



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO. 16 OF 2016**

**JOHN NDUNGU MWANGI.....APPELLANT**

**VERSUS**

**DAVID CHEGE KARIUKI.....RESPONDENT**

**JUDGMENT**

On 13<sup>th</sup> April, 2011, the respondent filed a suit against the appellant in the Chief Magistrate's Court at Thika namely, Thika CMCC No. 157 of 2011, David Chege Kariuki v John Ndungu Mwangi (hereinafter referred to as "the lower court case"). The suit was brought through a plaint dated 13<sup>th</sup> April, 2011 which was amended with leave of the court on 6<sup>th</sup> October, 2011. In his amended plaint, the respondent averred that on or about 28<sup>th</sup> May, 2004 he entered into an agreement for sale with the appellant in respect of a parcel of land known as Ruiru/Kiu Block 2 (Githunguri)/ 4155 (hereinafter referred to as "the suit property"). The respondent averred that under that agreement, the appellant sold to him the suit property at Kshs.450,000/-. The respondent averred that he paid to the appellant a sum of Kshs.250,000/- on the execution of the said agreement and a further sum of Kshs.200,000/- on various dates thereafter leaving a balance of Kshs.50,000/-.

The respondent averred that when he sought to complete the agreement by paying the balance of the purchase in the sum of Kshs.50,000/-, the appellant refused to accept the same and to surrender the title deed for the property to him so that he could apply for the consent of the Land Control Board for the purposes of having the property transferred to his name. The respondent averred that the appellant refused to accept the said sum of Kshs.50,000/- even after the respondent had deposited the same with his advocates for collection by the appellant. The respondent averred that after purchasing the suit property, the appellant gave him vacant possession of the same. He averred that he subdivided the property and sold portions thereof to third parties who had occupied the same. The respondent sought specific performance of the agreement or in the alternative a refund of Kshs.400,000/= together with an amount equivalent to the market value of the suit property to be assessed by the court. The respondent also sought costs of the suit and any other relief the court could deem fit to grant.

The appellant filed a defence and counter-claim against the respondent. The appellant admitted that he sold the suit property to the respondent at a consideration of Kshs.450,000/- and that the respondent paid to him a sum of Kshs.400,000/- leaving a balance of Kshs.50,000/-. The appellant contended however that the said agreement for sale was null and void for want of consent of the Land Control Board. The appellant denied that a disagreement arose between him and the respondent when the respondent sought to pay the balance of the purchase price in the sum of Kshs.50,000/-The appellant averred that it was the respondent who breached the agreement for sale between them. The appellant averred that after he entered into the said agreement for sale with the respondent, the respondent closed his office and disappeared for over 3years. The appellant averred that by the time the respondent sought to pay the balance of the purchase price, the agreement for sale had become null and void. The appellant denied that he had given the respondent vacant possession of the suit property and authorised him to sell the property to third parties. The appellant averred that the respondent had trespassed on the suit property and fraudulently purported to subdivide and sell portions thereof to third parties without any right to do so.

In his counter-claim, the appellant reiterated the contents of his defence and contended that the respondent had trespassed on the suit property and fraudulently purported to sub-divide and sell portions thereof to third parties. The appellant sought a declaration that the agreement for sale that the appellant entered into with the respondent in respect of the suit property was null and void and of no legal effect and an injunction restraining the respondent from entering, remaining on, selling, charging, sub-dividing, allotting, interfering with the appellant's quiet possession or howsoever dealing with the suit property. The appellant also sought damages for trespass.

The respondent filed a reply to defence and defence counter-claim on 8<sup>th</sup> November, 2011 in which the respondent contended that it was the appellant who had breached the said agreement for sale by his failure to attend the Land Control Board meeting. The respondent contended further that the said agreement for sale was valid and enforceable. The respondent averred that the appellant was out to unjustly enrich himself by benefiting from the purchase price and at the same time seeking to retain the suit property. The respondent denied that he was guilty of fraud and contended that it was the appellant who acted fraudulently by accepting payment from the respondent and subsequently refusing to transfer the suit property to the respondent.

At the trial before the lower court, the respondent testified as follows. He told the court that he entered into a sale agreement with the

appellant in respect of the suit property. The purchase price was agreed at Kshs.450,000/-. He paid to the appellant Kshs.200,000/- and was to pay the balance within 90 days. He did not manage to pay the balance of the purchase price as had been agreed. He made further payments later which the appellant acknowledged leaving a balance of Kshs.50,000/-. The appellant then refused to go for the said balance of the purchase price. He told the court that the appellant had a duty to transfer the suit property to him after obtaining consent of the Land Control Board. He denied that he had invaded the suit property. He averred that he entered the suit property pursuant to the agreement for sale that he entered into with the appellant and that no one objected to his entry. He stated that he had sold portions of the suit property to third parties who had developed the same. He maintained that the agreement for sale he entered into with the appellant was valid.

In cross-examination, he stated that he made the first payment to the appellant in 2004 after they entered into the agreement for sale and paid the rest in installments. He stated that he could not remember when he made the last payment. He admitted that it took him a long time to pay the purchase price. He stated that he was initially in the business of buying and selling land but had shifted to being a driver. He stated that he had sub-divided the suit property but had no document to show that he had obtained consent to carry out the said subdivision. He stated that he had the agreements he made with the people he had sold portions of the suit property but had not brought the same to court. He stated that the suit property was sub-divided into 16 portions which he sold at Kshs.50,000/- each. He stated that he did not sign an application for Land Control Board Consent and that he did not know that failure to obtain consent of the Land Control Board within 6 months rendered the agreement void.

In his evidence, the appellant told the court that he sold the suit property to the respondent at Kshs.450,000/- and that after the initial deposit, the respondent was to pay the balance within 90 days. He stated that after 90 days, he visited the respondent's office and found it closed. He stated that he did not see the respondent for a period of 3 years until he met him at a funeral. He told the court that when he inquired from the respondent where he had been, he told him that he had no money. He stated that the respondent asked him to enter into another agreement with him with regard to the payment of the balance of the purchase price. He stated that he acceded to the respondent's request and allowed him to pay the balance of the purchase price in installments. He stated that he had not allowed the respondent to enter the suit property. He stated that he visited the suit property and found that the respondent had sub-divided the same. He stated that he had not authorised the respondent to sell the suit property. He stated that the respondent had not pursued the issue of the Land Control Board consent. He urged the court to declare the agreement for sale between him and the respondent invalid on account of the respondent's breach of the same. He stated that he was ready to refund to the respondent the money he had paid to him on account of the purchase price.

In cross-examination, the appellant admitted that he received a total of Kshs.400,000/- from the respondent and that although the respondent defaulted in paying the balance of the purchase price within 90 days, he continued to receive payments from the respondent. He stated that he had not allowed the respondent to sell the suit property. He also denied that he had been offered the balance of the purchase price. He stated that the respondent was yet to pay him Kshs.50,000/-. He stated that it was the responsibility of the respondent to obtain the Land Control Board Consent but the respondent got lost and became evasive.

After the close of evidence in the lower court, the parties filed written submissions. In a judgment delivered on 21<sup>st</sup> January, 2016 the lower court allowed the respondent's claim and dismissed the appellant's counter-claim. The lower court entered judgment for the respondent on the following terms:

- (a) That the appellant does surrender the title deed for the suit property to the respondent to enable him book for the transfer of the suit property.
- (b) The respondent to pay the appellant Kshs.50,000/- together with interest from the date of judgment .
- (c) That each party bears its own costs.

In the judgment, the lower court framed only one issue for determination namely, whether the agreement for sale between the appellant and the respondent was null and void. On this issue, the lower court found that the respondent did not pay the purchase price in full in accordance with the terms of the agreement between him and the appellant. The lower court held however that the appellant having accepted the payment of the balance of the purchase price after the expiry of the 90 days that had been agreed upon and having stood by watching the respondent sub-dividing and selling off portions of the suit property to third parties, he was estopped from turning round and claiming that the agreement for sale was unenforceable. The lower court held that the appellant having accepted the balance of the purchase price after the agreement for sale had been breached, he created a trust in favour of the respondent.

It is against this judgment that the appellant preferred this appeal. The appellant challenged the decision of the lower court on 13 grounds which are set out in his memorandum of appeal dated 18<sup>th</sup> February, 2016 as follows:

- 1) The learned Magistrate erred in law and fact by granting prayers not sought by any party in the proceedings.
- 2) The learned magistrate erred in law and fact by upholding the sale agreement dated 25<sup>th</sup> May, 2004 when the evidence was clear that the respondent had breached the same.
- 3) The learned magistrate erred in law and fact by ordering the surrender of the original title deed over the land parcel No. Ruiru/Kiu Block 2 (Githunguri)/4155 when the same was not a term of the sale agreement dated 25<sup>th</sup> May, 2004.
- 4) The learned magistrate erred in law and fact in ordering specific performance of the agreement dated 25<sup>th</sup> May, 2004 when the same was not sought by the respondent.
- 5) The learned magistrate erred in law and fact in failing to make a determination whether the sale agreement dated 25<sup>th</sup> May, 2004 offended the provisions of the Land Control Act Cap. 302 laws of Kenya.

- 6) The learned magistrate erred in law and fact in making a finding that the respondent had subdivided and sold land parcel No. Ruiru/Kiu Block 2 (Githunguri)/4155 when no such evidence was presented before the court.
- 7) The learned magistrate erred in law and fact in failing to consider whether the appellant was entitled to the injunction sought in the counter-claim in the circumstances of the case.
- 8) The learned magistrate erred in law and fact in determining issues on ownership of land parcel No. Ruiru/Kiu Block 2 (Githunguri)/4155 when the same was a preserve of the High Court under the Registered Land Act Cap. 300 (now repealed) or the Environment and Land Court Act Cap. 12A Laws of Kenya.
- 9) The learned magistrate erred in law and fact in misinterpreting the law under Section 30 of the Registered Land Act Cap. 300 Laws of Kenya and finding that there were overriding interests over land parcel No. Ruiru/Kiu Block 2 (Githunguri)/ 4155.
- 10) The learned magistrate erred in law and fact in finding that the appellant had turned midway in the implementation of the sale agreement dated 25<sup>th</sup> May, 2004 thus misapplying the decision in *Stedman vs. Stedman* (1976) AC 536.
- 11) The learned magistrate erred in law and fact in finding that the respondent was entitled to land parcel No. Ruiru/Kiu Block 2 (Githunguri)/ 4155 on the basis of a breached sale agreement.
- 12) The learned magistrate erred in law and fact in finding that the rights of the respondent in a breached sale agreement dated 25<sup>th</sup> May, 2004 overrode the appellant's registered rights over land parcel No. Ruiru/Kiu Block 2 (Githunguri)/4155.
- 13) The learned magistrate misdirected herself in applying the decision in *Macharia Mwangi Maina & 87 others vs. Davidson Mwangi Kagiri*(2014) eKLR.

The appeal was argued by way of written submissions. The appellant filed his submissions on 16<sup>th</sup> January, 2018 while the respondent filed his submissions on 19<sup>th</sup> February, 2018. I have considered the record of the proceedings of the lower court and the judgment of that court which is the subject of this appeal. I have also considered the grounds of appeal put forward by the appellant and the submissions of counsel. I will consider the appellant's grounds of appeal one after the other and where it is convenient to do so, I will consider some of the grounds together.

I find no merit in ground one of appeal. The relief which the appellant has claimed to have been granted by the lower court without being asked to do so was contained in that part of the judgment in which the court had ordered the respondent to pay to the appellant a sum of Kshs.50,000/- being the balance of the purchase price together with interest. I am unable to fault the lower court for making this order. It was not contested that the purchase price agreed upon by the parties was Kshs.450,000/- and that the respondent had paid Kshs.400,000/- leaving a balance of Kshs.50,000/-. The lower court having found that the agreement for sale between the appellant and the respondent was valid and enforceable and having ordered specific performance, it was not untoward or unfair for the court to order the respondent to pay the balance of the purchase. The court had inherent power to make orders which would complement the other orders it had made. I wish to add that the relief complained of was against the respondent and in favour of the appellant. I wonder why the appellant was aggrieved with an order that was not against him and as such was not prejudicial to him in any way.

With regard to ground two of appeal, again, I am unable to fault the lower court's finding. It was not contested that the respondent had breached the agreement for sale between him and the appellant. However the appellant had acquiesced to the said breach and allowed the respondent to pay the balance of the purchase price by installments three (3) years after the respondent had failed to honour his part of the bargain. I am in agreement with the lower court that the appellant was estopped from going back to the strict terms of the agreement for sale more particularly the condition that required payment of the balance of the purchase price within 90 days of the date of the agreement.

I also find no merit in grounds 3 and 4 of appeal. What the respondent sought in prayer (a) of the Amended plaint dated 13<sup>th</sup> September, 2011 was specific performance. For specific performance to take place, all the completion documents including the title deed had to be availed. The court having made a finding that the appellant was obliged to transfer the suit property to the respondent, I cannot fault the lower court for ordering the appellant to surrender the title deed for the suit property to the respondent.

With regard to ground 5 of appeal, I am in agreement with the appellant that the lower court glossed over the issue as to whether the agreement for sale between the appellant and the respondent was null and void under the provisions of the Land Control Act, Chapter 302 Laws of Kenya. This was a live issue before the court and the same had been raised by the parties in their pleadings and submissions and authorities were cited by both parties in support of their respective positions on the issue. Apart from stating in the judgment that he had read some of the authorities that were cited by the parties on the issue, the court did not make any finding on the issue. This was an error on its part.

It was not contested that the agreement for sale between the appellant and the respondent was subject to the Land Control Act, Chapter 302 Laws of Kenya ("the Act"). It was also not contested that the parties did not obtain consent of the Land Control Board for the transaction. Under section 6 of the Act, the agreement for sale between the appellant and the respondent became null and void after the expiry of 6 months of its coming into existence. The respondent had argued in the lower court that the transaction was saved under doctrine of constructive trust. He argued that when the appellant received the purchase price for the suit property from the respondent he created a trust in favour of the respondent that did not require consent. Although the lower court mentioned that such a trust had been established, it did not relate it to the issue of the Land Control Board consent.

In my view, the respondent did not plead trust in his plaint and reply to defence and defence to counter-claim. The respondent did not also lead evidence to establish the said trust. From the record, the issue of trust was raised by the respondent in the lower court at the submission

stage. None of the cases that were relied on by respondent was to the effect that failure to obtain consent for a controlled transaction did not render the transaction void. The nearest the authorities went more particularly, Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR was that in appropriate cases, a constructive trust can be implied to save such transaction. Such a trust must however be pleaded and proved. That was not the case in the lower court where the respondent neither pleaded trust nor proved the same. It is my finding in the circumstances that the agreement for sale between the appellant and the respondent was null and void for want of Land Control Board Consent and that the lower court erred in not making that finding.

On grounds 6, 7 and 8 of appeal, I find no merit in the same. The evidence that was tendered by the respondent that he had informally subdivided the suit property into sixteen portions and sold the said portions to third parties was not controverted. The photographs that the respondent produced in evidence showing the occupation of the suit property by third parties were also not challenged by the appellant. The appellant cannot argue therefore that there was no evidence of the subdivision and sale of portions of the suit property to third parties. The same applies to the injunction that was sought by the appellant. There was no evidence that the respondent was in possession of the suit property or that he was capable of doing any of the things which the appellant wanted him to be restrained from doing. In the circumstances, I cannot fault the lower court for its failure to grant to the appellant injunction on the terms that the same were sought by the appellant. On the issue of jurisdiction of the court, the same was not raised before the lower court. However, it has since been confirmed by the Court of Appeal that the lower court has jurisdiction to hear and determine disputes over the environment and land subject only to their pecuniary jurisdiction. This ground of appeal has no merit.

With regard to ground 9 of appeal, I am unable to follow the lower court in its interpretation of section 30 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). The typed proceedings do not make sense as concerns the issue. In the circumstances, I am unable to express any opinion on this ground of appeal. With regard to grounds 10, 11 and 12 of appeal, I have already dealt with the issues raised therein while considering ground 2 of appeal. With regard to ground 13 of appeal, I am unable to fault the lower court for relying on the Court of Appeal case of Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri (Supra). That case was binding on the lower court. The decision of David Sironga Ole Tukai v Francis Arap Muge & 2 others (2014) eKLR that was cited before me by the appellant was not cited before the lower court. Even if it was, it had equal weight with the decision in Macharia Mwangi Maina and 87 Others v Davidson Mwangi Kagiri (Supra) the two being Court of Appeal decisions made by three (3) judge bench of the court. The lower court still had a right to choose between the two Court of Appeal decisions. I wish to bring to the attention of counsel the existence of yet another Court of Appeal decision which disagreed with the decision in David Sironga Ole Tukai v Francis Arap Muge & 2 Others (Supra) and confirmed the decision in Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri (Supra) as good law. This is the Court of Appeal case of Willy Kimutai Kitilit v Michael Kibet (2018) eKLR.

In the final analysis, the appeal before me succeeds only on one ground namely, that the lower court erred in not finding that the agreement for sale between the appellant and the respondent was void for want of Land Control Board Consent. I therefore allow the appellant's appeal and set aside the judgment and decree made by the lower court on 21<sup>st</sup> January, 2016. In place thereof, I hereby make the following orders:

- 1) It is hereby declared that the agreement for sale between the appellant and the respondent over L.R No. Ruiru/Kiu Block 2 (Githunguri) /4155 is null and void and of no legal effect.
- 2) A permanent injunction is issued restraining the respondent from having any other or further dealings with L.R No. Ruiru/Kiu Block 2 (Githunguri)/ 4155.
- 3) The appellant shall refund to the respondent the sum of Kshs.400,000/- that was paid to him as the purchase price for L.R No. Ruiru/Kiu Block 2 (Githunguri)/4155 together with interest at court rates from 6<sup>th</sup> October, 2011 until payment in full.
- 4) Each party shall bear its own costs in the lower court and in this appeal.

**Delivered and Dated at Nairobi this 14<sup>th</sup> day of February 2019**

**S. OKONG'O**

**JUDGE**

**Judgement read in open court in the presence of:**

Mr. Thuku for the Appellant

Mr. Manyara h/b for Mr. Ngugi for the Respondent

Mr. Waweru-Court Assistant