



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 53 of 1998

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

- 1. MULA NTIENGE 1ST APPELLANT**
- 2. NTHENGE MUIA MBULO..... 2ND APPELLANT**

VERSUS

PETER KAKUI MUTISO..... RESPONDENT

10 Coram J.W.Mwera J.

Kerongo Advocate for Appellant F.M. Mulwa Advocate for Respondent Court clerk - Muli

JUDGEMENT

The amended plaint on which the case was based in the lower court at Kangundo averred that the present respondent who was the plaintiff sued the 3 appellants over a contract of sale of land known as M1TABON1/KAIAN1/1254 between the respondent and the 1st appellant Muia Nthenge 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/= was paid to 1st appellant in the presence of his 2 sons (aforesaid appellants) and a local Assistant Chief who also witnessed the translation in August 1993. At the hearing of this appeal and before the learned trial Magistrate the sale agreement was referred to. The sale agreement was alluded to and not denied. It was also not indispute that as at the time of the transaction the area was still under adjudication.

The plaint further claimed that in April 1994 the 3 appellants wrongfully entered and/or still being in possession, wrongfully remained there and excluded the respondent from the suit land, a thing they persisted in even at the time of filing the suit. It was further averred that the appellants then cut down the respondent's crops on the said land occasioning him more loss and damage 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 for breach of contract and trespass. Mr. F. Mulwa represented the respondent then as he also did here.

On 3.11.94 the appellants represented by M/s Kilonzo & Company Advocates Nairobi filed a defence to the suit. The defendants denied ever having sold the suit land to the respondent adding that if such deal ever took place, then it was null and void for want of a consent 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 subject land at all. That the appellants offered and tendered Shs.50,000/- purchase price paid to the 1st appellant but he neglected to receive the money.

The lower court record shows that on 28.2.95 Mr. Ngatia Resident Magistrate observed and ordered that the subordinate court at Kangundo did not have jurisdiction to determine this case relating to land. He added that the parties would avail themselves the procedure laid down under the Land Disputes Act. But on 26.2.98 Mr. Ngatia's successor Mr. Nyamweya Senior Resident 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 appears that 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 under the Registered Land Act. But it does not apply to land falling within an adjudication section or as affected by the Land Consolidation Act. It has been said earlier that the suit land lay in an area 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 the transaction of sale *did* not have the relevant land control board consent. That accordingly the learned trial Magistrate at Kangundo would hear the suit since without the said consent what the present respondent would be seeking was recovery of his Shs. 50,000/-, the purchase price and nothing like damages. That ruling was not appealed against nor was it a subject of review if any party felt so.

The judgement in the lower court went over the pleadings including the result of a reference to the local District Officer when he chaired a panel of elders. That panel had concluded, by whatever approach they took to the dispute e.g. the parties breaching a Presidential 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 had been followed by the appellants depositing that sum in the District Officer's office (Kathiani) on 8.12.93. The learned trial Magistrate agreed with the arguments that the suit land indeed was subject to the Land Adjudication Act and accordingly it did not require a land control board consent to dispose of any interest in it. He observed further that what the respondent would have done was to apply as a purchaser so that his name would be entered on the land register under the Registered Land Act. He wondered how the 2nd appellant Nthenge succeeded in getting his name 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 that the respondent would have been entitled to the land. However the learned trial Magistrate recorded that he lacked jurisdiction to issue a permanent injunction against the appellants on the plea of trespass and he thought that the aggrieved party would seek such orders in the High Court. But the learned trial Magistrate went on to assess general damages for the breach of contract. Very rightly the learned Senior Resident Magistrate laid out the law that for such damages to issue evidence must be placed before the court of the price of a comparable piece of land in the local area which the aggrieved purchaser has bought (or would) after the deal he was engaged in was frustrated by the acts of the seller. It is the price difference between that in the contract and the "new" purchase that the buyer has to make. There was this part of the decision in that regard that raised contention when the appeal was heard:

"The court has reliably learnt that this land currently 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 the value of the suit land was Shs.250, 000/- or Shs.300, 000/-, the latter sum which was awarded in general damages for breach of contract.

The memorandum of appeal had 6 points. Points 1 & 2 were argued together and point apparently 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 sale fell under the Land control Board Act and that because the relevant land control board consent was not obtained the deal was null and void. This point can be disposed of right way by stating that before adjudication was over the land was still subject to customary law tenure and indeed there was no evidence that the Minister had declared the locality where the suit land lay as a land control area (see section 3 Cap 302). In fact it has never been denied that this Act applies to land where 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 appellant 2 in whose name the land in issue was ultimately registered. That is basically true. Neither the pleadings nor evidence alluded to fraud.

As for damages put at Shs. 300,000/- this court was satisfied that although the learned trial Magistrate properly and correctly set out the principle of law to recover damages in a breach of contract of sale of land, there was no evidence that a similar piece of land as the respondent intended 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 was not 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 judgment against 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 the learned trial Magistrate considered that application. He ruled that although the 1st appellant was not present himself in court his lawyer was. And that if he chose to let his co-defendants testify at the hearing then that was all well and good. It is true that it was the 1st appellant who was said to have sold land No. 1254 to the respondent. Reliefs were sought against him with his co-litigants severally and jointly.

The learned trial Magistrate was satisfied that the trial would go on in the way the defendants/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 lacked jurisdiction: This has been set out above in that the learned trial Magistrate declined jurisdiction in regard to issuing a permanent injunction. Wrongly or otherwise that is what the judgment said. The respondent prayed for possession of the land. All that he held was a contract of sale to it. He had never been in possession. Probably the respondent was raising for orders of specific performance in the light of the old section 3(3) Law of Contract Act because both seller and buyer signed the contract of sale and the learned trial Magistrate found that it was a valid contract. The cross appeal prayed this court to determine the dispute between him and the appellants finally citing section 78 (1) (a) Civil Procedure Act by which, it appears, he desired this court to conclude the litigation herein by finding that with a valid contract of sale agreement he 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 the Land Adjudication Act (Cap 284) this court saw one dated 9.11.94 (Exhibit 11I) to institute or continue with the suit in the lower court.

Accordingly it was validly before court.

The learned trial Magistrate clearly saw in his judgment after reviewing the whole file and proceedings before him that even if the respondent held a valid contract still he could not order the transfer of land to

him. The 1st appellant may still have been in favor of the transaction but his two sons - the 2 co-appellants:

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

So learned trial Magistrate considered it suitable to order that the respondent get general damages for breach of contract. All in all it seemed that with the 1st 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 no evidence on how the learned trial Magistrate arrived at Shs.300, 000/=, This has been remarked upon already. To the learned trial Magistrate and this court appears to agree, the damages were the next best alternative to specific performance even without praying for that alternative. Had the respondent laid before the court proof that he had bought or would buy a similar plot of land for 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/=, the purchase price paid.

Accordingly the lower court award of Shs. 300,000/= in general damages is set aside. In its 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 it since as the matter went through court, this court is of the view that respondent should get interest on this sum on the lower court rates or whatever rates that were applicable from 8.12.93 to 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