REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L APPEAL NO. 13 OF 2017

[Formerly Eldoret High Court Civil Appeal No. 89 of 2010]

MOSES K. BURER.....APPELLANT

VERSUS

WILLIAM SEREM.....RESPONDENT

JUDGMENT

Moses K. Burer ***(hereinafter referred to as the appellant)*** has come to this court on appeal from the judgment of the learned Senior Resident Magistrate, Hon. G. A. Mmasi in Eldoret CMCC No. 46 of 2007 against **Mr. William Serem** ***(hereinafter referred to as the respondent).*** The genesis of this dispute is land known as Chepkanga Trading Centre Plot No. 75 which plot is part of that land known as Sergoit/Karura Block 1/Lelit/49 claimed by the appellant.

In the Lower Court, the appellant claimed that on 30.6.2006, he entered into an agreement with the respondent for sale of the said parcel of land at an agreed consideration of Kshs. 300,000. According to the appellant, it was an express provision of the agreement that the said sum of money was to be paid in full on or before the 1st of October, 2006 and that the said agreement was subject to the consent of the relevant Land Control Board. It was averred by the appellant that the respondent paid a total of Kshs. 290,000 leaving a balance of Kshs. 10,000 which amounts was not paid. The appellant repudiated the agreement and asked the respondent to take a refund of the purchase price. The respondent continued laying claim on the rent and the property despite the fact that the agreement had been repudiated. Ultimately, the appellant's claim was for an order of injunction restraining the respondent by himself, agents, servants from interfering with the plaintiff's possession of the suit premises.

The respondent filed defence denying the allegation in the plaint and stated that he paid the entire amount to the plaintiff before the deadline. According to the respondent, the appellant entered the premises and chased the respondent with his tenants and therefore, causing the respondent to lose his daily livelihood. The respondent claimed specific performance on the part of the appellant.

When the matter was slated for hearing in the Lower Court, the appellant testified that he entered into agreement with the respondent for the purchase of the suit plot of Chepkanga Trading Centre of Khs. 300,000. The respondent did not pay the consideration fully as there was a balance of Kshs. 10,000 as by 1.10.2006. the appellant asked for the balance but it was not forthcoming and therefore he cancelled the agreement and sent him a banker's cheque of Kshs. 290,000 but he declined to take.

Moses Kaptembei Kosgei, a witness to the agreement gave evidence on behalf of the appellant and stated that the purchase price was Kshs. 300,000. He witnessed Kshs. 180,000 being paid but the rest he was not present. He took the cheque of Kshs. 290,000 to the chief but he refused to take it. On cross examination, he states that the respondent took possession of the premises and bought construction materials.

On the part of the respondent, he testified that he bought the plot for Kshs.300,000. He paid Kshs. 180,000 on the date of the agreement. The balance was to be paid on or before 6.10.2006. He paid a total of Kshs. 290,000 to the appellant, Kshs.6000 to Augustine Limo as commission, Kshs.4000 was paid for the title deed. He was given a refund of Kshs. 290,000 vide a banker's cheque but he declined to take the same.

Augustine K. Limo testified that he witnessed the agreement after the respondent had paid the appellant Kshs.180,000 and signed the agreement. He saw the respondent pay Kshs.6,000 for the commission. He was not present when the agreement was written but he was shown the same.

David Njuguna was a tenant of the appellant. He was a Pastor of Hosanna Worship Centre, Chepkanga. In June 2006, the appellant told him that he had sold his church building to the respondent and was to start paying rent to the respondent. He paid rent for 6 months to the respondent but later the appellant went to the premises with a padlock and claimed that the rent was to be paid to his benefit.

Joel Tanui was a village elder of Sergoit location. On 20.11.2006 at the Chief's office, they received a report that the appellant had sold the land in dispute to the respondent. The respondent had paid Kshs.290,000 in total and had given Kshs.6000 as commission. According to the witness, the respondent had paid a total of Kshs.296,000 for the land and Kshs.4000 for the title. According to the area assistant chief, Alexander Kiprono Situk, only Kshs.296,000 had been paid. Kshs.4000 was paid for processing the title.

The learned Magistrate found 3 issues ripe for consideration thus;

1. ***Whether there was a sale agreement.***

2. ***What the terms of the sale agreement were.***

3. ***Who between the plaintiff and defendant breached the agreement?***

The court heard that the sale agreement existed having been entered into on 30.6.2006. The purchase price was Kshs.300,000 on that date the respondent paid Kshs.180,000, on 4.8.2006 Kshs.6000 was paid as full payment of commission.

The court found that the appellant received the money but was lodging claim on the land. The only balance was Kshs.10,000.

The appellant being dissatisfied with the decision of the Lower Court, appealed on grounds ***that the learned trial Magistrate erred in law and fact by not considering that the subject land agreement is null and void by provisions of section 8(1) of the Land Control Act, Cap. 302, Laws of Kenya. That the learned trial Magistrate erred in law and fact by not considering that the respondent was only entitled to the refund of the consideration/purchase price. That the learned trial Magistrate erred in law and fact by not considering that the respondent had breached the terms and conditions of the subject sale agreement. That the learned trial Magistrate erred in law and fact by not considering that the appellant had rescinded the agreement. That the learned trial Magistrate erred in law and fact by not considering submissions on the part of the appellant.***

The appellant submits that there was a balance of Kshs.10,000. The fact that the respondent did not pay the entire purchase price was in breach of the agreement and therefore, rescinded the agreement. The appellant further argues that the consent of the Land Control Board was not obtained and therefore, the sale agreement was null and void.

In the submissions filed by the firm of Chepkitway, the respondent argues that his possession of the plot created an equitable interest on the land and therefore, the appellant's remedy was to seek eviction orders or specific performance. Moreover, that the sale agreement does not contain a default clause and that there is no requirement of the consent of the Land Control Board.

The respondent invokes the doctrine of constructive/implied trust as he had paid the whole purchase price. This being the first appeal, the court is entailed to consider all the facts and arrive at it on conclusion. However, the court ought to view itself that it never heard the witnesses.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to evaluate and examine the lower court record and the evidence before it and arrive at its own conclusion.

This principle of law was well settled in the case of **Selle – Vs – Associated Motor boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that,

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)."***

The salient facts of this matter are that on 30.6.2006, the appellant and the respondent entered into agreement in respect of Plot No. 12 Chepkanga Centre for Kshs. 300,000. The respondent paid Kshs.180,000 at the signing of the agreement and the balance of Kshs.120,000 was to be paid on or before 1st October, 2006. The respondent took possession of the property with immediate effect. On 13.7.2006, the appellant received Kshs.40,000, on 4.8.2006 he received Kshs.20,000 and on 9.9.2006, he received Kshs.50,000. On 4.8.2006, Mr. Augustine Limo received Kshs.6000 as his commission. The respondent took possession and was receiving rent between 05.07.2006 to 5.2.2007.

Considering the first ground of appeal, this court finds that no evidence was laid before the Lower Court that the Land Control Act applies. There is no evidence before the Lower Court and this court that the land in dispute was agricultural land and therefore, the Land Control Act Cap 302 Laws of Kenya applies.

Even if it applied, the respondent took possession of the property from the appellant. The appellant willingly surrendered the land hence an implied or constructive trust was created in favour of the respondent.

This court finds that the respondent paid a total of Kshs. 300,000 being Kshs.180,000 an execution of the agreement, Kshs.110,000 thereafter, Kshs.6,000 being the commission and Kshs.4,000 for the title. Therefore, the court finds in conclusion that the learned Magistrate erred in finding that the respondent was owing Kshs.10,000 as he had paid the whole purchase price.

The upshot of the above is that the appeal is dismissed with costs to the respondent.

Dated and delivered at Eldoret this 17th day of January, 2019.

A. OMBWAYO

JUDGE