



REPUBLIC OF KENYA

High Court at Meru

Civil Appeal 107 of 2009

MOSES KINOTI MUGAMBI.....APPELLANT

VERSUS

LAWRENCE KATHIARESPONDENT

(An appeal from the judgment and decree of the Principal Magistrate's court at Nkubu(Hon.S. M. Githinji, PM) dated 7th day of September, 2009 in Nkubu PMCC No.55 of 2008)

RULING

The appellant was the plaintiff at the lower court. The appellant sued the respondent seeking specific performance of the agreement dated 18th July, 2008 for the sale of land measuring 0.50 points of acre(half acre) to be excised from L. R.NO.Abogeta/Lower Chure/948 by the respondent to the appellant, in the alternative refund of Kshs.500,000/- and survey fees of Kshs.25,000/= plus interest at bank and court rates from 18th July, 2008 until the date of payment in full, general damages for breach of contract with costs and interest.

The undisputed facts of the case are that on 18th July, 2008 the appellant and the respondent entered in sale agreement in writing whereby the respondent agreed to sell to the appellant 0.50 acres of land to be excised from respondents land parcel No.Abogeta/Lower Chure/948 at an agreed purchase price of Kshs.700,000/=.

That on 18th July, 2008 the appellant paid to the respondent Kshs.500,000/= leaving a balance of Kshs.200,000/= which was to be paid upon transfer of the portion sold to the appellant. It was term of the sale agreement that parties to the agreement were to share equally subdivision fees, transfer fees and stamp duty to the Government and incidental costs to be incurred during transfer process. The sale agreement did not provide or indicate period for completion of subdivision and transfer of the purchased portion of land. The agreement was silent on completion date.

The appellant paid to PW2, Catherine Kagwiria his share of survey fees of Kshs.25,000/= on 18th July, 2008. The appellant took PW2 to the respondent's land for subdivision without prior arrangement and found the respondent absent. On 25th August, 2008 the appellant instructed his advocate to issue demand notice to the respondent(P.exh.4(a) and invited the respondent for deliberation on 31st September, 2008 at 2.00 p.m. at appellant's advocates offices. That on the same day the appellant through the same advocate issued another letter(Exhibit 4b) to the respondent, stating that the respondent had failed or neglected to comply with terms of the agreement dated 18th July, 2008 and as such he demanded that the respondent do pay him Kshs.1,400,000/- for breach of contract, a refund of purchase price of Kshs.500,000/- plus accrued interest. Alternatively deliver possession of land to the appellant forthwith and pay Kshs.1500/-

being advocates fees for drawing the legal notice. That on 3rd September, 2008 the respondent made a reply through his advocate stating that he had already sought Land Control Board consent to subdivide the land to enable him transfer portion bought by the appellant.

The respondent expressed his willingness to refund the paid up consideration the paid up consideration of Kshs.500,000/= if the appellant was dissatisfied with the action taken by the respondent. The appellant was requested to pay his part of subdivision fees to speed up the process(as per exhibit 5).

That on 15th September, 2010 the appellant filed the suit at the lower court. During the hearing of the suit at the lower court the appellant gave evidence and called one witness. The respondent on the other hand gave evidence and called one witness. The trial court thereafter delivered its judgment and ordered the respondent to refund to the appellant Kshs.500,000/- paid as consideration and that each party to bear its own costs of the suit.

The appellant being aggrieved by the trial court's judgment preferred an appeal against the trial court's judgment. The appellant filed memorandum of appeal in person dated 6th October, 2009 and set forth the following grounds of appeal.

- 1. The learned trial Magistrate erred in law and fact by finding that the only limiting period in the transaction between the appellant and the respondent was the Legal requirement that the Land Control Board consent was to be obtained within 6 months after making of the agreement and he failed to find that the respondent's conduct rendered the transaction null and void.***
- 2. The learned Trial Magistrate further erred in law and fact in that he found that the respondent was waiting to effect the agreement or even refund the consideration paid when there was no such evidence on record.***
- 3. The learned Trial Magistrate erred in law and fact by finding that the inhibition order prevented the respondent from transferring the land to the appellant when there was no evidence before the court that the respondent intended to do so and therefore the registration of the inhibition was therefore appropriate and desirable under the circumstances.***
- 4. The learned trial Magistrate further erred in law and fact by finding that the appellant moved fastly and unreasonably in bringing up the suit before the court when there were clear signs that the respondent had frustrated the agreement.***
- 5. The learned trial Magistrate erred in law when he failed to consider the evidence of PW2 with the resultant finding that the sum of Kshs.25,000/- paid by the appellant to PW2 was not refundable by the respondent to the appellant.***
- 6. The learned trial Magistrate erred in law and fact in that he made a finding that the respondent was not responsible for frustrating the transaction entered into between the appellant and the respondent when the evidence before the court clearly indicated the party who was at fault.***
- 7. The learned trial Magistrate erred in law and fact in that he found that the respondent should refund the sum of Kshs.500,000/- only to the appellant and thereof denied the appellant the interest accrued to the sum of Kshs.500,000/= from the date of payment to the date of the refund of the sum.***
- 8. The learned trial Magistrate erred in law and fact by finding that the appellant was not entitled to any costs and thereby the court disregarded the provisions of Section 7 of the Land Control Act(Cap.302) and Sections 26 and 27 of the Civil Procedure Act(Cap.21).***
- 9. The learned trial Magistrate erred in law and fact by failing to consider and analyze the entire evidence of the appellant and his witness and thereby arrived at the wrong finding on the issue before the court.***

10. the learned trial Magistrate erred in law and fact in that he disregarded and failed to consider the weight of the evidence of the appellant's submissions and the judicial authorities tendered before the court.

11. The decision of the learned trial Magistrate was and is against the weight of evidence and the same is bad in law.

On 17th November, 2011 the court gave directions that the appeal be determined by way of written submissions. The learned advocate for the appellant Mr. Kiogora Arithi filed his submissions with list of authorities on 20/1/2011 whereas Mr. W. P. Mburugu, learned Advocate for the respondent filed his submissions on 30th January, 2012. When appeal came up for highlighting on 27/9/2012 this court heard oral submissions by Mr. Kiogora learned Advocate for the appellant and Mr. Mburugu learned Advocate for the respondent. This court has carefully considered the said submissions. It has also read the pleadings filed by the parties herein, proceedings, judgment and Memorandum of appeal in support of parties respective opposing positions.

The appellant has combined his grounds of appeal and I shall deal with the same as combined and argued. The appellant has combined grounds Nos 1,2,3 and 4 and argued the same together. The learned Advocate for the appellant faults the trial magistrate by failing to make a finding that time factor was of essence.

The agreement dated 18th July, 2008 entered into by the appellant and the respondent do not have a clause indicating completion date. The same do not indicate when subdivision and consent of the land Control Board and transfer were to be effected. The appellant proceeded to have subdivision on 20/7/2008 without notice to the respondent and without consent of the Land Control Board having been applied and obtained for subdivision. He complained of respondent's breach of contract 38 days after execution of the sale agreement. He invited respondent for deliberation on 3/9/2008 however, before deliberation could be given a chance he demanded Kshs.1.4.million,refund of Kshs.500,000/- being purchase price paid, in alternative transfer of the land with Kshs.1500/= being demand notice fees. The transaction between the appellant and the respondent was over an agricultural land and as such it was governed by the provisions of Land Control Act(Cap.302).

Section 6 1(a),(b),(c) of Land Control 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.

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.

As the sale agreement was silent on time of completion of the transaction between the parties, the transaction being over an agricultural land, the trial court correctly found and held the only limiting period in the transaction was legal requirement that Land Control Board consent was to be obtained within the prescribed period of 6 months from the date of the agreement. The suit was filed before the period had lapsed. PW2 in her evidence averred that the respondent had facilitated the process of subdivision, transfer and mutation and had given coloured passport size photograph, copy of his identity card and that the respondent had offered payment of fees for services. The evidence is clear that the respondent was willing to honour the terms of the agreement which was frustrated by the appellant's conduct. The appellant issued demands contrary to the terms of the agreement and before 6 months had expired. He applied for an order of inhibition on the land and the same was granted and registered. The inhibition prohibited transfer hence 6 months expired without subdivision and transfer.

In view of the foregoing I do not find any merits in grounds no's 1, 2, 3 and 4 of the appeal. The trial court made a finding that time was of essence and correctly found and held 6 months was the period within which the parties could have completed their transactions failure whereof the transaction became null and void by operation of law.

The appellant in ground No.5 of memorandum of appeal averred that the trial magistrate erred in law in failing to consider the evidence of PW2 with the resultant finding that the sum of Kshs.25,000/= paid by the appellant to PW2 was not refundable by the respondent to the appellant

PW2 in her evidence testified that she calculated the charges, survey, physical planning, council, Land Board application and transfer of title deed and came to Kshs.50,000/=. That there was also amount for registration. The appellant paid Kshs.25,000/=. During cross-examination PW2 testified that she had charged Kshs.50,000/= for survey fee, physical planning, county council fee, land transfer fee etc. she only claimed to have made payment to county council and Land Control Board but had no receipts with her. The trial magistrate in his judgment considered the evidence of PW2 and on the alleged paid Kshs.25,000/= to PW2 the court found the same was not refundable as the services paid for were not offered. I have considered the evidence of PW2 and it is clear that the amount of Kshs.25,000/= paid to PW2 was not used for the purpose for which PW2 had received the same. PW2 did not produce any single receipt to support how the money was used. The trial court was correct to find the money was not used for services for which it had been paid for. In the circumstances I find no merit in ground No.5 of the appeal and the same is dismissed.

The appellant combined grounds Nos.6, 7 and 8 of the Memorandum of appeal and submitted on them all together. The appellant aver that the trial court erred in law and fact by finding that the respondent was not responsible for frustrating the transaction between himself and the appellant. The evidence on record is that 2 days after the execution of the sale agreement, appellant proceeded to the respondent's land with surveyor, PW2, to excise the portion purchased. That by letter dated 25/8/2008(exhibit 4(a) the appellant wrote to the respondent complaining to him that he had breached terms and conditions of the sale agreement. That by further letter of the same day the appellant claimed Kshs.1.4million, for breach of contract, refund of Kshs.500,000/= being purchase price, in alternative transfer of the land bought and Kshs.1500/-demand notice fees. The respondent, responded through a letter dated 3/9/2008 denying that he was in breach of the contract and indicated that he had applied to the Land Control Board for consent to subdivide the land to enable him transfer the portion to the appellant. The respondent requested the appellant if he was not satisfied with respondent's action to say so as respondent was ready to refund the purchase price of Kshs.500,000/= instead of making false allegation. The appellant without responding to respondent's letter filed this suit on 1stSeptember, 2008. The six(6) months period within which consent would have been applied for subdivision and transfer had not lapsed. The appellant after filing his suit proceeded on to obtain orders of inhibition, preventing the respondent from proceeding on with subdivision and even transfer of the land to the appellant. The trial court found that it was the appellant's action of registering orders of inhibition which frustrated the contract. I have evaluated and analyzed the evidence given before trial court and I have found that the trial court made no error in finding that the

respondent was not responsible for breach of the contract. The evidence on record is clear that the appellant acted hastily most lastly and unreasonably in the way he handled the matter as correctly found by the trial court.

It is the appellant's actions which made the respondent to be unable to seek consent for subdivision and transfer. I find no merit in ground Nos.6,7, and 8 of Memorandum of Appeal and the same are dismissed.

The authorities referred to me in support of these grounds of appeal by the appellant can be distinguished in that the transaction in those cases had become null and void for want of consent when the matters were taken to court. In the instant case the appellant frustrated the contract before the contract had become null and void. He further frustrated the respondent from obtaining consent for subdivision and effectual transfer and showed no willingness to co-operate with the respondent in seeking necessary consents for subdivision and transfer by blocking the same through filing an inhibition order with the Land Registrar preventing all transaction over the suit land.

I therefore find the authorities submitted to the lower court and referred to this court though binding upon this court, to be not relevant to the facts of this case. The appellant combined ground No.9, 10 and 11 of the Memorandum of appeal and submitted on the same all together.

The appellant faulted the trial court on the grounds that it failed to analyze the entire evidence on record and the judicial authorities by the court of appeal as the court did not consider the said authorities although the same were relevant and were binding to the court. I have considered the trial court's proceedings and the judgment. The judgment is detailed and exhaustive. The trial magistrate before coming to his conclusion quite well analyzed the evidence of all parties and considered all exhibits and relevant law. Once authorities are submitted to court, the court is bound to consider the same and their relevancies to the suit before it and apply them accordingly if relevant. It is not proper for court to ignore the same.

The case of **PETER WAWERU WAITITU – V- KARANJA-CYRUS KARANJA C.A. NO.257/2001(NRB), RIOKI ESTATE CO(1970) LTD – V- KINUTHIA NJOROGE(1976-80) 1 KLR Page 589 and ELIZABETH CHEBOO-V-MARY GIMNYIGEI C.A. NO.40/78(KSM)** all dealt with the transactions which had become void for want of consent of the Land Control Board. In the above-mentioned judgments, it was held that Section 7 of the Act does not forbid payment of interest on money that had been paid in the course of a void transaction.

That though the trial court did not comment on authorities supplied to it, I find that it did not make an error in failing to follow the authorities though bound by the decisions of the superior court. The authorities were not relevant to the instant case as in the present case the appellant filed the suit before the contract between himself and the respondent had become null and void for want of consent. The parties had time to proceed to Land Control Board and obtain consent to proceed with the transaction if they wished to do so. The appellant breached the contract before expiry of six(6) months as trial court found. The authorities submitted by the appellant in my considered opinion were not relevant and the trial court was not at fault in failing to follow the same. Had the appellant filed suit claiming the consideration after the contract had become null and void by virtue of respondent's failure to get consent for subdivision and transfer the appellant would have been justified in seeking refund of the consideration plus interest and he would have succeeded on seeking interests.

In view of the foregoing I find grounds Nos.9, 10 and 11 of the appeal without merits and the same are dismissed.

The upshot is that the appellant's appeal is found to be without merits and the same is dismissed with costs of appeal to the respondent.

DATED AT MERU THIS 7TH DAY OF NOVEMBER, 2012.

J. A. MAKAU
JUDGE

Delivered in open court in presence of

Mr. Kiogora Arithi for appellant

Mr. W. P. Mburugu for the respondent (absent)

J. A. MAKAU
JUDGE