



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

Civil Appeal 7 of 2005

FRANCIS MAORE MUCHEKE.....APPELLANT

VERSUS

CHARLES KITHURE AKUABA.....RESPONDENT

J U D G M E N T

The appellant was the defendant at the lower court. The respondent sued the appellant claiming Kshs.60,000/-. The appellant denied the respondent's claim and filed a defence.

When the matter came up for hearing the appellant did not attend. The respondent proceeded with the matter and called no witness.

The facts of the respondent's case are not in dispute. The appellant and the respondent entered into a sale agreement on 30/10/2001 in which the appellant sold 0.20 hectares of parcel No.838 Akithi/Athwana Adjudication area at a purchase price of Kshs.30,000/- which sum the respondent paid. The agreement was reduced down in writing on 30.10.2001. it was term of the agreement that the consent of the Land Control was to be obtained on 29.11.2001; in default the guilty party would pay twice the money i.e. Kshs.60,000/-.

The appellant refused to attend the Control Board for the consent hence the respondent this suit at the lower court claiming immediate payment of Kshs.60,000/- as damages.

The trial court after hearing the case entered judgment in favour of the respondent for Kshs.60,000/- with costs and interest.

The appellant being aggrieved by the judgment of the Principal Magistrate R.N. Kimingi, delivered on 27th January, 2005 in her PMCC 4 of 2002 filed this appeal on 11th February, 2005 setting down the following grounds of appeal.

- 1. *The learned Magistrate erred in law and facts in awarding the respondent damages for breach against the provisions of the Land Control Act(Cap.301) Laws of Kenya.***
- 2. *The learned Magistrate erred in law and facts in deciding the whole case against the law.***

Prior to the hearing of the appeal Counsel sought directions that the appeal be heard by way of written submissions. The Counsel filed their written submissions. I have carefully considered the written submissions. The court has also read the pleadings and the proceedings in this case.

The appellant's contention in his appeal is that the trial court's judgment offends the provisions of the Land Control Act (Cap.302) Law of Kenya in that the land in question in an agricultural land registered under the Registered Land Act (Cap.300) (repealed).

That in the transaction between the appellant and the respondent consent of the Land Control Board was required to be applied for and obtained within 6 months from the date of the contract for transfer to be effected. That the contract became null and void for failure to obtain consent within the stipulated period and as such the respondent was only entitled to refund of the consideration and that he was not entitled to any other claim.

Under Section 6(1) (a) (b), and (c) of the Land Control Act it provides:-

“6. (1) Each of the following transactions -

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

Further Section 7 of the Land Control Act provides:-

“7. 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.”

In addition to the above Section 8(1) of the Land Control Act provides:-

“8. (1) 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 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 so to do, upon such conditions, if any, as it may think fit.”

In the instant appeal, the appellant and the respondent entered into sale agreement on 30.10.2001. The respondent in his plaint and in his evidence averred that since the contract was made consent of the Land Control Board was not applied for and obtained. That by 1/5/2002 the contract between the appellant and the respondent had become null and void. The respondent's remedy as of the time of filing the suit was refund of the purchase price or valuable consideration which he had paid. The money paid is recoverable as a debt. The respondent could not enforce the contract which had become null and void nor could they respondent seek payment of damages.

In view of the foregoing, I find that ground No.1 of the appellant's appeal has merits and is allowed. In the circumstance, the appeal is allowed, the lower court judgments is set aside.

The appellant is awarded costs of appeal and court below with interest.

DATED, SIGNED AND DELIVERED AT MERU THIS 9th DAY OF OCTOBER, 2012.

**J. A. MAKAU
JUDGE**

DELIVERED IN OPEN COURT IN PRESENCE OF:

- 1. MR. Wamathe h/b for appellant**
- 2. Mr. Mwongela for the respondent(absent)**

**J. A. MAKAU
JUDGE**