

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 340 OF 1995 (O.S.)

PETER WAWERU WAITITU.....PLAINTIFF

Versus

CYRUS J. KARANJA.....DEFENDANT

J U D G M E N T

On 20th May 1985, Peter Waweru Waititu as vendor and Cyrus Karanja as purchaser entered into an agreement for the sale of a portion of 15 acres of applicants land namely Land Reference No.100291/28. It was a condition of the sale that the consideration would be a vehicle registration No. KUP 865 whose value was agreed at Shs.75,000.00

It is not denied that, the purchaser transferred the said vehicle to the vendor. However, the applicant did not transfer to him, and as a result of which he had a caution registered against the vendor's property namely Land Reference No.14765 on 7th December 1992.

The vendor, (whom I shall refer to as 'the applicant) has now moved this court by way as an Originating Summons. He claims that the purchaser (hereinafter called 'the respondent'), has no right or interest capable of creation by an instrument registrable under the Registration of Titles Act or at all. He also wants the respondent to show cause why the said caveat should not be withdrawn. The application is supported by the affidavit of the applicant, in which he depones that the said caveat was registered against the wrong land as it was not subject to the sale. The application is opposed. In reply thereto, the respondent depones that the registration of number of the property that was subject to the sale was late as changed to LR No. 4765 upon fresh allocations of the former. Suit fact is supported by an annexure to the replying affidavit, which clearly indicates that on 1st September 1986, the applicant was allocated a portion of 12 hectares of the property known as LR 10029/28. He also depones that the said property was never subdivided as originally intended as the applicant changed his mind, and he then lodged and had the caution registered therein to preempt further subdivision and disposal of the property. It is his intention that the caveat stays in place until the applicant complies with his obligations under the agreement for sale.

The subject land is described in the Grant shall be used for agricultural purposes and the residence of the grantee. It is thus land to which the Land Control Act would readily apply.

I am therefore guided by Section 6 of the said Act which make it a mandatory requirement that parts to a transaction such as the one envisaged here which is referred to as a controlled transaction do obtain the consent of the Land Control Board otherwise the transaction is void.

However Section 7 thereof stipulated that:

"If any money or other valuable consideration has been paid in the course of a controlled transaction becomes void under the Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid."

Having handed paid valuable consideration, for a transaction I find is null and void, the respondent was only entitled to recover the value of the said consideration, as a debt from the applicant. He had no right to have the caveat registered against the property. Indeed the applicant's counsel submits that the respondent's claim if any has a recovery of the consideration.

The respondent appeared composed I found his testimony credible and reliable. To my mind he is a victim of circumstances, whose naivete was taken advantage of the applicant. Having taken possession of the motor vehicle the applicant cannot have his cake and eat it.

He who received valuable consideration should not benefit from an illegal transaction. In my humble opinion, the applicant seeks to take advantage of his own wrong and is using the statute as an instrument of fraud. Equity will not permit such a course of conduct. I do order that he pays back an amount equivalent to Shs.75,000.00, being the agreed value for the motor vehicle. I have also taken in account the fact that, had the respondent invested the sum over the years he would have received earned a reasonable return on it over the years. I am of the opinion that an average reasonable rate of return over the period would have been 20% p.a. It is therefore ordered that the applicant shall pay interest on the above sum at 20% p.a. payable from 20th May 1985, being the date of the Agreement for Sale. It was also on that date when the vehicle and its registration documents were handed over to the applicant. Interest shall accrue thereon until payment in full.

The applicant shall also bear the costs of this application.

Dated and delivered this 24th day of May 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of:

Mr. Kimani for the respondent.

Mr. Ongoti for the applicant.