REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 5 OF 2015

JOHN GACHUNGA NJOROGE.....APPELLANT

-VERSUS-

JOSEPH NJOROGE MWANGI.....RESPONDENT

JUDGMENT

1. The respondent herein, Joseph Njoroge Mwagi, instituted a suit in the lower court to wit Kigumo **SRMCCC No.24 of 2010** seeking judgment against the appellant, John Gachunga Njoroge for:

a. **An order of transfer of land parcel number Loc.2/Makomboki/619 from the defendant (read the appellant) to him. An order for transfer of 0.75 acres out of Loc.2/Makomboki/1541 from the defendant (read appellant) to him or in the alternative refund of Kshs.400,500/-;**

b. **Costs of the suit;**

c. **Interest on (b) above;**

d. **Further relief as may be just.**

The respondent's case was premised on a sale agreement allegedly entered into between the respondent and the appellant on 2nd November, 2005.

2. Upon considering the evidence presented before him, the Trial Magistrate entered judgment in favour of the respondent.

3. Aggrieved by the the decision of the lower court, the appellant appealed to this court on the following grounds:-

i) The learned magistrate erred in law and fact by admitting and giving undue weight to otherwise suspect, inadmissible and incompetent documents produced by the respondent thus arriving at a wrong decision and judgment;

ii) The learned magistrate erred in law and fact by failing to consider the very credible and sound defence offered by the defence and as a result arrived at wrong findings and judgment;

iii**) The learned magistrate erred in law and fact as to the burden of proof in a civil matter and ended up importing extrensic evidence otherwise not part of the evidence on record;**

iv**) The learned magistrate erred in law and fact by failing to construe and consider the governing and relevant provisions of the Land Control Act particularly section 6 and 7 and their effect on the case before him;**

v**) The learned magistrate erred in law and fact by admitting and relying on what was actually inconsistent, contradictory and otherwise apparently false evidence thus arriving at a decision not supported by the evidence of record.**

5. Vide the appeal herein, the appellant seeks to set aside the judgment of the lower court with costs of the appeal and the case before the lower court.

6. This being a first appeal, it is the duty of this court to evaluate afresh the evidence on record in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. See the case of **Selle & Another** vs. **Associated Motor Co. Ltd & Others** (1968) E.A. 123.

Pleadings

7. According to the case presented before the lower court, the respondent entered into an agreement for sale of land parcel number Loc.2/Makomboki/616 with the defendant. The agreement was entered into on 2nd November, 2011. The agreement was for sale of 0.75 acres of Loc.2/Makomboki/616 which was later sub-divided into Loc.2/Makomboki/1541 and 1542. The agreed purchase price was Kshs.345,000/= (see paragraph 4 of the plaint).

8. It was contended that by the time the suit was filed, the appellant had received Kshs. 331,500/- from the respondent but, without any lawful excuse refused, failed and/or neglected to transfer the portion of the suit property the respondent had purchased.

9. It was also contended that it was a term of the contract executed between the respondent and the appellant that the party in default would pay 20% of the purchase price to the innocent party. (paragraph 7 of the plaint).

10. Vide paragraph 8 of the amended plaint, the respondent's claim was for transfer of land parcel number Loc.2/Makomboki/619. In the alternative, the respondent was seeking refund of Kshs.400,500/- being the consideration that had passed between them and penalty payable of Kshs. 69,000/=. The said claim is replicated in the reliefs section of the plaint as prayer No. (a).

11. In his statement of defence, dated 8th February, 2010 the appellant denied all the allegations contained in the plaint and put the respondent to strict proof thereof. He also contended that it is the respondent who breached whatever agreement there was and that the suit was time barred, tainted by ill faith and misrepresentation, incompetent and fatally defective.

Evidence

12. The respondent who testified as P.W.1, told the court that he entered into an agreement for sale of the suit property with the appellant on 2nd November, 2005. The agreed purchase price was Kshs.345,000/= out of which he paid Kshs. 185,000/= on 2nd November, 2005; Kshs.100,000/-on 11th November, 2005; Kshs.30,000/- on 10th March, 2006; Kshs.10,000/- on 29th April, 2006 and Kshs.6,000/ on 18th August, 2008 making a total of **Kshs.331,500**/=. The respondent further informed the Trial Magistrate that they had agreed that incase of breach of the terms of the agreement, the party in breach was to refund the purchase price with 20% interest.

13. The respondent's informed the trial court that after receiving the above consideration, the appellant refused to transfer the land to him. In support of his case, the respondent produced the agreements allegedly executed between him and the appellant as **Pexbt 1** to **5**.

14. Upon being cross-examined by counsel for the appellant, **Mr. Mwangi Ben**, the respondent

maintained that he made the payments mentioned herein above, most of which he made through his advocate's office.

15. He admitted that he had not obtained Land Control Board consent and that the agreements he relied on do not contain the same land parcel numbers.

16. In re-examination, he explained that the appellant gave him different title deeds (two) and that the appellant had gone to the land registry and sub-divided land parcel number 619; That the change of circumstances led to the memorandum of understanding executed between himself and the appellant (**Pexbt-2**)- The memorandum of understanding was signed to change the title number because he had realised that he had been given a fake land number.

17. The respondent further informed the Trial Magistrate that the agreements he produced were signed by the appellant.

18. With regard to the contention that the advocate they went to was not qualified to practice, he stated that he was not aware of that fact.

19. The appellant who testified as D.W.1, informed the court that he knew the respondent and admitted that he had agreed to sell a portion of land to the respondent to raise money to pay hospital bills for his sister.

20. He informed the court that they signed an agreement on 29th April, 2006 and that on that day he was paid Kshs.10,000/=. He stated that he was paid a further Kshs.6,000/= on 18th August, 2006, in total making Kshs. 16,000/-.

21. He admitted having signed the two agreements in which the two payments are captured and having gone to Mburu & Co. Advocates on 2nd November, 2005 but denied having signed any agreement before Mburu Advocate or received any money in respect of the agreement he allegedly signed on that day; **Pexbt-1**.

22. He disowned the agreement signed on 30th March, 2006, **Pexbt-2** and **Pexbt-3**.

23. Arguing that the signature appearing on those agreements is not his, he produced a copy of his identity card with his signature to show that the agreements were not signed by him.

24. He told the court that he did not attend the Land Control Board because the respondent did not pay the purchase price.

25. He further told the court that after seeing the handwritten agreements, he contacted Mburu advocate who denied knowledge of the agreements and agreed to come and testisfy as a witness.

26. His advocate conducted a search on the website of the Law Society of Kenya and discovered that Mburu was not qualified to practice as an advocate.

27. Upon being cross examined, he acknowledged that he went to the firm of Mburu & Co. Advocates on 2nd November, 2005 but maintained that he did not sign any agreement or receive money.

28. He told the court that he did not take any action despite having discovered that his signature was forged.

29. He acknowledged that he needed Kshs. 180,000/- for his sister's hospital bills.

30. He also acknowledged that the agreements he executed referred to the one of 2005. He contended that he did not understand the contents of the agreement he executed.

31. He acknowledged that **Pexbt-1** has his name and identity card.

32. In re-examination, he denied having appeared before Mburu advocate and maintained that he only received Kshs. 16,000/- from the respondent.

33. He stated that he knows Loc 619 and not 662. Land parcel in **Pexbt- 2** is 662. **Pexbt- 3** also contains 662.

34. He denied having given the numbers contained in the agreements relied on by the respondent.

35. He stated that he took his first identity card in 1990 and replaced it in 2013.

36. He confessed that he saw the forged documents for the first time in court.

37. It was on the basis of the foregoing evidence that the learned Trial Magistrate found in favour of the appellant.

38. In finding in favour of the respondent, the learned Trial Magistrate, after giving a brief overview of the cases of the parties, observed:

> **"The issue this court must determine is whether the plaintiff has proved his case on a balance of probability. This court must determine whether the plaintiff and the defendant entered into an agreement for the sale of the land or not. It is also an issue to determine whether the defendant was ever paid money by the plaintiff. The court must also determine whether the defendant is liable to refund or not.**
>
> **The parties to this suit filed their written submissions in support of their positions. I have considered the submissions.**
>
> **In his written submissions, the counsel for the defendant argued that since the said D.N Mburu was mentioned to have drawn, witnessed and signed the documents was found to be unqualified person, the documents produced by the plaintiff as exhibits should be expunged from the record. He further stated that when the said Mburu was confronted by the defendant he stated that the agreement was drawn by a clerk. It is worth noting that the said advocate D.N Mburu was an important witness by both parties.**
>
> **To the plaintiff, D.N Mburu would have clearly state whether he signed the documents or not and to the defendant who alleged that the documents originated from his office, the same were signed by his clerk.**
>
> **The plaintiff and the defendant are lay persons and would not know how advocate offices are operated. The advocate whose clerk purportedly acted on his behalf must take responsibility.**
>
> **Another issue which is important here is the defendant claimed that his signature was forged yet he took no action as this is a criminal offence. The two gentlemen knew each other well no evidence was adduced to show the plaintiff from the blues would come out with this kind of claim against the defendant. Assessing the evidence, I believe the two must have had some transaction. It is not proper to hide under formality to defeat justice.**
>
> **Under Article 159(d) of the Constitution, it is stated that justice shall be done or administered without undue regard to procedural technicalities. This court is aware of the provisions of Section 31, 33 and 34 of the Advocates Act which states that no unqualified person should purport to do duties of a qualified advocate and therefore any document prepared and signed by said person is void...The other issue is that the sale agreement did not have the blessing of the Land Control Board as provided for under Section 6 of the Land Control Act. This**

cannot be relied on since the defendant is the one who made it difficult for the process to go on owing to his none cooperation. <u>Further more the plaintiff seeks an alternative prayer for the refund</u>. This to me is also a mere technicality.

After considering the entire evidence, it is my humble finding that the plaintiff proved his case on a balance of probability. I will therefore enter judgment in his favour as prayed. I will also allow the costs of the suit."

39. Did the learned Trial Magistrate err by entering judgment in favour of the respondent?

40. In determining that issue, it is important to consider the various grounds of appeal, the evidence and the determination made in respect thereof.

<u>Ground one</u>

41. **The learned magistrate erred in law and fact by admitting and giving undue weight to otherwise suspect, inadmissible and incompetent documents produced by the respondent thus arriving at a wrong decision and judgment;**

With regard to this ground, upon review of the totality of the evidence adduced before the learned Trial Magistrate, I make the following observations:

i). That the appellant did not object to the production of those documents during trial.

ii). That the appellant challenged the documents through his submissions.

iii) that the respondent relied on other documents not drawn before the advocate and which the appellant acknowledged that he signed. For instance acknowledgement receipt, dated 10th November, 2005 (**Pexbt. 3**) and **Pexbt. 4** which is an acknowledgement receipt for of Kshs. 10,000/- from the respondent being further payment towards purchase of ¾ acre from land parcel Loc 2/Makomboki pursuant to the sale agreement dated 2nd day of November, 2005.

Pexbt. 3 is in the following terms:-

"I John Gachunga Njoroge holder of identity card card number 10751537 of post office box number 3 Kangari in the Republic of Kenya do hereby acknowledge receipt of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) from Joseph Njoroge Mwangi...being further payment towards purchase of ¾ acre from larger parcel Loc.2/Makomboki/662 pursuant to the sale agreement dated 2nd November, 2005.

We also confirm that the balance of the purchase price is Kenya shillings fifty nine thousand five hundred (kshs. 59, 500) only.

We, further agree that if any party defaults to the agreement dated 2nd November 2005 in their respective obligations under the above indicated agreement, then in case of default by the purchase price already paid up shall be refunded less 20% in damages and in case of default by the vendor he shall refund the purchase price plus 20% in damages."

iv). The appellant also admitted having gone to the firm of D.N Mburu & Co. Advocates in connection with the agreement dated 2nd November, 2005 and seeing the secretary and the clerk who allegedly endorsed the agreement.

42. In my view, the learned Trial Magistrate properly directed himself on the question of admissibility of those documents because firstly, the documents were relevant for the purpose of helping the court understand the nature of dealings the parties had engaged in. Secondly, the appellant did not object to the production of those documents during trial and thirdly, it was not demonstrated that the respondent who is

a lay man, acted in bad faith or with knowledge of the failure of the advocate to take out a practicing certificate to warrant his being punished for the mistakes of the advocate or his members of staff. In this regard see the case of **Republic v Resident Magistrate's Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna & 9 others [2016] eKLR** where it was held:-

> **"...A claim in law and a course of action belongs to the client and not the advocate. It is hard to justify, in this era where the Constitution (at Article 159) commands the courts to privilege the ideals of substantive justice as opposed to legal formalism, statutory interpretation which bereaves a party of a valid substantive claim because his or her lawyer failed to adhere to a procedural requirement unrelated to the claim in question. The case would be different, of course, if there is evidence that the client acted in bad faith or with knowledge of the failure of the lawyer to take out a practicing certificate but still persisted in having the lawyer represent them. No such evidence was presented here. Instead, we have a group of innocent members of the public who instructed a law firm – not even a particular lawyer – to file a claim on their behalf. The law firm so instructed, then, assigned the file to a lawyer in the firm who happened not to have taken a practicing certificate. In my view, to paraphrase the Supreme Court, the fact of this case, and its clear merits lead me to a finding that the pleadings drawn and signed by Mr. Nyanyuki as well as the submissions he made in the two suits are not invalid merely by dint of Mr. Nyanyuki's failure to take out a practicing certificate."**

Ground two

43. **The learned magistrate erred in law and fact by failing to consider the very credible and sound defence offered by the defence and as a result arrived at wrong findings and judgment;**

Concerning this ground, contrary to the appellant's contention that the learned Trial Magistrate did not consider his defence, it is clear from the judgment that the learned Trial Magistrate considered the appellant's defence and found it to be unreliable on the following grounds:

a) The appellant did not avail D.N Mburu Advocate to vouch for the allegation that the documents relied on by the respondent did not originate from his office yet he was an important witness for both parties;

b) The respondent and the appellant being lay persons would not know how advocate offices are operated;

c) The learned Trial Magistrate believed the testimony of the appellant and disbelieved that of the appellant;

d) The learned Trial Magistrate dismissed the defence offered by the appellant on the ground that it hinged on mere technicalities which could not be used to defeat the respondent's claim.

44. Having already found that the learned Trial Magistrate did not err by admitting the documents produced by the respondent, and being of the view that the appellant could not rely on the defence of want of the consent of the Land Control Board to defeat the appellant's claim for refund of the purchase price, it is my considered view that the appeal cannot be sustained on this ground.

Ground three

45. **The learned Magistrate erred in law and fact as to the burden of proof in a civil matter and ended up importing extrensic evidence otherwise not part of the evidence on record;**

With regard to this ground, it has not been demonstrated in what manner the learned Trial Magistrate misdirected himself on the question of the burden of proof or what extrinsic evidence, if any, the learned Magistrate imported into the suit. This notwithstanding, I gather that the appellant's contention is

premised on the determination of the court that the advocate who allegedly drew the impugned sale agreement was an important witness for both parties.

46. The learned Magistrate reasoned that the advocate would have clarified the appellant's allegation that the sale agreement relied on by the respondent was not signed by the advocate.

47. Because it is the appellant who sought to prove that the agreement relied on by the respondent was not signed by the advocate by dint of the provisions of **Section 107** of the Evidence Act, Cap 80 Laws of Kenya, the burden of proof lay with the person who asserted that fact, that is to say the appellant. If this ground is premised on that finding, I find it to be without basis and incapable of availing the appellant the reliefs sought.

Ground four

48. **The learned Magistrate erred in law and fact by failing to construe and consider the governing and relevant provisions of the Land Control Act particularly section 6 and 7 and their effect on the case before him:**

Concerning this ground, I reiterate my observation in ground two that the appellant could not rely on the defence of want of the consent of the land control board to defeat the appellant's claim for refund of the purchase price.

Ground five

49. **The learned magistrate erred in law and fact by admitting and relying on what was actually inconsistent, contradictory and otherwise apparently false evidence thus arriving at a decision not supported by the evidence on record.**

With regard to this ground, It is trite law that *an appellate court will not normally interfere with a finding of the trial court based on facts unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding. In this regard s*ee the case of ***Mwangi v Wambugu, [1984]*** *KLR 453* where it was held:

> ***"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

*50. On whether the appellant has made up a case for interference with the findings of the trial court, on account of the alleged in*admissibility, inconsistenty, contradiction and falsehood of the evidence adduced by the respondent, I begin by reiterating my finding in ground one that the evidence adduced by the respondent was relevant for the purpose of helping the court understand the nature of the dealings held between the parties before him.

51. Concerning the alleged gaps in the evidence, I find those gaps to have been properly explained by the respondent who informed the court that the appellant misled him as to the plot he was selling to him. I also note that the alleged gaps concerning the property being sold was subsequently rectified through the documents the parties later on executed to rectify the defect.

52.The upshot of the foregoing is that the respondent has not made up a case for being granted the orders sought. Consequently, I dismiss the appeal herein with costs to the respondent.

53. For avoidance of doubt and for clarity of the nature of judgment entered in favour of the respondent,

the appellant has a choice to either make arrangements for transfer of the suit property to the appellant or to refund the consideration which passed as between them plus the default penalty in accordance with the agreement executed between them, that is to say Kshs.400,500/- plus costs of the suit and interest.

Orders accordingly.

Dated, signed and delivered in Nyeri on this 23rd day of January, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Joseph Njoroge Mwangi – respondent

N/A for the appellant

Court assistant - Lydia