



IN THE COURT OF APPEAL

AT NYERI

CORAM: VISRAM, GATEMBU & ODEK, J.J.A

CIVIL APPEAL NO. 4 OF 2014

BETWEEN

JOSEPH NYAGA NJAGI 1ST APPELLANT

HARRISON NJIRU NJERU 2ND APPELLANT

MUGANE ITTA (suing as trustees and officials of

CHRIST TRUE VINE MINISTRY CHURCH 3RD APPELLANT

AND

MICHALE MUCHIRA NDUMA 1ST RESPONDENT

JOSEPH NJIRU IRERI 2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Embu (Ongu'ndi, J.)

delivered on 19th November, 2013

in

H.C.C.A No. 19 of 2012)

JUDGEMENT OF THE COURT

1. The appellants are trustees and officials of Christ True Vine Ministry Church. On 26th January, 2010, the appellants entered into an agreement with the 1st respondent wherein the 1st respondent as the absolute registered proprietor of Land Parcel No. Ngandori/Kirigi/3594 was to lease a portion of the said parcel for a rental sum of Kshs. 1,000/= per month. The appellants made an advance payment of Kshs. 10,000/= towards the monthly rent. It was a term in the said agreement that should the appellants wish to buy a portion of the parcel, the lease amount paid will be utilized towards the purchase price.
2. On the strength of the lease agreement, the appellants constructed a church on the parcel at a cost of Kshs. 300,000/=. Subsequently, on 20th September 2010, the appellants and the 1st respondent

- substituted the earlier agreement for lease and made a formal written agreement for purchase of the portion of land measuring 0.08 hectares out of land parcel no. Ngandori/Kirigi/3594 for a consideration of Kshs. 200,000/=; the portion was to comprise of the part where the appellants had built a church. To this end, the appellants paid the 1st respondent a sum of Kshs. 40,000/=.
3. It is the appellant's contention that immediately upon receipt of the said sum of Kshs. 40,000/=, the 1st respondent disappeared from his home and failed to communicate with the appellants. The appellants did conduct a search at the lands office on 3rd November, 2010 and discovered that the 1st respondent had transferred half share of land parcel no. Ngandori/Kirigi/3594 to a third party. That on 15th June 2011, the 1st respondent approached the appellants and required them to make a further payment of K sh. 55,000/= to enable him transfer the purchased portion to them. The appellants later discovered that the 1st respondent had transferred the remaining half portion on which the church was built to the 2nd respondent herein.
 4. The appellants claim is that the 1st respondent had no right to dispose and transfer the portion of the suit land he was selling to them to the 2nd respondent as they had paid the purchase price and had developed the same. The appellants contend that the 1st and 2nd respondents committed fraud in transferring the said portion to the 2nd respondent. Before the trial magistrate's court the appellants sought for an order that the 1st respondent should refund the 2nd respondent the monies paid to him so that the portion the appellants were buying could be transferred to them by the 2nd respondent.
 5. The trial magistrate's court upon hearing the suit held that the appellants had failed to prove fraud on the part of the 2nd respondent and dismissed the suit with costs. As regards the 1st respondent, the trial magistrate held that the 1st respondent had received a total of Ksh. 105,000/= from the appellants but no consent from the relevant Land Control Board was obtained and hence the sale agreement was null and void. The trial court ordered the 1st respondent to refund the appellants the sum paid of Kshs. 105,000/= with interest from the date of the sale agreement.
 6. The appellants lodged a first appeal to the High Court and by a judgment dated 19th November, 2013, the learned Judge (H.Ong'undi J.) dismissed the appeal stating as follows:

“So what are the appellants complaining against the 2nd respondent? He was not a party to the agreement between them and the 1st respondent. They have not shown that he was aware of the agreement between them. The defence by the 1st respondent has been alluded to. The record shows that interlocutory judgment was entered against the 1st respondent on 28th November 2011. This judgment has never been set aside. The 1st respondent did not enter any appearance but filed a defence on 25th November 2011 admitting the claims. I find this statement very suspect because it was filed under one receipt with the pretrial questionnaire by the appellants. All along the 1st respondent did not participate in the proceedings. The 2nd respondent's evidence shows how he purchased the land from the 1st respondent and the land was transferred to him after obtaining consent from the Land Control Board. The appellants never obtained any such consent. Failure to obtain the consent from the Board resulted in their agreement being null and void. They could only be entitled to a refund of their money (Kshs. 105,000/=) and not the land. The structure they put on the land was a temporary one and they ought to remove it. If they do not remove it the 2nd respondent would obviously remove it to their own detriment. My finding is that the learned trial magistrate analyzed the evidence well and arrived at the right decision as the appellants failed to prove their case against the respondents. I find no reason for interfering with that decision. The result is that the appeal lacks merit and is dismissed. The judgment of the learned trial magistrate is confirmed. Costs of the appeal to the 2nd respondent”.

7. Aggrieved by the decision of the High Court, the appellants have moved to this Court in a second

appeal. In the Memorandum of Appeal, it is urged that:-

- *The learned Judge erred in law and fact and misdirected herself by failing to consider the appellants rights and interests as bona fide purchasers who had a valid agreement of sale for a portion of the suit land.*
- *The Judge erred in law and fact in failing to find that the trial magistrate's court had no jurisdiction to adjudicate on matters of eviction which is the preserve of the High Court and consequently the appellant's constitutional rights were grossly violated.*
- *The learned Judge erred in failing to find that the 2nd respondent did not have a valid title deed to the suit property and that the 2nd respondent failed to produce proof of attendance before the Land Control Board.*
- *The learned Judge erred in law and fact by failing to call the land registrar to give evidence as the government agent and custodian of titles and legal records to land which evidence would have shed more light in respect to the authenticity or legality of the title obtained by the 2nd respondent.*
- *The learned Judge erred in improperly analyzing the evidence on record and arrived at a wrong conclusion.*

8. At the hearing of this appeal, the appellants were represented by learned counsel **Messrs Bwonwonga** while the 2nd respondent was represented by learned counsel **Messrs Okwaro Muyodi**. There was no appearance for the 1st respondent.

9. Counsel for the appellant reiterated the grounds of appeal and submitted that the learned Judge erred in failing to find that the lower court had no jurisdiction to hear the issue of eviction of the appellants from the suit property; that the Judge erred in failing to recognize and protect the appellant's right to own property as guaranteed under **Article 40** of the 2010 **Constitution** and it was a miscarriage of justice for the High Court to rule that the structure on the suit property ought to be removed. It was submitted that the learned Judge erred in failing to properly re-evaluate the evidence on record and arrive at independent conclusions. Counsel emphasized that there was a valid contract between the appellants and the 1st respondent and this contract created rights and obligations which the learned Judge failed to recognize and enforce; that the High Court erred in not appreciating and recognizing the contractual rights conferred upon the parties by the sale agreement. It was submitted that failure to obtain consent of the relevant Land Control Board was a technicality which this Court should overlook in light of the provisions of **Article 159 (2)** of the **Constitution**.

10. Learned counsel for the 2nd respondent opposed the appeal. He urged this Court to find that the 2nd respondent did not violate any constitutional rights of the appellants; that the learned Judge properly evaluated the evidence on record and correctly found that the sale agreement between the appellants and the 1st respondent was null and void for want of consent of the relevant Land Control Board. Counsel submitted that the learned Judge correctly made a finding that the appellants had no contractual or enforceable agreement against the 2nd respondent and the learned Judge was correct in holding that fraud on the part of the 2nd respondent had not been proved. Counsel submitted that the grounds of appeal as raised by the appellants are matters of fact that are outside the purview of this Court in a second appeal.

11. We have considered the submissions by learned counsel in this matter and analyzed the judgment of the High Court. We have taken into account the grounds of appeal as itemized in the Memorandum of Appeal. We remind ourselves that this is a second appeal and this Court is enjoined to consider only points of law. **Section 72** of the **Civil Procedure Act** stipulates that:-

“Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal

by the High Court, on any of the following grounds, namely:

- a. ***the decision being contrary to law or to some usage having force of law;***
- b. ***the decision having failed to determine some material issue of law or usage having the force of law;***
- c. ***a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits.***

12. The appellant contended that the learned Judge erred in not finding that fraud had been proved. We are of the considered view that in the present case, it was not enough for the appellants to have pleaded fraud; it was incumbent on the appellants to tender evidence to prove the particulars of fraud to the satisfaction of the trial court. In ***Mutsonga vs. Nyati (1984) KLR 425***, at pg 439, this Court held:

“Whether there is any evidence to support an allegation of fraud is a question of fact”.

13. In the instant case, the appellants contend that the learned Judge erred in finding that fraud was not proved. This being a second appeal, we note that there is concurrence by the two courts below on the issue of fact that fraud was not proved. We see no reason to interfere with this finding which is a matter of fact and not an issue of law.

14. On the issue of consent of the relevant Land Control Board, the learned Judge found that the 2nd respondent had obtained the requisite consent of the Board and the suit property was transferred and registered in his name. On the other hand, the appellants never obtained consent of the Land Control Board after entering a sale agreement with the 1st respondent.

Section 8 (2) of the Land Control Act provides as follows: “The land control board shall either give or refuse its consent to the controlled transaction and subject to any right of appeal conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court.”

15. The appellants in their Memorandum of Appeal contend that the learned Judge erred in failing to find that the 2nd respondent failed to produce proof of attendance before the Land Control Board; that the Judge erred in law and fact by failing to call the land registrar to give evidence as the government agent and custodian of titles and legal records to land which evidence would have shed more light in respect to the authenticity or legality of the title obtained by the 2nd respondent. On these submissions, we are reminded that there is a presumption of legality and formality as captured in the maxim *omnia rite acta praesumuntur* and the burden lies on he who alleges illegality to prove the same. If the appellants' contention is that the 2nd respondent did not attend the Land Control Board, it was incumbent upon the appellants to lead evidence to prove this. The learned Judge made a finding that the 2nd respondent had proved that he had obtained consent of the Land Control Board and we see no error of law in relation to this finding of fact. On the issue of failing to call the land registrar to give evidence, it is our considered view that it is not the duty of the trial court or the first appellate court to call witnesses to prove any issue for trial. It is the duty of a party to a suit to call any witness he/she/it deems fit to prove its case.

16. **Section 6** of the **Land Control Act** (Cap 302, Laws of Kenya) renders a sale agreement void for all intents and purposes if the consent of the Land Control Board is not obtained. In the instant case, the appellants never obtained the consent of the relevant Board and it is our finding that the learned Judge did not err in holding that the sale agreement between the appellants and the 1st respondent was null and void for purposes of creating and transferring an interest in land over the suit property.

17. The appellants in their submissions urged this Court not to place undue regard to technicalities and overlook the failure of the appellants to obtain consent of the Board. We are cognizant of the

provisions of **Article 159 (2) (d)** of the **Constitution** that stipulates that justice must be administered without undue regard to procedural technicalities. The requirement for consent of the land control board is not plainly a procedural prerequisite but a necessity that has substantive implications as to whether an interest in land can be transferred from one party to another. The **Land Control Act** does not leave remediless a party who does not obtain consent within the stipulated time frame; refund of any monies paid pursuant to a sale agreement is provided for. We observe that both the trial magistrate and the learned Judge recognized the appellants' right to get refund of all the monies paid to the 1st respondent and we see no reason to interfere with that finding.

18. On the contention that the appellants' contractual rights were not appreciated and recognized, we are of the view that privity of contract dictates that the appellants contractual rights are *in persona*; the rights are enforceable against the 1st respondent and due to the absence of the consent of the land control Board, the appellants rights under the sale agreement are not rights exercisable *in rem* and did not attach and vest on the suit property. On the jurisdictional question, it is our considered view that the issue before the trial court and the High Court related to whether the appellants had an enforceable claim and interest in the suit property as against the respondents. On the issue of eviction the remarks by the learned Judge were obiter and did not form the *ratio decidendi* of the decision.

19. The totality of our consideration of the issues raised is that the grounds of appeal as raised have no merit and we order that this appeal be and is hereby dismissed with costs to the 2nd respondent.

Dated and delivered at Nyeri this 28th day of May, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR