



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, GITHINJI & AGANYANYA, JJ.A.)

CIVIL APPEAL NO. 233 OF 2003

GEORGE MURIAINI MUHORO T/A A.M. MUHORO ADVOCATEAPPELLANT

AND

GEORGE NDUNGU KAMITIRESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi Milimani (Mbaluto, J.) dated 19th December, 2002

in

H.C.C.C. No. 1957)

JUDGMENT OF THE COURT

In an originating summons filed in the superior court on 3rd November, 2000 the plaintiff/respondent sought the following orders from the defendant/appellant:-

- (a) The defendant/respondent George Muriaini Muhoro T/A G. M. Muhoro Advocate be ordered to refund Kshs.90,000/= together with interest, paid to him as stakeholder for sale of part marked E2 of L.R. No. Makuyu/Kimorori/1597.***
- (b) The said Kshs.90,000/= be refunded with interest with effect from 18th February, 2000 till payment in full.***
- (c) Costs of this application be provided for.***

The application was supported by an affidavit deposed to by the plaintiff/applicant. The facts of the case were that the applicant/purchaser and Ngimu Farm Limited, the vendor entered into an agreement on 3rd March 2000 wherein the purchaser was to buy 5 acres of land out of L.R. Makuyu/Kimorori/1597. The portion was marked in red and designated as E2 on the sketch plan. The purchase price was agreed at Kshs.900,000/= of which Kshs.90,000/= being 10% thereof was paid to the appellant as a stakeholder. Completion date of the transaction was set for 18th May, 2000 but this was not to be because

it was alleged the vendor did not obtain consent of the Land Control Board as required by the provisions of **section 6** of the Land Control Act, Chapter 302 Laws of Kenya and that it did not release title documents to the purchaser's advocate for the preparation of transfer. The respondent then sued the appellant for refund of the deposit and in a judgment dated 19th December, 2002 (*Mbaluto, J.*) (as he was then) granted the orders sought; hence the appeal filed herein on 23rd September, 2003. It has 6 grounds of appeal, as follows:-

- 1. The learned Judge erred in law by ordering that the appellant do refund Kshs.90,000/= together with interest paid to him as stakeholder in respect to the sale of L.R. No. Makuyu/Kimorori/ Block 1/1597 while he was not a party to the agreement.**
- 2. The learned Judge erred in law and fact by failing to appreciate fully the terms and conditions of the agreement which only bound parties to (sic) and not third parties**
- 3. The learned Judge erred in law and in fact by failing to appreciate the condition that the contract of sale was still in subsistence and the stakeholder had no evidence to the contrary.**
- 4. The learned Judge erred in law and fact by rewarding the respondent against the wrong party.**
- 5. The learned Judge erred in law and fact by failing to consider all the evidence before him.**
- 6. The learned Judge erred in law and fact by failing to strike out the suit on the basis of misjoinder.**

The appeal was heard by this Court on 27th February 2011 wherein **Miss Telewa**, learned counsel for the appellant, submitted that the appellant was not a party to the agreement hence he was not bound by it as he was a mere agent of the vendor. That in case of the breach of the agreement of sale it was for the vendor to be sued and not his advocate. **Miss Chege**, learned counsel for the respondent, opposed the appeal and stated that the appellant had participated in the case in the superior court and the decretal amount was paid after the application for stay of execution was refused. Counsel also agreed that the appellant was not a party to the agreement but was only the vendor's advocate.

If this was the position then was the said counsel supposed to be sued over Kshs.90,000/= which he held as a stakeholder? Special condition 2 of the agreement made provision for what should happen to the down-payment of Kshs.90,000/= in the event of default by the respondent. This amount was to be forfeited to the vendor. However, nothing was said in the case of default on the part the vendor. In this case the default was allegedly caused by the vendor who did not apply for the consent of the Land Control Board of the area in which the land is situated, given that this was an agricultural land; and also that it did not avail title documents to the purchaser's advocates for the preparation of the transfer; (*see special condition No. 4*). In view of this default, it would have been proper for the deposit to be refunded to the respondent after the determination of the dispute between the purchaser and the vendor. But from the record it is not clear this has been done. This transaction was between the vendor – **Ngimu Farm Limited** and the purchaser, **George Ndungu Kamiti**. Though the appellant was the advocate for the vendor he was paid a deposit of Kshs.90,000/= as a stakeholder agreed upon by both parties. According to the **Dictionary of English Law by Earl Jowitt**:

“A stakeholder is a person with whom money is deposited pending the decision of a bet or a wager or one who holds money or property which is claimed by rival claimants but in which he himself claims no interest.”

However, a stakeholder has a duty to deliver the money or property to the owner or owners once the right to legal possession or ownership has been established by judgment or by an agreement between competing parties. In the case the subject of this appeal the appellant was not a party to the agreement dated 3rd March, 2000. The parties thereto have been stated elsewhere in this judgment. It is said the vendor failed to obtain the consent of the Land Control Board (*see special condition 4 of the agreement*). If this be so, then the Kshs.90,000/= deposit held by the appellant as stakeholder was not liable to be forfeited to the vendor as provided in special condition No. 2 of the agreement. Instead it was refundable

to the respondent/purchaser, see special condition No. 3 of the agreement.

In the circumstances of this appeal, it is our view that the respondent had no cause of action against the appellant and the learned Judge fell into an error in awarding the respondent the amount sought in the originating summons with costs and interest. We allow this appeal and set aside the superior court's order. He was not privy to the contract between the vendor and purchaser. We were informed off the record by counsel during the submissions on this appeal that after judgment the appellant paid over to the respondent the decretal amount. We order the amount so recovered to be refunded to the appellant except that the amount of Kshs.90,000/= shall be held by the appellant pending the resolution of the dispute between the respondent and Ngimu Farm Limited, the vendor. The appellant shall have the costs of this appeal and of the suit in the superior court. These shall be the orders of the Court.

Dated and delivered at Nairobi this 25th day of March, 2011

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR