



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**ELCA NO. 57 OF 2019**

**THE RECEIVER MANAGER, BULLEYS TANNERIES LIMITED.....APPELLANT**

**VERSUS**

**PETER NGANGA CEGE.....1<sup>ST</sup> RESPONDENT**

**SOLOMON IGECHA CEGE.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Ruling and orders issued on the 19/9/2019**

**by Hon Moses Wanjala – SRM in CMCC No 781 of 2013, Thika)**

**RULING**

1. This Appeal arises from the trial Court Ruling and Orders issued on 19<sup>th</sup> September 2019 in Thika CMCC No. 78 of 2013 in favor of the 1<sup>st</sup> Respondent.
2. The Appellant filed his memorandum of appeal dated 3<sup>rd</sup> October 2019 against the impugned Ruling containing nine grounds of appeal as follows;
  - a. **THAT** the Learned Magistrate erred in law and in fact in Ordering that the property known as L.R. No. Thika Municipality Block 5/459 (hereinafter referred to as “the Suit Property”) be transferred to the 1<sup>st</sup> Respondent notwithstanding the fact that the 1<sup>st</sup> Respondent has never paid the full purchase price or complied with the provisions of the Sale Agreement dated 16<sup>th</sup> July 2001.
  - b. **THAT** the Learned Magistrate misguided himself in Law and in fact in placing reliance on the Judgment dated 27<sup>th</sup> September, 2018 of Hon. C.A. Otieno Omondi in **CMCC 781 of 2013 Peter Ng’ang’a Cege vs. The Receiver Manager, Bulleys Tanneries and Another.**
  - c. **THAT** the Learned Magistrate misdirected himself in fact and in law in placing reliance on extraneous evidence and matters and as a result he arrived at a wrong decision.
  - d. **THAT** the Learned Magistrate erred in law and in fact in disregarding the Appellant’s Grounds of Opposition and submissions thereto.
  - e. **THAT** the Learned Magistrate misdirected himself on the facts and the law and based his findings on wrong and irrelevant considerations.
  - f. **THAT** the Learned Magistrate erred in law and in fact in finding that the 1<sup>st</sup> Respondent proved his case to the required standard.
  - g. **THAT** in all the circumstances of the case, the finding of the Learned Magistrate are totally insupportable in law.
  - h. **THAT** the Learned Magistrate was openly biased in favour of the 1<sup>st</sup> Respondent.
  - i. **THAT** in all the circumstances of the case, the Learned Magistrate failed to do justice before the Appellant.

3. To place the appeal in context, the 1<sup>st</sup> Respondent filed his claim vide an amended Plaintiff dated 7/10/2014. He averred that on 16/7/2001, he entered into a sale agreement for the purchase of the suit land and was issued with a subdivision scheme approval for the land in the year 2001. That upon completing payment in 2002, he learnt that the Appellant had irregularly issued the 2<sup>nd</sup> Respondent a title to the suit land. He thus sought declarations that all transactions involving the Appellant resulting to the registration of the 2<sup>nd</sup> Respondent as the registered owner of the suit land be cancelled and the suit land reverts to his name. Alternatively, he sought full compensation for the market value of the suit land together with costs and interests.
4. The Appellant opposed the claim vide his defence dated 18/11/2013 whilst the 2<sup>nd</sup> Respondent failed to enter appearance and file his defence. Accordingly, judgment in default against him was entered on 8/10/2015.
5. The suit proceeded for hearing with rival parties calling sole witnesses. Upon analysis of the evidence adduced before it, the trial Court was satisfied that the 1<sup>st</sup> Respondent had proven his claim and on 27/9/2018 entered judgment in his favor by declaring the transaction between the Appellant and 2<sup>nd</sup> Respondent null and void and that the suit land be registered in the 1<sup>st</sup> Respondent's name.
6. The Court record shows that the said Judgment has never been appealed against or reviewed whatsoever.
7. On 1/4/2019, the 1<sup>st</sup> Respondent filed an application dated 8/1/2019 principally seeking the Court to order the 2<sup>nd</sup> Respondent to transfer the suit land to the 1<sup>st</sup> Respondent and in default the Executive officer of the Court be directed to execute transfer documents in his place. Reliance was placed on the aforesaid judgment and decree in favour of the 1<sup>st</sup> Respondent that remained unexecuted.
8. The Appellant objected to that application vide the grounds of opposition dated 18/7/2019. He argued that the 1<sup>st</sup> Respondent was not entitled to the orders sought because he had not paid the full purchase price of the suit land as contained in the sale agreement dated 26/7/2001. The Court rendered its Ruling on the said Application and allowed it in its entirety. The trial Court agreed that indeed there was an unexecuted judgment in favor of the 1<sup>st</sup> Respondent and there being no appeal against it, the ground of oppositions raised could only be entertained on appeal. That said Ruling is the subject of this appeal.
9. The Appellant's memorandum of appeal is clear that the appeal impugns the Ruling and Orders issued on 19/9/2019 but his Record of appeal states otherwise, that it's an appeal against the Judgement delivered on 27/9/2018.
10. Parties canvassed the appeal by way of written submissions.
11. The Appellant filed his submissions dated 28/9/2021 through the firm of Kimondo Gachoka & Company Advocates. The Appellant largely submitted on the facts leading to the suit in the trial Court.
12. As to whether the 1<sup>st</sup> Respondent paid the full purchase price of the suit land, the Appellant submitted in the negative. It was categorical that the 1<sup>st</sup> Respondent only paid a deposit of Kshs 125,000/- and the balance of Kshs 175,000/- remains owing to date. In addition, that the receipts dated the 5/9/2001, 27/3/2002 and 27/6/2002 contained in the 1<sup>st</sup> Respondent's list of documents did not emanate from the Appellant and that no such payments were received from the 1<sup>st</sup> Respondent. That its conclusion is that the 1<sup>st</sup> Respondent failed to meet and/or perform its obligations under the agreement of sale.
13. That having not satisfied the Court as its obligations in the agreement, he was not entitled to specific performance. That the only remedy available to the 1<sup>st</sup> Respondent was a refund of the deposit paid less 20% being liquidated damages.
14. It was its case that the Learned Hon Magistrate erred in law and fact when it ordered that the suit be transferred to the Respondent despite noncompliance with the provisions of the agreement of sale with respect to payment of the purchase price.
15. That as a result, the Court Ruling dated 19/9/2019 is erroneous for non-completion of the sale agreement and ought to be set aside. Reliance was placed on the cases of **William Kazungu Karisa vs Cosmos Abgore Chanzera (2006) eKLR**, **Kihuba Holdings Ltd vs Charo Karisa Ngulu [2021]eKLR** among others.
16. On the other hand, the firm of Muturi Njoroge & Co. Advocates filed submissions dated 13/7/2021 on behalf of the 1<sup>st</sup> Respondent. He was emphatic that there is currently no appeal against the Judgment that prompted the filing of the application dated 8/1/2019. That the Appellant's application seeking leave to appeal out of time i.e ELC Misc App. No. 40 of 2019 was withdrawn on 4/11/2019 alongside the draft memorandum of appeal. That as such the Appellant's grounds of appeal as drawn are not founded in law as the trial Court judgment has not been impeached through an appeal or review. That the appeal is a non-starter and should be dismissed with costs.

### **Analysis & Determination**

17. In my view the sole issue for determination is whether this appeal is merited.
18. The duty of an Appellate Court like in this case is to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions. Furthermore, this Court is bound to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand.
19. Having outlined the case before the trial Court and the ensuing Judgment, it is not in dispute that the said Judgment was in favor of the

1<sup>st</sup> Respondent herein. In an attempt to enjoy the fruits of his judgment, he moved the Court vide his application dated 8/1/2019 whose Ruling is the subject of this appeal.

20. A reading of the Ruling indicates that the application was opposed by the Appellant despite the fact the order sought was directly against the 2<sup>nd</sup> Respondent to transfer the suit land to the 1<sup>st</sup> Respondent. That in default of the 2<sup>nd</sup> Respondents complying with the order to transfer, the Executive Officer be at liberty to execute the relevant transfer documents. The 2<sup>nd</sup> Respondent did not participate in the hearing of that application and the Learned Magistrate noted as much.

21. Both parties herein filed their rival submissions. The Court gave due consideration to them and pointed out the Appellant's opposition can only be raised on appeal and not in that application. The Court reiterated that it was not only called to issue orders but ensure that such orders are complied with. The Court allowed the application in its entirety.

22. Did the Court err in any way in reaching its finding above? I am afraid not. The Court appreciated that there was indeed an unexecuted judgment and decree in favor of the 1<sup>st</sup> Respondent. The orders sought were against the 2<sup>nd</sup> Respondent against whom judgment in default had already been entered. In fact, the Appellants counsel on 25/7/2018 acknowledged the fact that Judgment in default was already in place against the 2<sup>nd</sup> Respondent.

23. The arguments of the Appellant impugning the Judgement are in my view misplaced. I say so because on record there is a record of appeal against the Judgement dated the 27/9/18. The instant appeal, in my considered understanding is with respect to the Ruling of the 19/9/2019 allowing the execution of the judgement. Up until now the Judgement of 27/9/18 has not been successfully appealed, set aside and or vacated. I find no ground to fault the Learned Magistrate for allowing lawful execution proceedings to ensue against a valid judgement.

24. In the end, the Court is not persuaded that the application is for granting. The appeal is unmerited and is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

25. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 28<sup>TH</sup> DAY OF OCTOBER 2021 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**DELIVERED ONLINE IN THE PRESENCE OF;**

**KABUGU HOLDING BRIEF FOR MS THUKU FOR THE PLAINTIFF**

**DEFENDANT 1 – ABSENT**

**DEFENDANT 2 – ABSENT**

**MS. PHYLLIS MWANGI – COURT ASSISTANT**