IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 55 OF 2016

BETWEEN

ROBERT WALUSEKHE WASAKANIA......................APPELLANT

AND

JOHN DIANG'A OBASO (Suing as Guardian **ad litem** of

SAMUEL AWOUR TONGOI)....................................RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kitale,

Environment and Land Court (E. Obaga, J.) dated 1st February, 2016

in

E & L SUIT NO. 84 OF 2012)

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JUDGMENT OF THE COURT

[1] This is an appeal from the judgment and decree of the Environment and Land Court at Kitale dated 1st February, 2016. By the judgment the court declared the agreement of sale of land dated 15th January, 2008 entered into between **Samuel Owour Tongoi** as vendor and the appellant as the purchaser illegal, null and void and hence unenforceable in law. In addition the court dismissed the appellant's counter-claim for specific performance of the said agreement.

[2] In May, 2012, **John Diang'a Obaso** as a guardian ad litem of Samuel Awour Tongoi filed a suit against the appellant claiming, *inter alia*, that, sometime in early 2008, the appellant illegally took advantage of the mental status of the vendor who was suffering from lapses of memory since 2005 and the prevailing tribal clashes and drafted an agreement of sale of 7.4 acres and compelled the vendor to sign the agreement.

The particulars of illegality pleaded were:

> "i. Taking advantage of Samuel Awour Tongoi so as to illegally secure his signature relating to an invalid sale agreement.
>
> ii. Executing a nonexistent sale agreement where no consideration had been paid.
>
> iii. Taking possession of the said Samuel Awour Tongoi's property without his consent and without securing consent of the relevant Land Control Board.
>
> iv. Preparing and executing a false agreement in breach of the Law of Contract Act."

The appellant filed a defence and counter-claim. He averred that on 15th January, 2008, the appellant bought 7.4 acres being part of Tongoi's parcel **Sinyerere/Kipsaina Block 2/Kesogon/467** at a consideration of Shs. 505,000/-; that the appellant paid Shs. 404,000/= leaving a

balance of Shs. 104,000/=; that the Tongoi's applied for the consent of the Land Control Board which was given on 13th August, 2008; that Tongoi was mentally sound; that the vendor vacated the land immediately after the sale and gave vacant possession to the appellant; that Tongoi disposed off his cattle and his caretaker collected the remaining few properties.

[3] At the trial, the respondent (guardian) gave evidence and called three witnesses, namely, **Nahason Shisia Shinyanga** who was a domestic servant of Tongoi; **John Echonyinadwa**, Tongoi's farm manager and **Dr. Peter otiato** – a medical officer at Maseno Mission Hospital.

The appellant also gave evidence and called one witness – **Stephen Barasa Wasekania** – a brother of the appellant.

[4] The learned trial judge evaluated the evidence. As regards Tongoi's mental status; the court made a finding thus:

> ***"Given the prevailing situation and the health status of Mr. Tongoi, I find that he was not in the right frame of mind to enter into such an agreement which was not only exploitative but also made in bad faith. If Mr. Tongoi signed the agreement then there must have been undue influence and such an agreement cannot be allowed to stand."***

The court rejected the application for consent of Land Control Board and the consent thereof on the ground that the parcel of land indicated in the two documents was No. 569 which had nothing to do with Tongoi's land parcel No. 467. The court also noted that the appellant claimed to have bought parcel No. 56. Similarly, the counter-claim was rejected on the ground that it related to land parcel No. 467 whereas the agreement of sale related to parcel No. 56 and his oral evidence to parcel No. 569.

[5] The judgment of the court is challenged on eleven grounds. The reliefs sought in the appeal are that the judgment be set aside; the appellant's counter-claim be allowed and an order of specific performance be granted. The parties filed written submissions and in addition the respective counsel made oral submissions.

[6] The plaint filed shows that the respondent as guardian of Tongoi was challenging the validity of the agreement of sale of land dated 15 th January, 2008 on the grounds that Tongoi was suffering from lapses of memory and that the appellant drafted the agreement and compelled Tongoi to sign. One of the particulars of illegalities pleaded was executing a nonexistent agreement where no consideration was paid. The burden of proof of the claim was on the respondent. The impugned agreement dated 15th January, 2008 contains five paragraphs numbered 1, 2, 4 and 5. It is apparently a home-made agreement. Paragraph 2, 3 and 5 read:-

> "2. THE AGREED PRICE NEGOTIABLE.
>
> 3. A DEPOSIT OF KSHS 404,000 (FOUR HUNDRED AND FOUR THOUSAND SHILLINGS ONLY MADE THIS 15TH DAY OF JAN. 2008.
>
> 4. THE BALANCE OF KSHS 104,000 (ONE HUNDRED AND FOUR THOUSAND SHILLINGS ONLY SHALL BE PAID IN ………………. FROM NOW.
>
> 5. THE TITLE DEED SHALL BE SUBMITTED TO THE BUYER UPON FINISHING THE BALANCE."

It is signed by both the appellant and Tongoi. Two persons **Jennifer Namalwa** and **Stephen Barasa Wesakania** signed as witnesses of the purchaser and **Edward N. Murut** signed as a witness for the vendor. The agreement indicates that it relates to sale of the remaining part of **Sinyereri/Kipsaina block 2/Kesogon 56/467.**

[7] The respondent and his witnesses did not give evidence relating to the execution of the impugned agreement. The appellant gave evidence relating to the execution of the agreement and called, Stephen Barasa Wesekania, who was also his witness at the execution of the agreement. The evidence shows that Tongoi executed the agreement and was in a normal frame of mind.

It was not the respondent's case as pleaded that Tongoi did not execute the agreement. The case pleaded was that Tongoi was compelled to sign the agreement. That fact was not proved by the respondent. The finding of the trial judge that there was undue influence is not supported by concrete evidence. Further, the appellant produced the application for the consent of the Land Control Board and stated that Tongoi took him to the Land Control Board. The respondent pleaded that the consent of the Land Control Board was not secured. However, he did not refute the evidence of the appellant. The trial judge rejected the application for consent and the consent not for the reason that they were not genuine but rather for the reason that they related to a different parcel number. As regards the payment of the purchase price, the court found that the appellant did not show any evidence that he had such a sum to pay during that time when there was fighting in many parts of the country particularly in Trans-Nzoia where the land is situated.

It is apparent that the appellant did not adduce evidence relating to the execution of the agreement and payment of the purchase price. The onus of proof was on the respondent. The appellant said that he paid Shs. 404,000/= and called a witness who claimed that Shs 254,000/= was paid on the first occasion and Shs 150,000/= on the second occasion. If the appellant was lying, the agreement should not have indicated that there was a balance of Shs.104, 000/= to be paid.

He admitted in his statement and in evidence that he has not paid the balance of Shs 104,000/= and gave the reason for non-payment. It is clear that the judge shifted the burden of proof to the appellant.

From the foregoing, we find from the evidence that the agreement of sale dated 15th January, 2018 was executed by both the appellant and Tongoi; that Shs 404,000/= was paid by the appellant to Tongoi and that an application for consent of the Land Control Board was made and

the requisite consent granted. The findings of the trial judge to the contrary are set aside.

[8] As regards the capacity of Tongoi to enter into the agreement, the learned judge made a finding that Tongoi was suffering from senile dementia and that the appellant must have taken advantage of his mental status. It is true that the respondent was appointed by the High Court on 24th May, 2011 as a guardian of Tongoi under the Mental Health Act. The appellant's counsel, **Mr. Onyinkwa** relied on three authorities on the law as to capacity of a person with mental disability to enter into a contract. The treatise **Cheshire, Fifoot, FurmsSton's Law of Contract** 14th Edition states at page 497, third paragraph:

> **"The first question in all cases is whether a party at the time of contracting was suffering from such a degree of mental disability that he was incapable of understanding the nature of the contract. If so, the contract is not void but voidable at the mental patient's option, provided that his mental disability was known or ought to have been known by the other contracting party. The burden of proving this knowledge lies upon the person mentally disordered.**
>
> **If, however the contract was made by him during a lucid interval, it is binding upon him notwithstanding that his disability was known to the other party."**

The appellant's counsel also relies on **Grace Wanjiru Munyinyi & another -v- Gideon Waweru Githunguri & 5 others [2011] eKLR.**

The respondent testified that he took Tongoi to Maseno Mission Hospital in 2005 and referred to two reports prepared by Dr. Otiato. Dr. Otiato stated that he joined Maseno Mission Hospital in 2008 but said that Tongoi has been a patient at the hospital since 2005. He produced two reports dated 12th March, 2009 and 8th April, 2010. In the hand written report dated 12th March, 2009, he stated in part:

"In view of the above, I conclude that he should not be held accountable for any actions or words stated in the period after 2005."

Dr. Otiato admitted that he was asked to write the two letters by the relatives of Tongoi.

The two letters bear Tongoi's hospital No as *"OP/954/09"* which indicates that it relates to a hospital record of 2009. Copies of the hospital records showing diagnosis were not produced. The two letters are addressed to: "**TO WHOM IT MAY CONCERN**".

It is apparent that the statement in the letter dated 12th March, 2009 that Tongoi should not be held accountable for actions or words stated in the period after 2005 indicates that the reports were made for purposes of this dispute. The evidence of Tongoi's illness is general in nature. The evidence does not refer specifically to his mental state on 15th January, 2008, when the impugned agreement was entered into.

In a nutshell, there was no concrete evidence which showed on a balance of probabilities that Tongoi was suffering from mental disability or was not lucid as at the time of the execution of the agreement. In any case, the evidence of mental disability was rebutted by the appellant. The appellant produced a power of Attorney executed by Tongoi on 16th March, 2009 donating power to deal with the suit land to the respondent. He also produced two letters written by Tongoi dated April, 2008 concerning the sale of the suit land. Those two letters were written after the date of the agreement of sale. In addition, the appellant and his witness testified that Tongoi was in his normal senses at the time of the execution of the agreement.

In the premises, we find that the respondent did not prove on a balance of probabilities that Tongoi was suffering from mental disability to such a degree that he was incapable of understanding the nature of the contract at the time of the making and execution of the contract.

Accordingly the findings of the learned judge that Tongoi was not in the right frame of mind to enter into the sale agreement and that there was undue influence are set aside.

[9] Nevertheless, the issue whether there was an enforceable agreement for sale of Sinyerere/Kipsaina Block 2/Kesongon/467 remains. The respondent pleaded that part of the land was sub-divided in 2006 into nine plots of 50ft by 100ft and plots disposed of to different persons including the appellant. The first agreement of sale dated 30th November, 2007 refers to land parcel Sinyerere/Kipsaina block 2/Kesogon/56. The disputed agreement of sale refers to the land sold as the remaining part of Sinyerere/Kipsaina Block 2/56/467. The appellant stated in his evidence that he was buying parcel No. 56 comprising of 7.4 acres and that parcel No. 569 was a sub-division of parcel No. 56. The application for the consent of the Land Control Board and the consent refer to parcel No. 569. The Title Deed issued on 18th March, 2004 shows that Tongoi is registered as proprietor of Sinyerere/Kipsaina Block 2/Kesogon/467 comprising of 4.73 Hectares. The certificate of official search dated 15th September, 2011 shows that Tongoi is still registered as proprietor of parcel No. 467.

On the issue of sub-division the learned judge stated:

> "If it is true that the defendant bought part of the suit land and obtained title for the 50 X100 plot then the search of 15.9.2011 would not have reflected parcel No. 467 because the title would have been closed and fresh titles issued reflecting new parcel numbers.

At least on the evidence on record I find that there is no agreement between the defendant and Mr. Tongoi regarding parcel No. 467 (suit land)."

Regarding the order of specific performance sought in the counter-claim, the court reasoned that since the agreement of sale showed that the appellant was purchasing unknown acreage from parcel No. 56 and referred the parcel No 569 in his evidence, he cannot seek an order touching on parcel No. 467 which is 4.74 hectares (about 11 acres).

In ground 4 of the appeal, the appellant states that Tongoi sub-divided parcel No. 462 into various parcels resulting in different numbers one of them being parcel No.569.

The appellant's counsel submitted that the original parcel was No. 56; that parcel No. 467 came about after sub-division of 56; that Tongoi did not surrender the original title and that the mutations have not been registered.

[10] It is evident from the foregoing that the disputed sale agreement relates to 7.4 acres – a part of parcel No. 467 which measures 11 acres.

As **section 25(2)** of the Registered Land Act *(now repealed)* provided, that a division of land is given effect by closing the register relating to the parcel and opening new registers in respect of new parcels resulting from the division and recording in the new registers all subsisting entries appearing in the closed register. That provision is re-enacted in **section 22(2)** of the Land Registration Act.

Further, **section 89** of the Registered Land Act *(now repealed)* provided:-

> **"No part of the land comprised in a register shall be transferred unless the proprietor has first sub-divided the land and new registers have been opened in respect of each sub-division."**

Section 42 of the Land Registration Act has identical provision. It is admitted that sub-divisions of parcel No. 467 have not been registered. It is also apparent that the register of parcel No 467 has not been closed.

It follows that for that reason, the agreement dated 15th January, 2008 is not valid and is not enforceable by specific performance. Further the fact that the agreement indicated that the purchase price was negotiable which means that the final purchase had not been agreed upon also renders the agreement invalid.

However, those findings do not bar the appellant from recovering the part of the purchase price which as we have found was paid to Tongoi under the agreement or pursuing any other claim relating to the agreement. Such claims cannot be considered in this appeal as such claims were not made in the counter-claim.

[11] As regards the costs of the appeal, the appeal has been dismissed mainly on the ground that mutation of the land part of which was the subject matter of the sale transaction was not effected and registered. Otherwise the appellant's ground of appeal relating to a contract of sale of land, execution, part payment of the purchase price, obtaining the consent of Land Control Board and the capacity of Tongoi to enter into the contract have succeeded. In the premises, the just order is that each party bears his own costs of the appeal.

[12] For the reasons stated in paragraph 10 and 11 above, the appeal is dismissed. Each party to bear its own costs of the appeal.

Dated and Delivered at Eldoret this 4th day of April, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR