



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 31 OF 2015**

**DAVID MITHAMO GATITU.....APPELLANT**

**VERSUS**

**BONIFACE KARIMI NYAMU.....RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 16<sup>TH</sup> DECEMBER, 2014 BY HON K.K. CHERUIYOT – P.M AT KERUGOYA CHIEF MAGISTRATE’S COURT CIVIL SUIT NO. 306 OF 2013)***

**JUDGMENT**

The Respondent herein (as plaintiff) had filed **KERUGOYA CHIEF MAGISTRATE’S CIVIL CASE No. 306 of 2013** against the Appellant (aka **JAMES MAINA KANYIRI**) as 1<sup>st</sup> defendant and two others seeking judgment in the following terms:

- (a) A declaration that the 1<sup>st</sup> defendant entered into a contract to sell his land parcel No. INOI/KARIKO/1542 registered in his names to the plaintiff and rectification of the written instruments to accord with the true agreement of the parties.***
- (b) An order for specific performance compelling the 1<sup>st</sup> defendant to transfer the land parcel No. INOI/KARIKO/1542 in favour of the plaintiff within 30 days from the date of judgment or in default, the purchase price together with interest within 30 days from the date of judgment.***
- (c) Removal of caution on land parcel No. INOI/KARIKO/1542 placed by the 3<sup>rd</sup> defendant.***
- (d) Costs and interest of (a) and (b) above at Court’s rates.***
- (e) Any other and/or further relief that this Honourable Court may deem just and fit to grant.***

The basis of the suit was that on 30<sup>th</sup> September 2013, the Appellant, who was using the name **JAMES MAINA MUNYIRI**, and the Respondent, entered into an agreement by which the Appellant agreed to sell and the Respondent agreed to purchase land parcel No. INOI/KARIKO/1765 at a consideration of Ksh. 1,250,000 of which Ksh. 1,050,000 was paid at the time of executing the sale agreement and the balance of Ksh. 200,000 was to be paid on or before 31<sup>st</sup> December 2013. However, the Appellant did not turn up at the Land Control Board’s office at Kerugoya on 1<sup>st</sup> October 2013 as agreed. When the Respondent made enquiries, he was informed by the village elders that the land showed to him was INOI/KARIKO/1542 and not INOI/KARIKO/1765 and further, that the Appellant’s name was **DAVID MITHAMO GATITU** and not **JAMES MAINA MUNYIRI**.

The Appellant and the two others were served by way of substituted service following leave granted by the trial magistrate on 30<sup>th</sup> December 2013 after the process server had filed an affidavit of service to the effect that the Appellant had moved away from home and nobody knew his physical address. Interlocutory judgment was entered against the Appellant and the two others after which, following a formal proof, judgment was entered against the Appellant on 16<sup>th</sup> December 2014 (not 16<sup>th</sup> September 2014 as indicated in the memorandum of appeal) by **HON. K.K. CHERUIYOT – PRINCIPAL MAGISTRATE** as sought in the plaint.

Aggrieved by that judgment, the Appellant filed this appeal and has set forth the following ten grounds:

- 1. The learned trial magistrate erred in law and fact in admitting application dated 29<sup>th</sup> December 2013 when the Applicant had not satisfied the Court that the attempts to serve the defendant with summons to enter appearance.***
- 2. The learned trial magistrate erred in law and fact in granting the application by accepting that the process server one Philip Muiru Kimani had sworn an affidavit dated 29<sup>th</sup> December 2013 while the affidavit was not signed as commissioned.***

3. *The learned trial magistrate erred in law and fact in accepting affidavit of service by a process server who did not have a valid practicing certificate.*
4. *The learned trial magistrate erred in law and fact in concluding that the Appellant was not a party in agreement for sale dated 30<sup>th</sup> September 2013 and yet he had enough evidence to support his doing so.*
5. *The learned trial magistrate erred in law and fact in concluding that the Appellant was a party to the sale agreement and yet no evidence was adduced before him to prove the same.*
6. *The learned trial magistrate erred in law and fact in condemning the Appellant to pay the paid sum and yet there were other defendants in the amended plaint who had been sued jointly and severally.*
7. *The learned trial magistrate erred in law and fact in failing to order substituted service how many times the advert should take as one day was not enough to effect service.*
8. *The learned trial magistrate erred in law and fact in failing to hold that the decision in Chief Magistrate Criminal Appeal No. 24/24 (sic) could have assisted him to clear doubts in the civil case he was conducting.*
9. *The learned trial magistrate erred in law and fact in speeding up this call to conclusion (sic) without giving it a second thought as to the prayers sought.*
10. *The learned trial magistrate erred in law and fact in condemning the Appellant un-heard.*

The appeal was canvassed by way of written submissions which have been filed both by **MR. GACHERU** advocate instructed by **GACHERU J. & CO. ADVOCATES** for the Appellant and **MR. NGIGI GICHOYA** advocate instructed by **NGIGI GICHOYA & CO. ADVOCATES** for the Respondent.

I have considered the appeal and the submissions by counsel.

This being a first appeal, my duty is to reconsider and re-evaluate the evidence and draw my own conclusions though always bearing in mind that I neither saw nor heard the witnesses and therefore I should make due allowance in that respect – see **SELLE VS ASSOCIATED MOTOR BOAT COMPANY 1968 E.A 123** and also **JIVANJI VS SANYO ELECTRICAL COMPANY LTD 2003 K.L.R 425.**

Grounds 1, 2, 3 and 10 of the appeal can be considered together as they take issue with the trial magistrate’s ruling dated 30<sup>th</sup> December 2013 in which he allowed the Respondent’s application dated 29<sup>th</sup> December 2013 seeking leave to serve the Appellant by way of substituted service through the local dailies. That application was premised on the supporting affidavit by the Respondent dated 29<sup>th</sup> December 2013 in which he had deponed, inter alia, that between 1<sup>st</sup> November and 20<sup>th</sup> December 2013, he had instructed the process server by the name **PHILIP MUIRURI KIMANI** to serve the Appellant with summons and plaint but he had been informed that the Appellant and the other defendants had vacated their home and their whereabouts were un-known. The said process server had himself sworn another affidavit also dated 29<sup>th</sup> December 2013 to the effect that on 29<sup>th</sup> November 2013, he visited the home of the Appellant with a view to serving him and the 2<sup>nd</sup> defendant but was informed that the two **“had moved away about two months before and that nobody knew their current physical address”** - see paragraph five (5) thereof. Given that averment that the Appellant’s whereabouts or physical address were un-known, the trial magistrate was entitled to allow the application for substituted service. The import of that averment was not that the Appellant was not at home on the day of service which may therefore have necessitated an order that another attempt be made to serve him. That averment meant that the Appellant had relocated elsewhere and his whereabouts were un-known. What other attempts would therefore be needed to serve a party who had moved from home to an un-known address? It would have been futile for the process server to keep visiting a home from where the Appellant had relocated. In any event, the Appellant did not refute that allegation. On the ground that the process server’s affidavit of service was not signed or commissioned, I have looked at it and it is signed both by the process server himself and commissioned by an advocate by the name **MWAURA SHAIRI ADVOCATES & COMMISSIONER FOR OATHS**. If the said process server did not have a valid practicing certificate, the Appellant was at liberty to have him summoned for cross-examination. The record shows further that on **15<sup>TH</sup> MAY 2014** some two months before the case came up for formal proof on **24<sup>TH</sup> JULY 2014**, the Appellant had also been served with a copy of the amended plaint, summons and other documents by **MR. NGIGI GICHOYA** an advocate of this Court while attending a criminal case having been pointed out by the Respondent. Notwithstanding that service, the Appellant did not attend Court yet that was the easiest thing to do. In the circumstances, the Appellant cannot now complain that he was condemned un-heard. Counsel for the Respondent has correctly cited the Court of Appeal’s decision in the case of **THE UNION INSURANCE COMPANY OF KENYA LIMITED VS RAMZAN ABDUL DHANJI C.A CIVIL APPLICATION No. 179 of 1996** where the Court held:

***“The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it”***

The Appellant having been served both by substituted service through advertisement in the Standard newspaper of **27<sup>TH</sup> MARCH 2014** (as directed by Court) and also personally on **15<sup>TH</sup> MAY 2014** by counsel, he cannot be heard to complain that he was condemned un-heard. Grounds 1, 2, 3, 7 and 10 of the appeal are hereby dismissed.

Grounds 4 and 5 of the appeal can also be considered together. In ground 4, the Appellant takes issue with the trial magistrate for **“concluding that the Appellant was not a party in agreement for sale dated 30<sup>th</sup> September 2013”** while in ground 5, it is submitted that the trial magistrate erred in law and fact **“in concluding that the Appellant was a party to the sale agreement and yet no evidence was adduced before him to prove the same”**. The Respondent’s evidence at the trial was that the Appellant was introduced to him by the 2<sup>nd</sup> defendant as

**JAMES MAINA MUNYIRI** and he was even shown a copy of the title deed to the land parcel No. INOI/KARIKO/1765 bearing that name. Thereafter, the Appellant signed the sale agreement dated **30<sup>TH</sup> SEPTEMBER 2013** in which he described himself as **JAMES MAINA MUNYIRI** and it was only later that the Respondent discovered that that was a fraud and that the Appellant was in fact known as **DAVID MITHAMO GATITU**. The Appellant was clearly a party to the sale agreement although using different names and that is why he was sued as **DAVID MITHAMO GATITU** Alias **JAMES MAINA MUNYIRI**. The trial magistrate did not therefore error either in law or in fact and those grounds of appeal must also be rejected.

Ground 6 of the appeal faults the trial magistrate for condemning only the Appellant to refund the Respondent the purchase price yet there were other defendants jointly sued with him. It is true that the Appellant had been sued as the 1<sup>st</sup> defendant together with two other defendants. However, it is clear from the plaint that the orders sought and which I have reproduced above, were only in respect to the Appellant and not the other defendants. There was really no need to sue the other defendants yet no remedy was sought against them. However, the trial magistrate did not error in only making orders against the Appellant because he was the only party against whom orders of specific performance of the sale agreement and/or refund of the purchase price were sought.

Secondly, it is clear from the sale agreement that the parties thereto were the Appellant (as vendor) and the Respondent (as purchaser) and paragraph three (3) thereof shows that it was the Appellant who received the Ksh. 1,050,000 as down payment leaving a balance of Ksh. 200,000. There would have been no justification in condemning the other defendants to refund the purchase price yet it was paid to the Appellant.

Thirdly, the trial magistrate found the sale agreement to be void for want of consent of the Land Control Board pursuant to **Section 6 of the Land Control Act**. Under **Section 7** of the said Act, consideration paid for a transaction that becomes void for lack of consent is **“recoverable as a debt by the person who paid it from the person to whom it was paid .....”**. The trial magistrate was therefore right in condemning the Appellant to refund the purchase price since he was the party who received it. That ground of appeal similarly fails.

Ground 8 takes issue with the trial magistrate for failing to hold that the decision in Chief Magistrate’s Criminal Appeal No. 24/24 could have assisted him to clear doubts in the Civil Case. I have looked at the proceedings in the trial Court and no criminal case described as No. 24/24 nor any other criminal case file was produced before the trial magistrate. It is not therefore clear how the trial magistrate could have considered evidence that was not placed before him. That ground similarly fails.

Lastly, ground 9 of the appeal appears to be a complaint that the trial magistrate concluded the trial expeditiously i.e. with **“speed”** and **“without giving it a second thought”**. **Article 159 (2) (b) of the Constitution** provides that:

**“Justice shall not be delayed”**

Further, the overriding objective of the **Civil Procedure Act and Rules** is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The suit in the subordinate Court was filed on **31<sup>ST</sup> OCTOBER 2013** and judgment was delivered on **16<sup>TH</sup> DECEMBER 2014** which in my view was commendable given the common trend in civil cases where parties will sometime employ all tactics to delay the trial. The trial magistrate should therefore be commended, not vilified, for expediting the trial which is what the law required of him. That ground of appeal similarly fails.

The up-shot of the above is that this appeal is devoid of any merits. It is hereby dismissed with costs to the Respondent.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> JANUARY, 2018**

**Judgment dated, delivered and signed in open Court this 26<sup>th</sup> day of January 2018 at Kerugoya**

Ms Kiragu for Mr. Ngigi for Respondent present

No appearance for the Appellant.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> JANUARY, 2018**