



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 64 OF 1992**

**JOHN MURIU GACHE ..... APPELLANT**

**VERSUS**

**KAMAU NJUGUNA**

**PETER KINYAGA ) ..... RESPONDENTS**

**(Appeal from the Judgment of the P.M's Court at Kaimbu in**

**Civil Case No. 104 of 1988 dated 11th of February,**

**1992**

**J U D G M E N T**

This is an appeal against the Judgment of the Senior Resident Magistrate, Mr. Wamwayi (as he then was) delivered on the 11th of February, 1992. The Learned Magistrate found in favour of the plaintiff on his alternative prayer to the Court of refund of the purchase price for a failed sale of land. The total amount Ordered to be paid to him being 75,100/=. In the same judgment, the Learned Magistrate found that there having been no consent of the Land Control Board Githuguri, the transaction between the plaintiff and the defendant was null and void for lack of consent. He dismissed the case against the 2nd defendant after having found that he was not a party to the agreement of sale.

Briefly, this is what the suit before the Learned Magistrate was all about. The plaintiff, John Muriu Gacwe claim was that on 13/11/1986, he entered into an agreement between him and the 1st defendant for the purchase of 2.5 acres, a portion of Gatamaiyu/ Kagua/300 for the sum of 84,000/=. The agreement was not documented. The suit premises was agricultural land, therefore subject to the Land Control Act Cap 302 of the Laws of Kenya. The facts of the agreement were not denied by the 1st defendant who was selling the land nor did he deny that he was paid 75,000/= although no receipt was produced.

In as far as the consent of the Land Board was concerned, it was the plaintiff's evidence and pleading that the same was obtained on 15/7/1987. He could not produce the consent or copy because it was given together with the transfer document and mutation forms to the 2nd defendant who refused to have the land transferred to the plaintiff or return the same to the plaintiff. The reason that the defendant gave was that the family refused to have the land sold and asked him to refund the money. This he did through the District Commissioner although the plaintiff refused to take the money.

The 2nd defendant in his defence denied entering into any agreement with the plaintiff. According to him the suit premises was registered in their names jointly with one other person, brother of theirs who was deceased. The agreement for sale was only between the plaintiff and the 1st defendant leaving out

him, the 2nd defendant and the deceased brother. The land was still held under one title as no subdivision had been done. His contention was that the transaction lacked the consent of the Githunguri Land Control Board and thereby rendered the whole transactions null and void.

The memorandum of appeal filed herein sets out four grounds of appeal namely that:-

- 1."The Learned Magistrate erred in Law and in fact in finding that there was no consent of the Land Control Board to the agreement between the appellant and the Respondents.
- 2.The Learned Magistrate erred in law in dismissing the case against the 2nd respondent.
- 3.The Learned Magistrate erred in law and in fact in failing to appreciate that the 1st defendant's/respondent's defence consisted of admission of facts pleaded by the appellant.
- 4.That the Learned Magistrate erred in law and in fact in finding that the plaintiff had failed to prove payment to the respondent, the sum of 84,000/=

To first consider the first ground of appeal. The appellant's contention is that the 1st Respondent did not deny that the consent was obtained. Therefore the Learned Magistrate had no basis upon which to find that the consent of the Land Control Board was never given because the same was not produced in Court by the appellant even after the explanation that the consent was kept by the 2nd Respondent who refused to make it available.

The appellant's contention is that the 1st defendant admitted in his evidence that they had gone to the Land Control board at Githunguri. Upon this admission, the Learned Magistrate should have presumed that the consent had been obtained.

It is important to briefly look at the 1st defendant, Kamau Njuguna's evidence before the Learned Magistrate. This is what he said.

"The land in question belongs to three people. None of us has been given title. The shamba has not been subdivided.

No surveyor has come there for subdivision. We have agreed as to where to cultivate.

Yes, me and the plaintiff went before the Land Control Board once. We were not given consent as one owner had

passed away. I do not know when Kamau died. I was living in the Rift Valley.

What is obvious is that the appearance before the Land Control Board was between Kamau the 1st Respondent and the plaintiff. It had nothing to do with the other two proprietors of the land, one of them already deceased. This supports the 1st Respondent's evidence that contrary to what the Plaintiff's story is, the Land Control Board did not issue the consent for the sale when the other owners of the land were not there. There was also the evidence of the 2nd Respondent that he never took or kept the consent documents as alleged by the plaintiff.

The plaintiff was aware of the 2nd Respondent's allegation that there had been no consent. He made no effort to obtain the records of the transaction from the Land Control Board. He called

not even one person that had sat on the Board. He did not even have a copy of the agreement. He adduced no evidence to the fact that the 2nd Respondent ever even took part in the deal or was even aware of the sale agreement and payment of the monies or even the attendance at the Land Control Board.

If the appellant was serious, there would have no difficult in calling the records of the Land Control Board. The Learned Magistrate had only the plaintiff's evidence unsupported by any document or any

other evidence. Evidence that was fully rebutted by both the respondents. To my mind he properly addressed his mind to the scanty evidence before him and reached the conclusion that in fact no consent had been obtained in terms of Section 6 (2) of the Land Control Act. The unwritten sale agreement between the 1st respondent and the plaintiff had no legal force. It was void for lack of consent.

Having reached the above finding, in that there had been no consent for the sale between the 1st respondent and the plaintiff, the Learned Magistrate was quite correct in dismissing the case against the 2nd respondent. He could not have held him responsible for an agreement that did not exist. Ground two of the appeal also fails.

As for ground three, I have dealt with it. 2nd respondent while admitting that he and the 1st plaintiff went to the Land Control Board. He explained why the consent was not given. In that two of the other proprietors were not there to agree to the subdivision before he could even sell.

As to the issue of payment. The Learned Magistrate in considering the same stated:-

"In the absence of evidence to prove that the plaintiff paid Sh.84,000/=, I find that the plaintiff has proved the purchase price to the tune of 75,000/=".

This is the sum that he Ordered that should be refunded. In as far as this claim is concerned, the plaintiff had no evidence apart from his word that he had paid 84,000/=. This is a very surprising state of affair. 84,000/= was a lot of money and yet the appellant got no receipt for it. So once more it was his word against the 1st respondent's word.

Save that the 1st respondent went further in his evidence and testified that he had paid back the money he had been given in front of the elders and the D.O. The plaintiff had not objected that he was being refunded less than the amount he had paid.

Secondly, in his own evidence, he was not sure what the agreed purchase price was. He states that it was 84,000/= and at the juncture says it was 80,000/= plus 4,000= for other expenses.

The 1st respondent's story that the agreed purchase price which he refunded of 64,000/= was supported by the D.O's letter he exhibited. The rest of the money that brought the Total claim of 75,000/= was according to the Respondent given for his expenses. When he came from the Rift Valley, that amount was also awarded to the appellant. On that ground, I am unable to reach a different finding from that of the Learned Magistrate. Ground four of the appeal also fails.

On the above basis, this appeal hereby fails.

It is hereby dismissed with costs to the 1st Respondent.

Orders accordingly.

**OWUOR**

**PUISNE JUDGE**

**20/10/96**

Coram: Owuor J.

Mr. Kabero holding brief for Mr. Maosa for the

Respondent

Mr. Mwaniki holding brief for Mr. Muhoro for the

appellant

Court Clerk - Njehia

**Court:** Judgment delivered in chambers.

**OWUOR**

**J U D G E**