strike out the original defendant's filed defence at the time of writing the judgment. He purported the act:- "...at any stage of the proceedings ....." as provided under Order III rule 13 of the Civil Procedure Rules. I hold that the application to strike out should have come from the Plaintiff and at an earlier stage and not from the court itself at the last hour of the proceedings when neither the Defendant nor even the Plaintiff himself knew of such a drastic step. The Magistrate certainly failed to give the Appellant an opportunity to be heard before striking out the pleading. The Magistrate's action was not only totally unjustified, uncalled for, but also against basic rules of natural justice.

Furthermore, he despicably misapplied Order III rule 13. This ground succeeds.

A further ground was to the effect that there was no contract for the court to specifically enforce. It is clearly in evidence that the original Defendant George Gitonga repudiated the sale contract some time in 1995 when he decided to bring the contract to an end. He offered to refund the purchase price as per Respondent's evidence. He drew a Barclays Bank Cheque Number 301694 for Kshs.45,000/- payable to the Respondent who clearly accepted to get the refund. Respondent took it and banked it in his account. Unfortunately the cheque was dishonoured with "refer to draw".

In this court's view acceptance by the Respondent of the cheque in refund of his money, terminated the long and tortuous contract between the parties.

The fact that the cheque was dishonoured did not make a difference and could not rebuild the original contract of sale. All that he could be entitled to thereafter would be refund of his money paid to the Defendant (and possibly, without deciding, damages) and not the piece of land in question.

It is my finding that the trial Magistrate erred in coming to the conclusion that the Plaintiff was, after he accepted to be refunded the purchase price money, entitled to specific performance. This ground succeeds. I have taken time to consider whether or not this is a suitable case in respect of which I should order a re-trial. I have come to the conclusion upon the grounds upon which this appeal is allowed, that if a re-trial is ordered the chances of the Plaintiff getting a judgment of specific performance of the Sale Agreement the subject of this suit, are non-existent. The evidence likely to be adduced during which retrial will unlikely be any different from that already in the record of the lower court. A finding can be made and I do make such finding, that the evidence in the lower court record does establish on the balance of probability that the Respondent (Plaintiff in the lower court case) parted with his Kshs.40,000/-. The contract under which that happened was null and void. If the money is not refunded to him, it will amount to unjust enrichment to the original Defendant (who is now deceased) or to his estate. It is not necessary that the Respondent should file a fresh suit to recover the same where there is adequate evidence upon which to base a decision that the money aforesaid should be refunded. I accordingly think that the estate of the deceased Defendant should refund, especially since the same will benefit from the fact that the land in question will go to it. This appeal is accordingly allowed with the following orders.

#### ORDERS:

1. Appeal is allowed with costs in any event.
2. The Estate of the Defendant George Gitonga to pay Kshs. 40,000/- to the Respondent within a period of 60 days in default the Respondent to be at liberty to execute.

Dated and delivered at Mombasa this 24th day of April, 2002.

D. A. ONYANCHA

## J U D G E

Delivered in the presence of:-

Ndegwa - for Kimani -for Appellant

Wameyo - for Jiwaji -for Respondent