



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAROK**

**ELC APPEAL NO. 3 OF 2017**

**FORMERLY NAKURU HCA NO. 108 OF 2013**

**ISAAC PERE.....APPLICANT**

**-VERSUS-**

**TIMINA LEKENI OSIO.....RESPONDENT**

*(Appeal from the Judgement and decree of the Chief Magistrate court Narok W.N. Njagi dated 17<sup>th</sup> June, 2013)*

**JUDGEMENT**

The Memorandum of Appeal filed herein raises about 19 issues for determination however, the Applicant in his submissions condensed them to 4 grounds as hereunder: -

- i. That the learned magistrate erred in law and fact by declaring the defendant as the bonafide purchaser of land parcel Cis Mara/Oleleshwa /3931(hereinafter called the suit land)
- ii. That the learned magistrate erred by compelling the plaintiff to deliver vacant possession and free access of the suit land to the defendant
- iii. The magistrate erred in law by restraining the plaintiff and his agents from interfering with the suit.
- iv. That the learned magistrate had erred in holding that the defendant had forged or presented an irregular letter of consent to the Land Control Board.
- v. That the magistrate erred in holding that the sale agreement dated 7/10/05 was legally void and enforceable.
- vi. That the learned magistrate erred in taking into account extraneous issues in rendering his decision.

From the above grounds it is my assumption that he abandoned the other 13 grounds out of the 19 grounds that were contained in the appellant's memorandum of appeal.

The background to this appeal arises from the judgement and decree of the Chief Magistrate Narok based on the court's view that the Plaintiff had failed to proof his case and compelled the defendant to deliver the suit property. It is the appellant's view that he did not receive the full purchase price and the respondent went ahead to process the transfer and thus there was no completion.

The appellant further contends that the trial court having failed to take into account the non-completion of transaction went ahead and ordered the plaintiff to deliver vacant possession and allow access of the land to the defendants and consequently gave restraining orders against the appellant from interfering with the suit land.

The appellant in his memorandum of appeal stated that the defendant had forged and presented an irregular letter of application to the Land Control Board and that he never attended the land Control Board and executed the necessary transfer documents to complete the transaction.

On the sale agreement it is the appellant's contention that he did not receive the full purchase price and without the same the entire contract of sale was void and hence non-enforceable.

In his response to the submission by the Appellant on the grounds of appeal, the respondent stated that the learned magistrate had found the orders sought by the appellants were in vain and will not serve any useful purpose which was not challenged at all.

On the consent to transfer, the respondent seems to apportion blame on the part of the appellants who during the proceedings before the trial court he did not sign the consent but also stating that he obtained the consent to sub-divide and transfer the suit land.

On the allegations of forgery, it is the respondent's contention that the same was not raised by the appellant in the supplementary record of appeal and that the respondent is only accused of collecting title before payment of the balance of the purchase price and therefore the issue of forgery is an afterthought.

The respondent lastly contends that parties to a suit must be bound by their pleadings and the appellants having admitted to have received the necessary consents and later claim fraud is needless and he thus prayed that the appeal be dismissed.

I have read the record of appeal and the submissions made by the respective counsel on record. From the onset I must point out that the jurisdiction of this court on appeal are only limited to matters of law, however, from the memorandum of appeal and the six grounds upon which the appellants submitted they were certain factual grounds upon which the appellant seeks the court's intervention namely grounds 1,4 and 6 of the submissions filed and the issues for determination before me are:-

1. Whether the magistrate erred in not finding that the defendant had forged and presented an irregular letter of the land control board and
2. Whether the magistrate erred in finding the sale agreement dated 7/10/05 as void and unenforceable.

On the first issue it is not disputed that there was a sale agreement between the parties in respect of the suit land, it is the appellant's contention that the non-completion of the purchase price would render the agreement void and unenforceable. The respondent submits that she had paid the entire purchase price and it was within the authority of the advocates who handled the transaction that she went ahead to effect the transfer and collect the title deed.

From the supplementary record of appeal, a copy of the sale agreement was annexed at page 5. The consideration for the land was kshs. 800,000/- of which kshs. 400,000 was payable on the signing of the agreement and the balance to be paid on or before 7<sup>th</sup> November, 2005. From the records at pages 7-11 there is an acknowledgment of receipt of payment totaling to kshs. 350,000/- which was paid on diverse dates between 3<sup>rd</sup> March, 2006 to 3<sup>rd</sup> May, 2007 leaving a balance of kshs. 50,000/- which the appellant and the respondent both agreed as the outstanding amount. However, at page 11 there was a bankers cheque of kshs. 50,000 payable to one Issack Pere the appellant herein.

From the above it is evidently clear that the respondent had paid the total consideration for the land and I agree with the learned magistrate as he correctly states in his judgement that the defendant having paid the full purchase price and the appellant having received the same the contract between them was fully consummated and with no evidence tendered to prove that the respondent varied and/or breached the contract this ground falls and I thus find that the contract between the appellant and respondent was indeed proper and capable of enforcement.

On whether the respondent had forged the consent document it is my finding that the standard of proof of forgery is higher, furthermore I do not see the reason why one will forge transfer documents and consent to transfer when he has dutifully paid the entire purchase price for the suit land.

In my mind there was no motivation whatsoever for the respondent to engage on the same. From the supplementary record I did not find any evidence either documentary or by way of witness that the appellant had led before the trial court to have the said allegations proved. On his non-attendance before the Land Control Board it would have been easy for the appellant to produce the minutes of the Land Control Board or seek to have the chairman or any member summoned to substantiate his claims of which he elected to do so.

Having disposed off the issues that I identified for determination, I find that the appeal lacks merit and I thus dismiss the same with costs.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 2<sup>nd</sup> day of July, 2019**

**Mohammed Noor Kullow**

**Judge**

**2/7/19**

In the presence of:

Counsel for the parties

CA:Chuma