REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Civil Appeal 100 of 2007

FESTUS OGADA ……..……. APPELLANT

AND

HANS MOLLIN …….. RESPONDENT

(*An appeal from the judgment of the High Court of Kenya at Mombasa (Sergon, J) dated 20th April, 2007*

In

H.C.C.C. No. 284 of 2000)

****

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court in its Mombasa High Court Civil Case No. 284 of 2000. The appellant is **Festus Ochol Ogada**. He was the defendant in the suit with Hans Mollin, the 1st respondent, as the plaintiff. The superior court granted the respondent judgment in the following terms:-

"***(i) It is declared that Festus Ogada is holding L.R. NO. MN/1/3143 in trust for Hans Mollin.***

(ii) The defendant is hereby directed by an order of this court to transfer the aforesaid title to the plaintiff within a period of 30 days from the date of judgment and in default the Deputy Registrar of this court is mandated and directed to execute the necessary transfer documents so as L.R. No. MN/1/3143 is transferred to the plaintiff.

(iii) An order of mandatory injunction is issued compelling the defendant to give the plaintiff free access to the entire property forthwith.

(iv) The defendant to pay costs of the suit."

The aforesaid decision was delivered on 20th April, 2007. Following that decision, the appellant filed a notice of appeal on the same day announcing his intention of appealing against it, and on 30th May, 2007 lodged a record of appeal. However, that notwithstanding, on 20th August, 2007 effect was given to the decision and the property was transferred to the respondent and a provisional certificate of title was issued on the same day. Ten days later the property was transferred to one Joyce Odongo Ambundo also known

as Joyce Ambundo Muck (Joyce), for a consideration of Kshs.5,000,000/-. It is quite clear from the foregoing that the transfer to Joyce was done in a hurry, apparently, to take the property beyond the reach of the appellant. We will revert to that issue later, but first the background facts.

The appellant, a Kenyan national, bought the suit premises sometime in 1994, and on 20th June 1994 the title of the property was transferred to him by its then title holder, Eustace Wambugu Muraguri. According to the appellant the purchase price was Kshs.1,385,000/-, which was paid in two installments of Kshs.385,000 and Kshs.1,000,000/- respectively. He caused an architect, one Okello Jacob, to prepare architectural plans for a double storied house to be drawn. Thereafter, he engaged a contractor who constructed the house. In his testimony before the superior court, he stated that all the money he spent in building the house was from his own sources. He testified that he was both a shareholder and employee of a tour company known as Turkana Safaris, owned two taxis from which he got reasonable income, had 3 fishing boats based on Lake Victoria from which he earned a daily income of Kshs.3000/-, was previously a shareholder with Hanos (K) Limited, with Hans Huse and Herbert Oser and he also engaged in mining in the Kilimanjaro area of Tanzania with one Alex Bowe. It was his evidence that the respondent did not contribute any money towards the construction of the house. However, after its completion he invited the 1st respondent to occupy the ground floor of the house as a tenant and asked him to pay upfront a sum of Kshs.250,000/, which he paid in two installments, the first one of Kshs.8000/- in cash and Kshs.242, 000/- which he, the appellant, withdrew from the respondent's bank account with Barclays Bank, Nkrumah road Mombasa with the authority of the respondent. He paid all the annual statutory rents, namely land rent and rates. The 1st respondent, although the two were friends, did not in any way participate in paying those charges.

The dispute between the parties started some time in 1999. The respondent claimed he is the one who gave the appellant all money he had spent in purchasing the land on which he built the two storied house, and that all the money used in putting up the building was sent to the appellant by him. The dispute started when the appellant allegedly refused to hand over title documents of the property to the 1st respondent.

What was the basis of the respondent's claim? In his plaint dated 21st but filed in the superior court on 26th June, 2000, the 1st respondent, a German national averred that by an agreement made between him and the appellant he financed the purchase of a plot of land No. 3143 section 1 Mainland North, Mombasa, for the construction of a residential house for his own occupation during holiday seasons. The purchase price was Kshs.3 million, and the property would be acquired in the name of the appellant. He arranged for building plans to be prepared in Germany and had them forwarded to the appellant as his agent who would obtain approval of the plans from the Mombasa Municipal Authority and thereafter supervise the construction of the house on the understanding that on completion of the house the appellant would have occupation rights, rent free, during his lifetime, of the upper floor of the house. The plaint is silent on the dates of the aforesaid arrangement, but in his evidence at the trial the respondent testified that the deal with the appellant was in or about 1994. Be that as it may, the 1st respondent further averred in his plaint, that the appellant purchased the property, supervised the construction of the house but used an architectural plan other than the one he had supplied to him, and on completion of the house he realized that the appellant, contrary to their agreement had the property registered in his name.

The 1st respondent also averred that he had given the appellant a power of attorney to operate his bank account with Barclays Bank, Mombasa, and using that power of attorney the appellant exhausted all moneys in that account, and he was unable to account for a sum of DM 6000.

In the end the 1st respondent prayed for :-

"***(1) A declaration that the appellant held the suit property in trust and that the appellant be compelled to transfer the title to the respondent.***

(2) That the defendant be ordered by mandatory injunction to give free access to the plaintiff

to the property and to his premises forthwith. Alternatively both plaintiff and Defendant stay outside of property.

(3) That a temporary injunction be issued restraining the Defendant from selling or charging, leasing or otherwise parting with the title or possession of the said plot No. 3143 section 1 Mainland North pending hearing of this case.

(4) That the Defendant do pay DM 6000 aforesaid and Kshs.92,420 as per paragraph 13 and 14 above.

(5) Costs of this suit."

Paragraph 13 of the plaint deals with the DM 6000 allegedly withdrawn from the respondent's bank account by the appellant using the power of attorney donated to him by the 1st respondent. Paragraph 14 of the plaint covered expenses of Kshs.10,000 which the 1st respondent allegedly paid to the appellant for certain legal expenses relating to their agreement but which the appellant did not allegedly use for the agreed purpose, as also hotel charges the 1st respondent incurred totaling Kshs.82,420/- following the appellant's refusal to let him use the suit property.

Apart from the aforesaid suit, the 1st respondent complained to the police in Mombasa that the appellant had defrauded him. The police arrested the appellant and prosecuted him on a charge of theft by agent of a sum of DM. 3,500,000/ being the money the appellant allegedly obtained from the 1st respondent to purchase land and build a house thereon for the 1st respondent, but which he allegedly converted to his own use. The case was dismissed for want of prosecution as on the date the case was to come for a hearing there was no representation for the prosecution. Attempts to have the case revived were unsuccessful.

At the hearing of the suit, the main issue was whether indeed the 1st respondent had paid all or part of the money for the purchase of the land No. 3143, section 1 Mainland North Mombasa, and for the construction of a house thereon.

The 1st respondent testified and called various witnesses to support his case. Apart from the money the appellant withdrew from the 1st respondent's bank account here in Kenya, all the other payments allegedly made to the appellant were made through the 1st respondent's friends. The respondent called Karl Shroeder, who testified that he paid the appellant DM. 70,000/- in three trunches, in 1994 and 1995 respectively. In all those occasions the payments were made at Castle Hotel, Mombasa, where the appellant was based. Albert Antonio Pott testified that he was given DM. 3000 by the 1st respondent to pay it over to the appellant for the construction of a gate. He said that he did so in traveller's cheques which were in his name. The appellant allegedly acknowledged receipt by giving his identity card number. He was however, unable to explain how those cheques were or would be cashed by a person who was not the payee.

Helmut Franz, a lorry driver in Germany, was the third witness the 1st respondent called to testify on his behalf. He testified that he knew the appellant either in 1987 or 1988, when they met here in Kenya in one of his several visits to Kenya. He testified that he was given DM. 11,000 to deliver to the appellant, and instead of paying all of it to the appellant he paid over the money to him by two instalments, namely, DM 7,000 in December, 1995, and the balance of DM 4000 in January, 1996. He changed the money into Kenya currency in the black market, in his words "*to earn money*." He pocketed the excess money over and above the official rate of exchange reigning at that time. He thus made a profit from the money by changing it into Kenya currency in the black market.

It is quite clear that apart from the money the appellant withdrew from the 1st respondent's bank account here in Kenya which the appellant admitted he did, all the money the 1st respondent allegedly paid over to the appellant was through German friends. Each of the alleged payments was large, and receipt was

not acknowledged in writing. The appellant denied receipt of all those payments even the one allegedly made to him by Helmut Franz who said that the appellant acknowledged receipt by giving his identity card number. That notwithstanding, it is curious that the 1st respondent was always sending the money through friends. It would appear to us that, if indeed he sent money as he stated, there was something illegal he was concealing. It is noteworthy that the payments were being made at Castle Hotel. It is also curious that one of the payments was said to be by travellers cheques in the name of the person who was sent . How it was cashed, if at all, is incomprehensible. These financial transactions appear to us to have been shady.

The trial Judge assessed the evidence before him. He accepted the testimony of the 1st respondent and his witnesses and disbelieved the appellant. He did not think the appellant's sources of income would enable him to meet the expenses for the purchase of a vacant plot of land at Nyali, Mombasa, a high class area, and to put up a residential house of the size and quality as the one in dispute . He held that the money to purchase the vacant plot and to build the house on it came from the respondent. He accepted the 1st respondent's case that the appellant was merely a trustee and that whatever he did was for the benefit of the respondent. He presumed the existence of a resulting trust and on that account gave judgment as earlier on stated. The learned Judge did not however pronounce judgment on DM 6000 which the appellant allegedly wrongfully and unlawfully withdrew from the 1st respondent's bank account.

In the appeal before us the appellant's memorandum of appeal mainly attacks findings of fact, but in our view the central question is whether there was evidence before the trial court to show that the 1st respondent indeed paid for the purchase of a plot in Nyali, Mombasa, and financed the construction of a house thereon. Before we deal with that issue, there are certain developments which occurred after judgment which are fundamental and thus merit consideration.

After judgment was delivered on 20th April, 2007, execution followed. The suit property was transferred to the 1st respondent on 20th August, 2007. This appeal was filed on 30th May, 2007 and the 1st respondent must have been served with the said record within a period of 7 days as stipulated under **rule 87** of this Court's Rules. Otherwise this appeal would have been struck out as incompetent either on the application of the 1st respondent or on the Court's own motion. The significance of this is that the 1st respondent knew as early as 8th June, 2007 that the appellant had filed this appeal. That notwithstanding, the 1st respondent transferred the suit property to Joyce on 30th August, 2007. This fact came to light when at the instance of this Court a search was conducted in the Land Registry in Mombasa, to establish the current registered owner of the suit property. Following that realization this Court ordered that the current registered owner of the property be made a party in this appeal. The appellant promptly brought a motion seeking extension of time within which to serve a notice of appeal upon Joyce. The motion was allowed after which Joyce was served with the notice of appeal. She thus became the 2nd respondent in the appeal. Upon being served with the necessary documents she appointed Mr. Jengo to appear for her.

At the resumed hearing of the appeal, Mr. Ouma for the 1st respondent was supposed to wind up his submissions, but Mr. Jengo raised a jurisdictional point concerning the propriety of the joinder of his client as a party in the appeal. His submission went as follows: This Court is a creature of statute to wit the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, which Act defines the jurisdiction of the Court. The Court sits on appeals from decisions of the superior court. A party must have been a party in proceedings before the superior court for this Court to have jurisdiction to adjudicate upon a dispute touching on that party. Joyce having not participated in proceedings before the superior court was, therefore, improperly made a party in this appeal. She stands to be prejudiced as she has not been given a substantive right to put her case forward in writing and the case against her be defined. She did not have the opportunity of examining and cross-examining witnesses. She has been denied the right to challenge, on appeal, any decision that might be made against her in this appeal. This Court has no original jurisdiction except in contempt of court proceedings. The 2nd respondent was brought into this appeal pursuant to an application for extension of time to serve her as a person likely to be affected by this appeal. Justice may be done herein but it will not be seen to be done to the 2nd respondent. The

learned counsel then went on to submit on the doctrine of *lis pendens* consideration of which we defer until later in this judgment, if the need arises.

Mr. Jengo having raised a jurisdictional point we must first deal with it before continuing with our consideration of the merits of the appellant's appeal. **Section 3(1)** of the Appellate Jurisdiction Act, provides as follows:-

"**3 (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law."**

It cannot be gainsaid that this Court has jurisdiction to hear this appeal. The right is conferred by the Civil Procedure Act, and rules made thereunder. **Section 5(1)** of the Appellate Jurisdiction Act, makes provision for the making of rules of Court for regulating the practice and procedure of the Court of Appeal with respect to appeals and, in connection with such appeals, for regulating the practice and procedure of the High Court. **Sub-section (2)** thereof sets out purposes for which such rules may be made. That list is not however exhaustive in view of the wording of **sub-section (1),** above.

Rule 76 of the Court of Appeal Rules was promulgated pursuant to the provisions of **section 5** of the Appellate Jurisdiction Act. It provides as follows:-

"**76(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.**

Provided that the Court may on application which may be made ex parte, within 7 days after lodging the notice of appeal direct that service need not be effected on any person who took no part in the proceedings in the superior court."

It appears to us to be the policy of the law that all persons likely to be affected by an appeal need to be given an opportunity to be heard in that appeal. The duty is placed on an intending appellant to identify all persons likely to be directly affected by his appeal and accordingly serve them with a notice of appeal. **Rule 76(1**), above, is couched in mandatory terms clearly showing that the law places much importance on the principle that a person should not be condemned unheard. That is a rule of natural justice. The Court's duty is to give the party an opportunity to be heard whether the opportunity is regarded as not adequate, provided it is given at the earliest possible opportunity. It was for that reason that this Court adjourned the hearing of this appeal until after the 2nd respondent would have been brought on board.

Mr. Jengo argues that it was improper for us to allow the 2nd respondent to be enjoined in the appeal at this late stage. We agree it is late. However it was not possible for her to be enjoined any earlier. She came into the picture when the suit property was sold to her, which was long after the suit in the High Court had been determined. It is true she was made a party after other parties to this appeal had concluded their submissions. We do not see what prejudice which has been caused or will be caused to her merely for coming into the matter at the time she did. She never complained of being denied any assistance by the Court, say in obtaining copies of the recorded submissions. Indeed when Mr. Jengo submitted on the merits, he was able to articulate the case for the 2nd respondent and he did not indicate that he missed any of the submissions previously made or that the submissions did not make sense to him. The issue raised against the 2nd respondent is that she bought the subject property in breach of the provisions of **S. 52** of the Transfer of Property Act. Her counsel addressed us at length on it.

In view of what we have stated above, we find no basis for holding that this Court lacks the jurisdiction to hear the appeal as affects the 2nd respondent. It was the Court's duty to ensure that the 2nd respondent was made aware of the existence of this appeal and to have her served with all the necessary papers. She had the right to appear or to decline to appear. She decided to appear by counsel. We find nothing which would have precluded this Court from proceeding with the hearing of the appeal and pronouncing a decision thereon. The Court did exactly the same thing in the case of **Mahira Housing Co. Ltd. vs. Mama Ngina Kenyatta & Kristina Pratt**, Civil Appeal No. 267 of 2001. In that case two

properties which were the subject matter of the litigation were sub-divided and the sub-divisions thereof were transferred to people who were not parties in the litigation in the High Court. This Court differently constituted ordered that they be served with a notice of appeal as happened in this case.

Having come to that conclusion, we will revert to the issue we posed earlier, namely whether there was material before the trial court for it to come to the decision it did, that the 1st respondent provided all the money for the purchase of a plot of land at Nyali, Mombasa, and for erecting a residential building thereon.

Mr. Ng'eno appeared for the appellant. In his submissions he stated that the evidence by the 1st respondent on the money he allegedly sent to the appellant is contradictory. The money was allegedly sent when the Exchange Control Act, Cap 113 Laws of Kenya was still in force and no evidence of approval to retain the money in the country in accordance with the Exchange Control Act, was tendered. Besides he submitted, certain money was said to have been delivered to the appellant at Castle Hotel, on dates after the hotel had been demolished. Learned counsel wondered aloud why there was no written acknowledgment of receipt of the money allegedly paid over to the appellant which, clearly was a large sum of money.

Mr. Ouma for the 1st respondent supported the decision of the superior court. In his view the trial Judge saw and heard witnesses testify and he was the person best placed to assess their credibility. It was his view that the 1st respondent gave cogent and acceptable evidence as to how he raised his money, as opposed to the appellant whose sources of income were doubtful.

We have no doubt whatsoever, that this Court, as a first appellate court in this matter is duty bound to consider all the evidence which was adduced before the trial court, analyze and evaluate it before coming to a decision one way or the other, of course without overlooking the conclusions of the trial court and at the same time bearing in mind that unlike the trial court we do not have the benefit of seeing and hearing witnesses testify as to appropriately assess their credibility (see **Selle & Another v Associated Motor Boat Co. Ltd. & Others [1968] EA. 123 and Peters v Sunday Post Limited [1958] EA 424).** It is quite clear from the decision of the trial court that that decision was based on credibility of witnesses.

It was common ground that the plot of land on which the house in dispute was built by the appellant was acquired in 1994. Construction work of the house commenced immediately and by December 1994, the house was ready. The appellant testified to that effect and that by March 1995 he installed a telephone line in the premises. Construction started in or about July 1994 before the architectural plans were approved by the Municipal Authority. Those plans were approved in November 1994. The architect Mr. Okello Jacob supervised the construction work on the instructions of the appellant. The 1st respondent, conceded that he was not involved in the construction work of the house. The appellant solely looked for the plot and supervised the construction work of the house.

But the 1st respondent, as earlier on stated, claimed he met all the expenses. In the course of the trial an issue was raised as to whether, if indeed he sent money to the appellant, the necessary declarations under the Exchange Control Act were made. His answer was that the Exchange Control Regulations ceased to have effect in 1992. The trial court did not deal with this aspect. If indeed the Exchange Control Act, was still in force at the time the 1st respondent allegedly brought in money into the country then whatever money he brought in was illegally retained. It was a crime to engage in clandestine dealings in foreign currency which is what the respondent by his own evidence was doing. The Exchange Control Act, now repealed, made it a criminal offence to bring into the country money otherwise than as was provided in that Act. **Section 4** of the Act required all persons other than authorized dealers to surrender gold or foreign currency to an authorized dealer unless the minister for the time being in charge of Finance consented to their retention:

Section 36 of the Exchange Control Act made provision for enforcement of the provisions of the Act. The 5th Schedule of the Act made general provisions for offences and penalties for breaching any of the requirements of the Act. Such breach was a criminal offence punishable with a fine or imprisonment or

both such fine and imprisonment. In addition, any property involved was liable to be forfeited.

The Exchange Control Act was repealed by Act No. 11 of 1995. It then means that on those dates the 1st respondent said he sent money to the appellant through friends without officially declaring it or surrendering the same to a licensed dealer he was committing an offence.

In **Jones V. Merionethshire Permanent Building Society [1892] 1 ch. 173**, quoted with approval in **Lakhan V. Vaitha [1965] EA 454,** Lindley L. J. authoritatively rendered himself thus:-

"***A plaintiff is not entitled to relief in a court of equity on the ground of the illegality of his own conduct."***

It is quite clear from the evidence on record that the 1st respondent by giving friends money to bring to Kenya was deliberately subverting the law. Karl Shroeder in his testimony during cross-examination, stated as follows on that issue:-

"***I was carrying Mr. Mollin's money so as to avoid the law. I knew I was doing something I know it was illegal …. That in each of the three times I carried the money for Mr. Mollin to avoid the law."***

The respondent had a bank account with Barclays Bank Nkrumah Road, Mombasa. He did not explain why he did not transfer the money to the appellant through that account, more so because he stated that he had authorized the appellant to operate that bank account. There is something the 1st respondent did not want the court to know regarding the alleged payments to the appellant. It would appear to us that he must have been engaged in some illegal business with the appellant alone or with some other people. Apart from what Karl Shroeder said there is the testimony of Helmit Franz about being given money and some diamonds to deliver to the appellant. The diamonds were to be sold here in Kenya. The witness stated as follows:-

"***Mr. Mollin sent me to give money i.e. German Mark 11,000 with some diamonds. I was told the money would be used to build Mr. Mollins house. He was to sell the diamonds … I knew that Ogada was working in Jewellery shop in Germany. … I did not declare the cash at the airport."***

Later the witness continued:-

"***I was told to just give the money to Mr. Ogada with instructions not to get any receipt. I was (sic) not lying but I am telling the truth. The money was changed privately not through the bank."***

Mr. Heinz Warner also testified he knowingly did not declare foreign currency he was given by the respondent to deliver to the appellant. The 1st respondent himself testified that he knew the foreign money he sent to the appellant through friends would be changed in the black market, and that he gave the appellant Kshs.200,000/- worth of diamonds. We take judicial notice of the fact that diamonds can only be legally sold in Kenya by a licensed dealer. No evidence was adduced to show either that the 1st respondent or the appellant was a licensed dealer. In the circumstances was the superior court right in giving judgment in the 1st respondent's favour?

The 1st respondent clearly wanted the superior court to aid him to benefit from the aforesaid illegal money transactions. In our view the matter having come to the attention of the superior court, although by a side wind, that court should have declined to assist the 1st respondent. It offends public policy to aid flouters of the law to benefit from their illegal acts.

It may be argued that if the court refused to assist the 1st respondent, it will end up benefiting an accomplice in the same crime. The issue was considered by the Privy Council in the case of **Mistry Amar Singh v. Serwano Wofunira [1963] EA. 409**. That court accepted and adopted the words of Forbes V.P, on first appeal, that:-

"***It would be contrary to public policy for courts to refuse to assist an African to eject a non-African in illegal occupation of the former's land, even though the African may have committed an illegal act in permitting the non-African to enter on the land."***

The Privy Council also quoted the words of Lindley L.J. in the English case of **Scott v. Brown Doering, McNab & Co. (3) [1892] QB 724** in which the learned Judge authoritatively stated:-

"***Ex turpi cansa non Oritur action*.**

This old and well-known legal Maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."

A.L. Smith L.J. , in the same case at P. 734, clarified the matter thus:-

"***If a plaintiff cannot maintain his cause of action without showing as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action."***

The foregoing is clear evidence that the 1st respondent's credibility as a witness was in doubt. If he was able to knowingly subvert the law, there was nothing to stop him from lying about the transactions he said he handled with the appellant. Indeed there is evidence on record that Inspector Rugendo Mbogori, was investigating a case of stealing by agent against the appellant. He testified that the 1st respondent had complained that the appellant converted money from the 1st respondent's bank account into his own use. The amount of money allegedly stolen was in excess at Kshs.3,500,000/- which was meant to purchase a plot of land for the 1st respondent and Kshs.7,548,000/- meant for the construction of a house. The appellant was charged but the 1st respondent did not attend court to give evidence in the case, with the result that the charge against the appellant was dismissed by the court. The dispute between the parties was civil in nature but the 1st respondent purported to use the police to coerce the appellant to give him the money he was claiming from him.

There is another aspect to this case. The trial court held that the appellant did not have reasonable sources of income from which he would obtain money to purchase the land and to construct a residential house. The trial Judge did attempt to analyze each party's sources of income. He considered the appellant's sources, which included his salary of Kshs.14,000/- per month, earnings from his fishing boats, but did not consider the evidence which the 1st respondent himself gave that the appellant sold his house at Kiembeni. No evidence of the selling price was given. It is also clear that the proceeds of the sale were not taken into account in assessing the appellant's worth.

In view of the foregoing we come to the conclusion that the trial Judge did not fully analyze the evidence before him which if he had done, he would have come to the conclusion that both the 1st respondent and the appellant were involved in some illegal activities and that it was doubtful if the 1st respondent remitted to the appellant all the money he said he did. The subject house was completed in December, 1994 or early 1995, and yet most of the money allegedly sent to the appellant was remitted in 1995. Besides, the 1st respondent did not file his suit until the year 2000. He did not explain satisfactorily why it took him so long to bring the action. Besides, the alleged contract between the parties was to the effect that the appellant was to have a life interest in the upper flat. The trial Judge's judgment is silent on it. The life interest was allegedly given in consideration of services which according to the 1st respondent, the appellant provided. It is curious that one would build a house and give it to a friend for his own occupation for an indefinite period, rent free. However, as there was no counterclaim, we say no more on this issue.

For the reasons we have given above, we allow the appellant's appeal, and set aside the orders made by the trial Judge.

The next question is whether we should cancel the registration of Joyce and order that the suit property revert back to the appellant. We earlier set out submissions by Mr. Jengo for Joyce. We have already dealt with the question of the jurisdiction of this Court to deal with Joyce's title over the suit property. We came to the conclusion that the Court has the jurisdiction to deal with the matter. The second part of Mr. Jengo's submission was on section 52 of the Transfer of Property Act. That section deals with the doctrine of *lis pendens*. That section in pertinent part, provides:-

"***During the active prosecution in any Court having authority … of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein except under any authority of the Court and on such terms as it may impose."***

The doctrine of *lis pendens* is meant to maintain the status quo over the property which is the subject matter of a pending suit until after the final determination of the suit or until the suit is in any other manner terminated. There is no doubt that at the time the suit property herein was transferred to Joyce this appeal had been filed and the 1st respondent had notice of it. The question which immediately arises is whether Joyce too was aware of the existence and pendency of this appeal. Mr. Jengo submitted before us that Joyce was a purchaser of the suit property without notice of the pendency of this appeal.

We earlier set out the circumstances surrounding the sale of the suit property to Joyce. Transfer of the property to the 1st respondent was pursuant to the decree from which this appeal arose. The transfer was effected on 20th August 2007. On 30th August, 2007, title to the same property was transferred to Joyce. We have no evidence as to how Joyce came to know of the existence of the property and that it was available for sale. However, it can be inferred from the evidence on record that Joyce knew that the property was the subject matter of an appeal. Joyce gave her full name to the Registrar of Titles. The names were Joyce Odongo Ambundo alias Joyce Ambundo Muck. She is a Kenyan woman married to a German man. The speed with which she allegedly purchased the land after it was transferred to the 1st respondent suggests that the transfer was hurriedly arranged. Besides, the price given in the title document is Kshs.5,000,000/- which is far below what the 1st respondent said he spent to purchase the plot and to put up a residential house thereon. According to the 1st respondent he spent Kshs.3 million to purchase a vacant plot. He spent over Kshs.7 million to construct a residential house thereon. In total he said he spent over Kshs.14 million. Why then would he sell such a valuable property at a paltry sum of Kshs.5 million? Besides, we were told that Joyce is based in Germany. That the property was allegedly sold to her suggests that she is a person the appellant knew well and solicited her assistance in the matter. It is noteworthy that although the transfer to her was effected on 30th August 2007 the instrument of transfer bears the date 24th August, 2007. She clearly was aware of what was going on. The transfer was obviously intended to defeat the outcome of the appeal. The transfer was a nullity and we so declare. Consequently we order the cancellation of the transfer of the suit property to her as well.

We have agonized on the question whether the appellant should keep the property in view of what we stated earlier that the property may have been purchased with money retained and used in the country in violation of the Exchange Control Provisions. Had the provisions been in force today the Court would have had the power to order forfeiture of the property to the State. However, the Exchange Control Act, having been repealed, that power went with it. Had the appellant been the original plaintiff we would have had no difficulty in the matter. We would have simply declined to assist him. However, since the 1st respondent is the one who alleged that he brought money into the country illegally and he is the one who sought the court's assistance, he is the one to suffer for his disregard for the law.

That being our view of the matter, and in view of what we stated earlier, that it is possible the appellant bought the plot and built a house thereon from proceeds of sale of his Kiembeni house and with money

from his own sources, we order that his name be reinstated as owner of the suit property if for any reason it was deleted.

As regards costs, considering the background to this matter we make no order as to costs.

Dated and delivered at Nairobi this 30th day of October, 2009

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.