



**REPUBLIC OF KENYA**

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

**E & L APPEAL NO. 4 OF 2017**

**JORAM YATOR.....APPELLANT**

**VERSUS**

**TITUS KANGOGO.....RESPONDENT**

**JUDGMENT**

**Titus Kangogo, (hereinafter referred to as the respondent)** moved to Lower Court in Eldoret Chief Magistrate's Civil Case No. 240 of 2015 against one **Joram K. Yator (hereinafter referred to as the appellant)** claiming that vide a gentleman's agreement made sometimes between March, 2008 and February, 2009, the appellant purported to sell to respondent 1.5 acres of land with that parcel of land known as **Mauton/Kipsinende Block 4** at an agreed consideration of Kenya Shillings Three Hundred Thousand Only (Kshs.300,000) and that after the payment of the whole purchase consideration, the appellant failed to give vacant possession of the said suit land to the plaintiff. That he has suffered losses as a result of the appellant's failure to make good his contractual obligation to give vacant possession of the said suit land to him.

That despite demand being made and notice of intention to sue having been issued, the appellant had refused and or neglected to refund the said purchase consideration and or give vacant possession of the said suit land to the respondent hence necessitating the filing of the suit.

The appellant filed a statement of defence denying that he ever purported to have land measuring 1.5 acres forming part of L. R. No. Mauton/Kipsinende Block 4 or any part thereof to sell to the plaintiff for Kshs. 300,000 as alleged and puts the plaintiff to strict proof.

That to the contrary the respondent indeed deposited Kshs.250,000 in the appellant's account with Equity Bank as follows:

- (i) On 3.4.2008 - Kshs.120,000 at Kitengela**
- (ii) On 19.5.2008 - Kshs.50,000 at Kitengela**
- (iii) On 28.5.2008 - Kshs.40,000 at Moi Avenue, Nairobi**
- (iv) On 29.9.2008 - Kshs.20,000 at Kitengela**
- (v) On 4.2.2009 - Kshs.20,000 at Kitengela**

That the appellant, upon receipt of the funds, took the same under the instructions of the owner of the parcel of land one Kemeli Chebore and the cash was paid to Mr. Kemeli Chebore's surveyor one Mr. Bisaule Masese who used to operate from the offices known as Geomatic Systems (Surveyors) within Eldoret Town at Kaplimo House whom Mr. Kimeli instructed to go and do the survey of the land and this was done with the full knowledge of the respondent. That the said surveyor, Mr. Bisaule Masese died in late 2012 while the owner of the land Mr. Kimeli Chebore also died in 2013. The appellant claimed that the respondent was at liberty to follow up his land from the estate of Kimeli Chebore.

According to the appellant the respondent could not claim a refund of Kshs.300,000 in the first place received by the appellant when the appellant only received and transmitted the cash to the land owner who is known to the respondent.

This being a first appeal, this court has a duty to re-evaluate the evidence on record and come to its conclusion.

It was the respondent's evidence that he paid the appellant Kshs.250,000 towards purchase of 1.5 acres of land from the appellant. The appellant sold the land to another person for Kshs.1.8 Million. When asked to refund the money, he refused. The money was deposited in the appellant's account. The Kenya Shillings 50,000 was paid at Barngetuny Plaza. There was no sale agreement as this was a gentleman's agreement. The defendant deposited the money in the account of Joram Yator.

PW2, Jackson Kibet stated that he recalls sometime in the month of March, 2008 the respondent was scouting for land within strawbug area when the appellant's brother one David Yator who was with them informed them that his brother had some land for sale in that area. The said David Yator directed the respondent to see his brother for the purpose of negotiating the price.

The said David Yator made a phone call to the appellant inquiring about the land. The appellant went to Barngetuny Plaza and confirmed to them that he wanted to sell apportion of the parcel of land known as Mauton/Kipsinende Block 4 and the appellant expressed his interest to buy.

Upon his arrival, the respondent indicated to him that he was interested in purchasing 1½ acres. They eventually agreed a price of Kshs.300,000 for the said 1½ acres of land.

They also agreed on the mode of payment where the respondent indicated to the defendant that he was going to pay him a sum of Kshs.50,000 in cash within 2 days.

After the two days, they met again at Barngetuny Plaza being the respondent, the appellant, himself and David Yator whereupon the respondent handed over the sum of Kshs. 50,000 in cash to the appellant in their presence.

Upon the receipt of Kshs. 50,000, the two parties agreed that the balance of Kshs.250,000 was to be paid by way of direct deposit to the appellants account at Equity Bank. The respondent later informed him that he had paid all the outstanding sum of Kshs. 250,000 to the appellant. He later came to know that the appellant did not hand over vacant possession of the land to the respondent.

DW1, Joram Yator the appellant stated that his neighbor called Chebore used his mobile phone to cause the respondent to deposit money in his account for a plot in town. He gave him the account number and the respondent put money in the account. The appellant transferred the money to one Kimeli Chebore. In total, the respondent deposited Kshs. 250,000 and the appellant gave Kimeli Chebore the entire amount.

After hearing evidence from both parties, the Honourable Magistrate found that Kshs. 250,000 was deposited on the appellant's account but there was no evidence of Kshs. 50,000. There was no evidence that Kshs. 250,000 was transferred to Chebore Kimeli's account. There was no evidence that Kimeli Chebore is deceased. The Honourable Magistrate found that it was only fair that the money be returned.

The appellant's grounds of appeal are that:

- 1. The learned Honourable Magistrate erred in law and fact by holding that the appellant had land to sell to the respondent without any evidence on record and or any written sale agreement.**
- 2. The learned Honourable Magistrate erred in law and fact in holding that the appellant refunds the respondent the sum of Kshs. 250,000.**
- 3. The learned Honourable Magistrate erred both in law and fact by holding that the appellant did not pay the sum of Kshs. 250,000 to one Kimeli Chebore who was the owner of L. R. No. Mauton/Kipsinende Block 4 who actually received the amount in question.**
- 4. The learned Honourable Magistrate erred in law and fact by failing to consider defence evidence which clearly showed that the respondent was shown the land and the owner thereof but he did not follow up the same.**
- 5. That the honourable court erred in law and fact in a land matter over which the court did not have jurisdiction.**

I have considered the evidence on record and submissions of counsel and do find that the learned Magistrate did not find that the appellant had land to sell and therefore the first ground of appeal has no merit as it is based on a non-existent finding.

This court further finds that there was no written agreement between the appellant and respondent.

**Section 3 of the Law of Contract Act Cap 23 Laws of Kenya** makes provision that certain contracts must be in writing. It provides precisely that no suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

And that no suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.

**Moreover, that no suit shall be brought upon a contract for the disposition of an interest in land unless— (a) the contract upon which the suit is founded—**

**(i) is in writing;**

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust. The meaning of the above is that there is no enforceable contract for sale of land between the appellant and the respondent in respect of disposition of land enforceable in law.

However, there is evidence that the respondent paid the appellant KshS. 250,000 due to a gentleman's agreement as consideration for land belonging to a 3<sup>rd</sup> party Kimeli Chebore.

It was the appellant to transfer land to the respondent and not Kimeli Chebore as the latter was not party to the gentleman's agreement. As found by the learned Magistrate, no evidence was availed to court that the said Kimeli Chebore existed, or if he had existed he died.

On the issue of jurisdiction this court finds that the claim was for refund of purchase price of land based on breach of contract and a null and void contract and not claim for the use and occupation and title to land and therefore the honorable Magistrate was possessed of jurisdiction.

Moreover, the finding that the appellant was to refund the respondent Kshs.250,000 was proper as the appellant received the money vide an oral agreement. The upshot of the above is that the appeal is dismissed with costs.

**Dated and delivered at Eldoret this 6<sup>th</sup> day of December, 2018.**

**A. OMBWAYO**

**JUDGE**