REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

CIVIL APPEAL 53 OF 98

(From Original Conviction and Sentence of Civil Case No.44 of 1994 of the Senior ResidentMagistrate's Court at Kangundo: CD. Nyamweya Esq., of 21.5.98)

1. MULA NTIIENGE ……. 1ST APPELLANT

2. NTHENGE MUIA MBULO……..…… 2ND APPELLANT

VERSUS

PETER KAKUI MUTISO……..……..…… RESPONDENT

10 Coram J.W.Mwera J.

Kerongo Advocate for AppellantF.M. Mulwa Advocate for RespondentCourt clerk - Muli

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JUDGEMENT

The amended plaint on which the case was based in the lower court at Kangundo averredthat the present respondent who was the plaintiff sued the 3 appellants over a contract of sale ofland known as M1TABON1/KAIAN1/1254 between the respondent and the 1st appellant MuiaNthenge who was described as the father of the 2nd and 3rd appellants: Nthenge and Mbulo. That the land lay in Kaiani adjudication section and a full purchase price of shs.50,000/= waspaid to 1st appellant in the presence of his 2 sons (aforesaid appellants) and a local AssistantChief who also witnessed the translation in August 1993. At the hearing of this appeal andbefore the learned trial Magistrate the sale agreement was referred to. The sale agreement wasalluded to and not denied. It was also not indispute that as at the time of the transaction the areawas still under adjudication.

The plaint further claimed that in April 1994 the 3 appellants wrongfully entered and/orstill being in possession, wrongfully remained there and excluded the respondent from the suitland, a thing they persisted in even at the time of filing the suit. It was further averred that theappellants then cut down the respondent's crops on the said land occasioning him more loss anddamage besides denial of user.

The respondent in the main prayed for orders for vacant possession of the land and an injunction against the appellants not to enter the suit land. He also sought general damages forbreach of contract and trespass. Mr. F. Mulwa represented the respondent then as he also didhere.

On 3.11.94 the appellants represented by M/s Kilonzo & Company Advocates Nairobifiled a defence to the suit. The defendants denied ever having sold the suit land to therespondent adding that if such deal ever took place, then it was null and void for want of aconsent from the relevant land control board.

It added that up to that time the title to the land was still vested in the 1st appellant,Muia, and so he and his sons the co-appellants could not be said to be in trespass over the subjectland at all. That the appellants offered and tendered Shs.50,000/- purchase price paid to the 1st appellant but he neglected refused to receive the money.

The lower court record shows that on 28.2.95 Mr. Ngatia Resident Magistrate observedand ordered that the subordinate court at Kangundo did not have jurisdiction to determine thiscase relating to land. He added that the parties would avail themselves the procedure laid downunder the Land Disputes Act. But on 26.2.98 Mr. Ngatia's successor Mr. Nyamweya SeniorResident Magistrate embarked on the trial quite probably unaware of the order of 3 years earlier.However looking at the Land Disputes Act No. 18/90 which came into force on 1.7,93 it appearsthat the learned Senior Resident Magistrate had jurisdiction to entertain the suit before him.That Act defines Land as described in the Land Control Act whether or not it is registered underthe Registered Land Act. But it does not apply to land falling within an adjudication section oras affected by the Land Consolidation Act. It has been said earlier that the suit land lay in anarea where adjudication was under way.

This court's ruling of 5.4.95 (Osiemo J.) in a miscellaneous application to transfer this suit from the lower court to the High Court dismissed that application and added that thetransaction of sale *did* not have the relevant land control board consent. That accordingly thelearned trial Magistrate at Kangundo would hear the suit since without the said consent what thepresent respondent would be seeking was recovery of his Shs. 50,000/-, the purchase price andnothing like damages. That ruling was not appealed against nor was it a subject of review if anyparty felt so.

The judgement in the lower court went over the pleadings including the result of areference to the local District Officer when he chaired a panel of elders. That panel hadconcluded, by whatever approach they took to the dispute e.g. the parties breaching aPresidential directive (sic) not to sell family land without the whole family consenting, that the land had to revert to the appellants on refunding of Shs. 50,000/= purchase price. This award hadbeen followed by the appellants depositing that sum in the District Officer's office (Kathiani) on8.12.93f. The learned trial Magistrate agreed with the arguments that the suit land indeed wassubject to the Land Adjudication Act and accordingly it did not require a land control boardconsent to dispose of any interest in it. He observed further that what the respondent would havedone was to apply as a purchaser so that his name would be entered on the land register underthe Registered Land Act. He wondered how the 2nd appellant Nthenge succeeded in getting hisname as the absolute proprietor of land parcel No. 1254 and termed that fraudulent.

The lower court observed that the appellants were in breach of the sale contract and thatthe respondent would have been entitled to the land. However the learned trial Magistraterecorded that he lacked jurisdiction to issue a permanent injunction against the appellants on theplea of trespass and he thought that the aggrieved party would seek such orders in the HighCourt. But the learned trial Magistrate went on to assess general damages for the breach ofcontract. Very rightly the learned Senior Resident Magistrate laid out the law that for suchdamages to issue evidence must be placed before the court of the price of a comparable piece ofland in the local area which the aggrieved purchaser has bought (or would) after the deal he wasengaged in was frustrated by the acts of the seller. It is the price difference between that in thecontract and the "new" purchase that the buyer has to make. There was this part of the decisionin that regard that raised contention when the appeal was heard:

"The court has reliably learnt that this landcurrently goes for a staggering price between Shs.250, 000/-and Shs.300, 000/=."

Mr. Kerongo submitted that this "learning" by the learned trial Magistrate of the price of land was not borne anywhere in the claim or evidence e.g. by a valuation report that indeed thevalue of the suit land was Shs.250, 000/- or Shs.300, 000/-, the latter sum which was awarded ingeneral damages for breach of contract.

The memorandum of appeal had *6* points. Points 1 & 2 were argued together and point 3apparently was abandoned. Point 4 was heard on its own while points 5 and 6 were put together.In essence the grounds alluded to the failure by the learned trial Magistrate to find that the salefell under the Land control Board Act and that because the relevant land control board consentwas not obtained the deal was null and void. This point can be disposed of right way by statingthat before adjudication was over the land was still subject to customary law tenure and indeedthere was no evidence that the Minister had declared the locality where the suit land lay as a landcontrol area (see section 3 Cap 302). In fact it has never been denied that this Act applies to landwhere interests have been registered. The petition further said that there was no proof, let alone pleadings, of fraud as the learned trial Magistrate suggested in his judgment regarding appellant2 in whose name the land in issue was ultimately registered. That is basically true. Neither thepleadings nor evidence alluded to fraud.

As for damages put at Shs. 300,000/- this court was satisfied that although the learnedtrial Magistrate properly and correctly set out the principle of law to recover damages in a breachof contract of sale of land, there was no evidence that a similar piece of land as the respondentintended to buy from the appellants was at the time of the judgment worth Shs.250-300,000/=.The statement by the lower court that it had "learnt" that that was the current market value wasnot borne out by evidence. It did not have to be used as a basis for the award of Shs.300, 000/=general damages for breach of contract. Before concluding the cross appeal filed by the respondent which was in essence an answer to the appeal had its own features to be determined here.

Ground 1 was to the effect that the learned trial Magistrate did not enter judgmentagainst the 1st appellant, the actual seller of the land when he failed to turn up at the hearing in accordance with Order 9B rule 3, 6 Civil Procedure Rules. The lower court record shows that thelearned trial Magistrate considered that application. He ruled that although the 1st appellant wasnot present himself in court his lawyer was. And that if he chose to let his co-defendants testifyat the hearing then that was all well and good. It is true that it was the 1 st appellant who wassaid to have sold land No. 1254 to the respondent. Reliefs were sought against him with hisco-litigants severally and jointly.

The learned trial Magistrate was satisfied that the trial would go on in the way thedefendants/appellants had thought fit. This court similarly saw nothing amiss with that course.In any case the contract of sale was admitted and produced.

Ground 2 was against the conclusion by the learned trial Magistrate that he lackedjurisdiction: This has been set out above in that the learned trial Magistrate declined jurisdictionin regard to issuing a <u>permanent</u> injunction. Wrongly or otherwise that is what the judgmentsaid. The respondent prayed for possession of the land. All that he held was a contract of sale toit. He had never been in possession. Probably the respondent was raising for orders of specificperformance in the light of the old section 3(3) Law of Contract Act because both seller andbuyer signed the contract of sale and the learned trial Magistrate found that it was a validcontract. The cross appeal prayed this court to determine the dispute between him and theappellants finally citing section 78 (1) (a) Civil Procedure Act by which, it appears, he desiredthis court to conclude the litigation herein by finding that with a valid contract of sale agreementhe was entitled to the land now in the name of the 2nd appellant as both sides seemed to say.

Beginning with what Mr. Kerongo referred to as lack of consent under section 30 of theLand Adjudication Act (Cap 284) this court saw one dated 9.11.94 (Exhibit 1ll) to institute orcontinue with the suit in the lower court.

Accordingly il was validly before court.

The learned trial Magistrate clearly saw in his judgment after reviewing the whole fileand proceedings before him that even if the respondent held a valid contract still he could notorder the transfer of land to him. The 1st appellant may still have been in favor of thetransaction but his two sons - the 2 co-appellants:

"..... were against the sell (sic)..... "

So learned trial Magistrate considered it suitable to orderthat the respondent get general damages for breach of contract. All in all it seemed that with the1st appellant being incapable of transferring the land to the respondent, instead he had allowed his son the 2nd appellant to be registered over it, damages would do. But then there was noevidence on how the learned trial Magistrate arrived at Shs.300, 000/=, This has been remarkedupon already. To the learned trial Magistrate and this court appears to agree, the damages werethe next best alternative to specific performance even without praying for that alternative. Hadthe respondent laid before the court proof that he had bought or would buy a similar plot of landfor a sum higher than that contracted he would nonetheless have been entitled to his damages.But that he did not lay such evidence before court, all that he can get is Shs. 50,000/=, thepurchase price paid.

Accordingly the lower court award of Shs. 300,000/= in general damages is set aside. Inits place it is ordered that the respondent get back his Shs. 50,000/-. Although this sum was apparently deposited at the local district officer's office and the respondent has not collected itsince as the matter went through court, this court is of the view that respondent should getinterest on this sum on the lower court rates or whatever rates that were applicable from 8.12.93to the date hereof.

The appeal succeeds limited to the ground on general damages. The cross appeal is dismissed. The principle is that costs follow the event but in the circumstances of this appeal and cross appeal each side to bear its own costs here.

Judgment accordingly.

Delivered this 15th day of July 1999.

J.W. MWERA

JUDGE