



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 378 OF 94

MUCHONJO MARUGUAPPELLANT

VERSUS

NGUTHIRU PCEA CHURCHRESPONDENT

J U D G M E N T

This appeal arises from the judgment and order of the Senior Resident Magistrate (Mrs. Rachid) delivered on 12th July, 1994 at the Chief Magistrate's Court (Sheria House) Nairobi in Civil Case No. 4347 of 1993.

In that case, the plaintiff, described in the plaint as Nguthuru Pefa Church, a religious organization registered under the societies Act, sought a court order for specific performance of an agreement

entered into between it and the defendant on 15th December, 1989 wherein the latter sold a portion of his land LOC.4/MURUKA/871 measuring 0.2 of an acre to the former.

The defendant, however, refused to transfer that portion to the plaintiff and this gave rise to the case which was filed in the above court on 19th May, 1993 for the prayers per the plaint. A defence filed by the defendant to the suit on 28th June, 1993 denied all the averments in the plaint and put the plaintiff to the strict proof.

The case was fixed for hearing on 10.1.94 and 17th June, 1994 and judgment delivered on 12th July, 1994 wherein specific performance of the agreement was ordered or in the alternative refund of the purchase price of Kshs.34,000/=, money spent on building of the church plus other developments effected on the land plus costs and interest and also general damages of Kshs.10,000/= plus costs and interest.

Out of this decision an appeal was filed in this court on 23rd December, 1994 in a memorandum of appeal which listed 5 grounds of appeal.

These were there were there the magistrate erred in maintaining a suit which was defective on the face of it, that she erred in failing to find that the plaintiff had no locus standi to bring and maintain the suit; that she erred in making an order for specific performance when consent of the Land Control Board had not been obtained, that she erred in awarding Kshs.160,000/= when the same was not proved with admissible evidence and that she erred in awarding general damages of Kshs.10,000/= when the same was not based on any law or precedent.

The special was called for hearing by this court on 24th October, 2002 when counsel for the parties appeared either to present or oppose the same.

Counsel for the appellant repeated verbatim what was contained in the memorandum of appeal while counsel for the respondent submitted that there was overwhelming evidence that the sale agreement was entered in by and between the parties for the

sale of 0.2 acre by the appellant to the respondent that though the respondent was not a legal entity, the contract was performed. That specific performance was not the only remedy granted by the lower court but that there was an alternative remedy in form of an award of damages.

That Land Control Board Consent was not given because the defendant refused to attend the board meeting. Counsel submitted that since the plaintiff paid the purchase price, it was in occupation of the suit plot where it had constructed a church building.

While the appellant counsel prayed that this appeal be allowed, the respondent's counsel prayed that it be dismissed with costs. I have heard counsel's submit on this appeal and also perused the lower court record of proceedings and judgment. I can see this as one of those cases where the court is called upon to assist one or the other of the parties to do what it morally sees as wrong because the law says so.

Counsel for the plaintiff agrees to the key submissions by counsel for the defendant, that no Land Control Board Consent was granted for the agreement entered into between the parties on 15th

December, 1989 wherein the defendant sold the plaintiff 0.2 of an acre from his land known as LOC.4/MURUKA/871 because the said defendant refused to attend the board meeting, and that the plaintiff is not a legal entity.

However, he submits that, nevertheless, the contract was entered into.

But he knows that by Section 6 of the Land Control Act, Chapter 302 of the Laws of Kenya no contract for the sale of agricultural land can be valid without the Land Control Board Consent being applied for and obtained within 6 months of making of the sale agreement, unless, of course, that period is extended. That the contract for the sale of the suit plot was made and signed by the parties or that they both signed Land Control Board forms is not sufficient.

It is true that defendant's refusal to attend the board meeting where such consent should have been given was the main contributing factor to the consent not being obtained and that the consent was not obtained was sufficient for avoiding this contract of sale.

As to the award of special damages, the law is clear. These must be specifically pleaded and strictly prove – see *Ouma v Nairobi City Council* [1976] KLR 297. It would appear when the plaint was drafted in the case subject to this appeal, the plaintiff, so called, strictly wanted no other order except that of specific performance.

This is why there was no specific plea for special damages except the amount used as purchase price,

leave alone refund of expenses for constructing the church on the plot, in the body of the plaint. And even there was no specific amount sought for refund of this purchase price in the alternative prayer, would be expected. A prayer for special damages is granted for a loss already incurred and this is why there should be strict proof thereof to confirm the expenditure incurred by way of production of relevant receipts and documents to establish the same. Nothing of the sort was done in the case subject to this appeal to prove the figure of Kshs.166,000/= which the lower court awarded to the plaintiff.

To make matters worse, the defendant denied selling the plot to the plaintiff although there was a contract of sale properly executed before an advocate and also Land Control Forms signed by both parties.

He instead said he had only leased the plot to the plaintiff for prayer purposes at a monthly fee but did not explain why he had not evicted the church from that plot from 1994 after it only paid rent for 5 months, according to his evidence.

I agree, as the lower court did, that there was a properly executed contract of sale between the parties to this appeal but with so many legal shortcomings as stipulated herein, I would not say there was overwhelming evidence as counsel for the plaintiff put it before this court, to prove the plaintiff's claim on a balance of probabilities. The plaintiff, as cited in the plaint, is not a legal entity as the church as such cannot sue in its name and can only do so through its officers.

This is not mere want of form but a serious legal issue as to whether the church as such had locus standi in the matter.

If this be so, then I cannot say it could be entitled to the orders sought including refund of the purchase price and damages for breach of contract.

Otherwise it has been my view in cases of this nature that if the Land Control Act were amended to provide for general damages for those who pay out money to purchase agricultural land which is eventually not transferred for lack of the consent of the Land Control Board cases of cheating and fraud by intending sellers would be minimized.

Otherwise, with profound regret, I allow this appeal and set aside the lower court order and do hope this hard hearted defendant will give the plaintiff sufficient time to organize themselves before moving out of the plot, if this is his ultimate intention.

There will be no order for costs in the appeal.

Delivered and dated this 30th day of October, 2002.

D.K.S. AGANYANYA

JUDGE