



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 17 OF 2017

CHARLES MUKHULU MURUNGA.....APPELLANT

VERSUS

JACKSON JUMA MURWARESPONDENT

JUDGEMENT

The appellant herein being dissatisfied with the whole judgment of honourable M.L. Nabibya AG. SRM delivered on the 17th day of October, 2013 in Butali SRMCC No. 47 of 2011 wishes to appeal from the same on the following principal grounds:-

1. That the learned magistrate erred both in law and fact in holding that the respondent had proved his case on a balance of probability.
2. That the learned magistrate erred both in law and fact in holding that the respondent had obtained the requisite consent of the land control board to validate the land transfer transaction.
3. That the learned magistrate erred both in fact and law in analyzing the evidence before herself and hence arriving at a wrong finding.
4. That the learned magistrate erred both in law and fact by rejecting the defence offered by the defendant and hence arriving at a wrong finding.

The appellant prays that his appeal be allowed and the judgment of the lower court be set aside with costs to himself.

On ground numbers one and two they submit that the learned Magistrate erred in holding that the Respondent had proved his case on a balance of probability. The Plaintiffs' claim was for specific performance of a land contract. It is mandatory provision of the Land Control Act which was in force that the land transaction will only be valid if the seller had obtained consent to transfer the portion of land within a period of six months from the day of entering into the contract. In this case the seller didn't obtain any consent to transfer the portion of land to the purchaser and or Respondent since they disagreed in the course of the transaction. At page 99 lines 18 and 19 of the records of appeal where the Respondent admits that the appellant did not go to the land control board and hence no consent for the transaction was obtained as required in laws at the time when this contract was entered into. The court failed to appreciate that consent was compulsory for the transaction between the Appellant and the Respondent to be valid in law and became enforceable in law. The court enforced an invalid contract by entering judgment for the Respondent.

On ground number three they submit that the learned magistrate did not analyze the evidence before her properly and hence arrived at a wrong finding. The learned magistrate failed to recognize that the contract between the Appellant and the Respondent was not valid in law since no consent of the land control board was obtained within six (6) months to validate the contract. Further the court failed to appreciate that the Respondent had not paid the full purchase price for the contract to be enforced. The court had no authority to force the appellant to receive the balance of the purchase price when it was clear that the parties had disagreed in the course of the transaction. At pages 99 paragraph 3, 4, 5 6 and 7th Respondent admits that he had not paid the entire purchase price to the Appellant.

On ground number four they submit that the court failed to consider the defence offered by the Appellant against the Respondent's claim. The appellant had given evidence that the Respondent had only purchased one (1) acre from him but the court went ahead to enforce a contract for one and half (1 ½) acres against the Appellant. The court failed to appreciate that there was no payment of the entire purchase price to the appellant to entitle the respondent for judgment for the orders that he sought against the appellant.

The respondent submitted that, the Appellant herein having admitted and acknowledged having sold only one acre to the Respondent herein and not one and half acres it was mutually agreed as between the advocates for the Appellant and Respondent that the lower court be narrowed to half acre portion. The lower court case was therefore narrowed to whether the Respondent herein is entitled to half acre portion or not. At the hearing it was clear that the Appellant herein sold the one and half portion to the Respondent herein. The Respondents case was

that after first paying for the one acre he later purchased the half acre portion.

The Appellant herein after receiving the initial agreed consideration price for the added half acre portion kept on peddling and hood winking the Respondent herein, the Appellant kept on pushing the price of the half acre portion by always demanding a higher price once the Respondent herein to transfer the purchased land to the Respondent. The parties herein being close relatives and given that the Respondent herein was in occupation and use of the entire one and half acre portion always yielded to the never ending demands of the Appellant.

The purchase price for the half acre portion first was priced at Ksh. 32,500/=, which the Respondent herein paid fully for. The Appellant herein, when the Respondent herein approached him to transfer the one and half acre portion changed his mind and informed the Respondent herein that the value of the half acre portion of land had risen from Ksh. 32,500/= to Ksh. 72,500/=, and that he was ready to transfer the said land if the Respondent would now pay the Ksh. 72,500/=. The Respondent being in possession and use of the said half acre portion topped up to the said Ksh. 72,500/=. After paying the Ksh. 72,500/= the Respondent expected the Appellant herein to transfer the one and half acre portion which the Appellant failed to do so. Sometime in the year 2011 when the Respondent herein went to pay the balance of Ksh. 71,5000/= and asked him to transfer the said land to the Respondent, the Appellant again shifted the goal posts and informed the Respondent he could only transfer the said land if the Respondent paid Ksh. 140,000/= for the half acre portion. The Respondent herein received the Ksh. 71,500/= and demanded the excess balance to top up to Ksh. 140,000/= for the half acre portion. The Respondent being seriously interested in his land accepted the new offer of Ksh. 140,000/= for the half acre portion. A few days later when the Respondent approached the Appellant herein with the full balance consideration to top up the Ksh. 140,000/= the Appellant again refused to accept the said monies became doggy and arrogant to the Respondent herein. The Appellant herein refused to appear at the Malava Land Control Board and receive the balance consideration of Ksh. 70,000/= and further refused to appear at the Malava Land Control Board as agreed. Thereafter the Respondent herein realized that he was being taken for a ride by the Appellant herein and filed the lower court case at Butali.

At one time during the hearing of the lower court case the Appellant herein asked that the matter be amicably settled and said he was ready and willing to receive the Ksh. 70,000/= at his lawyers office. When the said monies of Ksh. 70,000/= were taken to the Appellant's lawyer's offices for him to collect he again changed his mind leading the lower court case to go to full hearing. The lower court after having fully heard the parties and after due consideration of the evidence adduced in court did find that the Respondent had proved his case on a balance of probability and arrived at the fair and just judgment which is being challenged in this appeal.

After the above said lower court case a decree was extracted and the same executed. By the time the decree herein was being executed the Appellant herein had subdivided the original land parcel L.R. N. KABRAS/847 into two to create land parcels 3748 and 3749. The Respondent's land was on portion 3748. The Respondent herein then sought to execute the decree of the lower court and get his half acre portion from land parcel L.R. N. KABRAS/MALAVA/3748.

After demarcation the Respondent herein acquired one and half acres of his land from the said land parcel 3748 and has now land parcel L.R. N. KABRAS/MALAVA/4438. They submit that as the parties herein battle the Respondent is in occupation and possession of his title deed and the land. The appeal herein is therefore time barred and waste of the courts precious time. The Respondent should not be left to eternity whilst the Appellant was using the half acre portion to fleece the Respondent herein. The lower court was therefore just and fair in arriving at the judgment it arrived at in the lower court. To allow the appeal herein is to expose the Respondent to further exploitation by the Appellant justice is two way and not one way. The parties had their time in court and justice was done in the judgment of the lower court.

This court has considered both the Appellant's and the Respondent's submissions. The case herein is in respect of L.R. N. KABRAS/MALAVA/845 later subdivided to create L.R. N. KABRAS/MALAVA/4438. The appeal herein arises from BUTALI SPMCC No. 47 OF 2011, Jackson Juma F. Murwa Versus Charles Mukhulu Murunga. In the above mentioned lower court case at Butali by a plaint dated 10th May 2011 the Respondent herein prayed for the following orders.

1. An order of specific performance compelling the Defendant to perform his part of the contract by receiving the balance consideration of Ksh. 70,000/= and asked to appear at the Kabras Land Control Board and transfer one half acre portion of land parcel L.R. N. KABRAS/MALAVA/847.
2. In default the Executive Officer of the Honorable court be authorized to sign all the necessary transfer forms and papers on behalf of the Defendant so as to effect the transfer of one and half acre portion of land parcel L.R. N. KABRAS/MALAVA/847 to the Plaintiff.
3. Costs.

The above said case was determined in favor of the plaintiff who is the Respondent herein. The brief facts giving rise to the initial case BUTALI SRMCC No. 47 OF 2011 at the lower court at Butali is that vide a land sale agreement dated 9th February 2006 the Respondent herein (Jackson Juma F. Murwa) bought one and half acre of original land parcel L.R. N. KABRAS/MALAVA/847, at an agreed consideration price of Ksh. 97,500/= read (Ninety seven thousand five hundred shillings).

On grounds one and two of the appeal, from the proceedings the court was informed that the real purchase of the said land commenced sometime in the year 2001 when the Respondent started paying the purchase price by installments and the Appellant herein on his part acknowledged receipt of the monies. Thereafter the Appellant herein gave the Respondent herein vacant possession of the said one and half acre portion which the Respondent herein occupies to date. Since receiving the last agreed consideration price on 9th February 2006 to the time the Respondent herein instituted the lower court case BUTALI SRMCC No. 47 OF 2011, the Appellant herein had failed to cooperate with the Respondent and officially appeared at the Malava Land Control Board and officially transferred the said one acre portion to the Respondent hence the said lower court case. The Appellant herein admitted and acknowledged having sold only one acre to the Respondent herein and not one and half acres of land. On page 27 of the judgement and page 114 of the record of appeal, the Trial Magistrate held that the consent to transfer the portion of land was prepared within the stipulated 6 months and hence the agreement was not time barred. The Appellant's contention that it is mandatory provision of the land control act which was in force that the land transaction will only be valid if the seller had obtained consent to transfer the portion of land within a period of six months from the day of entering into the contract cannot

stand. It is the appellant who has refused to appear before the board.

On grounds three and four of the appeal that the learned magistrate erred both in fact and law in analyzing the evidence before herself and hence arriving at a wrong finding. And that the learned magistrate erred both in law and fact by rejecting the defence offered by the defendant and hence arriving at a wrong finding, I find the same has not been established. Judge Maraga as he then was, in the case of *Reliable Electrical Engineers Ltd & Another v Kenya Petroleum Refinery Ltd* (HCC 190 of 2005), held that :

“the jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source.”

At the hearing of this case in the lower court, the Plaintiff did produce in court land sale agreements evidencing sale of the subject land. I find that these agreements are valid and enforceable. The Trial Magistrate has carefully analysed the case in her judgement and on page and in conclusion she stated that,

“his defence supports the plaintiff’s claim that he is to take the balance of the purchase price.

Judgement if therefore entered in favour of the plaintiff as prayed in the amended plaint for the defendant to receive the balance which exact figure is kshs 70,000/= and to ensure smooth transfer of the land to the purchaser/plaintiff in default the Executive Officer to sign the necessary transfer forms...”

In ***Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870***, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the award as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE