



**REPUBLIC OF KENYA**  
**IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA**

**ELC APPEAL NO. 9 OF 2016**

**JOHN H.O. MWANZA.....APPELANT**

**VERSUS**

**LAWRENCE MUBATSI KUNDU..... RESPONDENT**

**JUDGMENT**

This appeal stems from the lower court judgment in Mumias RMCC No. 433 of 2008 delivered on the 24<sup>th</sup> November 2010 where in the Appellant was the Plaintiff and the Respondent the Defendant.

In the pleadings in the lower court the Appellant claimed that he had executed an agreement with the Respondent wherein the Respondent had disposed of 2 acres of his interest in land L.R No. North Wanga/Namamali/665 and the agreed price was Kshs. 120,000/=. The Appellant had made payments totaling to kshs. 54,000/= when the Respondent had a change of heart and cancelled the agreement. The Appellant was thus seeking the refund of Kshs. 54,000/= and the lower court dismissed the claim hence this appeal.

On grounds 1 and 3 of the appeal, the Appellant submitted that the Respondent was not the legal owner of the said two acres of land and hence had no capacity to enter into a contract with the Appellant for one cannot pass on a better title than he himself has as alluded to under Section 23 of the Sale of Goods Act, hence the total failure of consideration. Further the consent of the Land Control Board operational at the time of the sale had yet to be obtained pursuant to Section 6 of the Land Control Act (CAP 302) which added to the illegality of the transaction and made the purchaser apprehensive for he stood to lose his interest.

On grounds 2 and 4 of the Appeal, the Respondent knowing very well he had no title to the land parcel, proceeded to defraud the Appellant of his money under false pretence. The Appellant was not aware of the Respondent's lack of title at the time of the purchase of the land, but later got wind of the same and hence moved to protect his interests.

On grounds 4 and 5 of the Appeal it is submitted that the Appellant acted with due diligence to avoid the furtherance of a fraudulent act when it came to his knowledge and stopped remitting any more money.

The Respondent submitted that on grounds 1 and 2 of the appeal the appellant at all material time knew that the Respondent was disposing of his 2 acres share of the land and the balance of Kshs. 66,000/= was to be paid to the Respondent once probate and administration proceedings pending in the High Court had been finalized.

On the issue of the Land Control Board in ground 3 and 4 of the appeal if the lower court had ordered a refund then it would have been tantamount to enforcing an illegal agreement if the transaction was found void. If on the other hand it is argued that the agreement was valid then it can only be recovered as a debt

and this was not pleaded in the plaint. The Respondent relied on the following authorities; in the matter of the estate of Salim Okiti Nanjira & Mwanatena Auma Okitivs Asman Onyanchi Wanga & Others HCCC 261 of 2005 Kakamega, Country Broadcasting Co. Limited vs. Go Communication Limited & Others HCCCD 12 of 2010, Kenya Airways Limited vs Satwant Singh Flora CA No. 54 of 2005 and Priscilla Nyambura vs. Marathon Corporation Kenya Limited & Others HCCC 221 of 2007.

The Respondent submitted that it was the Appellant who breached the agreement as he had not finished paying off the balance of the purchase price of Kshs. 66,000/= and was only looking for an easy way out of his obligations.

This Court has carefully read through the Appellant's and the Respondent's submissions together with the authorities relied upon. The issues for determination in this appeal are as follows;

1. Whether the Respondent was the legal owner of the 2 acres of land parcel No. L.R. North Wanga/ Mamali/665 the property he purported to sell to the Appellant.
2. Whether there was an element of fraud on the part of the Respondent or unlawfulness when he sold the suit parcel to the Appellant.
3. Whether the agreement had become void for lack of the Land Control Board consent.
4. Whether the trial court should have made an order for refund of the part consideration paid to the Appellant by the Respondent.

On the issue of ownership of a parcel of land see the case of Esther Ndegi Njiru & Another vs. Leonard Gatei HCC No. 128 Of 2011 where the Judge held that;

Under section 26(1) of the Land Registration Act the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Section 26(1) provides:-

**26.(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

Section 24(a) of the Land Registration Act provides as follows:

***“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”***

From the above provisions of the law, one can only sell what is theirs and what they have title to. The Respondent submitted that on grounds 1 and 2 of the appeal the appellant at all material time knew that

the Respondent was disposing of his 2 acres share of the land and the balance of Kshs. 66,000/= was to be paid to the Respondent once probate and administration proceedings pending in the High Court had been finalized and title passed on to him. It is on record that the parcel of land subject matter of this suit L.R No. North Wanga/ Mumamali/ 665 belonged to one OkumuWambundo and not the Respondent. Furthermore, the said OkumuWambundo died on the 19<sup>th</sup> November 1994. The Respondent therefore, had no title which he could have passed over to the Appellant at the material time in the first instance. This was unlawful and this kind of agreement cannot be sanctioned by any Court of Law.

Be that as it may and without prejudice to the foregoing let us presume that the agreement was lawful, the question is whether it would be enforceable. The Appellant in his ground 3 of appeal stated that the sale agreement was unenforceable as there was no consent obtained from the Land Control Board. There is no dispute that the land the subject of the transaction is agricultural land which is subject to the provisions of the **Land Control Act (Cap 302)** of the **Laws of Kenya**.

**Section 6 (1)** of the **Land Control Act** provides that any transaction requiring the consent of the Land Control Board is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with the Act. For the reasons already stated above the agreement would be void for lack of the consent of the Land Control Board and most importantly sale by a person who had no proprietary rights in the land he was purporting to sell. See the case of Bogani Properties Limited vs. Fredrick Wairegi ELC Civil Case No. 125 of 2014, lack of the Land Control Board makes the said agreement void by operation of the law and the remedy in this case would be a refund of the money paid. See also the Case of Kariuki vs. Kariuki 1983 KLR 225. I find that the Respondent had no title to pass to the Appellant and the agreement was hence unlawful.

For the above reasons I find the appeal has merit and the same is allowed. The judgment by the trial court is set aside together with all consequential orders arising therefrom and make the following orders;

1. That the Appellant be refunded the sum of Kshs 54,000/= already paid to the Respondent with interest at Court rates.
2. Costs of the appeal are awarded to the appellant.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7<sup>TH</sup> DAY OF MARCH 2017.

N.A. MATHEKA

JUDGE