



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, TUNOI & BOSIRE, J.J.A.)

CIVIL APPEAL NO. 84 OF 1985

BETWEEN

WAWERU MANGERE.....APPELLANT

AND

SIRINYI OLE KURITI alias SIRINYI OLE MUSIRO.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Trainor J) dated 27th June, 1985

in

H.C.C.S. NO. 192 OF 1979(O.S.)

RULING OF THE COURT

The applicant, Waweru Mangere, as plaintiff in Nairobi High Court Civil Case No 192 of 1979, unsuccessfully brought an action by plaint against the respondent, Sirinyi Ole Kuriti alias Sirinyi Ole Musiro, in effect, seeking an order that the respondent specifically perform his part of an agreement dated 19th January, 1965 for sale of a parcel of land in Ngong area. As at the date of the agreement the land was unregistered. Subsequently, however it was registered in the name of the respondent as parcel No Ngong/Ngong/477. One of the reasons for the dismissal of the applicant's suit was that he did not obtain the requisite consent of the Land Control Board within the time prescribed in the relevant legislation. The applicant was aggrieved by that decision and brought this appeal which was filed on 23rd August, 1985.

The grounds upon which the appeal was brought are not material to this ruling. What is, however, material is the fact that in the application before us, dated 9th April, 1999, the applicant seeks, *inter alia*, an order terminating the appeal or in the alternative, an order marking the appeal as settled. Apart from the issue of costs, the applicant also prays that an earlier motion, dated 17th January, 1984, be withdrawn and that a sum of Kshs 160,341.85 together with interest thereon, held in an interest bearing bank account with Credit Finance Corporation in the name of the Registrar of this Court, be released to his advocates, Messrs Wachira Nderitu Ngugi & Company.

In his affidavit in support of the application, the applicant depones, *inter alia*, that after his suit was dismissed he entered into a fresh agreement with the respondent for the purchase of the same parcel of land, in which the purchase price was upped from Kshs 12,500/= to Kshs 55,500/=, but the acreage of the subject matter remained the same at approximately 43.2 acres; that thereafter the respondent consented to the transaction being submitted to the appropriate Land Control Board for the area for its approval, which approval was given on 4th September, 1990; that the respondent duly executed instruments of transfer of the land to him whereupon the land was transferred to the applicant and a land certificate was eventually issued to him; that the money regarding which he seeks an order for its release to him includes Kshs 93,740/= he deposited with the aforesaid Corporation by order of the superior court as one of the conditions for granting him a stay of execution of the decree in the aforesaid suit, and further Kshs 2,000/= he deposited in the same account each month from 1st September, 1985 up to 25th February, 1987, to cover mesne profits he would be expected to pay if he eventually lost his appeal.

The applicant has annexed to his affidavit a copy of a document allegedly thumb printed by the respondent acknowledging not only that he received a further sum of Kshs 43,000/= as consideration for the suit land, but also indicating that he had, as evidence of his willingness to continue with the deal, signed the necessary application for Land Control Board consent and a copy of the transfer instrument in that regard. Besides, he also annexed a copy of the Land Control Board consent and also a copy of the land certificate which was issued to him. It is, however, clear from a casual glance at the said land certificate that it is incomplete, as the encumbrance section is missing.

The applicant's counsel, Mr Ngugi, submitted before us that in view of the foregoing no purpose would be served in pursuing the appeal, as the applicant, in effect, has got what he intended to achieve by his failed civil suit, and the only assistance he requires from this Court is an order for the release of the money he deposited with Credit Finance Corporation. We have no hesitation whatsoever in holding that we lack the jurisdiction to issue such an order. The applicant having deponed in the affidavit in support of this application that the money was deposited as aforesaid pursuant to an order of the superior court, it follows that only that Court may make an order of its release in absence of a decision determining the appellant's appeal, in his favour. The applicant must have been alive to this fact because, as we stated earlier, he wants us to order either that the appeal has been settled or been terminated so as to use such order to claim the money.

The Court of Appeal, by dint of the provisions of section 2 of the Appellate Jurisdiction Act, cap 9, Laws of Kenya, exercises such jurisdiction as is conferred on it by statute.

It may only determine appeals to it, either by hearing such parties to them who wish to be heard and thereafter give a decision on the merits, or mark it as settled by consent of the parties on specific terms, or dismiss the appeal for non-attendance if the appellant or his counsel or at the request of the appellant or both parties as the case may be mark it as withdrawn.

The respondent has filed a replying affidavit wherein he has not only expressed his objection to the release of the money held in deposit to the applicant, but also the prayer for marking the appeal as settled. He also depones that he appended his thumb mark and signature on the documents we alluded to earlier under threats of incarceration in police cells if he did not do so. In view of the foregoing averments by the respondent this appeal cannot properly be marked as settled, as the respondent does not consent to it. The respondent does not, however, oppose the withdrawal of the application dated 17th January, 1994, which application we have no hesitation in ordering that it be marked as withdrawn with no order as to costs.

The only outstanding issue is what is to happen to the appeal. The applicant as the appellant is not interested in pursuing it and he has not applied for its withdrawal. In view of that fact we do not consider it appropriate to leave it pending. The application under consideration and the appeal itself were listed together for hearing before us. Since the appellant does not wish to prosecute it and we cannot possibly force him to do so, the order that commends itself to us to make is that the appeal be and is hereby dismissed for want of prosecution. We also dismiss the applicant's application dated 9th April, 1999, except for the first prayer which we allow.

As neither the respondent nor his advocate attended the hearing of both the application and the appeal, we make no order as to the costs of both the appeal and the application.

Dated and delivered at Nairobi this 19th day of October, 2000.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR