



IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 70 OF 2018

LUCY WATIRI NDUATI.....APPELLANT

VERSUS

GEORGE KAMAU.....RESPONDENT

(Appeal from the judgment of Hon. G.H. Oduor (Mr.) SPM in Limuru Senior Principal Magistrate's Court Civil Case No. 154 of 2010 delivered on 27th August, 2014)

JUDGMENT

1. Before the trial court, Limuru Senior Principal Magistrate's Court, **GEORGE KAMAU, (George)** the respondent in this appeal, sued **LUCY WATIRI NDUATI (Lucy)** the appellant in this appeal. George sought judgment against Lucy for Kshs.350,000/= plus interest and costs. By her amended defence in the trial court, Lucy denied indebtedness to George and also filed a counter-claim seeking order for specific performance and in alternative damages for breach of contract.

2. The trial court by its judgment dated 27th August, 2014 entered judgment in favour of George as prayed in the plaint. Lucy's counter-claim was dismissed. Lucy was aggrieved by that judgment and therefore filed this appeal.

3. This is the first appellant court. How this appeal should be handled by this Court was set out in the case of **KENYA PORTS AUTHORITY VS. KUSTON (KENYA) LIMITED (2009) 2EA 212**. The Court of Appeal stated *inter alia* that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

4. It is admitted by both parties that they entered into a written contract dated 20th February, 2010. By that agreement George agreed to buy and Lucy agreed to sell property **LIMURU/KAMIRITHU/2955** for Kshs.460,000/-. George paid Kshs.350,000/= towards the purchase price on executing the afore-stated agreement. There remained a balance of Kshs.110,000/=. The parties agreement provided that, that balance of purchase price was to be paid by George “after or within a period of six weeks” from 20th February, 2010.

5. George's case is that after making the initial payment he was unable to pay the balance of the purchase price and he communicated his inability to make that payment to Lucy. That on being informed Lucy undertook to refund George the initial payment. However, George pleaded that she did not make that refund. That failure prompted George to make a demand, through his advocate. Lucy's advocate by letter dated 11th August, 2010 confirmed that Lucy was willing to make the refund. George filed the case against Lucy because she failed to make the refund, and this was despite the fact the contract did not have forfeiture clause. Further it is George's case that specific performance cannot be ordered because Lucy subsequently sold the subject property to someone by the name of Simon Mwangi Mwai.

6. Lucy's case is that George was supposed to pay the balance of the purchase price within six weeks of the date of the agreement but that George failed refused and neglected to pay that amount as required. Lucy therefore alleged that George breached the contract which breach resulted in her suffering loss and damages because she was prevented from selling the subject property to other interested buyers.

7. Further that the alleged breach by George also prevented her from buying another parcel of land.

8. The trial court in its considered judgment found that the parties' agreement did not have a forfeiture clause. The court therefore stated that it was not the parties' intention for there to be forfeiture of the deposit paid by George. The trial court further found that the parties' agreement was “discharged by express agreement of the parties.” Further the trial court found that Lucy had failed to prove her counter claim.

ANALYSIS

9. Parties are indeed bound by the terms of their agreement. A case on that point is SAMUEL NGIGE KIARIE VS. NJOWAMU CONSTRUCTION COMPANY LIMITED & ANOTHER (2019) eKLR, thus:-

“This Court is persuaded by the finding by this Court in Malindi in SUN SAND DUNES LIMITED V RAIYA CONSTRUCTION LIMITED [2018] eKLR:-

“The object of construction of terms of a contract is to ascertain its meaning or in other words, the common intention of the parties thereto. Such construction must be objective, that is, the question is not what one or the other parties meant or understood by the words used. Rather, what a reasonable person in the position of the parties would have understood the words to mean.”

It is trite law that parties to a contract are bound by the terms and conditions stipulated therein. That is the case in the instant appeal since the facts confirm that the parties acknowledged having entered into the agreement for the sale of the suit land. None complained of fraud or coercion and they are accordingly bound by its terms. This what this Court had in mind in NATIONAL BANK OF KENYA V PIPEPLASTIC SAMKOLIT (K) LTD & ANOTHER [2001] eKLR thus:-

“The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

10. The parties' written agreement has no ambiguity. It is clear on what the parties intended. George agreed to buy and Lucy agreed to sell the subject property for Kshs.460,000/=. Kshs.350,000/= was paid by George and the agreement confirmed that George was required to pay Lucy the balance of the purchase price of Kshs.110,000/= within six weeks from 20th February, 2010. It is clear that the intention of the parties was that the title documents of the subject property were to be held by the parties' witness to the agreement until George paid the remaining balance of the purchase price. George failed to pay the balance of the purchase price as agreed.

11. George's evidence was that he informed Lucy of his financial inability to pay the balance of the purchase price and Lucy confirmed to him that she would refund him the deposit of Kshs.350,000/= paid by him. Although Lucy denied having received that notification from George about his inability to pay the balance of the purchase price, that denial is contradicted by Lucy's advocate letter dated 22nd March, 2010. That letter was in response to George's advocate's letter dated 16th March, 2010, a demand letter written before court action was commenced. In that demand letter George's advocate, *Soita & Saende Advocates* wrote to Lucy as follows:-

“Dear Madam,

RE: REFUND OF KSHS.350,000/= FOR FAILED SALE TRANSACTION FOR PURCHASE OF LIMURU/KAMIRITHU/2955

We act for George Kamau who has instructed us to address you as follows:-

That our client entered into an agreement for sale where he was to purchase the above referenced plot from you. That our client paid you Kshs.350,000/= which you duly acknowledged receiving. That our client has since pulled out of the transaction and you have promised to refund the money that he had paid.

These particulars are well within your knowledge.

Our instructions are to demand as we hereby do that you refund our client the said Kshs.350,000/=.

TAKE NOTICE that if we do not receive the said Kshs.350,000/= within the next SEVENTEEN (17) DAYS from the date hereof, we have instructions to institute legal proceedings against you at your own risk as to costs and their incidentals.”

12. Lucy's advocate responded to the above demand by letter dated 22nd March, 2010. In that letter Lucy's advocate stated that George had “not formally notified” Lucy “in writing of his intention to repudiate the contract.” The advocate went on, in that letter to state thus:-

“That in the event that your client has fully decided not to go on with the transaction we shall be grateful to receive a formal notification to that effect.

That in the meantime, we let you know that our client (Lucy) was selling her parcel of land to enable her meet certain urgent financial obligations and any moneys paid to her went directly to meet the same.

That in light of the above our client (Lucy) is not in a position to refund the moneys at short notice, should the parties agree to such refund, and (sic) may require some time to raise the moneys.”

13. As stated before George was required under the agreement to pay the balance of the purchase price within six weeks of the date of the agreement, that is 20th February, 2010.

14. Despite George failing to meet that deadline Lucy did not call upon George to do so, nor did she give him notice to make good of that payment. Lucy, from the above reproduced correspondence, undoubtedly waived her right to require George meet that condition of the agreement to pay the balance. Having waived that right she cannot be heard to plead, as she did in her counterclaim that George breached the agreement in failing to make payment of the balance of the purchase price. Lucy did not at any one time make demand for George to make that payment. Waiver was discussed by the Court of Appeal in the case of 748 AIR SERVICES LIMITED VS. THEURI MUNYI (2017) eKLR thus:-

“Waiver is an intentional relinquishment or abandonment of a known right or privilege. In the case of BANNING VS WRIGHT (1972) 2 All ER 987, at page 998 the House of Lords stated thus:-

“The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct”.

Closer home in the case of SITA STEEL ROLLING MILLS LTD VS JUBILEE INSURANCE COMPANY LTD [2007] eKLR the Court stated thus:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”

This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the SERAH NJERI MWOBI case (supra) and we adopt its analysis in respect of waiver and estoppel by conduct, thus: -

“The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See SEASCAPES LIMITED VS DEVELOPMENT FINANCE COMPANY OF KENYA LIMITED, [2009] eKLR.”

15. Not only did Lucy waive her right to demand that George does pay the balance of the purchase price but through her advocate she offered to refund George the deposit. This offer was in Lucy's advocate's letter dated 11th August, 2010, as follows:-

“Dear Sirs,

RE: P.M.C.C. NO. 154 OF 2010 LIMURU

GEORGE KAMAU VS. LUCY WATIRI NDUATI

The above matter refers.

This is to let you know that we have received instructions from our client to the effect that she is now in position to refund the deposit to your client.

Kindly confirm that the above is agreeable to you (sic) client and that we may draw an appropriate consent to be signed and filed in court.

Your quick response will be highly appreciated.”

16. The totality of Lucy's offer in her advocate's letter is that she had rescinded the contract. That being so, and because the parties' contract did not have a forfeiture clause Lucy was then bound to refund George the deposit paid to her. In this regard I refer to a Canadian case, namely B.C. DEVELOPMENT CORPORATION VS. NAB HLDG. LTD., 1986 CanLII 977 (BC CA) where the court said:-

“Dimensional Invt., Mr. Justice Ritchie referred to the reasons of the majority of the English Court of Appeal in STOCKLOSER V. JOHNSON, [1954] 1 Q.B. 476, [1954] 2 W.L.R. 439, [1954] 1 All E.R. 630 (Denning and Somervell L.JJ.). I propose to adopt this passage from the reasons of Lord Justice Denning, at pp. 489-90, which was approved by Mr. Justice McFarlane, for this Court, in HUGHES V. LUKUVKA (1970), 1970 CanLII 800(BC CA), 75 W.W.R. 464, 14 D.L.R. (3d) 110 at 112, as expressing the law that should be applied in British Columbia:-

“It seems to me that the cases show the law to be this:-

When there is no forfeiture clause. If money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money; but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: see PALMER V. TEMPLE; MAYSON V. CLOUET; DIES V. BRITISH & INTERNATIONAL CO.”

17. The Canadian Court in that case **B.C. DEV. CORP** (supra) also stated thus:-

“In PRIMEAU V. MEAGHER, 1923 CanLII 117 (SK CA), 17 Sask. L.R. 610, [1923] 3 W.W.R. 1308, [1923] 4 D.L.R. 1096, Mr. Justice Lamont, this time for the Saskatchewan Court of Appeal, said at pp. 1100-1101:

Some confusion, no doubt, has arisen through the use of the term “rescission” in the various cases to denote a variety of meanings. To “rescind” primarily means to annul, abrogate, set aside or extinguish. The logical consequences of true rescission are, the returning by each party of the benefits he has received under the contract. There must be restitution in integrum.”

18. It follows that Lucy having rescinded the contract and having waived her right to demand payment of the balance of the purchase price the trial court rightly entered judgment for George for the refund of the deposit made by him. Lucy did not prove her counterclaim and the trial court was right to have dismissed it.

DISPOSITION

19. For reasons set out above the appeal is without merit and it is dismissed with costs.

JUDGMENT DATED and DELIVERED at KIAMBU this 29th day of APRIL, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant.....Kevin

For the Appellant.....N/A

For the Respondent.....Mr. Wanda

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE