Iluluwe Development Limited v Omondi (Environment and Land Appeal E071 of 2021) [2023] KEELC 18974 (KLR) (18 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18974 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E071 OF 2021

JA MOGENI, J

JULY 18, 2023

BETWEEN

ILULUWE DEVELOPMENT LIMITED ..... APPELLANT

AND

JUDITH ACHIENG OMONDI ..... RESPONDENT

(An Appeal from the judgment of the Chief Magistrate's Court at Nairobi (Hon.E. Wanjala[Miss] dated 13th August 2021 in CMCC No. 2159 of 2019)

JUDGMENT

1. The genesis of the dispute leading to this appeal is an agreement for sale between the Appellant herein and the Respondent. The Appellant seeks the following reliefs from the appeal: -

    a. The Appeal be allowed as a consequence whereof the Judgment of the Chief Magistrate's Court in CMCC No. 2159 of 2019 dated 13th August 2021, be set aside and be substituted with an Order dismissing the suit with costs.

    b. The costs of the Appeal be awarded to the Appellant

2. According to the Appellant, sometime in 2011 Respondent accepted an offer and agreed to purchase the Plot No. A080 for Kshs 1,620,000 and Plot No. A148 for Kshs 1,800,000 which was the appellant's conceptualized Golf Estate Development on Land Reference 13208/2 in Mavoko Municipality in 2011. The Respondent on or about 11/01/2012 remitted a sum of Kshs 1,620,000 for plot No. A 080 which was 100% of the purchase price and Kshs 540,000 which was Kshs 30% of the price for Plot No. A148.

3. The Appellant wrote to the Respondent on 8/08/2016 informing her that the Golf Development Project would not be proceeding and they undertook to facilitate a full refund of the Respondent's

initial investment. Since the Respondent did not want to convert her initial investment into the new project which she considered to be more expensive.

4. The Respondent on 3/11/2016 issued a demand notice to for the sum of Kshs 2160,000 together with interest and damages for loss of bargain as the value of her investment had appreciated from January 2012 to 8/08/2016 when the Appellant rebutted the development.

5. The appellant admitted owing the Respondent but only refunded Kshs 2,160,000 but never covered the loss of bargain that the respondent claims to be the capital appreciation of the property which according to the valuation she did stood at Kshs 2,640,000 as at August 2016. The valuation done by Realty Valuers put the value of the property at Ksh 7,600,000 broken down as Plot No. A080 valued at Kshs 3,600,000 and Plot A148 valued at Kshs 4,000,000.

6. The Magistrate Ms E. Wanjala entered judgment for the respondent against the Appellant for loss of bargain for Plot A080 for a sum of Kshs 1,980,000 and also awarded the cost of the valuation fees putting the total to Kshs 2,043,800 plus interest at court rates from the date of the filing of the suit till payment in full.

7. The Appellant was dissatisfied with the decision filed this appeal against the whole decision of the trial court. In the Memorandum of Appeal, the Appellant stated that learned magistrate erred in law and fact by finding that notwithstanding the refund of the deposit paid, the Respondent was entitled to loss of bargain with regards to plot A080.

8. It is the appellant's contention that there exists no valid sale agreement between the parties with respect to the disposition of the interest in the suit property since the respondent declined the sign the sale contract. In the appellant's submissions they referred to section 3 of the *Law of Contract* underscoring the fact that it is a requirement that any contract for disposition of an interest in land must be in writing and therefore the learned magistrate should have dismissed the respondent's claim.

9. Further that the Respondent was not entitled to any reliefs since the agreement made was an oral one with no consequences. That the claim of loss is unmerited and the interest awarded is also unmerited so it was the Appellant's prayer that the court overturns the erroneous finding of the trial court.

10. The Respondent despite being served with the Appeal on 26/09/2022 did not file any response to the Appeal. The parties were directed to file their submissions on 27/03/2023 and the date of 18/07/2023 reserved for the judgment. As at the date of concluding this judgment the respondent had not filed any submissions. In essence therefore the Appeal is unopposed. But be as it may this court has an obligation to scrutinize all the cases filed and make a finding based on law whether the suit is opposed or not.

11. I have considered the entire record and judgment of the trial court, the grounds of appeal, and the appellant's submissions. It is noted that in the impugned judgment, the trial magistrate made a finding that she was satisfied on a balance of probabilities that the Respondent (Plaintiff) had paid for the two plots A080 and A148 and is entitled to the claim made for loss of bargain for plot A080.

12. The sole issue for determination is whether the appeal is merited.

13. As a first appellate Court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the Court in a first appeal is as stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123, and that is to re-evaluate and re-assess the entire evidence with a view to arriving at proper inferences of fact and independent conclusions. This position was also stated in the cases of *Abok James Odera t/a AJ Odera*

& Associates v John Patrick Machira t/a Machira & company Advocates [2013] eKLR; and *iMwana Sokoni v Kenya Bus Services Limited* [1985].

14. The guiding parameters for this Court are therefore that on first appeal; the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; secondly, in reconsidering and re-evaluating the evidence, the first appellate Court must bear in mind and give due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses testify before her; and lastly it is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.

15. The case of the Appellant was that because the Respondent refused to sign the letter of offer then there was no valid contract that the Respondent could rely on because there was no binding and enforceable contract pursuant to which they were liable to. Therefore, it is their submission that the trial magistrate in her judgment was in err.

16. Land sale contracts are subject to the formal statutory requirements set out in Section 3(3) of the *Law of Contract Act* which provides as follows: -

> " 3
>
> (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
>
> (a) the contract upon which the suit is founded—
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
>
> Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust."

17. My reading and interpretation of the respondent's claim which was awarded by the trial magistrate is what in common law is referred to as a form of general damages called purchaser's claim for loss of bargain. The Right Honourable *Sir Robert Megarry and Sir William Wade in their work "The Law of Real Property, 8th Edition, Page 694* have the following exposition on this kind of claim;

a) The General Rule.

An action for damages is the primary remedy under the law of contract, though it is less important in relation to contracts for the sale of land than specific performance. The measure of damages is the loss to the claimant from the non-performance of the contract. A vendor, for example can recover the difference between the price agreed to be paid and the net value of the property left on his hands, giving credit for any deposit paid by the purchaser. A purchaser can claim for the loss of a bargain, i.e the amount by which the net value of the property when conveyed to him at the due date would have exceeded the purchase price. But the court may

order such damages to be assessed at some other date where justice so requires; this may be the date of the hearing if the property has risen in value meanwhile. Where the purchaser claims damages for his loss of bargain he cannot in addition recover his costs, e.g. for investigation of title. If he is to be placed in the position in which he would have been had the contract been performed, he would necessarily have incurred those costs.

Damages may be assessed on a "costs of cure" basis where the claimant can establish that his loss consists of or includes the cost of doing work that in breach of contract the defendant failed to do. Thus where a vendor of land fails to carry out work that he contracted to do to the property prior to sale, the claimant may recover the cost of that work if either he does it himself or he can show that he intends to do so. However, the court may refuse to award damages assessed on this basis if to do so would be unreasonable: the question in every case is to determine the loss that the claimant has actually suffered.

18. Damages in the nature of loss of bargain are general damages to be assessed by the court at the time of rendering a determination. In the present suit, the trial court was presented with uncontroverted evidence by a registered and practicing land valuer showing that the suit property value had enhanced for the five years or thereabout that the project was not executed. This information was not controverted by the appellant although there was indeed no contract to base the valuation on.

19. The appellant has argued in the 3rd ground of appeal that the original bargain between the parties was rendered obsolete, overtaken by events and impossible to complete and or frustrated by law. I note that at the same time the appellant in a letter dated 22/02/2017 seeking compensation for loss of bargain and interest from their advocates Oraro & Company Limited written to the advocate for the respondent Njoroge Regeru & Co Advocates stated "..our client will only engage yours upon receipt of a Valuation report that is in line with the situation on the ground and which reflects the current value of land around Kinanie area of Machakos County"

20. This valuation report dated 19/07/2017 by Realty Valuers East Africa Limited was produced and shared. It advised the respondent on the market value and what they are entitled to as compensation for the loss of bargain and interest. Prior to the production of the report the appellant had refunded vide cheque numbers 209896, 209897 and 209898 for Kshs 720,000 each being what they termed in the letter dated 18/11/2016 "...a refund of your client's investment". In my understanding this was a refund or monies paid by the respondent and since there was no contractual obligation on the part of the appellant the referenced amounts hereinabove to had to be refunded since the money was not covered in any contract.

21. The key issue in this appeal revolves around the non-existent contract which was addressed in various letters between the appellant and the respondent leading one to conclude that there is an anticipated formal contract that was to crystalize but was frustrated by the failure of the Iluluwe development to grow into the anticipated development project. This issue was the focal issue of consideration by the Court of Appeal [Gicheru JA, Kwach JA, and Muli JA] in *East African Fine Spinners Limited (in receivership) & 3 others v Bedi Investments Limited* [1994] eKLR. Expressing himself on this question, Gicheru JA adopted the following words of *Lord Westbury LC in Chinnock v The Marchioness of Ely* 4 DE G J&S 638 at 646:

> "As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this court requires, to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as

to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

22. Gicheru JA (as he then was) further adopted the following words of Jessel, MR in *Winn v Bull* [1877]7 Ch D 29 at pages 31 and 32:

> " Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail."

23. Lastly, Gicheru JA adopted the following words of Sir Raymond Evershed MR in Bennet, *Walden & Co v Wood* [1950] 2 All ER 134 at page 137:

> " Parties contracting in particular words must be assumed to intend the ordinary meaning of those words. Applying the proper test of construction, viz, what is the ordinary, straightforward, meaning of the language, it seems to me reasonably clear that the answer here is that by "offer" is meant a firm offer. In the ordinary sense of the term in business matters an offer is something which by acceptance creates a bargain. An offer subject to contract lacks that essential characteristic, for its acceptance does not create a contract."

24. On his part, Kwach JA rendered himself on this question in the following words:

> " The sale was by its express terms subject to contract and until that contract had been executed there was no contract between the parties which could be enforced by an order of specific performance or mandatory injunction."

25. Kwach JA adopted the following principle outlined by Banker LJ in *Keppel v Wheeler & another* [1927] 1 KB 577:

> " I pause here to state plainly what is now well established that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged."

26. It is therefore clear that the anticipated formal contract by way of an agreement for sale never crystalized because the project was frustrated and the contract was therefore now signed. The prevailing jurisprudence on the tenor of a letter of offer is that there is no binding contract in the absence of the anticipated formal contract by way of agreement for sale. The prevailing law is that parties to the letter of offer remained in negotiations pending settlement of terms and execution of the formal contract by way of an agreement for sale.

27. Besides, the letter of offer did not have any framework on the mode of completion. The appellant would, in the circumstances, not be said to have been in breach of contract in the sense of failure to perform the contract in the absence of any agreed framework on completion. It is only upon failure to perform in terms of the agreed and clearly stipulated completion framework that the appellant would be deemed to be in breach and would be liable to pay for loss of bargain.

28. My conclusion and observation is that there was no formal contract existing between the parties and the finding of the trial court was in err with regard to the loss of bargain and interest due to the respondent since it is crystal clear that there was not contract in existence yet this was a sale of an interest in land.

Disposal Orders

29. Consequently, my finding on the single issue in this appeal is that the trial magistrate erred in her finding that the Kshs was entitled to loss of bargain for plot A080 for a sum of Kshs 1,980,000 since there was no contract between the parties I also find that there being no contract I see no justification why the trial magistrate made a finding for refund of the valuation fees. I therefore set aside the judgment of the trial magistrate and allow the appeal as prayed.

30. Costs of the appeal are awarded to the appellant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY 2023.

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MOGENI J

JUDGE

In the virtual presence of:-

Ms Mutua for the Appellant

Ms Amuka for the Respondent

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE