IN THE COURT OF APPEAL

AT NAKURU

(Coram: Gicheru & Kwach JJ A)

CIVIL APPEAL NO 26 OF 1992

Between

JOSEPH K. CHERONO .....APPELLANT

AND

KIPLAGAT KIMITEI.....RESPONDENT

(An appeal from judgment of the High Court of Kenya at Eldoret (Aganyanya J) dated 5th day of September, 1991

in

HCCC No 178 of 1987)

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JUDGMENT

Gicheru JA. The case for the appellant in the superior court was that some time in the year 1974 the respondent accompanied by his father and mother approached him and told him that he was the allottee of Plot Number 210 in the Kaptagat Settlement Scheme Number 46 in Uashin Gishu district, the suit plot. This plot measured approximately 35.8 acres. According to the appellant, the respondent told him that he had obtained Settlement Fund Trustees and Guaranteed Minimum Return loans on the security of the said plot and he would have liked to exchange it with a plot that was unencumbered if the appellant had one. The loans debts then outstanding against the suit plot amounted to over Kshs 25,000/=. The appellant then asked the respondent how much land he wanted from him in exchange of the suit plot and the respondent said that he wanted 15 acres of land in respect thereof.

According to the appellant, he had three plots: one of which was at Chepkorio in Keiyo Marakwet district, while the other two were at Plateau and Muyeng'wet farm in Uasin Gishu district. Depending on which of the three plots suited the respondent, the appellant was to give him 15 acres of land set of such plot in exchange with the suit plot. For this reason, the appellant took the respondent together with his father to all the three plots. The respondent settled for 15 acres of land at Muyeng'wet farm.

Pursuant to their oral agreement in regard to the transaction referred to above, on 18th October, 1975 the respondent left – thumb – printed and the appellant signed a transfer instrument in connection with the transfer of the suit plot to the appellant. This was in the presence of Settlement Officer (1), Sirikwa on behalf of the Settlement Fund Trustees and who acknowledged the respondent's left-thumb-print and the

appellant's signature on the transfer instrument. On the same day, the original copy of an application to the Uasin Gishu Land Control Board for its consent to the transfer of the suit plot from the respondent to the appellant made and left-thumb-printed by the respondent and signed by the appellant was transmitted to the Secretary, Uasin Gishu Land Control Board by the Settlement Officer (1) referred to above. On 25th November, 1975 the said Land Control Board gave its consent to the aforementioned transaction. Although in the transfer instrument, the application for consent of the Uasin Gishu Land Control Board, and in the letter of consent the consideration in the transaction referred to above is shown to be Kshs 17,350/-, it is apparent from the appellant's evidence in the superior court that the oral agreement was that he was to give the respondent an alternative piece of land at Muyeng'wet farm measuring 15 acres.

After obtaining the letter of consent from the Uasin Gishu Land Control Board, the appellant paid off the outstanding Settlement Fund Trustees and Guaranteed Minimum Return loans attaching to the suit plot and on 19th July, 1985 he was issued with the title deed for the suit plot. Subsequently, he charged the suit plot to the Standard Chartered Bank Africa PLC in consideration of a loan of Kshs 200,000/-.

The foregoing notwithstanding, the respondent never vacated the suit plot and according to the appellant, his efforts to transfer 15 acres of his plot at Muyeng'wet farm to the respondent came to naught. Nonetheless, he was ready to take all the necessary steps to transfer the same to the respondent. It was for that reason that he sought the eviction of the respondent from the suit plot.

It is, however, apparent that at the time of the alleged oral agreement between the respondent and the appellant as is set out above, the appellant was the registered proprietor of 1,500 shares, of Kshs 20/- each, fully paid, in Muyeng'wet Farmer's Company Limited which entitled him to 83.6 acres of that company's Land LR No 5743 – Uasin Gishu. Out of this land, he gave 20 acres to his mother and as on 6th August, 1987 he was entitled to a balance of 63.6 acres. Save for his proprietorship of the company shares referred to above which reflected the measure of his entitlement to the company's land in Muyeng'wet farm, the appellant had neither a title to the 83.6 acres of land out of which he gave 20 acres to his mother nor to the remaining 63.6 acres. The appellant admitted as much in the superior court when he said that he had only shares in Muyeng'wet farm which was a group land and that he had not taken possession of the land out of which he could have transferred 15 acres to the respondent in exchange of the suit plot.

The respondent's answer to the appellant's case in the superior court was that there was no agreement between him and the appellant that he was to exchange the suit plot with 15 acres of the appellant's land at Muyeng'wet farm but had leased the said plot to the appellant for 13 years from 1975 to 1988 in consideration of the appellant assisting him to pay off the outstanding loans attaching to this plot. In that connection, the appellant had ploughed part of the suit plot for the period of the lease agreement and thereafter he was to move out of the said plot. According to him, at one time the appellant took him to a small town outside the municipality of Eldoret where he was bought beer and thereafter asked to take some fertilizer on behalf of the appellant. In that regard therefore, he and the appellant went into a storey building in that town where he signed some papers but did not know whether it was before a Settlement Officer. The respondent denied having attended any meeting of the Land Control Board in connection with any transaction concerning the suit plot. Subsequently, when HE the President of the Republic of Kenya was issuing title deeds in Eldoret Township to the proprietors of the various plots in the Kaptagat Settlement Scheme as is set out at the beginning of this judgment, the title deed in respect of the suit plot was issued to the appellant. He then realized that he had been cheated by the appellant and therefore reported the matter to the District Commissioner at Eldoret. In those circumstances, the respondent asked the superior court to revert the title to the suit plot back to him.

In his judgment delivered on 5th September, 1991, Aganyanya J, who tried the appellant's suit against the respondent, observed that from the evidence available before him, the appellant could not show that he had any land at Muyeng'wet farm which he could hand over to the respondent. The learned trial judge then proceeded to say that:

> "Under section 3 sub-section 3 of the Law of Contract Act any agreement for the sale of land must be in writing and this is so with transfer or application for consent and the application to the Land

> Control Board for consent cannot be construed to be such an agreement, given the fact that the defendant disputes the purpose for which he might have thumb-printed the documents presented to him by the plaintiff."

To the learned trial judge therefore, what was being revealed before him was a case of mistake or fraud and the fact that the appellant had been cultivating the suit plot for a period of 13 years without paying anything to the respondent coupled with his inability to remove the latter from the said plot lent credence to the respondent's testimony that he had only allowed the appellant to cultivate the suit plot for having assisted him to repay the outstanding loans referred to above. Consequently, the learned trial judge dismissed the appellant's case with costs and ordered the rectification of the register so as to have the respondent registered as the proprietor of the suit plot, to wit, land parcel No Uasin Gishu/Kaptagat/210.

Against that decision, the appellant appeals to this Court and has put forward five grounds of appeal. At the hearing of this appeal on 28th September, 1994, Mr Kalya for the appellant argued grounds 1, 2 and 3 of the appellant's appeal together and grounds 4 and 5 of the said appeal together. Concerning the former grounds of appeal, the appellant's quarrel was mainly that the learned trial judge failed to hold that he had the requisite land to exchange with the suit plot and thereafter proceeded to hold that he had fraudulently transferred the said plot to himself. In regard to these grounds therefore, Mr Kalya contended that the appellant had the requisite land to exchange with the suit plot and in connection with the appellant having fraudulently transferred the said plot to himself, he submitted that the respondent's allegation in that respect was unsustainable as the same had not been particularized. As to the latter grounds of appeal, particularly ground 4, the appellant's complaint was that the learned trial judge was in error when he held that there was no memorandum or note in writing pursuant to the oral agreement for the disposition of the suit plot between the respondent and himself as was contemplated by section 3 (3) of the Law of Contract Act, Chapter 23 of the Laws of Kenya, the Act, before the same was repealed by Act No 21 of 1990. Mr Kalya's submission in regard to this complaint was that not only was there a memorandum or note in writing as was envisaged by the subsection aforementioned in the form of the transfer instrument and the application for consent of the Uasin Gishu Land Control Board as are indicated above, but the appellant had also taken possession of the suit plot in part performance of the oral contract concerning the said plot between the respondent and himself. However, conceding that the appellant had no title to any land at Muyeng'wet farm which he could pass over to the respondent in exchange of the suit plot, Mr Kalya left the matter to this Court.

The submission of Mr Nyaundi for the respondent was that the requirements of the subsection referred to above were not complied with in regard to the disposition of the suit plot. At any rate, the oral contract relating thereto was without consideration since, according to him, the repayment of the outstanding loans attaching to the suit plot was in consideration of the appellant's occupation and cultivation of the said plot in terms of the oral agreement to lease the same to the appellant for a period of 13 years as is outlined above. To Mr Nyaundi therefore, the appellant's appeal to this Court was unmeritorious.

Before its repeal as is set out above, section 3 (3) of the Act stipulated as follows:

> "3. (3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or some person authorised by him to sign it.
>
> Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –
>
> (i) has in part performance of the contract taken possession of the property or any part thereof; or
>
> (ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

Evidently, the purpose of this subsection was to avoid parties being held to contracts concerning the disposition of an interest in land the terms of which they had not agreed, but not to facilitate the escape of

a party from a contract relating to such disposition the terms of which he had agreed. Indeed, as Buckley LJ pointed out in *Law v Jones*, [1974] 1 Ch 112 at pages 124 and 125 letters G, H and A when dealing with section 40 of the English Law of Property Act 1925 which was almost similar to our section 3(3) of the Act as is set out above, where such a contact is oral:

> "it may be evidenced by some writing which expressly or by necessary implication recognizes the existence of a contract as for example by referring to "our agreement" or to a "sale" effected by one party to another. But it is not in my judgment necessary that the note or memorandum should acknowledge the existence of a contract. It is not the fact of agreement but the terms agreed upon that must be found recorded in writing. Of course, I do not ignore that the section uses the words "note or memorandum thereof" in a context where "thereof" clearly relates to the contract sought to be enforced, but the section presupposes the existence of a contract and in case after case in the books one finds the existence of the contract established by extraneous evidence."

"Some memorandum in writing" which is no more than a document in which the terms of a transaction or contract are embodied or "note" in that behalf which in effect is a brief statement of particulars or of some fact, necessarily required under the above-mentioned subsection that it be sufficiently descriptive of the parties so that there could be no fair or reasonable dispute as to the person who was disposing of or purchasing an interest in land. Such description could only have been sufficient under the said subsection when it identified such parties without the necessity of resorting to parol evidence. To constitute a sufficient "memorandum or note" under that subsection therefore, the parties to and the subject – matter of the contract together with the terms of the contract and the signature of the party to be charged or of some person authorized by him to sign such "memorandum or note" even though such signature was put thereon *alio intuitu* and not in order to attest or verify the contract had to appear in such "memorandum or note". It was the embodiment of these factors in writing in a "memorandum or note" which evidenced the transaction. Indeed as Lord Searman observed in *Fauzi Elias v George Sahely & Co (Barbados) Ltd* [1983] 1 AC 646 at page 655 when dealing with similar provisions in the English Statute of Frauds 1677:

> "In seeking a sufficient memorandum it is not necessary to shoulder the further burden of searching for a written contract. Evidence in writing is what the statute requires. For, as *Steadman v Steadman* [1976] AC 536 emphasised, an oral contract for the sale of land is not void but only in the absence of evidence in writing or part performance, unenforceable. If therefore, a document signed by the party to be charged refers to a transaction of sale, parol evidence is admissible both to explain the reference and to identify any document relating to it. Once identified the document may be placed alongside the signed document. If the two contain all the terms of a concluded contract, the statute is satisfied."

From the transfer instrument referred to earlier in this judgment, the suit plot was allocated to the respondent on 7th May, 1964 and on the same day it was charged in favour of the Settlement Fund Trustees to secure the repayment of the sum of Kshs 6,000/= advanced to the respondent by the said Fund together with interest accruing therefrom at the rate of 6$^1/_2$ per cent per annum. When in 1974 the respondent approached the appellant over the suit plot as is outlined at the beginning of this judgment, he had not repaid his indebtedness to the Settlement Fund Trustees. According to the transfer instrument referred to above, on the transfer of the suit plot by the respondent to the appellant, subject to the conditions, reservations and declarations contained in the letter of allotment of the said plot dated 7th May, 1964, the latter agreed to repay the former's outstanding indebtedness and to keep him indemnified against that indebtedness. As I have earlier pointed out, this instrument which indicated that the transfer of the suit plot was in consideration of a sum of Kshs 17,350/= paid to the respondent by the appellant was left-thumb-printed by the respondent and signed by the appellant in the presence of the Settlement Officer (1) on behalf of the Settlement Fund Trustees who certified that the respondent and the appellant had appeared before him on 18th October, 1975 and having ascertained their identities acknowledged the respondent's left – thumb – print and the appellant's signature and that both parties had freely and voluntarily executed the transfer instrument and had understood its contents.

The original copy of the application for the consent of the Uasin Gishu Land Control Board addressed to the Secretary of the said Land Control Board and left-thump-printed by the respondent and signed by the

appellant was on the date aforementioned – 18th October, 1975– dispatched to the aforesaid Secretary by the Settlement Officer referred to above. In that application was indicated the nature of the controlled transaction in respect of which the consent of the Uasin Gishu Land Control Board was sought. The identities of the parties were clearly set out therein and the suit plot together with its location and acreage was also set out in that application.

The consideration of Kshs 17,350/- together with the repayment by the appellant of the respondent's indebtedness to the Settlement Fund Trustees were equally set out therein.

By a letter dated 27th October, 1975 addressed to the respondent and the appellant and copied to the District Commissioner, Eldoret and the Settlement Officer (1), Eldoret by the Secretary to the Uasin Gishu Land Control Board, the parties to this appeal were required to present themselves for an interview by the said Land Control Board at its meeting that was to be held in the District Commissioner's Office, Eldoret on 25th November, 1975 at 10.00 am. The interview was in connection with their application for consent of that Land Control Board which had been delivered to its Secretary on 23rd October 1975. At that meeting, the said Land Control Board gave its consent to the transfer of the suit plot by the respondent to the appellant and a letter of consent in that regard was issued by that Land Control Board on 9th December, 1975.

Notwithstanding the respondent's denial that he never attended the meeting of the Uasin Gishu Land Control Board held on 25th November, 1975, following the letter dated 27th October, 1975 addressed to him and to the appellant as is mentioned above and which letter required the two parties to present themselves for interview by that Land Control Board at that meeting in accordance with section 17 (1) of the Land Control Act, Chapter 302 of the Laws of Kenya, it seems unlikely that the said Land Control Board would have given its consent to the controlled transaction concerning the disposition of the suit plot in the absence of the respondent. It is more likely than not that he attended the meeting of the above mentioned Land Control Board as is set out above and as was asserted by the appellant in his evidence in the superior court. The combined effect therefore of the documents referred to above when laid alongside each other was to constitute a sufficient memorandum in writing in compliance with section 3 (3) of the Act before it was repealed as is indicated above. On this score, Mr Kalya's submission in regard to there being a memorandum or note as contemplated by the aforesaid subsection pursuant to an oral agreement between the respondent and the appellant for the disposition of the suit plot was not without merit.

As to the appellant having taken possession of the suit plot in part performance of the agreement referred to above, the proviso to section 3(3) of the Act as is set out above required that an intending purchaser or lessee of an interest in land who had performed or was willing to perform his part of a contract would in that regard have taken possession of the property or any part thereof, or being already in possession, continued in possession in connection therewith having done some other act in furtherance of the contract. Thus, in order to vindicate good faith, where the vendor in an oral contract for the disposition of an interest in land stood by when the purchaser or lessee in performance or part performance of his contractual obligation had taken possession of the property the subject-matter of the contract or any part thereof; or having already been in possession continued to be in possession in that respect having done some other act in furtherance of the contract; such vendor could not be exonerated from the performance of his reciprocal obligations on the ground that the contract was not in writing and signed by him or by some person authorized by him to sign it. For as Sir Thomas Plumer, MR observed in *Morphett v Jones*, 1 Sw 181:

> "The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure."

Indeed, as the Earl of Selborne LC pointed out in *Maddison v Alderson* [1882-3] 8 App Cas 467 at pages 475 and 476 while dealing with the doctrine of part performance consequent to that part of section 4 of the Statute of Frauds 1677 that related to interest in land:

> "In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase – money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestae* subsequent to and arising out of the contract. So long as the connection of those *res gestae* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestae* themselves, justice seems to require some such limitations of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of the material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement."

The use of the words *res gestae* in preference to–"acts of part performance of the alleged contract" in the foregoing passage was probably, as Lord Simon of Glaisdale indicated in *Steadman v Steadman,* [1976] AC 536 at page 561 letters A and B, for the reasons that the Earl of Selborne L C "was emphasizing that what gave rise to the equity was, not the contract itself, but what was done ancillary to it" since:

> "once it was considered incumbent to do equity without undermining the statute, it was reasonable to look for attendant circumstances which inherently rendered it probable that there had been an antecedent contract the obligations of which it would be inequitable to allow a party to escape."

The position taken by the respondent both at the trial of the suit against him in the superior court and at the hearing of this appeal was that the possession of the suit plot by the appellant was pursuant to an agreement to lease the same to him for a period of 13 years from 1975 to 1988 on his repayment of the outstanding loans attaching to the said plot. According to the respondent therefore, the appellant's possession of the suit plot was not in pursuance of an oral contract for the transfer of this plot by him to the appellant. Although the appellant's position in this regard was that his acts of possession of the suit plot was in furtherance of the oral contract for the disposition of the same to him by the respondent, notwithstanding that this may have been so, those acts by themselves could easily have been in the performance of the oral contract to lease the suit plot as was alleged by the respondent. Consequently, those acts on their own did not constitute part performance of the oral contract for the disposition of the suit plot by the respondent to the appellant.

As I have indicated earlier in this judgment, the appellant had no title to any land in Muyeng'wet farm out of which he could have transferred 15 acres to the respondent pursuant to his oral contract with the respondent for the disposition of the suit plot to which there was a sufficient memorandum in writing in compliance with the relevant provisions of section 3(3) of the Act as are set out above. Although the memorandum in writing relied on in the oral contract indicated that the disposition of the suit plot was in consideration of a sum of Kshs 17,350/-, in the appellant's own words in the superior court, besides his repayment of the outstanding loans attaching to the said plot, he was to transfer 15 acres of his land in Muyeng'wet farm to the respondent. This never became possible as he had no title to any land in that

farm. The exchange of the 15 acres of land in Muyeng'wet farm with the suit plot was an essential and integral element of the oral contract for the disposition of the said plot by the respondent to the appellant. It was not capable of performance in the absence of title to any land in Muyeng'wet farm that the appellant may have had a right to. The result therefore was a total failure of this part of the consideration that perhaps had arisen from both parties mistaken belief that the appellant had the 15 acres of land in Muyeng'wet farm which he could transfer to the respondent in compliance with the terms of their oral contract. It certainly is because of this that the respondent never vacated the suit plot; and notwithstanding Mr Kalya's contention in this appeal that the appellant had the requisite land to exchange with the suit plot, the truth is that the appellant had no land in that regard the title of which could be vested in the respondent in fulfilment of their bargain in the oral contract for the disposition of the suit plot. On account of this therefore, there was no legal validity to that contract. Consequently, Aganyanya J was correct in dismissing the appellant's suit in the superior court with costs and in the order he made subsequent thereto. In the result, I would dismiss the appellant's appeal with costs to the respondent and as Muli JA has since the hearing of this appeal ceased to hold office and Kwach JA agrees, in terms of the relevant provisions of rule 32(3) of the Rules of this Court, it is so ordered.

Kwach JA. I have had the advantage of reading, in draft, the judgment of my brother Gicheru JA and I agree with him that this appeal should be dismissed with costs to the respondent.

Dated and delivered at Nakuru this 22nd day of February 1995

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR