



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU
(Coram: Kneller & Hancox, JJ A & Chesoni, Ag J A)
CIVIL APPEAL NO 65 OF 1983

BETWEEN

NG'ANG'A KARAGO KARANJA APPELLANT

AND

FRANCIS KARANJARESPONDENT

(Appeal from the judgment of the High Court of
Kenya at Kakamega (Gicheru, Ag J) dated
10th May, 1983
In
Civil Appeal No 7 of 1983)

JUDGMENT OF KNELLER, J A

Ng'ang'a Karanja, the appellant, asks this court to set aside the judgment of the High Court (Gicheru Ag J) at Kakamega, which dismissed his appeal from the decision of the Bungoma Resident Magistrate who found for Francis Karago Karanja, the respondent, in his suit against the appellant. The respondent by his plaint asked for an order that the appellant should transfer half an acre to him from his land parcel E Bukusu/S Kanduyi/1016 which he had sold to him on May 23, 1978 for Kshs 8,000 which had subsequently received the consent of Bungoma Town Council. The Appellant in his written statement of defence admitted the sale and consent but denied it was agreed that the portion sold was exactly half an acre in area. It was, he claimed, what was marked out by the parties during the negotiations for the sale and it was less than half an acre so the appellant was only ready and willing to transfer the latter to the respondent if he agreed but he do not do so.

The issue was, therefore, did the appellant agree to sell half an acre of his land or some portion less than that which was agreed upon by the parties before the sale? The respondent had to prove it was the half acre. Evidence was given by the parties who between them produced an informal written agreement of March 23, a formal one of May 23 both of 1978 drawn up by an advocate signed by the parties and an application of August 11, 1978 to subdivide the plot which, again, they both signed and once more the area to be sold and bought is described as half an acre.

The appellant in his petition of appeal to the High Court complained that the Magistrate's decision was wrong because he ignored the evidence of the appellant, he did not visit the plot and or see the boundary the parties planted to the portion which was the subject of the sale.

The learned judge went through the evidence, including those documentary exhibits, again and found no merit in the appeal. The agreements of sale, discharge and application to subdivide the appellant's land

specifically referred to the half acre and the appellant agreed he had signed each one. The magistrate considered the appellant's evidence that despite these documents he sold something less than half an acre. There was no call for the magistrate to go and see the appellant's plot and the half acre or less or sisal markers in it.

The appellant's petition to this court is in exactly the same terms as that which was before the High Court and together with his submissions they do not lead us to have any doubt the learned judge was right to dismiss the first appeal. So in my view, it would be right to dismiss this appeal with costs. There is another matter which must be mentioned. The appeal record does not include the decree of the High Court and that is a defect and could result in the appeal being struck out. Rule 85(1) Court of Appeal Rules: but there was no prior application to do so: rule 101(b) (ibid) or for leave to do so at the hearing of the appeal: rule 101(b) (ibid): and, in my judgment, it is right in this appeal, where the parties are not represented, to deal with it on the merits and dismiss it with costs.

As Hancox, J A and Chesoni Ag J A agree it is ordered.

Delivered at Kisumu this 9th day of December, 1983.

A A KNELLER

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JUDGE OF APPEAL

REPUBLIC OF KENYA

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BETWEEN

NG'ANG'A KARAGO KARANJA APPELLANT

AND

FRANCIS KARANJA RESPONDENT

(Appeal from the judgment of the High Court of
Kenya at Kakamega (Gicheru, Ag J) dated
10th May, 1983

In
Civil Appeal No 7 of 1983)

JUDGMENT OF CHESONI AG J A

I have had the opportunity of reading the draft judgment of Kneller, J A and

I agree with the orders proposed therein.

Delivered at Kisumu this 9th day of December, 1983

Z R CHESONI

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AG. JUDGE OF APPEAL

REPUBLIC OF KENYA

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AT KISUMU

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CIVIL APPEAL NO 65 OF 1983

BETWEEN

NG'ANG'A KARAGO KARANJA APPELLANT

AND

FRANCIS KARANJA RESPONDENT

(Appeal from the judgment of the High Court of
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10th May, 1983
In
Civil Appeal No 7 of 1983)

JUDGMENT OF HANCOX, J A

I have had the advantage of reading the judgment of Kneller, J A in draft. I agree with it, and in particular that the concurrent findings of fact of the two lower courts that the agreed sale was of half an acre of the land in question and not a Lesser, defined portion, was correct.

I also agree that this appeal was liable to be struck out for non-inclusion of the decree. This requirement, and the consequences of not complying with it have been made clear repeatedly by this court, see in particular the decisions in Ruth Wamuchii Kamau v Monica Mirae Kamau, Civil Appeal No 49 of 1982.

I agree with the orders proposed by Kneller J A that this appeal should be dismissed with costs.

Delivered at Kisumu this 9th day of December, 1983.

A R W HANCOX

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR