REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 56 OF 2014

ISAAC NGATIA KIHAGI ..... APPELLANT

-VERSUS-

PAUL KAIGA GITHUI ..... RESPONDENT

JUDGMENT

Introduction

1. By a plaint dated **16th April, 2008** and amended on 6th June, 2009 the appellant herein instituted a suit before the lower court to wit, Nanyuki SPMCC No. 64 of 2008 seeking the reliefs listed therein against the respondent herein.

2. The appellant's claim was premised on a sale agreement he had entered into with the respondent on 19th January, 2006 to sell to him a portion of the respondent's parcel of land known as Nyeri/Naromoru/1009 measuring 6.48 hectares.

3. The agreement *inter alia* provided that the portion being sold was 3 acres; that the purchase price was Kshs.475,000/= and that the vendor was to pay a deposit of Kshs.100,000/= with the balance being paid in instalments until payment in full. The agreement further provided that the buyer would take possession of the portion sold immediately after paying the deposit.

4. It was the appellant's case that despite having met his obligations under the sale agreement and being ready and willing to fulfil his obligations under the agreement, in breach of the agreement, the respondent failed, refused and neglected to subdivide the suit property or take any measures towards completion of the agreement.

5. For those reasons, the appellant filed the suit at the lower court seeking the following reliefs against the respondent:

(a) Specific performance of the said agreement;

(b) In alternative, an inquiry as to the damages for breach of the sale agreement or at his option an account and refund to him all sums found due upon taking such inquiry or account as stated in paragraph 7(ii) of the plaintiff with interest thereon;

(c) Further or other relief that the court may deem fit;

(d) Costs of the suit.

(e) Interest on a, b, and c above at court rate.

6. In his reply to the amended plaint the respondent admitted that he agreed to sell a portion of the suit property to the appellant and that pursuant to the agreement, he received Kshs. 100,000/= being deposit but denied having received any other payment in respect of the transaction.

7. The respondent further pleaded that the agreement was frustrated by existence of a boundary dispute in respect of the suit property and the adjacent parcel of land Nyeri/Naromoru/104. The respondent further contended that he was unable to obtain the consent to subdivide and transfer the suit property.

8. In his counter-claim, the respondent contended that because the appellant took possession of the portion he sold to him immediately after they executed the agreement and remained in occupation even after the transaction became null and void, he was deprived of the use of his land and the profits of the portion of the land.

9. Arguing that the appellant's occupation and use of the portion sold to him was in violation of the provisions of **Section 22** of the Land Control Act, Cap 302 Laws of Kenya, the respondent urged the court to dismiss the appellant's case with costs to him and to enter judgment in favour for:

(i) An order of eviction of the appellant from the suit property; mesne profits thereon to be determined by the court;

(ii) Costs of the counter-claim.

10. Upon considering the case presented before him the Trial Magistrate (TM), *inter alia* held:

"The plaintiff is seeking specific performance, an inquiry as to damages for breach of the sale agreement or an account and refund of all the sums found due upon taking such inquiry or account. The transaction herein is void and plaintiff cannot claim either specific performance or general damages based on the voided transaction. Plaintiff is however entitled to a refund of Kshs.100,000/= that he paid the defendant on the voided transaction.....

Defendant is seeking eviction of plaintiff from land parcel Nyeri/Naromoru/1009 and mesne profits. The transaction herein is void and defendant cannot claim mesne profits based on the voided transaction. The transaction herein having become void, the plaintiff has no business remaining on the defendant's land.

In the end, there is judgment for plaintiff against the defendant for Kshs.100,000/= (one hundred thousand only). On the other hand, there is judgment for the defendant against the plaintiff for an order of eviction.

Both parties have partly succeeded and so, each shall bear its costs of the suit."

11. Aggrieved by the decision of the TM, the appellant appealed to this court on the following grounds; that the learned TM erred:

(a) By entertaining a claim for eviction while the court had no jurisdiction to do so.

(b) In her interpretation of the provisions of the Land Control Act, Cap 302 and the regulations made thereunder.

(c) finding that a sum of Kshs. 200,000/= was not paid to the respondent.

(d) shifting the burden of proof.

(e) finding that existence of an encumbrance was insignificant.

12. The appeal was disposed of by way of written submissions.

Appellant's submissions

13. On behalf of the appellant, it is submitted that it is not in dispute that the respondent through a sale agreement dated 19th January, 2006 offered to sell to the appellant a parcel of land measuring 3 acres. The parcel was to be excised from Nyeri/Naromoru/1009.

14. On the date the sale agreement was executed, the respondent received a down payment of Kshs.100,000/= and subsequently received a sum of Kshs.200,000/= as shown on the written acknowledgement dated 5th April, 2006. It is pointed out that the respondent denied having signed the written acknowledgement for receipt of Kshs. 200,000/=.

15. With regard to the 1st ground of the appeal, it is pointed that the TM issued an eviction order against the appellant on the basis that the sale transaction was void. Based on the decisions in the cases of **Peter Kanyari Kihumbu v. Gladys Wanjiru Migwi & Another** (2005) e KLR; **Makuu Kilole & 2 Others v. Nzioka Mbwii & 2 Others** (2005) e KLR; and the case of **the Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd** (1989) KLR, it is submitted that the trial court lacked jurisdiction to issue an eviction order.

16. On ground 2, the TM is said to have erred by holding that each of the parties to the sale agreement could have applied for consent to sub-divide the suit property with a view of transferring the portion the appellant had bought to the appellant. Pointing out that the suit property was registered in the name of the respondent, the appellant argues that it would not have been possible for the appellant to complete and lodge an application for consent to subdivide land that does not belong to him.

17. Concerning grounds 3 and 4, it is submitted that the respondent being the one who contended that the acknowledgement for payment of Kshs. 200,000/= which the appellant produced as Pexbt 2 was a forgery, under **Section 109** of the Evidence Act, Cap 80 Laws of Kenya, he was the one with the burden of proving that the acknowledgement note was forged. The TM is faulted for shifting the burden of proving that fact from the respondent to the appellant yet the respondent was the one who contended that the document was a forgery.

18. With regard to ground 5, the TM is faulted for having held that the undisclosed restriction which the respondent had placed on the title to the suit property was insignificant. The TM magistrate is said to have fallen into error regarding that finding because failure to disclose existence of the encumbrance was a clear reflection of the respondent's dishonest character.

19. It is submitted that if such dishonest conduct was weighed against the respondent's denial of having

signed Pexbt 2, the court would have arrived at an irrestistible conclusion that the respondent was not a candid litigant. According to the appellant, he could not have applied for the consent when there was a restriction against dealing with the title.

Respondent's submissions

20. On behalf of the respondent, it is submitted that the court could not grant the appellant the order for specific performance because the parties had not obtained the consent of the Land Control Board to subdivide the suit property and transfer the subdivision to the appellant as required under **Section 6** of the Land Control Act, Cap 302 Laws of Kenya.

21. According to the respondent, the order of eviction was warranted as the court could not have allowed the appellant to continue occupying the suit property once it found the agreement to have become void by operation of law.

22. Terming the appellant's contention that the Trial court had no jurisdiction to grant an order for eviction absurd, the respondent, submits that it is not reasonable for the appellant to expect refund of the purchase price and at the same time continue occupying the suit property.

23. According to the respondent, the TM did not misinterpret the law as once the agreement became void, the appellant's remedy was merely refund of his money.

24. Concerning the appellant's contention that the respondent received Kshs. 200,000/=, an overview of the evidence adduced by the appellant concerning that payment is given and submitted that the TM had reasons for doubting the candidness and forthrightness of the appellant regarding the payment of that amount. The appellant is said to have contradicted himself concerning the payment of that amount.

25. According to the respondent, the appellant ought to have brought the advocate who witnessed the acknowledgement note to prove that the respondent received the money in his presence on 5th April, 2006. Arguing that the advocate would have settled the issues of how the payment was made, or whether the signature of the the respondent was forged, the respondent submits that the TM did not shift the burden of proof to the appellant.

26. Arguing that the TM was right in finding that the issue of the restriction the respondent had registered was insignificant, the respondent submits that the parties had not reached the stage where the presence of the restriction could have hindered the completion of the transaction as no application for subdivision of the land was made. It is pointed out that the TM observed that none of the parties raised the issue of the encumbrance as the main cause of the failure of the transaction.

27. Maintaining that the court did not err by issuing an eviction order against the appellant, counsel for the respondent submitted that such an order was incidental to the outcome of the first prayer. According to the respondent, the appellant had no reason to continue occupying the suit property once the reason behind his occupation was voided.

Analysis and determination

28. Concerning the payment of the Kshs.200,000/=, the appellant's pleadings and evidence in respect thereof are said to have been contradictory.

29. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before

the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. See **Selle & Another** vs. **Associated Motor Co. Ltd & Others** (1968) E.A. 123.

30. The evidence adduced before the lower court and on the basis of which the TM made the impugned judgment was as follows:

The appellant informed the trial court that on 19th January, 2006 he entered into a sale agreement with the respondent. The agreement was for sale of 3 acres of land out of Nyeri/Naromoru/1009 measuring 15 acres. Upon execution of the agreement, he paid the respondent Kshs. 100,000/=. He took possession of the 3 acres on the day they executed the contract. As at the date of giving his testimony he was still in occupation.

31. The appellant further informed the court that on 5th April, 2006 he paid the defendant Kshs. 200,000/=. The respondent acknowledged receipt of that amount by signing an acknowledgement note which he produced as Pexbt 2.

32. He produced the sale agreement as Pexbt 1, a copy of the title deed for Nyeri/Naromoru/1009 as Pebxt 3 and a copy of the demand letter he issued to the respondent before filing the suit as Pexbt 4.

33. Explaining that he was ready to pay the outstanding balance of Kshs. 175,000/=, he urged the court to direct the defendant to transfer to him the 3 acres he bought and if he fails to transfer the land to him, to pay him Kshs. 2,400, 000/=. He also prayed for the costs of the suit.

34. In cross examination, the appellant informed the court that he paid the respondent Kshs.100,000/= on the date the sale agreement was executed.

35. Concerning payment of the 200,000/=, he stated that he paid the respondent in instalments but the respondent later on acknowleged receipt of that amount before his advocate.

36. The appellant further informed the court that he had placed a restriction on the suit property because the respondent wanted to sell it to someone else.

37. He conceded having told the respondent that he would pay him after the transfer is effected. He also asked the respondent to obtain the consent of the Land Control Board but he failed to obtain it.

38. He admitted that he pleaded that he paid the 200,000/= in instalments and that the respondent later acknowledged receipt of the sum before an advocate. He, however, could not recall the dates he paid the 200,000/= instalments and could not recall the witnesses who were present.

39. On his part, the respondent informed the court that he agreed to sell 3 acres of the suit land to the appellant. The appellant paid him Kshs.100,000/= and no more. He informed the court that the appellant told him to give him title to the 3 acres before he could pay the balance of the purchase price being kshs. 375,000/=. He declined.

40. He contended that the agreement between him and the appellant lapsed after 6 months. He further informed the court that he neither subdivided his land nor sought or obtained consent of the Land Control Board.

41. He denied having signed the acknowledgment note showing that he received kshs. 200,000/=.

42. He further informed the court that in 2008, the appellant sold the portion he had sold to him to three other people who were at the material time cultivating the land. He urged the court to dismiss the appellant's case with costs to him and to order the appellant to compensate him for the use of his land. He further urged the court to evict the appellant from his land.

43. In cross examination, he stated that he did not identify to the appellant the 3 acres he was selling to him and that the appellant did not take possession of the 3 acres. He contended that the appellant occupied part of his land without his consent. He further stated that he was the one to pay the surveyor and explained that he did not pay the surveyor because he had placed a caution in 2009. At the time of sale of the property the restriction was in force.

44. He admitted that he did not inform the appellant about the restriction, which was contrary to clause 5 of the sale agreement.

45. He contended that he did not pay the surveyor because he was not paid the balance of the purchase price.

46. He denied having received any demand letter from the appellant, (Pebxt 4), saying that it could not have been sent in 2011 because the suit was already in court.

47. He further explained that he did not obtain the consent of the Land Control Board because he did not have enough money to make a follow up-the appellant refused to give him money as they had agreed upon.

48. The respondent informed the court that if the appellant had given him the agreed sum, he would have pursued the land case and then subdivided the land so that the appellant could get his 3 acres.

49. Explaining that his land is agricultural, he informed the court that he would not give any land to the appellant. He maintained that the appellant sold part of his land to 3 other people who were not parties to the case.

50. The decision of the lower court was premised on the foregoing evidence.

51. From the memorandum of appeal filed in this appeal and the submissions made in respect thereof I find the issues for the court's determination to be:

(i) Whether the trial court had jurisdiction to make an order for eviction of the appellant once it established that the agreement pursuant to which the appellant occupied the suit property was voided"

(ii) Whether the TM misconstrued the provisions of the Land Control Act, Cap 302 and the regulations made thereunder"

(iii) Whether the TM erred in finding that a sum of Kshs.200,000/= was not paid to the respondent"

(iv) Whether the TM shifted the burden of proof to the appellant"

(v) Whether the TM erred by finding that the existence of an encumbrance was insignificant"

52. With regard to the first question, I agree with the respondent's contention that the order for eviction was incidental to the issue raised in the suit. That being the case, the trial court had the power to order

for eviction of the appellant once it found his occupation of the suit property was unlawful. I find the cases cited in support of the appellant's contention that the court had no jurisdiction to grant an order for eviction to be distinguishable from the circumstances obtaining in this case in that the claim herein was not merely for eviction of the appellant but for determination of the rights of the parties to the suit property. In my view, once the court found that the appellant's right to the suit property was limited to refund of the consideration that passed between the parties, in line with the court's overriding objective under **Section 1A** of the Civil Procedure Rules, the court was justified in entering judgment for the respondent as dictated by the circumstances of the case.

53. If anything, it beats logic for the appellant who had moved the court either for an order of specific performance or refund of the consideration he had paid in respect of the sale agreement to argue that he would still be entitled to occupy the suit property even after having received a refund of his consideration! If the court were to do such a thing, it would be tantamount to telling the appellant that he can eat his cake and still have it, an impossibility!

54. On whether the TM misconstrued the provisions of the Land Control Act, Cap 302 Laws of Kenya and the Regulations made thereunder, I begin by pointing out that what the TM's decision on that issue was. On that issue the TM stated:

"Consent by the Land Control Board

Section (6(1) of the Land Control Act provides as follows:-

"*An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any part thereto".*

It is clear from the above provision that any party to the agreement can apply for consent of the land control board. There is no where where it is indicated that the application should be of necessity be made by the person seeking to sub-divide or sale land. In cases of sub-division as in the present case, the land control regulations provide that the application for consent should be accompanied by a plan in addition to other requirements. The plaintiff (read appellant) was capable of meeting these conditions. It is therefore not correct for the plaintiff to claim that he was waiting for the defendant to make a first move.

The provisions of section 8(1) of the Land Control Act that provides that the High Court may notwithstanding that the period of six months having expired extend that period where it considers that there is sufficient reason to do so, upon such conditions, if any, as it thinks fit. The plaintiff has not made any application seeking to extend time.

From the foregoing, it is apparent that the sale agreement between the plaintiff and defendant has been voided by failure of the parties to seek

the consent of the Land Control Board within six months as prescribed by law.....The transaction herein is void and the defendant cannot claim mesne profits based on the voided transaction. The transaction herein having become void, the plaintiff has no business remaining on the defendant's land".

55. On whether the TM misconstrued the above provisions of the law, whilst I have my own reservations as to whether failure to obtain the Consent of the Land Control Board within the time stipulated in law for

doing so, owing to existence of many Court of Appeal decisions to the effect that failure to obtain consent within the time stipulated in **Section 6(1)** and that either party in a controlled transaction can apply for the consent of the LCB, I find and hold that the TM did not misconstrue the provisions of the Land Control Act and the Rules made thereunder. Instead he made a proper interpretation of the law. In this regard see the case of **David Sironga Ole Tukai v. Francis Arap Muge & 2 Others (2014) eKLR** where the Court of Appeal stated:

"The Land Control Act remains one of the most litigated statutes in Kenya. As a consequence, a consistent line of case law has emerged, both from this Court and the High Court on the interpretation and application of various provisions of that statute. Those authorities cover a span of 47 years from the date of enactment of the Act in 1967 to this day. From the outset, it is clear to us that the decision of the High Court that has precipitated this appeal together with the recent decision of this Court in *MACHARIA MWANGI MAINA & 87 OTHERS V DAVIDSON MWANGI KAGIRI (supra)*, are a departure from the previous consistent decisions of our courts as we shall shortly demonstrate. The real question in this appeal is whether that departure is really based on sound legal foundation."

The court continued **"……The reason behind the above stringent provisions of the Act is to be found, in our view, in the rationale of the land control legislation. Before enactment in its present form, the Land Control Act had existed in one form or another in the colonial period. Writing on a previous version of the same law namely, the *Land Control (Native Lands) Ordinance (No. 28 of 1959),* the eminent Kenyan legal scholar, the late *Prof. HWO Okoth Ogendo* captured the purpose of the legislation thus:**

"The purpose of the Land Control (Native Lands) Ordinance was to protect uninitiated peasants from improvident use of their rights under the new tenure system. Even though individualization was seen as necessary precondition to the planned development of the African areas, it was also appreciated that it could lead to many other problems more difficult to solve than the ones it was intended to eliminate. The Royal Commission had

warned, for example, that in many peasant communities individualization had led to 'the emergence of a chronic state of indebtedness, the continued fragmentation of holdings and the unproductive accumulation and holding of land by a few individuals in circumstances of little income-earning opportunity for those who have parted with the land' ". (See TENANTS OF THE CROWN, Acts Press (1991) page 74).

What is beyond doubt, the paternalistic nuances of its colonial origins notwithstanding, is the fact that the enactment of the Land Control Act in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land.

It is not surprising therefore that in *WAMUKOTA V DONATI [1987] KLR 280* at page 291 *Apaloo,*

***JA* (as he then was) found the public policy considerations behind the Land Control Act unquestionable in the following terms:**

"I believe that sound reasons of public policy motivated the Parliament of Kenya to seek to prevent the alienation of agricultural land to non Kenyans or to Kenyans without the interposition of the judgment of an independent

board. Section 6 of the Act lays down the sanction for violation of the Act in absolute terms. An alienation made in transgression of the Act is ordained to be void for all purposes. Strong words indeed!"

We can quote a few consistent decisions of the courts in Kenya that hitherto have given full effect to the provisions of the Land Control Act. In *LEONARD NJONJO KARIUKI V NJOROGE KARIUKI ALIAS BENSON NJONJO, CA. NO. 26 OF 1979* this Court affirmed that once the land in question was proved to be agricultural land within a controlled area, transactions affecting it were controlled transactions which in law became void in the absence of consent from the land control board. And in *KARURI V GITURA [1981] KLR 247* the Court concluded that the provisions of the Land Control Act are of an imperative nature to the extent that there is no room for the application of any doctrine of equity to soften its provisions.

Speaking for the Court in *KARIUKI V KARIUKI [1983] KLR 225, at p. 227*, *Law, JA* affirmed that when a transaction is stated by the express terms of an Act of Parliament to be *void for all purposes* for want of necessary consent, a party to that transaction cannot be guilty of fraud if he relies on the statute to argue that the transaction is void. His Lordship also added that no general damages are recoverable in respect of a transaction which is void for all purposes for want of consent and that the only remedy open to a party to a transaction which has become void under the Act is recovery of any money or consideration paid in the course of the transaction under section 7 of the Act.

In *SIMIYU V. WATAMBAMALA [1985] KLR 852, Nyarangi, Ag. JA (as he then was)* echoed *KARURI V. GITURA* (supra) at P 856 when he stated:

"Here, the appellants had to obtain consent for the controlled transaction. They did not and so the agreement was void for all purposes including attempting to set up estoppel."

……That was the weight of precedent and authority that was before the trial judge when he determined the suit before him. In our opinion, the learned judge did not give any serious reasons for departing from such consistent decisions, many of which were directly binding on him. All that we see is the taking of refuge in unclearly articulated notions of inequality, injustice, equity and natural justice."

56. Although both the High Court and the Court of Appeal has in many decisions held that the import of failure to obtain the consent required under **Section 6(1)** of the Land Control Act is to render the controlled dealing void, my view of that question, which view owing to the binding nature of decisions of the Court of Appeal must bow to the decisions of the Court of Appeal, is that the failure of obtain the consent of the land control board within the stipulate time merely renders a controlled dealing voidable as opposed to being void. I say this being a reading of the provisions of the said **Section 6(1)** with the provisions of **Section 8** and **9** of the Act makes it improbable that it is the failure to obtain the consent of the land control board within six months of entering into the controlled dealing which makes the dealing void.

57. It is noteworthy that the overly quoted **Section 6(1)** does not provide that the otherwise voided controlled dealing shall become void by dint of the provisions of that section but by dint of the provisions of the Act. In that regard see the said section of the law which at the relevant part provides as follows:

"6(1) Each of the following transactions that is to say-

(a)....

(b)....

Is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act." (Emphasis supplied).

58. Whereas **Section 8(1)** requires that the application for the consent be made in the prescribed form to the relevant land control board within six months of the making of the agrement for the controlled transaction by an party thereto, the proviso under that subsection of the law provides an avenue for breathing live into an otherwise dead transaction. How is that possible"

59. Since **Section 8(1)** recognizes that it is possible to breath life to the otherwise voided transaction, the only reasonable construction that can flow from that **Section 8** of the law giving the High Court power to revive the otherwise voided transaction is that the transaction did not become void but voidable at the lapse of the time provided in **section 6(1).**

60. **Section 9** appears to amplify the above interpretation of the law by *inter alia* providing that:

"(9)(2) where an application for consent for consent of a land control board has been refused, then the agreement for a controlled transaction shall become void-

(a) On the expirely of the time limited for appeal under section 11; or..."

61. The foregoing notwithstanding, having determined that the position held by the Court of Appeal on the matter is binding on this matter, my interpretation of those provisions of the law is just but food for thought in prospective considerations of the import and purport of **Section 6** of the Land Control Act as read with **Section 8** and **9** of the Act by the courts, especially the Court of Appeal.

62. Turning to the third issue framed for the court's determination, to wit whether the TM erred by finding that a sum of Kshs. 200,000/- was not paid to the respondent, the question of payment of that amount of money being a question of fact, it is trite law that an appellate court would not differ with the trial court on a question of fact unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. In this regard see the case **Mwangi v Wambugu, [1984] KLR 453.**

63. Was the finding of the TM based on no evidence or misapprehension of the evidence presented before him to warrant interference by this court" I don't this so. A review of the pleadings filed in this court shows that the respondent had on the onset denied having received the said amount of money and

put the appellant to strict proof of the allegation that he had paid the said amount and that the payment was acknowledged by the defendant before his advocate. The evidence adduced before the trial court shows that despite having been given an opportunity to prove that the defendant indeed received the said amount, the plaintiff failed to do so by failing to call the advocate who allegedly endorsed the document through which the respondent allegedly acknowledged having received the said amount, he was unable to name any person who witnessed payment of the money or any installment in respect thereof. He also gave contradictory evidence concerning payment of that amount of money.

64. As is usually the practice in land transactions, it was expected that the appellant would at least produce some document(s) concerning its alleged payment of the Kshs. 200,000/- to the respondent and even name or avail some people who witnessed the payment of the money.

65. The upshot of the foregoing is that the TM was justified in holding that failure by the plaintiff to call the advocate, Jechoniah Oraro, in whose presence the acknowledgement note relied on by the appellant was signed by the respondent left the court with the evidence of the appellant and the respondent. The TM was also justified in holding that the burden of proving that the respondent received the Kshs. 200,000/= lay with the appellant, which burden he failed to satisfy to the satisfaction of the court.

66. On whether the TM shifted the burden of proof of the question as to whether the signature appearing on the acknowledgement note was forged, whilst it is true, it is the respondent who contended that it was forged, the burden to proof that the document was forged would only have shifted to the respondent if and only if the appellant had discharged the burden of proving that the respondent indeed placed his signature on the document. Since neither the appellant nor the respondent adduced evidence capable of proving the issue raised concerning that acknowledgement note, the matter was left unproven. In this regard see the provisions of **Section 3(4**) of the Evidence Act, Cap 80 Laws of Kenya which provides as follows:

> **“A fact is not proved when it is neither proved nor disproved.”**

67. As to whether the TM erred by finding existence of an encumbrance in respect of the suit property insignificant, upon review of the case urged by the appellant before the lower court, I agree with the TM that the appellant’s case did not turn on the existence or none existence of the encumbrance but on the question as to whether parties to the suit fulfilled their respective obligation under the agreement they had entered into.

68. For the foregoing reasons, I find the appeal to be lacking in merits and dismiss it with costs to the respondent.

69. Orders accordingly.

Dated, signed and delivered at Nyeri this 19th day of December, 2017.

L N WAITHAKA

JUDGE

Coram:

Ms Ndegwa h/b for Mr. Mwangi for the appellants

Ms Maina h/b for Mr. Kebuka Wachira for respondents

Court assistant - Esther