IN THE COURT OF APPEAL

AT KISUMU

(Coram: Gicheru & Gachuhi JJ A)

CIVIL APPEAL NO 28 OF 1991

JAMES SABATIA ……..…….….. APPELLANT

VERSUS

ALUBISI AMUKAYIA & ANOTHER…..……. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisumu

(Omolo J) dated 8th August, 1990

in High Court Civil Case No 202 of 1979)

JUDGMENTS

Gicheru JA: Plot No 86 in the Lumakanda Settlement Scheme, Kakamega district, the suit plot, was on 9th November, 1963 alloted to Alubisi Amukayia, the first respondent, by the Settlement Fund Trustees. By a written agreement dated 3rd March, 1970, the first respondent agreed to sell and James Sabatia, the appellant, agreed to buy this plot at a price of Kshs 4,000/-. The sum of Kshs 1,400/- was paid to the first respondent by the appellant on the date of the agreement. A further sum of Kshs 600/- was to be paid to the first respondent by the appellant on 11th March, 1970 but the agreement was silent as to how and when the remaining balance of the purchase price of Kshs 2,000/- was to be paid to the first respondent by the appellant. According to the appellant, however, on 11th May, 1970 he paid to the first respondent another sum of Kshs 1,050/- and was left with a balance of Kshs 950/- to pay to the first respondent pursuant to the agreement. By the year 1971, he had not paid this latter sum of money to the first respondent. As a result, the first respondent filed an action against him in Kakamega Senior Resident Magistrate's Court Civil Case No 135 of 1971 for the repossession of the suit plot or and in the alternative for the payment of the outstanding balance of Kshs 950/-. The first respondent's contention, however, was that the appellant had made no further payments towards the purchase of suit plot after paying the initial sum of Kshs 1,400/- mentioned above. It was for that reason that he brought the aforementioned action against the appellant.

The result of the suit mentioned above was a consent order dated 23rd May, 1972 which was in the following terms:

"By consent: The plaintiff will transfer plot number 86 Lumakanda Scheme Kakamega district to

the name of the defendant on payment of Kshs 950/- plus Kshs 300/- agreed costs by the defendant to the plaintiff."

The appellant claimed to have complied with this order while the first respondent asserted that this was not so since he had received no payment whatsoever pursuant to the said order. It was because of this, according to him, that he subsequently sold the said plot to Jotham N Mwangi, the second respondent, at a purchase price of Kshs 4,000/- and had it transferred to him on 15th September, 1973. On 1st August, 1972, however, the advocates appearing for the first respondent in the suit referred to above, Messrs, Mukele & Company, wrote a letter to the appellant the contents of which were as follows:

"Dear Sir,

R M Civil CaseNo 135 of 1972

Aluvisia Amukayia Isiaho vs James Savatia Could you please call on us immediately and pay Shs 1,250/- as ordered by the Resident Magistrate, Kakamega on the 23rd May, 1972.

Unless you pay the said amount within 14 days we shall apply for execution in order to attach your property and you will pay more costs thereto. This is the last warning.

Yours faithfully,

Signed

Mukele & Company

Advocates

cc

Balongo, Aganyanya & Co,

Advocates

Kenyatta Avenue

PO Box 702

KAKAMEGA"

On 28th August, 1972, Messrs, Mukele & Company, Advocates issued receipt No 2633 in acknolegement of their having received cheque No 211790 dated the same day for a sum of Kshs 1,250/- from Messrs Balongo, Aganyanya & Company, Advocates being payment to Alubisi Amukayia Isiaho, Messrs Balongo, Aganyanya & Company, Advocates were acting for the appellant in the suit mentioned above.

From the letter and the receipt referred to above, it would appear that the appellant complied with consent order set out. Above and in so doing completed the payment of the purchase price in respect of the suit plot. Nonetheless, after the suit plot was transferred to the second respondent as is mentioned above, the latter paid the outstanding Settlement Fund Trustees loan attaching to the said plot. He then moved on to it, and according to him, it was registered in his name and in 1981 he was issued with a title deed in respect of the same.

By a plaint dated 2nd July, 1979, the appellant sued the first and second respondents in the High Court of Kenya at Kisumu in that Court's Civil Suit No 202 of 1979. In that suit, the appellant acknowledged that the suit plot was registered in the name of the second respondent. Nevertheless, he claimed against the first and second respondents jointly and severally for specific performance of the agreement and sought

that they be ordered by the Court to sign all the relevant documents necessary to effect the transfer of the suit plot into his name. Indeed, at the hearing of the suit in the superior court, he categorically stated that he wanted nothing other than being registered as the proprietor of the suit plot. He made it plain that he did not want a refund of the money he had paid to the first respondent since he could not now buy land with such money. This was notwithstanding his alternative prayer in his plain for the refund of the said money. He, however, did not plead nor was any evidence led that the registration of the second respondent as the proprietor of the suit plot was not a first registration and that it was obtained or made by fraud or mistake.

In his judgment, the learned trial judge observed that the appellant was in effect seeking rectification of relevant register by canceling the registration of the second respondent and directing that he be registered in place of the latter. To do this, he was required to plead and prove that that registration was obtained or made by fraud or mistake. Failure to plead these matters disabled him from being within the provisions of section 143 of the Registered Land Act, chapter 300 of the Laws of Kenya, the Act, so as to give the superior court jurisdiction to order or not to order rectification of the relevant register. As a result, the trial judge dismissed his suit with costs; and since he had rejected any suggestion that the superior court should order a refund of the purchase price and payment of any damages by the respondents, the learned judge declined to award him that which was against his wishes.

The appellant's appeal to this Court concerns his having obtained the consent of the relevant Land Control Board and that he had a judgment of the Kakamega Senior Resident Magistrate's Court in respect of the suit plot which was in force. There is nothing in his appeal concerning rectification of the relevant register under section 143 of the Act which latter founded the dismissal of his suit in the superior court. Indeed, at the hearing of this appeal on 2nd December, 1992 all he said was that if he could not get back the suit plot he should be refunded his money.

Section 143 of the Act provides that:

> "143. (1) Subject to subsection (2) of this section the court may order rectification of the register by directing that any registration be canceled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission fraud or mistake in consequence of which rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

Neither of the essential elements of this section that were relevant to the appellant's claim were pleaded by him nor was any evidence led in respect thereof. The second respondent is the registered proprietor of the suit plot who is in possession. He acquired it for valuable consideration. Without pleading and establishing the vital ingredients of the section set out above that were relevant to his claim, the appellant could not hope to succeed. There was no other way in which he would have obtained registration as the proprietor of the suit plot in place of the second respondent. His suit in the superior court was doomed to fail and was properly dismissed by that Court. I can therefore find no merit in his appeal.

Although the appellant had in the superior court rejected anything short of being registered as the proprietor of the suit plot and indeed pressed his suit in that Court principally along that line, at the hearing of this appeal, he had a change of heart and said that if he could not get back the suit plot he should be refunded his money. From what I have outlined above, it does appear that he had over a period of about two and half years paid to the first respondent a sum of Kshs 4,000/- towards the purchase of the plot aforementioned. There is no lawful cause why he should not be refunded this sum of the money by the first respondent.

In the result, I would dismiss the appellant's appeal with costs to the respondents but would order that he be refunded by the first respondent the sum of Kshs 4,000/- with interest at court rates from the date of filing suit in the superior court until payment in full.

Gachuhi, JA: I have had the advantage of reading the judgment prepared by his Lordship Gicheru JA in draft form and I entirely agree with him that this appeal should be dismissed with costs, with a further order he proposes that this Court should make regarding the sum of Shs 4,000/- paid to the 1st respondent.

In the light of these two concurring judgments, the appeal is dismissed with costs to the respondents. There will be a further order that the first respondent does refund to the appellant the sum of Shs 4,000/- being the purchase price paid together with interest thereon at court rates from the date of filing suit till payment if full.

These judgments are delivered under the provision of rule 32 (3) of the Rules of this Court.

Dated and Delivered at Kisumu this 9th day of June, 1993

J.E. GICHERU

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL