



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: G.B. M. KARIUKI, SICHALE & KANTAI, JJA)

CIVIL APPEAL NO. 116 OF 2014

BETWEEN

THOMAS RATEMO OIRA.....APPELLANT

AND

DR. ANDREW ISOE MINGATE OCHOKI.....RESPONDENT

(Being an appeal from ruling of the High Court of Kenya at Nakuru (L.N Waithaka, J.) dated 24th January, 2013)

In

E.L.C. Case. No.222 of 2013)

JUDGMENT OF THE COURT

Dr. Andrew Isoe Mingate Ochoki, the respondent herein, was the owner of a parcel of land known as Nakuru/Miti/38 (previously Plot No. 722/38 Miti Mingi Settlement Scheme). He was approached by the appellant, Thomas Ratemo Oira, sometime in the year 2009, who offered to purchase the parcel of land from him. They agreed that in consideration of Ksh.1,500,000/- and other payments to Settlement Fund Trustees the appellant could purchase the land. The appellant issued 2 cheques totaling the said sum and the respondent handed over all documents relating to the land to the appellant. When the 2 cheques were presented by the respondent to the bank for payment they were both returned unpaid with remarks “confirmation awaited”. This confirmation did not come on time or at all. In the meantime the appellant, armed with the documents he had received from the respondent, not only had transfer registered in his favour but moved into the land. This led to High Court Civil Case No. 222 of 2013 being filed by the respondent at the Environment and Land Court, Nakuru, where the respondent prayed for orders *inter alia* that it be declared that he was the rightful owner of the land; that injunction orders be issued restraining the appellant from taking over or dealing with the land and that tile issued to the appellant in respect of the land be cancelled. The respondent also filed a Notice of Motion asking for similar orders. That motion was opposed by the appellant in the hearing that took place before L. N. Waithaka, J. who, in a ruling delivered on 24th January, 2014 issued an injunction restraining the appellant from entering into the land or interfering with it until the suit was heard and determined. Those

orders provoked this appeal where the appellant, who is an Advocate of the High Court of Kenya, has listed not less than 42 grounds of appeal. A perusal of the said grounds shows that they are not grounds of appeal as envisaged by the rules of this court at all. They are instead a recitation of evidence that the appellant should produce before the trial court when the suit now pending before that court is set down for hearing.

When the appeal came up for hearing before us on 12th July, 2017, the appellant recited the facts we have enumerated but confirmed that the 2 cheques he had issued to the respondent had not been paid by the bank upon presentation for payment,

Mr. Robert Ndubi, learned counsel for the respondent, in opposing the appeal, supported the ruling of the learned Judge submitting that it was right that the property be preserved pending hearing of the suit in a case where the purchase price had not been paid but where the appellant had managed to transfer the suit land to himself in circumstances challenged by the respondent. The following appears in the replying affidavit filed at the trial court by the appellant:

“27. That on 2nd February 2009 the Defendant gave the Plaintiff two Cheques. Cheque No. 000018 dated 15th March 2009 for Kshs, 1,000,000 and Cheque No. 000025 dated 31st March 2009 for Kshs.500,000. Annexed hereto and marked “TRO-21” are copies. Cheques No. 000018 dated 15th March 2009 for Kshs.1,000,000 and Cheque No. 000025 dated 31st March 2009 for Kshs. 500,000 respectively

28. That on 31st March 2009 the Plaintiff banked Cheque No. 000018 dated 15th March 2009 for Kshs.1,000,000 at National Bank of Kenya Limited but the bank was not able to get confirmation from the Defendant’s bank and the same was returned with the reasons confirmation awaited. Annexed hereto and marked “TRO-22 (a) and (b)” is a copy of the said cheque and the letter forwarding the cheque.

29. That on 31st March 2009, the Plaintiff banked Cheque No. 000025 dated 31st March 2009 for Kshs. 500,000 at National Bank of Kenya Limited but the bank was not able to get the confirmation from the Defendant’s bank and the same was returned with the reason confirmation awaited. Annexed hereto and marked “TRO-23 (a) and (b)” are copies of the cheque and forwarding letter.

30. That on 1st October 2009 the Plaintiff informed the Defendant that the two cheques were returned with remarks the reasons confirmation awaited from the bank ----.”

The appellant, in effect, admits that he issued cheques in payment as purchase price for land which cheques were returned unpaid with remarks that confirmation was awaited. There was no explanation to the trial Judge how that confirmation was to be given and the appellant did not give any reasonable explanation why he issued cheques but did not give his bank the requisite confirmation. It is not lost on us, and this is borne out in the appellants affidavits filed in that court, that attempts were made much later to replace the said cheques when the value of land could probably have escalated changing the whole scenario completely. As the suit has not been heard we should not speak to those issues as doing so may embarrass the trial Judge who will handle the suit.

The learned Judge was entitled, in the circumstances presented before her where an owner of land had handed transfer documents to the appellant apparently in good faith believing that cheques issued would be paid but where such cheques were dishonoured on presentation for payment, to issue orders of injunction to protect the respondent who had not received consideration for sale of his land.

This appeal lacks merit and we dismiss it with costs to the respondent.

Dated and delivered at Nakuru this 27th day of September, 2017.

G.B.M. KARIUKI

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR