



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT BUSIA
Civil Appeal 42 of 2007**

JOHN BARASA WEYAAPPELLANT

~VRS~

DAUDI DADO NYABOLA.....RESPONDENT

JUDGMENT

The Appellant John Barasa Weya appeals against the judgment of Busia Resident Magistrate in PM CC No.97 of 1995. The court in that case entered judgment in favour of the Plaintiff Daudi Dado Nyabora the Respondent herein for a portion of two (2) hectares to be excised from Appellant's land parcel No.BUKHAYO/MATAYO/960.

Mr. Fwaya for the Appellant argued the grounds of appeal. It was contended that, the lower court erred in ignoring the provisions of section 6 of the Land Control Act which requires that the consent of the Land Board be obtained within six (6) months of the transaction. The alleged agreement was not reduced in writing as required by section 3 of the Law of Contract Act. There were several contradictions on the acreage bought by the Appellant and on how much money was paid by the Respondent as purchase price. The Appellant's counterclaim was not considered by the court since no finding was made on it.

The Respondent's counsel, Mr. Bogonko opposed the appeal on grounds that, the case was proved in the lower court which resulted in the correct finding by that court. The oral agreement was followed by the application for consent to sub-divide which validated the transaction as provided for by section 8 of the Land Board Control Act. The counter claim was considered by the lower court and there was no evidence to support it. The requisite court fees was not paid for the counterclaim and that would as well mean that, there was no counterclaim at all. It is the Respondent's contention that, the contradictions on the acreage and the amount paid for purchase of the land were not fatal.

On the issue of the agreement, it is not disputed that it was an oral one contrary to the requirements of section 3 of the Law of Contract Act. The provision requires that all land sale agreements be reduced in writing. The supporting documents produced in the Magistrate's Court were two. The first one was an application to sub-divide land parcel Bukhayo/Matayo/960 in two portions of 9.6195 and 9.0 acres respectively. This application which is supposed to be made by the registered proprietor of the land is not signed. It has an official stamp on top of the first page of "District Officer, Nambale", which is an indication that it was received in that office though unsigned. Consent to sub-divide was granted on 1st September 1992. No consent to transfer any portion of the land to the Appellant was produced before the court. A copy of official search shows that the Respondent lodged a caution against the title on 25th August 1992, the same month the application for consent to sub-divide was made.

The Plaintiff testified that, he bought two hectares (4 acres) from the Defendant in 1992 which was to be excised from land parcel no. BUKHAYO/MATAYO/960. He paid Ksh.8,600/= as purchase price.

Consent for sub-division was obtained and the portion curved out. Later the Defendant refused to transfer the portion to him. He placed a caution against the title of the land. In cross-examination, the Plaintiff said he paid Ksh.20,600/= and later said he paid Ksh.16,600/=. It was admitted that the application for consent to sub-divide was not signed because the Defendant refused to do so. It was also admitted that there was no consent to sub-divide the land to curve out the four (4) acre portion.

The Defendant denied in his defence that he sold any land to the Plaintiff in 1992 or at all. He denies applying for sub-division to curve out any portion for the Plaintiff. He prayed for the removal of the caution.

The only evidence before the lower court is that of the Plaintiff and the Defendant. The magistrate in his judgment found:

“There was no date when the agreement was needed but Ex 1 and 2 show that a consent was granted by the chairman. There is no evidence that the consent has been challenged or that it was obtained fraudulently. I will hold the consent was partly granted hence the Defendant can’t go against it.”

As argued by the counsel for the Appellant, the unsigned application for sub-division was for different portions of land measuring 9.6195 and 9.0 acres respectively. The acreage in question is four (4) acres which has no relevance to this document. Being an unsigned document the application for consent to subdivide has no legal force. The consent purported to be given based on the document is for sub-division of the 9.615 and 9.0 acres. This is not relevant to the Plaintiff claim of the four (4) acres. The court ought to have been concerned with consent to transfer four (4) acres. There was no such consent given by the Land Board and the Plaintiff admits it. This alone was enough to knock out the Plaintiff’s case in the lower court. Under section 6 of the Land Control Act, the consent of the Land Board to transfer must be obtained within six (6) months from the date of the agreement. In this case, the necessary consent was never obtained and this makes the transaction *void ab initio*. The Plaintiff did not occupy or use the portion he was buying and as such he can not be favoured by section 8 of the Act since there was no specific performance.

Mr. Bogonko argued that the act of sub-dividing the land was as good as specific performance. This is not correct since the law calls for specific performance. After all, this court has made its finding that the evidence tendered does not support sub-division for four (4) acres. The effect of this all is that there was no sub-division at all.

The contradictions on the amount paid for purchase of the land by the Plaintiff were material to the case and should have been considered.

It is my finding that, the lower court’s finding was not supported by the evidence adduced by the parties. It was also in contravention with the provisions of section 6 of the Land Control Act and section 3 of the Laws of Contract Act. The magistrate therefore erred in law and fact in finding that the Plaintiff had proved his case.

I therefore allow the appeal and set aside the judgment of the lower court and all consequential orders. The cautions and restrictions against the land parcel no.BUKHAYO/MATAYO/960 by the Plaintiff be removed forthwith. Each party to meet its own costs of the appeal.

F. N. MUCHEMI

JUDGE

Dated, Delivered and Signed at Bungoma this 4th day of November, 2009 in the presence of Mr. Jumba for Nandwa for appellants.