REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CIVIL APPEAL NO. 37 OF 2014

CHARLES MUNENE NGOCHI.........................APPELLANT

VERSUS

MARY MUGURE..RESPONDENT

(Being an Appeal from the Orders made on 26th July 2013 by Hon. S.N. Ndegwa - P.M. Kerugoya in Civil Suit No. 268 of 2000)

JUDGMENT

This Appeal arises from the orders by the Principal Magistrate Hon. S.N. Ndegwa issued pursuant to a Notice of Motion application dated 3rd July 2009 brought under *Order XX Rule 11 (2) Order XX1 Rule (1) CPR and Section 63 (e) and 3A CPA*. The Appellant had sought the following orders:

(1) That the defendant/respondent be allowed to liquidate the balance of the principle decretal amount of Ksh. 80,000/= in instalments of Ksh. 10,000/= per month with effect from 31st July 2009 and a similar amount for the subsequent five months per month until payment in full.

(2) That in the interest of justice, the interest on the principle amount and costs herein be computed afresh and the undated decree and consent order dated 19/9/2005 on record herein be set aside.

(3) That there be a stay of execution of the decree herein pending the hearing and determination of this application.

(4) That the costs of this application be in the cause.

The said application was based on the affidavit of the appellant sworn the same date and grounds apparent on the face thereof. The application was opposed with a replying affidavit sworn by the respondent/plaintiff. After considering the said application and the materials placed before him, the trial magistrate rendered herself on 26/7/2013 by dismissing the same with costs. The appellant was aggrieved by the dismissal order and filed the present Appeal citing the following grounds of Appeal:

(1) That the learned magistrate erred in both law and fact by refusing to exercise her discretion judiciously to the detriment and prejudice of the defendant.

(2) That the learned magistrate erred both in law and fact by failing to appreciate that the agreement of sale of land was null and void since no consent had been sought and or given by the Land Control Board within the statutory time period.

(3) That the learned magistrate erred both in law and fact by holding that interest could accrue from an agreement of sale of land that was essentially null and void and further more an award which was statutorily barred by Section 7 of the Land Control Act Cap. 302.

(4) That the learned magistrate erred in law and fact by failing to comprehend that the consent order that awarded interest which was barred by statute was an agreement contrary to the policy of the Court and therefore arrived at a wrong decision.

(5) That the learned trial magistrate erred in law and in fact by failing to appreciate that the consent on the interest arising from the purchase price provided in the sale agreement had been entered through misrepresentation or ignorance of the law, by the advocates for the parties.

(6) That the learned trial magistrate erred in law in failing to appreciate that the consent order awarding interest statutorily barred was aimed at defeating or circumventing the law and that a consent order cannot legalize what the law has already

declared to be illegal and therefore arrived at a wrong decision.

(7) That the learned trial magistrate erred in law in failing to appreciate that the Court has inherent jurisdiction, in the interest of justice to set aside all orders made contrary to policy of the law and without jurisdiction.

(8) That the learned trial magistrate erred in law and fact in failing to comprehend that consent order cannot confer jurisdiction to the Court where none existed.

(9) That the learned trial magistrate erred in law in failing to comprehend that the law does not apply retrospectively.

(10) That the learned trial magistrate erred in law and fact in failing to take cognizance of the case law put to her in the submissions of the defendant.

The genesis of this suit as indicated from the proceedings can be traced back to 16th February 1999 when the parties herein entered into an agreement for the sale of the property known as Title No. GICHUGU/SETTLEMENT/SCHEME/1295 at a price of Ksh. 130,000/=. It was a term of the said agreement that the respondent who was the purchaser was to pay the appellant (seller) Ksh. 80,000/= and the balance of Ksh. 50,000/= would be paid upon acquiring consent from the Land Control Board. It is common ground that no consent of the Land Control Board was sought and/or obtained within six months from the date of the said agreement. Subsequently, vide a plaint dated 21st November 2000, the respondent filed a suit against the appellant seeking the following orders:

(a) Refund of Ksh. 80,000/= together with interest at a rate of 35% per annum from 16th February 1999.

(b) Payment of Ksh. 19,500/= as expenses.

(c) Costs of the suit.

(d) Interest on (a) and (b) above.

(e) Any other relief the Court may deem fit to grant.

On 19th September 2005, the trial Court adopted a consent order that had been compromised by the parties as a judgment of the Court which read as follows:

"By consent judgment for plaintiff at Ksh. 237,000/= which is inclusive of interest. Plaintiff to get costs of the suit".

Aggrieved by that judgment, the appellant filed the Notice of Motion dated 3rd July which gave rise to the impugned order. The issues that arise from this Appeal which were also the subject of the application dated 3rd July 2009 are as follows:

(1) Setting aside consent judgment.

(2) Interest of 35% per annum.

(3) Whether the sale agreement was void for lack of consent.

(4) Who will bear the costs of this Appeal?

ISSUE NO. 1

In the case of ***Samuel Mbugua Ikumbu Vs Barclays Bank of Kenya Limited (2015) e K.L.R,*** The Court of Appeal stated the following on setting aside consent judgment:

"What are the circumstances that would lead to a consent order or judgment which has been adopted as an order of the Court to be varied or set aside?

The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts …………"

Based on those reasons, this Court as an appellate Court is enjoined to inquire and determine whether there are sufficient grounds for setting aside the consent order adopted by the trial Court on 19th September 2005. The appellant contends that the interest of 35% from 16/02/1999 is contrary to the provisions of the *Land Control Act Cap. 302 Laws of Kenya* and the policy of the Court.

ISSUE NO. 2

The parties agreed to the interest of 35% per annum and when they were recording the consent, they agreed to Ksh. 237,000/= inclusive of interest. The appellant is not claiming that the interest should be computed afresh since it was contrary to the provisions of the Land Control Act Cap. 302 and against the policy of the Court. When the parties entered into the contractual agreement for land parcel No. GICHUGU/SETTLEMENT/SCHEME/1295 on 16th February 1999, they also agreed voluntarily and freely on the default clause should any party fail to fulfil their respective contractual obligations. The parties are bound by the terms they mutually agreed upon in the contract. In the case of ***NATIONAL BANK OF KENYA LTD VS PIPEPLASTIC SAMOLIT (K) LIMITED (2001) e K.L.R,*** the Court of Appeal held:

> ***"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved".***
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> ***This case was decided on 8th June 2001. And later on 28th June 2002 in the case of AJAY INDRAVAN SHAH VS GUILDERS INTERNATIONAL BANK LTD CIVIL APPEAL NO. 135/2001 (2002) 1 E.A. 269. The Court of Appeal held that the provisions of Section 26 (1) of the Civil Procedure Act are applicable only where the parties to a dispute have no, by their agreement, fixed the rate of interest payable. If the parties by their agreement have fixed the rate of interest, then the Court has no discretion in the matter and must enforce the agreed rate UNLESS it is shown in the usual way that either that the agreed rate is illegal or unconscionable or fraudulent.***
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> ***From these two judgments, it is clear that the Court can interfere even where parties have agreed on a rate of interest as long as it is shown that the rate is illegal, unconscionable or fraudulent. From the evidence before the learned trial magistrate, there is no evidence of illegality or fraud …….***
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> ***An interest of 50% PER MONTH was agreed on. This calculates to an interest of 600% PER ANNUM. Even the financial institutions which are authorized to charge interest do not charge those kinds of rates. The agreement was drafted after the respondent had already been given the cash and taken it to school. This bargain between the appellant and respondent is found by this Court to be unconscionable in the sense that no man in his senses and not under delusion would agree to such an interest rate. Even no honest or fair man would make such an offer to a friend. This rate is so unreasonable and oppressive to the respondent, even though they had agreed to it. The appellant took advantage of the respondent's desperate situation to fleece him".***

It is trite that a Court of law will not interfere with a contract entered into between two consenting parties and the interest agreed upon unless the same is illegal, unconscionable or fraudulent. An interest rate of 35% per annum cannot in my view be considered unconscionable, illegal or fraudulent.

ISSUE NO. 3

Section 8 (1) of the Land Control Act Chapter 302 provides as follows:

> ***"An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six (6) months of the making of the agreement for the controlled transaction by any party thereto; provided that the High Court may notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason to do so, upon such conditions, if any, as it may think fit".***

Again, **Section 7** of the same Act provides**:**

> ***"If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this 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, but without prejudice to Section 22".***
>
> ***Pursuant to the provisions of Section 6 of the Land Control Act, there must be consent to transfer. If no consent was sought and obtained, the agreement between the parties become null and void after six months pursuant to Section 8 of the Land Control Act. That agreement cannot be enforceable in law and the only remedy for a controlled transaction that has become null and void is for a refund, recoverable as a debt pursuant to Section 7 of the Land Control Act".***

Therefore in this case, the sale transaction became null and void for all purposes as no consent had been given by the Land Control Board within the stipulated period. The other issue I wish to comment is that the orders which the appellant sought in the Notice of Motion dated 3rd July 2009 which gave rise to the impugned decision were discretionary in nature. They are orders that cannot lie on Appeal as of right but a party may seek leave as provided for under ***Order 43 Rule 1 (2) and (3) CPR*** and ***Section 75 CPA.*** There is no application from the record of Appeal compiled by the appellant that he sought and obtained leave to file this Appeal. The Court in the case of ***PETER NYAGA MUVAKE VS JOSEPH MUTUNGA CIVIL APPEAL NO. 86 OF 2015 (NAIROBI) reported in (2015) e K.L.R*** expressed itself on failure to seek leave to appeal from an order and stated as follows:

> ***"Without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules; the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this Court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water".***

I agree with the binding decision by the Superior Court which is applicable to the instant case. Following my analysis and evaluation as shown above, I find this Appeal has no merit and it is hereby dismissed with costs.

DATED, DELIVERED and SIGNED via e-mail at Kerugoya Court this 5th day of June, 2020.

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E.C. CHERONO

ELC JUDGE