



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO 108 OF 1985**

**SIMON ODINGA.....APPELLANT**

**V**

**CHARLES SANDE.....RESPONDENT**

**JUDGMENT**

In 1979 Simon Odinga entered into an agreement of sale of his parcel of land Butso/Indangalasia/355 with Charles Sande. The entire parcel of land comprised 11.5 acres. The price agreed was Kshs 2,000 per acre. Charles Sande paid Kshs 23,000 on August 23, 1979. Later, the said agreement was altered by consent. The parcel of land was to be subdivided into two unequal portions one of which comprised 5.3 acres was now sold to Charles Sande at the same rate of the sub-division was approved by the Commissioner of Lands and the Municipal Council of Kakamega. The vendor then refused to carry the agreement through. Charles Sande sued Simon Odinga in the Resident Magistrate's Court for specific performance of the agreement. The trial magistrate after considering the evidence, gave judgment for the plaintiff.

The defendant appealed to the High Court, Kakamega basing his appeal on trust and that the trial magistrate misdirected himself in decreeing specific performance when the refund of the purchase price ought to have been ordered and that the trial magistrate did not appreciate that the purchase price had been deposited in court.

The appeal was dismissed. The appellant now appeals to this court on the same grounds as in the High Court and further brought in section 6 of the Land Control Act (Cap 302). There were three supplementary grounds which introduced conditional precedent.

Mr Onyikwa for the appellant argued the three supplementary grounds together and stated that the sale was subject to conditional precedent. In substance there is no evidence either from the written agreement itself or the oral evidence to support such conditional precedent. Even if it could be implied that the sale was conditional on the vendor obtaining another piece of land, this could have been implied only if the first agreement which was altered in 1980 when they had agreed on the sale of 5.3 acres, the vendor retaining the balance and refunding part of the payment paid for the entire 11.5 acres. There can never be conditional precedent implied on the second agreement. The vendor was not selling his entire land. It was not open to the vendor to imply that it was conditional on obtaining another piece of land. It was for that reason implied in the first agreement that the vendor applied for the sub-division which was approved by the Commissioner of Lands and the Municipal Council of Kakamega. The appeal fails on these grounds.

Mr Onyikwa had also attacked the legal validity of the agreement relied by the respondent. In his

pleading the respondent relied on the agreement of 1979 which was for the sale of 11.5 acres. That agreement was rescinded by the later agreement. There was quick reaction by the respondent in applying for amendment of the pleadings under Rule 44 (2). The court granted the application by allowing the responding to plead and rely on the agreement made on March 27, 1980 for the purchase of 5.3 acres. The evidence before the court was wholly based on the later agreement dated March 27, 1980. The amendment was allowed so as to tie up with the evidence. This ground of appeal also fails.

The ground that bought the necessity of obtaining the Land Board Consent was not proceeded with since the Land Control Act does not imply to land within the Municipality.

On the question of trust, Mr Onyikwa argued that the vendor held the land in trust for himself and his family. Mr Minishi for the respondent replied that there was no allegation of trust in the defence that was filed and no amendment was sought.

Trust should specifically be pleaded and where possible particulars should be stated. Section 30 of the Registered Land Act provide for over riding interest not to be noted in the register. Section 28 preserves the rights of a proprietor not liable to be defeated except as provided in the Act.

But Mr Onyikwa relied on the *proviso* to this section in submitting that the appellant hold the land in trust for himself and his family. This provision is:

“Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee”.

This kind of trust need qualification. It is a *proviso* that is commonly applied where brothers or relatives are entitled to or have an interest in land but only one of them particularly the senior member of the family is Simon Odinga v Charles Sande the registered proprietor and where the interest of other parties are noted in the register. In instances where the head of the family intends to dispose of the entire land leaving the wife without anywhere to cultivate to feed herself and children or where by such sale the children will be left landless without anything to inherit, it has been found useful to apply this *proviso* so as to block the sale. But in my view the *proviso* cannot be used in the present case where the matter has gone through the land board and a subdivision approved. The appellant and those claiming the land under him are not rendered landless as they have a portion left to them, to live on and eventually to inherit. This ground also fails.

The appellant has not succeeded on any ground of appeal argued. The result is that the appeal fail and so it is dismissed with costs.

**Platt J A** I have read the judgment of Gachuhi, JA with which I am respectfully in substantial agreement. I would only attempt to make a few points in support.

First, there was no evidence of or understanding about a condition precedent in the case. That situation, even in a collateral agreement, must be clear otherwise every agreement for sale would be rendered precarious, the seller failing to move until he has found alternative land. If such a condition is part of the main sale agreement then it should be in writing as required by Section 3 of the Contract Act (Cap23).

Secondly, the *proviso* to Section 28 of the Registered Land Act has also a general purpose. Section 28 describes the powers of the registered owner. Section 126 of the Act provides for trusts which may or may not be referred to in the registration of the title to the land. A trustee has all the registration of the title to the land. A trustee has all the powers of the registered owner; but in his case he must exercise his powers in accordance with the trust. The *proviso* reminds him of his duties. There may be several kinds of trusts some writings, and some not. Some trusts arise in customary circumstances. In all cases, where the registered owner is a trustee he must exercise his powers in accordance with the trust.

In this case there is no ground for thinking that the seller was holding the land in accordance with any trust, and none was pleaded.

As Apaloo JA also agree there will be an order in terms that Gachuhi, J A has suggested.

**Apaloo JA** I agree and have nothing to add.

**February 9 1987**

**PLATT, GACHUHI & APALOO JJA**