



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 9 OF 2014**

**SUSAN WAKUTHII KIBATA)**

**MILLICENT WANGECHI KIBATA).....APPELLANTS**

**VERSUS**

**ELIZABETH NJOKI MURAGE.....RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 12<sup>TH</sup> MARCH, 2014 BY HON J.A KASAM – S.R.M AT KERUGOYA SENIOR PRINCIPAL MAGISTRATE’S COURT CIVIL CASE NO. 109 OF 2013)***

**JUDGMENT**

The issue that calls for my determination in this appeal is whether a Court can order for the payment of interest on the purchase price arising out of an agreement for the sale of land that is void.

On 27th July 2009, the parties herein entered into an agreement whereby the Respondent was to sell ½ acre out of her beneficial share in land parcel No. NGARIAMA/NGIRIAMBURU/1367 to the Appellants. The land was by then still registered in the names of the Respondent’s mother though the Appellants were to occupy the portion sold awaiting completion of the succession proceedings and transfer process. The agreement had a default clause to the effect that if the Respondent failed to meet her obligations, she would refund the purchase price of Ksh. 180,000 together with interest of 40% p.a. and a further sum of Ksh. 20,000 as liquidated damages.

As is not un-common with such agreements, the Respondent did not meet her part of the agreement thereby prompting the Appellants to file **KERUGOYA SENIOR PRINCIPAL MAGISTRATE’S COURT CIVIL CASE No. 109 of 2013** seeking against the Respondent the transfer of ½ acre out of land parcel No. NGARIAMA/NGIRIAMBURU/1367 or in the alternative, a refund of Ksh. 185,000 with interest at 40% p.a. with effect from 27th July 2009 plus the agreed liquidated damages of Ksh. 20,000. The Appellants also sought an order for costs of the suit with interest.

In a judgment delivered on 12th March 2014, the trial magistrate **HON. J. KASAM** (Senior Resident Magistrate) found that the agreement was void for lack of consent by the Land Control Board and entered judgment for the Appellants only for the acknowledged sum of Ksh. 185,000 which the Respondent had received plus costs and interest of the suit but declined to award the interest of 40% p.a. or the Ksh. 20,000 liquidated damages.

That judgment provoked this appeal in which the Appellants have raised the following seven (7) grounds in seeking to overturn the findings of the trial magistrate:

- 1. The learned trial magistrate erred in law and in fact in failing to make a finding that the parties had voluntarily entered into an agreement with clean terms and the parties were bound by the said terms since a Court of law cannot re-write a contract between parties.**
- 2. The learned trial magistrate erred in law and fact in making a finding that the Plaintiffs/Appellants ought to prove benefit for being in occupation of the land for a period of four (4) years yet failed to address herself to the clear terms of clause 3 of the agreement.**
- 3. The learned trial magistrate erred in law and fact in failing to make a finding that by refusing to perform her contractual obligations, the Respondent was clearly in breach of the contract terms of the agreement and therefore Section 7 of the Land Contract Act was not applicable in the circumstances but clause 7 of the agreement dated 27th July 2009.**
- 4. The learned trial magistrate erred in law and fact in failing to award any interest to the amount paid in 2009 of Ksh. 185,000 notwithstanding the inflation, the agreed rate of interest and even the Respondent conceding in written submission that interest ought to be awarded.**
- 5. The learned trial magistrate erred in law and fact in failing to award agreed liquidated damages of Ksh. 20,000 which amount had not been contested and had even been admitted by the Respondent as payable in paragraph 3 of her statement of defence.**
- 6. The learned trial magistrate erred in law and fact in failing to make any comment on or to be guided by the authorities submitted to her on the rate of interest applicable despite the fact that the same were of superior Court and therefore binding on her.**
- 7. The learned trial magistrate erred in law and fact in making a finding that the Respondent had no right to sell land without an authority from the Court yet no provision of law was cited to support such a position.**

The appeal was canvassed by way of written submissions which have been filed both by **MAINA KAGIO** advocate for the Appellants and **A.N. CHOMBA** advocate for the Respondent.

I have considered the appeal together with the submissions by counsel.

As this is a first appeal, my role is to reconsider and re-evaluate the evidence before the trial magistrate and draw my own conclusions though always bearing in mind that I neither saw nor heard the witnesses and make due allowance for that. This Court is also not bound to follow the findings of the trial Court if it appears that the Court failed on some point to take account of particular circumstances – **SELLE VS ASSOCIATED MOTOR BOAT COMPANY LTD 1968 E.A 123.**

Receipt of the Ksh. 185,000 by the Respondent was not disputed. The agreement stated that the purchase price was Ksh.180,000 but it is clear that the Respondent also received a further sum of Ksh. 5,000. It is also common ground that the Respondent was the party in breach of the agreement. Paragraphs six (6) and seven (7) of the said agreement are relevant for purposes of this appeal. They provide as follows:

**6:“That the balance of Ksh. 80,000/= (Eighty thousand Shillings) shall be paid to the Vender after the Land Board has given consent and the necessary transfer effected”.**

**7:“That in the event to Vendor failing to execute her part of the agreement, she will refund all the monies the Purchaser will have paid and/or in furtherance of this transaction together with interest at a rate of 40% per annum and a further sum of Ksh. 20,000 being liquidated damages”.**

It is clear that the agreement entered into by the parties herein related to purchase of agricultural land and therefore, by dint of the provisions of **Section 6 of the Land Control Act (Chapter 302 Laws of Kenya)**, the consent of the Land Control Board of the area was necessary otherwise the agreement would be

“void”. The trial magistrate made a finding, and rightly so, that since no such consent had been obtained, the Appellants were only entitled to a refund of the purchase price by dint of the provisions of **Section 7 of the Land Control Act** which states that:

***“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22”***

**Section 22** of the same Act makes it an offence punishable with a fine or imprisonment for any person to enter or remain in possession of land in furtherance of a void transaction.

Grounds 1, 2, 3 and 4 of the appeal takes issue with the fact that the trial magistrate erred in failing to make a finding that the parties were bound by their agreement, that the Appellants were in occupation of the land and that **Section 7 of the Land**

**Control Act** was not applicable and therefore interest should have been payable on the Ksh. 185,000 received as purchase price in view of clause 7 of the parties agreement. It is of course correct that parties are bound by their contract and a Court cannot re-write a contract for them. However, a Court cannot enforce an illegal contract. In his submissions on behalf of the Appellants, counsel has referred me to the case of **MORRIS MWITI MBURUGU VS DENNIS KIMANTHI M'MBURUGU CHUKA HIGH COURT SUCCESSION CAUSE No. 43 of 2015** and proceeded to submit as follows:

***“Your lordship from the record of appeal and the supplementary record of appeal, it’s clear that though initially the land belonged to a deceased person, the Respondent later obtained her share of the land. By her action, she had made the Appellants believe that they were to own the land. She received the full purchase price and made the appellants develop the land. As per paragraph 3 of the sale agreement which is in the supplementary record of appeal, the respondent allowed the appellants to take occupation and to develop the land which they did until the time the case was filed and they left the land. Though the contract, in view of Sections 45 and 82 of the Law of Succession Act, is not enforceable, in the persuasive case of Meru High Court Succession Cause No. 43 of 2015 Morris Mwiti Mburugu Vs Denis Kimanthi M’Mburugu at page 8 first paragraph, it was held that the Court will not allow the provisions of the law to be used as a vehicle for fraud. The Court should look at substantive justice as set out in Article 159 of the Constitution”.***

It is the view of counsel, as held in the above case, that the law should not be used as a vehicle of fraud. Indeed that is what **MABEYA J.** held in that case. However, counsel for the Respondent has submitted that a Court should not enforce a contract that is null and void ab-initio. With respect, the case of **MORRIS MWITI MBURUGU** (supra), in so far as it seems to suggest that the harshness of the law should be tampered with the equitable principles, cannot be good law. Doctrine of equity cannot override the law. Equity follows the law. Counsel for the Respondent has cited my own decision in **MURIUKI SAMSON MURIITHI & ANOTHER VS JAMES MWANGI GERALD & OTHERS KERUGOYA ENVIRONMENT AND LAND COURT CASE No. 167 of 2015** where I cited **MISTRY SINGH VS SERWANO WOFUNIRA KULUBYA 1963 E.A 408** where it was held that no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to have arisen out of a contract or transaction which is illegal. And with regard to the submission that **Article 159 of the Constitution** can be invoked in such circumstances, the Court of Appeal recently in the case of **DAVID SIRONGA OLE TUKAI VS FRANCIS arap MUGE & OTHERS C.A CIVIL APPEAL No. 76 of 2014 (2014 e K.L.R)** stated that:

***“Lastly, we do not share the view that the express provisions of the Land Control Act can be equated to procedural technicalities that can be overlooked by virtue of Article 159 (2) (d) of the Constitution and the overriding objective under the Appellate Jurisdiction Act”.***

The Court went on to state that the application of the substance of common law, the doctrines of equity

and statutes of general application cannot be invoked to contradict the provisions of a statute. It follows therefore that notwithstanding the fact that the Appellants went into occupation of the land in dispute, the agreement was void in law and under **Section 7 of the Land Control Act**, the Appellants were only entitled to the ***“money or consideration paid”*** and nothing else. The claim for interest at 40% p.a. was therefore rightly rejected by the trial magistrate.

Ground 5 of the memorandum of appeal takes issue with the fact that the trial magistrate failed in failing to award the agreed liquidated damages of Ksh. 20,000. Again the case of **MISTRY SINGH** (supra) is authority for the proposition that the Court cannot lend aid or succor to validate any illegal contract. See also **STANDARD CHARTERED BANK VS INTERCOM SERVICES LTD & OTHERS 2004 e K.L.R** where the Court of Appeal cited the old English case of **HOLMAN VS JOHNSON 1775-1802 ALL E.R 98** where Chief Justice MANSFIELD stated:

***“The principle of Public Policy is this:***

***Ex dolo malo no ovitur actio. No Court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi cause, or the transgression of a positive law of this country, there the Court says that he has no right to be assisted. It is on that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff”.***

Therefore, while it is true that parties have the freedom to enter into agreements and that Courts cannot re-write agreements for them, it is also the law that Courts will not enforce obligations arising out of an illegal agreement. To have ordered the Appellants to pay the Respondent the sum of Ksh. 20,000 as liquidated damages would have amounted to the trial Court enforcing an illegal agreement. That ground of appeal must also therefore fail.

In grounds 5 and 6 of the memorandum of appeal, the Appellants complains that the trial magistrate did not make any comment nor was she guided by the cases cited and which were binding on her and further, that she erred in law and in fact in making a finding that the Respondent had no right to sell the land.

It is correct that counsel for the Appellants filed submissions in the trial Court and referred the Court to two cases one from the Court of Appeal and two from the High Court all of which expounded on the law that parties are bound by their contracts and that the Court cannot re-write contract for them. It is also true that in her judgment, the trial magistrate did not make any reference to those cases which were of course binding on her. **Order 21 Rule 4 of the Civil Procedure Rules** indicates what a judgment should contain but it does not define the term. It states that:

***“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision”***

While a trial or appellate Court may not be in a position to refer to all cases cited by counsel in their submissions, in a case such as this where the trial Court appears not to have applied the cases referred to it by the Appellants' counsel, it would be appropriate for the Court to give its reasons as to why it did not follow those cases. That will also guide an appellate Court in appreciating why the trial Court made the decision that it did. And where two contrasting cases, both binding on a Court are cited, it is important to distinguish them and state why. I would recommend that practice. Having said so, however, the trial magistrate confined her judgment in applying **Section 7 of the Land Control Act**. And notwithstanding the fact that she made no reference to the cases cited by counsel for the Appellants, she arrived at the right decision in my view. That ground of appeal must also fail.

Finally, on the ground that the trial magistrate erred in law and fact in making a finding that the Respondent had no right to sell the land, the Court rendered itself as follows:

***“The land in issue parcel number 10 Ngariama/Ngiriambu/1367 was registered in the names of the Respondent's late mother JULIANA WARUGURU, the said property belonged to the Estate***

***of the deceased, the defendant had no right to sale (sic) the land without an authority of the Court and the plaintiffs knew of that fact as pleaded herein”***

It is clear from the Appellants own pleadings in the trial Court that by the time the parties were entering into a sale agreement with respect to land parcel No. NGARIAMA/NGIRIAMBURU/1367, it was still registered in the names of the defendant’s deceased mother **JULIANA WARUGURU**. No confirmation of grant with respect to the deceased’s Estate had been done. **Section 45 (1) of the Law of Succession Act** provides that:

***“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person”. Emphasis added***

On the other hand, **Section 82 (b) (II)** of the same Act provides as follows:

***“no immovable property shall be sold before confirmation of the grant”***

The net effect of the above provision of the law is that before the grant of letters of administration is confirmed, no one including the administrator of the Estate of a deceased can deal with his property including selling the same. Any person who does so is guilty of intermeddling with the deceased’s Estate and is liable, if found guilty, to a fine or imprisonment as provided under **Section 45 (2) (b) of the Law of Succession Act**. Therefore, any person who purports to purchase such property before confirmation of grant will be doing so at his own risk. The trial magistrate may not have cited that law, as raised in the memorandum of appeal, but it is clear from what I have just stated above that she was right in making the finding that the Respondent had no right to sell the land in dispute. That ground of appeal must also be rejected.

The up-shot of the above is that this appeal lacks merit. It is hereby dismissed with costs to the Respondent.

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**

Judgment dated, delivered and signed in open Court this 14<sup>th</sup> day of July 2017

Mr. Ngigi for Mr. Chomba for Respondent present

Ms Nyangati for Mr. Kagio for Appellant present

Right of appeal explained.

**B. N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**