REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 613 OF 2017

CAROL ABURI.....APPELLANT

VERSUS

ECHUKA COUNTRY ESTATES LIMITED.....1ST RESPONDENT

THUO CEGE.....2ND RESPONDENT

JULIE MUTHONI CEGE.....3RD RESPONDENT

HOUSING FINANCE GROUP.....4TH RESPONDENT

(Being an appeal from the Ruling delivered on 4th November, 2016 by Hon. L. Wachira (Mrs.) (Senior Resident Magistrate) at Chief Magistrate Court's Milimani Commercial Courts in CMCC No. 4370 of 2016)

JUDGMENT

1. The Appellant, Carol Aburi, instituted this suit in the lower court by way of a plaint dated 4th July, 2016 seeking the following orders:-

a. Special damages of Kshs.8,725,000/=.

b. General damages.

c. Cost of the suit.

d. Interest on (a) and (b) above at commercial rate until payment in full.

e. Any other relief the court deems fit.

2. The 1st Respondent, Echuka Country Estates Ltd, was sued as the developer of a residential estate comprising of 6.315 hectares of land on parcel No.LR 155/57 Tigoni (hereinafter suit property). The 2nd Respondent, Thuo Cege and the 3rd Respondent Julie Muthoni Cege were sued as the Directors of the 1st Respondent Company. The 4th Respondent, Housing Finance Group, was sued as the chargee of the suit property and as the institution where the Appellant deposited part of the purchaser price.

3. It was further pleaded that the Appellant paid the sum of Ksh.8,725,000/= towards the purchase of house No. 1.5 with Ksh.5,300,000/= of the same being deposited with the 4th Respondent. The Appellant's contention is that there was breach of contract by the 1st Defendant through it's developers and that the project was not completed and house handed over to her in February, 2015 as per the agreement. That the Appellant consequently rescinded the contract and demanded a refund of the Ksh.8,725,000/= but that no refund was forthcoming.

4. Simultaneously with the filing of the plaint, the Appellant filed the application dated 4th July, 2016 seeking the following orders:

1. Spent.

2. That the 1st, 2nd, 3rd and 4th Defendants/Respondents be restrained from using and or transferring the monies paid to it by Plaintiff/Applicant

3. That the 1st , 2nd 3rd and 4th Defendants/Respondents deposit Ksh.8,725,000 paid by the Plaintiff/Applicant in court plus interest accrued since the money was transferred to them within 14 days from date of issuance of the order herein.

4. That in the alternative, the 1st , 2nd 3rd and 4th Defendants/ Respondents deposit the money in an interest earning account within 14 days from date of issuance of the order in the name of the advocate for the parties pending the hearing and determination of the suit

5. That cost of the application be provided for.

5. The application was premised on the grounds stated in it's body and the affidavit in support sworn by the Appellant, Carol Aburi. It is stated that the Appellant entered into a sale agreement for the purchase of a residential house. That the Appellant paid a total of Ksh.8,725,000/= to the 1st , 2nd and 3rd Respondents. That the 4th Respondent had a charge over the property and Ksh.5,300,000/= that was paid by the Appellant was transferred by the 1st, 2nd and 3rd Respondents to the 4th Respondent. That the 1st Respondent was in breach of the agreement and the Appellant rescinded the same but the Respondents have failed to refund the Appellant's money.

6. In a replying affidavit filed by the 1st, 2nd and 3rd Respondents in opposition to the application, it is stated that the 1st Respondent was the owner of the suit property. That the 1st Respondent and the Appellant entered into an agreement for the purchase of one house out of the 26 houses being constructed. That the Appellant paid the sum of Ksh.8,500,000/= towards the purchase of the house and also paid Ksh.225,000/= legal fees to the vendor's advocate. That the said deposits were made in accordance with the terms of the agreement and were to be utilized in financing the construction costs of the entire estate.

7. It is further averred that as per the terms of the agreement, the completion date was after the obtaining of the Architect's certificate of completion and certificate of occupation. It is further stated that the project has commenced and that the agreement did not stipulate that time was of essence. That the Appellant has rescinded the contract and rejected the offer of refund of the purchase price subject to the 1st Respondent finding another buyer.

8. The 4th Respondent in it's replying affidavit stated that the suit property was charged by the 1st Respondent to the 4th Respondent for the sum of Ksh.76,000,000/=. That the 4th Respondent is a stranger to the sale agreement entered in respect of the house in question. That the said agreement was between the Appellant and the 1st, 2nd and 3rd Respondents and there is no privity of contract between the Appellant and the 4th Respondent. That the 4th Respondent has not infringed any of the Appellant's legal rights and therefore the Appellant has no reasonable cause of action against the 4th Respondent. That the money received by the 4th Respondent from the 1st Respondent is for the satisfaction of the loan facility.

9. The application was dismissed by the trial magistrate and thereby triggered this Appeal. The grounds of Appeal are as follows:

1. That the magistrate erred in fact and law by not applying order 40 rule 1(b) and 11 of the Civil procedure Rules 2010 correctly.

2. That the magistrate erred in fact and law by not taking into account that the contract had been rescinded.

3. That the magistrate erred in fact and law by misinterpreting the agreement for sale and misapplying the clauses of the contract.

4. That the magistrate erred in fact and law by not taking into account that the clauses of the agreement were no longer applicable to the parties.

5. That the magistrate erred in fact not taking into account that the Respondents and especially the 4th Respondent had admitted having received monies from the Appellant despite there being no contract between the Appellant and the 4th Respondent.

6. That the magistrate erred in fact and law by failing to appreciate that the Appellant contracted to purchase a unit within the development but not to finance the development.

7. That the magistrate erred in fact and law by failing to apprehend that the 4th Respondent could only keep or hold funds for persons with units in the development while it is clear that the Appellant did not have one since it was not constructed.

8. That the magistrate erred in fact and law by not apprehending that precisely because there was no contract between the Appellant and the 4th Respondent is the reason why the 4th Respondent should be ordered to deliver the monies belonging to the Appellant in court.

10. The Appeal was canvassed by way of written submissions which were highlighted before me. The suit being at an interlocutory stage,

this court will only delve into matters that relate to the disposition of the application as hand.

11. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated Motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".**

12.The application was brought under Order 40 rule 11 Civil Procedure Rules which stipules as follows:

> **"Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the court may order the same to be deposited in court or delivered to such last named party, with or without security, subject to the further direction of the court."**

13. As between the Appellant and 1st, 2nd and 3rd Respondents, it is common ground that an agreement was entered into between the Appellant and the 1st Respondent and that the Appellant has made some of the payments as per the agreement. It is also not in dispute that the house in question has not been handed over to the Appellant and that the Appellant has since rescinded the contract. The money paid by the Appellant has not yet been refunded. The other matters raised are in dispute and can only be determined with finality after the full hearing of the case.

14. The final reliefs sought by the Appellant in the plaint are special damages, general damages, costs and interest. The application for orders of injunction is therefore not anchored in the plaint. From the plaint on record the dispute that the court will eventually determine is a case for damages. Parties are bound by their pleadings. The Court of Appeal affirmed this position in the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014]** which cited with approval the decision of the Supreme Court of Nigeria in **Adtoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002** where Adereji JSC expressed himself thus on the importance and place of pleadings:-

> **"...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...**
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> **...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."**

15. Order 40 rule 11 which the Appellant has invoked provides for the deposit of money when a party has admitted that the holds such money as a trustee or that the money belongs or is due to another party. In the case at hand, the position of the 1st, 2nd and 3rd Respondents is that the payments made were to be used in financing the construction costs of the entire estate. The 4th Respondent had denied any privity of contract with the Appellant and stated that any money deposited by the Appellant was for the satisfaction of the Loan facility. P*rima facie,* there is therefore no admission of any matters as envisaged under Order 40 rule 11 Civil Procedure Rules. The suit requires to go into a full hearing to be determined on merits.

16. As stated by the Court of Appeal in the case of **Eswari Electrical PVT Ltd v Empower Installation Ltd & another [2017] eKLR**:

> **"in conclusion, we stress that the power to order a party to furnish security is to be exercised with great caution because at the time it is being exercised the dispute has not been determined one way or the other on merit."**

17. With the foregoing, I find no merits in the Appeal and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 29th day of May, 2020

B. THURANIRA JADEN

JUDGE