



REPUBLIC OF KENYA



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**Ngobe v Kamau (Environment and Land Appeal 33 of 2019)
[2023] KEELC 21077 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21077 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 33 OF 2019
OA ANGOTE, J
OCTOBER 26, 2023**

BETWEEN

PATRICK GICHUHI NGOBE APPELLANT

AND

DAVID NDUNG’U KAMAU RESPONDENT

(Being an Appeal against the Judgement and/or Decree of Honourable E. Wanjala-Senior Resident Magistrate delivered on the 28th March, 2019 in Milimani CMCC 1411 of 2018)

JUDGMENT

Background

1. Vide an amended Complaint dated 11th December, 2017, the Appellant(Plaintiff) sought as against the Respondent(Defendant) orders of specific performance compelling the Respondent to complete the Sale Agreement dated 17th January, 2014 and transfer to him a ¼ portion of all that land known as Dagoretti/Kangemi/126(hereinafter the suit property).
2. In the alternative, the Appellant sought for the refund of Kshs 600,000 paid to Ms Kang’ethe Waitere & Co Advocates as partial payment for the property, Kshs 160,000 being legal fees paid to Ms Achola Jaoko & Company Advocates, Kshs 20,000 paid to Kang’ethe Waitere and Co Advocates as legal fees on behalf of the Respondent and interest on the foregoing sums at 18% per annum pursuant to the [*LSK Conditions of Sale \(1989\)*](#).
3. The Appellants’ case before the trial court was that vide an agreement dated 17th March, 2014, the Respondent, being a beneficiary of the Estate of Salome Nyaruiru Kamau agreed to sell and transfer to him ¼ of an acre being a portion of the suit property for Kshs 3,000,000 and that the Respondent, vide a letter, purported to rescind the agreement and failed to grant to the him possession thereof.



4. It was averred by the Appellant that at the time of the purported rescission, he had paid Kshs 300,000 as deposit, Kshs 300,000 as further deposit and Kshs 180,000 as legal fees, all totaling Kshs 780,000; and that out of the aforesaid amount, the Respondent only refunded him Kshs 100,000.
5. The Respondent, *vide* his Amended Defence, denied the Appellant's assertions stating that he did not appoint the firm of Kange'the Waitere & Co to act for him in any way whatsoever; that he only received the sum of Kshs 100,000 from the Appellant which he refunded on realizing the Appellant had ulterior motives and that if any monies are held by the Advocate, the Appellant should seek for the money from said Advocates.
6. It was the Respondent's case that the Appellant failed to fulfil the material obligations with respect to the agreement frustrating him and negating the transaction.
7. The matter proceeded for hearing before the Trial Court which rendered its decision on 28th March, 2019. The Court found that whereas there was breach of the agreement on the part of the Respondent, he had gone ahead and lifted the caution against the land, sub-divided it and sold the portion to a third party. The trial court further found that the issuance of a mandatory injunction would be in vain and would impact on third parties who are not parties to the suit.
8. Further, the court held that whereas there was proof in respect of the sum of Kshs 600,000 claimed, there was no evidence of the payment of Kshs 160,000 claimed as legal fees and the Kshs 20,000 advanced to the Respondent.
9. Ultimately, the Court entered judgement for the Appellant as against the Respondent for the sum of Kshs 600,000 together with interest thereon at Court rates from the date of filing of the suit until payment in full. The aforesaid decision triggered the present Appeal. *Vide* the Memorandum of Appeal, the Appellant has set out six Grounds of Appeal which are;
 - i. That the Honourable Magistrate erred in law and in fact by declining to award the sum of Kshs 160,000/= being legal fees incurred by the Appellant in the sale and conveyance of Land Reference No Dagoretti/Kangemi/126.
 - ii. That the Honourable Magistrate erred in law and in fact by declining to award the sum of Kshs 20,000/= being legal fees paid by the Appellant on behalf of the Respondent/Appellant to the firm of Kang'the Waitere and Company Advocates.
 - iii. That the Learned Magistrate erred in law and in fact by declining to award Interest at 18% per annum pursuant to the *Law Society Conditions of Sale(1989 Edition)* with effect from 15th May, 2014 being the date of default on the part of the Respondent.
 - iv. That the Honourable Magistrate erred in law and in fact by failing to enforce the Agreement of Sale dated 17th January, 2014.
 - v. That the Honourable Magistrate erred in law and in fact by failing to appreciate and take into account the Appellants' cogent and uncontroverted evidence.
 - vi. That the Honourable Magistrate erred in law and in fact by making decisions contrary to the evidence on record.
10. The Appellant has sought for the following orders;
 - a. That the Memorandum of Appeal dated the 12th April, 2019 and filed in Civil Appeal No 226 of 2019 on the 18th April, 2019 be and is hereby struck out or dismissed with costs.



- b. That the Counter Appellant be and is hereby granted the following remedies in addition to the award granted by the subordinate Court on the 28th March, 2019.
 - i. Kshs 160,000/= being legal fees incurred in the sale and conveyance of L.R Number Dagoretti/Kangemi/126.
 - ii. Kshs 20,000/= being legal fees and disbursements paid on behalf of the Respondents to the Firm of Kang'ethe Waitere and Company Advocates.
 - iii. Interest at 18% per annum with effect from 15th May, 2014 being the date of default as stipulated under the [*Law Society Conditions of Sale \(1989 Edition\)*](#).
11. The Appeal was canvassed by way of written submissions.

Submissions

12. The Appellant's Counsel submitted that the agreement entered into between himself and the Respondent was a valid agreement pursuant to Section 3(3) of the [*Law of Contract Act*](#) having all the requisite elements, to wit, the offer, acceptance, consideration, intention to be bound and capacity to contract a transferable interest.
13. It was submitted that the Appellant, in compliance with clause 1.4 of the Agreement, deposited the 10% of the purchase price to the Respondent's Advocates to hold as stakeholder. Reliance was placed on the case of [*National Bank of Kenya v Pipelastik Samkolit \(K\) Limited & Another*](#) [2001]eKLR where the Court affirmed that it is not in the practice of re-writing contracts for parties.
14. It was submitted that due to the foregoing, it is clear that the agreement could only be rescinded on the basis of coercion, fraud or undue influence but only if pleaded, which was not the case; that whereas coercion was pleaded in HCCA 226 of 2019, the same was not set out in the Amended Defence and that pursuant to clause 12.2 of the Agreement, the [*Law Society Conditions of Sale 1989*](#) Edition were applicable thereto.
15. Counsel for the Appellant submitted that Rule 8(2)(b) thereof stipulates that in the event of breach on the part of the vendor, the deposit is refundable together with interest at 18% per annum and that the Appellant's claim for legal fees incurred by himself and paid to the Respondent's advocate is recoverable with interest at 18% per annum.
16. Counsel for the Respondent submitted that the Respondent did not appoint any Counsel to act for him in any sale transaction and only agreed to have Ms Waitere as his Counsel through undue influence and coercion on the part of the Appellant and that it is apparent from the evidence adduced that the firm of Kang'ethe Waitere was acting for the Appellant and not the Respondent.
17. It was submitted that vide the Appeal, the Appellant is trying to unjustly enrich himself; that nonetheless, the trial Court correctly found that there was no evidence of the payments of Kshs 160,000 and 20,000 and that whereas it is undisputed that the parties had agreed to enter into a contract for sale of land vide an agreement dated 17th January, 2014, the same was not a valid, binding and enforceable contract.
18. According to counsel, there was no consideration as defined in [*Chitty on Contracts, Vol. 1, General Principles, 29th Edition at paragraph 3-004*](#) which states that the traditional definition of consideration is that something of value must be given and accordingly that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value) and that in this case, there was no consideration.



19. Counsel submitted that further, as noted by the Court in *Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan]* [2017]eKLR, a signature is one of the factors which proves and establishes both offer and acceptance but not necessarily validity of a contract.
20. It was submitted that the Appellant confirmed in the trial court that the alleged agreement was neither franked nor that stamp duty was paid and that it was clear from the Appellant's testimony in the trial court that he did not pay the required deposit of Kshs 300,000 upon the signing of the agreement notwithstanding the fact that time was of the essence in the agreement;

Analysis and Determination

21. The Court has considered the Memorandum of Appeal and the submissions in support thereof. Whereas the Appellant has set out 6 Grounds of Appeal, the issues for determination are;
 - i. Whether the Magistrate erred in law and in fact by failing to grant the Appellant the sums of Kshs 160,000 and Kshs 20,000.
 - ii. Whether the Trial Court erred in failing to award Interest on the sums due to the Appellant at 18% per annum from the 15th May, 2014.
22. As the first Appellate Court, this Court is alive to the fact that in determining whether or not the trial Magistrate was justified in reaching the decision that she did, it is obligated and indeed under a duty to re-evaluate the evidence and materials that were placed before the subordinate court.
23. The Court is not bound by the findings of fact and law made by the lower court and may on re-evaluation reach its own conclusion and findings. This principle was aptly enunciated in the case of *Selle & Another v Associated Motor Boat Company Ltd & Others* (1968) EA 123 where the Court of Appeal stated thus;

“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 or heard the witnesses and should make due allowance in this respect.”
24. As to the circumstances under which this Court can interfere with the decision of the subordinate Court, the Court of Appeal in *Khalid Salim Abdulsheikh v Swaleh Omar Said* [2019] eKLR expressed thus;

“We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.”
25. It is not in dispute that the Appellant and the Respondent entered into a Sale Agreement dated 17th January, 2014 for the sale and purchase of one quarter acre of the suit property at the purchase price of Kshs 3 Million. It is equally undisputed that vide a letter dated 15th May, 2014, the Respondent formally rescinded the contract. The Respondent thereafter proceeded to dispose off the property to a third party.



26. The question before the trial court was whether or not there was breach of the agreement and the consequences thereof. While seeking specific performance, the Appellant also sought in the alternative refund of the sums he alleged to be due to him from the Respondent. The trial court found that there was breach of the Agreement by the Respondent. However, considering that the property had been disposed off, the Court granted the alternative prayer for refund of Kshs 600,000.
27. Vide the present Appeal, the question of whether or not there was breach of the Sale Agreement is not in issue. The Appellant does not question the Court's finding in this respect and neither does the Respondent by way of a cross-appeal.
28. Indeed, whereas under ground 4 of the Memorandum of Appeal, the Appellant states that the trial court erred in failing to enforce the Agreement for Sale as read with the LSK conditions of sale, no prayer is sought as regards the question of enforcement of the Agreement.
29. The Court also notes that the Appellant asks this Court to strike out the Memorandum of Appeal -Civil Appeal 226 of 2019. However, this is an Appeal pending before the High Court, a Court of equal status to this Court. The Court is not privy to, and is in any event jurisdictionally barred from entertaining such a prayer.
30. Ultimately, the only question before this Court regards the prayers for refund of Kshs 160,000 and, 20,000t and the imposition of interest at 18% per annum.
31. The prayers sought for the refund of Kshs 160,000 and Kshs 20,000 are in the nature of special damages. The law with respect to special damages is that they must be specifically pleaded and proved. Suffice it to quote the decision of the Court of Appeal in Hahn v Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the court held as follows:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
32. This was recently affirmed by the Court of Appeal in the case of Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR wherein it was observed as follows;

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”
33. It is not in doubt that the Appellant pleaded the sums claimed. Para 11 of the Amended Plaint provides a breakdown of the sums sought and indicates the receipt numbers in respect of the same. According to the breakdown, the legal fees was paid in several installments. Kshs 60,000 was paid in six instalments of Kshs 10,000 vide receipt numbers 007, 012, 013,031, 069 and 47. As well as in two installments of Kshs 50,000 under receipt numbers 087 and 715.
34. Having keenly considered the evidence, it is apparent that despite the specificity pleaded with respect to the payments amounting to Kshs 160,000, there is no evidence in the form of the receipts alluded to or in any other way. The Court therefore agrees with the trial court's decision in this respect. The claim, unsupported by any evidence must fail.



35. As regards the claim of Kshs 20,000, it is noted that the Appellant in his supplementary bundle of documents adduced copies of two receipts, receipt numbers 2301 and 2313 in respect of Kshs 10,000/ = each. According to the Appellant, this money is due from the Respondent because it was paid on behalf of the Respondent for legal fees.
36. While the receipts evince payment of the Kshs 20,000, this money is indicated to be from the Respondent. As such, without more, to wit, a statement by Counsel indicating that they were paid the monies by the Appellant for the Respondent, the receipts are insufficient to support the claim by the Appellant. This claim also fails.
37. The Appellant sought interest at 18% per annum on the sums of Kshs 600,000, Kshs 160,000 and Kshs 20,000. While the Court is in agreement with the Trial Court as regards the lack of evidence in respect of the sums of Kshs 160,000 and Kshs 20,000, it will still consider whether the interest claimed by the Appellant should have been applied to the Kshs 600,000.
38. The question of the payable interest can only be determined by looking at the agreement and all other documents which apply to the contract, and then the law. The Agreement did not carry an express provision on interest. However, it incorporated the 1989 *Law Society Conditions of Sale*. Clause 12.2 of the Agreement stated thus;

“The sale is subject to the *Law society conditions of sale (1989 Edition)* in so far as they are not inconsistent with or excluded or amended by the provisions of the Agreement.”

39. According to the Appellant, pursuant to Rule 8(2)(b) of the *Law Society Conditions for sale*, in the event of breach on the part of the vendor, the deposit was refundable together with interest at 18% per annum. Rule 8, under the head, Interest on Purchase money provides as follows;

“(1) Subject to sub-condition (2) hereof, where completion is delayed beyond the completion date by an act or default of the vendor or his mortgagee no interest is payable on the purchase money.

(2)

- (a) Where completion is delayed beyond the completion date by an act or default of the vendor or his mortgagee, the purchaser may deposit the purchase money upon seven (7) days call at any bank in the town where the office of the vendor's advocate is situated and give to the vendor notice in writing of such deposit.
- (b) From the date of receipt by the vendor of notice under paragraph (a) hereof, the vendor is bound to accept the interest allowed on the deposit unless and until completion is further delayed by an act or default of the purchaser and the purchaser is entitled to the rents and profits and is liable for the outgoings.”
- (c) In lieu of his remedies under paragraphs (a) and (b) hereof, the purchaser may give to the vendor notice in writing of the out-of-pocket expenses he is suffering by reason of the delay in completion.
- (d) The vendor may offer to allow the purchaser possession before completion in which case any notice under paragraph (c) hereof



shall be of no effect. (e) In every other case, the purchaser shall be allowed by the vendor on completion such out-of pocket expenses or proportion thereof (not exceeding those claimed in the notice) as are reasonable considering the nature of the property, the extent of the delay and the nature of the expenses claimed and any other circumstances affecting the claim whether or not of the same nature as the foregoing.

- (3) Where the completion is, for any reason whatsoever, other than the default of the vendor or his mortgagee, delayed beyond the completion date, the purchaser shall, subject as is hereinafter otherwise provided, pay to the vendor on completion interest on the balance of the purchase money computed from the completion date until the date of payment of the purchase money in full (both dates inclusive) provided however that, where any portion of the purchase money is secured by an undertaking under the provisions of condition 4(2)(b), interest on the secured balance shall only be payable from the earlier of the following dates, namely:
- (a) a date seven (7) days after successful registration of the conveyance; or
- (b) a date thirty (30) days after the completion date.
- (4) If any payment provided for in the Special Conditions is not paid on the date agreed, on completion the purchaser shall pay to the vendor interest on such payment from the date agreed until actual payment.

40. Out of abundance of caution, the Court has keenly considered the provisions of condition 8 aforesaid, and indeed the entirety of the 1989 *Law Society Conditions of Sale*. Whereas Condition 8 deals with interest on purchase money, this is in instances where completion is delayed. In this case, there was no completion at all. The Agreement failed in its entirety. Thus, the clause on interest is not applicable.

41. The relevant provision herein would be Condition 11 dealing with rescission and which provides as follows;

“3) On rescission the vendor shall repay to the purchaser his deposit and any payment of purchase price without interest and the purchaser shall return to the vendor all papers belonging to the vendor.”

42. That being the case, it is the finding of the court that the Appellant was not entitled to the 18% interest as claimed. For those reasons, the Court finds the Appeal to be unmerited.

43. The Appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 26TH DAY OF OCTOBER, 2023

O. A. ANGOTE

JUDGE

In the presence of;

Ms Tuwei for Kirimi for Respondent



No appearance for Appellant

Court Assistant - Tracy

