



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Civil Appeal 28 of 2003**

**PASKWALINA MURUGI ERNEST .....APPELLANT**

**VERSUS**

**EDWARD T. MWIRIGI .....1<sup>ST</sup> RESPONDENT**

**ERNEST JOSEPH RUKARIA .....2<sup>ND</sup> RESPONDENT**

***(An appeal from the judgment and decree of the Learned Nkubu Senior Resident Magistrate, Mr. N. Njuki in Nkubu SRMCC No. 81 of 1994 dated 4<sup>th</sup> day of September 2003).***

**JUDGMENT**

This is an appeal from resident magistrate court Nkubu delivered on 4<sup>th</sup> September 2003. The appellant was the plaintiff in the lower court. She originally filed the case together with her son who was the second plaintiff. During the cause of proceedings in the lower court, the 2<sup>nd</sup> plaintiff withdrew his action. The defendant is the husband of the appellant. The defendant is the 2<sup>nd</sup> respondent. She sued him seeking a declaration that she was entitled to get land parcels Nos. NKUENE/KITHUNGURI/29 and 506. She alleged that the two parcels of land were registered in the 2<sup>nd</sup> respondent's name to hold in trust. The lower court proceedings have an interesting history. The 2<sup>nd</sup> respondent although he filed a defence on 4<sup>th</sup> December 1998 denying the claim of the appellant, he thereafter failed to participate in the hearings until the conclusion of the case. There was another party now the first respondent who filed an application seeking to be joined as an interested party. He first filed a chamber summons on 6<sup>th</sup> February 1996. That application was subsequently withdrawn. He filed a subsequent application on 2<sup>nd</sup> April 2001 seeking similar prayer that he be joined as an interested party in the action. The basis upon which he sought to be joined as an interested party was that he had entered into a sale agreement with the 2<sup>nd</sup> respondent to purchase parcel No. 29. That agreement for sale was dated 8<sup>th</sup> February 1994. He stated in the supporting affidavit that he had paid the 2<sup>nd</sup> respondent a total of Kshs. 70,000/=. That application was granted on 21<sup>st</sup> July 2001. It was granted as prayed. The interested party seemed to have filed two statements of claim. The first one was entitled, "Statement of claim by the interested party." It was filed on 4<sup>th</sup> September 2001. The interested party later filed another statement of claim on 30<sup>th</sup> April 2002 which was entitled, "Third party's statement of claim." Both statements of claim essentially say the same thing. The interested party/3<sup>rd</sup> party who is the first respondent alleged to have entered into the sale agreement with the 2<sup>nd</sup> respondent for the purchase of the parcel No. 29 for Kshs. 80,000/=. He had paid Kshs. 70,000/= leaving a balance of Kshs. 10,000/= which was to be paid upon the Land Control Board giving consent to the transfer. In his pleadings, he alleged that the appellant was aware of that transaction. But as can subsequently be seen in his evidence and even in the evidence of his witness they

acknowledged that the appellant was not aware of the transaction. By the time the first respondent was joined into the proceedings, the plaintiff had adduced her evidence and was awaiting the delivery of judgment. The 1<sup>st</sup> respondent filed an application on 4<sup>th</sup> September 2001 seeking the prayer “*That the court be pleased to open up this case to enable the applicant (1<sup>st</sup> respondent) give his evidence.*” That application was allowed by the court on 24<sup>th</sup> April 2002 when the lower court ordered that the case was to start *denovo*. In that ruling of 24<sup>th</sup> April 2002, the learned magistrate made curious statements which are worthy paying attention to. He stated as follows:-

***“First and foremost, I would say there is nothing in law known as interested part. What there is a third party..... This is what I do understand the interested party wanted to be referred as..... I have considered the application, the supporting affidavit and the annexed claim by the third (interested) party.”***

Those statements in that ruling contradicted the learned magistrate’s ruling of 26<sup>th</sup> September 2001 whereby he granted the first respondent leave to be joined in the proceedings as an interested party not as a third party. At this point, I wish to deal with the first ground of appeal of the appellant. The appellant in that ground stated:-

***“The learned trial magistrate erred in law in allowing the first respondent into the proceedings herein by violation of the express provisions of O.1 R.14 of the Civil Procedure Rules.”***

I am in agreement the learned magistrate by the Civil Procedure does not recognize a party called *interested party*. When a party enters into civil action, he is either plaintiff defendant or third party. It therefore follows that the learned magistrate indeed erred by his ruling of 21<sup>st</sup> July 2001 whereby he allowed the first respondent to be joined in the proceedings as an interested party. By his ruling on whether the case should start *denovo* which was delivered on 24<sup>th</sup> April 2002, the learned magistrate seemed to somehow review his earlier order and begin to refer to the first respondent as a third party. The Civil Procedure is very clear on who should join a third party. O.1 R. 14(1) states:-

***“Where a defendant claims as against any other person not already a party to the suit (hereinafter called a third party).....”***

That rule proceeds to lay the background of what consideration the defendant should have in joining the third party. It was not proper therefore for the learned magistrate to join the first respondent as a third party. Having joined him as a third party, according to the ruling of 24<sup>th</sup> April 2002, it is not clear against whom his claim was directed. It is clear from the various rulings and the judgments of the learned magistrate that the defendant who is the 2<sup>nd</sup> respondent in this appeal absconded from the trial from the very initial stages. Indeed it is his disappearance that prompted the first respondent to seek to be joined in the proceedings. That being so then the question that arises to my mind is whether the 2<sup>nd</sup> respondent was ever served with the first respondent’s claim as a third party. On the whole, I find that I am in total agreement with the appellant in the first ground of appeal and I concur with that ground in finding that the learned magistrate erred in law to have joined the first respondent in contravention of the Civil Procedure Rules. In making that finding, I am not persuaded by the 1<sup>st</sup> respondent arguments in his submissions that O.1 Rule 9 mitigates against misjoinder of parties. That rule provides:-

***“No suit shall be defeated by reason of the misjoinder or none joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”***

That rule does not assist the first respondent. Here it is not a case of misjoinder, it is, in my view a case of joining a party not recognized under the Civil Procedure Act and Rules. As I stated before, there is no party known as interested party in the Civil Procedure Rules. In the case of third party, it is a party who is brought into a civil action by the defendant where such defendant would either seek contribution or indemnity amongst others from such a third party. The 1<sup>st</sup> respondent does not “*fit the deal*” as far as

that definition is concerned. I uphold the first ground of appeal. The 2<sup>nd</sup> ground and the 3<sup>rd</sup> ground can be dealt together. They are as follows:-

2. ***The learned trial magistrate further erred in law in ordering land parcel No. NKUENE/KITHUNGURI/29 to be transferred to the first respondent even on the face of overwhelming evidence that no divisional Land Control Board consent has even been obtained pursuant to the sale agreement dated 8<sup>th</sup> April 1994 between the respondents yet this is agricultural land.***

3. ***Having found that the appellant's evidence on trust over land parcel Nos. NKUENE/KITHUNGURI/29 and 506 was uncontroverted, the learned trial magistrate erred in awarding land parcel No. NKUENE/KITHUNGURI/506 and refusing to award the appellant land parcel No. NKUENE/KITHUNGURI/29 and proceeding to award the same to the first respondent without any legal basis.***

In order to consider those grounds, it is important to bear in mind the evidence adduced in the lower court. The appellant in her evidence stated that she got married to the 2<sup>nd</sup> respondent in August 1965. She was a teacher by that time and she retired in 1982 when she held the post P3. In 1966 she bought two pieces of land. The first one she bought from M'Rinkanya which was 1.5 acres. She paid for that parcel Kshs. 300/=. The land was however registered in her husband's name, the 2<sup>nd</sup> respondent. That was parcel No. 29. The 2<sup>nd</sup> piece she purchased from M'Kiranga which was also 1.5 acres and she paid for it Kshs. 450/=. That parcel was also registered in her husband's name and is parcel No. 506. She produced in evidence a note book where the transactions were recorded. At the time of giving evidence, she was residing in parcel No. 506. She stated that in 1991-1992 she began to receive demand notices from Kenya Finance. She realized that time that the 2<sup>nd</sup> respondent had obtained loans and had charged both parcels of land. The 2<sup>nd</sup> respondent refused to pay the loans. Having discussed the matter with the family, it was agreed that she pay the loan taken at Standard Chartered Bank which was in respect of parcel No. 506. In total she and the family paid Kshs. 11,010.75/=. She said that the family agreed that the loan in respect of parcel No. 29 was to be paid by the 2<sup>nd</sup> respondent. PWII stated that her father on or about 1956 sold 1.5 acres of land to the appellant. She witnessed the appellant pay her father Kshs. 450/= for that land. PWIII stated that he was approached by the appellant in 1966 with a request that he secures some land for her to purchase. He did so and introduced her to M'Rinkanya who was selling out 1.5 acres of land for Kshs. 300/=. The appellant paid for that land. This witness knew that the land was registered in the name of the 2<sup>nd</sup> respondent. He further stated,

***"In those days, women could not be registered as proprietor of land."***

He also managed to secure another parcel of land being 1.5 acres which the appellant purchased for Kshs. 450/=. This witness was present when both transactions were carried out. On being cross examined, this witness stated that he witnessed the appellant pay for both parcels of land. The next witness for the appellant was the brother of the 2<sup>nd</sup> respondent. He stated that the 2<sup>nd</sup> respondent had absconded from his matrimonial home. He was aware that the appellant on retirement discovered that both parcels of land had been used to secure loans by the 2<sup>nd</sup> respondent. He was present when the appellant went to pay the loan in respect of the parcel of land she was occupying. The last witness for the appellant stated that he had sold to the appellant 1.15 acres of land for Kshs. 300/=. He stated that the appellant told him to transfer that land into the 2<sup>nd</sup> respondent's name. He however was categorical that it was the appellant who paid for the land. The 1<sup>st</sup> respondent who in the proceedings was entitled 3<sup>rd</sup> party in evidence stated that in 1993 the 2<sup>nd</sup> respondent approached him and told him that he was unable to repay a loan obtained from Kenya Finance which was secured by parcel No. 29. At that time, that property was due to be auctioned. First appellant in the company of the 2<sup>nd</sup> appellant visited the bank manager who proposed that the 1<sup>st</sup> respondent purchase the parcel of land by private treaty. As a result of that suggestion, the respondents entered into an agreement dated 8<sup>th</sup> Feb. 1994. He paid in total to the 2<sup>nd</sup> respondent 70,000/=. Later he carried out a search on the parcel of land with a view to obtaining consent

of the Land Control Board. This was the time that the appellant filed the case in the lower court. He prayed that the court would either order that he be referred the amount paid or he be awarded the parcel of land No. 29. In cross examination, the 1<sup>st</sup> respondent acknowledged that the appellant was not present when he entered into an agreement with the 2<sup>nd</sup> respondent. He further contradicted his earlier statements and even his own pleadings by saying that the money towards the purchase of that land was paid to Kenya Finance although the receipt was issued in the name of the 2<sup>nd</sup> respondent. He made the following disclosure during cross examination.

***“I was not given LCB (Land Control Board) consent when the plaintiff (appellant) objected.”***

The 1<sup>st</sup> respondent called as a witness his wife. She confirmed that they had paid the 2<sup>nd</sup> respondent Kshs. 70,000/=. In her testimony, she stated that that money was paid personally to the 2<sup>nd</sup> respondent and not to Kenya Finance as stated by the first respondent. The learned magistrate in his considered judgment found that the appellant had proved her case in respect of her claim for parcel No. 506. She was therefore granted the prayers that she sought in respect of that parcel. In respect of parcel No. 29 the learned magistrate found that the first respondent had redeemed that parcel of land and was therefore *“entitled to the fruits of his sweat.”* He therefore proceeded to find that the first respondent had a claim over that parcel of land which was capable of registration. He ordered that the parcel No. 29 be registered in the name of the 1<sup>st</sup> respondent. The appellant’s claim was against the second respondent who did not appear to controvert her evidence. Her evidence was supported by credible witnesses whose evidence was also uncontroverted. It is not clear to me how the learned magistrate having found that the appellant succeeded in proving her claim in respect of parcel No. 506 failed to also find that she had similarly proved her case in respect of parcel No. 29. I state so because further to my earlier finding that the part which the 1<sup>st</sup> respondent played in the proceedings was not entirely clear bearing in mind that the trial court had first joined in as an interested party and later converted him to a third party. If he is regarded as a third party, it is only the defendant who could lay claim against him. The learned magistrate therefore indeed erred to have awarded the 1<sup>st</sup> respondent that parcel of land. But perhaps of greatest importance is the error awarded in that parcel of land when the said first respondent acknowledged that he did not obtain the Land Control Board consent due to the objection raised by the appellant. The agreement between the first respondent and the 2<sup>nd</sup> was dated 8<sup>th</sup> April 1994. By virtue of Section 6(1) of the Land Control Act Cap 302, the first respondent should have obtained consent from the Land Control Board within 6 months of the date of that agreement. By the time he was giving evidence that was on 23<sup>rd</sup> April 2003 he had not obtained that consent. That was more than six months. Section 6(1) therefore made that agreement between him and the 2<sup>nd</sup> respondent to be void. That indeed was the holding of the case of **Onyango & Another V. Luwayi (1986) KLR** when the Court of Appeal made the following holding:-

***“By virtue of the Land Control act (Cap 302) section 6(1), the sale transaction was void for all purposes owing to the failure to obtain the consent for it from the divisional Land Control Board which had to be made within six months of the making of the agreement. As the agreement was of no effect, specific performance could not be granted to the appellants in respect of it and it could not be the basis of a reference to a panel of elders.”***

Section 22 of the same Act criminalizes any act furtherance of a transaction which is void for lack of consent. That section is in the following terms:-

***“22. “Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6, and any person-***

***(a) pays or receives any money : or***

***(b) enters into or remains into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine***

***not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.”***

That being so I made a finding that the learned magistrate indeed erred in law in awarding the first respondent parcel No. 29. Under the Land Control Act the first respondent would only have been entitled to a refund of the money paid in respect of that transaction. That refund could only be paid by the 2<sup>nd</sup> respondent who as I earlier stated failed to participate in the proceedings in the lower court and there is no clear evidence in the lower court file that he was served with the first respondent’s statement of claim. Further, the first respondent in his statement of claim pleaded that he paid the 2<sup>nd</sup> respondent personally Kshs. 70,000/=. Later in his evidence, he stated that he made that payment to the Kenya Finance but the receipt was issued in the name of the 2<sup>nd</sup> respondent. In the light of that contradiction, and in the light of the lack of clear evidence that the 2<sup>nd</sup> respondent was served with his statement of claim, I find that I cannot order for a refund of the money paid towards that transaction. In the end, the appellant does succeed in her appeal and the judgment of this court is as follows:-

***1. The judgment of the Nkubu court in SRMCC No. 81 of 1994 is hereby set aside only to the extent of the award of parcel No. Nkuene/Kithunguri/29 to the first respondent and is substituted with the order that the parcel No. Nkuene/Kithunguri/29 be registered in the appellant’s name. The 1<sup>st</sup> respondent’s claim in the lower court is dismissed with costs to the appellant.***

***2. The court does hereby order the Land Registrar do dispense with the requirement of the production of the original titles of parcel Nos. NKUENE/KITHUGURI/29 and 506 in carrying out the transfer into the appellant’s name and the court does hereby order that the Deputy Registrar of this court do sign all the necessary documents to facilitate the transfer of Nkuene/Kithunguri/29 and 506 into the appellant’s name.***

***3. The appellant is awarded costs of the lower court case and costs of this appeal as against both the respondents.***

Dated and delivered at Meru this 1<sup>st</sup> day of October 2009.

**MARY KASANGO**

**JUDGE**