



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL APPEAL NO. 14 OF 2018**

**(Being an appeal arising from Judgment and Decree in Kitale Chief Magistrate's Court in Civil Suit No. 257 of 2017 delivered by D. Wangeci (SRM) on 30/5/2018)**

**RAMAKER GEROLD LAMBERTUS.....APPELLANT**

**VERSUS**

**PAUL MABWA OKWOMI.....RESPONDENT**

**AND**

**EVERLYNE NASIMIYU WANYONYI.....DEFENDANT**

**J U D G M E N T**

1. The issues raised in this appeal are clear and straight forward. On 4/2/2015 the Respondent entered into a sale agreement with the Applicant as well as one Everlyne Nasimiyi Wanyonyi where the Applicant purchased one acre out of **Land parcel No. Kwanza/Namanjalala Block 5/1087** for a total amount of Kshs 500,000/= which amount he received . The parties were thereafter to pursue the conveyancing process so as to have the said parcel excised and transferred to the purchasers.
2. The same was not effected leading to the filing of the suit at the lower court for the refund of the purchase consideration together with attendant costs totalling Kshs 665,000/=.
3. The Respondent filed a defence denying the same and stating that the appellants frustrated the whole agreement because of their internal family feuds. He further contended that the Appellants gave him some professional work to do i.e drawing of house plans which todate they have failed to pay. He gravated for the leave of the court to file a counterclaim.
4. The Appellants thereafter filed an application for summary judgment which the trial court disallowed on 30<sup>th</sup> May 2018 and which has necessitated this appeal.
5. When the matter came up for hearing the Respondent who was acting in person indicated that he needed time to pay the amount but mid way, he changed his mind hence the court's order that the appeal be heard.
6. The centrality of the appellant appeal is whether the sale agreement presented to the trial court had been rendered null and void by want of the consent of the Land Control Board taking into consideration that this was an agricultural land. If so did the Respondent breach the agreement?
7. From the pleadings filed on record, there is no contention that there was a sale contract between the parties as stated above. Its also clear that the Respondent was paid the total purchase consideration.
8. The trial court seemed to have been convinced that the defence filed by the Respondent raised triable issues which necessitated that the matter should go to full trial.
9. I have read the Respondents defence very well. Save that he has raised the issues of Professional Services he offered to the Respondents, there is no doubt that he received the money. More significantly, he did not file any counterclaim so as to claim his fees against the Respondents. The same simply remains mere allegations.
10. The substantive issue is the fact that the Sale agreement was frustrated by the lack of the requisite consent from the Land Control Board as envisaged by the Land Control Act Cap 302 Laws of Kenya. The alternative therefore was for the parties to extent the time by mutual

consent or the refund of the purchase consideration.

11. Clearly, the Respondent cannot have both the Land and the money. He has to choose one. He could not peg his professional services on the sale agreement. He was and infact still is free to demand the same outside the contract noting as found above that he did not counterclaim.

12. Without, therefore, wasting much judicial time, I find the appeal meritorious. I note that despite being granted opportunity the Respondent did not submit orally or in writing.

13. The Appeal is hereby allowed. The lower court ruling dated 30<sup>th</sup> May 2018 is set aside. The Respondents Paul Mabwa Okwomi is hereby ordered to pay the decretal amount together with costs and interest within the next 30 days from the date herein as prayed for in the plaint.

14. The Appellants shall have the costs of this appeal and the cost at the lower court.

Orders accordingly.

**Delivered, signed and dated at Kitale this 3<sup>rd</sup> day of April, 2019.**

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**H.K. CHEMITEI**

**JUDGE**

**3/04/19**

**In the presence of:**

**Ms Munialo for the Appellant**

**Respondent – Absent**

**Court Assistant – Kirong**

**Judgment read in open court.**