

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEALNO. 106 OF 2011

WYCLIFFE NYONGESA NAMAMU.....APPELLANT

V E R S U S

EMILY NAFUNA TEMBU1ST RESPONDENT

J U D G M E N T

This is an appeal from the judgment of the Resident Magistrate Kakamega (MR. P. O. OOKO, R.M.) delivered on 4.7.2011. The grounds of appeal are that the trial magistrate ignored the fact that the appellant is the registered proprietor of the suit land No. **BUNYALA/BUDONGA/407**, that the trial court erred in law in holding that the appellant did not pay the full purchase price yet the evidence on record is clear. The decision of the magistrate has caused injustice.

Parties agreed to file written submissions but only the appellant complied. The submissions by counsel for the appellant state that the appellant is the registered owner of the land and produced copy of his title deed. He also produced copies of the sale agreement as well as proof of payment of the purchase price. The record of the trial magistrate shows that only one witness, the appellant, testified. The appellant's evidence was that he bought the suit land and signed a sale agreement with the previous owner SEFERIO TEMBU WASWA on the 26.1.1999. The purchase price was KShs.120,000/= and he was buying 2 acres. On that date he paid a deposit of KShs.25,000/=. On the 6.5.1999 he paid a further deposit of KShs.13,000/=. On 27.5.1999 the seller agreed to add him another extra acre for KShs.60,000/= making the total land sold to be 3 acres. On that date he paid him KShs.60,000/=. This left a balance of KShs.82,000/= which he paid on the 3.7.1999. He was taken to the Land Control Board and later obtained his title deed. Seferio died on the 2.5.2005 and was buried on the suit land. He wanted his body to be exhumed and their house removed from the land.

The trial magistrate evaluated that evidence and dismissed the suit. The court held that the transfer of the suit land to the appellant was shrouded in mystery and was even challenged by the seller in the High Court. I have gone through the pleadings before the trial magistrate. The appellant produced a title deed that is in his name. It was issued on 9.6.1999. The plot number **BUNYALA/BUDONGA/407** is 1.1 hectares. The appellant produced sale agreements and acknowledged of receipt documents purportedly signed before and advocate by the seller. The record shows that Seferio Tembu Waswa filed civil suit number 86 of 2005 before the Kakamega High Court. In his plaint it is indicated that he only sold 1 acre to the appellant for KShs.30,000/=. The appellant used to lease the land before and a copy of lease agreement was also exhibited in an application for injunction before the trial magistrate. The seller contended that the appellant unlawfully transferred the land to himself. The record before the trial court shows that no consent of the Land Control Board was produced by the appellant. The receipts issued by the firm of Azangalala & Company Advocates indicate that they were for court fees, land fees and attestation fees. The receipts also show that they were issued for client's account as opposed to office account. Although the seller's wife is indicated to have signed the sale agreement for the two acres she swore an affidavit on the 4.7.2005 indicating that only one acre was sold. The sale agreement done on the 26.1.1999 indicates that it was for 2 acres. The 2nd agreement dated 27.5.1999 does not refer to the earlier agreement of 26.1.1999. The 2nd agreement does not even indicate whether any deposit had been paid.

The trial magistrate found that the case proceeded ex-parte as the court was informed that ex-parte judgment had been obtained yet that judgment had been set aside. The court evaluated the evidence and

noted that the proof of payment of the balance of the purchase price was not established. I have gone through the record of the trial court show that the case was listed for hearing for several times and was adjourned. Judgment was entered in default of appearance on the 8.5.2007 when counsel for the appellant made an oral application before the court. The judgment was set aside by consent on the same date after counsel for the respondent appeared in court. Thereafter the case was listed for hearing but was adjourned several times. On the 23.5.2011 the case was slated for hearing. Miss Andia, Advocate appeared for the defendant but informed the court she had lost touch with their client and wanted to file an application to cease acting. The case proceeded for hearing the same day without such an application being filed. The proceedings of that day indicate the following:-

“Court: In view of a default judgment having been entered against the defendant on 21.12.2005, I do not think that her counsel really have any right of audience without first setting aside the said default judgment. I therefore direct that this matter shall proceed for formal proof as stated.”

Given the record of the trial magistrate I do find that the case proceeded ex-parte. This was not proper as the defendants were not in court and their advocate had indicated that she wanted to cease acting. The court by its own mistake treated the matter as formal proof but noted that mistake in its judgment although it blamed it on the counsel for the appellant. Counsel for the appellant told the court that the matter was coming up for formal proof. Since the ex-parte judgment had been set aside I do find that the hearing was unprocudral. The defendants were condemned unheard even if no defence had been filed. It is also clear that there was another suit pending before the High Court this being case number 86 of 2005. Counsel for the respondents filed a notice of preliminary objection dated 25.4.2005 indicating that the appellant’s suit was sub-judice as the same issues were pending before the High Court. It is clear that the plaintiff’s suit was filed on the 27.5.2005 as per the court receipt as the plaint does not bear a court stamp. The suit before the High Court No. 86 of 2005 seems to have been filed on the 22.2.2005 although it was stamped by the Chief Magistrate’s Court. The title is that of the High Court and the verifying affidavit also shows that it was meant for the High Court. The stamping of the plaint with the stamp of the Chief Magistrate’s Court was therefore a mistake of the Court and not that of the respondent. Counsel for the respondent also filed the preliminary objection and referred to the suit before the High Court.

From the pleadings and the record of the trial court I do find that the hearing proceeded unlawfully as the defendants were not aware that the case was coming for hearing. Counsel for the respondents ought to have been allowed to withdraw from acting before the suit proceeded. That would have enabled the respondents to be aware that their lawyer wanted to withdraw. There was no evidence that the respondents had been personally served with the hearing date. Further, since there was another matter pending before the High Court the court ought to have heard the preliminary objection first before hearing the case. This was a mistrial as even if the court held in favour of the appellant there would still be the High Court case that was still pending. I do find that the appellant’s case was filed while knowing that the seller had contested the transfer of the property to the appellant in another case.

I find that there was no substantive justice in hearing the matter. I do not wish to comment on the evidence and exhibits produced by the appellant. I do set aside the judgment of the magistrate’s court as the case was heard prematurely. I will not enter judgment in favour of the appellant as there is another case pending before the High Court. I further order that restriction be registered against the suit land plot number **BUNYALA/BUDONGA/407** pending the finalization of the dispute. This file to be forwarded to the High Court and consolidated with High Court Civil Case No. 86 of 2005 as the issues are the same. Since the trial magistrate dismissed the appellant’s application for injunction I do order that status quo be maintained whereby the respondents keep on staying on the suit land pending the finalization of the dispute. The appeal is determined on those terms. Costs shall follow the outcome of the suit before the High Court.

Delivered, dated and signed at Kakamega this 15th day of October 2014

SAID J. CHITEMBWE

J U D G E