



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: OMOLO, GITHINJI, J.J.A. & DEVERELL, AG. J.A.)

CIVIL APPEAL NO. 214 OF 2001

BETWEEN

DAVID K. KIPSANG APPELLANT

AND

JAMES KIPCHENGER RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at

Nakuru (Rimita J) dated 21 st July, 2000

in

H.C.C.C. NO. 229 OF 1995)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Rimita J) concerning a dispute as to land in the Rift Valley. The appellant David K. Kipsang, was the defendant in Nakuru High Court Civil Case No. 229 of 1995 in a suit brought by James Kipchenger the respondent in this appeal. The superior court gave judgment for the defendant/respondent and granted the relief sought in the Amended Plaint as prayed. The orders which had been sought were as follows:-

“1. A declaration that the plaintiff is the lawful owner of all those shares in the name of the defendant in respect of receipt No.488 for Kshs.5,140.00 and that the defendant has no valid claims over the same.

2. A declaration that in view of revocation of the agreement between the parties the consideration therefor together with interest arising thereof revives (sic) back to the plaintiff and the defendant has no lawful claim over it.

3. A declaration that LR.No Molo South Kerengeti Block 3/97 (Kirantich) is the property of the plaintiff and the title deed issued to the defendant in respect thereof is null and void.

4. A perpetual injunction to issue against the defendant by himself, his agents or servants

restraining them from entering and or interfering with the plaintiff's said shares in any manner.

5. The defendant be ordered to surrender title deed of the suit property to the plaintiff and execute necessary documents of transfer in default whereof the court do cancel title deed No. Molo South Kerengeti Block 3/97 (Kirantich) in the defendant's name and the Land Registrar be ordered to rectify his records accordingly and further issue a title deed to the suit property to the plaintiff (sic).

6. A refund of Kshs.860 together with interest from 1982 to date.

7. Vacant possession.

8. Costs of this suit."

The land at the centre of this appeal is **L.R. No..Molo South Kerengeti Block 3/97 Kiranytich** (hereinafter "**the suit land**"). It is not disputed that the appellant was the registered owner of the suit land at the time the suit was filed on 11th December 1990.

The dispute is about the way in which he became the registered owner. In order to understand this it is necessary to go back to 1975. In that year on 25th August the appellant agreed to sell to the respondent a half acre of land being Plot No. 67 part of a scheme arranged by Rift Valley Enterprises Ltd. The price to be paid by the respondent to the appellant was Shs.6,000. At that time the respondent was a director of a land company called Kiranytich Farms Company Ltd (hereinafter "**Kiranytich**").

The respondent agreed that it would pay, on behalf of and in the name of the appellant, to **Kiranytich** the sum of Shs.5,140 thus enabling the appellant to become a shareholder in **Kiranytich**. This would entitle the appellant to be allocated land in the Kiranytich scheme in due course. The respondent delivered to the appellant a receipt issued by Kiranytich headed under the company name with the words **SHARES CAPITAL**. This receipt was numbered 488 and dated 6th September 1995 and acknowledged receipt by **Kiranytich** from the appellant of Shs.5,140. (This receipt is hereinafter called "**the receipt**").

The balance of the purchase price for Plot No. 67 being Shs.860 was paid in cash by the respondent to the appellant.

At this stage the respondent had fulfilled its side of the August 1975 agreement. Performance by the appellant however hit an insuperable obstacle. This was that the Plot No 67 was not owned by the appellant. It was owned by his wife and she refused to part with the plot so that the appellant was unable to complete the sale. The appellant and the respondent had no option but to cancel the August 1975 agreement which cancellation they formalized in a document dated 27th March 1982 and signed by both parties.

This document was drawn up by the appellant and delivered at his request together with the **receipt** by a Mr. Ruto (PW 2) to the respondent. This March 1982 agreement (hereinafter "the cancellation agreement") contained one sentence which is critical to the dispute between the appellant and the respondent. This read as follows;-

"2. MIMI MIMMKUBALI KUPEWA MR. JAMES KIPCHENGER RECEIPT YANGU YA NO. 488 YA TAREHI 6/9/1975 YA KSHS. 5,140/= (FIVE THOUSAND ONE HUNDRED AND FORTY KWA JINA KIRANTICH FARMERS CO. LTD. P. O. KABARNET)".

The core dispute between the appellant and the respondent is as to the basis upon which the appellant was delivering the receipt to the respondent.

The appellant, at the superior court hearing and before this Court, claimed that the **receipt** had been delivered merely as a security for his repayment of the Shs.6,000 paid out by the respondent as consideration for the purchase of Plot No.67 which had proved impossible to complete.

The respondent, on the other hand, claimed that, by giving the receipt to the him, the appellant was transferring to the respondent the appellant's shares in **Kiranytich** together with the rights derived from ownership of those shares to allocation of land in the **Kiranytich** scheme.

This dispute raises two issues. The first being as to the construction of the **cancellation agreement** and the second being whether, if the respondent is correct in his interpretation of it, the delivery of **the receipt** could in law have the effect of transferring the shares in **Karanytich** from the appellant to the respondent.

We have come to the conclusion that, in the absence of any words in the **cancellation agreement** expressly stating that the giving of the receipt to the respondent was by way of security for performance by the appellant of his obligation to repay the Shs.5,140, the intention of the parties was that the "kupewa" or giving of the receipt to the respondent was meant to be an outright transfer of that piece of paper.

We now turn to the second issue as to the legal effect, if any, of **the receipt** being unconditionally in the possession of the respondent. This is relevant because the respondent contended that his possession of the receipt bestowed upon him the ownership of the shares in **Kiranytich** which the appellant had acquired as a result of the payment evidenced by the receipt headed **SHARES CAPITAL**. The respondent also claimed that any plot of land on the Kiranytich scheme which was allocated to the appellant as a result of his shareholding would be automatically transferred to the respondent upon the latter acquiring the receipt.

The burden of proving that these consequences flowed from the change in possession of the receipt was clearly on the respondent, being the party asserting this proposition. It was therefore incumbent upon him to produce the Memorandum and Articles of Kiranytich which would, presumably, contain the rules governing such far reaching events.

The Respondent did not produce those vital documents, or indeed any other documents indicating that such would be the consequences. No provisions of the Companies Act or of any other legislation were relied on in this context.

We consider that there was insufficient evidence to support the proposition that **the receipt** is either a shares certificate or a share transfer. **Kiranytich** appears from the use of the word "Limited" in its name to be a company registered under the Companies Act and there is nothing in that Act to suggest that such a receipt could be that type of document.

The respondent appears from paragraph 3 of the Amended Plaintiff to be claiming that in 1975 he had title to **the suit land** which he then transferred to the appellant by paying to **Kiranytich** the Shs.5,240 on behalf of the appellant in 1975 and that the **suit land** was transferred by the appellant back to the respondent in 1982 by the delivery to the respondent of **the receipt** without any reference to **Kiranytich**. There was no evidence that the suit land had even been demarcated as a separate entity from the whole land owned by Kiranytich or otherwise come into existence in 1975 or 1982 or at any time before the appellant became the registered owner of it, by first registration on 21st May 1991.

There was no evidence that, either before or after the 1975 agreement or the 1982 cancellation agreement, the respondent had acquired any rights vis a vis Kiranytich to any particular piece of land. The appellant relied heavily on the fact that his claim to the suit land was supported by his registration as the registered proprietor on 21st May 1991 which registration was a first registration.

Section 143(1) of the Registered Land Act , Cap 300 reads:-

"143 (1) Subject to sub section (2), the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained by fraud or mistake."

This makes it clear that even if fraud had been established in the obtaining of the appellant's first registration (which we do not think it has) the registration could not have been cancelled or amended. For confirmation of this see the judgment of the Court (Nyarangi, Gachuhi, and Apaloo JJA) in **Mugogo v. Sihowa** [1988] KLR 256 at page 257.

For all of the above reasons we hereby allow the appeal and set aside the judgment of the superior court and substitute therefor a judgment dismissing the plaintiff's claim but with no order as to costs neither here nor in the court below.

Dated and delivered at Nairobi this 15th day of April, 2005.

R. S. C. OMOLO

JUDGE OF APPEAL

E. M. GITHINJI

JUDGE OF APPEAL

W. S. DEVERELL

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR