



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL APPEAL NO. 32 OF 2017**

**THOMAS NYAGA NJUKI.....APPELLANT**

**VERSUS**

**ALEXANDER IRERI KARIMI.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. This is an appeal against the judgment of Embu Chief Magistrate delivered on 26/06/2017.
2. The appellant herein filed suit against the respondent seeking orders for injunction against the respondent or his agents from selling, leasing transferring or in any way interfering with L.R. Evurore/Nguthi/139; an order for specific performance compelling the respondent to effect transfer of the said land to him; damages for loss of user from the date of sale; mense profits or in the alternative an order to the executive officer of the court to execute and effect transfer of the land to the appellant.
3. The trial court in dismissing the suit found that though there was an agreement for sale of the suit land between the parties herein, the agreement was not enforceable as it lacked consent of the Land Control Board. The trial court also held that it was immaterial which of the parties was in breach as the Land Control Act only provided that the purchase price paid was recoverable. The trial court proceeded to order that the respondent do refund the deposit of paid purchase price of Kshs. 11,000/= with interest from the date of payment until the date of refund as well as half costs of the suit.
4. Being dissatisfied with the trial court's decision, the appellant filed this appeal based on six grounds that can be summarised as follows;
  - a) *That the learned magistrate erred both in law and fact by delivering judgement against the appellant against a balance of probabilities as well as against the weight of evidence established by the appellant.*
  - b) *That the learned magistrate erred both in law and fact by failing to appreciate that the appellant had paid more than the entire purchase price being Kshs. 38,700/= thus he was entitled to a refund of the same as there was no evidence adduced to support that he had collected Kshs. 19,000/= from the firm of Rugatia & Co. Advocates.*
  - c) *That the learned magistrate erred both in law and fact by holding that the appellant was entitled to half costs of the suit.*
5. The parties filed submissions to dispose of the matter.

**B. Appellant's Submissions**

6. It is submitted that in as much as section 6 (1) of the Land Act provided that such a transaction is void unless consent of the Land Control Board has been given, Section 7 of the same Act proceeds to provide that consideration paid for a transaction which has become void is recoverable as debt and thus the appellant having proved that he paid Kshs. 38,700/= as consideration, he was entitled to recover the whole amount as a debt.

7. It is further submitted that the trial court erred by delivering judgement in favour of the respondent despite the fact that the respondent failed to adduce evidence in support of his case specifically the allegation that the agreed sum for the suit land was Kshs. 300,000/= and the Kshs. 30,000/= was merely a deposit.

8. It is submitted that as the respondent was in breach of the sale agreement for he was liable to settle the consideration already paid and that the appellant was entitled to full costs of the suit.

### **C. Respondent's Submissions**

9. It is submitted that the trial court did not err in terminating the case in favour of the respondent as the parties to the said agreement failed to apply and subsequently obtain the consent of the Land Control Board. On the proposition that the consent of the Land Control Board is vital to the validation of registered land reliance was placed in the cases of Samuel Kirubi Njuki v Margaret Wangari Macharia [2014] eKLR, Karuri Gituru [1981] KLR 247, Koyumkei Multipurpose Co-operative Society Limited & 17 Others v Rael Chepng'etich Koch [2019] eKLR and that of David Sironga Ole Tukai v Francis Arap Muge 2 Others [2014] eKLR.

10. It is further submitted that the trial magistrate was not convinced of the sum paid and thus was right in holding that only Kshs. 11,000/= should be refunded as the appellant had not proved his allegations of monies he had paid. Reliance was placed on the case of Isaac Ngatia Kihagi v Paul Kiaga Githui [2017] eKLR.

11. On the issue of costs, it was submitted that the same are granted at the discretion of the Court as provided in section 27 of the Civil Procedure Act as well as was held in the case of Elias Njue Ireri v Kubu Benson Nderi & 3Others [2019] eKLR.

### **D. Analysis & Determination**

12. It is now established that the role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof, as was restated in Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR, the court restated the duty of an appellate court as follows: -

*“As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....*

*.....From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally”*

13. The evidence of the parties is to the effect that the appellant and the respondent entered into agreement for sale of the suit land for Kshs. 30,000/= evidenced by the agreement for sale dated 5<sup>th</sup> May 1990.

14. The appellant alleged that he made payments to the respondent amounting to Kshs. 38,700/= as consideration however he asserts that the respondent frustrated the completion of the sale by among other things failing to procure the consent of the land control board.

15. The respondent in his defence denying any contractual relationship with the appellant. The respondent further stated that the appellant had since recovered Kshs. 19,000/= from Rugatia & Co. Advocates who seemed to be handling the conveyance.

16. Accordingly, it is my considered view that the issue for determination herein is: -

*a) Whether the learned magistrate erred both in law and fact by dismissing the appellant's case.*

*b) Whether the learned magistrate erred both in law and fact by holding that the appellant was only entitled to half costs of the suit.*

17. That the agreement was subject to consent of the Land Control Board. Both the vendor and the purchaser appreciated that they were dealing with agricultural land and that they required the consent of the Land Control Board. The same is noted in the agreement for sale dated 5<sup>th</sup> May 1990 under the heading "Consideration". **Section 6 of the Land Control Act**, Cap 302, provides as follows: -

*"Transactions affecting agricultural land*

*(1) Each of the following transactions that is to say—*

*(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;*

*(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;*

*(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, 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."*

18. The law speaks for itself that the consent of the Land Control Board is a mandatory requirement for subdivision and sale of agricultural land. The Land Control Act, does provide at Section 8, that the application for consent of the LCB is supposed to be made within 6 months of the agreement. That provision of the law is drawn as follows: -

*"Application for consent*

*8(1) 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 party thereto:*

*Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit."*

19. The agreement herein was made on 5<sup>th</sup> May 1990, and it follows that within 6 months of this period that is by 5<sup>th</sup> October 1990 an application needed to have been made but the same was not made. There is provision for extension of this period of time but I am not persuaded that the circumstances of this case should allow me to exercise my discretion to extend the time. I do not have any application before me for extension of the time, so that the other party may respond to such request.

20. The purchaser herein is not a stranger to the requirements of the Land Control Act and he was indeed aware of the requirement for consent and that is why the same was inserted in the sale agreement. The Land Control Act, is indeed very strict on the issue of consent, such that it provides for an offence for any person taking possession before the said consent is issued. This is provided at **Section 22 of the Act** which states as follows: -

*"Section 22: Acts in furtherance of void transaction*

*Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by [section 6](#) of this Act, and*

any person—

(a) pays or receives any money; or

(b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.”

21. In the cases of *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (2014) eKLR* and *Willy Kimutai Kitilit vs Michael Kibet (2018) eKLR* the Court of Appeal opted to allow a contract of sale of land to be performed despite there not being any consent from the LCB. In contrast there is the case of *David Sironga ole Tukai (supra)*, where a different bench of the court of appeal arrived at a contrary decision and asserted that consent of the LCB must be granted as required by the Land Control Act.

22. I opt to follow the decision of *David Sironga Ole Tukai*. I think there is a purpose to the Land Control Act. If one looks at Section 9 of the Act for example, the LCB can allow or decline to give consent, based on factors such as the economic development of the land concerned or on the maintenance or improvement of standards of good husbandry.

23. It is not disputed that the sale agreement herein was frustrated and that no consent was obtained from the Land Control Board Siakago. The only remedy left for the appellant is that provided at Section 7 of the Land Control Board, which provides as follows:

“Section 7: Recovery of consideration

*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.”*

24. I have already set out the provisions of Section 22 above, and I am of the view that the same do not come to the aid of the appellant. What the appellant is entitled to is a refund of what they have paid under the contract. The appellant alleges that he paid a cumulative amount of Kshs. 38,700/= as consideration for the suit land.

25. In support of his case the appellant filed an acknowledgement of Kshs. 500 dated 23/11/1989 and a receipt of Kshs. 19,000/= from Rugatia & Co. Advocates. The respondent filed a witness statement in which he stated that the appellant gave him Kshs. 11,000/=.

26. There are two receipts relied on by the appellant dated 2/11/1998 and 4/11/1999 for Kshs. 3,000/= and Kshs. 2,700/= respectively. The two receipts are from Rugatia & Co. Advocates to the appellant herein and they clearly indicate that they are for payment of fees in RMCC 91 of 1987 and SPMCC 91 of 1987 respectively.

27. Accordingly, the only monies paid by the appellant towards the consideration for the suit land herein from the evidence adduced is a total of Kshs. 30,000 being the agreed consideration for the sale of the land. The respondent stated that Kshs. 19,000/= paid as consideration for the transaction herein was to be paid to one Kirai Njeri whom he owed money however the same was not paid as the aforementioned Kirai Njeri subsequently sued the respondent thus alerting the respondent to the fact that the appellant had gone to the advocate and asked for a refund of Kshs. 19,000/=.

28. Consequently, it is my considered view that the only monies owed to the appellant were Kshs. 11,000/= paid as part of consideration and that the trial court did not err in so finding.

29. Regarding the issues of costs, Section 27 of the Civil Procedure Act provides as follows: -

“27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in

*force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;*

*provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”*

**30.** In Republic v Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application No. 6 of 2014, the court held as follows: -

*“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”*

**31.** I find useful guidance in the following passage from the **Halsbury’s Laws of England**; <sup>[4]</sup>

*“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).*

**32.** In the instant suit before the trial court, the appellant was partly successful in his claim. The trial court awarded him half the costs. The court exercised its discretion judiciously and I find no reason to interfere with that decision.

**33.** The upshot of the above is that I find that this appeal lacks merit and dismiss it with costs.

**34.** It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 21<sup>ST</sup> DAY OF JANUARY, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Guantai for Respondents**

**Ms. Muriuki for Muriuki Mureithi for Applicants**



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