



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO.38 OF 2011

JOSEPH ONYANGO MARIKOAPPELLANT

VERSUS

GEORGE ODUORRESPONDENT

(An Appeal arising out of the judgment in Busia SPMC.No.395 of 2004 delivered by M.W. Njagi RM on 15th June 2011)

J U D G M E N T

1. In the Subordinate Court from which this matter arises (Joseph Onyango Mariko (the **Appellant** herein) sued George Oduor (the **Respondent** herein) for the following prayers:

“ a) **For specific performance that land registered no.Bukhayo/ Bugengi/531 be transferred to the plaintiff.**

Alternatively refund of the purchase price of Kshs.7,000/= plus interest at Bank rates of Kshs.25% from 1983.

b) That the defendant do sign all relevant transfer forms and in default the executive officer of this court be authorized to do.

c) Costs”

The Pleadings

2. It was the averment of the Appellant that in 1983 or thereabouts, the Respondent agreed to sale to him the whole of that land registered as Bukhayo/Bugengi/531 (hereinafter the **suit property**) at an agreed consideration of ksh.7000/=. It was the Appellants further averment that the consideration was duly paid but that on 10th May 2004 the Plaintiff learnt of the Defendant’s intention to rescind the agreement and to refund the purchase price.
3. In response the Respondent filed a statement of Defence dated 27th June 2009 in which he averred that the purchase price was ksh.6000/= and not ksh.7000/=. Besides, that he refunded the entire purchase price back to the Plaintiff. This averment would be in total contrast with his alternative Defence that completely denied the existence of a sale agreement.
4. The Defence also raised two Statutory Defences. First, that the transaction was null and void for not receiving the necessary Land Control Board Consent. Secondly, that the suit was time barred by the Limitation of Actions Act (Chapter 22 Laws of Kenya).

The Evidence

5. Joseph Onyango Meriko (PW1) told Court how he bought the land known and described as Bukhayo/Bugengi/531 from the Respondent. In his support he produced a written agreement dated 19/01/1903 and written notes in acknowledgment of the payments made towards the consideration. Although he was to initially testify that he paid the entire purchase price, the last instalment being on 12.6.83, he later in cross-examination conceded that he only paid ksh.6400/=. That the balance of ksh.600/= was to be paid upon transfer. The Appellant stated that he had not paid this balance as the Respondent was away from home and could not be found. In support of her husband's story, Christine Onyango (pw 3) gave similar evidence.
6. The transaction between the Appellant and Respondent received the consent of the Nambale Land Control Board on 28/6/1983 and Vicky Chelangat (PW2), the District Officer of Nambale Division produced the letter of consent.
7. In his statement in Defence, the Respondent confirmed entering the sale transaction for sale of the suit property with the Appellant at a consideration of ksh.7,000/= which was to be paid before he signed the transfer in favour of the Appellant. That the Appellant has not tendered this in full payment. He denied disappearing from his rural home where his six (6) wives reside. He nevertheless testified that he would travel to Nairobi where he worked. He told Court how he refunded to the Appellant the sum of ksh.6000/= in May 2004 by way of a cheque drawn in favour of the Appellants Advocates Fwaya, Nandwa & Co. Advocates. That payment appears to have been returned and so his daughter Rosemary Aseka bought a bankers cheque for a similar amount which was sent again to the said advocates while the civil suit had already been presented. In the end it was his testimony that he was unwilling to complete the transaction even if the balance was tendered as his family had now decided against it.
8. Upon considering the evidence the learned Magistrate entered judgment for the Appellant for refund of ksh.6,400/= with interest from the date of filing suit until payment in full. The above is the evidence in brief for analysis and re-evaluation by this first Appellant Court (Selle –vs- Associated Motor Boat Company Ltd [1968] E.A.123).
9. What are the grounds of Appeal? In a Memorandum dated 12th July 2011 and filed a day later, the grounds are that:-

“1. The Trial Magistrate erred in law in her failure to find that the appellant had satisfied the conditions for specific performance.

2. The Trial magistrate erred in law in failure to find that there was consent from the Land Control Board to transfer the subject matter.

3. The Trial Magistrate erred in law in failure to find and proceed in accordance with the Land Control Act.

4. The Trial Magistrate erred in law in awarding refund of purchase price with interest from date of filing instead of from date of payment.”

5. The trial Magistrate erred in law and fact in considering matters not pleaded or adduced in evidence.

6. The trial Magistrate erred in law that balance of purchase if any had no bearing on the principle of specific performance.

7. The Trial Magistrate erred in failure to award refund of purchase price with interest from 1983 to date of payment.”

10. The thrust of this Appeal, as the Court perceives it, is that the Appellant had made out a case for specific performance and so judgment should not have been entered for refund of the purchase price. It being common ground that there was a valid sale agreement that had received the requisite land control board consent, the crux of the matter would be who was in default of the

Contract of Sale.

11. Again on this all important question this was convergence that the entire purchase had not been paid by the Appellant. The Appellant put the outstanding balance at sh.600/= while the Respondent at ksh.1000/=. The learned Magistrate found, and in my view correctly that the outstanding balance was ksh.600/=. This was on the basis of Exhibits 1(a) (b) and (f) which showed that ksh.6400/= had been paid by the Appellant to the Respondent.
12. It was the evidence and argument of the Appellant that the balance was to be tendered upon transfer of the land but that the Respondent was not available to receive it. The Respondent denied non-availability and maintained that the balance was to be paid before transfer.
13. It must however be remembered that he who asserts has the duty to prove and on this occasion the Appellant was obliged to prove his assertion that the Respondent was not available to receive the balance. But as will be clear shortly the Appellant may have not done enough on this.
14. First he would fall victim to his own pleadings. In paragraph 3 of his Amended plaint, the Appellant stated;

“3. In 1983 or thereabouts the defendant agreed to sale to the plaintiff the whole of land registered no.Bukhayo/Bugengi/531 at the agreed consideration of Ksh.7000/= which amount was paid.” (my emphasis).

As is often said, parties are bound by their pleadings. The Appellant by his own hand had boxed himself into the position that he had in fact paid the entire purchase price of ksh.7000/= in full. And this was not an oversight because he maintained that line in his examination in chief only to retract it when confronted with documentary evidence payments tendered. In his evidence in chief he had said:-

“In 1983 he sold me land. It was L.R. No.Bukhayo/Bugengi/531 we agreed at a price of ksh.7000/= I paid the entire amount.” (my emphasis).

He contradicted that as follows:-

“Shown exhibit 1g reads it on request of defendants counsel. It talks of a balance of ksh.600.00. Yes it seems I remained with a balance of ksh.600.00. I paid him ksh.6400/= balance of ksh.600/= was to be paid on transfer. He does not live at home so I was unable to get him. His wife is alive.”

15. The initial game plan of Appellant was that he had paid the entire purchase price. It is only upon this plan being dismantled in cross-examination that he sought to blame the Respondent for non-completion. On this the Appellant merely stated that:-

“He does not live at home and so I was unable to get him.”

In support of this rather weak evidence was PW3's testimony that

“The seller disappeared from his home so were unable to pay him.”

The Appellant was in my view, obliged to give more succinct evidence of the Respondents non-availability or evasiveness. This Court finds like the learned Magistrate, that the Respondent was in default.

16. An order for refund of what was paid was ordered by the Court because there was no contestation on this by the Respondent. The Respondent had in fact after filing of the suit, attempted to tender the refund. The only question that would follow was whether or not that amount should attract interest and if so as at what rate.
17. When the learned Magistrate found that the Appellant was not entitled to specific performance, it was in my view, also a finding that the default was by the Appellant and not the Respondent. On my own analysis of the evidence I have come to the same conclusion. It being so, the refund offered by the Respondent should not have attracted any interest whatsoever. But as there was no

cross Appeal on the issue, I would not disturb the learned Magistrates orders on interest. Nevertheless, the entire Appeal is dismissed with costs.

F. TUIYOTT

J U D G E

DATED, SIGNED AND DELIVERED AT BUSIA THIS 15TH DAY OF MAY 2014

IN THE PRESENCE OF:

KADENYICOURT CLERK

FWAYA.....FOR APPELLANT

N/A.....FOR RESPONDENT