REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

LAND & ENVIRONMENTAL DIVISION

HCCA NO. 43 OF 2013

SABASTIAN O. SUNYA.....APPELLANT

VERSUS

GEORGE P. B. OGENGO.....RESPONDENT

R U L I N G

1. The Appellant herein – **SEBASTIAN O. SUNYA** – felt aggrieved by the ruling of the Lower Court (MARAGIA, R.M) delivered on 13/8/2013 and preferred this appeal. The Respondent in the appeal is **GEORGE P. B. OGENGO,** a person said to have sold the Appellant a plot measuring 50ft x 50ft in Land parcels Nos. MARACHI/BUJUMBA/1021 and 1022. He later reneged on the agreement entered into and that gave rise to various suits, this one included.

2. The suit giving rise to this appeal was filed by the Appellant as Plaintiff on 9/9/2011 vide a plaint dated 22/12/2010. In the suit, he was claiming a refund of Kshs.70,000, which was the purchase price alleged to have been paid in full. He also claimed interests on the purchase price at 20% from 25/10/2016 until payment in full.

3. The Respondent, who was the Defendant filed a defence on 24/10/2011 in which he admitted the transaction but put the measurements of the plot at 80ft x 50ft. The Appellant had alleged that the Respondent was to facilitate transfer. This was denied by the Respondent. And while the Appellant felt it was the Respondent who breached the agreement, the Respondent felt the other way round.

4. At some point, the Appellant felt that the defence filed had no merits and filed an application on 19/4/2013 asking that the defence be struck out and that judgement be entered as prayed in the plaint.

5. The Respondent responded to the application vide a replying affidavit filed on 4/6/2013 and intimated that the refundable sum was Kshs.80,000/=, which he was ready to refund.

6. The Respondents response elicited the filing of a supplementary affidavit from the Appellant in which he clarified that he was claiming 70,000/=, not 80,000/= and that the plot he was buying was 50ft x 50ft.

7. Thereafter, the application was canvassed by way of written submission. The ruling on the application was delivered on 13/8/2013, with the court awarding 80,000/= and declining to award interests as prayed for. The refusal to grant interests gave rise to this appeal.

8. It is clear that the appeal is not against the whole ruling. It is only against the aspect of claimed interests which the court refused to grant.

9. This appeal itself was also canvassed by way of written submissions. The Appellant's submissions were filed on 18/7/2017. The respondents submissions had earlier been filed on 7/12/2016.

10. The grounds of Appeal were as follows:

> i. That the Learned Magistrate erred in law and fact by failing to grant the Appellant's application as pleaded both in the application and the plaint and in absence of cross-application and cross-action from the Respondent.
>
> ii. The Learned Magistrate erred in law and fact by failing to properly exercise her discretion in an application for striking out defence and consequently arrived at an unfair conclusion.
>
> iii. The Learned Magistrate erred in law and fact by failing to grant the Appellant interest on the principal sum sought as a refund in a failed transaction.

11. It is crucial to appreciate that the memorandum of appeal is clear that only part of the ruling is being appealed against. And that part is the one that concerns interests on the principal sum.

12. In the Appellants submissions, the Lower Court was faulted for only partially allowing the application. To the Appellant, the Lower Court only had the option to allow the application entirely or dismiss it. It could only travel the route it did if the Respondent had filed a cross-application and/or counter-claim to the suit with prayers of the kind granted by the Court.

13. The Lower Court was also faulted for not appreciating that the Appellant's claim was for 70,000/=, not 80,000/=. The 80,000/= awarded related to an agreement between the Respondent and a different party and the Appellant was not part of it.

14. On the issue of interests, two cases – **BENJAMIN MILTON KIPROTICH MARITIM vs ROSE TABUTANY RERO & Another 2015 eKLR** and **PETER WAWERU WAITITU vs CYRUS J. KARAJA [2007] eKR** – were cited to show it is lawful to grant interests.

15. The submissions of the Respondent seem to take the position that the whole ruling is being appealed against. According to the Respondent the Lower Court acted within the law and properly exercised its discretion. It was submitted that the trial magistrate acted cautiously and considered all relevant facts including those contained in the sale agreement.

16. It would appear in the submissions that granting of interest would amount to the Court re-writing the agreement between the parties. It appears clear that this position is taken because the contract between the parties herein had no provision for interest. The Respondents position appears to be that the Appellant should have asked for damages for breach of contract.

17. The decided case of KENYA PORTS AUTHORITY vs KOBIL KENYA LTD: (NAIROBI – MILIMANI: HCCC NO. 83 of 1998) was cited to show that the Appellant had no legal entitlement to an award of interests on the principal sum.

18. I have had a look at the Lower Court proceedings including the ruling under challenge. I have also looked at the record of appeal and the rival submissions by both sides. In my view, the ruling of the Lower Court is fundamentally flawed. In the first place, what was awarded as the purchase price was kshs.80,000/=. The Appellant had not claimed this amount. The sum of 80,000/= was a creation of the Respondent. He referred to it in the defence in the Lower Court and mentioned it again in the replying affidavit to the application to strike out defence in the Lower Court.

19. The Lower Court committed a blunder by treating the amount of 80,000/= as the Appellant's

entitlement. And it did so even after the Appellant had made it clear in a supplementary affidavit that he was only claiming 70,000/=. It is curious though at this stage that the Appellant seems to have no problem with the award of 80,000/=. With respect, the admission of 80,000/= by the Respondent as the refund due was wrong. It was an incorrect admission and a court guided by justice cannot be guided by it. It is wrong too for the Appellant to abide by it knowing well that he paid 70,000/=, not 80,000/=.

20. The Respondent also seems not to be bothered that the Appellant was awarded 80,000/= instead of 70,000/=. This is perhaps because the Respondent has not discovered his mistaken admission or probably because, without payment of interests, it is relatively easier to refund this amount.

21. Whatever the position, the Court is neither with the Respondent nor the Appellant on this issue. And to the Court, this award was a fundamental flaw in the ruling as nobody had claimed it.

22. As concerns interest, I will not make much comment in view of the decision I am about to make. All I need to say is that it is not clear why 20% is put as interest instead of any other figure. Justification for this should have been manifest in the Appellant's submissions, given that this is the main plank of the appeal.

23. In coming to my decision, I will be guided by the overriding objectives and interests of fair play. Section 1(B),(1) of Civil Procedure Act enjoin that the Court should endeavor to arrive at "the just determination of the proceedings". Section 3A of the same Act clothes the Court with inherent jurisdiction to do real and substantive justice even where procedure seems to place obstacles in the way. There is necessity in this case to do real and substantive justice. And this is so, notwithstanding prevailing procedural bottlenecks. As the saying goes: *Necessitas vincit legem; legume vincula irridet.* (Necessity overcomes the law; it laughs at the fetters of laws).

24. The Appellant is comfortable with an award of 80,000/=, which he never paid. He only paid 70,000/=. The Lower Court made a decision that unjustly enriched him by 10,000/=.

25. As regards interests, it is clear the Appellant claimed it. The Respondent denied it. This then was an issue for determination at the trial of the main suit. But this is not the only issue for trial manifest in the pleadings. For instance, what was the size of the plot allegedly being purchased by the Appellant? 50ft x 50ft or 80ft x 50ft? We can go further and ask: who breached the sale agreement, the Appellant or the respondent? Both accused each other of breach in the pleadings. When the Court is faced with all this, and given the summary nature of the outcome that the application in the Lower Court sought to achieve, one wonders whether it was prudent to allow the application or allow the suit. It should not be forgotten that even a single issue for trial in a suit should dis-incline the Court to allow summary procedure.

26. Given all this scenario, and guided by the considerations already stated elsewhere in this ruling, I do not intend to only partially allow the appeal. I exercise my discretion to set aside the entire ruling of the Lower Court so that the entire suit can go for trial. The entire ruling is therefore set aside and the suit should go for full trial.

Dated, signed and delivered at Busia this 26th day of July, 2017.

A. K. KANIARU

JUDGE

<u>In the Presence of</u>:

Appellant: ……

Respondent……..……