



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 96 OF 2015

BETWEEN

HASSAN MUSAMBAYI MBARUKU APPELLANT

AND

NASHON ASEKARESPONDENT

***(Being an Appeal arising from the Judgment of the High Court of Kenya at Kakamega
(Chitembwe, J.) delivered on 12th June, 2015***

in

H.C.C.C. NO. 123 OF 1998)

JUDGMENT OF THE COURT

A) THE SUIT BEFORE THE TRIAL COURT

1. In the suit before the High Court, the appellant impleaded the respondent seeking a declaration that non-completion of the purchase price of land parcel number **ISUKHA/SHIRERE/3245** amounted to a fundamental breach of contract, and hence the sale transaction in respect of the said parcel of land ("**the suit land**") was null and void. The appellant also prayed that the Land Register be rectified after cancellation of the title to the suit land.

2. The appellant alleged on 19th May, 1993 he entered into a sale agreement with the respondent vide which the appellant was to sell and transfer to the respondent a portion of land parcel No. **ISUKHA/SHIRERE/3186** at an agreed purchase price of Kshs.180,000/= . However, the respondent paid Kshs.100,000/= only, thereby defaulting in payment of the full purchase price.

3. The appellant accused the respondent of fraud in causing subdivision of the original parcel of land using forged documents, effecting transfer of the suit land using forged documents and obtaining consent of the area Land Control Board using forged documents.

4. As per the appellant's testimony before the trial court, the agreed purchase price was Kshs.180,000/= if the plot to be sold was found to be one acre or Kshs.160,000/= if it was less than an

acre. After subdivision the size of the suit land was found to be one acre. The appellant signed the transfer in favour of the respondent, notwithstanding the fact that the appellant's family members had raised objection to the transaction.

5. The appellant admitted that the respondent had paid him Kshs.100,000/=. He further conceded that the respondent had paid him some other monies, albeit on friendly basis, and not as part of the balance of the purchase price. The appellant said that he was surprised to find that the respondent had obtained a title deed for the suit land. He alleged that the respondent fraudulently obtained consent of the area Land Control Board since they had not attended the Land Control Board to seek consent for sale and transfer of the suit land.

6. The respondent testified that he had paid the full purchase price of Kshs.160,000/=. He paid the initial deposit of Kshs.100,000/= before the advocate who prepared the sale agreement and later, on 31st May 1993 and 6th July, 1993 paid to the appellant sums of Kshs.30,000/= at his place of work, Mumias Sugar Company. The payments were witnessed by one **Philip Olubishiri Wameyo**, who testified as DW2.

7. The respondent further testified that the appellant had applied to the Municipal Council for consent to subdivide the original parcel of land. The subdivision was done through the Municipal Physical Planner. Thereafter the land was subdivided and the respondent was issued with a title deed to the suit land while the appellant got a title deed to land parcel number 3244.

8. The trial court, in finding for the respondent, held that the full purchase price had been paid, that no consent of the Land Control Board was required as the suit land was not agricultural, and that the appellant had not demonstrated that there was any fraud perpetrated by the respondent.

B) APPEAL BEFORE THIS COURT

9. Being dissatisfied with the said Judgment, the appellant preferred an appeal to this Court. He stated that the learned judge erred in law in failing to find that the subdivision of the original parcel of land and registration of the two titles was done secretly, illegally and without his consent, and in failing to find that the respondent had not paid the entire purchase price. The appellant further contended that the trial judge did not have jurisdiction to hear and determine the suit since he was not a designated judge of the Land and Environment Court as established by the **Constitution of Kenya, 2010**.

10. During the hearing of the appeal, the appellant was unrepresented, while **Mr. George Murunga** appeared for the respondent. The appellant simply reiterated his grounds of appeal as summarized herein above.

11. Mr. Murunga submitted that there was overwhelming evidence that the full purchase price had been paid, that the appellant, having testified that the suit land was designated for residential purposes, no consent of the area Land Control Board was necessary.

Counsel further submitted that the appellant had not proved any fraud against the respondent.

12. Regarding jurisdiction of Chitembwe, J to hear and determine the suit, the respondent's counsel submitted that the suit was filed in 1998 and was finalized in 2014. All land cases that were pending before the court as at 27th August, 2010 when the new Constitution was passed, which provided for establishment of Environment and Land Courts, were to proceed before the High Court. Besides, it was at the instance of the appellant that the matter proceeded for hearing before Chitembwe, J. and therefore the appellant is estopped from arguing that the judge had no jurisdiction, Mr. Murunga added.

C) DETERMINATION AND DISPOSAL

13. We shall begin by considering the issue of the trial judge's jurisdiction to hear the suit. From the proceedings, it is clear that this issue was not raised at all. However, since jurisdiction of a court is an

issue of law that goes to the root of any matter in dispute, it can be raised on appeal for the first time. Jurisdiction is everything, and without it a court of law ought to down its tools.

14. **Article 162 (2)** of the **Constitution of Kenya 2010** stipulates that:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

- a. ***employment and labour relations; and***
- b.
- c. ***the environment and the use and occupation of, and title to, land.”***

Parliament did not enact the **Environment and Land Court Act** until 2011. However **section 22** of the **Sixth Schedule** to the **Constitution** stipulates that:

“All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under the Constitution or as directed by the Chief Justice or the Registrar of the High Court.”

15. With regard to cases that were pending before the High Court in Kakamega, the appellant did not tell this Court when the Chief Justice issued the directive requiring judges of the High Court at Kakamega to cease hearing land cases that had been filed there before promulgation of the new Constitution. In the absence of such information, the suit having been filed in 1998, we have no basis of finding that Chitembwe, J. had no jurisdiction to hear and determine the suit. That ground of appeal is without merit and we hereby dismiss it.

16. We now turn to consider whether the respondent paid the full purchase price for the suit land. The appellant stated that purchase price was Kshs.160,000/=. He denied having been paid the balance of Kshs.60,000/=, although he conceded that subsequent to the initial payment of Kshs.100,000/= the respondent paid him some money *“as friendly advances”*. He did not state the circumstances under which such advances were made to him.

17. The evidence of Phillip O. Wameyo, DW2, dispelled any doubt that the appellant had not been paid the balance of Kshs.60,000/=. DW2 had witnessed the payment of the balance of the purchase price and a memorandum to that effect, D.Exh.3, was drawn and signed by the parties before two witnesses. The appellant did not dispute the contents of that document or allege that his signature thereon had been forged. In the circumstances, we must dismiss the ground of appeal that alleges that the full purchase price for the suit land had not been paid.

18. Was any fraud in the process of subdivision of the land, acquisition of consent to transfer and registration in favour of the respondent proved against him? We do not think so. According to the evidence on record, it is the appellant who obtained authority of the Kakamega Municipality Physical Planner to subdivide the original parcel of land. The suit land was situated within Kakamega Municipality and there is no evidence that it was for agricultural purposes. In the circumstances there was no legal requirement for consent from the Land Control Board.

19. The appellant instructed Arch Surveys to prepare the mutation form and thereafter signed the transfer of the suit land in favour of the respondent. Having done so voluntarily, there is no basis upon which he can allege that the transfer of the suit land was done fraudulently.

20. In the circumstances, there is no truth in the appellant’s contention that the respondent was guilty of any fraud, and we must dismiss this ground.

21. All in all, we find this appeal lacking in merit and consequently dismiss it in its entirety. The appellant shall bear the costs of the appeal.

DATED and DELIVERED at KISUMU this 27th day of May, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR