



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELCA 1 OF 2020**

**PETER MAINA MUNINA.....APPELLANT**

**VERSUS**

**ANNE WANJIRU WACHIRA**

**(suing as Attorney of**

**SAMUEL NDUATI NJUGUNA).....RESPONDENT**

**(An appeal against the judgement delivered on the 11/12/19 by the Learned Chief Magistrate, the Hon M W Wachira in CMCC No 42 of 2018)**

**JUDGMENT**

1. Vide a contract of sale entered into between the Respondent (Plaintiff) and the Appellant (Defendant) on the 13/4/2010, the parties agreed to sell and purchase two plots to be excised from MAKUYU/KIMORORI/BLOCK3/664 each measuring 0.045 ha at the total consideration of Kshs 1,350,000/-.

2. The Plaintiff's case is that the Defendant breached the agreement of sale leading to the issuance of 21 days' notice to the Defendant to complete the agreement.

3. The Plaintiff filed suit against the Defendant seeking interalia specific performance, vacant possession of the suit land, damages for breach of contract and costs and interest of the suit.

4. In denying the Plaintiffs claim the Defendant contended that there was no valid agreement for sale between the parties. That in the alternative the agreement was illegal or void ab initio for want of Land Control Board consent to transfer the suit land. He pleaded limitations of actions and contended that the suit should be struck out for being statute barred. That damages cannot be maintained on an unenforceable contract.

5. In its judgement delivered on the 11/12/19 the Hon Court granted judgement in favour of the Plaintiff as follows;

“this Court enters judgment for the plaintiff against the Defendant for the sum of Kshs 1,350,000/- being the sum paid to the Defendant as acknowledged by the Defendant with interest as Court rate from the filing of the suit until payment in full and costs of the suit.”

6. Aggrieved by the said decision the Appellant has proffered the following grounds of Appeal;

a) The Learned Magistrate erred in law in finding that that a power of attorney dated 7/10/2017 and registered on 6/1/2018 could have been used to enter into a lawful contract of sale dated 13/4/2010 so as to validate the contract.

b) The Learned Magistrate erred in law in faulting the Appellant for not obtaining Land Control Board consent while it is the duty of both parties to a contract for sale of land affected by that law to apply for and obtain such consent.

c) The Magistrate failed to address and resolve all the issues raised by the parties.

d) The Magistrate erred in not resolving the issue of the capacity and competence of the Respondent (Anne Wanjiru Wachira) to enter into the subject contract or to file the suit before the Court purporting to be an attorney of Samuel Nduati Njuguna.

e) The Learned Magistrate misapprehended and misapplied Section 39(1) (b) and Section 4 (1) (a) of the Land Act to validate a contract for sale of land declared void Section 6 of the Land Control Act and whose performance would amount to a crime under Section 22 of that Act.

f) The Magistrate erred in not finding the Plaintiff's suit offended Section 4(1) of the Limitation of Actions Act and was therefore statutorily time-barred.

g) The so-called discretion the Magistrate said she was using does not exist in law to override express provisions of the Law.

h) The Magistrates went beyond her call by granting the Plaintiff reliefs not prayed for, one of them being refund of purchase price which had not been prayed for in the plaint.

i) The judgement of the lower Court is not supported by the evidence on record and is clearly arbitrary and against the Law.

7. The Appellants sought the following orders;

a. The Judgment of the lower Court be set aside and an order be substituted in its place dismissing the Plaintiff's suit in the lower Court with costs.

b. The costs of this Appeal be awarded to the Appellant against the Respondent.

c. Such further or other orders be made as are just.

8. I have read and considered the written submissions of the parties which I shall refer to in the judgment.

9. As to whether there was a valid agreement between the parties, the Court has reviewed the agreement on record executed between the parties. The agreement contains the description of the property, the consideration and the terms upon which the parties bound themselves to.

10. Section 3 (3) of the Contract Act provides as follows;

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

11. The signatures of the parties are attested by an Advocate namely Karanja Kangiri who also drafted the agreement for sale and was said to be the Advocate of the Appellant then.

12. It is the finding of the Court that going by the provisions of the law, the agreement of sale was valid.

13. Whether the agreement of sale can be invalidated by the power of attorney to the Respondent registered on the 6/1/2018, the Appellant has argued that the agreement of sale was between himself and one Samuel Nduati Njuguna. He has faulted the agreement on grounds that it was signed by the Respondent and not the said Njuguna. That the Respondent only obtained a power of attorney in 2018 way after the agreement was signed. That the fact that the agreement of sale was signed way back in 2010 without a power of attorney invalidates the same to the extent that the Respondent did not have locus to represent Mr. Njuguna.

14. The Court has found that the agreement of sale is expressed to be between Njuguna and the Appellant at the preamble however on the execution part, it is signed by the Respondent as the agent of the said Njuguna. The Appellant led evidence and admitted that he knew that the Respondent executed the agreement as an agent of Njuguna and in furtherance of the completion indeed received and accepted the purchase price paid through the said agent.

15. In his evidence in Court he stated that the agreement was drafted and signed before his Advocate who though raised the issue of the said power of attorney was in agreement that it could be provided later.

16. It is a general power of attorney that comprises inter alia all the activities carried out by the Respondent which are; negotiating and purchasing the land and filing suit on behalf of Njuguna. He cannot therefore turn around and sustain a claim that the agreement for sale is invalid on that ground. The Court has perused the power of Attorney registered on the 16/1/2018.

17. From the conduct of the parties in the suit, it is clear that the Appellant knew and accepted that the Respondent was acting as an agent of Mr Njuguna. There is clear manifestation with respect to the intention of the parties to ratify the agency relationship between the said Njuguna and the Respondent at a later point. The Respondent led evidence that the said Njuguna resides abroad and hence the delay in obtaining the same. It can be deduced from the evidence of the Respondent that the power of attorney was registered in readiness for the

transfer and registration of the suit land in the name of the said Njuguna.

18. I find no ground to invalidate the agreement of sale in that regard. This ground is dismissed.

19. It is trite law that Courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592, Scrutton L.J.** held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract.”

20. The agreement of sale did not provide for who amongst the parties was to procure the Land Control Board consent. The Land Control Act provides that either party may apply for the consent to transfer the suit land. It was the contention of the Appellant that the sale became void on account of lack of the said consent. That may be so. It is not in dispute that the land was an agricultural land and therefore subject to the Land Control Board consent.

21. Section 6 of the Land Control Act Cap 302 states;

“(1) Each of the following transactions that is to say— (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a Land Control area; (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of its void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act”.

22. Section 6(3) of the said Act provides that the section does not apply to transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles or a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.

23. The transaction in question did not fall within the exempted transactions.

24. Section 7 of Land Contract Act provides that if any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to [Section 22](#).

25. It is admitted by the Appellant in evidence that he received the sum of the Kshs 1,350,000/- However in his submissions he submitted that he received only Kshs 1 Million and not the full amount. The Respondent led evidence that the sum of Kshs 330,000/- was paid via bank transfer to the Appellants account by Reuben Henry Muhia. The Appellant has not disputed this payment in particular.

26. **Section 8(1)** of the same Act provides that the consent of the Board ought to be obtained within six months of the making of the agreement with a proviso that that the High Court may enlarge the time.

27. It is not in dispute that the said consent was not obtained within the period of six months from the date of the signing of the agreement of sale no leave sought from the Court to enlarge time within which the parties could apply for the same.

28. It is the contention of the Appellant that the agreement is void for want of the Land Control Board consent. The strict application of Sections 6 and 7 of the Land Control Act limits the Appellants action to recovery of debt in the voided agreement. The provisions of the section 7 provide that any monies paid in pursuance to a void contract are recoverable as a civil debt.

29. The Appellant faulted the Learned Magistrate for granting the refund of the monies yet there was no plea for it. The intention of the parties can be gleaned from their conduct and transaction that they intended to sell land to each other. The sale was actually concluded and that is why under para 3 of the agreement of sale the parties covenanted as follows;

“there is a meeting of minds ad-idem as to the subject matter and between the parties herein.”

30. Based on the agreement, the Appellant received the purchase price in respect to the sale and what remained were the formalities of transferring the land to the Respondent. The right of the Appellant was the payment of the sum of Kshs 20,000/- which the Respondent states is outstanding (this is notwithstanding the evidence of the Appellant that he had been paid in full). In this case he had been fully paid and he cannot hold the money as well as the land at the same time. The rights to the land had passed to the Respondent upon the payment of the purchase price. The Appellant therefore held the title to the subject lands under a constructive trust in favour of the Respondent.

31. The Court of Appeal, after quoting with approval the cases of **Mutsonga Vs. Nyati (1984) KLR 425, Kanyi Vs. Muthiora (1984) KLR 712**, and **Yaxley Vs. Gotts and Another (2000) Ch. 162** defined the equitable doctrine of constructive trust *viz-a viz* the suit as follows:

“A constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the Appellants and the Respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case.....constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.”

32. That said this Court is both a Court of equity and a Court of law. Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing; and equity detects unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.

33. It is the finding of the Court that allowing the Appellant to hold the land and the purchase price is inequitable. The justice of the case is that the Appellant must refund the purchase price together with interest. The Court will grant appropriate orders in the end.

34. The Learned Magistrate cannot be faulted in granting the remedy that she did.

35. As to whether the cause of action was time barred, the Court will look at the period when the cause of action arose. There are various arguments and counterarguments by the parties in respect to this point. The Appellant posits that the cause of action arose in 2010 while the Respondent argues that the cause of action arose 21 days after the notice issued in June 2017.

36. The agreement of the parties did not provide for the completion of the sale. It however adopted the provisions of the Law Society conditions of sale. It follows that time was not of essence to the agreement. Evidence was led that the parties went dormant until 2017 when the Respondent issued a 21 days notice to complete which notice was not heeded by the Appellant. It is the Courts view that the cause of action accrued after the notice. That means that the time started running from 2017 and 6 years provided for under Section 4 of the Limitations of Actions Act.

37. Section 4 of the Limitations of Actions Act provides that the following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

38. Section 7 of Limitation of Actions Act provides that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

39. It follows that the cause of action arose on the 17/6/2017 and therefore limitation of actions kicks in after 6 years under Section 4 and 12 years under Section 7 of the provisions of Limitation of Actions Act. The suit was filed on the 6/2/18. The Court finds that the suit is not statute barred.

40. With respect to the sum of Kshs 1,350,000/- the Appellant argues that the sum paid and received by the Appellant was Kshs 1.0 million only. That the Court erred in granting the Appellant the sum of 1,350,000/- a sum in excess of what was received. In evidence the Appellant admitted receipt of Kshs 1,350,000/-. The Appellant is estopped from turning the corner and denying the receipt of the cash.

41. With respect to breach, parties contemplated a scenario of default and provided for liquidated damages as follows;

“in case of breach of contract the party in breach shall pay the aggrieved party 20% of the consideration as liquidated damages.”

42. In this case the parties provided for the 20% of the purchase price as liquidated damages. It is the finding of the Court that the Appellant is liable to pay 20% of the purchase price in addition to the refund of the purchase price.

43. The Appeal is dismissed for lacking in merit.

44. The judgement of the lower Court is substituted with the orders of this Court as follows;

(a) The Appellant shall refund the sum of Kshs 1,330,000/- together with 20% p.a interest as liquidated damages to the Respondent from the time of filing suit until payment in full.

(b) The costs of the Appeal shall be payable to the Respondent.

45. **It is so ordered.**

**DATED, SIGNED & DELIVERED ONLINE THIS 10<sup>TH</sup> DAY OF DECEMBER 2020.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Gichuki for the Appellant

Omulama for the Respondent

