



**REPUBLIC OF KENYA**

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

**E.L.C APPEAL NO. 2 OF 2015**

PETER OMOKE OMONYI.....APPELLANT

VERSUS

CHARLES KAMAU MUTHONI.....RESPONDENT

the consent of the Land Control Board had not been obtained. He therefore issued an order compelling the Appellant to remove the caution lodged on the suit land and dismissed the counter claim. The Respondent was awarded costs of the suit and counter claim.

That judgment provoked this appeal in which the Appellant has raised the following nine (9) grounds in seeking to have the Respondent's claim dismissed and the Appellant's counter claim allowed with costs:

- 1. The learned trial magistrate erred in law and in fact when he failed to appreciate that there was in fact consent of the Land Control Board and arrived at a wrong decision.***
- 2. The learned trial magistrate erred in law and in fact when he based his finding on facts not presented before him and hence arrived at a wrong decision.***
- 3. The learned trial magistrate erred in law and in fact when he failed to appreciate the fact that the Appellant had invested heavily on the suit property with the full authority and consent of the Respondent and by failing to order appropriate compensation arrived at an unjust decision.***
- 4. The learned trial magistrate erred in law and in fact when he failed to fully adjudicate the issues before him, apply the overriding objective and render substantive justice to the parties and accordingly arrived at a wrong decision.***
- 5. The learned trial magistrate erred in law and in fact when he allowed the Respondent to unjustly enrich himself through his own wrong-doing and in breach of contract and hence arrived at a wrong decision.***
- 6. The learned trial magistrate erred in law and in fact when he wrongly found that the Appellant's only remedy was a refund of purchase price and hence arrived at a wrong decision.***
- 7. The learned trial magistrate erred in declaring the agreement for sale of land null and void which was not the correct legal position.***
- 8. The finding of the learned trial magistrate was manifestly unjust and oppressive.***
- 9. The learned trial magistrate erred in awarding costs of the action to the Respondent despite his obvious breach of contract.***

The appeal was canvassed by way of written submissions which have been filed by **MR. KIARIE** instructed by **KIARIE NJUGUNA & CO. ADVOCATES** for the Appellant and **MR. WAIRIMA** instructed by **MWANIKI WAIRIMA & CO. ADVOCATES** for the Respondent.

I have considered the appeal and the submissions by counsel.

This being a first appeal, my duty is to reconsider the evidence, evaluate it and draw my own conclusions though always bearing in mind that I neither saw nor heard the witnesses. This Court will therefore not normally interfere with the trial Court's findings of fact unless the same are founded on wrong principles of fact or law – **SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT COMPANY LTD & ANOTHER 1968 E.A 123.**

This appeal brings to the fore the vexing problem on how the Courts should treat a purchaser who has taken possession of land following an agreement that is null and void. As will be clear in this judgment, even the Court of Appeal is still pulling in different directions on this issue. The last I heard on this was that a five Judge bench was to be constituted to consider this issue and that there was also a pending case in the Supreme Court. The five Judge bench is yet to be constituted in the Court of Appeal and neither has the Supreme Court determined it. The two contrasting decisions of the Court of Appeal are **DAVID SIRONGA OLE TUKAI VS FRANCIS ARAP MUGE & OTHERS C.A CIVIL APPEAL No. 76 of 2014 (2014 e K.L.R)** (the **SIRONGA** case) and **MACHARIA MWANGI MAINA & OTHERS VS**

**DAVIDSON MWANGI KAGIRI C.A CIVIL APPEAL No. 26 of 2011** as considered with **CIVIL APPEAL No. 26 and 27 of 2011 (2014 e K.L.R)** (the **MAINA** case).

The determination of this appeal rests on whether or not the agreement between the parties was consented to and if not, whether the Appellant was entitled to enforcement of the same.

The trial magistrate made a finding that the agreement between the parties dated 13th February 2009 by which the Respondent was to sell 1/8 of an acre out of the suit land to the Appellant did not obtain the necessary consent as required by **Section 6 of the Land Control Act**. It was therefore null and void and un-enforceable. From the record, the trial magistrate cannot be faulted for that finding. A copy of the letter of consent dated 12th August 2010 and which was among the exhibits produced by the Respondent clearly showed that the consent granted to the Respondent was only to sub-divide the suit land into two portions. There was no consent granted to transfer any portion to the Appellant. **Section 6 (1) of the Land Control Act** provides as follows:

***“Each of the following transactions –***

***(a) the sale, transfer, lease mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;***

***(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations 1861 for the time being apply;***

***(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a Private Company or Co-operative Society which for the time being owns agricultural land situated within a land control area, 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 to that transaction in accordance with the Act”***

It is clear from the parties’ agreement that the transaction was subject to the consent of the Land Control Board which was not obtained. That rendered the transaction null and void and therefore un-enforceable. Counsel has submitted that the consent to sub-divide was sufficient for purposes of this transaction since the transfer would only come after the sub-division. However, from the provisions of the law that I have cited above, there must be consent to transfer. That was not granted.

Counsel for the Appellant has also submitted that the trial Court ought to have done substantive justice rather than allow the Respondent to unjustly enrich himself. That was the route that the Court took in the **MAINA** case (supra) when it said:

***“This Court is a Court of law and a Court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing and equity detests unjust enrichment”***

The Court in the **MAINA** case (supra) then went on to find that even where the relevant consent was not obtained as is the position in this case but the purchaser is in possession of the land, such purchaser would be entitled to the land by virtue of the equitable doctrines of Constructive trust and Estoppel. The Court in the **SIRONGA** case (supra) took a different view and held that given the express provisions of the law to the effect that any transaction in a land control area is void for all purposes unless the consent of Land Control Board has been granted, there can be no room for the Court to import the doctrines of Equity. Confronted with similar circumstances in the case of **ZACHARY WARWIMBO RUHANGI VS CLEMENT MUTURI KIGANO KERUGOYA ELC CASE No. 334 of 2015**, I followed the decision in the **SIRONGA** case (supra). I was up-held by a different bench in **ZACHARY WARWIMBO RUHANGI VS CLEMENT MUTURI KIGANO C.A CIVIL APPEAL No. 24 of 2016 (2017 e K.L.R)**. It is clear therefore that until a five bench Judge decides otherwise, I must continue to follow that path and make a finding, which I hereby do, that the trial magistrate did not error either in law or in fact when he decided that the agreement between the parties was null and void for lack of the necessary Land Control

Board's consent and was therefore not enforceable. The trial magistrate was therefore entitled to make the order compelling the Appellant to remove the caution that he had placed on the suit land. In the same vein, the trial magistrate was right in dismissing the Appellant's counter claim seeking the transfer of 1/8 acre of the suit land to him as per the agreement. Since the agreement was illegal for lack of consent, it could not be enforced by the Court. In **MAPIS INVESTMENT (K) LTD VS KENYA RAILWAYS CORPORATION (2005) 2 K.L.R 410**, the Court of Appeal cited with approval **LINDLEY L.J. in SCOTT VS BROWN DOERING, MINAB & CO. (3) (1892) 2QB 724** as follows:

***“No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. If the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him”.***

Once the agreement was established to be null and void and therefore illegal, the trial magistrate's hands were tied and he could not have come the aid of the Appellant whose counter claim was therefore correctly dismissed and I must equally dismiss his appeal.

Counsel for the Appellant has taken issue with the trial magistrate for not ordering a refund of double the purchase price as provided by the parties' agreement. It is true that paragraph six (6) of the agreement provided that in case of breach, the Vendor would refund double the amount paid. However, the trial magistrate could not have made such an order because, firstly, it would amount to enforcing an illegal contract. Secondly, it is clear from **Section 7 of the Land Control Act** that only the purchase price is refundable. In his plaint, the Respondent had asked that he be at liberty to refund the purchase price. The trial magistrate ought to have made that order.

On costs, the trial magistrate awarded them to the Respondent. While costs are at the discretion of the Court and ordinarily follow the event unless the Court decides otherwise for good reasons, it was harsh to punish the Appellant with costs in the circumstances of this case. Not only has the Appellant lost the land but he has also lost the development thereon. Yet the Respondent was the author of this unfortunate occurrence. I find it prudent to reverse the trial magistrate's order on costs by directing that each party meet their own costs.

Ultimately therefore and after considering all the evidence, I make the following orders:

- 1. The appeal is dismissed.***
- 2. The Respondent to refund the Appellant the purchase price of Ksh. 100,000 forthwith.***
- 3. Each party to meet their own costs in this Court and in the Court below.***

**B.N. OLAO**

**JUDGE**

**29<sup>TH</sup> SEPTEMBER, 2017**

**Judgment delivered, dated and signed in open Court this 29<sup>th</sup> day of September 2017**

Ms Waweru for Mr. Mwaniki for the Respondent present

Ms Kiragu for Mr. Njuguna for the Appellant present.

**B.N. OLAO**

**JUDGE**

**29<sup>TH</sup> SEPTEMBER, 2017**