Mutiso v Kaati (Environment and Land Appeal E036 of 2022)
[2023] KEELC 22439 (KLR) (18 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22439 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E036 OF 2022

A NYUKURI, J

DECEMBER 18, 2023

BETWEEN

WILLIAM SILA MUTISO ..... APPELLANT

AND

PETER MAINGI KAATI ..... RESPONDENT

(Being an Appeal from the Judgment delivered on 27th September 2022 by Honourable M.Opanga (Senior Resident Magistrate) in Kangundo in ELC Case No. 88 of 2020)

JUDGMENT

Introduction

1. The Appellant in this matter filed appeal against the judgment of Honourable M. Opanga, Senior Resident Magistrate, delivered on 27th September 2022 vide Kangundo SPM ELC Suit No. 88 of 2020. In the impugned judgment, the learned magistrate allowed the plaintiff's suit as prayed in the plaint and dismissed the defendant's counterclaim with costs to the plaintiff.

Background

2. On 19th November 2013, Peter Maingi Kaati purchased two parcels of land namely Matungulu/Sengani/3548 and Matungulu/Sengani/3575 from William Sila Mutiso at a consideration of Kshs. 960,000/= which was paid in installments and in full. However, the titles of the purchased parcels could not be transferred to the purchaser because their mother title being Matungulu/Sengani/3470 was found to have been unlawfully transferred to an entity called Saminico Ltd. That transfer and the resultant subdivisions were nullified *vide* Machakos ELC Case No. 164 of 2009, although an appeal thereto is pending at the Court of Appeal. Thereafter in 2016, the defendant paid the plaintiff Kshs. 360,000/=.

3. Therefore, on 30th July 2020, Peter Maingi Kaati filed suit vide plaint dated even date, against William Sila Mutiso. The plaintiff sought for a declaration that the contract between the parties had been rescinded and a refund of the outstanding purchase price of Kshs. 600,000/= together with interests thereon from 23rd January 2014, plus costs. He averred that in November 2013, he entered into a sale agreement with the defendant for purchase of land parcel Nos. Matungulu Sengani/3548 and Matungulu/Sengani/3575 and paid the full agreed price of Kshs. 960,000/=. He also stated that the purchased parcels could not be transferred to him as the titles held by the defendant were fraudulent. He stated that the defendant had refunded him a sum of Kshs. 360,000/= leaving a balance of Kshs. 600,000/=, which he had failed to pay despite demand and notice to sue having been served on him.

4. In a statement of defence and counterclaim dated 6th November 2020, the defendant denied the plaintiff's claim and stated that he was the registered owner of the suit properties and had capacity to sell the same. He further averred that vide a judgment delivered on 13th April 2018 in ELC Case No. 164 of 2009, the court ordered that the titles of the registered owner and all other subsequent registered owners of the subdivision of parcel No. Machakos/Sengani/3470 which included the suit properties, be cancelled and in the place thereof the name of Michael Mutiso Sila (deceased) be registered.

5. The defendant stated that there was no fraud on his part and the original titles given to the plaintiff were authentic and due process was followed. He averred that he was an innocent purchaser for value and was not aware of any pending suit over the mother title at the time he purchased the land from Saminico Ltd or when he sold the land to the plaintiff. He denied ever agreeing to refund the purchase price to the plaintiff, claiming that the Kshs. 360,000/= that he gave the plaintiff in the year 2016, was a loan which was supposed to have been repaid in a year.

6. In his counterclaim, he prayed for specific performance for payment of Kshs. 360,000/=; damages for breach of contract together with interest thereon from the time of breach until payment in full; and costs.

7. The matter proceeded to a full hearing by viva voce evidence, whereof parties rehashed the contents of their respective pleadings. Consequently, upon considering the pleadings, evidence and submissions, the trial court found that the contract between the parties had been frustrated by the cancellation of titles issued to the defendant, vide Machakos ELC Case No. 164 of 2020 on 13th April 2018. The court also found that the defendant was not a bona fide purchaser as there was no proof of due diligence on his part. The court further found that the defendant had not demonstrated that the sum of Kshs. 360,000/= paid to the plaintiff was a loan. Consequently, the trial court allowed the plaintiff's claim for refund of Kshs. 600,000/= plus interest from the year 2016. The court then dismissed the counterclaim.

8. Aggrieved with the findings of the trial court, the appellant filed a memorandum of appeal dated 10th day of May 2022 against the judgment on the following grounds;

    1. That the learned Magistrate erred in fact and law by failing to appreciate that the Environment and Land Court, Machakos, issued a judgment in ELC No.164 of 2009 revoking the title deed Matunguku/Sengani/3470 issued to Saminico together with all subsequent subdivisions of the property, among them the suit properties herein Matungulu/Sengani/3548 and Matungulu/Sengani/33575 and there was no fraud on the part of the appellant.

    2. That the learned Magistrate erred in fact and law by holding that the appellant was not a bona fide purchaser for value yet the appellant purchased and sold the suit property without notice of any ongoing suit regarding the mother title and such information would not have been apparent to him even after exercise of due diligence.

3. That the learned Magistrate erred in law and fact by condemning the appellant to pay interest on the subject amount from the year 2016 yet the judgment of the court revoking the subsequent subdivision of Matungulu/Sengani/3470 was delivered on 2018.

4. The learned Magistrate erred in law and fact by shifting the burden of proof of fraud to the appellant yet it was the respondent who pleaded fraud on the part of the appellant contrary to the *Evidence Act*.

5. The learned Magistrate erred in law and fact by failing to appreciate that the sum of Kshs. 360,000/= was advanced to the respondent before the title deeds were revoked by the court in its judgment delivered on 13th April 2018 and not a refund of the purchase price.

6. That the learned Magistrate erred in law and fact by ignoring express testimony of defence witness and by failing to appreciate and interrogate the documents filed in support of the defendant's case.

7. The learned trial Magistrate erred in law and fact by arriving at contradicting conclusion that the contract was frustrated and also faulting the appellant despite lack of evidence to support the respondent's allegation of fraud.

8. The learned trial Magistrate erred in law and fact by failing to appreciate that the respondent had not proved his case to the required standard.

9. The learned trial Magistrate erred in law and fact in relying on conjuncture, supposition and extraneous matters.

9. Consequently, the appellant sought that the judgment of the lower court be set aside and vacated with costs of the appeal and interest to the appellant. The court ordered that the appeal be disposed by way of written submissions. On record are the appellant's submissions filed on 13th February 2023 and the respondent's submissions filed on 16th March 2023.

Appellant's submissions

10. Counsel for the appellant submitted that the respondent who pleaded fraud failed to prove the same as the appellant obtained titles to the suit property upon following the due process by conducting a search and ascertaining the ownership of the suit property. Reliance was placed on section 26(1) of the *Land Registration Act*, to argue that the title for the suit properties was prima facie evidence of ownership and that the respondent ought to have discharged the burden of proving fraud as required under sections 107, 108 and 109 of the *Evidence Act*. Counsel argued that Order 2 Rule 4 of the C*ivil Procedure Rules* requires that particulars of fraud be specifically pleaded by being particularized, which was not done in this case.

11. It was also submitted that the allegation that the titles were fraudulent is misleading as the titles herein were nullified because the previous registered owner breached the contract of sale by failing to pay the entire purchase price.

12. Counsel further submitted that the appellant was a bona fide purchaser for value, as he had purchased the suit property in good faith and without notice of any defect on the mother title even upon conducting a search on the same. Counsel maintained that the appellant had good title to pass to the respondent.

13. On the payment of Kshs. 360,000/=, counsel submitted that the same was a loan because the judgment revoking the title was delivered on 13th April 2018, hence the amount advanced in March 2016 could

not have been a refund to the respondent since it was given more than two years before the judgment was entered.

14. On whether the appellant could be liable for a frustrated contract, counsel argued that the contract was frustrated as none of the parties could be blamed for the fact that the titles herein were cancelled by the court. Counsel insisted that both the appellant and respondent did due diligence before purchasing the suit properties. Counsel argued that the frustration could not have been foreseen by the parties as the appellant had not been aware of a pending suit. Counsel took the position that where a contract is frustrated, no party should be held liable to pay damages. Counsel referred the court to the case of *Show Case Properties Ltd v Kenya Commercial Bank (2015)* eKLR.

Respondent's submissions

15. On the first ground of appeal, counsel for the respondent relied on the case of *Eviline Karigu (suing as administratix of the estate of the late Muriungi Mçhuka alias Miriungu M'Gichuga) v MÇhabari Kinoro [2022]* eKLR and submitted that fraud should not just be pleaded, it must also be proved strictly.

16. Counsel submitted that the contract between the parties herein was valid. Counsel argued that the appellant did not conduct any due diligence as he did not produce any search that he did prior to purchasing the suit properties. Counsel argued that the trial court correctly held that the appellant was not a bona fide purchaser for value and that the court appreciated the judgment of the ELC Court in No. 164 of 2009 revoking the title deed of the suit property. Reliance was placed on the case of *Lawrence P.Kariuki v Attorney General & 4 Others [2013]* eKLR on who qualifies to be a bona fide purchaser.

17. On the payment of interest on the subject amount, counsel contended that the appellant had failed to complete the transaction as agreed yet the respondent had done their part. On the issue of shifting the burden of proof, counsel argued that the respondent had discharged the burden of proof since the appellant had no proper title and that it was upon him to prove otherwise. As for the payment of Kshs. 360,000/=, it was submitted that the appellant did not file any documentary evidence in support of his claim of a loan to the respondent and that the trial court was right in finding that the amount was paid on finding that there was an existing case on the suit property. It was further submitted that the trial court appreciated all the defence evidence as adduced under sections 62 and 64 of the *Evidence Act*. It was also submitted that the contract between the parties was frustrated by the cancellation of the titles hence the actions of the appellant amount to fraud as he sold the land knowing very well that there was a pending suit. It was finally submitted that the respondent had proved his case to the required standard.

Analysis and Determination

18. The duty of this court as a first appellate court is to re-evaluate, reconsider and re-analyse the evidence before the trial court and make its own independent conclusions bearing in mind that it had no opportunity to see or hear witnesses and give due allowance for that. (See Selle v Associated Motor Boat Company Limited & Others (1968) EA 123).

19. I have considered the appeal, parties' rival submissions and the entire trial record. It is not disputed that the parties did indeed enter into a sale agreement for the sale of the suit properties, duly executed the same and the purchase price of Kshs. 960,000/= thereon fully paid. It is also not disputed that at the time of contracting, the appellant was the registered owner of the suit property. Notably, it was at the point of completion that the respondent noted an issue on the title hence the transfer could not be effected. Whether the appellant was aware or ignorant of the defect in the mother title cannot

be ascertained from the pleadings. However, it is conceded by both parties that the contract between the parties was frustrated by the order issued in Machakos ELC Case No. 164 of 2009. In view of the frustration, the respondent sought for refund of the paid purchase price. On the other hand the appellant argues that where there is frustration of a contract, then none of the parties should be liable to pay damages.

20. The Court of Appeal in *Lucy Njeri Njoroge v Kaiyahe Njoroge [2015]* eKLR cited with approval the case of Davis Contractors Ltd v Farehum U.D.C. (*supra*), where it was stated thus,

> The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self induced .

21. Similarly, in the case of *Charles Muirigi Miriti v Thananga Growers Sacco Limited & Others [2014]* eKLR, the Court held as follows:

> "As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea."

22. The question that arises then is whether frustration of a contract allows either party to rescind the same. *Black's Law Dictionary, Ninth Edition* defines "rescission" as,

> A party's unilateral unmaking of a contract, for a legally sufficient reason such as the other party's material breach or a judgment rescinding the contract.....Rescission is generally available as a remedy or defence for a non-defaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their pre-contractual positions.

23. Therefore where for no fault of either party, it is not possible to perform the terms of a contract, either party is at liberty to rescind the same with the effect that the parties are reverted to the position they were in before they entered into the contract. Frustration, is a defence against due or further performance and not against rescission of the contract.

24. Article 10 of our *Constitution* binds this court whenever it applies or interprets *the Constitution* or any law to be guided by national values and principles of governance which include the principle of equity. Equity will not suffer a wrong without a remedy and will not allow a wrongdoer to benefit by a wrong.

25. When the appellant sold the property to the respondent, he had the duty to pass title to the respondent, but that did not happen. The appellant has given a long winding narrative and excuses on why the title was not transferred to the respondent. As the respondent did not seek for specific performance of the contract between the parties, but having only sought to get a refund of the money he paid, equity would demand that the refund is done, whether or not the appellant was aware that the suit property had not been lawfully acquired by the person he purchased from. It would therefore be unconscionable for the appellant to wriggle out of refunding the respondent the sum of Kshs. 960,000/=, on the pretext of being an innocent purchaser for value without notice of defect in title. The argument that he was an innocent purchaser for value without notice of defect in title, is misplaced in this matter, as that in my view, is irrelevant. The bottom line is that he received money for a property he did not deliver. The respondent played no part in his inability to transfer the suit property. His innocence if at all, cannot be used as a shield to avoid refunding the purchase price he received, because if that were to be allowed, it would lead to unjust enrichment on his part. If he was innocent, then nothing stops him from alleging his innocence as against the person who sold him the suit property and seeking for a refund. Having considered the evidence, it is my view that the appellant's allegation that the sum of Kshs. 360,000/= paid to the respondent in 2016 was a loan, is not supported by any shred of evidence and hence, I find the same to be merely a red herring. For the above reasons therefore, I find and hold that the trial court was right in dismissing the counterclaim and allowing the plaint.

26. On the question of interest, section 26 of the *Civil Procedure Act* provides for the power of the court to award interest as follows;

> Interests
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> 1. Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
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> 2. Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

27. Therefore, where the decree is for payment of money and there is no evidence of parties agreement on when interest should start running, the court has power to award interest from the date of filing suit.

28. In this case, the appellant faulted the trial court for awarding interest on the principal sum from 2016 and argued that interest ought to have run from 2018 when judgment was entered in Machakos ELC No. 164 of 2009. On the other hand, the respondent arguing in support of the judgment, submitted that the trial court was right to award interest from 2016 when the respondent allegedly found out that there was a pending suit in respect of the suit properties. Having considered both arguments, I do not find any basis for granting interest either from 2018 or 2016 as submitted by the parties herein. I have perused the land sale agreement done by the parties and I do not find any clause on interest in

the event of a refund. Therefore, it is my finding that as the agreement between the parties is silent on when interest should begin running, it is reasonable that the same starts to run from the date of filing suit which is 30th July 2020 as that will be in accordance to section 26 (1) of the *Civil Procedure Act*.

29. In the premises, I find no merit in the appeal, and the same is hereby dismissed with costs to the respondent. Consequently, the judgment of the lower court is hereby upheld, save that interest at court rates on the principal sum, shall run from 30th July 2020 till payment in full.

30. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF DECEMBER, 2023

A. NYUKURI

JUDGE