



IN THE COURT OF APPEAL  
AT NAIROBI

(CORAM: O’KUBASU, GITHINJI, J.J.A. & ONYANGO OTIENO,  
AG.J.A.)

CIVIL APPEAL NO. 16 OF 2001

BETWEEN

**RICHARD KAMIRI GACHWE KAHIA**

(The Administrator of the Estate of the

Late Mrs. Rahab Waithera Kahia ..... APPELLANT

AND

**EDWARD KAMAU NG’ANG’A ..... RESPONDENT**

(Appeal from the judgment of the High Court of Kenya at Nakuru (Rimita, J.) dated 7th June, 2000

in

H.C.C.C. NO. 36 OF 1995)

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JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Rimita, J.) delivered on 7th June, 2000 in which the learned judge gave judgment in favour of the respondent herein, **Edward Kamau Ng’ang’a** (who was the plaintiff in the superior court). The facts of the case appear fairly simple and straightforward. The respondent entered into a land sale agreement with one, **Rahab Waithera Kahia**, on 9th December, 1986, in which it was agreed that Mrs. Kahia would sell to the respondent 100 acres out of *Land Reference No . OL KALAU 3777/25* at a consideration of Shs.1,100,000/=.

The respondent made a down payment of Shs.600,000/= and thereafter paid the balance by instalments. According to the respondent, the balance of the purchase price was paid by way of instalments leaving a balance of only Shs.4,000/=. That is why in the final judgment in the superior court the respondent obtained judgment in the sum of Shs.1,096,000/=. It was however the appellant’s contention that the total amount paid by the respondent was Shs.760,000/=.

This being a first appeal we are bound to re-evaluate the evidence, assess it and make appropriate conclusions about it, remembering that we have not seen or heard the witnesses and making due

allowance for this – see **SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD** [1968] E.A. 123 and **WILLIAMSON DIAMONDS LTD. V. BROWN** [1970] E.A. 1.

As regards the purchase price the respondent gave evidence which was supported by relevant documents to prove payment. We have carefully considered the evidence placed before the trial court and it is abundantly clear that apart from Shs.66,000/= which was paid in cash all other payments were effected by cheques. Hence, on the issue of purchase price we accept, as did the learned Judge, that the respondent paid a total of Shs.1,096,000/=.

This amount of Shs.1,096,000/= which was paid as purchase price was paid to the seller of the land, Mrs. Kahia. The respondent took possession of the 100 acres sometime in November, 1988 and like a serious purchaser of such agricultural land started to carry out developments, which included clearing the bushes, fencing it (to assert ownership), maintaining trees and construction of a dam. He brought in 52 head of cattle, 60 goats and 40 sheep. Up to that stage, the respondent had become a proud owner of a well developed farm of 100 acres but to complete the sale transaction the consent of the relevant Land Control Board was necessary. The respondent was ready and willing to go to the Land Control Board but Mrs. Kahia appeared to be somewhat reluctant as whenever she was asked to go to the Land Control Board, she gave excuses.

Unfortunately, Mrs. Kahia died on 5th October, 1989 before the parties had appeared before the Land Control Board for the necessary consent to the sale agreement. That was the beginning of the respondent's problems. The appellant, **Richard Kamiri Gachue Kahia** was appointed administrator of his mother's (Mrs. Kahia's) estate vide Certificate of Confirmation of a Grant issued on 30th November, 1993. The death of Mrs. Kahia and the coming of the appellant into the picture brought more misery to the respondent. The appellant herein moved with speed and drove out the respondent together with all his livestock and other belongings from the 100 acre land. The respondent ran to the local District Officer but no assistance was forthcoming.

When the respondent found that Provincial Administrator (D.O or Chief) could not assist him get back his land, he turned to the Judiciary. That is when he filed a suit in the High Court at Nakuru seeking the following reliefs against the appellant:-

***“(a) A permanent injunction to restrain the defendant from interfering with the Plaintiff's possession of his portion of land number 3777/25.***

***(b) An order that the defendant transfer the said land to the plaintiff.***

***(c) In the alternative and without prejudice to the prayers (a) & (b) the defendant be ordered to pay the plaintiff***

***1) K.Shs.6,068,500/=***

***2) K.Shs. 5,000/= per day for 20 th November, 1994 until this case is heard and determined.***

***(d) Costs of the case***

***(e) Interest on (c) & (d) from the date of filing this suit until payment in full.***

***(f) Any other or alternative relief.”***

As the respondent filed the plaint seeking the above stated reliefs, he also filed Chamber Summons application under order XXXIX rule 1, 2, 3, 7 and 9 of the Civil Procedure Rules in which he sought the following restraining orders:-

**“1.**

**2. THAT the defendant be restrained from chasing away, evicting, entering on in any way whatsoever interfering with the plaintiff's possession of the plaintiff's portion of the land known as L.R. 3777/25 Ol Kalou until this suit is heard and determined.**

**3. THAT the defendant be restrained from keeping the plaintiff's livestock and employees away from the said land.**

**4. THAT the defendant be condemned with the costs of this Application."**

The Chamber Summons application was heard inter partes but in the end the respondent's misery increased as his application was dismissed with costs. His only hope was fastened on the main suit.

At the conclusion of the main suit, the respondent had reason to smile as judgment was given in his favour although his success could not be described as total since he did not get his 100 acres back but only the purchase price. In his judgment the learned Judge concluded thus:-

**"I therefore find that the defendant was properly sued as a legal representative of his mother, Rahab Waithera Kahia.**

**He is therefore bound to refund the sum of K.Shs.1,096,000/= to the plaintiff.**

**Consequently, there will be judgment for plaintiff against the defendant for the sum of Shs.1,096,000/= with costs and interest.**

**In the circumstances I order that interest be paid at the rate of 25% per annum from the date of filing of the suit.**

**The plaintiff will be allowed access to the land he had developed to carry away what he can possibly salvage therefrom."**

Being aggrieved by that judgment the appellant filed this appeal setting out seven grounds of appeal as follows:-

**"1. That the learned trial Judge erred in his judgment by believing the plaintiff's evidence as against Defendant**

**2. That the learned trial Judge erred and/or misdirected himself in law and fact by failing to make a finding that the respondent/plaintiff's claim was based on a null and void transaction and that the same was null and void for all purposes.**

**3. The learned trial Judge erred by failing to find that the claim by the respondent/plaintiff was affected by the statute of the limitation of actions Act there being sufficient evidence on record that the claim was time barred.**

**4. The learned trial Judge failed, contrary to the evidence on record, that the late (Rahab Waithera Kahia) had no sufficient capacity and or authority to enter into any contract of sale as alleged concerning the property known as L.R. No. 3777 /25 Ol -Kalou.**

**5. The learned trial Judge erred both in fact and in law when he failed to make a finding that the plaintiff had not proved his case, on a balance of probabilities as is required by the Law.**

**6. The learned trial Judge erred both in fact and in law when he made a finding that the defendant was liable to pay the plaintiff a sum of Kshs.1,096,000/= when the evidence on record was to the contrary.**

**7. The learned trial Judge erred both in law and fact when he entered judgment together with**

***inte rest at the rate of 25% when the said rate had not been proved and/or properly pleaded.”***

The appellant has asked us to set aside the judgment of the superior court and condemn the respondent to pay the costs both in the superior court and in this Court.

The appeal came before us for hearing at Nakuru on 25th February, 2004 when it was ably argued by Mr. C.N. Kihara, for the appellant, and Mr. D.N. Ikua, for the respondent.

It was Mr. Kihara's submission that as there was no consent from the Land Control Board, the sale transaction was null and void and hence there could be no relief awarded to the respondent after the transaction had become void. He went on to argue that the money paid in the transaction was only Shs.760,000/= but this money is recoverable as a debt from the person to whom it was paid. The next strong point in Mr. Kihara's submissions was that even recovery of Shs.760,000/= was time barred since the plaint was filed on 20th January, 1995 which was more than six years from the date of the agreement. Lastly, Mr. Kihara took issue with the judge's order of 25% as the rate of interest. Mr. Kihara contended that the rate of 25% had not been pleaded. In his view, there was no basis for the order of interest at 25%. For all these reasons, Mr. Kihara asked us to set aside the judgment of the superior court.

In opposing the appeal, Mr. Ikua started off by reminding us that the appellant had admitted that he was the administrator of the estate and that the parcel of land that the respondent bought was part of the estate. He supported the decision of the learned Judge in that the respondent was entitled to recover what he had paid. Mr. Ikua emphasized that the suit in the High Court was essentially a case to recover a piece of land and so the cause of action was within time.

The first ground of appeal relates to evidence adduced by the parties in the superior court. We have, on our own, considered the evidence in the superior court and the conclusion reached by the learned judge and we are of the view that there can be no merit in this ground. The same must fail.

The second ground of appeal faults the learned Judge on the ground that he failed to find that the claim was based on a null and void transaction. There can be no dispute that the sale transaction required the consent of the Land Control Board and that in absence of the consent the agreement for sale became void for all purposes. Indeed, the learned Judge was alive to this fact when he stated thus in his judgment:

***“Section 6 of the Land Control Act Cap.302 is very precise. The Agreement for sale of land between the plaintiff and the deceased Mrs. Kahia was void for all purposes.”***

In view of the foregoing, this ground (ground 2) clearly lacks merit. The same must accordingly fail.

The third ground was on the issue of ***Limitation of Actions Act*** . It was argued that the suit was time barred. From the evidence, the respondent was driven out of the land in November 1994 and, in our view, that is when time started to run. The plaint was filed on 20th January, 1995 . On this issue of limitation, the learned Judge in his judgment said:-

***“I find that under the circumstances of this case, the cause of action arose in 1993 when the plaintiff was chased away from the land. He could not and would not have had cause to claim the refund before he was told that he was not to get any land from the defendant and his family. I find the claim is not time barred.”***

We are in agreement with the learned Judge's observation and hence it follows that the third ground must fail.

The fourth ground of appeal related to the issue of whether the late Rahab Waithera Kahia had sufficient capacity and authority to enter into any contract of sale concerning the land in dispute. Since the sale agreement was declared null and void, the question of Mrs. Kahia having capacity and/or authority to enter into such a sale agreement does not arise. We see no merit in this ground of appeal and it must therefore fail.

The fifth ground of appeal related to the finding of the learned Judge as regards facts and the law. We have already referred to the evidence adduced by the respondent and we found that he gave clear and straightforward testimony of what took place. He was certainly a credible witness. The learned trial Judge found him to be so and we have no reason to differ from the finding of the learned Judge. Hence, this ground of appeal must also fail.

The sixth ground of appeal was to the effect that the learned Judge was in error when he made a finding that the appellant was liable to pay to the respondent a sum of K.Shs.1,096,000/= when the evidence on record was to the contrary. We are rather perplexed by this ground of appeal. We have already stated elsewhere in this judgment that the payment of the purchase price was made by way of cheques apart from Shs.66,000/= which was paid in cash. We have already upheld the learned Judge's finding to the effect that the respondent paid a total of Shs.1,096,000/=. Even Mr. Kihara, in his submission, conceded that Shs.760,000/= had been paid.

It was, however, submitted that even if some money was paid the same cannot be recovered in view of the provisions of the Land Control Act (Cap.302 Laws of Kenya). It was Mr. Kihara's contention that there could be no relief available to the respondent after the transaction became void. That would have been a correct statement but for section 7 of the Land Control Act which provides:-

***“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”***

Hence, while a party to a controlled transaction that has become void may recover any money or other valuable consideration as a debt such party would not be entitled to recover compensation for improvements. The respondent in his filed plaint had claimed for compensation for improvements carried out on the farm together with the cost of maintaining the animals on the neighbor's land. The learned Judge disallowed all these reliefs except what he found to have been money paid as consideration in the sale transaction. In our view, the learned Judge was right in coming to that conclusion. To fortify our conclusion we would refer to KARIUKI V. KARIUKI [1983] K.L.R. 225 at p.227 in which Law J.A. stated:-

***“No general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent. The only remedy open to a party to a transaction which has become void under the Act is that he can recover any money or consideration paid in the course of the transaction under section 7 of the Act. See also the decision of this Court in CHEBOO V. GIMUNYIGEI (Kisumu Civil Appeal No. 40 of 1978) in which a majority of this Court disagreed with the view expressed by Madan JA that compensation for improvements was recoverable in addition to the money or other consideration paid in the course of a transaction which has become void under the Act. Had the Act so intended, it would have so provided. See also KARURI V. GITURU AND OTHERS (Nairobi Civil Appeal No. 25 of 1980) which is to the same effect.”***

In view of the foregoing, we are satisfied that the learned Judge was right in granting the respondent's prayer for recovery of the purchase price that he had paid in the transaction that became null and void by the provisions of Land Control Act. It follows that the sixth ground must fail.

Lastly, we come to the seventh ground which is in respect of rate of interest awarded by the learned Judge. We were told by Mr. Ikua that the learned Judge was right in allowing interest rate at 25% because that was within his discretion. But nowhere in the plaint did the plaintiff (the respondent herein) plead that rate of interest. In such circumstances, the rate of interest would be at Court rates. In KENYA COMMERCIAL BANK LTD. VS. MWANZAU MBALUKA AND ANOTHER – Civil Appeal No. 274 of 1997 (unreported) this Court stated:-

***“In GANDY V. CASPAIR (1956) EACA 139 it was held that to decide against a party on***

*matters which do not come within the issues on which the parties want a decision on would clearly amount to an error apparent on the face of the record. And in NKALUBO V. KIBIRIGE [1973] E.A. 102 Spry V.P, while commenting on the general statement in the case of ODD JOBS V. MUBIA [1970] E.A. 476, that a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated; said as follows: -*

*“I accept that as a general statement but I do not think it can be invoked to allow the introduction of what amounts to a new cause of action.”*

*The trial Judge by raising and determining the suit on an issue which was neither pleaded nor evidence adduced on thereby introduced a new cause of action against the appellant. He clearly went astray and his judgment cannot be left to stand on that account.”*

We would express ourselves in similar way as regards the 25% rate of interest ordered by the learned Judge since the plaintiff neither pleaded (25% interest rate) nor led evidence to prove it. We are therefore satisfied that the appellant must succeed on that ground. With that we come to the end of this land transaction which started way back in 1986 at the shop of the respondent along River Road in Nairobi. It is also the end of this appeal.

The appellant has succeeded on the last ground of appeal and hence the order on interest at the rate of 25% is set aside and substituted thereof with an order of interest at Court rates which shall be 12% on the principal amount of **Shs.1,096,000/=** and 14% on costs of the suit. Hence this appeal succeeds only to that limited extent. The appellant, unmeritorious as he may be, is entitled to some costs as he has been partially successful.

We therefore order that the appellant be awarded a third of the costs of this appeal.

***Dated and delivered at Nairobi this 19th day of March, 2004.***

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**AG. JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**