



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**CIVIL APPEAL NO. 2 OF 2017**

**DR BONIFACE KEVIN OOKO GANDA.....PLAINTIFF**

**VERSUS**

**PHILIP ONDITI.....1<sup>ST</sup> DEFENDANT**

**WILLIAM KIARITHA.....2<sup>ND</sup> DEFENDANT**

*(Being an Appeal arising from the decision judgment of Hon. Ncodemus Moseti Resident Magistrate at Eldoret Chief Magistrate's Court Case No. 700 of 2008 delivered on 20<sup>th</sup> December 2016)*

**JUDGMENT**

This appeal arises from a suit filed by the appellant against the respondents in the lower court seeking for a declaration that the agreement made between the appellant and the 1<sup>st</sup> defendant has been abrogated and that the 1<sup>st</sup> defendant should take back the deposit of his purchase price, a permanent order of injunction against the defendants their agents, servants from continuing with further construction of a building on the said parcel of land known as Langas/Phase/4/506. The court heard the case and dismissed the plaintiff's suit necessitating the filing of this appeal. The appellant filed a memorandum of appeal listing six grounds as follows;

- 1) The learned Magistrate erred in law in his appreciation of the legal position on whether one is entitled to sell an unregistered interest in land.
- 2) The learned Magistrate erred in law in failing to make a finding on the 2<sup>nd</sup> defendant's claim against the 1<sup>st</sup> defendant.
- 3) The learned Magistrate erred in law in failing to make a finding that the agreement between the plaintiff and the defendant had been abrogated.
- 4) The learned Magistrate erred in law in failing to find whether an order of injunction ought to be issued barring any construction on L.R Langas Phase 4/506.
- 5) The learned Magistrate erred on facts to appreciate the evidence on sales governed by provisions of the Land Control Act with regard to Agricultural Land.
- 6) The learned Magistrate misdirected himself on whether the appellant had a registrable interest capable of being sold.

The Appeal was listed for directions and Counsel agreed to canvass the appeal by way of written submissions which were filed.

**APPELLANT'S SUBMISSIONS**

Counsel for the appellant gave a brief background to the case leading to the dismissal of the plaintiff's suit. On the 1<sup>st</sup> ground, Counsel for the appellant submitted that the Magistrate erred in finding that the appellant did not have any registrable interest in the suit land even after producing a sale agreement in court indicating that he had purchased the land for value therefore making him an owner.

On the 2<sup>nd</sup> ground of appeal as to whether the learned Magistrate erred in law in failing to make a finding on the 2<sup>nd</sup> defendant's claim against the 1<sup>st</sup> defendant, who had filed a notice of claim dated 8<sup>th</sup> February 2010 in respect of Kshs. 850,000/ being the purchase price of the suit property, Kshs. 1,750,000/ being cost of putting up a building and Kshs. 80,000/ being money paid to the 2<sup>nd</sup> defendant for onward transmission to the 1<sup>st</sup> defendant, Counsel submitted that this claim is an indication that the appellant sold the land to the 1<sup>st</sup> respondent who did not have an interest over the parcel to sell to the 2<sup>nd</sup> respondent as he had not completed paying the full purchase price.

Counsel further submitted on the 3<sup>rd</sup> ground on the failure to find that the agreement between the appellant and the 1<sup>st</sup> respondent had been abrogated that the fact that the 1<sup>st</sup> Respondent purchased LANGAS PHASE 4/506 at an agreed purchase price of Kenya Shilling Five Hundred thousand (kshs.500,000/=) as stated in the agreement dated 11<sup>th</sup> August, 2008 leaving a balance which he failed to clear and the Appellant cancelled the agreement that the 1<sup>st</sup> Respondent had breached the contract and further failed to embrace remedies available for a breach of such contracts Counsel relied on the case of **Kanyago vs Kenya Commercial Bank Limited & Another (2004)eKLR 126 and Mwangi vs Kino**, whereby the court held that :-

***If a purchaser failed to pay the balance of the purchase price on the agreed date, the vendor is discharged from further performance of the contract by the purchase's failure to pay the balance of the purchase price.***

Counsel further cited the case of **Thrift homes Limited vs Kays Investment Limited (2015) eKLR** where Ougo J. stated that:-

***"The sale agreement was a contract between the parties, my understanding is that when a party to a contract promises to do a certain thing at a specified time but fails to do it the contract becomes avoidable and he ordered vendor refund deposit of the purchase price to the purchaser.***

On the 4<sup>th</sup> ground as to whether the Learned Magistrate erred in Law in failing to make a finding whether an order of injunction ought to have been issued barring any construction on **L.R. No.LANGAS PHASE 4/506**, Counsel submitted that the suit land belongs to the appellant and such failure would cause the appellant to suffer irreparable damage. Further that this was a fundamental issue that needed to be considered.

On the 5<sup>th</sup> ground on the issue of failing to consider the provisions of the Land Control Act which required the consent of the Land Control Board making the transaction void for lack of a consent of the land Control Board. Counsel cited the case of **Katana Lughanje Masha v. Joseph K.Nyagah (2014)eKLR** where Angote J. held that: -

***"in the absence of the consent of the Land Control Board, this court can do no more than to hold that the only thing that the Defendant is entitled to is a refund of Kenya Shillings Thirty-Eight Thousand (Kshs. 38,000/=) that he paid to the plaintiff and not the suit property.***

On the final ground as to whether the Learned Resident Magistrate misdirected himself on whether the Appellant had a registrable interest capable of being sold, Counsel submitted that the property in the hands of bona fide purchaser ought to be protected. He further submitted that the appellant had proved that he was the owner of the suit property and therefore he is entitled to Registrable interest as provided by Law, thus he has every right to do any transaction pertaining the suit land. That the appellant had deposited Kshs.421,500/= on 20<sup>th</sup> April 2011 being refund of the purchase price. Counsel cited the case of **Danson Muniu Njeru vs William Kiptarbei Korir & 6 others (2014)eKLR** where Munyao Sila J.held that:

***"For the above reasons, I declare the agreement between the deceased and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants null and void and the same cannot be enforced. I further declare that the remedy of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lies in getting a refund of what they paid under transaction..... The Defendants have not demonstrated any legal right that would entitle them to remain in possession of the land. They must vacate and if they do not, the Plaintiff has every right to evict them at their own cost. The plaintiff is also entitled to an Order of Permanent injunction to bar the Defendants from remaining on the suit land."***

Counsel therefore urged the court to allow the appellant's appeal as prayed.

The 1<sup>st</sup> respondent did not file any submissions.

## **SECOND RESPONDENT'S SUBMISSIONS**

Counsel for the 2<sup>nd</sup> respondent filed submissions and opposed the appeal on the grounds that the learned Magistrate was right in finding that the appellant had failed to prove that he was the registered owner of the suit land. It was his submission that the appellant never produced the agreement in court and from the proceedings it cannot be discerned who bought the plot. The only evidence of his claim of ownership was a rates payment request produced as exhibit P-Exh1 which is not sufficient proof of ownership.

Counsel further submitted that in the amended plaint the appellant stated that the suit land is registered in the names of Kiptot Arap Sitienei and Emmy Tabarbuch Korir, and that parties are bound by their pleadings hence the appellant's pleadings at the lower Court did not prima facie support his claim of ownership.

Counsel submitted that from the evidence the appellant did not prove that he was the registered owner of the suit property as he did not produce an agreement or a title to the suit land. Counsel urged the court to dismiss the appeal with costs to the respondent.

## **Analysis and Determination**

It is the duty of this Court as a first appellate court to reconsider the evidence, reevaluate and make its own conclusions. This duty was set out by the Court of Appeal in the case of **Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212** where the court held inter alia, that:-

*“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”*

From the record, the issues for determination in this appeal are whether the learned Magistrate erred in fact and law in finding that the appellant had no registrable interest in the suit land; second whether the transaction between the parties required the consent of the Land Control Board, third whether the learned Magistrate erred in failing to find that the agreement between the appellant and the 1<sup>st</sup> respondent had been abrogated.

On the first issue as to whether the appellant had a registrable interest, the Trial Magistrate found that the appellant did not prove that he had any registrable interest in the suit land as he had not produced any document of title to show that he was the registered owner. It is on record that PW 2 testified that the suit plot does not have a title and that any person who intends to sell a property must inform the County and in this case the appellant did not inform them.

The Appellant, in his amended plaint stated that the suit land was registered in the names of Kiptot Arap Sitienei and Emmy Tabarbuch Korir. It is trite law that parties and the court are bound by their pleadings. See the decision of the **Malawi Supreme Court of Appeal** in **MALAWI RAILWAYS LTD Vs. NYASULU** [1998] MWS 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings.” The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;

*“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....”*

*In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”*

I am also of the view that the appellant knew the case that he wanted the court to adjudicate upon through his pleadings. The appellant even had an opportunity to amend his pleadings. The trial court was also bound by the pleadings of the parties which they presented before the court. I also agree with the observation above by the learned Judges that it is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Even if the court is itching to go outside the pleadings, this would be occasioning injustice which calls for an appeal and revision of such orders.

Further in the case of **LIBYAN ARAB UGANDA BANK FOR FOREIGN TRADE AND DEVELOPMENT & ANOR Vs. ADAM VASSILIADIS [1986] UG CA 6** the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in **JONES Vs. NATIONAL COAL BOARD [1957]2 QB 55** that;

*“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”*

Our system of courts is adversarial system as opposed to inquisitorial system in other jurisdictions. We are bound by this system until it is changed. It is further on record that the appellant had already admitted that the land was not registered in his names. The appellant did not demonstrate any nexus to the registered owners and what complicated the matter further was the fact that the appellant pleaded in the amended plaint at paragraph 7(a) *“the suit land is registered in the names of Kiptot Arap Sitienei and Emmy Tabarbuch Korir (both deceased) and the same is agricultural land which requires Land Control Board consent and failure to obtain a consent makes the transaction void and the only remedy is to refund the purchase price”*.

If the land was registered in the name of deceased persons, then how did the appellant have authority to even institute the suit in the first place? What is the relationship of the appellant with the deceased persons who are the registered owners of the suit land? There was no grant of letters of administration for the estate of the deceased registered owners or any agreement to show the nexus. The 2<sup>nd</sup> respondent produced sale agreement between him and the 1<sup>st</sup> respondent and the construction that the appellant came to court to stop. I find that the parties are bound by their pleadings and the admission that the suit property was registered in the names of deceased persons complicated the case for the appellant. He cannot redeem himself in this case. The Learned Magistrate was right in finding that the appellant did not prove his case against the respondents.

On the 2<sup>nd</sup> issue as to whether the transaction required the consent of the Land Control Board, it is on record from the evidence of PW2 Barnabas Cheruyiot from the County government that land in Langas where the suit plot is situate was previously agricultural land but were sub divided and a change of user from agricultural to commercial was effected. This confirmed that the transaction did not require any consent from the Land Control Board. This answers the question whether the transaction was subject to the consent of the land Control Board. The appellant cannot clutch on this ground.

Even if the land was agricultural land that required the consent of the Land Control Board and a party had created a constructive trust on behalf of another who bought and took possession, equity would still be in aid of such a person if there is such proof as was held by the Court of Appeal sitting in Eldoret in the case of of **Willy Kimutai Kitilit v Michael Kibet [2018) eKLR** where the doctrine of constructive trust was applied.

The learned Magistrate having found that the appellant had not proved that he had a registrable interest in the suit land he was under no duty to determine the 2<sup>nd</sup> respondent's claim against the 1<sup>st</sup> respondent as the claim was dependent on the success of the appellant's claim against the 1<sup>st</sup> respondent.

The upshot is that I find no reason to upset the finding of the learned trial Magistrate and therefore this appeal lacks merit and is dismissed with costs to the 2<sup>nd</sup> respondent.

**Dated and delivered at Eldoret this 2<sup>nd</sup> day of May, 2019**

**M.A ODENY**

**JUDGE**

**JUDGMENT read in open court** in the presence of Mr.Odhiambo for the 2<sup>nd</sup> Respondent and Mr. Mogambi holding brief for Miss.Tum for the Appellant and in the absence of Mr.Obudho for the 1<sup>st</sup> Respondent.

Mr.Mwelem – Court Clerk